

## PERSONAL OR PRIVATE INTEREST

1991-2019

**19-39—Private Interest:** *(Footnotes omitted for formatting purposes).* [Employee] was a Treatment Coordinator for [a Division] within [a State Agency]. She was responsible for case management and coordination of services for her client's and their families. She did not provide direct care to the clients. She had recently received permission from her supervisor to work a modified work schedule. Instead of the traditional Monday through Friday work week, she would work longer hours on Monday through Thursday so that she could work a half day on Fridays.

[Employee] also owned her own counseling business. She contracted with another company to provide financial billing services. Her clients were referred to her from both the private and the public sectors and she only accepted adult clients. [Employee] was made aware of a counseling position which required the counselor to speak English and Spanish. If she accepted the position, she would counsel the children on-site. [The facility provided services] for children ages 4 through 11.

[Employee] asked the Commission if her private work at [the facility] would create a conflict of interest with her State position.

### **1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them.**

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." A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.

It was unlikely that [Employee] would encounter her State clients while working at the [facility] and vice-versa because both sets of clients were of differing age demographics. [Employee]'s State clients were adolescents. At the [facility], her clients would be primarily aged 4 through 11. [Employee] had spoken to her State supervisor about her interest in the [outside] position. [Employee] stated that in the unlikely event she was to encounter one of the [facility's] clients, or members of their families, while working at her State job, she would recuse herself from working with that client or their family. She stated that there were other Treatment Coordinators in her Division to whom the client could be assigned. In addition, her supervisor had agreed to let [Employee] work a modified schedule so that she could work at the [facility] on Friday afternoons. However, [Employee] should recuse herself from working with any [of the facility's] clients if she had contact with the client or their family while performing her State job duties.

As long as [Employee] abided by the above-cited recusal strategies, it was unlikely that she would be required to review and dispose of matters related to a State client while performing the [facility's] job duties and vice-versa.

## **2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust.**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. The Commission treats that as an appearance of impropriety standard. 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. Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. 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.

As long as [Employee] recused herself as necessary, her dual roles were unlikely to create a justifiable impression of a violation amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] preemptively addressed this issue by modifying her work schedule to allow one afternoon per week to perform her private job duties.

**19-36—Personal Interest:** *(Footnotes omitted for formatting purposes).* [The President of a school board asked if a newly elected board member had to recuse himself from matters involving teachers because he was married to a teacher.]

The [school’s] bylaws set forth rules to avoid conflicts of interest, depending on the [member’s] relationship to the school, students and the community. [The school board’s President asked the Commission to offer advice on the extent of the new member’s conflict(s) of interest and which matters would require his recusal.]

While the Commission had no jurisdiction to interpret [the school’s] bylaws, the Commission reviewed the matter to determine what types of situations would require [the new board member’s] recusal under the State’s Code of Conduct.

### **A. Jurisdiction**

A State agency is defined as “any office, department, board, commission, committee...school district, board of education and all public bodies existing by virtue of an act of the General Assembly....” “School districts” are “[s]tate agencies” in the Code. As a result, the school’s board members are considered state employees, defined in relevant part as any person: “who is an elected or appointed school board member.”

**B. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them.**

“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.” As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. ‘Close relative’ is defined as “a person’s parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.” A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” Rather, it recognizes that an official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials.

Under the Delaware common law, conflicts of interest for public officials may arise as a result of more than just pecuniary interests. The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." The concern is that decisions be based on a "fair and unadulterated examination of the merits" and that "any conduct giving the appearance that impropriety is involved therein should be studiously avoided." Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. Thus, the State Code is basically a codification of the common law restrictions which Delaware Courts have recognized as encompassing more than pecuniary interests.

This Commission has repeatedly held that the spousal relationship is a basis upon which conflicts of interest can, and do, arise. [The new board member] was prohibited from reviewing and disposing of matters related to a close relative, his wife. That would include, but was not limited to, teacher contracts, raises and benefits. In addition, conflicts of interest may arise out of matters that do not involve pecuniary interests. [The new board member] should also recuse himself from decisions regarding his wife in any way. For example, a vote for Teacher of the Year does not involve any monetary benefit. However, if [the board member’s] wife was one of the candidates, he could not vote on the matter.

**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.**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. The Commission treats that as an appearance of impropriety standard. 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. Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. 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.

As long as [the new board member] recused himself as necessary, there would be no appearance of impropriety. Indeed, his public recusals would have a positive effect on the public's confidence in their school board.

**19-31—Private Interest:** *(Footnotes omitted for formatting purposes).* [Employee] is a member of a [Board]. The Board has the legal authority to administer and supervise [an entity] and is the chief decision-making body of the [entity]. The Board generally meets once a month, in the evenings.

[Employee] applied, and interviewed for, a position with [a State vendor] as a [Coordinator]. His/her duties would include: identifying and recruiting potential stakeholders and community members; gathering information about needs and available resources through meetings, interviews, and focus groups; facilitating public meetings and focus groups, leading [subcommittees]; making findings and recommendations; working collaboratively with other groups to coordinate projects, activities, etc.; collecting and coordinating data for reports to demonstrate contract goals and deliverables. [Employee] stated that [his/her] Board is one of the stakeholders that would be involved in [the] initiative.

[Employee] asked the Commission if his employment [with the State vendor] would create a conflict of interest with his position on the Board.

**1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them.**

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." As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.

At the meeting, [Employee] was unclear about how much involvement the Coordinator would have with the Board's [staff and/or constituents]. As a result, the Commission offered the following advice to avoid any potential conflicts. In general, if the Coordinator's contact with [the Board's staff and constituents] takes place outside the confines of the working environment, the fact they [share a similar interest] was incidental to the contact, [Employee]'s work would be less likely to conflict with his/her Board duties. However, if the Coordinator is required to go to [the Board's location] and work with [constituents] on the premises, the potential for a conflict would be much higher.

Whatever the cause, it is possible to cure conflicts of interest through recusal. Courts have long recognized the remedial nature of recusal. At common law it was

recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are “routinely cured through abstention or recusal on a specific matter.” For example, if [Employee]’s position required him to work with an individual who subsequently had a matter pending before the [Board], he/she would need to recuse him/herself from consideration of that matter. Similarly, if the Coordinator were to ask the [Board] for permission to go to one of the [Board’s] locations and set up a program, that request would likely go through the Board. In that case, [Employee] should not be the person making the request [of the Board] nor should he/she consider the request as a Board member.

## **2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust.**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. The Commission treats that as an appearance of impropriety standard. 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. Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. 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.

The public’s perception is likely to be related to how much direct contact the Coordinator would have with the [Board and their constituents]. If the Coordinator does not work in [any of the Board’s satellite locations, Employee]’s dual roles would be less likely to raise suspicion that he/she was engaging in conduct that would be contrary to the public trust. If the Coordinator is required to engage in activities that involve the [Board’s staff or constituents], [Employee] should recuse him/herself from consideration of those matters whether the matter arose under his/her role as Coordinator, Board member or both. [Employee]’s recusal will assure the public that he/she is not engaged in conduct that is contrary to the public trust.

### **19-30—Complaint (Personal Interest) *(footnotes omitted for formatting purposes)***

#### **Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. On August 9, 2019, Complainant submitted a “Complaint” against the mayor of [a local municipality]. There was no Commission meeting in August and Commission Counsel was unable to reach Complainant prior to the September meeting. Consequently, the matter was not included on the agenda. The Complaint was not notarized. Nevertheless, the Commission reviewed the Complaint to decide if the facts properly alleged a violation of the Code of Conduct. If so, the Complaint could be re-submitted with the appropriate notarization.

#### **Jurisdiction**

The Commission’s jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. It may only act if it has jurisdiction over the party charged and jurisdiction over the

complaint's substance.

After determining that the Complaint was not properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. At this stage of the proceedings all facts were assumed to be true. Allegations that were deemed to be frivolous or that fail to state a claim should be dismissed. The remaining allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation.

#### **A. Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

Municipal employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the [municipality] has adopted a Code of Conduct that was at least as stringent as the State Code of Conduct. [The mayor] was subject to the State Code of Conduct because the [municipality] had not adopted its own Code of Conduct.

#### **B. Subject Matter Jurisdiction**

The Commission can only address alleged violations of "this chapter"-Title 29, Ch. 58. The Complaint alleged a variety of election violations. However, those matters did not fall within the Commission's jurisdiction. The one allegation in the Complaint that referenced the State Code of Conduct was the allegation that [the mayor], voted on a matter in which he had a personal interest. The alleged conduct appeared to fall within the Commission's statutory jurisdiction.

#### **Facts**

[The municipality] held a city council election in 2019. In preparation for that election, [the mayor] actively recruited [Mr. X] to be a candidate, indicating that [Mr. X] would be a great addition to the city council while also implicitly denigrating the existing candidates, including Complainant. Subsequently, an issue was raised as to whether [Mr. X] met the criteria to run for city council because his status as a "resident" was called into question. That issue, as well as the eligibility of other candidates, was addressed at a city council meeting prior to the election. [The mayor] ultimately voted that [Mr. X] did qualify as a resident and that he be allowed to participate in the election. Ordinarily, the mayor's personal interest in [Mr. X] would not have been apparent during the vote. However, Complainant, and others, had read a copy of an email between [the mayor and Mr. X] when it was inadvertently sent out in response to a FOIA request.

#### **Law**

**29 Del. C. § 5805(a)(1): Municipal officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in**

## **performing official duties.**

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." A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.

The Commission decided that the sentiment expressed in [the mayor's] email did not rise to the level of a personal interest in [Mr. X's] candidacy. Notably, there were no facts alleged to indicate that [the mayor] and [Mr. X] were more than mere acquaintances. A private interest must be such that it would tend to impair an official's judgment. Other than the fact that [the mayor] perceived [Mr. X] to be a better candidate than others who were running for election, there was nothing in the complaint to substantiate a finding that [the mayor's] official judgment would be impaired by his acquaintance with [Mr. X].

**19-29 Ronaldo Tello—Private Interest (Waiver Granted)** *(footnotes omitted for formatting purposes.*

**Hearing and Decision By:** *William F. Tobin, Jr., (Vice-Chair, Acting Chair); Michele Whetzel, (Vice-Chair); Commissioners: Andrew Manus; Roarke Moore; F. Gary Simpson*

Dear Dr. Tello,

Thank you for attending the Sept. 17, 2019, Commission meeting to which you were accompanied by Harvey Doppelt, the Director of Specialized Services at DPBHS and Chief Investigator of the CORE program. After consideration of all the relevant facts and circumstances, the Commission decided that it would be a conflict of interest for your private business to contract with a vendor benefiting from Federal grant monies that pass through your employing agency. However, the Commission granted you a waiver until June of 2020, the grant's expiration date. The Commission's reasoning is set forth below.

### **I. FACTS**

You are a Family Crisis Therapist ("FCS") for the Division of Prevention and Behavioral Health Services ("DPBHS"), within the Department of Services for Children Youth and their Families ("DSCYF"). You are assigned to the Wm. C. Lewis Elementary School ("school") in the Red Clay School District. The school provides a dual language immersion setting. You work with children and their parents from kindergarten through 5<sup>th</sup> grade to provide case management, referral and counseling services to the children and their families. You also act as an advocate for the parents within the school.

You also have a private business, Hispanic Personal Development. You want your business to provide services under the umbrella of Delaware CORE (Community Outreach, Referral and Early intervention) by contracting with one of CORE's vendors, Horizon House. CORE is funded by the Federal government by means of a pass-through grant and

is administered by DPBHS, your state employer. CORE serves young adults ages 16-25 who have symptoms of early psychosis. CORE believes that with early intervention people diagnosed with psychosis can lead rewarding and productive lives. To that end, CORE educates the public about psychosis while also guiding and supporting youth and families that are affected. Your business would assign a 'cultural broker' to Hispanic speaking families to help them navigate the bureaucracy of the state and the healthcare system. The request for a cultural broker would likely come from a Horizon House employee. Your business is the only one of its kind in Delaware.

You asked the Commission if it would be a conflict of interest for your business to contract with a vendor in the Delaware CORE program. Furthermore, if the Commission decided that such a contract would be a violation of the Code of Conduct, you asked for a waiver.

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

### **A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them.**

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." As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.

Your state job duties are unrelated to the work you would perform for CORE. In your State position, you work with children in kindergarten through 5<sup>th</sup> grade. The age demographic for the CORE program is ages 16-25. Because of the differing age demographics between the two positions, the Commission decided that it was very unlikely that you would encounter one of your State clients while performing duties related to your private business and vice versa. As a consequence, the potential for a conflict of interest is greatly reduced. At the meeting you did acknowledge that there is a remote possibility that you could work with a State client in the school setting and discover that one of their older family members would benefit from CORE's services, but that it had never happened before. In order to avoid a conflict that may arise from such a situation, you would ask the school counselor if they could work with the student's family so that you would not have a conflict of interest. As a result, you have identified an acceptable recusal strategy for this portion of the Code of Conduct that would mitigate any conflict of interest issues between your two roles.

### **B. No state employee may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee is associated by employment.**

You work for the agency that administers the CORE program. While it is true that your State job duties are not related to grants or contractors, your private business would receive monies from one or more of CORE's vendors that are paid out of Federal grant monies administered by DPBHS. In addition, like any agency administering a grant, your State agency is responsible for overseeing the funds to assure they are spent in ways that are compatible with the grants purpose. Mr. Doppelt is DPBHS' Chief Investigator for the CORE program. Although his purpose in attending the meeting with you was to confirm the program's need for services provided by your private business, his presence also illustrates the crossover between your State job and your private business. Furthermore, even though your business would receive payments from Horizon House or another CORE vendor, it does not change the fact that the monies originated from your State agency. Under the aforementioned circumstances, you would be assisting a private enterprise (your private business) in a matter before DPBHS, your State employer. That is a conflict of interest and a violation of the State Code of Conduct.

**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.**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. The Commission treats that as an appearance of impropriety standard. 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. Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. 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.

You found out about the need for 'cultural brokers' through a combination of contacts that arose out of your State job and your private contacts in the community. However, having already established a conflict of interest, the Commission turned to your request for a waiver.

**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.**

**(a) Undue Hardship**

A waiver may be granted if there is an "undue hardship" on the applicant or the agency. "Undue" means "more than required" or is "excessive." CORE is not a State agency. Ordinarily, a private entity does not qualify for a waiver. However, because CORE is funded through a grant administered by DPBHS, the Commission took into consideration Mr. Doppelt's comments regarding the need for your private business' services. According to Mr. Doppelt, the Hispanic community is generally reluctant to avail themselves of services available from the State and/or the medical community, thus categorizing them as an underserved community. Mr. Doppelt stated that the aid of a cultural broker would benefit members of the Hispanic community by acting as a guide to help them navigate language barriers, as well as the procedures and paperwork necessary to avail themselves of available resources. As a result, your private business shares a common goal with CORE and would also advance your agency's goals. Lastly, Mr.

Doppelt stated that the services provided by your private business are not usually available outside of urban areas, your business being the sole exception in Delaware. After weighing the relevant factors, the Commission decided to grant you a waiver until the end of June 2020.

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

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. The statute was designed to protect against self-dealing and its enforcement is generally the best way to serve the public purpose.

The CORE grant is set to end in June 2020. A waiver of limited length assures the public that the waiver exists for a specific purpose, thus reducing the public's concerns about self-dealing while also promoting the public's confidence in their government.

**III. CONCLUSION**

The Commission decided to grant you a waiver until the end of June 2020 to allow your business, Hispanic Personal Development, to contract with one or more of CORE's vendors to provide the services of a cultural broker when requested. This entire opinion will be published so that the public may know that the conduct prohibited by the State Code of Conduct has been reviewed and approved by the Commission.

Sincerely,

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

William F. Tobin, Jr.  
Acting Chair

**19-27—Complaint Personal Interest**

**I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 *Del. C.* § 5810(a). On June 11, 2019, [a person] submitted a sworn Complaint against [a board member]. PIC received the Complaint via U.S. Mail on June 24, 2019. The Complaint was not notarized in the appropriate format. 29 *Del. C.* § 4328(3). See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). However, assuming the notarization could be easily fixed and re-submitted at a later date, the Commission reviewed the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A).

At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim should be dismissed. 29 *Del. C.* § 5809(3). However, seeing no frivolous allegations suitable for dismissal, the Commission then examined the allegations to determine if a

majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there was any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

## **II. Jurisdiction:**

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### **A. Personal Jurisdiction**

[The board member] fell within the definition of "State employee" and was subject to the State Code of Conduct. 29 *Del. C.* § 5804(12)(a)(3).

### **B. Subject Matter Jurisdiction**

The Commission may only address alleged violations of "this chapter"-Title 29, Ch. 58. 29 *Del. C.* § 5810(h). The Complaint alleged that [a board member] discussed and voted on a [matter involving a family member]. In so doing, it was alleged that he/she violated the Code of Conduct's prohibition against reviewing and disposing of matters in which the official has a personal or private interest (29 *Del. C.* §§ 5805(a)(1) and (2)) and creating an appearance of impropriety amongst the public. 29 *Del. C.* § 5806(a). Both of those allegations fell within the Commission's jurisdiction.

## **III. Facts**

In the spring of 2018, the board decided to review salaries paid to [various employees under the purview of the board]. In pursuit of that endeavor, the board formed a committee to work on the project. The committee met in executive session and discussed the project in May, June, July and August 2018. During those meetings, [board member] discussed salaries, including the proposed salary of [a family member]. In August 2018, the salary recommendations were presented to the full board and discussed at length. During a public meeting in September 2018, [a board member] voted in favor of the salary adjustments. At no time did [the board member] recuse him/herself from discussing and advocating for [the family member's] recommended salary adjustment.

[Complainant] contacted the board President and raised concerns about whether it was appropriate for [the board member] to participate in, and vote on, the salary plan. [The board President] passed that information to the board's legal counsel. The board's counsel interpreted the statute as allowing [the board member] to vote on the salary plan and suggested that [Complainant] was confused about how to apply the statute. [Complainant] filed the Complaint because the board did not take any steps to correct what he/she perceived to be an ethics violation.

## **IV. Applicable Law**

**A. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). 'Close relative' is defined as "a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood." 29 Del. C. § 5804(1).

A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

Obviously, [the board member's family member] was a 'close relative'. As such, [the board member] should not review and dispose of matters pertaining to [the family member] while serving in his/her official capacity on the board. However, despite the law, [the board member] discussed and voted on [the family member's] salary instead of recusing him/herself as was proper.

Officials subject to the State Code of Conduct often argue that their actions "with respect to the matter" did not result in "a financial benefit or detriment to accrue to the person or a close relative to a greater extent than others similarly situated" because their actions involved other people, in addition to their relative, and that everyone in similar classifications received the same treatment. That reasoning is flawed. The legal parameters of § 5805(a)(1) are not defined by § 5805(a)(2).

First, the Code of Conduct has a clear and specific definition section. See, 29 Del. C. § 5804. Second, within the clear text of § 5805(a)(1), the second sentence reads "a personal or private interest is one which tends to impair independence of judgment. . . ." Thus, within that provision the law spells out what constitutes a "personal or private interest." Third, the Delaware Supreme Court has affirmed an interpretation of § 5805(a)(1) independent of § 5805(a)(2). See, *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). Fourth, the Commission has held that § 5805(a)(1) is a codification of the common law restriction on public officials having a personal or private interest. *Commission Op. Nos. 97-24; 97-30; and 00-04*. That is because conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253 (1997)*.

The [relative was one of numerous employees whose salary was being reviewed by the committee. However, the relative was only one of two people [in a particular category]. The Complaint specified that the salaries of the [two people in that category] were considered separately during discussions of the salary review project. As a result, even

within the broader context of salary discussions, [the family member's] salary was discussed on a narrower scale of one out of two.

As a result of the aforementioned conduct the Commission determined it was reasonable to believe that violations of both 29 *Del. C.* §§ 5805(a)(1) and 5805(a)(2)(a) occurred.

**B. 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 ensure that there was not only no actual violation, but also not even a “justifiable impression” of a violation. 29 *Del. C.* § 5802. The Commission treated that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was 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 the appearance of impropriety issue, the Commission looked at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42*. Those circumstances were examined within the framework of the Code's purpose which is to achieve a balance between a “justifiable impression” that the Code was 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).

The Commission considered the totality of the circumstances surrounding [the board member's] discussion and vote on his/her [family member's] salary and whether it was likely to create an appearance of impropriety amongst the public. First, the salary discussions were held in executive session, as is required when discussing personnel matters, but it also meant that the process was not transparent. Second, [the board member's] input and vote on salaries [for the particular category] was focused on two people, one of whom was [a family member]. Third, it would be difficult for [the board member] to argue that requiring his/her recusal for matters pertaining to [the relative's] employment would be ‘unduly circumscribing’ his/her conduct because it was a small part of his/her overall board duties. In mitigation, [the board member had sought advice] regarding his/her ability to vote. The Commission decided it was unlikely that the public would believe that [the board member's] actions were directed towards the classification of the position without being influenced by [the family relationship].

**V. Decision**

Because [Complaint's submission] was not properly notarized, the Commission decided to rule on the Complaint before them, assuming that [Complainant] would re-submit the Complaint with the proper notarization. 29 *Del. C.* §§ 5809(3) and 5810(a). The Commission decided that the allegations in the Complaint were substantiated by adequate facts to support a reasonable inference of a violation and the matter would be set for a hearing after the Complaint was re-submitted.

*The matter was subsequently resolved to the mutual satisfaction of the parties and the Complainant. [Employee] was not required to admit any wrongdoing because he had acted under the advice of counsel.*

**19-24—Personal Interest:** [Employee] is [an upper level employee of a State Agency]. [The Agency] is comprised of many [separate divisions]. [Employee's] brother was hired by [a State vendor] to work on a State contract. Day-to-day oversight of the contract was managed by [one Division's] administrative staff who reported to a [Division Head]. [Employee] provided the Commission with an organizational chart.

[The Brother] applied and was hired [by the Vendor]. [The Vendor had a management hierarchy between the Brother and the Vendor's] CEO. Should any disciplinary or corrective action be necessary, the action would proceed through three levels of [the Vendor's] supervisory review before it would be passed on to [the Agency]. There were another four layers of supervision between [Employee] and the [Division Head]. [Employee] stated that should a disciplinary action be necessary, [Employee] would not be involved in either [Vendor's] decision-making process nor provide input to [the Division's] staff.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." *Id.* Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

The [familial] relationship between [Employee] and [Brother] was that of a close relative. 29 Del. C. § 5804(1). As a result, if [Employee] were to review or dispose of matters related to [the Brother], they would have a conflict of interest as a matter of law. However, given [the difference between the Employee's job status and that of the Brother], the Commission decided it would be unlikely that [Employee] would be called upon to review [the Brother's] work. First, because of the difference between their two sets of job duties and second, because of the many layers of supervision between [Employee's] position and [the Brother's] position. The Commission decided that the numerous layers of supervision between the two positions constituted an acceptable method of recusal which would prevent [Employee] from reviewing and disposing of matters related to [the Brother's] job performance.

**2. 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 ensure 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).

The Commission decided that the circumstances surrounding [the Brother’s] employment (i.e. the multiple layers of supervision and the fact that he worked for [Vendor] even though he was assigned to the [Agency’s] campus) would mitigate any impression of impropriety which may be created amongst the public.

**19-23—Personal Interest:** [Employee] was employed by a [Division] of a [State Agency]. He had been a State employee for 28 years. From September 2017 until May 2019, [Employee] was [a supervisor]. In May 2019, [Employee] was moved to a new position with the same pay. According to [Employee], he was removed from his position as the [supervisor] because he also contracted with [Agency] to provide [specific services]. His State supervisors advised [Employee] that because he was the [supervisor of a specific program], it was improper for him to contract with his [Division]. [Employee] was given the choice of ending his contractual status with [the Division] or moving to another State job. [Employee] reluctantly agreed to move to another job. [Employee] did not believe it was a conflict of interest for him to contract with [the Division] because he was given implicit permission to do so in 2007 by PIC.

In 2007, [17 State employees submitted a request for a waiver to allow them to contract with State agencies to provide a specific service]. The issuance of the waivers/opinions was put on hold because members of the General Assembly wanted to create a statute which would accomplish the same goal without the need for individuals to apply for a waiver from the State Code of Conduct. In 2008, [the General Assembly passed a law that would allow the employees to contract with their Division except for a few caveats built into the statute].

[Employee] was one of the 17 individuals that applied for a waiver in 2007 (17-15). [Employee] stated that because the Commission knew about his conflict in 2007, by virtue of his waiver application, and did not pursue an enforcement action against him, that he was given implicit permission to continue to [contract with his [Division] until the legislature carved out a statutory exception in 2008. In his written submission, [Employee] argued that the same conduct could not now be a conflict of interest.

[Employee] asked the Commission to decide that either: a) his status as a [contractor] did not conflict with his former job duties as the [supervisor] or b) to grant a waiver to allow him to continue to contract with [his Division].

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." *Id.* Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[The Division] decided that [Employee] had a conflict of interest once he was promoted to the [supervisory] position. In order to resolve the conflict, they moved him to another position. While [the 2008 statute] did give State employees permission to contract with the State, there were also a few caveats in the statute: [the employee could not review and dispose of matters related to the contract while performing their State job duties and they could not be subject to oversight by an employee more junior to them].

During the meeting, [Employee] stated that his work as a contracted provider had been approved by an employee in a position equal to, or higher than, his position as the [supervisor]. In addition, he stated that he did not review or dispose of matters related to [his contract] while performing his State job duties. As a result, the Commission decided that [Employee] qualified for the above cited exemption in the statute and did not need a waiver to contract with [the Division]. The Commission declined to interpret or decide whether [the Division] followed their own policy when transferring [Employee] to another position because that was not within the Commission's jurisdiction.

**2. 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 ensure 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).*

It was unlikely that the public would perceive [Employee]'s dual roles as creating an appearance of impropriety because it fell within the statutory exemption designed to allow such conduct. As long as his work was approved by a [Division] employee of equal or higher status than him and he did not review or dispose of matters related to his contractual work, his status as a contracted provider was well within the law.

**19-19—Private Interest:** On April 5, 2019, Commission Counsel received an email from an employee of the State Auditor's Office. The Auditor's Office had received an anonymous tip on the 'fraud hotline' that [an employee of a school district] had awarded a school contract to her brother-in-law's employer. Commission Counsel contacted the school district's attorney and he stated he would respond after he had a chance to look into the matter.

Subsequently, [the attorney] verified that the school district had awarded a contract to the brother-in-law's employer and also stated that at the time the contract was under consideration by the school board, [Employee] had disclosed the fact that her brother-in-law worked for [the private company]. He then stated that the award of the contract could not be a conflict of interest because the term 'brother-in-law' was not defined as a "close relative" in the Code of Conduct. Commission Counsel responded to [the attorney] that not all conflicts of interest were defined by family relationship and that as a matter of 'fact' [Employee] could have violated the Code of Conduct. Commission Counsel then offered [Employee] an opportunity to seek an advisory opinion.

[Employee], through [the attorney], declined an advisory opinion. However, she did submit a written statement and provided records which documented the process by which [the private company] was awarded the contract.

The Commission considered what course of action to pursue in the matter. [Employee] had declined an advisory opinion. If the Commission was satisfied with the documentation [Employee] provided, Commission Counsel recommended no further action. If the Commission was not satisfied that [Employee] had addressed the issue appropriately, the only other option would be for the Commission to self-initiate a Complaint and set the matter down for a hearing.

**A. District employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties.**

[Employee] had a private interest when she made the decision to award the contract to [the private company]. She believed that her official judgment was not affected by the fact that her brother-in-law was employed by the company that won the contract. She first pointed to the fact that she obtained three bids for the contract despite not being required to do so by the Office of Management and Budget's rules. [The private company] did submit the lowest bid. It was also clear that the district's former contractor was not complying with the terms of their maintenance agreement and they were double billing for their services.

**B. District employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment.**

District employees are not to deal with their own board to ensure decisions by their colleagues and coworkers are not unduly influenced by another employee's connection to the private enterprise.

Delaware Courts have addressed the concern when that occurs. In that case, an appointee to DNREC's Fish and Wildlife Advisory Council, which was under the Fish and Wildlife Division, sought to contract with the Division on matters where the Division had specific authority and responsibility. The Cabinet Secretary declined to contract with him, even though the contract was publicly noticed and bid, and even though he was the lowest bidder. The Secretary was concerned about the close association between the appointee and the Division and wanted to "avoid any allegation or suggestion of undue influence in the letting of contracts by this Department." The Court noted at that time that the State had no specific conflict of interest law. It also noted that there was nothing in the record to show that the State official secured the contract as the result of anything other than submitting the lowest responsible bidder, but it approved the Secretary's action saying: "the award of contracts for public works has been suspect, often because of alleged favoritism, undue influence, conflicts and the like" and "it is vital that a public agency have the confidence of the people it services and, for this reason, it must avoid not only evil but the appearance of evil as well." Three years later, a Code of Conduct was passed that included the bar against State employees, and appointees to an agency's Boards or Commissions, dealing with their own agency, and it was deemed one of the provisions the General Assembly found "to be so vital" that it carried a criminal penalty.

[Employee] discussed her family connection to [the private company] during the board's executive session in October 2018. As a result, it was impossible to tell if [Employee] advocated for [the private company] or merely presented the bids to the board and they selected the lowest bidder. The Commission decided to close the matter because of the documentation provided by [Employee].

**19-04 & 19-05—Private Interest:** [Employee 1] worked for a Division of [a State Agency]. [Employee 1] was assigned to work at [a school], where she worked with children and their parents [that were within a specific age range]. [Employee 1] provided case management and counseling services to the children and acted as an advocate for the parents within the school.

[Employee 2] worked for [a different] Division within the [Agency]. [Employee 2] worked with youth at [a residential facility near the Division's physical location]. [The] residential [facility] only accepted youth within a specific age range, with specific needs. [Employee 2]'s duties included managing a caseload and providing services to youth and their families.

When asked about their access to [an Agency] database, [Employee 1] and [Employee 2] both stated that they could only access information that was pertinent to their State job duties and denied having access to information about [other facilities or clients that were not part of their caseload].

[Employee 1] and [Employee 2] planned to purchase a [private business]. [The business] would [serve very young children]. [Employee 1] and [Employee 2] stated that

the [business] planned to accept [clients that received state subsidies]. The [businesses that accept state subsidies] are licensed and regulated by [a third] division within [the Agency].

[Employee 1] and [Employee 2] asked the Commission whether their co-ownership of the [business] would create a conflict of interest with their State job duties.

**A. State employees may not review or dispose of State 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).**

[Employee 1] and [Employee 2] would have a private interest in the [business] through their co-ownership of the facility. They planned to accept clients that [received state subsidies]. Clients applying for [the subsidies] go through an application process where their income is evaluated to determine if they are eligible for aid. If eligible, the client would be provided with a list of [participating businesses] (including the facility to be purchased by [Employee 1] and [Employee 2]) and are told to choose one. Thereafter, [a separate state agency] directly reimburses the [business] for the client's expenses.

[The business] would be monitored and regulated by a separate division within [Agency]. [Employee 1] and [Employee 2] did not work in the Division responsible for regulating and licensing the [business]. Nor did they work for [the Agency] that presented the [subsidized] clients with a list of eligible [businesses]. Unlike previous applicants, [Employee 1] and [Employee 2] had more separation between their State job duties and the agencies they would be required to work with as co-owners of [the business]. When determining if their dual roles created a conflict of interest, the Commission relied heavily on their assertion that they could not access records related to [similar businesses] or the clients of any particular [business]. If that information turned out to be otherwise, the letter opinion would be null and void because the Commission could only offer an advisory opinion if "there was a full disclosure to the Commission or Commission Counsel of all material facts necessary for the advisory opinion". 29 Del. C. § 58079(c).

As to [Employee 1], the [business] was in the same geographic area as the school where she performed her State job duties. The Commission was concerned that she may encounter her [business's] clients while performing her State job duties and vice-versa. When the Commission inquired about that possibility, [Employee 1] responded that although [the business and the school] were in the same county, they were not physically located in close proximity to one another. The geographic separation reduced the likelihood that [Employee 1] would encounter one of her [business's] clients while performing her State job duties. Adding more separation between her two roles, she pointed out that [the business would not serve the same age group as those she worked with in her State job]. That fact also alleviated a concern that she would refer her State clients to [her business].

[Employee 2] did not work in the Division responsible for regulating and licensing the [business]. While she worked near the [Agency] campus, [her State job location was] separated from the main office space. She pointed out that [the business] would serve children [of a different age demographic as those she worked with in her State job]. As a result, there was no concern that she would refer her State clients to [her business].

**B. State employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1).**

State employees are not to deal with their own agency to ensure decisions by their colleagues and coworkers are not unduly influenced by another employee's connection to the private enterprise.

Delaware Courts have addressed the concern when that occurs. *W. Paynter Sharp & Son, Inc. v. Heller*, 280 A.2d 748, 752 (Del. Ch., 1971). In that case, an appointee to DNREC's Fish and Wildlife Advisory Council, which was under the Fish and Wildlife Division, sought to contract with the Division on matters where the Division had specific authority and responsibility. *Id.* at 751. The Cabinet Secretary declined to contract with him, even though the contract was publicly noticed and bid, and even though he was the lowest bidder. *Id.* at 750-751. The Secretary was concerned about the close association between the appointee and the Division and wanted to "avoid any allegation or suggestion of undue influence in the letting of contracts by this Department." *Id.* at 750. The Court noted at that time that the State had no specific conflict of interest law. *Id.* at 751. It also noted that there was nothing in the record to show that the State official secured the contract as the result of anything other than submitting the lowest responsible bidder, but it approved the Secretary's action saying: "the award of contracts for public works has been suspect, often because of alleged favoritism, undue influence, conflicts and the like" and "it is vital that a public agency have the confidence of the people it services and, for this reason, it must avoid not only evil but the appearance of evil as well." *Id.* at 752. Three years later, a Code of Conduct was passed that included the bar against State employees, and appointees to an agency's Boards or Commissions, dealing with their own agency, and it was deemed as one of the provisions the General Assembly found "to be so vital" that it carries a criminal penalty. 29 Del. C. § 5805(f).

The Commission has always interpreted this provision with an eye towards the size of the applicant's employing agency and the number of divisions within its purview. That is so the Commission's opinions would be consistent with the legislature's desire to encourage citizens to assume public employment and "therefore, the activities of...employees of the State should not be unduly circumscribed." 29 Del. C. § 5802. [Employee 1] did not work on the [Agency's] campus so she was physically separated from those State employees who could make decisions or recommendations about the [business]. Therefore, the limitation imposed by the conflict of interest statute was mitigated because it was unlikely that she had the type of close relationships with co-workers in other Divisions than the type of relationships contemplated by the statute.

[Employee 2] did work near the [Agency's] campus but she was physically separated from those State employees who could make decisions or recommendations about the [business]. Therefore, the limitation imposed by the conflict of interest statute was mitigated because it was unlikely that she had the type of close relationships with co-workers in other Divisions than the type of relationships contemplated by the statute.

**C. State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).**

This is basically an appearance of impropriety test. The test is if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997). Actual violations of the Code of Conduct are not required; only the appearance thereof. *Commission Op. No. 92-11*; 63C Am. Jur. 2d Public Officers and Employees, 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).

As long as [Employee 1] and [Employee 2]'s job duties did not change and they did not encounter the same clients while performing the work duties of either position, it was unlikely that their ownership of [the business] would create an appearance of impropriety.

Under this provision, the Commission considered whether it would be perceived that an official was using public office for personal gain or benefit, which is barred by the Code. 29 Del. C. § 5806(e).

The [Division responsible for licensing and regulating their business] was only open during [Employee 1] and [Employee 2]'s State work hours. It was their responsibility to address regulatory and licensing issues without using their State time and resources to do so. In addition, they could not use their State time to send or receive phone calls, emails or perform other administrative work related to the [business].

#### **19-02--Personal or Private Interest (Waiver Granted)**

**Hearing and Decision By:** *Bonnie Smith (Chair); William F. Tobin, Jr., (Vice-Chair); Michele Whetzel, (Vice-Chair); Commissioners: Andrew Manus; Jeremy Anderson, Esq.*

Dear Mr. Chesney,

Thank you for attending the March 19, 2019 Commission meeting. Once again, the Commission would like to extend its sincere apologies for your extremely long wait while the Commission considered the matter which was scheduled immediately preceding yours. Please also extend our apologies to your agency's Deputy Attorney General, Lawrence Lewis, who had to leave for a meeting before the Commission had the opportunity to meet him.

After consideration of all the relevant facts and circumstances, the Commission decided to grant your request for a waiver to allow you to contract with a vendor to place advertisements in the University of Delaware's game day program. The Commission's reasoning is set forth below. As a waiver was granted, this opinion will be published in its entirety so that the public will know that the Commission has reviewed and approved the matter.

#### **I. FACTS**

You are the Director of Communications for the Division of Small Business ("DSB") within the Department of State. Your Division was established in July 2017, to replace the

Delaware Economic Development Office. As a new division, you are exploring ways to raise public awareness about the work of the DSB. Part of your State job duties includes locating and supervising outside vendors, including local and regional publications, to whom the DSB pays for advertising space. Your division has identified a key demographic group that is most likely to own a small business and you believe that one way to target that demographic is to buy ads in the University of Delaware's game day program. The cost of the ads you want to place are \$5,000, below the State threshold for public notice and bidding. Only one vendor, University Sports Publications ("USP"), sells ad space in the game day programs and their salesperson is someone with whom you have a long and close friendship. You recognized that your friendship with the vendor's representative may create a conflict of interest with your State job duties and asked the Commission for an advisory opinion. If the Commission determined that your personal interest did violate the Code of Conduct's conflict of interest provision, you asked for a waiver to be allowed to contract with the vendor.

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

### **A. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

You do not have a conflict of interest as a matter of law because the salesperson is a friend, not a close relative. However, you have a conflict of interest as a matter of fact because the salesperson for USP is a close friend. You stated that you have known each other for over a decade and you were both members of the other's wedding party. Having established that you have a personal interest, your request to contract with USP would create a conflict of interest with your State job duties because you would be reviewing and disposing of matters in which you have a personal interest, namely a financial benefit to your friend's employer and a sales commission for your friend.

### **B. 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 ensure 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).

Any member of the public aware of the close relationship between the buyer (you/the State) and seller (your friend/vendor) would likely be suspicious that your official duties were influenced by your friendship with the salesperson, regardless of the relatively small dollar amount of the contract. At the meeting you stated that you could recuse yourself from working with the vendor and ask one of your supervisors to handle the matter, but you added that it would be additional work on that person’s workload. Although you have a conflict of interest, the Commission decided that your recusal was not necessary given the waiver granted below.

**C. 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 29 Del. C. § 5807(a)**

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

USP is the sole source that provides advertising in the U of D’s game day programs. Obviously, the DSB has an interest in advertising in Delaware so that it may reach Delaware residents interested in the services your Division provides. The Commission decided that the fact that USP is the only vendor providing the service you have identified as being beneficial to DSB’s outreach efforts, qualifies as an undue hardship and has granted your request for a waiver. The waiver is for one year and the amount of money that can be paid to the vendor must not exceed the initial \$5,000 that was discussed at the meeting. If you and your Division decide that advertising in the game day programs was a successful marketing strategy and want to continue contracting with the vendor in the future, you should return to the Commission for further advice.

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

The overall purpose of the Code of Conduct is to instill the public’s confidence in its government. 29 Del. C. § 5802(1) and (2). The statute was designed to protect against these types of transactions and its enforcement is usually the best way to serve the public purpose. However, the relatively small dollar amount of the contract (\$5,000) and the length of the waiver (not to exceed one year) strikes a reasonable balance between the law’s public purpose and the State’s interest in growing a new division.

### III. CONCLUSION

The DSB is granted a one-year waiver of the conflict of interest provision in the Code of Conduct to allow you to oversee a contract with USP, for no more than \$5,000, to purchase advertising space in the U of D's game day programs.

Sincerely,

*/s/ Bonnie Smith*

Bonnie Smith  
Chair

**18-54—Private Interest:** [Employee worked for a State agency updating digital data]. The information is shared on a public website which is hosted by the Department of Information and Technology (“DTI”). He also worked with counties and municipalities by providing some information that was part of the digital data to aid the county and municipal entities for use in their planning and decision-making processes. The State provided those services for free.

[Employee] wanted to bid on contracts with non-State government entities to provide [the same services he performed for the State]. As an example, [Employee] referenced a project in [a town] which involved updating and improving the [information used by the public when visiting the town]. When providing those services, he would need to access [the database he worked with at his State job] to gather necessary data. Another example of potential clients would be non-profit entities. [Employee] stated in his written submission that he would perform the work outside of his State work hours, on his own computer and using his own software.

[Employee] asked the Commission if his work on private contracts would create a conflict of interest with his State position.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the

outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

The Commission asked [Employee] if the State had ever considered providing additional services to municipalities free of charge. He stated that he was not aware of any such consideration. The Commission was concerned that the proposed contractual service could be a service the State would be willing to provide to the municipalities for free. The State already gathered data in areas that were in, or close to, a municipality. As a result, some of the data could have already been in the State database and extending that data to include municipal data may not have required the State to incur additional expenses to provide to others at no cost. Considering the fact that the State was willing to provide [some data] at no cost, the Commission did not want to assume that the State would refuse to provide additional municipal services if asked.

The Commission did not consider whether [Employee] could provide [data] services for non-profit entities because he did not have any specific entities in mind. The Commission must be able to compare the law to the facts and in the case of non-profit entities, there were not enough facts upon which to base an opinion.

**2. 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 ensure 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).

[Employee] worked with municipalities and counties as part of his State job duties. The Commission was concerned that his dual roles, working for [the town] and working for the State on [town] projects, would create an appearance of impropriety among the public that he was using his State position for personal gain. That was bolstered by the fact that [Employee] was made aware of the [town] project because [a member of a town committee], that he had previously worked with at his State job, approached him and asked if he would be interested in bidding on the contract. Not only did his State job bring him into close contact with members of municipal government entities, he would have advance knowledge about their projects through the [data] work that he already performed. If he were to perform consulting work for the municipalities, he worked with in his State job, the blurring of the boundaries between his two roles could lead the public to believe that he was using his State position and/or contacts to benefit his private consulting business. The Commission advised [Employee] that he could work on out-of-state projects because they would not create a conflict of interest with his State position.

**18-45 Private Interest:** [Employee] worked [with a specific population of clients] for the Department of Services for Children, Youth and their Families (“DSCYF”). [Employee]’s job duties included performing evaluations of children up to 18 years of age and making recommendations for their treatment. The vast majority of her clients received health insurance through the State Medicaid program.

[Employee] wanted to work part-time [in a private business]. [Employee] would perform similar job duties as those she performed as part of her State job duties. However, she would not work with clients who were involved with [her Division]. She anticipated the majority of her private clients would be self-pay or private insurance. Should she encounter one of her State clients at her part-time job, she understood the need to recuse herself, as did her supervisor.

[Employee] asked the Commission to consider whether her part-time work would create a conflict of interest with her State position.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

[Employee]’s private employment qualified as a private interest. However, given the fact that [Employee]’s State clients were Medicaid recipients and her private clients would be self-pay or private insurance clients, the Commission decided it was unlikely she would encounter her State clients while performing her private job duties and vice versa. As a result, it was unlikely she would be required to review and dispose of matter in which she had a private interest. In the unlikely event she was to encounter one of her private clients while performing her State job duties, [Employee] was aware of the need to recuse herself from that client. In the event [Employee] were to encounter one of her State clients while working in her private practice she would recuse herself from evaluating that client and her supervisor had given her permission to do so.

**2. 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 ensure 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).

It was unlikely that [Employee] would encounter clients from one position while performing job duties related to the other position. In the event such a circumstance was to occur, she would recuse herself as necessary. Therefore, her dual employment was unlikely to create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated she would work at her private practice outside of her State work hours, mostly on Saturdays.

The Commission decided that [Employee]’s outside work would not create a conflict of interest with her State position.

## **18-43—Appearance of Impropriety; Personal or Private Interest**

### **I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 *Del. C.* § 5810(a). In October 2018, PIC received a Complaint via email and received a hard copy via U.S. Mail on October 24, 2018. The Complaint appeared to be notarized in the appropriate format. (29 *Del. C.* § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff’d PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

### **II. Jurisdiction**

The Commission’s jurisdiction was limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint’s substance.

#### **A. Personal Jurisdiction**

State employee is defined as a member...of a state agency and who receives or

reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year. 29 Del. C. § 5804(12)a. [Employee] was a State employee and fell within the Commission's jurisdiction.

### **B. Subject Matter Jurisdiction**

The Commission could only address alleged violations of "this chapter"-Title 29, Ch. 58. 29 Del. C. § 5810(h). The Complaint alleged [Employee] created an appearance of impropriety based [non-employment related activities]. [Acquaintance] occasionally [does business with Employee's agency]. The appearance of impropriety statute is 29 Del. C. § 5806(a) which is within the Commission's jurisdiction. However, the alleged conduct also included [other activities which were] not within the Commission's jurisdiction.

### **III. Facts**

[Complainant] alleged that [outside activities] by [Acquaintance] and [Employee] created an appearance of impropriety which would cause the public to question whether [Employee] could perform their official job duties independently and impartially. [Complainant] asked the Commission to conduct an investigation into [Employee]'s official activities as they related to [Acquaintance], and/or matters they had pending before the [Agency].

[Employee] was fully cooperative with the investigation and voluntarily provided Commission Counsel with a copy of a memorandum he/she gave to [their supervisor] shortly after his/her employment began. The memorandum listed the names of matters pending before the [Agency that required his/her recusal]. Those matters were designated to be handled by [another employee]. He/she further stated that they had not made any decisions about matters involving [Acquaintance].

In addition, [Employee's supervisor] provided a notarized attestation detailing [Employee]'s involvement, or lack thereof, with matters related to [Acquaintance]. [Employee's supervisor] attested that during [Employee]'s tenure the [Agency] had completed 12 matters. [Acquaintance] was not involved in any of those matters. Of the matters still pending, 14 involved [Acquaintance]. Six of those 14 were included in the recusal memo. The other eight matters were new matters in which [Employee] had no previous involvement and were not included in the recusal memo. Of those 14 new matters, the [Agency] had substantial communication with five of them since [Employee] was hired. Four of those were handled by [another employee]. The remaining matter was a new matter from which [Employee] recused themselves.

Commission Counsel spoke to [Acquaintance] about the allegations because he/she was mentioned in the Complaint. He/she stated that other than a casual 'hello', he/she had not had a conversation with [Employee] for at least two years. He/she did not consider their acquaintance to be friendly enough to cause concern about an appearance of impropriety.

Commission Counsel reviewed the statutes administered by the [Agency]. The statutes themselves are extensive, setting forth procedures in great detail.

### **IV. Application of the Law**

**29 Del. C. § 5806(a): Each state employee, officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the state and its government.**

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. 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). 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).

The Commission has previously held that in deciding if there is an appearance of impropriety it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75* (citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567 (1967)). That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

The investigation revealed that: 1) [Employee]'s association with [Acquaintance] did not create a conflict of interest with his/her job duties that had not already been remedied by his/her voluntary recusal from certain matters. As a result, there could not be an associated appearance of impropriety; 2) [Employee] had not reviewed or disposed of official matters related to [Acquaintance] since he/she began working for the Agency.

Notwithstanding the lack of an adequate factual allegation in the Complaint, the Commission reviewed and investigated the matter to see if there was an appearance of impropriety and determined that the Complaint was without merit and was dismissed.

**18-40 Robert Colton—Personal or Private Interest (Waiver Granted)**

**VIA EMAIL**

**November 30, 2018**

**Hearing and Decision By:** *William F. Tobin, Jr. (Vice-Chair) (Acting Chair),  
Commissioners: Jeremy Anderson, Esq.; Andrew Gonser, Esq.; Andrew Manus*

Dear Mr. Colton,

Thank you for attending the November 20, 2018, Commission meeting. After considering all the relevant facts and circumstances, the Commission decided that it is a conflict of interest for you to be both a State Employee and also a State contractor. The Commission grants the Department of Agriculture a six-month waiver to work on a solution to your conflict.

## **I. FACTS**

You work for the Delaware Thoroughbred Racing Commission (“DTRC”) as a Safety Steward. Your primary job duties are to communicate and coordinate track activities with stewards, the track superintendent, emergency medical technicians, jockeys, exercise riders, trainers and stable employees. As an employee of the DTRC, you report directly to them. However, you are considered a State employee and are paid by the Department of Agriculture.

You are also the Administrator for the Delaware Jockeys’ Health and Welfare Fund (“DJH&WF”). You were hired as a contractor and report directly to the Delaware Jockeys’ Health and Welfare Benefit Board (“DJH&WBB”). Your job duties included: overseeing the eligibility, enrollment, financial reporting and budgeting for the fund; communicating with the jockeys about health and safety issues; educating jockeys about safety equipment, program benefits, and insurance issues; acts as an industry advocate for health and safety issues. You stressed that you are not hired by the jockeys, do not receive a commission based on the jockey’s premiums and the monies in the fund are controlled by the Department of Agriculture. However, as the Administrator of the plan, you are compensated \$3000 per month.

You previously represented jockeys before the DTRC and stewards at disciplinary hearings, rule changes and appeals. However, your decision to represent those jockeys was a personal choice and not part of your duties as Administrator of the DJH&WF. Recognizing a potential conflict of interest between those actions and your position as Safety Steward, you stopped representing jockeys at those hearings at the beginning of the 2016 racing season.

You would like the Commission to consider whether your private interest as an Administrator for the DJH&WF creates a conflict of interest with your position working for the DTRC.

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

### **1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial

interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

You work with jockeys as the Safety Steward and you also enroll them in the benefit plan for which you are the Administrator. It is unlikely that you make decisions as Safety Steward that are directly affected by your role as Administrator of the benefit plan. However, because benefit plans are predicated on risk vs. reward types of analysis and Safety Stewards are to monitor and reduce risk, there could be the potential for conflict. For example, a decision you make as Safety Steward could have a direct or indirect effect on eligibility for benefits under the benefit plan. If you implemented a safety recommendation for jockeys at the horse track, it may be possible that failure to follow those recommendations would affect a jockey’s qualification for benefits under the benefit fund. It may also be possible that you could be called as a witness, in your capacity as Safety Steward, to provide testimony in litigation of claims by a jockey against the benefit fund. As such, the Commission decided you should not continue working in both positions.

The Commission then turned to the issue of whether you or the DA qualified for a waiver of this provision which is discussed below.

**2. 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 ensure 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).

Your involvement with jockeys as both a regulator and as a compensated benefit Administrator is likely to raise suspicion among the public that you are engaging in conduct that is contrary to the public trust. At a very minimum, your work as Safety Steward gives you direct access to potential customers for the benefit plan. The jockey’s may feel that they have to participate in the benefit plan in order to receive fair and equitable treatment from you in your capacity as Safety Steward. That is not to say you would do so, you are entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). However, this provision of the Code of Conduct requires only a justifiable impression of a violation and the Commission decided that your dual roles create such an impression.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private interest. You stated that you do not work for your private interest during State work hours.

### **3. Waiver. 29 Del. C. § 5807(a)**

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

You have been the Administrator of the DJH&WF for 11 years. Without going into too much detail, the program was created by you and is virtually a one-of-a-kind benefit plan for Delaware jockeys. Because you created and administered the fund for 11 years, no one else has the same level of experience in identifying and remedying issues that arise with the plan or its members. As such, the Commission decided it would be in the State’s interest to grant a six-month waiver to the Department of Agriculture to remedy your conflict of interest. Although the Commission cannot dictate a course of action, some agencies with similar conflicts have decided to take the state position and the contractor position and make it one job. Alternatively, other agencies have converted the contractor position into a casual/seasonal position so that the contractor position becomes a state position, thus eliminating the conflict.

You should know that when a waiver is granted, the proceedings become a matter of public record. This aids the entire public in understanding the factual basis for granting a waiver. That will serve to diminish any public perception that you are circumventing the law.

### **III. CONCLUSION**

Your position as a contractor for the DJH&WF creates a conflict of interest with your State position as Safety Steward. The Commission has granted a six-month waiver to allow the agency to remedy the situation.

Sincerely,

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

William F. Tobin, Jr.  
Acting Chair

**18-33—Personal Interest:** [Member] was one of seven people elected to [a specific Board]. The Board met monthly to discuss and vote on policies, rules and regulations

which were then implemented [administrative staff]. Since her election to the Board, [Member]'s daughter was hired as [a staff member].

Board members actively participated in [negotiating collective bargaining agreements]. Shortly before the meeting, the Board engaged in collective bargaining negotiations regarding [staff] salaries and discipline. Since [Member]'s daughter was [part of the staff], she recused herself from the September 2018, vote on the final contract.

She asked the Commission for advice about the need to recuse herself from matters involving [staff] compensation, benefits and discipline so that she could assure compliance with the Code of Conduct.

#### **A. Personal Jurisdiction**

Members of Boards fall within the definition of "State employee" and are subject to the State Code of Conduct. 29 Del. C. § 5804. As a result, [Member] fell under the Commission's jurisdiction.

#### **B. In their official capacity, employees 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). 'Matter' is defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(7). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated. 29 Del. C. § 5805(a)(2)(a). 'Close relative' is defined as "a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood." 29 Del. C. § 5804(1). However, personal or private interests are not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, the law recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. *Shellburne Inc. v. Roberts*, 238 A.2d 331 (Del. Super. 1967). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

Obviously, [Member]'s daughter was a "close relative" under the State Code of Conduct. As a result, she had a personal interest as a matter of law. While it could be argued that any financial benefit or detriment which would accrue to [Member]'s daughter would be the same as that which would accrue to other [staff], [Member]'s involvement with, and influence over, setting the terms of the collective bargaining agreement would be tinged with the influence of nepotism. Therefore, her participation in negotiating a collective bargaining agreement, setting [staff] salaries and benefits, would be a conflict of interest and she should continue to recuse herself from those matters, as she did in September 2018. As to her involvement in matters related to [staff] discipline, [Member] would only have a personal interest if the subject of the discipline was her daughter. Otherwise, she would not be required to recuse herself from those matters.

**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 ensure 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).

Because of the familial relationship, [Member]’s involvement in setting salaries and benefits would likely create an appearance of impropriety amongst the public which was the reason she should continue to recuse herself from those matters. However, her involvement in [staff] disciplinary matters was unlikely to create the same impression of a violation, unless that [staff member] was her daughter. As a consequence, [Member] could participate in matters related to discipline (other than her daughter’s) without the need to recuse herself.

[Member] should continue to recuse herself from all matters related to [the staff’s] salaries and benefits. There was no need to recuse herself from [staff] disciplinary matters unless that [staff member] was her daughter.

**18-29—Private Interest:** [Applicant] worked in the private sector as a consultant [in a specific field]. [Although she was engaged in the same type of work as a particular State Agency, she rarely had contact with them]. In fact, in 20 years of working in the field she had only been to the [Agency]’s offices on three occasions. On those occasions she acted as a courier and dropped off samples for one of her clients.

[Applicant] applied for, and was offered, a position with a [State Agency] as an Administrator. The Administrator was responsible for managing [various State programs]. Those programs involved the regulation of [industries similar to those for whom she consulted]. The Administrator was also responsible for the enforcement of state/federal [regulations]. [Applicant] wanted to accept the Administrator position but because of her consulting work, the [Agency] recommended she meet with the Commission to verify that her private interest did not create a conflict of interest with the [Agency] position.

**A. State employees may not review or dispose of State 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).**

As part-owner of the [consulting business], [Applicant] had a private interest. If she were to accept the [Agency]’s job offer she would maintain her ownership interest but

would no longer work as an on-site consultant. As a consequence, the Commission was unable to identify any circumstances under which her ownership interest would impair her official judgment while performing her State job duties.

**B. State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).**

This is basically an appearance of impropriety test. The test is if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997). Actual violations of the Code of Conduct are not required; only the appearance thereof. *Commission Op. No. 92-11*; 63C Am. Jur. 2d Public Officers and Employees 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).

While [Applicant] had worked in [the industry] for over 20 years, the work she performed as a consultant did not overlap with the Administrator's job duties. That separation would assure the public that she would be able to carry out her State job duties with integrity and impartiality. In addition, the Administrator position was posted on the State's website assuring the public that she was offered the position after a transparent and competitive application process.

[Applicant]'s ownership interest did not create a conflict of interest with the Administrator's job duties as long as she did not continue to work as a consultant.

**18-27A—Private Interest:** [Employee] worked for [a State Agency that monitored a specific set of clients]. [Employee] "provided, coordinated and monitored the delivery of [a specific service]. When asked if a treatment plan could include a recommendation that her client attend [business], she agreed that would be possible. If she were to make such a recommendation, her client and/or their family would be referred to the Division of Social Services ("DSS") to determine eligibility and to select a provider. The names of eligible providers are available for public inspection.

[Employee] and her sister had purchased a [business]. The [business] was fully operational at the time of purchase but its operation was suspended while [Employee] and her sister navigated the statutory and regulatory processes necessary to operate the [business]. [Employee] described her anticipated role as working with her sister and other staff regarding the operations of the [business]. A majority of the [business]'s previous clients were [subsidized by the State]. [Under the terms of the subsidy], the State paid the [business] directly.

All [similar businesses] were licensed and regulated by a subdivision of [Employee's State agency]. As required, she submitted an application for a [business] license. The licensing process was halted when a question arose as to whether her license application, submitted to a subdivision within her State agency, may have created a conflict of interest in violation of the State's Code of Conduct. The licensing process was

put on hold pending the Commission's determination as to whether her personal interest in the [business] created a conflict of interest with her State job duties.

**A. State employees may not review or dispose of State 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).**

[Employee] had a private interest in the [business] through her co-ownership. However, her State job duties did not require her to work with, license or regulate [such businesses]. When asked at the hearing if she could foresee any way her State job duties would require her to perform duties related to a [similar business], she responded that it may be possible that she would recommend a [similar business to one of her clients]. If [her client] could not afford the costs of [the business], [Employee] would refer them to [another Department] to determine their eligibility for [subsidization]. If approved for the benefit, [the other Department] would direct the [client] to select a [business] from a list of participating [businesses]. Thereafter, [that Department] would directly reimburse the [business] for the client's expenses. In the scenario [Employee] described, there was a possibility that her client could choose her [business] as the provider. In that instance, she would be making a referral in her official capacity that would benefit her financially as a co-owner of the [business]. However, because [Employee] would have no part in reviewing or disposing of the matter once the referral for services was made, her ownership of the [business], alone, did not violate this provision of the Code of Conduct.

**B. State employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1).**

State employees are not to deal with their own agency to ensure decisions by their colleagues and coworkers are not unduly influenced by another employee's connection to the private enterprise.

Delaware Courts have addressed the concern when that occurs. *W. Paynter Sharp & Son, Inc. v. Heller*, 280 A.2d 748, 752 (Del. Ch., 1971). In that case, an appointee to DNREC's Fish and Wildlife Advisory Council, which was under the Fish and Wildlife Division, sought to contract with the Division on matters where the Division had specific authority and responsibility. *Id.* at 751. The Cabinet Secretary declined to contract with him, even though the contract was publicly noticed and bid, and even though he was the lowest bidder. *Id.* at 750-751. The Secretary was concerned about the close association between the appointee and the Division and wanted to "avoid any allegation or suggestion of undue influence in the letting of contracts by this Department." *Id.* at 750. The Court noted at that time that the State had no specific conflict of interest law. *Id.* at 751. It also noted that there was nothing in the record to show that the State official secured the contract as the result of anything other than submitting the lowest responsible bidder, but it approved the Secretary's action saying: "the award of contracts for public works has been suspect, often because of alleged favoritism, undue influence, conflicts and the like" and "it is vital that a public agency have the confidence of the people it services and, for this reason, it must avoid not only evil but the appearance of evil as well." *Id.* at 752. Three years later, a Code of Conduct was passed that included the bar against State employees, and appointees to an agency's Boards or Commissions, dealing with their own agency, and it was deemed one of the provisions the General Assembly found "to be so vital" that it carries a criminal penalty. 29 Del. C. § 5805(f).

[Employee's business would] be monitored, regulated and licensed by a subdivision of [her Agency]. Although she did not work in the [same subdivision as the regulating body], her ownership of the [business] would require her to interact with [those] employees. In fact, she had already applied to [the subdivision] for a [business] license. The licensing and ongoing regulatory process would require her to represent her private interest before her own agency which is prohibited by the Code of Conduct. Because the licensing process had already begun, she had employees ready to staff the [business] and there were clients who may have been displaced while she waited for the Commission's decision, the Commission did not request that [Employee] withdraw her pending license application. However, as soon as the [business] was licensed and operating, [Employee's] sister (or someone else with an ownership interest) had to have the license transferred into their name (if possible) or reapply for licensing under their own name. That condition had to be completed within 90 days of the [business'] resumed operations. Once the [business] was no longer licensed in her name, [Employee] would no longer be required to represent her private interest before her own agency, thus removing the conflict of interest. Of course, that meant that she could not intervene in the [business'] licensing and regulatory issues moving forward.

**C. State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).**

This is basically an appearance of impropriety test. The test is if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997). Actual violations of the Code of Conduct are not required; only the appearance thereof. *Commission Op. No. 92-11*; 63C Am. Jur. 2d Public Officers and Employees 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).

Any reasonable person aware of this situation would question whether [Employee] would be able to carry out her State job duties with impartiality. Her private interest would be regulated by her division. A member of the public could question whether the [business] was being licensed and monitored by impartial parties because of her employment with the State. For that reason, during the time that the [business] was operating under a license in her name, the [business] could not accept [clients receiving State subsidies]. Not only would that reduce the public's suspicion that the clients at the [business] were referred there by [Employee] or her colleagues, it also reduced the likelihood that she would encounter one of her State clients while working at the [business]. In the event that [Employee] encountered one of her State clients while working at the [business], she was advised to immediately contact her State supervisor and ask to recuse herself from working with that client.

Under this provision, the Commission also considered whether it could be perceived that an official was using public office for personal gain or benefit, which is barred by the Code. 29 Del. C. § 5806(e). To avoid that perception [Employee] could not tell her State clients that she had an ownership interest in the [business]. In addition, she could not use her State position to gain access to [her Agency's] files regarding her [business], or those of her competitors. That was not to say that the Commission believed she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe*

*Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). The Commission merely wanted to make her aware of the rules so that she could avoid further difficulties while serving in her dual roles.

**18-27B—Private Interest (review):** [Employee] had asked for, and received, an advisory opinion in August 2018. After the opinion was issued, PIC was contacted by a supervisor in a different division of the Employee's State agency. [The Supervisor] was concerned that [Employee] had misrepresented the facts to the Commission in August 2018. After discussion with Commission Counsel, [Supervisor] agreed to meet with the Commission to discuss her concerns. [Employee] was advised that she would need to re-appear before the Commission to review her prior advisory opinion. [Supervisor] was scheduled to meet with the Commission separately from [Employee]. [Supervisor] was accompanied by [her boss].

[The Supervisor] started out by explaining that the [business Employee] intended to purchase had never closed during the time [Employee] was awaiting the Commission's advisory opinion. That information conflicted with [Employee]'s statements at the August 2018 hearing that if she was not granted [permission to proceed with the purchase of the business] that the facility would close, employees would be unemployed and [the clients] would be displaced. In fact, [the Supervisor] stated that parents and staff had no idea that the [business] might be sold during the time [Employee] was engaged in negotiations to potentially buy the facility.

[The Supervisor] stated that [Employee]'s state employment would allow her to access confidential information about other [similar businesses] in the State through a database. Some of the information in the database was available to the public but it also contained information about anonymous sources who have reported [business] violations to the State. Another concern raised was that the [State office that regulated the business] was only open during [Employee]'s work hours. [The Supervisor] questioned how [Employee] would address issues about the [business] without using her State work hours to do so. Lastly, [the Supervisor] pointed out that the Merit Rules have language that would prohibit [Employee]'s ownership of a [business].

The Commission stressed to [the Supervisor] that if the agency did not want their employees to work at, or own, businesses regulated by their agency that they could draft a policy prohibiting such activity. The policies and procedures of each agency may be more restrictive than the Code of Conduct but not less strict. [The Supervisor's boss] asked Commission Counsel to provide contact information for agencies that had drafted such policies.

[Supervisor and her boss] were excused and the Commission met with [Employee] later in the day.

*\*\*\*\*The Commission met separately with [Employee]\*\*\*\**

The Commission asked [Employee] about her previous comments during the August 2018, meeting regarding the fact that the [business] was on the verge of closing and that employees would be out of work and [clients] would be displaced if she was not approved to purchase the [business]. [Employee] denied making such comments. She also denied the fact that the database would give her access to confidential information not

available to the general public. [Employee] stated she still wanted to purchase the [business] (which actually closed on January 17<sup>th</sup>) and her sister would put her name on the [official records].

18-27A Motion--The Commission decided to withdraw [Employee]'s previous advisory opinion (now referred to as 27A).

18-27B Motion—[Employee]'s ownership or co-ownership of the [business] would create a conflict of interest with her State position.

**18-23-- Private Interest:** Employee worked for [a government entity in the] Planning Department ("Department"). The Department was responsible for regulating land use, building permits, code enforcement, mapping/geographic information systems and community development within the [government's] jurisdiction.

[Employee] and his wife were in the process of purchasing a farm located within the [government]'s jurisdiction. The property had been listed for sale for almost two years. They intended to divide the farm into individual lots through the subdivision administrative review process, which was administered by his Department. The process was set forth in the [government's ordinances] and consisted of an administrative review in which a member of the Planning Department would review the plans to determine the appropriate code, and also verified that all of the required "checklist" items had been submitted prior to approval and recordation of the plan. The process would not afford the reviewing party the opportunity to offer an opinion on the matter or to use their personal discretion. Once the plan was recorded the farm would be officially divided into separate lots.

The land use process was available to any landowner whose property met the subdivision criteria. As long as the code's requirements were followed, the plans were approved and recorded. There was no situation in which a plan that met the code's criteria could be denied and the process did not require any public hearings or notifications. Employee would not have any involvement in the review process and the reviewing staff member would report to the Director of the Department (Employee's supervisor). Employee hired consultants to do the engineering and surveying work and submit the finalized plans to the [government].

Employee asked the Commission whether his plan to subdivide his private property would create a conflict of interest with his official job duties.

#### **A. Personal Jurisdiction**

The State code applies to all counties and municipalities that have not adopted their own Code of Ethics.

It is the desire of the General Assembly that all counties, municipalities and towns adopt Code of Conduct legislation at least as stringent as this act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. Subchapter I, Chapter 58, of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which have not enacted such legislation by January 23, 1993. No Code of Conduct legislation shall

be deemed sufficient to exempt any [governmental entity], municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29.”

29 Del. C. § 5802(4).

Employee fell within the jurisdiction of the State Code of Conduct.

**B. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

[Employee’s] ownership of the farmland constituted a private interest. Having established the existence of a private interest, the Commission considered whether that interest conflicted with [Employee’s] official job duties. Obviously, as [an employee of the] Planning Department, it would be a conflict of interest for [Employee] to review and dispose of matters related to his subdivision request. However, [Employee] stated that subdivision requests were so routine that no one outside of the desk staff were required to review them. In the unlikely event the reviewing personnel required managerial input on [Employee’s] request, he had worked out a recusal strategy whereby the staff member would report directly to [Employee’s] supervisor. Obviously, [Employee’s] supervisor would be able to review the matter without fear of reprisal or retaliation. That did not mean the Commission believed [Employee] would seek reprisal or retaliation, he was, and is, entitled to a “strong 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).

**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 ensure 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)*.

Requests to subdivide properties that complied with the requirements of the code were routinely approved. Because the review process required very little personal judgment, it was unlikely that [Employee's] application to subdivide his land would raise suspicion amongst the public that he was acting contrary to the public trust. In addition, the staff member reviewing [Employee's] application would report directly to [Employee's] supervisor, thus diminishing the public perception that [the supervisor's] judgment was influenced by the prospect of reprisal or retaliation.

**18-19—Private Interest:** [Employee] worked for a Division within [a State agency] in [a position related to finances and accounting]. His job duties included: budget analysis; strategic planning; review and analysis of budget requests; developing strategies to maximize funding; providing advice to management regarding the allocation of resources; monitoring budget; analyzing and monitoring project initiatives and performance.

[Employee] had established a limited liability company. In sum, [Employee] wanted to consult with private businesses and government entities using his [financial aptitude]. He did not specify what types of government entities he planned to target.

[Employee] asked the Commission if his private business would create a conflict of interest with his State position, in violation of the Code of Conduct.

### **Applicable Law**

**1. In their official capacity, employees 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)*. As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 *Del. C. § 5805(a)(2)(a) and (b)*. A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 *Del. C. § 5805(a)(2)*. Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[Employee]'s LLC qualified as a private interest. Based upon his written submission and his comments at the hearing, the Commission decided that his LLC did not create a conflict of interest with his State job duties, with a few caveats. First, he could not contract with any division of [his State agency] because the Code of Conduct prohibits an

employee from representing a private entity before their own agency. 29 Del. C. § 5805(b). Second, he could not contract with any of his agency's vendors. 29 Del. C. § 5805(a)(1). If he were to do so, he could create a situation where he would be required to review and dispose of matters related to that vendor while performing his State job duties. Lastly, if he contracted with a local municipality, he must confirm that the entity did not receive State monies based upon [decisions he made as part of his State job duties]. If he were to do so, it could create a situation where the municipality would pay him with funds they received from the State. Such a scenario would call into question the independence of his official judgment. *Id.*

Apart from the above cited limitations, [Employee]'s LLC did not appear to create a conflict of interest with his State job duties so long as he did not use State time and resources to work on his private interest.

**2. 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 ensure 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 hearing, [Employee] asked if parking his personal vehicle, decorated with advertisements for his LLC, in a State-owned parking lot would violate the Code's prohibition against creating an appearance of impropriety. While the Commission did not find an appearance of impropriety *per se*, he was made aware that calling attention to his private business during his State work hours would likely require him to repeatedly explain the separation between his State job duties and his private interest. However, as long as he abided by the restrictions cited above and provided details about his dual interests when asked, it was unlikely that anyone would suspect he was engaged in conduct contrary to the public trust. The restrictions imposed on [Employee] achieved a fair balance between serving the Code's purpose without unduly circumscribing his conduct.

[Employee]'s private interest did not create a conflict of interest with his State job duties as long as he abided by the restrictions set forth by the Commission.

**18-18—Personal or Private Interest:** [Employee] worked for [a Division] of a [State Agency]. [Employee] evaluated children referred to her from the [Agency's] other divisions. The vast majority of the children she evaluated were aged 5 through 18 and received health insurance through the State Medicaid program. After completion of the evaluations, [Employee] made recommendations for care and worked with other professionals treating the client].

[Employee] wanted to open a private [business] to provide [services] to be used [for purposes related to education]. At the hearing, [Employee] stated that If a family were to request [her services], she would only accept private-pay clients. If [an educational facility] requested [her services] she would decline to evaluate any [child] receiving Medicaid benefits. She believed that those limitations would reduce the likelihood that she would encounter a child she had previously [encountered] as part of her State job duties.

[Employee] asked the Commission to consider whether her private [business] would create a conflict of interest with her State position.

**A. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[Employee]'s private [business] qualified as a private interest. However, given the fact that [Employee]'s State clients were Medicaid recipients and her private clients would be self-pay clients, it was unlikely she would encounter her State clients while performing her private job duties and vice versa. As a result, it was unlikely she would be required to review and dispose of matters in which she had a private interest. In the unlikely event she was to encounter one of her private clients while performing her State job duties, [Employee] was aware of the need to recuse herself from that client and had received approval from her supervisor to do so. In the event [Employee] were to encounter one of her State clients while working in her private [business], she would recuse herself from [working with] that child.

**B. 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 ensure 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).

It was unlikely that [Employee] would encounter clients from one position while performing job duties related to the other position. In the event such a circumstance was to occur, she would recuse herself as necessary. Therefore, her dual employment was unlikely to create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the dual employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated she would work at her private [business] outside of her State work hours.

[Employee]'s private [business] did not create a conflict of interest with her State position as long as she abided by the limitations discussed and she recused herself as necessary.

## **18-16—Complaint—Personal or Private Interest**

### **I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 *Del. C.* § 5810(a). On March 8, 2018, Complainant attested to a sworn Complaint against [a government official]. PIC received the Complaint on March 27, 2018. The Complaint appeared to be notarized in the appropriate format. (29 *Del. C.* § 4328(3)). (*Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

After deciding the Complaint was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim should be dismissed. 29 *Del. C.* § 5809(3). The remaining allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation could have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

### **II. Jurisdiction**

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. See,

e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

#### **A. Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 Del. C. § 5802(4).

Government employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the [governmental entity] has adopted a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 Del. C. § 5802(4). [Official] had been [part of the government entity] since 2016. Prior to [his current position], he served on [one of the entity's committees]. He was subject to the State Code of Conduct because the [government entity] had not adopted its own Code of Conduct.

#### **B. Subject Matter Jurisdiction**

The Commission could only address alleged violations of "this chapter"-Title 29, Ch. 58. 29 Del. C. § 5810(h). The Complaint alleged [Official] voted on matters in which he had a conflict of interest and created an appearance of impropriety but did not reference a specific statute. The conflict of interest provision is 29 Del. C. § 5805(a)(1) & (2). The appearance of impropriety statute is 29 Del. C. § 5806(a). The alleged conduct appeared to fall within those provisions of the Commission's statutory jurisdiction.

### **III. Facts**

#### **A. [The 'Matter']**

Complainant alleged that [Official] voted on [a matter] while he [was on the committee] and again [in his current position]. [The matter] involved a request by [a local business] to re-zone a parcel of land. According to the Complaint, the [committee considered the matter twice in] 2017. It was alleged that during those two meetings [Official] voted on the disposition of [the matter]. However, according to the copies of the minutes submitted by the Complainant, [Official] was not present at either of those meetings. Furthermore, the [Official left the committee to accept a different position] in 2016. As a result, it would have been impossible for him to vote as a member of the [committee].

In 2017, [the matter] was brought before the [government entity]. On both occasions [Official] voted to defer action on [the matter]. Finally, in early 2018, it was alleged that [Official] voted on three more motions related to [the matter].

## **B. [Community project]**

Next, Complainant alleged that [Official] improperly voted in favor of a loan to [non-profit entity in support of a community project]. The [non-profit entity] asked [the government entity] for a loan [to support the project] as part of a public-private partnership.

According to the Complaint, [Official]'s vote on the project was improper because [a family member] worked for a [business owned by two members of the private entity's Board of Directors]. Complainant further alleged that the terms of the loan for the [community project] were so favorable that [Official]'s vote(s) must have been influenced by his [family member's] employment. Based on the foregoing, Complainant believed that [Official] should have recused himself from the [community project] vote.

## **IV. Application of the Law**

### **A. 29 Del. C. § 5805(a)(1): [government] officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties.**

The Complaint alleged that [the Official] improperly voted on [a matter]. Two of the votes took place during the time period [Official's family member] was employed by [the business requesting the zoning change]. However, [Official] voted to defer action on the matter. Defer is defined as "delay; put off; postpone to a future time." (*Black's Law Dictionary*, p. 421 (5th ed. 1979)). In essence, his vote was a vote to *not* decide. The reason for the delay was to allow the [government] more time to investigate whether the zoning change would require additional traffic lights on the roadways surrounding the property. While it would have been more appropriate for [Official] to recuse himself from the matter, the Commission decided it was unlikely that his vote to postpone the decision-making process was the result of an improper influence on his official judgment. To the contrary, [Official] could have voted to move forward with the project and avoid further delays. By the time the [matter] was brought up for a final vote in 2018, [the family member] was no longer working [at the business], thus removing the conflict of interest.

Next, the Complainant alleged that [Official] had a personal interest in the [community project]'s success because his [family member] previously worked for [a member of the non-profit's Board of Directors]. When evaluating these provisions of the Code of Conduct, the Commission has previously emphasized the fact that a course of conduct need not actually result in a violation, only that it "may result" in a violation. *Commission Op. Nos. 92-11; 99-34*. As to the existence of a conflict of interest, Delaware Courts have held that for the interest to be sufficient [to constitute a conflict of interest] the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice, Del. Super.*, C.A. No. 95A-05-008, Graves, J. (November 21, 1995).

The agreement between the [non-profit entity] and the [government entity] has been described as a public-private partnership. Public-private partnerships are increasingly being used to leverage capital improvements. *Public Private Partnerships: Issues and Considerations, Practical Law Practice Note*, pg. 1. The partnership was predicated on the fact that both the public entity and the private entity share in the risks and rewards of the joint endeavor.

Governments often do not want (or cannot afford) to assume full financial and operational responsibility for their infrastructure projects. These projects are capital intensive and governments may not have the resources, personnel and expertise necessary to develop and manage these projects.... As a result, governments are increasingly using P3s as procurement method to develop their infrastructure.

*Id.*, pg. 2

The use of the P3 model has become so prevalent that the Financial Accounting Standards Board (FASAB) issued a formal statement detailing the need for P3s and the unique financial reporting rules which are applied to those entities.

[F]ederal public-private partnerships (P3s) are risk-sharing arrangements or transactions with expected lives greater than five years between public and private sector entities. Such arrangements or transactions provide a service or an asset for government and/or general public use where in addition to the sharing of resources, each party shares in the risks and rewards of said arrangements or transactions. As federal entities face under-utilization and skill retention issues....some entities are entering to P3 arrangements/transactions to put both infrastructure and government personnel to heightened work.

*FASAB Statement 49 (F.A.S.A.B.)*, 2016 WL 3209743 (June 30, 2017).

In sum, P3 agreements are used by a multitude of government entities to leverage capital investments, while reducing the risk associated with the project, much like the partnership between the [non-profit entity] and the [government entity].

The [non-profit board] was comprised of 14 members. Among the 14 members were [people with varied backgrounds]. Only two of the members, a minority, [owned a business where the family member was employed]. The [non-profit entity] donated [a significant asset] to the project, as well as [a significant amount of money] in initial funding before the [government entity] would be required to loan the [community project any money]. The [government entity] was protected from liability because they would not own the facility and because the [donated asset] was security for the loan.

The Delaware Superior Court has found that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. *Camas v. Delaware Board of Medical Practice, Del. Super.*, C.A. No. 95A-05-008, Graves, J. (November 21, 1995). The familial relationship in that case was one of husband and wife. *Id.* Furthermore, in situations where governments and private entities have created a public/private partnership, it is difficult to discern an official's bias when voting on the subject of the partnership because, by definition, a vote that is presumed to benefit the private entity, also benefits the government entity. Based on the foregoing facts, the Commission decided that the relationship between [Official] and his [family member's] employment was too attenuated to support the inference of a conflict of interest. As a result, the Commission dismissed the Complainant's allegations related to 29 *Del. C. § 5805(1)*.

**B. 29 *Del. C. § 5805(2)*: A person has an interest which tends to impair the person's independence of judgment in the performance of their duties when:**

- a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or
- b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.

As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b).

As stated above, [Official]’s votes on [the matter] were votes to defer the decision-making process. By the time an actual vote was taken in 2018, [the family member] was no longer employed at the business, thus removing the conflict of interest. As to the [community project] vote, the Commission decided that [the family member’s] employment with the [Board member’s business] was too attenuated from [Official]’s votes on the matter to create a conflict of interest. (See above). As a result, this allegation was dismissed.

**C. 29 Del. C. § 5806(a): Each [government] employee, officer and honorary [government] official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government.**

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. 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). 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).

The Commission has previously held that in deciding if there is an appearance of impropriety it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75* (citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567 (1967)). That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the “appearance of impropriety.” It noted that appearances of impropriety claims have been criticized as being too “imprecise, leading to ad hoc results.” *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991). Consistent with that opinion and other case law, the Commission dismissed this allegation because it was supported by only an appearance of impropriety which was solely based on suspicion and innuendo.

The Complaint was dismissed in its entirety for failure to properly allege facts which would support the Commission's finding of a violation of the Code of Conduct.

**18-15—Personal or Private Interest:** [Employee] accepted a casual/seasonal position with [a specific Department] as a [Division] Coordinator. The [Division] was [involved in an annual event involving State employees and private entities]. Her duties included: reviewing applications from organizations who wanted to be included in the [Division's] program; coordinating activities; working with State agencies to distribute [Division] materials; coordinating media relations for the [Division]; completing reports.

[Employee] also worked as a contractor for [a Division of a separate Department]. The contract on which she was working required her to organize documents, submit grant applications and solicit funds to facilitate the State's acquisition of a [certain property]. The contract expired in June 2018.

[Employee] asked the Commission to decide if her work on her [private] contract created a conflict of interest with her position as the [Division] Coordinator.

**A. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

Employee's duties as the [Division] Coordinator did not appear to overlap with the duties she was performing under [her private] contract. When asked by the Commission if there would be any overlap between the [organizations] she worked with [under the private contract] and those she would work with as the [Division] Coordinator, she stated there was no overlap. Employee pointed out that while she would be the [Division] Coordinator, [she would have no decision-making authority about the financial benefits awarded to each entity]. Based on the foregoing, the Commission determined that her dual roles would not create a situation in which she would be reviewing and disposing of matters in which she had a private interest.

**B. 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 ensure 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).

As long as [Employee] did not have contact with the same entities while performing her [State and private job] duties, it was difficult for the Commission to see how the public could perceive her dual positions as contrary to the public trust. [Employee] was also advised about the State’s prohibition against using State time and resources to work on her private contract. 29 Del. C. § 5806(e).

[Employee’s] private contract did not create a conflict with her position as the [Division] Coordinator as long as she did not use State time or resources to work on the contract.

## **18-14—Complaint Personal or Private Interest:**

### **I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 Del. C. § 5810(a). On February 22, 2018, Complainant attested to a sworn Complaint against [a government official]. [Official had been a member of the government entity] since 2008. PIC received the Complaint on February 27, 2018. The Complaint appeared to be notarized in the appropriate format. (29 Del. C. § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff’d PIC v. Hanson*, 69 A.3d 370 (Del. 2013))).

### **II. Jurisdiction**

The Commission’s jurisdiction is limited to interpreting Title 29, Del. C., Ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint’s substance.

After reviewing the Complaint to determine if it was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 Del. C. § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts are assumed to be true. 29 Del. C. § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim were dismissed. 29 Del. C. § 5809(3). The remaining allegations were then examined to determine if a majority of the

Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

#### **A. Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 *Del. C.* § 5802(4).

[Government] employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the [government entity] has adopted a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 *Del. C.* § 5802(4). [Official] was a member of the [governmental entity]. He was subject to the State Code of Conduct because the [government] had not adopted its own Code of Conduct.

#### **B. Subject Matter Jurisdiction**

The Commission can only address alleged violations of "this chapter"-Title 29, Ch. 58. 29 *Del. C.* § 5810(h). The Complaint alleged that [Official] violated: 29 *Del. C.* §§ 5805(a)(1) & (2); 5806(a), (b) & (c). The alleged conduct appeared to fall within the Commission's statutory jurisdiction.

### **III. Facts**

Generally, Complainant alleged that [Official] had a conflict of interest when he voted on the [government]'s budget in [numerous] fiscal years. Specifically, Complainant objected to [Official]'s votes because the annual budget contained disbursements to [volunteer organizations which had the potential to financially benefit the Official]. Complainant alleged that conflicts arose out of [Official]'s ownership of [a business] and his employment with [another business]. [Both of the businesses sold products to the same volunteer organizations that received the government disbursements]. Complainant alleged that [Official] voted to give funds to [the organizations] so that he could benefit financially through his private interests.

Exhibit A listed recipients of funds from 2012 to 2017. In addition to listing the recipient, the list also described the purpose for which the monies were to be used. The [volunteer organizations] were listed as recipients 22 times. Of those 22, 5 were for [products sold by the Official's business and employer]. They were: [*omitted to protect the individual's privacy*].

Exhibit B listed the monies that were disbursed to the [volunteer organizations].

Complainant also attached various exhibits detailing equipment purchased by the

[volunteer organizations] over the past decade. It would be impossible for the Commission to determine if there was a direct correlation between the funds granted to the [volunteer organizations] and the purchases of equipment from [the Official's business and employer] because [the volunteer organizations] also received monies from the State and through donations and fundraising efforts. However, the Commission considered whether [Official]'s ownership of [his business and/or his employment] created a conflict of interest with the performance of his official duties when voting on the [government's disbursements].

#### **IV. Application of the Law**

##### **A. 29 Del. C. § 5805(a)(1): [government] officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties.**

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). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

It was not clear how the [government's disbursement] process worked. However, the Commission decided it was likely that [Official] would [review the material] before he cast his vote. The minutes submitted as exhibits to the Complaint showed that [Official] voted "yea" for the [disbursements] but it was not clear if he had any say in how much each [organization] received or how much they received in total. The question considered was whether [Official]'s judgment would likely have been affected by his private interests.

Clearly as a person who owned his own company and worked for another company that sold [products to the organizations], [Official] would have an interest in the amount of monies each [organization] received [from the government]. That was especially true if [Official] had knowledge of which [organizations] were preparing to buy equipment prior to his vote on the [disbursements]. As such, the Commission determined this count was substantiated by the facts presented.

##### **B. 29 Del. C. § 5806(a): Each [government] employee, officer and honorary [government] official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government.**

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. 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). 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).

[Official]'s conduct had raised suspicion among at least one member of the public, Complainant. The Commission weighed [Official]'s right as a citizen to own a business and to work as an employee of another business against the appearance of impropriety caused by his private interest's relationship to official decisions he made as a [government official]. Although [Official]'s private interests were important, the Commission decided that his duty to the [government's] citizens to abide by the State's Code of Conduct weighed more heavily. This was especially true given the fact that [Official] could have easily recused himself from voting for the [disbursements to the organizations]. As a consequence, the Commission determined that the facts set forth in this allegation supported the finding of a violation.

**C. 29 Del. C. § 5806(b): No [government] employee, [government] officer or honorary [government] official shall have any interest in any private enterprise nor shall such employee, officer or honorary official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No [government] employee, [government] officer or honorary [government] official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:**

**(1) Impairment of independence of judgment in the exercise of official duties;**

To avoid impaired judgment in performing official duties, [government] officials may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Official] was not voting on matters directly related to [his business and his employer]. Nonetheless, his votes on the [disbursements] may have had a derivative effect on his private interest's financial well-being. The Commission considered whether the derivative effect was of such significance that it would affect [Official]'s official judgment.

The amount of monies given to [the organizations] over the past decade was significant. In addition, the equipment [Official sold while working for his employer] was expensive, sometimes costing tens of thousands of dollars or even more. The Commission decided it was likely that [Official]'s judgment could be impaired by the knowledge that monies allocated could be spent on items that would benefit himself or his employer. As such, this allegation was substantiated.

**(2) An undertaking to give preferential treatment to any person;**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. There were no facts to suggest that [Official] had given preferential treatment to his colleagues and co-workers and the allegation was dismissed.

**(3) The making of a governmental decision outside official channels;**

There were no facts to suggest that [Official] made official decisions outside official channels. This allegation was dismissed.

**(4) Any adverse effect on the confidence of the public in the integrity of the government.**

The purpose of the code is to ensure 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 this provision 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 [governmental entity]’s duties could be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

The Commission decided that [Official]’s dual interests created a justifiable impression of a violation. The close relationship between his official actions, the recipients of those actions and his private interests were likely to create an appearance of impropriety amongst the public. Consequently, the Commission substantiated this allegation.

**D. 29 *Del. C.* § 5806(c): No [government] official shall acquire a financial interest in any private enterprise which such official has reason to believe may be directly involved in decisions to be made by such official in an official capacity on behalf of the [governmental entity].**

This provision was inapplicable to [Official]’s situation. He had owned [his business] for many years and had also worked [for his employer] for a long period of time. There were no facts to suggest that he acquired his private interests knowing that he would be voting on matters that would benefit them financially. The allegation was dismissed.

A majority of the Commission found that there was reason to believe that violations of the Code of Conduct had occurred. The matter was scheduled for a formal hearing.

## **18-12—Complaint—Personal or Private Interest**

### **Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 *Del. C.* § 5810(a). On February 2, 2018, Complainant attested to a sworn Complaint. PIC received the Complaint on February 16, 2018. The Complaint appeared to be notarized in the appropriate format. (29 *Del. C.* § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff’d PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

After deciding the Complaint was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that are deemed to be frivolous or that fail to state a claim should be dismissed. 29 *Del. C.* § 5809(3). The remaining allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there was any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

## **Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 *Del. C.* § 5802(4).

County employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the county adopts a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 *Del. C.* § 5802(4). County employee was subject to the State Code of Conduct because [the] County had not adopted its own Code of Conduct.

## **Subject Matter Jurisdiction**

The Commission can only address alleged violations of "this chapter"-Title 29, Ch. 58. 29 *Del. C.* § 5810(h). The Complaint alleged [Employee] violated: 29 *Del. C.* §§ 5805(a)(1) & (2); 5806(a), (b) & (c). The alleged conduct appeared to fall within the Commission's statutory jurisdiction.

## **Facts**

Generally, Complainant alleged [that Employee] used his position with the County to the benefit of various members of [a local] family. Complainant also alleged that [Employee], himself, benefitted from financial investments in Delaware Limited Liability Companies doing business in [the] County, which may, or may not, have included joint ownership with one or more members of the [local] family. Complainant urged the Commission to force [Employee] to reveal his ownership interests in any Delaware LLC so a determination could be made as to whether [Employee] had benefitted himself or members of the [local] family.

Specifically, Complainant alleged that [Employee had used his influence to benefit a non-profit organization in which two members of the local family had an interest]. The [non-profit organization had planned a joint project with the County to benefit the local community].

Complainant alleged [Employee]'s influence on the project was improper because his spouse was employed at one of the family's [local] businesses. Complainant attached several Facebook posts illustrating [the spouse's] employment [at the business] between March 2016 and August 2017. Complainant further alleged that the terms of the [agreement between the County and the non-profit organization] were so favorable that [Employee] must have been influenced by either his wife's employment or his personal business relationship(s) with the [local] family. Based on the foregoing, Complainant believed that [Employee] should have recused himself from [matters related to the non-profit organization].

**29 *Del. C.* § 5805(a)(1): County employees or officials may not review or dispose of matters if they, or a close relative, have a personal or private interest that may**

**tend to impair judgment in the performance of official duties.**

The allegations that [Employee] *may* own LLC businesses with the [local] family were speculative and not supported by sufficient facts to allow the Commission to conduct a proper evaluation. The Delaware Department of State (“DOS”) oversees the laws governing LLC entities. *Title 6, Ch. 18 Del. Code*. The law does not require LLC owners/members to disclose their identities. The LLC registration process requires only the name of the entity’s registered agent, for service of process, and the signature of the person filing the Certificate of Formation which may, or may not, be a member of the LLC. 8 *Del. C.* § 18-201. DOS is only required to publish the names of the LLCs registered in Delaware. 8 *Del. C.* § 18-104(j). DOS is not required to collect information about the identities of the LLC’s members. As a result, it was not possible for the Commission to determine whether [Employee] had an interest in any LLC, either alone or with members of the [local] family. While absence of information is not always confirmation that an event did not occur, [Employee] was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). As a result, the allegation was dismissed as conclusory and not supported by sufficient facts to allow the Commission to determine that a violation had occurred.

The Complainant’s next two allegations were that 1) the terms of the agreement were so favorable to the [non-profit organization] that it must have been the product of [Employee]’s personal interest in the [local] family and 2) [Employee] had a personal interest in the [non-profit organization]’s success because his wife previously worked for the [local] family. When evaluating these provisions of the Code of Conduct, the Commission has previously emphasized the fact that a course of conduct need not actually result in a violation, only that it “may result” in a violation. *Commission Op. Nos. 92-11; 99-34*. As to the existence of a conflict of interest, Delaware Courts have held that for the interest to be sufficient [to constitute a conflict of interest] the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice*, *Del. Super.*, C.A. No. 95A-05-008, Graves, J. (November 21, 1995).

The agreement between the [non-profit organization] and the County was described as a public-private partnership. In order to understand the potential for a conflict of interest, it was necessary for the Commission to review the circumstances under which the conduct was alleged to have occurred. Public-private partnerships are increasingly used by governments at all levels to leverage resources needed for capital improvements. *Public Private Partnerships: Issues and Considerations, Practical Law Practice Note*, pg. 1. The partnership is predicated on the fact that both the public entity and the private entity share in the risks and rewards of the joint endeavor.

Governments often do not want (or cannot afford) to assume full financial and operational responsibility for their infrastructure projects. These projects are capital intensive and governments may not have the resources, personnel and expertise necessary to develop and manage these projects...As a result, governments are increasingly using P3s as a procurement method to develop their infrastructure.

The use of the P3 model has become so prevalent that the Financial Accounting Standards Board (FASAB) issued a formal statement detailing the need for P3s and the unique financial reporting rules which are applied to those entities.

[F]ederal public-private partnerships (P3s) are risk-sharing arrangements or transactions with expected lives greater than five years between public and private sector entities. Such arrangements or transactions provide a service or an asset for government and/or general public use where in addition to the sharing of resources, each party shares in the risks and rewards of said arrangements or transactions. As federal entities face under-utilization and skill retention issues...some entities are entering to P3 arrangements/transactions to put both infrastructure and government personnel to heightened work.

*FASAB Statement 49 (F.A.S.A.B.), 2016 WL 3209743 (June 30, 2017).*

In sum, P3 agreements are used by a multitude of government entities to leverage capital investments, while reducing the risk associated with the project, much like the agreement between the [non-profit organization] and the County.

The Commission considered the Complainant's allegation that the terms of the agreement were so favorable to the [non-profit organization] that [Employee]'s official judgment must have been affected by a conflict of interest. Under the terms of the agreement, both the County and the [non-profit organization] accepted various risks and rewards. However, it was difficult for the Commission to evaluate the measure of risk vs. reward using the comparative documents included with the Complaint. The example provided by the Complainant referenced loans from [a different private entity] to members of the *public*, not to the County. The County's involvement in that matter was to allow remaining funds from a previous program to be deposited in the new fund. Therefore, the Commission's review of [the included documents] did not assist the Commission in deciding if the terms of the agreement between the [non-profit organization] and the County were favorable or unfavorable. In addition, it would be difficult to compare two separate projects involving different entities, different goals, different risks and rewards. As a result of the insufficient factual basis, the Commission dismissed the allegation that the agreement was so favorable that it had to be influenced by [Employee]'s compromised judgment.

The Commission then considered the allegation that [Employee] had a conflict of interest when he acted on matters related to the P3 because of his wife's employment with a [locally owned] business. Complainant alleged those actions occurred in December 2017 and January 2018. After the Commission reviewed the Complaint's *Exhibit A*, they determined that it was likely that [the spouse] had previously worked for a business owned by [a local family]. However, it was not clear whether she was still employed there or if she worked there during the time that [Employee] acted on matters related to the [non-profit organization] and the County. Assuming [the spouse] was still working for [the local business], the Commission considered whether her employment with a business owned by two members of the [non-profit organization]'s 14 member board of directors was sufficient to create a personal or private interest likely to affect [Employee]'s official judgment.

The [non-profit organization]'s Board was comprised of 14 members. Among the 14 members were [a variety of people with diverse backgrounds]. Only two of the members, a minority, were part of the [local] family. The [non-profit organization] would be

required to donate [significant resources] before the County would be required to [contribute their share of the project]. The County was protected from liability because [their contribution to the project was secured by the assets donated by the non-profit organization].

Complainant specifically alleged a conflict of interest regarding [Employee]'s official actions in December 2017 and January 2018. The documentation provided would indicate that [the spouse] stopped working for the [local] business in the summer of 2017. At the time [of the official action], the conflict of interest would have been moot. Even assuming [the spouse] was still employed by the [local business] at the time [Employee] acted on matters related to the [project], the Commission decided the relationship between [Employee] and his wife's employment at a company owned by the [local] family, who were two members of a 14 member board of directors, was too attenuated to support the inference of a conflict of interest. The Delaware Superior Court has found that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. *Camas v. Delaware Board of Medical Practice, Del. Super.*, C.A. No. 95A-05-008, Graves, J. (November 21, 1995). The familial relationship in that case was one of husband and wife. *Id.*

Furthermore, in situations where governments and private entities have created a public/private partnership, it is difficult to discern an official's bias when acting on the subject of the partnership because, by definition, a vote that is presumed to benefit the private entity also benefits the government entity. Based on the foregoing, the Commission dismissed Complainant's allegations related to 29 *Del. C.* § 5805(1).

**29 *Del. C.* § 5805(a)(2): A person has an interest which tends to impair the person's independence of judgment in the performance of their duties when:**

- a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or**
- b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.**

As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 *Del. C.* § 5805(a)(2)(a) and (b). If [Employee] had a demonstrable conflict of interest, this provision would have applied. However, as a predicate, the Commission would have to link [Employee]'s official actions concerning the [non-profit organization] to [the spouse's] financial interest in working for a completely separate business, in an unrelated industry. Consequently, the Commission decided that the conflict of interest did not exist because of the attenuated relationship between the [local] businesses and the [non-profit organization]'s project.

**29 *Del. C.* § 5806(a): Each county employee, officer and honorary county official shall endeavor to pursue a course of conduct which will not raise suspicion**

**among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the county and its government.**

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. 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). In deciding appearance of impropriety issues, the Commission looked 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).

The Commission has previously held that in deciding if there is an appearance of impropriety it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75* (citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567 (1967)). That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

The Commission decided that given the absence of a conflict of interest (as explained above), the appearance of impropriety alone would not sustain a finding of a violation of the Code of Conduct. That was especially true when a consideration of the totality of the circumstances required the Commission to consider the benefits of the public/private partnership that were anticipated to accrue to the County. Therefore, the allegations related to 29 *Del. C.* § 5806(a) were dismissed.

**29 *Del. C.* § 5806(b): No county employee, county officer or honorary county official shall have any interest in any private enterprise nor shall such employee, officer or honorary official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No county employee, county officer or honorary county official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:**

**(1) Impairment of independence of judgment in the exercise of official duties;**

To avoid impaired judgment in performing official duties, County officials may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). The Commission decided, as set forth above, that [the spouse's] employment with a [local] family's business was insufficient to support the allegation that [Employee]'s professional judgment was compromised when he acted on matters related to the public/private partnership.

**(2) An undertaking to give preferential treatment to any person;**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. There were no facts that would indicate that [Employee]'s actions related to the [non-profit organization]'s project was predicated on his wife's employment.

**(3) The making of a governmental decision outside official channels;**

The Complainant did not allege that [Employee] was making official decisions outside official channels. In fact, the allegation in the Complaint was quite the opposite. [Employee] acted in an open forum, in full view of the public and on the record.

**(4) Any adverse effect on the confidence of the public in the integrity of the government of the county.**

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treated this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the County's duties could be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

The Commission decided that under the 'reasonable person' standard, [Employee]'s official duties could still be performed with impartiality, honesty and integrity. The tenuous connection between the [non-profit organization] and the businesses owned by the [local] family, coupled with the anticipated benefits of the public/private partnership, did not support a justifiable impression of a violation.

As a result of the foregoing, the Commission dismissed Complainant's allegations regarding violations of 29 *Del. C.* § 5806(b).

**29 *Del. C.* § 5806(c): No county official shall acquire a financial interest in any private enterprise which such official has reason to believe may be directly involved in decisions to be made by such official in an official capacity on behalf of the county.**

Complainant did not allege that [Employee] made official decisions related to [the local business]. That is/was the entity that [Employee] would have had a conflict of interest with, if his wife had continued to be employed there. The Commission could not draw an inference that an interest in [the local business] was the same as having an interest in the [public/private project] and this allegation was also dismissed.

**CONCLUSION**

The Complaint was dismissed in its entirety for failure to properly allege facts upon which the Commission could support a finding of a violation of the Code of Conduct.

**18-12(b)—Supplement Complaint; Personal or Private Interest:** At the May 15<sup>th</sup> meeting, the Commission dismissed the original Complaint ("A") against [Official]. Before the formal letter opinion was issued on June 8, 2018, Complainant submitted a supplement to his Complaint ("B"), which was received by PIC on May 25<sup>th</sup>. Attached to the

supplemental filing (marked by Complainant as Exhibit H) were minutes from [a meeting] showing that [Official] had been aware of, and voted on, matters related to [a community project] in 2017, despite the fact that he had previously stated he only voted on matters related to the [project] after January 2018.

### **Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 *Del. C.* § 5810(a). The supplement to the original Complaint was notarized in the appropriate format. (29 *Del. C.* § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013))). However, given the fact that the original Complaint had already been dismissed, it was unclear whether the supplement itself would qualify as a properly sworn Complaint. However, the Commission did not need to resolve that issue based on the analysis below.

### **Commission's Previous Decision--A**

Originally, Complainant alleged that in December 2017, and January 2018, [official] improperly voted in favor of a [community project]. The [community project] was [sponsored by a non-profit entity with a 14-member Board of Directors]. [One member of the Board donated significant assets to the community project]. [In exchange the government] agreed to loan the [non-profit entity monies towards the community project] as part of a public-private partnership. Complainant alleged that [Official]'s votes on the project were improper because [a family member], worked [at a business owned by two members of the Board] at the time of the vote. According to Complainant, [Official]'s failure to recuse himself from the matter was a violation of 29 *Del. C.* 5805(a)(1) (officials may not review or dispose of matters if they, or a close relative, have a personal or private interest that may tend to impair judgment in the performance of official duties).

The Commission, assuming that [the family member] was employed [at the business] during the time [Official] voted on matters related to the [community project], decided the relationship between [official] and [the family member's] employment at a company owned by two members of a of a 14 member Board of Directors, was too attenuated to support the inference of a conflict of interest. As a consequence, the Commission dismissed Complainant's allegations related to 29 *Del. C.* § 5805(1).

### **Commission's Consideration of the Supplement to the Original Complaint--B**

Complainant's supplemental submission (B) did nothing to change the facts the Commission previously considered. The Commission assumed that [the family member] was employed [at the business] during the time [Official] cast his vote(s) and decided that their employment did not create a conflict of interest which would have required [Official]'s recusal. As the matter had already been decided, the Commission also dismissed the supplement (B) to the original Complaint (A).

**18-06—Private Interest:** [Employee] had been a casual/seasonal worker for the [State] since 2012. [Employee] helped clients with their daily activities and provided mentoring. [Employee]'s work hours were Monday-Thursday from 8:15 a.m. to 4:45 p.m. and Fridays 8:15 a.m. to 1:45 p.m.

[Employee] applied for and was awarded a Request for Proposal (RFP) to oversee [a project that was being implemented at his State work location]. [The work was not related to his State job duties]. [Employee] and his wife formed an organization and responded to the RFP, which he was awarded. [Employee] asked the Commission to determine if the contract work would create a conflict of interest with his State job duties. If so, he requested a waiver.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[As part of his State job duties, Employee worked directly with clients]. The [project] would be open to members of the public and other State employees. Any clients who wanted to participate in the project would need to be attended by a staff member]. [Employee] stated that he would not [be tasked with attending to clients who were involved in the project]. Upon arrival at the [project, clients and their attendants] would make contact with [his wife]. As a result, it was difficult for the Commission to see how [Employee] would have an opportunity to make decisions about the [project] while performing his State job duties or vice versa.

**2. 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 ensure 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).

[Employee] would work at the [project] outside of his State work hours. In addition, there was no connection between his State job duties and his duties [related to the project], other than [it being located at the same location as his State job]. As a consequence, it was unlikely that [Employee]'s work [on the project] would create a justifiable impression of a conflict of interest amongst the public.

**18-05—Personal or Private Interest:** [The President] of the Board of Directors for [a subsidiary organization requested an advisory opinion]. The [subsidiary] was a non-stock, membership corporation whose sole member was [the parent entity]. Because [the parent entity] was the sole member of [the subsidiary], their interests were necessarily aligned.

During [the subsidiary's regulatory] renewal process, questions were raised as to whether members of [the parent entity's] Board of Trustees who also served on [the subsidiary's] Board of Directors had a conflict of interest. The [President of the subsidiary] consulted with a corporate attorney who concluded that:

[i]n the case of a subsidiary corporation with a sole member parent, the obligation of the subsidiary corporation is, ostensibly, to serve the interests of the parent corporation, except where the actions of the subsidiary would violate the law. Thus, in the case of [the subsidiary], a fiduciary obligation of [the subsidiary's] directors is to serve the business interests of [the parent entity], so long as the [subsidiary] does not violate any applicable law in doing so. Thus, it would appear that merely having directors, Trustees, or employees on the board of a subsidiary does not, in and of itself, give rise to a conflict of interest.

*(Citation omitted).*

The [subsidiary's] Board of Directors was comprised of 15 members. Of those 15, two members were also Trustees on [the Board of the parent entity] and four were employees of [the parent entity]. The remaining nine members were not affiliated with [the parent entity].

[The President] asked the Commission to answer the following questions:

1. Was it a conflict of interest for a member of [the parent entity's] Board of Trustees to also serve on [the subsidiary's] Board of Directors?
2. Was it a conflict of interest for [the parent entity's] employees to serve on [the subsidiary's] Board of Directors?
3. Did the number of [the subsidiary's] Board members with a potential conflict of Interest (i.e. a majority or minority) have an effect on the existence of a conflict of interest?
4. Did [the subsidiary's] and [the parent entity's] Board members have a conflict of interest as it related to finances and fiduciary issues?

## A. Jurisdiction

A State agency is defined as “any office, department, board, commission, committee...school district, board of education and all public bodies existing by virtue of an act of the General Assembly...” 29 Del. C. § 5804(11). [The parent entity] was a quasi-State entity, meaning it had characteristics of both a State agency and a corporation. Like a State agency, it was created by statute [*citation omitted*], its employees participated in the State benefits and pension system [*citation omitted*] and a majority of its Board members were appointed by the Governor [*citation omitted*]. In addition, [the parent entity] presented its annual budget request to the General Assembly. However, its enacting statute made clear that it was established as a corporation. [*Citation omitted*].

The Commission had previously decided that [the subsidiary’s] Board members and employees were State employees. The Commission had never decided whether [the parent entity’s] employees or Board members qualified as State employees and did not do so while reviewing this matter. A conflict of interest can exist between two government entities or between a government entity and a private entity. Thus, the involvement of the [subsidiary] was sufficient to confer personal jurisdiction.

## **B. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

First, the Commission considered whether [the parent entity’s] Board members and employees had a conflict of interest. When organizations share similar goals the likelihood of a conflict is reduced but not eliminated. The law prohibits decisions where the official has a private interest. It is not limited to those situations in which the conflict arises from competing goals or interests. The Commission had previously found that being a Board member of a corporation created a personal or private interest, which carried with it a fiduciary duty to the private organization. *Commission Op. No. 06-57 (citing Oberly v. Kirby, 592 A.2d 445 (Del., 1991) (Board Director owes fiduciary duty as corporate officer and member))*. In *Oberly*, it was held that Board members have a special duty to advance [the] goals and protect [the] assets of [an entity]. As a result, the Commission decided that [the parent entity’s] Board members and employees did not have a conflict of interest simply because they were also [members of the subsidiary’s Board]. Instead, the existence, or lack, of a conflict depended on the facts of each situation. As a rule, the parent-subsidiary relationship between [the entities] would effectively remedy any conflict of interest. However, even though it was unlikely, there was still the possibility that a situation would arise where [the parent’s] and [the subsidiary’s] interests would differ, creating a conflict of interest for [the parent entity’s] Board members and employees. The number of members (i.e. a majority or minority) with a conflict had no bearing on the analysis. The conflict would be personal to the member and would exist whether or not their vote would be the deciding factor in a matter pending before [the subsidiary’s] Board.

Next, should a conflict arise, the Commission considered whether [the subsidiary's] Board members could remedy the conflict through recusal. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are "routinely cured through abstention or recusal on a specific matter." *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997) (citing *56 Am. Jur. 2d Municipal Corporations § 172* (1971)); *Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960). However, it also was recognized at common law that some conflicts cannot be cured by recusal when government officials hold dual positions, regardless of sector. *63C Am. Jur. 2d Public Officers and Employees § 62, et. seq; Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers, 62 ALR 5th 67*. As a result, some courts held that when recusal from participating in decisions was not a sufficient remedy, one of the jobs must be relinquished. *People Ex. Rel. Teros v. Verbeck*, 506 N.E. 2d 464, 466 (Ill. App. 3 Dist. 1987). The courts referred to those situations as having a "clash of duties." *Id.*; See also, *O'Connor v. Calandrillo*, 285 A.2d 275 (N.J. Super.); *aff'd.*, 296 A.2d 324, *cert. denied*, 299 A.2d 727, *cert. denied*, U.S. Sup. Ct. 412 U.S. 940; *Sector Enterprises, Inc. v. DiPalermo*, 779 F. Supp. 236 (ND. NY 1991). That common law rule applied whether the individual held two government posts or a government post and a second job in the private sector. *63C Am. Jur. 2d Public Officers and Employees § 62*. The *Verbeck* Court said banning dual positions under some situations "ensures that there be the appearance as well as the actuality of impartiality and undivided loyalty." *Id.* (citing *Rogers*); See also, *O'Connor v. Calandrillo, supra*.

Under the law, the scope of "recusal" has been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). Thus, if [the parent entity's] Board members or employees found themselves confronted with a situation where their [position with the parent entity] was in conflict with [the subsidiary's] position, they were expected to recuse themselves from any involvement in the matter in both their [parent] and [subsidiary] roles.

**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 ensure 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)*.

The fact that the two entities had a parent-subsidiary relationship reduced any

appearance of impropriety that could be created by having dual roles with [the parent] and [the subsidiary]. In addition, the appearance of impropriety could easily be mitigated by appropriate recusal.

The [parent entity's] Board members and employees who also served on [the subsidiary's] Board of Directors did not have a conflict of interest per se. In the unlikely event a situation occurred where the interests of the two entities were at odds with one another, [the members who shared an affiliation with both the parent entity] and [the subsidiary] would have to recuse themselves from involvement in the matter in both of their roles.

**18-02—Private Interest:** [Employee worked as a Supervisor at a specific State Agency]. [Employee] oversaw the administration of [grant monies]. Grant monies were awarded to Delaware governmental entities to purchase equipment. The State then provided free training to those purchasers. Neither the purchase monies, nor the training, were available to private enterprises. [Employee] was primarily responsible for ensuring that purchases made with grant monies were allowable under the grant's regulations.

[Employee] was also a certified instructor [in a specific field]. She wanted to work as a contractor for [a private company to provide training in the use of equipment similar to that purchased with grant monies she disbursed in her State job]. [The private company] did not contract with the State.

[Employee] recognized that it would be a conflict of interest for her to contract with grant recipients but asked the Commission to decide if she could work as a contractor for [the company] to provide training to [other private entities].

**A. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

It was difficult for the Commission to see how [Employee] could review and dispose of matters in which she had a private interest. The grant recipients were all Delaware governmental entities who received free training in the use of the equipment they had purchased. Therefore, the likelihood that [Employee] would be confronted with a situation

in which a former grant recipient would contract with [the private company] to provide training at their own expense would be very small. Similarly, providing [other] services to private businesses would be unlikely to put her in a position where she would encounter former grant recipients. In the very unlikely event such a situation was to occur, [Employee] was advised to recuse herself and advise [the private company] that she could not work on that contract.

**B. 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 ensure 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).

[Employee] recognized the fact that contracting with grant recipients would create an impression of impropriety. So, too, would her work on a contract between [the private company] and a grant recipient be likely to raise suspicion amongst the public that she was acting contrary to the public trust. However, the possibility of such a circumstance was extremely remote. Furthermore, [Employee] was entitled to a presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). The Commission decided that as long as [Employee] recused herself as necessary, her part-time work with [the private company] would be unlikely to create an impression of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. Therefore, [Employee]’s part-time endeavors had to be performed outside of her State work hours.

[Employee]’s proposed contract work for [the private company] did not create a conflict of interest with her State job duties as long as she recused herself as necessary.

**17-33--Personal or Private Interest:** [Employee] was the Director of [a Division of a State agency]. Her Division contracted with several companies to provide [a service to certain] citizens. The contracts were paid for with a mix of state and federal funds.

[Employee] also volunteered at fundraising events for [a local charity]. In exchange, they were permitted free entrance into the event. Monies raised at fundraising events were

divided “equitably” between providers in the state. [The charity] did not contract with [Employee’s] Division.

[Employee] asked the Commission to consider whether her volunteer activities created a conflict of interest with her State position.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

[Employee] did not make official decisions about [the charity] while performing her State job duties. Nor did she have any involvement in determining how the [charity’s] proceeds were distributed. As a result, the Commission could not see how her volunteer activities created a conflict of interest with her State position.

**2. 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 ensure 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).

As long as [Employee] did not make decisions about [the charity] or the allocation of their funds, it was difficult to see how her volunteer work would create an appearance of impropriety.

The Commission further advised that the value of the waived entrance fees did not need to be reported as a 'gift' on [Employee]'s annual Financial Disclosure report because she provided consideration of equal or greater value through her volunteer activities. 29 Del. C. § 5812(h).

**17-32--Personal or Private Interest:** [Employee] worked for [a State agency] in Sussex County.

In addition to his State job, [Employee] was the co-founder and president of [a private business]. [The private business served the same segment of the population as Employee's State agency]. [Employee] started the business in July 2016, with his friend who served as the vice-president and manager of [the private business]. [The private business'] board consisted of [Employee], [his friend] and their spouses. [Employee] denied being involved in the day-to-day operations of [the private business]. As president, [Employee] was responsible for business development, banking, financing fund raising and other behind-the-scenes work. [His friend] was responsible for the day-to-day operations of [the business]. [The business] was funded through payments by the clients and through donations from the community. They did not receive funding from any government entities.

In the past year, [the private business] had 26 clients, 12 of whom were also served by [Employee's State agency]. [Employee] denied recruiting clients through [the agency] and stated that all [of the private business'] applicants were required to go through [his friend] to determine if they were eligible [for services]. [The business] received referrals through word-of-mouth [and two private businesses that contracted with Employee's State agency]. [Employee] asked the Commission to consider whether his work with [the private business] created a conflict of interest with his State position.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

In determining if there was a conflict of interest, the Commission evaluated the amount of crossover between the State employment and the private interest. At first

glance it was concerning that almost 50% of [the private business'] clients were also clients of [Employee's State agency]. However, the Commission decided that number was statistically insignificant considering [various factors]. The numbers *did* accentuate the fact that [the private business] was likely to continue to have clients who were [also served by the State agency]. The Commission then considered the likelihood that one of [Employee]'s State clients would also receive services from [his private business]. [Employee] stated that it was unlikely such a scenario would occur. The agency's [employees were not assigned clients from the geographic location of the private business]. Therefore, the likelihood one of his State clients would also receive services from [the private business] was extremely low.

When [Employee] was asked how clients were made aware of [his private business], he stated that two entities (who also contracted with the State), had referred clients to [his business]. [His business] did not pay monies to those two entities, nor did they pay [his business]. Otherwise, clients learned about [the business] through Facebook or word-of-mouth. [Employee] denied receiving referrals from his State co-workers. As a result, the Commission did not have any concerns that he would use his State position to recruit clients for [his business].

As to funding, [Employee] stated that [the business'] funds were a combination of donations and weekly payments by the clients. [The business] did not seek State funds, so there was no conflict of interest between his State job duties and the monies received by [the business].

**2. 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 ensure 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).

[Employee] worked with a similar population of people in his State job and at [his private business]. Consequently, he had to be very careful to avoid even the appearance of impropriety. To that end, he could not reference his State job title when acting in his capacity as president of [the private business]. That prohibition included, but was not limited to, references to his State job on the internet, Facebook and other forms of media. Additionally, he could not use State time or resources to the benefit of [his private business].

**17-31—Personal or Private Interest—Complaint:** On August 23, 2017, PIC received two *Complaints* against a councilman for [a Town]. [The councilman] was elected to a two-year

term on the Town Council in September 2015 and did not run for re-election in 2017. His last day as a councilman was September 22<sup>nd</sup> and one of his last acts was to vote to approve [a measure involving his wife's supervisor].

The Complaints were submitted by [two of the Town's] property owners. The Complainants alleged that [the councilman] violated the Code of Conduct's Conflict of Interest provision, 29 *Del. C.* § 5805(a), by voting on matters related to [his wife's supervisor]. At the time the Complaints were submitted, [the spouse] was a contract employee of the Town. She resigned from her position shortly after the Complaints were filed.

On August 29<sup>th</sup>, the Complainants sent a letter via email to the Mayor and Town Council advising they would drop their Complaints if [the councilman] sought advice from PIC. Commission Counsel contacted the Town attorney and extended the offer for an advisory opinion. The Town attorney responded in a letter dated September 1<sup>st</sup>, 2017, declaring that [the spouse's] resignation effectively ended any conflict of interest [the councilman] may have had.

At the September 22<sup>nd</sup> Town Council meeting, the Town attorney made a statement on the record that he had advised [the councilman] that he did not have a conflict of interest and that it would be permissible for him to vote on [the pending matter].

## **I. Procedure**

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). The Complaints were properly notarized.

## **II. Jurisdiction**

The Commission's jurisdiction was limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### **A. Personal Jurisdiction**

[The councilman] was a [Town] official. The town previously sought the Commission's approval of their own Code of Conduct pursuant to 29 *Del. C.* § 5802(4). The provision states "[i]t is the desire of the General Assembly that all ...municipalities...adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials." *Id.* The Commission approved the Town's Code of Conduct in September 2013 and it was subsequently adopted by the Town. However, the Town failed to follow through and create an Ethics Commission. While the Town technically adopted their own Code of Conduct, it could not be the intent of the legislature to allow municipalities to adopt their own Code of Conduct and then fail to administer the applicable provisions. The Delaware Supreme Court has held "[t]he goal of statutory construction is to determine and give effect to legislative intent." *LeVan v. Independence Mall*, 940 A.2d 929, 932 (Del. 2007). As a result, [the councilman] remained under the PIC's jurisdiction.

### **B. Subject Matter Jurisdiction:**

The Complaints alleged violations of 29 *Del. C.* § 5805(a) which was within the Commission's jurisdiction. *Commission Op. No. 95-05.*

### III. Allegations

**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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 *Del. C.* § 5805(a)(2)(a) and (b). A close relative is defined as "parents, spouse, children...and siblings of the whole and half-blood." 29 *Del. C.* § 5804(1).

The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." See, 29 *Del. C.* § 5805(a)(1). The Courts' concern is that decisions be based on a "fair and unadulterated examination of the merits" and that "any conduct giving the appearance that impropriety is involved therein should be studiously avoided." See, *Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (expressing the court's concern for any deviation from the administrative process as provided by law or participation in *ex parte* communications between one party and those charged with reviewing the merits for the State agency). Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. 63C *Am. Jur. 2d Public Officers and Employees* § 253 (1997). Thus, the State Code is basically a codification of the common law restrictions which Delaware Courts have recognized as encompassing more than pecuniary interests.

[The councilman] reportedly voted on [the supervisor's] contract renewal in 2015, while his wife was employed by the Town and reporting directly to [the supervisor]. He also voted [on two other matters involving his wife's supervisor]. [The councilman] participated in those votes after consultation with the Town's attorney but did not consult with PIC.

The Commission decided that [the spouse] clearly fell within the definition of a close relative as defined by the statute. Next, the Commission considered the three votes alleged to be in violation of the Code of Conduct. First, [the councilman] voted in favor of [a matter adverse to the supervisor]. That act would appear to be a direct contradiction of the allegations in the Complaints. Second, the Commission considered [the councilman]'s vote just after his wife's resignation. At that point, [the wife's resignation had removed] any conflict of interest. Third, the Commission considered [the councilman]'s vote to renew [the supervisor's] employment contract. While [the supervisor] was [the spouse's boss], that

alone was not enough to create a conflict of interest requiring [the councilman]'s recusal. If [the councilman] had been voting on a matter directly involving his wife, he would have had a conflict of interest. However, the Commission was unable to reach the conclusion that [the councilman]'s vote on the employment contract was affected by [his wife's] employment with the Town. The fact alleged in the Complaints was that the [councilman and his wife] lived a few doors down from the [supervisor] and the proximity of their homes "...creates a conflict of interest due to the presumed social relationship between the parties" was insufficient to sustain an allegation of a personal or private interest. In fact, Delaware Courts have held that for the interest to be sufficient [to constitute a conflict of interest] the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, Graves, J. (November 21, 1995). In *Camas*, the Delaware Superior Court held that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. The familial relationship in that case was one of husband and wife. *Id.* As a result, the Commission decided that [the councilman] did not violate the Code of Conduct's conflict of interest provisions when he voted on matters related to [the supervisor] and the Complaints were dismissed.

The Commission pointed out that only an advisory opinion from the Commission, in advance of any action or inaction which could constitute a violation of the Code of Conduct, provided legal protection to the requestor in the event a formal Complaint was lodged against them. In this case, had [the councilman] sought that advice, the Complaints would have been dismissed with no further consideration.

Motion: The Complaints were dismissed for failure to allege sufficient facts upon which the Commission could find a violation of the Code of Conduct.

**17-24--Personal or Private Interest:** [Employee] accepted a position with [a State agency].

[Employee] also maintained a private practice on a part-time basis. She identified two possible conflicts between her State position and her private interest. First, [Employee] was an approved provider for Delaware Medicaid patients. As a consequence, she regularly submitted reimbursement claims to Medicaid's Highmark and Aetna insurance plans. The state Medicaid program is administered by the Division of Family Services. Second, [Employee's] clients occasionally asked her to complete FMLA paperwork for submission to their employers. Some of her clients worked for the State. [Employee] recognized that it would be a violation of the Code of Conduct for her to continue to complete FMLA paperwork on behalf of her private clients who were also State employees. As a result, she voluntarily decided to no longer provide that service.

[Employee] asked the Commission to consider whether her continued work as a part-time provider for the state Medicaid program created a conflict of interest with her State position.

**1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[Employee]'s private practice qualified as a private interest. However, [Employee] did not work for the Division of Family Services, the agency with oversight of Medicaid. As a result, she would not be required to review or dispose of matters involving her private clients when submitting her reimbursement claims to Medicaid. It was possible, although extremely unlikely, that [Employee] would encounter one of her private clients while performing her State job duties. In that case, she would need to have a recusal strategy in place so the client could be assigned to a different [provider]. [Employee] stated she would discuss recusal strategies with her supervisor. In addition, in the unlikely event that one of [Employee's] State clients sought treatment at her part-time practice, [Employee] stated there were 14 other providers to whom the client could be assigned, allowing her to recuse as necessary.

**2. 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 ensure 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).

[Employee's] Division was completely separate from the Division of Family Services and the administration of the State Medicaid program. Furthermore, [Employee] did not work in a general, social services building where Medicaid services were located. Given the difference between [Employee's] State job duties and those performed by Medicaid staff, as well as her geographic separation from locations where Medicaid services were

offered, it was unlikely her private interest would raise suspicion among the public that she was engaged in conduct that was contrary to the public trust.

**17-22A—Personal or Private Interest—Complaint:** On July 5, 2017, PIC received a Complaint (“Complaint #1”) alleging multiple violations of the Code of Conduct. Complaint #1 was signed by multiple affiants. The Complaint asked the Commission to [provide an interim remedy while the Complaint was being reviewed]. On the same day, PIC received another Complaint (Complaint #2) filed and an un-notarized letter also alleging violations of the Code of Conduct. On July 10, 2017, PIC received two additional un-notarized letters describing [an employee’s] behavior while acting in his professional capacity. Finally, on July 12, 2017, PIC received another un-notarized letter alleging unprofessional conduct.

Complaint #1 was published in various media outlets including delmarvanow.com, wboc.com and The News Journal. Commission Counsel emailed [Complainants] on July 5, 2017 and advised that proceedings before the Commission were confidential and they should refrain from divulging any further information to the media.

On July 11, 2017, Commission Counsel sent a Preservation Letter to the [Employer] advising them to preserve any and all information related to the allegations pending before the Commission.

Complaint #1 alleged violations of 29 *Del. C.* § 5806(a)(e) and (h) which read as follows:

- (a) Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.
- (e) No state employee, state officer or honorary state official shall use such public office to secure unwarranted privileges, private advancement or gain.
- (h) No state employee, state officer or honorary state official, in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency.

Complaint #2 alleged violations of subsections (e) and (h).

## **Procedure**

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). Complaint #1 was notarized by multiple affiants. The Commission decided it was unlikely that every affiant could attest to the existence of all of the allegations in the Complaint. It was more likely that each affiant could only attest to the facts related to their [situation]. As a result, there was a procedural defect in Complaint #1 which would likely fail examination by a reviewing court. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). If the Commission determined that Complaint #1 properly alleged one or more violations of the Code of Conduct, the affiants would be asked to re-submit their Complaints separately so that it would be clear from the reading of

the Complaint which affiant alleged a particular violation of the Code of Conduct. Complaint #2 was submitted by [one person] and was properly notarized.

## **Jurisdiction**

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### **A. Personal Jurisdiction**

The [employer] previously sought the Commission's approval for their own Code of Conduct pursuant to 29 *Del. C.* § 5802(4). The provision states "[i]t is the desire of the General Assembly that all ... municipalities...adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials." *Id.* The Commission approved the Code of Conduct in September 2013 and it was subsequently adopted. However, there was no follow-through and no Ethics Commission was created. While there was an effort to adopt their own Code of Conduct, it could not be the intent of the legislature to allow adoption of a Code of Conduct and then permit a failure to administer the applicable provisions. The Delaware Supreme Court has held "[t]he goal of statutory construction is to determine and give effect to legislative intent." *LeVan v. Independence Mall*, 940 A.2d 929, 932 (Del. 2007). As a result, [Employee] remained under the PIC's jurisdiction.

### **B. Subject Matter Jurisdiction:**

As stated above, the Complaints alleged violations of 29 *Del. C.* § 5806 (a)(e)(h). Complaint #1 did not match specific facts with applicable violations of the Code of Conduct. Commission Counsel distilled the allegations down to the following list:

- Sexual Harassment
- Racial Discrimination
- Abusive Conduct
- Violation of 1<sup>st</sup> Amendment rights
- Improper Interference with [other departments]
- Misuse of property
- Harassing and demeaning behavior
- Violations of [other regulations]
- Pressuring to employees to disclose confidential information
- Misappropriation of funds
- Use of authority to obtain [extra benefits].

Complaint #2 alleged sexual harassment as a violation of 29 *Del. C.* § 5806(e)(h).

The Commission agreed that [Employee] acted in an unprofessional, offensive and deplorable manner. It was also clear that nothing was done over the past seven years to correct his behavior or hold him accountable. However, the Commission's jurisdiction is limited to administering the laws in Title 29, Chapter 58. *Commission Op. No. 95-05*. The Commission has previously decided that it has "no jurisdiction over personnel laws" (*Commission Op. No. 97-28*) or "allegations of sexual harassment such as 'leering,' making sexual comments, etc., [which] are governed by laws and regulations administered by such

entities as the Equal Employment Opportunity/Affirmative Action (EEO/AA) section under State Personnel, or the Department of Labor, or certain federal offices. Similarly, allegations of racism are governed by laws and regulations administered by such entities.” *Commission Op. Nos. 91-16, 98-42, 00-22.*

While the Code of Conduct does have a provision regarding sexual harassment (§ 5806(h)) the Commission has interpreted it as applying to interactions between government actors and third parties (*Commission Op. Nos. 98-42, 00-22*), such as vendors and contractors. The reason for that interpretation is the underlying purpose of the Code of Conduct. When creating the Code of Conduct, the legislature declared legislative findings and statement of policy. 29 *Del. C.* § 5802(1)-(4). Subsection (2) states “[t]o ensure propriety and to preserve public confidence, officers and employees...must have the benefit of specific standards to guide their conduct...”. The inclusion of § 5805(e) must be read in the context of the Code of Conduct (i.e. personal and private interest, conflicts of interest). The purpose of the statute was never intended to be a substitute for state and federal discrimination law. If the statute were to be interpreted otherwise, any sexual harassment claim between two state employees would fall within the Commission’s jurisdiction. Nothing in the legislature’s findings indicated that they intended to abrogate state sexual harassment laws. As a result, the sexual harassment claims were only considered as they related to [Employee] and third parties. In this case, Complaint #2 alleged such sexual harassment.

The same reasoning applied to § 5806(a), the appearance of impropriety standard. It too must be interpreted in the context of the Code of Conduct’s purpose. To interpret the standard otherwise would allow the provision to apply to behaviors that were not otherwise violations of the Code of Conduct. As a result, most of [Employee’s] disturbing behavior was not a violation of the Code of Conduct’s appearance of impropriety standard.

The one exception to the appearance of impropriety allegations would be those [that alleged Employee allowed his personal associations to interfere with his business decisions]. According to Complaint #1, [Employee] would intervene in citizen’s matters, substituting his judgment for that of [another employee] based on whether he did, or did not, like the particular citizen. Therefore, the appearance of impropriety alleged in Complaint #1 was grounded in a violation of 29 *Del. C.* § 5805(a), because it was alleged [Employee] allowed his professional judgment to be affected by personal interests.

29 *Del. C.* § 5806(e) prohibits the use of government property for private advancement or gain. The Complaint alleged that [Employee had used Employer’s resources for his own gain]. Therefore, the allegation in Complaint #1 regarding the issue appeared to set forth adequate facts upon which the Commission could determine if [Employee] violated the Code of Conduct.

Commissioner Smith pointed out that although some of the allegations may have been addressed with other agencies, [Employee] could have continued to violate those policies and procedures. The Commission decided there was no way to determine exactly which allegations in the Complaints were accurate without first investigating the matter. The Commission then discussed the possibility of hiring an investigator. Commission Counsel agreed to look into the possibility.

The Commission decided to open an investigation on [Employee] and the allegations contained in the Complaints.

**17-22B—Private Interest--Complaint:** [Employee] was [employed by a Town]. He had held that position since September 2012. [Employee had worked for the Town in other positions since 2008].

In July 2013, the Commission approved the Town's proposed Code of Conduct. It was adopted and made part of their Town Code in September 2013. However, the Town never created an Ethics Committee or appointed any members to such a committee.

On July 5, 2017, PIC received a Complaint ("*Complaint #1*") alleging [Employee] violated multiple provisions of the State Code of Conduct. *Complaint #1* was signed by multiple affiants. The affiants were Town employees, past and present. The Complaint asked the Commission to suspend [Employee] from his position until Commission Counsel could investigate the allegations contained therein, a remedy the Commission could not provide. On the same day, PIC received another Complaint ("*Complaint #2*") filed by [Affiant #14] and an un-notarized letter also alleging [Employee] had violated the Code of Conduct. On July 10, 2017, PIC received two additional un-notarized letters, describing [Employee's] behavior while acting in his official capacity.

The Commission authorized an investigation on August 18, 2017, and Commission Counsel hired [investigators] to look into the allegations contained in the Complaints.

*Complaint #1* alleged [Employee] violated 29 *Del. C.* § 5806(a)(e) and (h) which read as follows:

(a) Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.

(e) No state employee, state officer or honorary state official shall use such public office to secure unwarranted privileges, private advancement or gain.

(h) No state employee, state officer or honorary state official, in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency.

Complaint #2 alleged violations of subsections (e) and (h).

## **I. Procedure**

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). *Complaint #1* was notarized by 13 affiants. After reading the transcribed interviews it was clear that none of the 13 affiants could attest to the Complaint in its entirety. Rather, each affiant could only attest to the allegations related to their Town position. As a result, there was a procedural defect in *Complaint #1* which would fail examination by a reviewing court. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). Despite the defect, the Commission decided to review *Complaint #1* as if it were properly notarized under the theory that the defect could be easily corrected by asking each affiant to re-submit their Complaint separately. *Complaint #2* was properly

notarized.

The un-notarized letters submitted in the matter did not qualify as Complaints. As a result, the letters were used for informational purposes only.

## **II. Jurisdiction**

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the Complaint's substance.

### **A. Personal Jurisdiction**

[Employee] worked for [a Town]. The Town previously sought the Commission's approval of their own Code of Conduct pursuant to 29 *Del. C.* § 5802(4). The provision states "[i]t is the desire of the General Assembly that all ...municipalities...adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials." *Id.* The Commission approved the Town's Code of Conduct in September 2013 and it was subsequently adopted by the Town. However, the Town failed to follow through and create an Ethics Commission. While the Town technically adopted their own Code of Conduct, it could not be the intent of the legislature to allow municipalities to adopt their own Code of Conduct and then fail to administer the applicable provisions. The Delaware Supreme Court has held "[t]he goal of statutory construction is to determine and give effect to legislative intent." *LeVan v. Independence Mall*, 940 A.2d 929, 932 (Del. 2007). As a result, [Employee] remained under the PIC's jurisdiction.

### **B. Subject Matter Jurisdiction:**

As stated above, the Complaints alleged violations of 29 *Del. C.* § 5806 (a)(e)(h). *Complaint #1* did not match specific facts with applicable violations of the Code of Conduct and [contained an extensive list of allegations]. *Complaint #2* alleged harassment pursuant to 29 *Del. C.* § 5806(e)(h).

There was no doubt that [Employee] acted in an unprofessional, offensive and deplorable manner. It was also clear that the Town Council had done nothing over the past seven years to correct his behavior or hold him accountable. In desperation, the Complainants explored every available avenue in order to seek a remedy. However, as sympathetic a cause as *Complaint #1* presented, the Commission's jurisdiction was limited to administering the laws in Title 29, Chapter 58. *Commission Op. No. 95-05*. The Commission had previously decided that it had "no jurisdiction over personnel laws" (*Commission Op. No. 97-28*) or "allegations of sexual harassment such as 'leering,' making sexual comments, etc., [which] are governed by laws and regulations administered by such entities as the Equal Employment Opportunity/Affirmative Action (EEO/AA) section under State Personnel, or the Department of Labor, or certain federal offices. Similarly, allegations of racism are governed by laws and regulations administered by such entities." *Commission Op. Nos. 91-16, 98-42, 00-22*.

While the Code of Conduct did have a provision regarding harassment (§ 5806(h)), the Commission had interpreted it as applying to interactions between government actors and third parties (*Commission Op. Nos. 98-42, 00-22*), such as vendors and contractors. The reason for that interpretation was the underlying purpose of the Code of Conduct. When creating the Code of Conduct, the legislature declared legislative findings and

statement of policy. 29 Del. C. § 5802(1)-(4). Subsection (2) stated “[t]o ensure propriety and to preserve public confidence, officers and employees...must have the benefit of specific standards to guide their conduct...” The inclusion of § 5805(e) must be read in the context of the Code of Conduct (i.e. personal and private interest, conflicts of interest). The purpose of the statute was never intended to be a substitute for state and federal discrimination law. If the statute were to be interpreted otherwise, any harassment claim between two state employees would fall within the Commission’s jurisdiction. Nothing in the legislature’s findings indicate that they intended to abrogate state harassment laws. As a result, the harassment allegations were only considered by the Commission as they related to [Employee] and third parties who were not employed by the Town at the time of the conduct. In this case, [Affiant #14], presented the only harassment allegation over which the Commission may have had jurisdiction. (*Complaint #2*).

The same reasoning applied to § 5806(a), the appearance of impropriety standard. It too must be interpreted in the context of the Code of Conduct’s purpose. To interpret the standard otherwise would allow the provision to apply to behaviors that are not otherwise violations of the Code of Conduct. For example, if two State employees were engaged in an extra-marital affair it would likely create an appearance of impropriety amongst their colleagues and the public. However, their conduct would not fall within the Commission’s jurisdiction, no matter how egregious. As a result, [Employee]’s behavior was not a violation of the Code of Conduct’s appearance of impropriety standard.

The one exception to the appearance of impropriety allegations were those made by [Employee B] (*Complaint #1*). According to *Complaint #1*, [Employee] would intervene in matters pending before [Employee B] and substitute his own judgment based upon whether he did, or did not, like the particular citizen. Therefore, the appearance of impropriety alleged in *Complaint #1* was grounded in a violation of 29 Del. C. § 5805(a), allowing professional judgment to be affected by personal interests.

29 Del. C. § 5806(e) prohibits the use of government property for private advancement or gain. In March 2014, [Employee] used his Town vehicle to drive [out-of-state]. Assuming [Employee] travelled on private business, he saved the expense of fuel for his personal vehicle or the cost of a rental car. Therefore, the allegation in *Complaint #1* regarding [Employee], and his family member’s use of Town vehicles, did appear to set forth adequate facts upon which the Commission could find that he violated the Code of Conduct.

The Commission decided to dismiss allegations 1-6 and 9-13 in *Complaint #1* for lack of subject matter jurisdiction. The Commission then considered the remaining allegations and *Complaint #2*.

### **III. Properly Alleged Allegations**

#### **A. Improper Interference with the Building Inspector**

[Employee B] had worked for the Town for 17 years. [Employee B] was interviewed by [investigators] on August 16, 2017. According to the statements made by the other Complainants, [Employee B] was a somewhat aloof employee who preferred to work alone and didn’t go out of his way to exchange pleasantries with other employees. [Employee B] claimed that [Employee] had interfered with his job duties by singling out specific people for special treatment. The following examples were taken from [Employee B’s] transcribed interview.

**The First Example:** In 2015, [Employee] told [a resident] that she did not need a permit after [Employee B] had already told her that a permit was required, and the fee would be \$300. [Employee] told [Employee B] that he thought the necessity of a permit was “over-conscientious.” In the end, [the resident] was not required to get a permit. [Employee B] intimated that [Employee] was friends with [the resident] but he did not provide further information as to how they knew each other or the length of the acquaintance. [Employee] denied knowing [the resident] prior to discussing her permit.

**The Second Example:** In 2016, a contractor told [Employee B] that [Employee] had told the homeowner that he did not need a permit to repair damage to his property. [Employee B] did not ask [Employee] for further details about the conversation because [Employee] was [on an extended vacation].

**The Third Example:** In 2014 and 2015, [Employee B] received complaints about contractors on a project working on holidays and weekends in violation of the Town Code. When [Employee B] confronted the contractors, they claimed to have received permission from [Employee]. [Employee B] asked [Employee] about the extra work hours and [Employee] stated he told the contractor it was ok to work outside regulated hours as long as they worked indoors. Since then the Town has passed an ordinance formalizing the Town’s construction hours.

**The Fourth Example:** A resident rented his property. [Employee B] had cited and fined [the resident] in 2015, for failure to obtain a rental license. The next year, [Employee B] again fined [the resident] for failure to obtain a rental license. [The resident] called [Employee] and explained extenuating circumstances and [Employee] negated the citation. There was no mention of the ‘extenuating circumstances’ but [the resident] died four months later. The Commission did not see how [Employee’s] actions were motivated by a personal or private interest.

**The Fifth Example:** [Employee B] transferred a permit [from one business to another]. [Employee] was upset about the transfer because he received reports from citizens that the work being done on the building was in excess of the permit. The matter was eventually sent to the Town attorney for his review. The Town attorney was able to put [Employee] “at ease” with the work on the property.

**The Sixth Example:** [Employee B] granted a permit to [the owner of a new business in an established location]. [Employee] was upset because he didn’t think [the permit was eligible to be transferred]. [Employee] asked [Employee B] to advise him when he was going to issue a Certificate of Occupancy because he wanted to check with the Town attorney about the issue. “Q. Did [Employee] interfere with the issuance of the certificate of occupancy after you informed him that you were going to issue it? A. No.” *Transcript of [Employee B], 53:19-23.*

**The Seventh Example:** A business was granted a permit to remain open past usual business hours. When the business was taken over by new owners, they changed the name of the business. [Employee B] continued the permit obtained by the previous owner to allow [the new business] to remain open [until the same time]. [Employee] did not think that the conditional use permit as it was originally granted was legitimate. After researching the issue, it came to light that the conditional use was never recorded despite having all the proper documentation

and signatures. The matter was turned over to the Town attorney and the business was still operating under the conditional use permit.

**The Eighth Example:** The owner of [a] business, wanted to install a retractable canopy over an outside eating area. Because the [business] was a nonconforming business in a nonconforming building, an issue was raised as to whether the awning was an expansion of a nonconforming building. The matter was turned over to the Town attorney. In the meantime, [Employee] told [Employee B] and the former mayor that he did not want them talking about the project. “Q. But was that because [the Town solicitor] was looking into the legality? A. Yeah.” *Transcript 61:19-21.*

**The Ninth Example:** [Employee B] told [Employee] that the next phase of a project could not move forward until the Town had received all of the required plans and approvals from various agencies. [Employee] did not object to [Employee B’s] statement.

**The Tenth Example:** In January 2017, [a resident] approached [Employee] about activity taking place near her complex. [Employee B] stated that [Employee] and [the resident] were friends. [Employee] asked [Employee B] about the project and [Employee B] showed him the relevant paperwork. [Employee] continued to contact [Employee B] stating that he heard the project was [noncompliant]. [Employee] then told [Employee B] not to issue [an approval]. The matter was sent to the Town attorney who concluded that the project was legitimate. “Q. On this particular case where [Employee]’s friend...was involved, any investigations that [Employee] asked you to undertake or any of the complaints that [Employee] asked you to look into, did any of those delay the certificate of occupancy? A. No. Fortunately, they didn’t.” *Tr. 68:19-24; 69:1-2.*

**The Eleventh Example:** A friend of [Employee], complained about a permit issued by [Employee B] to an adjacent property owner. [Employee B] showed [Employee] the paperwork and the matter was dropped.

**The Twelfth Example:** [Employee B] approved a resident’s request [regarding his property]. [There was a disagreement about how to interpret the applicable statute]. [Employee B] made a unilateral interpretation of the Code and allowed the [resident to make the requested changes]. [Employee] then called a meeting to discuss why [Employee B] had allowed the [change]. He then told [Employee B] that he disagreed with his interpretation of the Code.

**The Thirteenth Example:** [Employee] told [Employee B] to grant permits to [residents] in contravention of the Town Code. [Employee B] denied [one resident’s request and the matter was appealed to the Town] which granted the request.

**The Fourteenth Example:** [Employee B] issued a permit to allow a company to place a dumpster across some of the Town’s parking spots. [Employee] asked [Employee B] to make sure the dumpster would be removed before the weekend. The construction foreman stated they would not be able to meet that deadline. When [Employee B] relayed that information to [Employee] a loud argument ensued. The Town and the contractor eventually reached a deal where the contractor paid to leave the dumpster in place for a few extra days.

In the above examples, the Commission decided there was insufficient factual evidence upon which to base a finding that [Employee] allowed his personal or private interests to affect his professional judgment while performing his job duties. One issue that demonstrated [Employee]'s lack of a private interest was that [Employee B] claimed that [Employee] did not like [a particular resident] and that was why [a specific request] had not been approved. On the other hand, he also alluded to the fact that the construction workers on another project (also owned by the resident) were afforded special treatment because they were allowed to work on holidays and weekends.

## **B. Misuse of Town Property for Personal Gain**

### **1. The Use of the Car Leased by the Town**

*Complaint #1* alleged that a car leased to the Town was driven by [Employee] on a personal trip where it was subsequently involved in an accident. The allegation further stated that [Employee] attempted to cover-up the accident. Commission Counsel requested copies of [Employee's] employment contract, the accident report and any email communications between [Employee] and the Town Council regarding the motor vehicle accident.

The documentation revealed the car was originally leased at the request of [a previous Town employee]. [Employee]'s employment contract gave him "full use" of the car." The contract did not define the term "full use" and so it was given its ordinary meaning. 1 *Del. C.* § 301 & § 303. "Use" is defined as "to avail oneself of; to utilize." *Black's Law Dictionary*, 1541 (6<sup>th</sup> ed. 1990). In addition to the allegation that [Employee] misused the Town vehicle by driving it for personal use, *Complaint #1* stated that [Employee] tried to "cover-up" the accident. The supporting documents obtained from the Town did not support that allegation. The accident report was dated March 23, 2014. The Town provided copies of emails between [Employee], the Town's insurance carrier and various Town Commissioners beginning on March 23, 2014, through June 25, 2014. The emails showed that [Employee] did not attempt to hide the accident from the Town Council as alleged.

### **2. The Ticket**

*Complaint #1* alleged that [Employee's] daughter drove the Town vehicle on at least one occasion which came to light when the Town received a copy of a speeding ticket.

During the interviews some of the Complainant's stated that [Employee]'s daughter was issued a speeding citation while others stated it was a red-light violation. Similarly, some of the Complainants believed the violation happened in North Carolina while others thought it was in Maryland. According to the Complainants, the ticket was sent via U.S. Mail to Town Hall and opened by an employee who was deceased. No one else saw the original ticket and knowledge about the issue was based on hearsay, sometimes second and third hand. Upon request, the Town Attorney provided a copy of the canceled check that was used to pay the fine. The check was drawn on [Employee]'s personal checking account. No Town funds were used to pay for the citation.

The Commission decided that, given the fact that [Employee]'s employment contract gave him "full use" of the Town vehicle and the citation was paid for out of [Employee]'s personal funds, the Complaint did not set forth sufficient facts on which to base a finding that [Employee] misused Town property for personal gain by driving the car

[out-of-state] or by allowing his daughter to drive the car.

### C. Sexual Harassment

[Affiant #14 was responsible for paying] business license fees. Traditionally, [Affiant #14] paid the license fees [in May] although the official due date was March 31<sup>st</sup> each year. According to *Complaint #2*, in a March 2016, phone call, [Employee] demanded that the license fees be paid immediately. [Affiant #14] went to Town Hall the next day, March 22, 2016, and paid the outstanding license fees. As she was approaching the window to drop off the payments, [Employee] opened a door and asked her to come back to his office. [Affiant #14] took a seat in front of the desk and, rather than sit behind the desk, [Employee] sat in a chair next to [Affiant #14]. [Employee] then placed his hand on her thigh and said something along the lines of “if you play your cards right, you could have my job one day.” [Affiant #14] immediately felt uncomfortable and stood up to leave. She had to wait for [Employee] to stand up so she could get past him to the door. [Affiant #14] stated that she felt harassed. She had returned to Town Hall twice since then and had taken other people with her so as not to create a situation where she was alone with [Employee].

29 *Del. C. § 5806(h)* reads: “No [Town official] in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual’s favorable treatment by that person...” During her interview [Affiant #14] was asked whether she had ever expressed an interest in replacing [Employee]. [Affiant #14] stated she had never considered it and found the idea laughable as she earned a lot more money in her position than [Employee] did. *Transcript, 29: 20-24*. Other than alluding to the fact that [Affiant #14] could have his job, it was unclear what favorable treatment [Employee] would be able to offer [Affiant #14]. [Affiant #14] did mention that [her employer] was considering applying for a permit but was getting pushback from the Town. She speculated that perhaps [her employer] was on [Employee]’s enemies list as described in *Complaint #1*, but the approval issue was raised well after the incident in [Employee]’s office.

The Commission could not determine that [Employee] was implicitly offering [Affiant #14] an employment opportunity in exchange for favors. Although his behavior was bizarre and uncomfortable, there did not appear to be a *quid pro quo*. That was especially true given the fact that [Affiant #14] stated that she and [Employee] had never discussed her taking his job, nor did she have any desire to do so. That did not mean the Commission found the behavior within the bounds of normal business interaction, only that the statute required a request for favors in exchange for favorable treatment (in the context of a government official), which did not exist. Even [Affiant #14] admitted she was unable to guess at a reason for [Employee]’s behavior.

Motion: The allegations in *Complaint #1* and *Complaint #2* were dismissed for lack of subject matter jurisdiction or for failure to allege sufficient facts upon which the Commission could find a violation of the Code of Conduct.

**17-19—Private Interest:** [Employee worked for a State Agency]. His duties included: “conducting and coordinating research activities, liaising with federal and local stakeholders on projects, and providing technical oversight [of] management activities for [the Agency] and other State agencies.”

[Employee] asked the Commission to consider whether: (1) he could work as a consultant for private companies contracting with the State (generally) or his department or division (specifically); (2) he could provide consultant services to private companies that did not contract with the State, if the duties would not overlap with his State duties; (3) he could work on projects outside the State of Delaware; (4) there was a rule against entering into a business arrangement with a State co-worker; (5) he could start a part-time business providing [a specific type of] inspection for private [companies] as required by a different section of [Employee]'s State Division.

## **A. Applicable Law**

### **1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

### **2. 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 ensure 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).

## **B. Applying the Law to the Questions Raised**

**1. Could [Employee] work as a consultant for private companies contracting with the State, his department or his division?**

The law prohibited [Employee] from reviewing and disposing of matters in which he had a private interest. His State duties were related to [a specific area]. The analysis of whether his work for a private company would violate the law focused on the subject matter of each contract-- rather than the entity that issued the contract. However, it was more likely that a contract between a private company and his Division would involve matters he was responsible for while performing his State duties. In addition, the likelihood that his work for a private company would create an appearance of impropriety would be greater if the contract was with his Division because of the increased potential that there would be overlapping contacts or employees.

**2. Could [Employee] provide consultant services to private companies that did not contract with the State if the duties did not overlap with his State duties?**

Generally, if the private company did not contract with the State, it was very unlikely that he would review and dispose of matters related to the private employer while performing his State job duties. Nor would his work for such a company be likely to create an appearance of impropriety amongst the public.

**3. Could [Employee] work on projects outside the State of Delaware?**

The Commission's jurisdiction extended to [Employee]'s work for the State. As long as a project was not connected to Delaware, it was not likely he would be put in a position to violate the applicable provisions of the Code of Conduct. However, in [Employee]'s case, he worked with federal agencies whose jurisdiction extended across state lines. Generally speaking, if he accepted private employment or consultant work out-of-state, he could not interact with any of the same federal personnel he worked with when performing his State job duties. Generally, [Employee] did not provide enough facts upon which the Commission could give him a definitive answer.

**4. Are there rules against entering into a business arrangement with a State co-worker?**

The answer to the question depended on the position the co-worker held and if [Employee] had job duties related to the co-worker. The Code of Conduct does not have a blanket prohibition against owning a business with a co-worker, but the question could not be phrased that broadly. A business relationship with a co-worker is usually permissible as long as neither of them had supervisory responsibility over the other. [Employee] did not elaborate further on his co-worker's status.

**5. Could [Employee] start a part-time business conducting inspections for private developers which were regulated by a different section of his Division?**

Without knowing the specific type of project, or the extent to which other sections of his Division were involved, the Commission could not answer this question. [Employee] was instructed to return to the Commission when he had more specific information upon which the Commission could base its opinion.

**17-17—Private Interest:** [Employee worked for a State official]. His job duties included reaching out to interested parties to advance policy initiatives and researching policy issues. He worked a standard 9 a.m. to 5 p.m. work schedule. Matters that he worked on were generally reviewed by senior staff members before being assigned to him.

[Employee] was recently elected to [a non-State office]. The [entity's] regular meetings [were conducted on a set schedule, as were their committee meetings]. [Employee] did anticipate that there would be times he would be called upon to conduct [other] business during his State work hours. When such a situation occurs, he had devised a process by which he would take annual leave from his State job in order to attend to such duties.

[Employee] asked the Commission to determine if his elected office conflicted with his State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not ordinarily work on matters involving [his elected office] while performing his State job duties. However, it was impossible to anticipate what types of matters could arise in the future. [Employee] was advised that if a situation arose which would require him to review matters related to [his elected office] while performing his State job duties, he would need to recuse himself. Under the law, the scope of "recusal" has been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

At the hearing [Employee] also indicated that he would likely be aware of a conflict of interest through his work [in his elected office] before it materialized in [his State job]. As a result, he would be able to "flag" those matters and advise senior staff members of his need to recuse himself well in advance of being asked to review the matter. The Commission also decided that if [Employee] were promoted to a more senior staff position in the future, he should return to the Commission for further advice.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before the State. 29 Del. C. § 5805(b)(1). [Employee] had to be very careful to draw a line between his two roles and to implement his recusal strategy as soon as he became aware of the potential for conflict so that his co-workers would not be influenced by his nonverbal cues about the matter such as gestures, facial expression, etc.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center, Supra*.

**(4) any adverse effect on the public's confidence in the integrity of its government:**

The purpose of the code is to ensure 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 this provision 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 County duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

[Employee] worked [for a State official]. He would need to be very careful to avoid even the appearance that he was using his State position to benefit [his private interest]. Unlike other State employees who had served dual roles as elected officials while also being employed by the State, [Employee]'s State job duties were more varied than most because [his State agency's] work was not limited to one area of State government. Similarly, while most State employees may not represent their private interest before *their* State agency, State officers (like [Employee's boss]) may not represent a private interest before *any* State agency. 29 *Del. C.* § 5805(b)(2). [Employee]'s close association with the high-ranking official required the Commission to impose the same prohibition against representing [his private interest] before *any* State agency. The Commission believed that the heightened prohibition was necessary in order to protect the integrity of the [State agency] and to avoid the appearance of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is State employee may not use State time or resources (i.e. computer, fax, phone, etc.) to work on the private interest. [Employee] has already worked out a time-keeping system to accommodate his duties related to [his private interest].

**C. Other Considerations**

The [private entity] adopted their own Code of Conduct pursuant to 29 *Del. C.* § 5802(4). As an employee of both, [Employee] was obligated to comply with both sets of ethics rules.

**17-14—Personal or Private Interest (Nepotism):** [Employee] was appointed to serve as the Director of [a State agency]. As Director, [Employee]'s primary responsibilities were the management of budgeting; programming analysis; planning; coordination; quality control; customer engagement; and information resources. [The Division's] Deputy Director was responsible for the management of other [sections within the division including a section where the Director's brother worked]. There were five layers of supervision between [the brother] and [Employee]. [Employee] did not approve her brother's leave requests nor did she sign his performance evaluations. In the event that a disciplinary action should become necessary, [Employee] had notified the Cabinet Secretary and Deputy Secretary that she would need to recuse herself from that matter.

Both [Employee] and her brother [worked in the same county]. However, [Employee]'s office [was not in the same building where her brother worked]. In addition, [Employee's brother] had different work hours than those she typically worked.

[Employee] asked the Commission to determine if her familial relationship created a conflict of interest with her position as Director. If the Commission decided there was a conflict of interest, [Employee] would be willing to put in place whatever restrictions the Commission deemed necessary.

**A. In their official capacity, employees 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).**

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Because of their familial relationship, [Employee] had a conflict of interest as a matter of law because her brother fell within the definition of a close relative as defined in 29 Del. C. § 5804(1). However, [Employee]'s position as Director did not require her to oversee employees within [this section of the Division]. Therefore, the question considered by the Commission was whether [Employee]'s position as Division Director would be likely to influence those supervisors who would be reviewing or disposing of matters related to her brother.

[Employee]'s job duties were vastly different than those of her brother. [Employee] was required to establish policies and procedures for the entire Division while her brother's position required him to interact with members of the public. In addition to the completely separate job duties, there were five layers of supervision between [Employee] and [her brother]. At the hearing she mentioned that her Deputy Director was completely capable of addressing any personnel issues related to [Employee]'s brother, independent of the fact that he was related to her. In the event that a circumstance arose where the Deputy Director needed to address an issue with someone from a higher level of management, she could contact the Cabinet Secretary or the Deputy Secretary, both of whom were already advised of [Employee]'s need to recuse herself. As long as she continued to recuse herself from any decisions regarding her brother's employment it was difficult for the Commission to see how any of her policy decisions would directly affect her brother, to a greater or lesser degree than other employees.

**B. 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 ensure 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).

The Commission next considered whether [the brother’s] employment in [Employee]’s Division would create an appearance of impropriety amongst the public. One factor the Commission considered was outward appearance. The [location] where they both worked, was a large network of buildings spread across acres of land. [Employee] and her brother worked in [separate non-contiguous buildings]. The buildings were not adjacent to each other and it was unlikely she would encounter her brother during the course of a regular workday. In addition to the geographic separation, [Employee] stated that her brother worked “2<sup>nd</sup> shift” meaning that their work hours overlapped only slightly, if at all. As a result, the Commission determined that the outward appearance of impropriety was minimal.

The next factor the Commission considered was the existence, or lack thereof, a nexus between [Employee]’s job duties and those of her brother. They both worked in completely different fields where their job duties did not overlap or bring them into contact with each other. Any impropriety that may be perceived as a result of [Employee]’s authority over all employees in [her Division] was greatly diminished by the recusal mechanisms she had already put in place.

**17-12—Personal Interest:** [Employee worked for a State agency which required him to drive around the State, identify a specific environmental problem and talk to landowners about how to resolve the problem. Employee would then contact employees in a different section of his agency to go to the location and remedy the identified problem.] When time allowed, [Employee] would respond to citizen inquiries and provide training related to [his field of expertise]. [Employee]’s job duties usually required him to cover the area from Dover up through New Castle County while his supervisor covered the area from Dover down through Sussex County. However, under certain circumstances, [Employee] could be required to work in any area of the State (i.e. his supervisor was on vacation, etc.).

[Employee] wanted to start a part-time business to provide services [related to the management of a different environmental problem] for private entities such as homeowner’s associations, the general public and property management companies. In his email request, [Employee] stated that he would focus his services [on a different, but related, environmental problem]. [Employee] acknowledged the fact that [he could be

presented with an opportunity to perform work related to the same duties he performed for the State] but did not anticipate it would be the primary focus of his business.

The [Agency] had already received a complaint from the owner of a private company, which would compete with [Employee]'s private business, alleging that [Employee]'s proposed business was a conflict of interest with his State position. He asked the Commission to determine if his proposed business did, in fact, create a conflict of interest with his State position.

## **A. Applicable Law**

### **1. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[Employee]'s proposed business qualified as a "private interest" as defined in the above statute. He stated that his private business would focus on two specific areas which were [regulated by a different State agency]. His State job duties primarily involved [contact with a specific type of private business and state-owned property]. [Employee] did acknowledge that, when time permitted, he also responded to citizen inquiries regarding [his State job duties]. While both his State job duties and his proposed private interest both involved [environmental issues], the Commission did not see how his work in the private sector would affect his official judgment while performing his State job duties. [Employee] did not make decisions about private citizens in his State job and the State did not receive a monetary benefit from [the interested parties whose environmental issues were corrected by the State]. Furthermore, the agency responsible for oversight of [the area in which he wanted to focus his private business was] not his employing agency. As a result, the Commission did not find that [Employee]'s proposed business would violate the Code of Conduct's conflict of interest rules pursuant to 29 Del. C. § 5805(a)(1).

### **2. 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 ensure 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).

Obviously, the complaint to [Employee]’s State agency about his proposed business indicated that some members of the public were upset by his decision to open his own private business. [Employee] stated at the meeting that the complaint was made by the owner of a company he previously worked for and who provided the same types of services as those he planned to offer. The Commission then considered whether the concerns expressed by his potential competitor would likely be shared by members of the general public.

When asked at the meeting if he thought his ownership of a private business would create an appearance of impropriety while performing his State job duties, [Employee] recognized the fact that some people could assume he would be distributing business cards for his private business while working on State projects. He also stated that he had encountered situations in his State position where he ended up working with private [entities] who were in the target demographic for his private business. To avoid such situations, the Commission asked whether he could limit his private business to an area of the State where he did not have State job duties. [Employee] responded that while he could limit his private business to a specific geographic area, he would be unable to limit his State job duties to a different area because of the need to cover for his supervisor when he was on vacation or other similar circumstances.

Taking those factors into consideration as well as the fact that his private business would be offering services similar to (if not exactly the same) as those he performed in his State position, the Commission concluded that [Employee]’s private business would likely create an appearance of impropriety amongst the public that he was using his State position to benefit his private business. That did not mean the Commission believed he would do so. He was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

The [Employee]’s proposed business would create a conflict of interest with his State job duties, despite his clear display of integrity. However, his obvious honesty did not overcome the Commission’s responsibility to protect the public from the appearance of impropriety. The Commission wanted to stress that he was not banned from owning all businesses, only the business that he disclosed for the purpose of obtaining an advisory opinion.

**17-08—Personal Interest:** [Employee worked for a Division of the Department of Natural Resources and Environmental Control (“DNREC”). Last year he and his wife submitted a bid to a Request for Proposals (“RFP”) offered by [a Maryland state agency]. [The

Maryland agency] was seeking to establish partnerships with small businesses on [one of their properties]. The RFP for the proposed partnerships included hosting events [related to the agency's mission]. [DNREC] has similar business partnerships in [Delaware].

If approved for a variance by [a town in Maryland] to deliver such programs, and if offered a long-term contract by [the Maryland agency], [Employee] would move his family [out-of-state] and operate a small business. [Employee]'s wife would work full time on the business and be the majority owner. [Employee] would support the business in his off-time and own a minority share of the business. [Employee] stated that he and his wife were the only bidders to respond to the RFP and they were waiting to begin contract negotiations.

[Employee] asked the Commission to consider the following questions:

1. Would his interest in a business which would offer [the requested programs] in Maryland create a conflict of interest?
2. A Division staff member had her own licensed small business doing [work related to the Maryland project]. She did not report directly to [Employee] but she was in his chain of command. Could his proposed small business contract with her small business without having a conflict of interest?

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[Employee]'s business would be located in Maryland. He would be contracting with a government entity rather than with a vendor who may also provide services to Delaware State [agencies]. As a result, it was difficult to see how [Employee] would be placed in a situation where he would be required to exercise his professional judgment when performing his state job duties over matters related to his small business.

[Employee]'s ability to privately contract with one of his DNREC employees was more problematic. The employee was under his chain of command which meant that while she did not directly report to [Employee], her supervisor did. [Employee] approved the employee's performance evaluations, job assignments, etc. If he were to contract with her

private business, he would be making decisions while performing his State job duties over matters in which he had a private interest. Even if he were to recuse himself from any matters related to that employee, her co-workers could harbor suspicions that she was shown preferential treatment because of the private contracting relationship. Consequently, the Commission decided that [Employee] should not contract with his subordinate's private business.

**B. 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).**

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The Commission did not see how there could be an appearance of impropriety surrounding [Employee]'s contract with [a Maryland state agency]. He would be working in a different state and he would not be working with vendors who also contract with the State of Delaware.

The appearance of impropriety surrounding [Employee]'s request to contract with his DNREC employee could cause the public to wonder if [Employee] or the [subordinate] were acting contrary to the public trust because of their supervisor/employee relationship. Additionally, their co-workers may have an unfavorable impression of the situation which would affect the morale in their [State agency].

**17-07—Personal or Private Interest:** Commission Counsel was contacted by [the] Director [of a State Commission] regarding the actions of one of his employees. Commission Counsel met with [the Director] on February 2, 2017 and during the meeting he provided documentation he had compiled during his investigation.

[Employee] worked for the Commission [helping a specific segment of the population apply for benefits]. He had worked with the Commission for about 5 years. [The Director] was contacted by one of [Employee]'s clients, Ms. [X]. [Ms. X] stated that she had been romantically involved with [Employee] since her first contact with him at the Commission's office in April 2015. [Employee] helped [Ms. X] receive benefits in an amount in excess of \$9,000. In September 2015, [Ms. X] "blessed" [Employee] with a check for \$2,500.00. While the circumstances surrounding [Ms. X]'s and [Employee]'s relationship and the \$2,500 differ, they both agreed that [Employee] was in a romantic relationship with [Ms. X] and he accepted a gift of \$2,500.

[The Director] was understandably upset that one of his employees took money from [a client] who he considered to be vulnerable. He was exploring all options available to him to have [Employee] held accountable for his actions. [The Director] reached out to PIC to see if [Employee]'s actions constituted a violation of the Code of Conduct. No formal complaint was filed.

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In this matter, [Employee] was in a romantic relationship with [Ms. X] during the pendency of her application for benefits. He could have referred [Ms. X] to another [co-worker] at any time during the pendency of [Ms. X]'s application. His status as a [Commission employee] allowed him to access [Ms. X]'s personal information, including her medical history and treatment notes. His knowledge of those factors magnified the significance of her \$2,500 "gift" to [Employee]. Whether the money was given to him willingly, or he was able to coerce [Ms. X] into giving him the money, [Employee] should not have been reviewing and disposing of matters in which he had a personal interest.

### **2. 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 ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treated that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was 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, this Commission looked 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).

The appearance of impropriety was readily identifiable. [Employee] used his State position to start a romantic relationship with [Ms. X] and perhaps used his inside knowledge of her mental status to convince her to give him part of the money she received as benefits. Any member of the public would deem such conduct as contrary to the public trust.

## **B. Options**

As no formal complaint was filed, the Commission could decide to: a) take no action; b) refer the matter to Commission Counsel for further investigation; or c) set the matter down for a hearing. 29 *Del. C.* §§ 5809(3) and 5810(a).

The Commission decided to set the matter down for a hearing because assuming all facts as true, [Employee] had a conflict of interest when performing his State job duties and his conduct created an appearance of impropriety. Commission Counsel issued a Notice of Hearing tentatively scheduled for March 27, 2017.

**17-01A—Personal or Private Interest—Complaint:** On January 13, 2017, the Commission received a Complaint submitted by [two citizens] against [a State employee].

In April 2016 [the citizens decided to become a resource for a Division of a State agency]. During the [application] process they were contacted by [a State employee about providing resources for a specific candidate]. [The citizens were not able to be a resource in that situation but decided to continue with the application process]. According to [the citizens, their decision to deny the first request caused the State employee to engage in a pattern of conduct to block their attempts to serve in a subsequent role. The State employee violated the agency’s own Policies and Procedures in a successful attempt to create bias against the citizens].

The [citizens met with several community leaders]. They were successful in getting a second [chance to participate with the agency’s programs. However, before a second decision was made, [the citizens] asked PIC whether it was appropriate for the State employee to continue participating on behalf of the State given the fact that she knew [the citizens] were lodging complaints against her. Commission Counsel determined it would not be appropriate for the State employee to continue to participate given the circumstances. [The citizens] forwarded that email to the State employee’s supervisors. The supervisors ignored the recommendation of Commission Counsel and allowed the State employee to continue participating in the matter. [The citizens’] request was denied for the second time after the State employee participated in the proceedings behind closed doors. [The citizens] believed that the State employee caused the agency to be biased against them. The citizens subsequently filed a formal Complaint].

The Complaint alleged [the State employee] violated multiple provisions of the Code of Conduct including the following prohibitions relating to conflicts of interest:

1. 29 *Del. C.* § 5805(e)—Unauthorized disclosure of confidential information
2. 29 *Del. C.* § 5805(a)(1) and (3)—Restrictions on exercise of official authority
3. 29 *Del. C.* § 5805(b)(1), (2) and (3)—Restrictions on representing another’s

interest before the state.

The Complaint also alleged [State employee] violated many of the general provisions of the Code of Conduct:

1. 29 *Del. C.* § 5806(a)—Appearance of impropriety
2. 29 *Del. C.* § 5806(b)(1)(2)(3)(4)—Personal or private interests
3. 29 *Del. C.* § 5806(f)—Disclosure of confidential information

## I. Procedure

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* §4328(3). The Complaint was notarized in the proper format. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

## II. Jurisdiction

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### B. Personal Jurisdiction

[Employee] works for [a Division of a State agency]. Therefore, [Employee] works for a "state agency" as defined in 29 *Del. C.* 5804(11) and she is a "state employee" as defined in § 5804(12)(a)(1). [Employee] is within the Commission's jurisdiction.

### B. Subject Matter Jurisdiction:

1. 29 *Del. C.* 5805(e). Unauthorized disclosure of confidential information.

**No person shall disclose any information required to be maintained confidential by the Commission under § 5806(d), § 5807(b) or (d), or § 5810(h) of this title.**

The allegations regarding the above cited provision of the Code of Conduct were misplaced. This provision prohibits revealing information presented to, and considered by, the Commission. The statute was not applicable to disclosures of all confidential information. The facts set forth in the Complaint regarding disclosure of confidential information could be a violation of [agency] policy but were not a basis for a violation of the Code of Conduct. When there is a failure to properly allege violations of the provisions of the Code of Conduct the Commission may, and did, dismiss them.

2. 29 *Del. C.* § 5805(a)(1) and (3)—Restrictions on exercise of official authority.

**(1) No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which the state employee, state officer or honorary state official has a personal or private interest.... 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.**

The [citizens] alleged [Employee] had a personal or private interest regarding the [matter at issue] based upon a pre-existing friendship between [Employee] and [Ms. Y, a former State employee]. [Ms. Y] had also been an [employee of the same Division]. It was unclear when she left State employment or whether or not she had contact with [Employee] during her period of State employment. [Ms. Y now works for an agency contractor]. The State's checkbook for 2016, shows that the State paid [the contractor] almost one million dollars for their services. It was unclear if the business was paid a flat fee or if they were paid per transaction. If [the contractor] was paid per transaction and [Employee] and [Ms. Y] did have a previous friendship, it was possible that [Employee] was influenced by a private interest which motivated her decision to advocate for [Ms. Y's position rather than that of the citizens who filed the Complaint].

It was also possible that [Employee] may have some sort of animosity towards the [citizens] because of their refusal to [accommodate the Employee during their first contact]. Only a review of [the Division's] records will provide insight into [Employee]'s recommendations and her reasoning for making such recommendations. It was especially troubling that [the Division] allowed [Employee] to continue to participate in the [citizen's] matter after receiving information from Commission Counsel that [Employee] could have a conflict of interest due to the [citizens'] complaining about her to her supervisors. Again, only a review of [the Division's] records would shed light on [Employee]'s motivation and the presence or absence of a conflict of interest.

**(3) In any case where a person has a statutory responsibility with respect to action or non-action on any matter where the person has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person may exercise responsibility with respect to such matter, provided, that promptly after becoming aware of such conflict of interest, the person files a written statement with the Commission fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person.**

[Employee] did not delegate her responsibilities in the [citizens'] matter and so this provision of the Code of Conduct was not applicable and dismissed.

**3. 29 Del. C. §5805(b)(1), (2) and (3)—Restrictions on representing another's interest before the state.**

**(1) No state employee, state officer or honorary state official may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee, officer or official is associated by employment or appointment.**

**(2) No state officer may represent or otherwise assist any private enterprise with respect to any matter before the State.**

**(3) This subsection shall not preclude any state employee, state officer or honorary state official from appearing before the State or otherwise assisting any private enterprise with respect to any matter in the exercise of such person's official duties.**

Based on the facts in the Complaint, it was unclear if [Employee] was advocating

for [the contractor's position] because of legitimate agency policies and procedures or if she was assisting [Ms. Y] and her [current] employer because of their prior association (if any). The Commission decided that more information was needed to determine whether there was a legitimate basis for the allegations.

**4. 29 Del. C. § 5806(a)—Appearance of impropriety.**

**Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.**

The Commission decided that more information was needed to determine if [Employee]'s actions were, in fact, a violation of the public trust.

**5. 29 Del. C. § 5806(b)—Personal or private interests**

**No state employee, state officer or honorary state official shall have any interest in any private enterprise nor shall such state employee, state officer or honorary state official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:**

- (1) Impairment of independence of judgment in the exercise of official duties;**
- (2) An undertaking to give preferential treatment to any person;**
- (3) The making of a governmental decision outside official channels; or**
- (4) Any adverse effect on the confidence of the public in the integrity of the government of the State**

This provision of the Code of Conduct refers to an employee's personal interest in a private business. While [Employee] may have a friendship with [Ms. Y], there were no facts which would indicate that [Employee] had a personal interest in [the contractor] and this claim was dismissed.

**6. 29 Del. C. § 5806(f)—Disclosure of confidential information.**

**No state employee, state officer or honorary state official shall engage in any activity beyond the scope of such public position which might reasonably be expected to require or induce such state employee, state officer or honorary state official to disclose confidential information acquired by such official by reason of such public position.**

Facts to support this allegation would be predicated upon [Employee]'s disclosure to [Ms. Y] of confidential facts or information detrimental to the [citizens]. Again, while the circumstances surrounding the [citizens'] experience with [Employee] leaned towards some sort of bias on [Employee]'s part, only a review of the file and statements from others involved in the matter could shed further light on whether the above provision of the Code

of Conduct was violated.

### III. Options

The Commission referred the matter to Commission Counsel for further investigation to determine if there were additional facts to be considered. Commission Counsel was to hire an independent investigator to conduct the investigation. Commissioner Anderson stated he was not comfortable with an investigator contacting [Employee] personally.

**17-01B—Personal or Private Interest—Complaint:** In April 2016, [X] decided to [offer needed services to a State agency]. During the process they were contacted by [a State employee of the agency], regarding [their offer of services]. After a face-to-face meeting and reviewing [pertinent documents X decided the offered opportunity was not a good fit]. According to the Complaint, [Employee] was upset by the decision and had engaged in retaliatory acts which resulted in [an adverse decision in another matter X was involved in with the same agency]. [X] could only speculate as to what [the employee] had written or said about them. However, [X] based their suspicion of [Employee's] bias on the fact that she had repeatedly failed to follow agency protocol while handling [their matter].

While trying to address [Employee's] perceived bias, [X] met with various local leaders and was successful in getting [a second review of the adverse decision]. However, [Employee] was required to make a recommendation [during the reconsideration of the matter]. [X] asked Commission Counsel if [Employee] should be allowed to [participate in the reconsideration] given the fact that [X] had lodged several complaints against her. Commission Counsel responded that it would appear to be a conflict of interest for [Employee] to participate given the fact that she was aware that [X] had lodged several complaints against her. [X] indicated that despite forwarding the email to [the Employee's] supervisors [Employee] did [participate in the reconsideration]. [X] was again denied approval [by the agency and a favorable decision was made for Y, who was assisted by Employee's former co-worker].

On January 13, 2017, [X] filed a Complaint against [Employee]. The Commission first reviewed the Complaint at the February 21, 2017, monthly meeting. At that time, the Commission decided to further investigate the matter to allow for the collection of additional facts and records. An independent investigator was assigned to the matter in May 2017, and the Commission subpoenaed records from [the agency] in June 2017.

The Complaint alleged [Employee] violated multiple provisions of the Code of Conduct including the following prohibitions relating to conflicts of interest:

1. 29 *Del. C.* § 5805(e)—Unauthorized disclosure of confidential information
2. 29 *Del. C.* § 5805(a)(1) and (3)—Restrictions on exercise of official authority
3. 29 *Del. C.* § 5805(b)(1), (2) and (3)—Restrictions on representing another's interest before the state.

The Complaint also alleged [Employee] violated many of the general provisions of the Code of Conduct:

1. 29 *Del. C.* § 5806(a)—Appearance of impropriety
2. 29 *Del. C.* § 5806(b)(1)(2)(3)(4)—Personal or private interests

### 3. 29 Del. C. § 5806(f)—Disclosure of confidential information

#### PROCEDURE

A properly sworn Complaint must be notarized pursuant to 29 Del. C. §4328(3). The Complaint was notarized in the proper format. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

#### JURISDICTION

The Commission then discussed personal jurisdiction and subject matter jurisdiction.

##### I. Personal Jurisdiction

[Employee worked for] an Executive branch agency. Therefore, [Employee] worked for a “state agency” as defined in 29 Del. C. 5804(11) and she was a “state employee” as defined in § 5804(12)(a)(1). [Employee] was within the Commission’s jurisdiction.

##### II. Subject Matter Jurisdiction:

The Commission had jurisdiction over allegations in the Complaint related to the Code of Conduct (generally) or Conflicts of Interest (specifically). To the extent the Complaint alleged violations of [agency] policy, the Commission did not have jurisdiction to decide those issues.

#### ALLEGATIONS

The Commission reviewed the allegations in order to determine whether the Complaint alleged sufficient facts upon which the Commission could find a violation of the Code of Conduct.

##### I. 29 Del. C. 5805(e). Unauthorized disclosure of confidential information.

**No person shall disclose any information required to be maintained confidential by the Commission under § 5806(d), § 5807(b) or (d), or § 5810(h) of this title.**

The allegations regarding the cited provision of the Code of Conduct were misplaced. Those provisions prohibit revealing information presented to, and considered by, the *Commission*. The statute was not applicable to the disclosure of *all* confidential information. There were no facts to indicate that [Employee] disclosed information about the proceedings before the Commission. As a result, the facts cited in the Complaint regarding disclosure of confidential information may or may not have been a violation of [agency] policy<sup>1</sup>, but were not a basis for a violation of these provisions in the Code of Conduct. Because there was a failure to properly allege violations of these provisions in the Code of Conduct, they were dismissed.

##### II. 29 Del. C. § 5805(a)(1) and (3)—Restrictions on exercise of official authority.

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<sup>1</sup> The Commission had no authority to determine whether [Employee] violated [agency] policies or procedures.

**§ (1) No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which the state employee, state officer or honorary state official has a personal or private interest.... 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.**

As a matter of law, 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). However, a personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. At common law and since its codification, Courts and this Commission have recognized that the provision covers a variety of relationships that may create a “personal or private interest.” See *Commission Op. Nos. 00-04 and 00-18*. Delaware Courts have held that under the common law, which has since been codified, the issue of whether the “personal or private interest” is sufficient to “tend to impair judgment” is an issue of *fact*, not of law as in § 5805(a)(2). See, e.g., *Shellburne, Inc. v. Roberts*, Del. Ch., 238 A.2d 331 (1967) (under common law, where complainant alleged government official had “personal interest,” and “conflict of interest” because of friendship and social relationships, and used public office in furtherance of such personal interest, court held determination was issue of fact); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (Court held that whether there was a sufficient personal interest to require recusal under the State Code of Conduct was an issue of fact). Thus, at common law and as codified, the conflict of interest provision permits a consideration of whether a particular relationship is either sufficient to create a conflict or too attenuated to create a conflict.

The Complaint alleged [Employee] had a personal or private interest in [the matter] based upon a pre-existing friendship between [Employee and her former co-worker]. The Commission was able to [confirm that Employee and her former co-worker worked together for four years. The former co-worker had been Employee’s supervisor]. [The former co-worker left the agency to work for a private company that contracted with the agency].

The Commission decided the fact that [the co-worker] had supervised [Employee] three and a half years prior to the submission of the Complaint was insufficient to establish a personal or private interest that would have affected [Employee’s] official decision-making process. Other than the fact that the two women previously worked together there were no facts alleged, nor was any information found in [agency] records, that would indicate [Employee] allowed her acquaintance with [her former co-worker] to affect her professional recommendations. Nor did the Complaint allege how [Employee] would have benefitted from making such a decision.

As to the fact that [the agency] did not ask [Employee] to recuse herself from [the matter] after she became aware that [X] had lodged complaints against her, [the agency’s] legal counsel advised that [Employees of the agency were often the only people with sufficient knowledge about the matter to make recommendations]. As a result, it was necessary for [Employee] to [be involved in the reconsideration of the matter]. In an effort to mitigate concerns of [Employee’s] possible bias, she was accompanied by [an agency] supervisor to ensure that no impropriety took place.

Considering all the relevant facts and circumstances, the Commission decided to dismiss this allegation for failure to adequately substantiate a personal interest that affected [Employee's] official decision-making process.

**§ (3) In any case where a person has a statutory responsibility with respect to action or non-action on any matter where the person has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person may exercise responsibility with respect to such matter, provided, that promptly after becoming aware of such conflict of interest, the person files a written statement with the Commission fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person.**

The primary purpose of the above statute is to alert the Commission to the fact that a State employee exercised their official judgment despite the presence of a conflict of interest. Once the written statement is submitted, the employee appears before the Commission to seek advice on ways to avoid such conflicts in the future. That advice is offered for the purpose of helping the employee understand the pitfalls of official decisions made in the face of conflicts of interest. At the time of the [reconsideration, Employee] and her supervisors knew that the Commission was aware of her possible conflict of interest because of the emails that were forwarded to [the agency]. In lieu of delegation, her agency chose to have a supervisor accompany [Employee during the reconsideration of the matter]. Shortly thereafter, PIC began to investigate [Employee].

If [Employee] had submitted a written statement to the Commission regarding her conflict of interest, the statement could have been used against her in any subsequent proceedings. Under those circumstances, the Commission believed that it would have been unfair to require [Employee] to make statements against her own interest. However, by way of the Commission's opinion, [Employee] was warned that any failure to disclose official decisions she could make in the future which involved a conflict of interest would be grounds for the Commission to impose administrative penalties against her up to, and including, termination.

**III. 29 Del. C. §5805(b)(1), (2) and (3)—Restrictions on representing another's interest before the state.**

**(1) No state employee, state officer or honorary state official may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee, officer or official is associated by employment or appointment.**

**(2) No state officer may represent or otherwise assist any private enterprise with respect to any matter before the State.**

**(3) This subsection shall not preclude any state employee, state officer or honorary state official from appearing before the State or otherwise assisting any private enterprise with respect to any matter in the exercise of such person's official duties.**

Relying on the facts in the Complaint and the information gathered during the Commission's investigation, there was no evidence that [Employee] represented a private interest before the State. To the extent that the Complaint alluded to the fact that

[Employee] represented [the private employer of her former co-worker], her job required her to work with [agency] contractors. As a result, even if she could be viewed as assisting a private enterprise, she qualified for the exemption in subsection (3). Therefore, the allegation was dismissed.

#### **IV. 29 Del. C. § 5806(a)—Appearance of impropriety.**

**Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.**

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. 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). In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *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).

The Commission previously held that in deciding if there is an appearance of impropriety because of an alleged professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75 (citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567 (1967))*. That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

As stated above, the investigation of [Employee] uncovered no information that indicated she had a professional or social relationship with [her former co-worker] beyond that of an acquaintance. Mere acquaintance, absent innuendo or suspicion, was not enough to substantiate an appearance of impropriety amongst the public and the allegation was dismissed.

#### **V. 29 Del. C. § 5806(b)—Personal or private interests**

**No state employee, state officer or honorary state official shall have any interest in any private enterprise nor shall such state employee, state officer or honorary state official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:**

- (1) Impairment of independence of judgment in the exercise of official duties;**
- (2) An undertaking to give preferential treatment to any person;**
- (3) The making of a governmental decision outside official channels; or**
- (4) Any adverse effect on the confidence of the public in the integrity of the government of the State**

This provision of the Code of Conduct is predicated on an employee's personal interest in a private business. While [Employee] may have had an acquaintance with [her former co-worker], there were no facts which indicated that [Employee] had a personal interest in [the co-worker's employer]. Accordingly, the allegation was dismissed.

**VI. 29 Del. C. § 5806(f)—Disclosure of confidential information.**

**No state employee, state officer or honorary state official shall engage in any activity beyond the scope of such public position which might reasonably be expected to require or induce such state employee, state officer or honorary state official to disclose confidential information acquired by such official by reason of such public position.**

Facts to support this allegation were predicated upon the assumption that [Employee] disclosed confidential information to [the former co-worker] regarding [the matter] or [X]. However, because [the former co-worker worked for an agency contractor], the Commission could not see how disclosure of information related to the matter would be "beyond the scope of [her] public position." 29 Del. C. § 5806(f). Consequently, the allegation was dismissed.

**CONCLUSION:** The Commission decided the Complaint did not sufficiently allege facts which would tend to prove [Employee] violated the State Code of Conduct. As a result, the Complaint was dismissed.

**16-56—Personal or Private Interest:** [Employee] was employed as the Director of [a Division within a State Agency]. [The Division] was responsible for the [planning and coordinating of specific activities]. He was also the Chairperson [of a] Working Group with similar responsibilities]. The Working Group had 24 members and oversaw approximately three million dollars in pass-through grants every year. Applicants for the grant money applied to the Working Group whose members discussed each application and then voted to determine the recipients. However, as Chairperson, [Employee] did not vote. His role was to make sure the guidelines and procedures for awarding the grants and the administration of the grants were followed.

Since he was appointed to his position as Director, he decided to apply for an unpaid position as the [head of a private entity]. He had been [the head of the private entity before but] gave up the position to devote his time to learning his new State duties. Now that he had become comfortable with his State duties, he wanted to resume his former [volunteer] position.

He asked the Commission to consider whether his [volunteer] position would create a conflict of interest with his State position.

**A. 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).

His [volunteer] position qualified as a personal interest. When the Commission asked him about possible overlaps between his position with the State and his [volunteer] position, he stated it was possible that [there may be some overlap in rare circumstances]. If such a situation were to occur, [Employee] could recuse himself from his [volunteer] duties and assign them to other [volunteer personnel].

[Employee] also mentioned that [his volunteer organization] applied for grants issued by the Working Group, of which he was Chairperson. However, [the volunteer organization] did not submit grant applications themselves, they applied through [an umbrella organization]. As a result, he would not be placed in a situation where he would submit grant applications on behalf of [the volunteer organization] and then review those same grant applications as part of his duties for the Working Group. Additionally, the Working Group had 23 other members, significantly diluting the ability of any one member to make decisions based upon a personal interest. Furthermore, while he may be required to review grant applications submitted [to the Working Group], his position on the Working Group did not allow him to vote, eliminating the possibility that he would vote in favor of his private interest.

**B. 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 ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treated that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could still 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 looked 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).

The Commission determined that as long as he recused as necessary, his dual roles did not create an appearance of impropriety.

**16-50--Personal or Private Interest:** In September 2016, PIC received anonymous information about a State employee. After reviewing the information, Commission Counsel contacted [Employee] to see if she wanted to seek an advisory opinion from the Commission. [Employee] agreed and provided PIC with an organizational chart and email communications between herself and [an investigative division of her agency]. [Employee] had previously addressed similar allegations within [her Agency]. In her email to Commission Counsel, she claimed she was completely cleared of any wrongdoing.

[Employee] was the Director [a specific division] within her [Agency]. [Her division was responsible for identifying agency fraud, reporting it to the proper authorities and collecting monies that was obtained by fraud]. The information PIC received alleged that [Employee] had a conflict of interest because she had hired several family members, and a family friend, to work in her unit.

Other allegations included the fact that [Employee] had allowed one of her subordinates, [Ms. X], to hire her own daughter and a new employee had been promoted too quickly. As the matter was [Employee]'s request for an advisory opinion, the promotion [issue] was not relevant. The allegation regarding Ms. [X] was only relevant for the purpose of examining [Employee]'s role in approving the hiring of Ms. [X's] daughter.

[Employee] was accompanied to the hearing by several of her employees. At the hearing, [Employee] readily admitted that she had hired a former friend and some of her immediate family members. However, before doing so, she requested permission from her supervisors, which she received. When asked about potential conflicts of interest, [Employee] indicated that she did not sit on the hiring panel for any of the interviews and that she did not directly supervise any of the employees in question.

**A. In their official capacity, employees 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). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A close relative is defined as "parents, spouse, children...and siblings of the whole and half-blood." 29 Del. C. § 5804(1). However, a personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

## 1. The Relatives

As to the hiring of her son and her sister, [Employee] had a conflict of interest as a matter of law because they both fell within the definition of a close relative as defined in 29 Del. C. § 5804(1). The Commission then considered whether she was reviewing and disposing of matters related to those employees. According to [Employee], she did not review and dispose of matters related to those two employees because they reported to other managers in the unit. However, all of the unit's managers ultimately report to [Employee]. As a result, although she had a formal recusal strategy, the Commission considered how effective her recusal strategy could be given the fact that the managers supervising [Employee]'s relatives ultimately report to [Employee]. Another factor affecting [Employee]'s recusal strategy was the fact that she worked in the same small office as her relatives. Courts have noted that a person's mere presence can undermine a person's attempt at recusal. *Prison Health Services, Inc. v. State*, 1993 WL257409 (Del. Ch.); *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

Case law holds that the presence of a person with a conflict of interest can influence those who had decision-making responsibility for the matter(s). While [Employee] was able to avoid reviewing and disposing of matters involving her relatives (i.e. signing their Performance Review), it was difficult for the Commission to believe that [Employee]'s presence did not affect those supervisors who were responsible for oversight of those employees. However, when asked, Ms. [X] denied that [Employee] exerted any influence over the supervision of her relatives. Although, under the circumstances, it was very unlikely that Ms. [X] would feel comfortable saying otherwise. [Employee] was her supervisor and controlled every aspect of her day-to-day work environment as well as her performance reviews and promotion opportunities. In addition, Ms. [X] faced a similar conflict of interest because her daughter also worked in the unit. While Ms. [X] did not directly supervise her daughter, it was extremely unlikely she would admit to an issue supervising [Employee]'s relatives because any consequences flowing from her comments would likely affect her own daughter.

The Commission also considered [Employee]'s obvious dedication to her job, her desire to hire qualified applicants and her difficulty recruiting employees. Of particular note was the transparent manner in which [Employee] conducted herself, her cooperation with the Commission and the fact that she received permission from her supervisors before hiring any of the employees at issue. Those factors weighed heavily in the Commission's deliberations.

In sum, after weighing all of the facts and circumstances, the Commission decided that there was no indication that [Employee] had exerted any influence over her relative's supervisors and she was not reviewing and disposing of matters in which she had a conflict of interest.

## 2. Family Friend

Conflicts of interest involving friends are established by the specific facts of each case. The Commission had previously held that in deciding if there was an appearance of impropriety because of an alleged professional or social relationship, it was improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75 (citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567 (1967)).*

According to [Employee], she had not seen [her friend] for more than 30 years and only recently re-connected with him through social media. When her [friend] asked her about job opportunities [in her division] she referred him to [Ms. X] and he was subsequently hired. One of the allegations in the letter was that [the friend] would jump the chain of command and take his complaints directly to [Employee]. The Commission then weighed that information against the presumption of honesty and integrity afforded to government employees. *Beebe*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

The Commission decided that the decision to disregard the [division's] reporting structure was [the friend's] decision, not [the employee's]. While that type of behavior can be problematic, the issue would be more appropriately addressed by inter-office policies and procedures or in [the division's] Human Resources Department. Otherwise, there was no indication [Employee] had a conflict of interest as it applied to [her friend].

**B. 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 ensure 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).

That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the “appearance of impropriety.” It noted that appearances of impropriety claims have been criticized as being too “imprecise, leading to ad hoc results.” Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991). However, courts have also noted that a major goal of the Ethics in Government Act was to avoid the appearance of impropriety. *United States v. Schaltebrand*, 11<sup>th</sup> Cir., 922 F.2d 1565 (1991).

In this case, the appearance of impropriety was not an “unarticulated concern.” PIC received information about [Employee] from at least two different sources. She had also addressed similar allegations with [an investigative unit in her agency]. The Commission decided the allegation of an appearance of impropriety was understandable given the circumstances. However, [Employee] provided the Commission with reasonable reasons for her actions. The Commission highlighted the fact that nepotism practices are almost always fraught with suspicion and mistrust but in this instance, there was no conflict of interest due to the high degree of transparency [Employee] had maintained about her actions throughout her State service. She was reminded that although there was not

conflict of interest in this case, she should not interpret the Commission's holding as permission to further engage in hiring of family members.

The Commission decided there was no conflict of interest or appearance of impropriety due to the transparency with which [Employee] conducted herself and the fact that she had received permission from her supervisors to hire her relatives. She should address the matter with her staff and put procedures in place to deal with the issues in the future.

**16-42—Personal Interest:** On August 23, 2016, the Commission received an anonymous letter alleging [a school district employee] had orchestrated the hiring of [two relatives by the school district]. The letter was not signed nor notarized so it did not meet the standard of a formal complaint. Ordinarily, in similar circumstances, Commission Counsel would contact the individual identified in the letter to see if they wanted to seek an advisory opinion from the Commission. However, [Employee] had already been before the Commission on two prior occasions.

[Employee] previously appeared before the Commission regarding the [District's] hiring of [another relative] for which she received a waiver after the fact. Later it was discovered that: she was not completely forthcoming when she provided the information to the Commission on which her waiver was based; she had not complied with the waiver's instructions that she not supervise [the relative]; and she did not properly notify members of the school community about that restriction. After those discoveries, [Employee] appeared before the Commission a second time to explain the discrepancies.

Given [Employee]'s past history with the Commission and her lack of compliance with the Commission's recommendations, the Commission decided to refer the matter to the Attorney General's ("AG") office for further investigation. 29 *Del. C.* § 5808A(4). Depending on the information gathered during the investigation, the AG's office could decide to: (1) dismiss the matter; (2) present the matter before the Commission in a formal hearing; (3) prosecute [Employee] criminally for Misuse of Public Office.

The Commission considered aggravating factors including: (1) [Employee] had previously demonstrated an unwillingness to follow the recommendations of the Commission; (2) [Employee] was already on notice that the hiring of family members is a highly suspect practice. The Commission did not find any mitigating factors weighing against the referral of the matter to the Attorney General's office.

The matter was referred to the AG's office for further investigation and/or proceedings.

**16-39—Personal or Private Interest:** [Employee] was recently appointed as the Executive Director of [a] Board. In addition to overseeing the Board [related to her profession] she was also responsible for the oversight of 11 other Boards.

[Employee] also worked as a consultant for [a small subdivision of a State agency]. As a consultant she worked with other groups who shared the same goals.

During the last contracting cycle, [Employee]'s duties included planning and facilitating quarterly meetings, providing guidance to other team members to help them develop and implement strategies, and developing projects. A new contract was being

proposed and [the agency] wanted [Employee] to verify that her new position as Executive Director did not create a conflict of interest with her position as a consultant.

**A. In their official capacity, State employees 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). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *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).

[Employee]’s duties as Executive Director were not related to her work as a consultant. Given the different nature of both positions, the Commission determined it was unlikely [Employee] would have contact with colleagues from either position while working for the other. Additionally, the [agency] was under [a separate department]. As a consequence, it was unlikely there would be any type of overlap in either duties or personnel between the two positions. That separation diminished the likelihood [Employee] would be required to review or dispose of matters in which she had a personal interest.

**B. State 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 ensure 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).

The Commission discussed the fact that [Employee]’s status as a State employee contracting with another State agency may raise concerns among the public that she was awarded the contract because of her State position. However, the Code of Conduct provided a solution to that perception. All State contracts in excess of \$2,000 must be publicly noticed and bid if there is a likelihood the contract will be awarded to a State employee. 29 Del. C. § 5805(c). That is so the public can be assured that everyone had an equal opportunity to bid on the contract. The rule applies regardless of the agency’s traditional procurement rules where the usual threshold for public notice and bidding is \$25,000 or \$50,000. As a result, even if the dollar amount of the contract fell below [the agency’s] traditional public notice and bidding threshold, if they had reason to believe the contract would be awarded to [Employee], the contract would have to be publicly noticed and bid if it’s value was over \$2000. The Commission felt that any perception of impropriety would be cured by the more thorough bidding process.

The Commission concluded [Employee]’s consultant work did not create a conflict of interest with her State position so long as [the agency] publicly noticed and bid the contract if it was for over \$2000.

**16-37—Personal or Private Interest:** [State official] is one of five elected members on [a] School Board. The Board meets monthly to discuss and vote on policies, curriculum, and recommendations of the district’s Superintendent. Since her election to the board, the board President has asked her to recuse herself from discussions regarding [specific personnel matters]. She had been asked to recuse herself twice over the past three years. According to [State official], the board President believed she had a conflict of interest because her husband worked for [an organization with an interest in personnel matters]. The [organization] is a state-wide entity which is made up of local associations. The [organization] advocates for [matters important to school personnel]. The [state-wide organization] also assists [the] local associations when they [interact with their district]. In short, the [organization] has a significant effect on the [matters decided by the school boards].

[The official’s spouse works for the organization]. He coordinates and disseminates information to the [organization]’s 12,000 members and he is also responsible for creating the [organization]’s quarterly newsletter. In that role, he is responsible for writing the majority of the articles in the newsletter with assistance from one other co-worker. At the meeting, he said the newsletter covers topics of interest to those in the education community, including matters before local school boards, if noteworthy. [The official’s spouse] does not have any decision-making authority related to [the organization]. The [organization] works with [the] local associations through liaisons, “field staff,” which are separate from his classification as “program staff.”

[State official] asked the Commission to decide if she had a conflict of interest requiring her recusal when the school board was reviewing matters related to the [organization].

#### **A. Personal Jurisdiction**

Members of Boards of Education fall within the definition of “State employee” and are subject to the State Code of Conduct. 29 *Del. C.* § 5804(12)(a)(3).

#### **B. In their official capacity, employees 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).**

The question the Commission considered under this section of the Code was whether [State official] had a conflict of interest, through her husband’s employment with [organization], which would be likely to affect her ability to perform her school board duties when reviewing [specific] matters. “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). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

[The spouse] had an on-going financial interest in retaining his position with [the organization] and [State official] shared that financial interest through her familial relationship with him. [The spouse] did not have any decision-making authority over [the matters at issue] or any job duties related to them at all. The Commission first discussed whether [State official] would be able to recuse herself from any matters directly related to the [organization]. Her spouse's job did not involve [the matters at issue]. Nor did the Board meet face-to-face with [organization] staff or the representatives of the local associations during [discussions]. Rather, the head of the district's Human Resources department or the district Superintendent played the role of "go between" and updated the Board [on the specific matters] and got feedback from the Board members.

While it appeared [State official] was sufficiently isolated from contact with the [organization] and its employees when serving in her capacity as a Board member, the Commission decided she would be unable to sufficiently recuse herself when her need to do so would be most essential. For example, her [spouse] reports on important and contentious matters involving local school boards. While he stated, and the Commission believed, he would recuse himself from any newsworthy matters related to the Board, the Commission could not ask him to do so. [Spouse] was not a State employee and the Code of Conduct which requires recusal when confronted with a conflict of interest did not apply to him. Second, [organization] could be unwilling to accommodate his recusal request because he was not the individual with the conflicting interests. Third, if [spouse] were to advise his wife that the [organization] was going to advocate for, or report about, an issue before the Board, [State official] would have already participated in the proceedings leading up to that point and her recusal would not cure her previous involvement.

In sum, the Commission decided recusal would not cure [State official]'s conflict of interest because it would be impossible for her to identify, in advance, those situations which would require her recusal. Furthermore, the Commission does not have the power to request [spouse's] recusal, nor does the Commission have a means by which it could monitor and enforce his recusal.

**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 ensure 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).

The Commission next considered whether [spouse's] employment was creating a justifiable impression of a violation. According to [State official], the appearance of impropriety was the primary reason she was asked to recuse herself from Board discussions related to [the issues in question]. The public could suspect she would have

access to confidential information which, if shared with the [organization], would put the district at a disadvantage. That is not to say she would do so, and the Commission believed her when she stated she would not do so. The Commission assured [State official] that she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996). However, she did admit there was talk of a similar nature when she was running for her school board seat. She stated some members of the public had speculated that [State official] and her husband would share confidential information with each other at home (she used the term “pillow talk”). The Commission decided such speculation was indicative of a “justifiable impression” of impropriety which would occur among the public if she were to participate in the [specific issue].

The Commission decided [State official] did have a conflict of interest between her role on the Board and her spouse’s employment with [organization]. She was advised to continue to recuse herself [as necessary].

**16-29—Personal or Private Interest—Complaint:** Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Ch. 58. 29 *Del. C.* § 5810(a). On June 9, 2016, [a citizen] filed a sworn Complaint against [a town official]. The Complaint was properly notarized pursuant to 29 *Del. C.* § 4328(3). *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

After deciding the Complaint was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that are deemed to be frivolous or that fail to state a claim should be dismissed. 29 *Del. C.* § 5809(3). The remaining allegations are then examined to determine if a majority of the Commission has reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

## **I. Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29.”

29 *Del. C.* § 5802(4).

Town employees and elected and appointed officials are subject to the State Code of Conduct unless the town adopts a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 *Del. C.* §5802(4). [The Town official] had been the Mayor of [the Town for over 15 years]. He was subject to the State Code of Conduct because the Town had not adopted its own Code of Conduct.

## II. Subject Matter Jurisdiction

The Commission only addresses alleged violations of "this chapter"-Title 29, Ch. 58. 29 *Del. C.* § 5810(h). The Complaint alleged [the Town official] violated: 29 *Del. C.* §§ 5809(3); 5805(a)(1) & (2), (b), (c); 5806(c), (d), (e), (f), (g); 5804(7), (8). With the exception of §§ 5804(7) & (8) and 5809(3), the alleged conduct fell within the Commission's statutory jurisdiction.

## III. Facts

[The citizen] alleged [the Town official] violated the Code of Conduct because of his dual roles as Mayor [and as an employee of a private company] that contracts with [the Town]. Specifically, she pointed to two separate conflicts of interest.

First, [the citizen] alleged [the Town] improperly entered into an Agreement with [a private company] and a few local [residents to improve efficiency in one of the Town's utilities]. According to [the citizen], [some residents received a financial benefit from the Agreement]. One of the [alleged beneficiaries] was [a resident who is married to [the town official]'s sister-in-law]. The Town benefitted from the Agreement because the [Agreement allowed the Town to expand the capacity of the utility which would allow more homes to be built and allow the Town to collect more taxes]. [The company] benefitted from the Agreement by being paid for their services. [The citizen] alleged that [the Town official's relative] received a financial benefit from the Agreement and that the financial benefit was a direct consequence of his relationship to [the Town official].

Commission Counsel confirmed with the Town Solicitor that [the town official was tangentially related to the resident]. At Commission Counsel's request, the Town Solicitor asked [the Town official] if he socialized with [resident]. [The Town official] responded that they occasionally saw each other at family birthday parties but he did not otherwise socialize with [resident].

The second conflict of interest [the citizen] alleged was a conflict created by [the Town official]'s employment with [a private company] which built [the Town]'s [utility facility].

## IV. Application of the Law

### **A. 29 *Del. C.* § 5805(a)(1): Town officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties.**

The Complaint alleged [the Town official] had a conflict of interest because of his dual roles as Mayor and as an employee of [the company]. When evaluating these provisions of the Code of Conduct, the Commission has previously emphasized the fact that a course of conduct need not actually result in a violation, only that it "may result" in a violation. *Commission Op. Nos. 92-11; 99-34.*

[The citizen] submitted documents which showed [the Town official] had an interest in both [the company] and the Town. The documents also demonstrated the fact that both entities did business with each other. However, [the town official] had previously appeared before the Commission regarding his dual roles as a [company] employee and Mayor of [Town]. *Commission Op. 08-06.* According to the previous opinion, [the company] had a

contract with the Town approximately seven years before [the town official] began working for them. As a condition of his employment with [the company], it was agreed that [the Town official] would not have any responsibilities related to [Town]. In addition, [the town official] agreed to recuse himself from all matters related to [the company] while serving as Mayor of [Town]. [The company] works with the Town Manager and the council member who is the head of the [utility] regarding contracting issues. At the time of the 2008 hearing, [the Town official] filed the required ethics disclosure regarding outside interests and advised the Commission that the Mayor only votes on matters if the council vote results in a tie. He agreed to notify PIC if he was ever required to cast a tie-breaking vote for a matter in which he had a conflict of interest. He had not disclosed any such vote since the 2008 opinion was issued. While absence of information is not always confirmation that an event did not occur, [the town official] was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), aff'd., No. 304 (Del., January 29, 1996).

In addition to the previous advice from the Commission, the Town has its own conflict of interest policy which requires anyone with a conflict to recuse themselves from the decision-making process. [The Town official] signed the policy, as all Town employees were required to do. Consequently, the Town would also monitor votes cast by [the Town official] to determine if he was engaging in conduct which would create a conflict of interest. Those facts along with the presumption of honesty and integrity afforded to [the Town official] by law was considered by the Commission before reaching the conclusion that [the Town official]'s employment with [the company] did not create a conflict of interest with his position as the Mayor of [Town] so long as he continued to recuse himself as required by the State Code of Conduct and the Town's conflict of interest policy.

As to the conflict of interest related to [resident], [the Town official] did not vote to select the participants of the [utility] program. He did sign the Agreement between the Town and [resident] because the Town Charter requires that he sign on behalf of the Town, but he only did so after the council had voted on the matter. According to the Town Solicitor, the Town was still seeking more [residents] to participate in the [utility] program, which made it unlikely [resident] was selected at the expense of another applicant or was shown preferential treatment. In addition, the Agreement between the Town and [resident] was identical to the Agreement between the Town and [another resident]. The identical terms indicated that [resident] was not afforded any special consideration when he engaged in the Agreement with the Town.

As to the existence of a tangential family relationship, Delaware Courts have held that for the interest to be sufficient [to constitute a conflict of interest] the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, Graves, J. (November 21, 1995). In *Camas*, the Delaware Superior Court held that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. The familial relationship in that case was one of husband and wife. *Id.* Here, the relationship was more attenuated. Similarly, the Commission has also determined that the existence of such relationships without more, are insufficient to establish a conflict of interest. (Commission Ops. 01-35, 16-14). While the Complaint did set forth the existence of a tangential family relationship, there were no additional facts which supported the allegation that the Agreement between the Town and [resident] was predicated on a conflict of interest.

**B. 29 Del. C. § 5805(2): A person has an interest which tends to impair the person's independence of judgment in the performance of their duties when:**

- a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or**
- b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.**

The Code sets forth circumstances under which a person has a conflict of interest as a matter of law. It was applicable to the alleged conflict of interest regarding [resident] for purposes of determining whether he qualified as a 'close relative' as set forth in subsection 5805(2)(a). The Code defines "close relative" as "...parent's spouse, children...and siblings of the whole and half-blood." 29 Del. C. § 5804(1). [Resident] did not qualify as a 'close relative'. As a result, [the Town official] did not have a conflict of interest under this section of the Code of Conduct.

**C. 29 Del. C. § 5805(b)(1): No town official may represent or otherwise assist any private enterprise with respect to any matter before the town with which official is associated by employment.**

[The Town official] sought the advice of the Commission regarding his dual roles in 2008. He was/is well aware of the limitations imposed upon him by the Code of Conduct. The Commission noted that as a condition of his employment with [company], he was barred from all matters related to the [Town]. Essentially, [the Town official] arranged to recuse himself from all matters between [the company] and [the Town] on both sides of the equation. The Commission decided it was highly unlikely he would begin participating in those decisions after voluntarily recusing himself and seeking the advice of the Commission.

This section of the Code did not apply to the alleged conflict regarding [resident] he was not a 'private enterprise' under the statute. 29 Del. C. § 5804(9).

**D. 29 Del. C. § 5806(c): No town official shall acquire a financial interest in any private enterprise which such official has reason to believe may be directly involved in decisions to be made by such official in an official capacity on behalf of the town.**

Given the Commission's previous advice to [the Town official], there was no reason to believe, or facts to support, the conclusion [the Town official] had made decisions about [the company] in his official capacity as Mayor. First, he previously received advice from the Commission instructing him that he must recuse. Second, the Town's conflict of interest rules also prohibited [the Town official]'s participation in any matter related to [the company]. Lastly, [the Town official] could not vote unless the council vote resulted in a tie. In those circumstances he was required to notify PIC about his vote, which the Commission did not receive. The lack of consistent voting power also made it virtually impossible for the Mayor to exert undue influence over the decisions of the Town Council.

Again, this provision did not apply to [resident] as he was not a 'private enterprise' as defined by the Code of Conduct. 29 Del. C. § 5804(9).

**E. 29 Del. C. § 5806(d): Any Town official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the Town shall file with the Commission a written statement fully disclosing the same. Such disclosure shall be confidential, and the Commission shall not release such disclosed information, except as may be necessary for the enforcement of this chapter. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the Town**

[The Town official] filed the required disclosure in 2008.

**F. 29 Del. C. § 5806(e): No Town official shall use such public office to secure unwarranted privileges, private advancement or gain.**

There were no facts to support the conclusion [the Town official] had improperly benefitted from his position as the Mayor of [Town]. The contractual relationship between [the company] and [the Town] was in place long before [the Town official] began working for [the company]. Nor did the Complaint allege that [the Town official] benefitted in any way from [resident's inclusion in the utility program].

**G. 29 Del. C. § 5806(f): No Town official shall engage in any activity beyond the scope of such public position which might reasonably be expected to require or induce such official to disclose confidential information acquired by such official by reason of such public position.**

There were no facts to support the conclusion [the Town official] had engaged in activity beyond the scope of his public position which required him to divulge confidential information.

**H. 29 Del. C. § 5806(g): No Town official shall, beyond the scope of such public position, disclose confidential information gained by reason of such public position nor shall such official otherwise use such information for personal gain or benefit.**

There were no facts to support the conclusion that [the Town official] disclosed confidential information to any person. To the extent that the Complaint implied [the Town official] gave confidential information to [resident] regarding the [utility] program by stating [resident] had equipment on his property before the council voted on whether to include an additional parcel of his property in the program, conclusory allegations based on suspicion and innuendo cannot support a claim; rather, the claim must be based on hard facts. *Commission Op. No. 96-75 (citing CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed Cir. 1967))*.

After evaluating all the relevant facts and circumstances, including the fact that [the Town official] had previously sought the advice of the Commission, the Commission decided to dismiss the Complaint in its entirety for failure to state a violation.

**16-23—Personal or Private Interest—Complaint:** On May 6, 2016, PIC received an un-notarized “Ethics Complaint” from [an Employee] regarding [her Supervisor]. Commission Counsel contacted [Employee] to advise her that the Commission could not consider her letter as a formal Complaint unless it was notarized. [Employee] re-submitted the Complaint on June 13, 2016. Her Complaint indicated that it was “confidentially submitted.” Commission Counsel contacted [Employee] again and advised her that the Commission could not guarantee her anonymity if the matter moved forward as a Complaint. She asked Commission Counsel to hold the Complaint until she could decide whether she wanted to move forward, given the fact her identity would be revealed.

PIC received an anonymous letter on October 13, 2016 which alleged the same conduct as was alleged in [Employee]’s Complaint. [Employee] contacted Commission Counsel on October 17, 2016 requesting that her Complaint move forward.

## **I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Chapter 58. 29 *Del. C.* § 5810(a). A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* §4328(3). While [Employee]’ Complaint is notarized, it is not notarized in the proper format. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff’d PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). The Commission could have decided to dismiss the Complaint for failure to be properly notarized. However, it was likely [Employee] would simply have the Complaint notarized in the proper format and re-submit it at a later date. Given the amount of time that had passed since [Employee] first submitted her Complaint, the Commission examined the Complaint further to determine if the Complaint adequately alleged a violation of the Code of Conduct.

## **II. Jurisdiction**

The Commission’s jurisdiction is limited to interpreting Title 29, *Del. C.*, Ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint’s substance.

### **A. Personal Jurisdiction**

[Supervisor] was a State employee working for a State agency as defined in 29 *Del. C.* §§ 5804(11) and (12)(a). As a result, the Commission did have personal jurisdiction over [Supervisor].

### **B. Subject Matter Jurisdiction:**

The Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that are deemed to be frivolous or that fail to state a claim should be dismissed. 29 *Del. C.* § 5809(3). The remaining allegations should then be examined to determine if a majority of the Commission has reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (*interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)*).

### **III. Facts**

The Complaint alleged [Supervisor] was reviewing and disposing of matters in which she had a personal or private interest in violation of the Code of Conduct's conflict of interest provision. 29 Del. C. § 5805(a). Specifically, the Complaint alleged 14 separate instances of professional conduct which [Employee] believed were influenced by [Supervisor]'s personal interest in one of [Employee]'s co-workers. The allegations were:

1. Manager verbally reprimanding [sic] staff because of issues brought to her by the subordinate.
2. Manager giving subordinate management responsibilities/tasks to create experience to gain promotion.
3. Manager reviews applications, selects applicants less qualified to ensure that subordinate receives most qualified rating to get promotion.
4. Manager writes questions for interview, provides with [sic] answers to subordinate and is on the interview panel to ensure promotion.
5. Manager had to interview in house applicants (All) for position- subordinate was less qualified in respect to another [employee] who was given an insufficient reason for the decision. Rumored that HR contacted [other employee] to find out why she declined the position, but she had not been offered the position; HR was told a different story from the truth/incorrect translation of what transpired.
6. Manager treats subordinate as a right hand when there are two other management positions (staffed).
7. Manager violates DOA Pcard policy- gave subordinate her Pcard (state issued) to hold during office absence in case of need to use and subordinate used for payment(s); not necessary because other managers in office are card holders.
8. Manager again, reviews/selects applicants to secure subordinates' promotion (interviewed week of 5/21/16, offered & accepted position same week of interviews); moving from a pay grade 8 to a 15 in less than 10 months.
9. Manager again, writes questions and provides with answers to subordinate and participates on interview panel to ensure promotion.
10. Subordinate eludes [sic] that she will receive the position before the interview is conducted-making personal/financial plans prior to on the basics [sic] of knowing that she would acquire the promotion.
11. Subordinate revealing information about relationship with and knowledge of other staff medical issues from Manager- HIPPA violations and the Pcard issue because she is not qualified for management and neither is the Manager who received her promotion on the same basics [sic].
12. Manager and subordinate take every break (smoke) and lunch together when possible since about July 2015 (inappropriately unprofessional actions/behavior).
13. Subordinate reveals after hours/weekend gatherings with Manager and their families.
14. Manager covers for subordinate and openly reprimands other staff on the basic [sic] of what the subordinate states without finding out what actually transpired; including management.

### **IV. Application of the Law**

When deciding whether there were sufficient grounds to support each allegation, the Commission considered the law applicable to those allegations. The Complaint alleged multiple violations of 29 Del. C. § 5805(a) which reads:

No state employee...may participate on behalf of the State in the review or disposition of any matter pending before the State in which the state employee...has a personal or private interest.... A personal or private interest in a matter is an interest which tends to impair a person's independence of judgement in the performance of the person's duties with respect to that matter.

As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 *Del. C.* § 5805(a)(2)(a) and (b). A close relative is defined as "parents, spouse, children...and siblings of the whole and half-blood." 29 *Del. C.* § 5804(1).

The Complaint did not allege that [Supervisor] and [the subordinate] had a familial relationship. As a result, [Supervisor] could not have a conflict of interest as a matter of law. The Commission decided there were insufficient facts to determine if [Supervisor] had a conflict of interest as a matter of fact. The Complainant was encouraged to re-submit the Complaint with supporting documentation.

#### **16-20 and 16-31—Personal or Private Interest:**

##### [Committee Participation]

The [Committee] is a public entity created by [a state agency] to review information and issue recommendations [to increase performance of outside entities related to the agency's mission]. The [Committee] reviews information submitted by [the entities], holds public meetings to discuss the information with the [entity's] leaders, and issues reports on the matters discussed at each meeting. During each process, the [Committee] holds two meetings: an initial meeting, where no recommendations are made, and a final meeting, where recommendations are made. The [Committee's] recommendations, and the reports from each meeting, are reviewed by the [agency's] Secretary before deciding. The Secretary may adopt or reject the [Committee's] recommendations.

The [Committee] has nine members. The State [agency] designates two of their members to be representatives on the [Committee]. The remaining members are appointed by the Secretary and include employees of the [agency], a community leader and two members of [Entity X]. [Person B] is a voting member of the [Committee] and [Person A] is a non-voting member.

Members of the [Committee] are appointed, or re-appointed, once a year. When asked to describe her role on the [Committee], [Person A] stated she serves as an 'interpreter' between [the member entity's] representatives and other members of the [Committee] who tend to speak in language familiar to those employed [by the agency], but not necessarily familiar to [the member entities] representatives who tend to be lay-people. [Person B] is a voting member of the [Committee]. [Person B] believes that when [the member entities perform badly] it reflects poorly on the community in general. [Person A and Person B] are the two [Committee] members most experienced in [the member entity's] operations.

[Entity X]

Both [Person A and Person B] are members of [Entity X]. [Entity X] is a non-profit organization which provides support services to [the member entities]. [Entity X] educates the public about [their mission and that of the member entities], [helps member entities] share in efficiencies and advocates for policy changes which benefit the [entities]. To advance initiatives supported by [the member entities], [Entity X] frequently lobbies in the General Assembly. In return for their support, the [member entities] pay dues to [Entity X] which accounts for 15% of their funding. [Person A] is the Executive Director and she is employed by [Entity X]. [Person B] is Board President, a voluntary position with a six-year term limit. His term expires this year. [Person A and Person B] stressed the fact that [Entity X and the Committee] have similar goals.

#### **A. Personal Jurisdiction**

Board and committee members are considered “honorary state officials” and are subject to the State Code of Conduct. 29 *Del. C.* § 5804(6).

#### **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).**

The Commission considered whether [Person B or Person A] had a personal interest in [Entity X] that affected their ability to perform their duties as members of the [Committee]. “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). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

There is no question that the [Committee] is a State entity. However, [the member entities] are also considered [a State entity]. They are an act of the General Assembly. [*Citations omitted*].

While [Entity X] was not a State entity, it was a non-profit organization which represented the interests of [the member entities]. In reality, [Entity X] was made up of political subdivisions of the state and advanced the legislative and public relations agenda of those entities. In a similar matter, the Office of Constitutional Rights and Public Trust (OCRPT) declared that a voluntary umbrella organization which was comprised of three political subdivisions of the State was not considered a “private enterprise” as defined in 29 *Del. C.* § 5804(9). That organization had an almost identical relationship to its member organizations as [Entity X] had with [their member entities].

The Commission discussed the fact that [Person B] was a voting member of the Committee but not a paid member of [Entity X]. They contrasted those facts with [Person A’s] circumstance where she is a paid employee of [Entity X] but a non-voting member of

the [Committee]. The result of the debate was a finding that [Entity X] is not a “private enterprise” as defined in the Code and as a result, there was no “private interest” which would create a conflict of interest.

The Commission next turned to an examination of whether [Person A and Person B’s] dual roles would be likely to raise suspicion that they were violating the public trust.

**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 ensure 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 least several [people] had interpreted the dual roles of [Person B and Person A] as inappropriate, which was evidenced by [a letter to a different State agency]. However, they overlooked the fact that [the member entities] are State entities. [Entity X] represents the interests of political subdivisions of the State. [Person A and Person B] were both appointed to their position on the [Committee] by the Secretary who was surely aware of their positions with [Entity X]. Additionally, the Commission could not think of a set of circumstances in which the [Committee] and [Entity X] would have competing interests. As members of the [Committee], [Person A and Person B] review [the member entity’s] applications and monitor [their] performance. Poorly performing [entities] may [lose the ability to operate in the State]. While the public may assume that members of [Entity X] would be opposed to [such an action against their member entities], the reality was that poorly performing [member entities] reflect poorly on all [of the member entities]. As a result, [Entity X’s] goals were aligned, rather than in conflict with, those of the [Committee].

The Commission also discovered that when [Person B] stepped down from the [Committee] for a period of time, the Secretary appointed [a person in a similar position] as his replacement, evidencing a need for a [Committee] member with [that type of] experience. The Commission discussed the fact that other boards and commissions are required to have members knowledgeable in the field over which they have jurisdiction. For example, the Board of Veterinary Medicine has veterinarian members because of the need for specialized knowledge. [Other] members of the [Committee] were experienced [in some areas of the Committee’s purview, but not the same areas as Person A and Person B]. Furthermore, the [Committee’s] members are appointed or re-appointed once a year. Should the Secretary become unhappy with the influence [Entity X’s] members were having on the [Committee] or if he received political pressure to remove them, he could easily appoint replacements. Lastly, the Commission considered the fact that the Secretary may accept or reject the recommendations of the [Committee]. Should the

Secretary believe the recommendations of the [Committee] were unduly influenced by [Person A or Person B], he was free to ignore the recommendations of the [Committee].

The Commission then engaged in a lengthy debate weighing the competing interests.

No conflict of interest for [Person A or Person B]. The Secretary could ignore the recommendations of the [Committee] if he chose to do so and they were appointed to [the Committee] because of their [particular] expertise with [the member entities].

**16-18—Personal or Private Interest:** [Employee] worked [for a State agency located in Dover]. The [Division is responsible for documenting and collecting federal taxes and dispersing the tax revenue to various states]. [Employee]’s job duties included assisting customers with [filing their federal paperwork].

[Employee] and her husband purchased a [business regulated by her State agency]. [Employee] performed all of the record-keeping functions for the business including [the forms required by her State agency]. [Employee] would not process her company’s paperwork or filings while working at her State job but requested permission to access the State’s computer system from her home computer.

[Employee] asked the Commission to consider whether her ownership of a business regulated by her State agency created a conflict of interest with her State job.

**A. State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d). “Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).**

[Employee] submitted the required Ethics Disclosure.

**B. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

In other matters related to employees [working for the same agency, but a different division], the Commission decided that recusal was not a perfect resolution to the conflict of interest issue. In *Commission Op. 13-29 (attached)*, the Commission decided it would be a conflict of interest for an employee to perform work for a private company outside of her State work hours, despite the fact she had agreed to recuse herself from matters related to the private company during State work hours. In that instance, the applicant’s position as a supervisor in her division obfuscated the remedial effects of recusal. *Id.* Similarly, in

*Commission Op. 16-05* an employee was not permitted to accept part-time employment at a [related, private business] even though he had a recusal strategy approved by his supervisors. The Commission decided recusal would not serve as a sufficient deterrent to the appearance of impropriety which would be created by the dual employment. *Id.*

In her State position, if [Employee] processed the required filings and paperwork for her private business, she would be disposing of matters in which she had a private interest. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). [Employee] recognized she could not conduct company business while working at her State job. Nonetheless, to ensure that all of the paperwork was processed appropriately, the Commission decided that [Employee]'s husband should personally appear at [the agency] to submit filings and payments, as required. The heightened requirement increased the transparency of the process for both [the Employee] and [the agency], as well as assuring her co-workers and the public that no special consideration was afforded to her because of her employment at [the agency]. Additionally, the quarterly nature of the filings did not impose an undue burden on her private business.

**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 ensure 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).

[Employee] asked the Commission to decide if she could be granted access to a customer database used by employees/owners of other companies. Ordinarily, her supervisor approved the issuance of log-in and password access to the database. The information in the database is not open to the public. Given the potential for a conflict of interest, [Employee] was denied access to the database by her supervisors. The Commission agreed with their decision. First, [Employee] would have to apply to her own supervisor to obtain authorized access. That, in itself, created an appearance of impropriety. The public could assume she was given access because of her work relationship with her supervisor. Second, she would be the only person to have access to the system as both an employee and as a customer. It could appear to other business owners, or to the public, that her State access would afford her benefits that other users did not have. That is not to say she would misuse the system. She was entitled to a presumption of honesty and integrity. However, given the fact [Employee] processed information from the database as part of her State job the Commission decided it would be improper for her to also access the database as a customer.

The Commission decided [Employee]'s co-ownership of [the business] did not create a conflict of interest with her position at [the State agency] as long as she abided by the conditions set forth above.

## **16-15—Personal or Private Interest (Complaint):**

### **I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, Chapter 58. 29 *Del. C.* § 5810(a). On March 15, 2016, [Complainant] filed a sworn Complaint against [a State official]. The Commission decided the complaint was properly notarized pursuant to 29 *Del. C.* § 4328(3). *Hanson v. PIC*, 2012 WL 3860732 (Del. Super, Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

After deciding that the Complaint was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts are assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that are deemed to be frivolous or that fail to state a claim should be dismissed. 29 *Del. C.* § 5809(3). After reviewing the Complaint, the Commission decided that, assuming all facts to be true, the allegations were not frivolous, nor did the Complaint fail to state a claim.

The allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. 29 *Del. C.* § 5809(3). "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (*interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)*).

### **II. Personal Jurisdiction**

The Commission's jurisdiction extends to State officers as defined in 29 *Del. C.* § 5804(13). State officers are defined as "any person who is required by subchapter II of this chapter to file a financial disclosure statement" and are not members of the General Assembly or judges in the courts of this State. 29 *Del. C.* § 5812(n)(1)(a). As a State officer, [the subject of the complaint] is required to file a Financial Disclosure form with PIC. Furthermore, [the official] did not fall within the above listed exclusions.

### **III. Subject Matter Jurisdiction**

The Commission can only address alleged violations of "this chapter"-Title 29, Chapter 58. 29 *Del. C.* § 5810(h). The Complaint alleged [the State official] violated the Code of Conduct's prohibition against accepting payment of expenses, or anything of monetary value, where the acceptance may result in: (1) impairment of official judgment or; (4) have an adverse effect on the public's confidence in their government. 29 *Del. C.* § 5806(b). The alleged conduct did fall within the Commission's statutory jurisdiction

### **IV. Facts**

[The State official is a member of a professional organization related to their State

job. The purpose of the organization is to establish rules and regulations that govern a particular industry. The official's State office is accredited by the professional organization every five years. In 2009, a subsection of the professional organization created a forum by which regulators of the industry meet with companies engaged in the business being regulated. The forum is held in various locations all over the world. The purpose of the forum is to monitor the degree of risk each business poses to the U.S. economy. The forums benefit the businesses and the regulating entities].

[Complainant obtained copies of the State official's travel receipts and alleged the State official improperly accepted reimbursement of travel expenses from the businesses regulated by their office. Complainant submitted receipts from seven trips in FY2015].

## **V. Application of the Law**

No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:

- (1) Impairment of independence of judgment in the exercise of official duties;
- (2) An undertaking to give preferential treatment to any person;
- (3) The making of a governmental decision outside official channels; or
- (4) Any adverse effect on the confidence of the public in the integrity of the government of the State.

29 *Del. C.* § 5806(b).

The Complaint specifically alleged violations of subsections (1) and (4). When evaluating those provisions of the Code of Conduct, the Commission has previously emphasized the fact that a course of conduct need not actually result in a violation, only that it "may result" in a violation. *Commission Op. Nos. 92-11; 99-34.*

### **A. Impairment of Independence of Judgment in the Exercise of Official Duties**

[The State official regulates a particular industry. The regulations benefit both the State and consumers].

The travel expenses giving rise to the complaint were for trips to [industry forums]. [The forums were created by the] professional organization to which [the State official] belongs and through which their State agency seeks professional accreditation. Through their organizational support and advocacy, [the organization has deemed the forums] to be important to both the companies and the regulating bodies. The [forums] facilitate the sharing of confidential information which allows both entities to operate more efficiently, evaluate the degree of risk each company introduces into the market and agree on best practice standards.

The issue considered by the Commission was whether the payment of [the official's] travel expenses by the sponsoring company(ies) *may* tend to impair their professional judgment. The Complaint did not allege facts, nor was there any other evidence, which would suggest their judgment was actually affected.

The Commission weighed several factors while deciding the matter. The Commission considered the distinction between a regulated entity and an entity contracting

with the State to be a key distinguishing factor. In order to properly regulate [specific] business in the State, the more information [the official] has about the company, the better off Delaware consumers are likely to be. The Commission also attributed significant importance to several other factors. First, the [forums] were created by the professional organization through which Delaware receives its accreditation. Presumably the national organization responsible for such accreditation would apply well-settled industry standards when conducting its accreditation review. There was no reason to believe the [organization] would deviate from those standards when creating and promoting attendance at the [forums]. Second, the trips appeared to be of short duration, reducing the likelihood that the trips were used for personal recreational purposes. Third, it appeared the travel expenses were first paid by the State and the State was then reimbursed by the company, no payments were sent directly to [the State official]. Lastly, the [forums] were hosted by many companies, not just one. That fact greatly reduced the likelihood that one company could gain an advantage over the others by paying [the State official's] expenses.

The Commission decided that [the State official's] attendance at the [forums] was part of their job. Not only does [the official] regulate the companies, [the official] also has a duty to protect Delaware consumers. The entity which accredits [the] State office decided that the best way for regulators to monitor the degree of risk borne by each company was to attend the [forums]. Furthermore, the monies were first paid by the State and then the State was reimbursed. [The State official] did not receive any direct payments from the companies.

#### **B. Any Adverse Effect on the Confidence of the Public in the Integrity of the Government of the State**

The restriction prohibiting conduct that may result in "any adverse effect on the public's confidence in the integrity of its government," is basically an "appearance of impropriety" test, as is the restriction, found in 29 *Del. C.* § 5806(a), against engaging in any conduct that may "raise suspicion" that the public trust is being violated. *Commission Op. Nos. 98-11; 98-23; 98-31.* Thus, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14.* It only requires that it "may result in an adverse effect on the public's confidence." *See also, Commission Op. No. 99-35 (citing 63C Am. Jur. 2d Public Officers and Employees § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict)).* To decide if there is an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78.*

While [the State official] does have decision-making authority over the [industry] operating in Delaware, the Commission decided the risks faced by Delaware citizens and the Delaware economy by having [the State official] perform their duties without all the relevant information far outweighed any appearance of impropriety that may be created.

The Commission did not have reasonable grounds to believe that a violation of the Code of Conduct occurred. As a result, the Complaint was dismissed, and the matter closed.

**16-14—Personal or Private Interest:** In March, the Public Integrity Commission (PIC) received two anonymous letters alleging that [a Board member] voted for matters in which he had a personal interest in violation of 29 *Del. C.* 5805(a)(1). Specifically, the letters

alleged that [the honorary State official] was making official decisions regarding [an employment matter], despite being related to [an applicant]. The authors of the letters did not file a formal, notarized complaint as required by the court in *PIC v. Hanson*. 2012 WL 3860732 (Del. Super., August 30, 2012 (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013))). Therefore, Commission Counsel contacted [the honorary State official], made him aware of the allegations, and asked if he wanted to seek an advisory opinion from the Commission. After consulting an attorney [the honorary State official] informed Commission Counsel that he wanted to seek an advisory opinion.

The Board has seven members. In September 2015, a meeting was held to discuss applicants for [a vacancy]. According to the Board minutes, the Board adjourned to Executive Session to discuss whether to interview the applicants or to make a selection without holding interviews. At the hearing [the honorary State official] informed the Commission that one Board member did not attend the Executive Session and two other members left before the session was adjourned. Usually, the Board's discussion preceding the selection of [an employee] is held during a public session, after the candidates had been interviewed. However, in this case, the discussion took place while the Board was in Executive Session because some of the applicants were current employees and the Board was prohibited from discussing personnel matters in public. Additionally, the Board was considering a short-term contract for a [temporary employee] which precipitated a suspension of some of the usual formalities of the hiring process. However, the job was posted and the [Board] received applications from all over the country.

When asked if other Board members were aware of his acquaintance with [Applicant], he stated that some people did know. It was not something he advertised, nor was it something he tried to hide. At the hearing, he told the Commission that during Executive Session the Board decided to hire [Applicant] based upon a variety of factors. First, [Applicant] was the only applicant with prior experience [in the position]. He had previously [worked in a similar position] for 12 years. Second, the [entity under the Board's jurisdiction was suffering from] a critical void in leadership. The previous [employee] had taken a leave of absence and the [next person in a leadership role] had retired at the end of August. Third, the [entity] had an important matter pending. While [employed by a different entity, Applicant] had [been successful with a similar matter]. Fourth, the [entity] had previously hired individuals for the position without interviewing the applicants. In short, he was selected because he was the most qualified candidate.

When the Board re-convened the public session, [the honorary State official] introduced a motion to hire [Applicant]. The Board voted 4-3 to hire [Applicant] effective October 2015, with [the honorary State official] voting in favor of the motion.

When asked about his relationship to [Applicant], [the honorary State official] stated [there was a distant tangential relationship by marriage]. The relationship did not qualify as a "close relative" as defined in 29 *Del. C.* § 5804(1). As a result, [the honorary State official] did not have a conflict of interest as a matter of law. 29 *Del. C.* § 5805(a)(2)(a.). However, the Commission considered whether [the honorary State official] had a conflict of interest as a matter of fact.

#### **A. Personal Jurisdiction**

Members [of the Board] fall within the definition of "State employee" and are subject to the State Code of Conduct. 29 *Del. C.* § 5804(12)(a)(3).

**B. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

At common law and since its codification, Courts and this Commission have recognized that the provision covers a variety of relationships that may create a “personal or private interest.” See, cases cited in *Commission Op. Nos. 00-04 and 00-18*. Delaware Courts have held that under the common law, which has since been codified, the issue of whether the “personal or private interest” is sufficient to “tend to impair judgment” is an issue of **fact**, not of law as in § 5805(a)(2). See, e.g., *Shellburne, Inc. v. Roberts*, Del. Ch., 238 A.2d 331 (1967) (under common law, where complainant alleged government official had “personal interest,” and “conflict of interest” because of friendship and social relationships, and used public office in furtherance of such personal interest, court held determination was issue of fact); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (Court held that whether there was a sufficient personal interest to require recusal under the State Code of Conduct was an issue of fact). Thus, at common law and as codified, the conflict of interest provision permits a consideration of whether a particular relationship is either sufficient to create a conflict or too attenuated to create a conflict. In *Jones v. Board of Educ. of Indian River Sch. Dist.*, the court found a board member’s acrimonious relationship with his son’s teacher constituted a personal interest when the board member voted to terminate the teacher. 1994 WL 45428 (Del. Super, January 19, 1994). See also, *Commission Op. No. 96-42* (improper for State employee to participate where brother-in-law would be affected by decision); but see, e.g., *Commission Ops. 14-26* (school board President did not have a personal interest when he appointed the parent of a child on his sports team to the school board); *00-18* (allegation of “personal or private interest” that State officer would financially benefit from decision was too remote and speculative).

Despite the existence of a tangential family relationship, the issue considered by the Commission was whether [the honorary State official]’s ability to perform his official duties was affected by a personal interest. To that end, the Commission considered the factors he cited in the Board’s decision to hire [Applicant]. [Applicant] was clearly well-qualified to fill the position and was particularly well-suited to meet the challenges facing the [entity] at the time of his hiring. In addition, the fact that three Board members refused to participate in the selection process during Executive Session was indicative of the fact that controversy was already brewing before the decision to hire [Applicant] was even made. Furthermore, no Board member declared an objection to [the honorary State official]’s motion or his vote during the Board’s public session. Lastly, the Board had previously hired individuals for the [same] position without interviewing the applicants. After consideration of all of the relevant factors, the Commission decided that [the honorary State official]’s vote to hire [Applicant] was not made based upon a personal interest.

Even assuming the existence of a personal or private interest, the statute provides an exception if the official has statutory authority that cannot be delegated, the official may exercise responsibility with respect to the matter, if promptly after becoming aware of the

conflict he files a written statement with the Commission disclosing the personal or private interest and explains why the responsibility could not be delegated. 29 Del. C. § 5805(a)(3).

In this instance, if [the honorary State official] had not voted, the Board would have been evenly divided when the vote was taken, forcing him to cast the tiebreaking vote. When asked why he did not disclose his vote to the Commission prior to being contacted by Commission Counsel, he stated he did not believe he had a conflict of interest because his relationship with [Applicant] did not qualify as a “close family member” as defined by the statute. 29 Del. C. § 5805(3). Once [the honorary State official] was made aware of the potential conflict, in lieu of a written statement he asked the Commission for an advisory opinion and appeared in person to explain the circumstances. The Commission was satisfied that [the honorary State official] did not knowingly avoid his obligation to make the Commission aware of the possibility of a conflict of interest or of his inability to delegate his responsibilities.

**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 ensure 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).

The Commission has previously held that in deciding if there is an appearance of impropriety because of an alleged professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75 (citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567 (1967))*. That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the “appearance of impropriety.” It noted that appearances of impropriety claims have been criticized as being too “imprecise, leading to ad hoc results.” Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

Taking into consideration its prior holdings and the totality of the circumstances, the Commission weighed [the honorary State official]’s tangential family relationship to [Applicant] against the following factors: [the honorary State official] did not benefit financially from the decision; [Applicant] was extremely qualified; the short duration of the employment contract; no Board members objected at the time of the vote; [the honorary State official] would have been required to cast the tie-breaking vote anyway.

Considering all the relevant factors, the Commission decided [the honorary State official]'s vote did not create a justifiable impression of a violation amongst the public that would undermine their confidence in their government.

The Commission decided [the honorary State official]'s vote was not a violation of the Code of Conduct.

**15-19—Personal or Private Interest—Family Member Contracting with Employee's Agency:** [Employee] worked for [a State agency] as a project manager. [Employee] managed [his agency's] projects from Dover to Delaware's southern boundary. This included [a specific project location in southern Delaware]. The project manager's role would be to perform construction oversight of the project including coordinating schedules; billing; and making sure the site contractor was complying with [various regulations]. Other professionals involved in the project's oversight would be the project's engineer and architect, as well as a third-party inspector. All of the inspector's reports would be sent to the engineer and architect for review and approval.

Planning for the [project] began about 9-12 months ago. The contract for the project was publicly noticed and bid. On July 28, 2015, [the agency] opened bids for the project. The contractor with the lowest bid was [Contractor X]. The business was owned by [Employee]'s son and [Employee] owned 45 shares of stock in the business. [Employee] provided a notarized memo showing that he had relinquished his voting rights in the business for a period beginning May 3, 2015 and ending in December 2020.

PIC was contacted by an [Administrator] for [the agency]. [The Administrator] stated that [the agency's] leadership wanted the Commission to decide if [Employee] could manage the project given the fact that the winning bidder was his son. [Employee] attended the hearing accompanied by [various agency employees].

**A. In their official capacity, State employees 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). The Commission determined that if the contract was awarded to [Contractor X], [Employee] would have a private interest as a matter of law by way of his relationship with his son. 29 Del. C. § 5805(a)(2). Even setting aside the familial relationship, the fact that [Employee] owned shares in the company created another conflict of interest which was not cured by his relinquishment of his voting rights in the business. First, surrendering his voting rights did not change the fact that [Employee] had an ownership interest in the business. Second, an increase in the wealth of the business would still benefit [Employee] regardless of his ability to vote.

Although [Employee] was entitled to a strong presumption of honesty and integrity, the best remedy for the conflict of interest would be for [Employee] to recuse himself from oversight of the project and to refrain from discussing the project with his son. Where there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *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). However, in this instance, the

Commission determined that recusal may alleviate [Employee]'s personal conflict but would not alleviate all of the ethical concerns surrounding the project. The Commission then considered the appearance of impropriety that could be created by the conflict of interest.

**B. State 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 ensure 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). In this instance, the public may suspect that the contract was awarded to [Contractor X] because the owner's father worked for the agency awarding the contract.

Courts have noted the many reasons for rules that bar nepotism. *Nepotism in Public Service*, 11 ALR 4th 826. They are meant to discourage favoritism; prevent the emergence of disciplinary problems, inhibit personal and professional cliques in which the familial relatives side with each other. *Id.* (citing *Lewis v. Spencer*, 468 F.2d 553 (CA5 Tex., 1972); 369 F. Supp. 1219; *aff'd.*, 490 F.2d 93 (CA5 Tex., 1973); 490 F.2d 93 (spouses could not teach in same College Department)). They allow for debate of issues at arm's length rather than under any possible inhibition that might exist because of an intimate relationship. *Id.* (citing *Rosenstock v. Scaringe*, 387 NYS 2d. 716 (3d Dept., 1976), *aff'd.*, 357 N.E. 2d 347). Such close relationships are bound to have a deleterious effect on the morale of other employees. *Id.* (citing *Keckeisen v. Independent Sch. Dist.* (CA8 Minn., 1975), *cert. den.*, 423 U.S. 833). Such bars, generally, tend to make for better efficiency in public office. *Id.* (citing *Backman v. Bateman*, 263 P.2d 561 (Ut., 1953)). Employment of family relatives by the same employer can impede efficiency and cause morale problems. *Id.* (citing *Espinoza v. Thomas*, 580 F.2d 346 (Neb., 1975)). Court said nepotism was recognized as "an evil that ought to be eradicated and stamped out". *Id.* (citing *Barton v. Alexander*, 148 P. 471, (Id., 1915)). Forbidding nepotism expresses the State's strong public policy against nepotism and the appearance of nepotism in government. *Id.* (citing *Wright v. MetroHealth Medical Ctr.*, 58 F.3d 1130 (Ohio, 1995)).

Here, the public could suspect that the contract was awarded based solely upon family relationship. Even presuming that [the agency] could prove [Contractor X] submitted the lowest bid, the public may suspect that [Contractor X] had inside information about the contract which allowed them to submit the most competitive bid. Also problematic was the timing of [Employee]'s relinquishment of his voting rights in the contracting business (two months before the bids were opened). It could appear he gave up his voting rights in anticipation of the fact that the contract would be awarded to his son's company even before the bids were opened.

Since recusal was not an option, the agency could consider awarding the contract to another bidder even if they did not submit the lowest bid.<sup>2</sup> Delaware Courts have long recognized that the awarding of State contracts involves a responsibility to safeguard the

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<sup>2</sup> The Public Integrity Commission has jurisdiction over the State Code of Conduct. The procurement rules of the agency may require a different result.

public trust. Specifically, the statutes and rules dealing with public contracts are meant to protect the public against the wasting of money. *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 regarding 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. Delaware Courts have recognized that the public has a desire to see that public officials granting State contracts have the 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 in the bid must be placed in the context of whether awarding the contract based solely upon being the lowest bidder insures public trust and confidence in the agency’s decision.

The Commission decided that the appearance of impropriety in this matter could not be remedied by [Employee]’s recusal from the project. Commissioner Anderson did not agree with the Commission’s determination, he felt that [Employee]’s recusal would cure the appearance of impropriety.

#### **15-05—Complaint—Town Employee Using Town Resources for Election Campaign:**

[A citizen] submitted a formal complaint against [a former town council member] alleging misuse of public office. [The former official] lost their bid for re-election in February 2014. Specifically, [the citizen] alleged [the official] used their position as a council member to disseminate [information to town residents not related to town business]. As evidence of the allegations, [the citizen] submitted a copy of an email sent by [another town official] to [a town resident] regarding payment of town taxes.

#### **A. PROCEDURAL STANDARDS:**

##### **(1) Sworn Complaint**

Any person may file a sworn complaint alleging violations of Title 29, Delaware Code, Chapter 58. 29 *Del. C.* § 5810(a). A complaint was originally submitted by [the citizen] via fax on January 21, 2015. Commission Counsel spoke to [the citizen] via telephone on February 9, 2015 and explained the notarization requirement. [The citizen] re-submitted the complaint on March 18, 2015. Like the complaint in the *Hanson v. PIC* case, the notary signed and sealed it, but did not indicate that it was a sworn statement as is the duty of the notary under 29 *Del. C.* § 4327(b): “A certificate of a notarial act is sufficient if it meets the requirements of subsection (a) of this section and it: (1) Is in the short form set forth in § 4328 of this title.....”. 29 *Del. C.* § 4328(3). Because the complaint in the *Hanson* case did not have the proper format, the *Hanson* Court held it was an “unsworn statement” and “proof of nothing.” *Hanson* at 9-10, 17. [The citizen] again

submitted the complaint on April 1, 2015. Her third submission contained the proper notarization. Therefore, the complaint met the procedural requirements set forth in 29 Del. C. § 5810(a).

## **(2) Procedure by Commission**

Once a properly sworn complaint is submitted, the Commission is to meet and review the complaint to determine if it is frivolous or fails to state a violation. *PIC Rules*; 29 Del. C. § 5809(3). If it is frivolous or fails to state a claim it may be dismissed. *Id.* The standard applied to a motion to dismiss is the standard in Superior Court Civil Rule of Procedure, 12(b)(6). Just as in a motion to dismiss, at this stage, the allegations are presumed to be true, absent further investigation. 29 Del. C. § 5808A(a)(4). If not dismissed based on that assumption, a Commission majority must find reasonable grounds to believe a violation may have occurred. *Id.* It may set the matter down for hearing; or (2) refer the matter to the Commission's Legal Counsel for investigation. *PIC Rules III (A)*.

## **(3) Jurisdiction**

### **a. Towns and Municipalities**

Town employees and elected and appointed officials are subject to the State Code of Conduct unless the Town adopts a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 Del. C. § 5802(4). During their time on the council, [the council member] was a public official. Members of the [omitted] town Council are subject to the State Code of Conduct as the town had not adopted its own Code of Conduct.

### **b. Former Officials**

For the reasons set forth below, the Commission did not address the issue of PIC's jurisdiction over former elected officials.

## **C. ALLEGATION**

[The citizen] alleged that [the council member] used town resources to distribute information [not related to town business]. Presumably, the [other town official] (who had also left office), sent out the information at the behest of [the council member]. However, there was nothing in the email which would indicate such a request by [the council member]. Since the [other town official] also had another working relationship with the council member] it was possible she sent the information of her own volition. The email itself was sent to a town resident, not [the citizen] herself, and was discovered by yet another town employee.

## **D. DISPOSITION**

The Commission decided the issue of jurisdiction was not relevant because the information provided to PIC was indicative of a criminal act and the matter should be turned over to the Attorney General's office for prosecution. In small towns the effect of the type of misconduct alleged in the complaint could have a huge effect on the [town's future]. Citizens should know that using town resources to distribute [material unrelated to the duties of their council position] will not be tolerated.

*Update: The Attorney General's office reviewed and investigated the allegations and discovered that there was improper use of Town resources. However, they declined prosecution because the candidate lost the election and the town employee who had acted on their behalf was no longer employed by the Town.*

**15-04 Conflict of Interest—Board Memberships:** A board member for an established charter school [School A] was contacted in December 2014 and asked if he, fellow board members and school employees would agree to work with another charter school [School B] during a time of transition. [School B] was under scrutiny by [a regulatory agency] and told that unless their entire board was replaced, the school would [be subject to regulatory consequences]. In response, [the board members and several employees from School A] agreed to assist the school.

To memorialize the new relationship between [the two schools] both parties entered into a Consulting Agreement which allowed [School A] to collect monies from [School B] to offset personnel costs related to the additional duties. According to [the board member], [School B] would benefit from the agreement because of the savings the school would realize from the termination of [various employees]. [School A] would benefit by having [School B] cover part of their personnel costs and through economies of scale. The agreement expires at the end of the 2016 school year. [The board member] stated it was not yet clear whether the two schools would merge together.

Both schools qualified as state agencies. See 29 *Del. C.* § 5804(11) and *Commission Op. 07-63*. Because they are both state agencies there may have been a perception that the Code of Conduct did not apply to dealings between the two entities. However, unlike other provisions of the Code of Conduct, 29 *Del. C.* § 5805(a) and 29 *Del. C.* § 5806(a) specifically omit reference to a “private enterprise,” allowing for the possibility of inter-agency Code of Conduct violations.

[The board member] asked the Commission to consider whether the employees and board members who were serving dual roles would have a conflict of interest under the Code of Conduct.

#### **A. Personal Jurisdiction**

School board members fall within the definition of “State employee” and are subject to the State Code of Conduct. 29 *Del. C.* § 5804(12)(a)(3).

#### **B. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 *Del. C.* § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

When asked whether it would be possible for the two schools to be in competition with one another for grant money or other resources, [the board member] responded that it

could be possible that both schools would apply for grant money from the same source. However, he also indicated that both schools would continue to apply for grants in the ordinary course of business and neither school would be disadvantaged by the fact that the two schools would be sharing staff or board members. [The board member] did not identify any other areas in which a board member or employee serving both schools could be called upon to make decisions where their relationship with the other school could affect their professional judgment. When asked, [the board member] stated that none of [School A]'s board members had friends or family that were employed by [School B].

[School A has many] members on their board. If the four members who were also serving on [School B]'s board were required to recuse from a vote, it would not affect [School A]'s ability to conduct business. However, [School B]'s board only has [a few] members. If [School A]'s board members, while serving on [School B]'s board were to recuse themselves from a vote, the board may not have the quorum required to act. For example, if [School B]'s board wanted to terminate their cooperative agreement with [School A], or vote to extend it, it would be improper for the members who also serve on [School A]'s board to vote. When asked how [School B]'s board would handle such a situation [the board member] responded that it was likely the board would appoint an independent committee to determine the best course of action. The committee then would make a recommendation to the entire board for a final vote. [The board member] stated that was how the board had handled the decision to enter into the Cooperative Agreement.

**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 ensure 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 looked 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).

It was unlikely the cooperative agreement between the two schools would create an appearance of impropriety. The agreement evolved out of necessity rather than personal or financial gain and was in response to [unanticipated actions by members of School B]. However, the Commission was concerned that [School B] may be losing their independence during the transition period.

The Commission decided to advise [the board member] that the dual roles served by [School A]'s board members and employees did not create a conflict of interest. However, to reduce conflicts of interest and the appearance of impropriety, the schools were advised to keep their finances separate and to expand [School B]'s board to include members without ties to [School A].

**14-43 - Conflict of Interest—Board Memberships:** [Employee] worked for [a political subdivision of the State as the Director of a particular Department]. As Director, [Employee] was responsible for managing the Department’s budget, procedures and policies. [A description of her specific job duties is omitted to preserve her anonymity].

One of the projects managed by [her Department] was [Community Project #1]. [Employee] described the program as “[her employer] uses federal funds to [advance a specific community enrichment goal]. [Her employer] had entered into a Memorandum of Understanding (MOU) with [Board A to facilitate Community Project #1]. [Employee] was not actually involved in the [day to day oversight of Community Project #1].

[Board A] was a statewide non-profit organization which provided public [access to Community Project #1]. [Board A worked with her employer to advance the goals of Community Project #1]. In September 2014 [Employee] was elected to the Board of Directors for [Board A]. When asked if she could envision a scenario in which [Board A’s] interests would conflict with those of [her employer], [Employee] stated it may be possible that [Board A] would propose a [project] over which her Department would have jurisdiction for [regulatory purposes].

In 2008 [Employee] was elected to the Board of Directors for [Board B]. She continued to serve on [Board B]. [Board B] was also a non-profit organization whose goals were to advance [Community Project #1]. [Board B] also had an MOU with [her employer]. The MOU was a general agreement by [employer] to support the goals of [Board B]. [Employee] indicated she could not envision a scenario in which [Board B’s] interests would be averse to those of [her employer].

[Employee] asked the Commission to decide if her position on either Board created a conflict of interest with her [employment]. Additionally, she asked if it was appropriate for her to witness documents in which both [her employer] and the non-profit organizations are a party.

#### **A. Personal Jurisdiction**

The State code applies to all counties and municipalities that have not adopted their own Code of Ethics. “It is the desire of the General Assembly that all counties, municipalities and towns adopt Code of Conduct legislation at least as stringent as this act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. Subchapter I, Chapter 58, of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which have not enacted such legislation by January 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29.” 29 Del. C. § 5802(4).

[Employer] did not have a Code of Conduct approved by PIC. Therefore, [employer] fell under the jurisdiction of the State Code of Conduct.

**B. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that an official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

The Commission has previously held that being a Board member of a corporation creates a personal or private interest, which carries with it a fiduciary duty to the private organization. *Commission Op. No. 06-57 (citing Oberly v. Kirby, 592 A.2d 445 (Del., 1991) (Board Director owes fiduciary duty as corporate officer and member))*. In *Oberly*, it was also held that Board members have a special duty to advance charitable goals and protect assets of the non-profit. The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5). As a Board member for two non-profit organizations which had formalized relationships with her employer, [Employee] met the threshold standard of having a private interest.

Having established the existence of a private interest, the Commission considered whether those interests created an actual conflict of interest. The goals of both non-profit organizations were closely aligned with those of [Employee’s] employer. Although [Employee] did not identify any actual conflicts between the two organizations and her employer, she did acknowledge that it could be a possibility in the future. However, the statute only requires that the employee make decisions related to their private interest. The statute is not limited to those decisions made by employees where the two interests have competing goals.

Despite their joint goals, the Commission decided [Employee]’s dual involvement with both [Board A and Board B] created a conflict of interest for matters directly related to [her employer]. The relationship between the two entities was not merely conceptual it was predicated on actual transactions involving the [exchange of monies]. [Employee] stated that some of her staff, in collaboration with [Board A’s] members, identified appropriate [projects for Community Project #1]. To date, she had not been involved in any of those decisions. When asked by the Commission if there were other employees who could serve as a resource for those members of her staff if they had any questions or problems, [Employee] stated that [there were other employees who had the authority] to handle those issues. The Commission did not find a conflict of interest for [Board A matters outside the geographic location of her employer]. As to a conflict with [Board B], [Employee] did not identify any decisions made by her in her official capacity related to [Board B]. The agreement between [Board B and her employer] appeared to be more of a joint mission statement and did not reveal any potential conflict of interest.

After having established a conflict between [Employee’s] position with [her employer] and [Board A], the Commission next considered whether she could remedy the conflict through recusal. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are “routinely cured through abstention or recusal on a specific matter.” *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997) (*citing 56 Am. Jur. 2d Municipal Corporations § 172 (1971); Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960)). However, it also was recognized at common law that some conflicts cannot be

cured by recusal when government officials hold dual positions, regardless of sector. 63C Am. Jur. 2d Public Officers and Employees § 62, et. seq; Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers, 62 ALR 5th 67. As a result, some courts held that when recusal from participating in decisions was not a sufficient remedy, one of the jobs must be relinquished. *People Ex. Rel. Teros v. Verbeck*, 506 N.E. 2d 464, 466 (Ill. App. 3 Dist. 1987). The courts referred to those situations as having a “clash of duties.” *Id.*; See also, *O’Connor v. Calandrillo*, 285 A.2d 275 (N.J. Super.); *aff’d.*, 296 A.2d 324, *cert. denied*, 299 A.2d 727, *cert. denied*, U.S. Sup. Ct. 412 U.S. 940; *Sector Enterprises, Inc. v. DiPalermo*, 779 F. Supp. 236 (ND. NY 1991). That common law rule applied whether the individual held two government posts or a government post and a second job in the private sector. 63C Am. Jur. 2d Public Officers and Employees § 62. The *Verbeck* Court said banning dual positions under some situations “ensures that there be the appearance as well as the actuality of impartiality and undivided loyalty.” *Id.* (citing *Rogers*); See also, *O’Connor v. Calandrillo*, *supra*.

The Commission decided [Employee]’s dual roles with [Board A and her employer] created a conflict of interest which required her to recuse herself from making any decisions in her official capacity [involving both Board A and her employer]. The conflict existed whether it arose from her position as a Board member or as a member of the Executive Committee. Should any matters be presented to [Employee] which involved both [her employer and Board A], she should recuse herself from making any decisions about those matters and refer them to other officials who could serve in her stead. As far as recusal, she should recuse “from the outset” and not make even “neutral” or “unbiased” statements. *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). The Commission recommended when matters are discussed which required her recusal, she leave the room to avoid influencing her colleagues with body language or gestures.

Recusal would also be appropriate in the unlikely event she was faced with a situation in which she was asked to make decisions about [Board B] in her official capacity. No facts presented at the hearing indicated such an event would occur, but the Commission wanted to make her aware of the restriction should such a circumstance arise.

Although [Employee] was not able to identify any actual conflicts between the two organizations and her government employer, she acknowledged that it may be a possibility in the future. If such a situation presented itself, she would be unable to serve the interests of both her government employer and the private interests. Therefore, if [Board A] begins expanding their scope to include projects in [her employer’s jurisdiction], that would result in a clash of duties that no amount of recusal would be able to cure. In that instance [Employee] would have to relinquish her position on [Board A’s] Executive Committee and Board.

**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 ensure 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).

The fact that the goals of the government entity and the non-profit entities were not at odds with one another reduced the appearance of impropriety. To date, [Employee] had not been placed in a situation where working for one entity had been accomplished at the expense of the other. The appearance of impropriety was further mitigated by her ability to recuse. However, [Employee]'s recusal would not cure the appearance of impropriety caused by her witnessing documents between [her employer and either Board A or Board B]. The Commission recommended she did not act in that capacity as long as she was a member of either organization.

[Employee] should recuse herself from any matters involving [Board A and her employer]. There was no conflict of interest between [Employee]'s [official] duties and [Board A's] projects in [other jurisdictions]. The decision applied whether she acted as a member of the Board or the Executive Committee. There was no conflict of interest between her duties for [her employer] and her membership on [Board B]. To avoid an appearance of impropriety she should not witness documents between [her employer and either Board A or Board B].

**14-26 - Personal or Private Interest—School Board Appointment:** In July 2014, PIC received a letter from [a citizen] which referenced a conflict of interest regarding the appointment of [another person (X)] to a vacant school board seat. According to [the citizen], the appointment of [X] was the result of a personal relationship between [X] and [a member of the school board]. [X's child is involved in an extracurricular activity with the current school board member and their child]. The writer believed the appointment of [X] to the vacant board seat violated of the Code of Conduct's appearance of impropriety statute.

[The citizen] correctly referenced the appearance of impropriety provision of the Code of Conduct. 29 *Del. C.* § 5806. Also applicable, but not referenced in the letter, was the prohibition against reviewing or disposing of matters in which an official has a personal or private interest. 29 *Del. C.* § 5805(a)(1). The writer did not file a formal, notarized complaint as required by the court in *PIC v. Hanson*. 2012 WL 3860732 (Del. Super., August 30, 2012 (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013))). Therefore, Commission Counsel contacted [the school board member], made him aware of the allegations (while preserving the writer's anonymity), and asked if he wanted to seek an advisory opinion from the Commission. Commission Counsel recommended he discuss the issue with the school board's legal counsel. [The school board member] contacted Commission Counsel and advised he would seek the Commission's opinion without the assistance of the district's legal counsel. Commission Counsel further advised [the school board member] that all proceedings would be confidential unless the Commission determined a violation had occurred. In that circumstance, the Commission's opinion would be made public. [The school board member] stated he would still like to seek an opinion from the Commission, and he did not mind if the opinion was made public.

Under normal circumstances, the Board consists of five members. At the time of [X]'s appointment, the Board had four active members and one vacancy. According to statute, if a school board vacancy occurs for any reason other than the expiration of a member's term, the remaining board members may fill the vacancy after public notice. 14 *Del. C. § 1054(b)*. The Board posted the vacancy and received four letters of interest/resumes from interested applicants. After reviewing the qualifications of each applicant, the Board voted to appoint [X] to fill the vacancy at the [next] meeting. At the Board meeting, there were three members present with one member absent due to a death in the family. The Code defines a quorum as a majority of the school board, in this case three votes were required for the Board to act. 14 *Del. C. § 1048(c)*.

[The school board member] attended the Commission's meeting on September 16<sup>th</sup>. At the meeting he confirmed he [did know X through an extracurricular activity]. However, he denied voting for [X] on the basis of that acquaintance. [The school board member] stated the Board selected [X] to fill the school board vacancy because they had previously worked with her on projects for the school district. [X] and [the school board member] were members of [the same committee]. During that process, he was able to observe her professional qualifications and familiarity with the district's issues. He stated it was that working relationship and her qualifications which influenced his vote to appoint [X] to the Board. [The school board member] stated he didn't know [X] well enough to consider her a friend. When the Commission asked about the extent of their acquaintance, [the school board member] stated that he and [X] know each other but they did not socialize together. Upon further questioning by the Commission it was determined [the school board member] is not related to [X], nor does he have a financial interest in a business owned by her.

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

### **A. Personal Jurisdiction**

Members of Boards of Education fall within the definition of "State employee" and are subject to the State Code of Conduct. 29 *Del. C. § 5804(12)(a)(3)*.

### **B. Subject Matter Jurisdiction**

The Commission did not have jurisdiction over the election issues [raised by the concerned citizen in the] letter. Therefore, those matters were not discussed. (*Commission Op. 95-03*) (Commission has no jurisdiction over school board elections process). The Commission does have jurisdiction over the appearance of impropriety and personal interest prohibitions in the Code of Conduct.

**C. In their official capacity, employees 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 personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 *Del. C. § 5805(a)(2)*. Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

At common law and since its codification, Courts and this Commission have recognized that the provision covers a variety of relationships that may create a “personal or private interest.” See, cases cited in *Commission Op. Nos. 00-04 and 00-18*. Delaware Courts have held that under the common law, which has since been codified, the issue of whether the “personal or private interest” is sufficient to “tend to impair judgment” is an issue of **fact**, not of law as in § 5805(a)(2). See, e.g., *Shellburne, Inc. v. Roberts*, Del. Ch., 238 A.2d 331 (1967) (under common law, where complainant alleged government official had “personal interest,” and “conflict of interest” because of friendship and social relationships, and used public office in furtherance of such personal interest, court held determination was issue of fact); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (Court held that whether there was a sufficient personal interest to require recusal under the State Code of Conduct was an issue of fact). Thus, at common law and as codified, the conflict of interest provision permitted a consideration of whether a particular relationship was either sufficient to create a conflict or too attenuated to create a conflict. In *Jones v. Board of Educ. of Indian River Sch. Dist.*, the court found a board member’s acrimonious relationship with his son’s teacher constituted a personal interest when the board member voted to terminate the teacher. 1994 WL 45428 (Del. Super, January 19, 1994). See also, *Commission Op. No. 96-42* (improper for State employee to participate where brother-in-law would be affected by decision); but see, e.g., *Commission Op. No. 00-18* (allegation of “personal or private interest” that State officer would financially benefit from decision was too remote and speculative).

After considering the facts surrounding the nature of the relationship between [the school board member] and [X], the Commission decided [the school board member] did not have a personal interest as a matter of law. The Commission also decided that [the school board member]’s acquaintance with [X] did not substantiate a personal interest as a matter of fact. Simply knowing someone did not support a finding of a personal interest likely to affect an official’s judgment. The absence of a personal interest meant that [the school board member]’s official duty, voting to appoint [X] to the Board, was not affected by his acquaintance with [X]. The Commission then turned its attention to a consideration of whether [the school board member]’s vote created an appearance of impropriety.

**D. 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 ensure 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).

The Commission had previously held that in deciding if there is an appearance of impropriety because of an alleged professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75 (citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567 (1967))*. That holding is consistent with the Delaware Supreme Court decision which held absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the “appearance of impropriety.” It noted that appearances of impropriety claims have been criticized as being too “imprecise, leading to ad hoc results.” Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware, Del. Supr., 592 A.2d 436 (1991)*.

Taking into consideration its prior holdings and the totality of the circumstances, the Commission decided [the school board member]’s casual social interaction with [X] was insufficient to establish an appearance of impropriety when weighed against the following facts: (1) [the school board member] did not financially benefit from the appointment of [X]; (2) [the school board member] did not have a personal interest as a matter of law, nor as a matter of fact; (3) the number of absences at the Board meeting necessitated the participation of [the school board member]; (4) the only evidence the public construed the appointment of [X] as improper was a letter from [one concerned citizen] who had her own personal interest in the vacant school board position.

## **CONCLUSION**

The Commission decided [the school board member] did not have a personal interest that affected his vote to appoint [X] to the school board. The Commission also decided [the school board member]’s vote did not create an appearance of impropriety.

**14-24 Personal or Private Interest—Nepotism: Conflict found. The entire letter opinion is published, with the consent of the applicant, in order to provide public notice. 29 Del. C. § 5807(d)(1).**

**July 17, 2014**

### **14-24 Personal or Private Interest – Nepotism**

**Hearing and Decision By:** *William Tobin, Vice Chair (Acting Chair);  
Commissioners: Andrew Gonser, Esq., Lisa Lessner, Bonnie Smith*

Dear Mr. Lewis,

Thank you for attending the Commission hearing on July 15, 2014. You were accompanied by Robert Fulton, Superintendent of the Cape Henlopen School District. Based upon your written submissions and your comments at the hearing, the Commission determined you violated the Code of Conduct’s provision against reviewing and disposing of matters in which you have a personal interest when you voted on the contract renewal for the Cape Henlopen Support Staff Association, of which your wife is a member. The improper vote also created an impression of

impropriety amongst the public. As a result, this advisory opinion will be published to provide public notice that the matter has been addressed.

## **FACTS**

You are a member of the Cape Henlopen School Board. Your wife is employed by the same school district as a paraeducator and she is also a member of the Cape Henlopen Support Staff Association (Association). Since joining the Board in 2009, you have abstained from voting on any matter which directly affects your wife's employment. However, on September 26, 2013, the school board voted to accept a new contract with the Association. You were one of seven board members in attendance at the meeting and, despite the obvious conflict, voted to accept the contract. You justified your vote by explaining that four favorable votes had already been cast when you voted. You decided it was permissible for you to vote because with four favorable votes, the motion to renew the contract was already guaranteed to pass. Subsequently, it was brought to your attention that you should not have voted on the contract renewal because of your personal interest. You then wrote a letter to the Commission disclosing your conflict of interest and explaining the circumstances of the vote.

After receiving your letter, PIC received an anonymous telephone inquiry as to whether you had sent a letter and if it was acceptable procedure for a person to report themselves to the Commission. Subsequently, PIC counsel contacted you and you agreed to seek the advice of the Commission regarding your conflict of interest.

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

### **A. Personal Jurisdiction**

Members of Boards of Education fall within the definition of "State employee" and are subject to the State Code of Conduct. 29 *Del. C.* § 5804(12)(a)(3).

**B. In their official capacity, 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). You had a private interest in the contract renewal through your spouse. Obviously, endorsing a contract which benefitted the terms of your spouse's employment also benefitted you. Although the contract affected the employment of many other employees, your vote raised the specter of nepotism.

Delaware Courts have dealt with the issue of nepotism in *Prison Health Services, Inc. v. State*. In that case, a State employee was not even on the committee which would be making a decision about awarding an agency contract. However, he participated in a discussion about the contract, which was awarded a few days later to the company for which his spouse worked. No facts suggested that he or his wife would financially benefit from the decision, and the Court even

noted that she was “albeit, a low-level employee” in the company. The Court also concluded his participation was “indirect” and “unsubstantial,” but then held: “Undoubtedly [his] conduct was inappropriate, and he should have abstained from even this limited role.” See also *Jones v. Board of Educ. of Indian River Sch. Dist.*, 1994 WL 45428 (Del. Super, January 19, 1994) (Board member should not have participated in decision to terminate teacher when he had a personal interest).

Like the employee in *Prison Health*, you participated in a decision that impacted the employment of a close relative—your wife. 29 Del. C. § 5804(1) (“close relative” includes spouse). However, unlike the employee in *Prison Health*, you recognized and ignored the conflict of interest by voting to renew the Association’s contract. Whether your vote was a ‘deciding’ vote is beside the point. The code requires that you not review or dispose of matters in which you have a personal interest. Therefore, your vote was a violation of 29 Del. C. § 5805(a)(1).

In addition, your mere presence in the room when the vote was taken is problematic. You and Mr. Fulton both expressed surprise that you should not have been in the room. The case law makes clear that when there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). Therefore, your prior practice of abstaining from voting on matters involving your wife does not go far enough. You must leave the room any time the Board discusses or votes on a matter in which you have a personal interest. This is to ensure that your fellow Board members are not influenced by nonverbal cues such as gestures, etc. We are in no way insinuating you would engage in such conduct. You are entitled to a strong legal presumption of honesty and integrity. *Beebe*. We simply make you fully aware of the restriction so that in the future you can guarantee conformity with the State Code of Conduct.

**C. Officials 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).**

Nepotism will always raise suspicion amongst the public that decisions are being made which are contrary to the public trust. The specific purposes of rules against nepotism are identified below, with one reason for having anti-nepotism policies as a means of insuring against “nepotism and the appearance of nepotism.” *Nepotism in Public Service*, 11 ALR 4th 826. Rules against nepotism are meant to discourage favoritism; prevent emergence of disciplinary problems, inhibit personal and professional cliques in which the familial relatives side with each other. *Id.* (citing *Lewis v. Spencer*, 468 F.2d 553 (CA5 Tex, 1972); 369 F. Supp. 1219; *aff’d.*, 490 F.2d 93 (CA5 Tex., 1973); 490 F.2d 93 (spouses could not teach in same College Department). They allow for debate of issues at arm’s length rather than under any possible inhibition that might exist because of an intimate relationship. *Id.* (citing *Rosenstock v. Scaringe*, 387 NYS 2d. 716 (3d Dept., 1976), *aff’d.*, 357 N.E. 2d 347. Such close relationships are bound to have a deleterious effect on the morale of other employees. *Id.* (citing *Keckeisen v. Independent Sch. Dist.* (CA8 Minn., 1975), *cert. den.*, 423 U.S. 833). Such bars, generally, tend to make for better efficiency in public office. *Id.* (citing *Backman v. Bateman*, 263 P.2d 561 (Ut., 1953). Courts have said nepotism was recognized as “an evil that ought to be eradicated and stamped out”. *Id.* (citing *Barton v. Alexander*, 148 P. 471, (Id.,

1915). Forbidding nepotism expresses the State's strong public policy against nepotism and the appearance of nepotism in government. *Id.* (citing *Wright v. MetroHealth Medical Ctr.*, 58 F.3d 1130 (Ohio, 1995)).

The purpose of the code is to ensure 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 this 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).

Obviously, in this case, there was an actual violation of 29 *Del. C.* § 5806(a). Knowing it was improper, you voted on a matter in which you had a personal interest. As a consequence, at least one anonymous member of the public was suspicious of the conduct as evidenced by the phone inquiry received by PIC.

#### **D. Remedies**

You asked the Commission for an advisory opinion pursuant to 29 *Del. C.* § 5807. Under that section of the code, all requests for advisory opinions are to remain confidential. However, you stated you would be agreeable to making your opinion public, given the fact PIC has received inquiries regarding your participation in the vote. The publication of your advisory opinion will make the public aware that a violation has taken place, the violation was acknowledged by you, and you sought advice about how to proceed in the future.

The Commission could, upon its own motion, file a formal complaint against you. Upon a finding of a violation, after the appropriate hearing, the Commission could censure you. Typically, a censure is in the form of a public opinion. However, because of your willingness to allow the Commission to publish your advisory opinion, public notice will have already taken place. Therefore, there is nothing to gain by pursuing that course of action.

Finally, the Commission could, but has decided not to, refer the matter to the Attorney General's office for criminal prosecution under 29 *Del. C.* § 5805(f). The referral must be based upon a determination by the Commission that your conduct was "knowing and willful". Factors considered by the Commission in mitigation of criminal prosecution were: you reported the violation yourself; you agreed to seek the advice of the Commission; you agreed to publication of your advisory opinion. However, you should take notice that future violations of this subsection of the Code could lead to criminal prosecution.

#### **CONCLUSION**

The Commission has determined you violated the Code of Conduct's provision against reviewing and disposing of matters in which you have a personal interest which also created an appearance of impropriety. As a result, this advisory opinion will be published to provide public notice of the violation. Going forward, this opinion should provide you guidance on how to avoid future violations of the Code of Conduct.

To the extent neither you, nor Mr. Fulton, understood the full scope of recusal, you should be aware that our office provides free ethics training to State employees. A training session can be arranged by contacting our office.

Sincerely,

/s/ William F. Tobin, Jr.

William F. Tobin, Jr.  
Vice Chair (Acting Chair)

The Commission decided, and with Mr. Lewis' agreement, the opinion letter should be published in its entirety, so the public is aware Mr. Lewis addressed the issue with the Commission.

**14-21 - Personal or Private Interest—Owning a Private Business:** [Employee] worked for [a division of a State agency]. She was [a manager of a specific facility]. [The facility] provided the residents with [a variety of services]. [Employee] was responsible for the day-to-day management of the facility and did not provide [services directly] to the residents. Her primary duties included direct oversight of two supervisors and a [another employee]. She also indirectly supervised [16 other employees].

[Employee] owned a [private] business and she provided services on a part-time basis. Her State agency did not refer clients to [Employee]'s business. [Employee] received referrals from [other sources]. Her clientele primarily consisted of adults, but she did [provide services to one adolescent-aged] child. [Employee] wanted the Commission to consider whether her part-time work constituted a conflict of interest with her State position.

**A. State employees may not review or dispose of matters in which they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1) and (2).**

[Employee] did not provide [direct services in her State position]. She did occasionally discuss [matters] with [those] under her supervision. In her private business, the majority of her clients were adults. Therefore, it was very unlikely she would encounter a private client while working at her State job or that she would encounter a State client while working in her private business.

In the very unlikely event such a situation occurred, the Commission advised she would need to recuse herself from any involvement with the client. Recusal has been broadly interpreted. Under the law barring her from reviewing and disposing of matters in which she has a personal or private interest that may tend to impair judgment in performing her State duties, Delaware Courts have ruled that when such interests exist, officials should recuse "from the outset" and not make even "neutral" or "unbiased" statements on the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). Barring statements from the person who recuses is to insure they do not unduly influence their colleagues. Further, Courts have held that "mere presence" of the person with the conflict

may influence their colleagues. That is not to say she would do so. There is a strong legal presumption that she would not engage in such conduct. *Beebe*.

At the meeting, [Employee] indicated that if she were faced with a situation in which a State client (or immediate family member) were to seek her [private] services she would refer them to another [business]. At her State job, she may not review and dispose of a matter involving one of her private clients. Therefore, in the similarly unlikely event one of her private clients subsequently [became involved with her State facility], she would not be able to oversee [the matter]. As long as she continued to serve a [different] clientele, she should not encounter such a situation.

**B. No state employee may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee is associated by employment. 29 Del. C. § 5805(b).**

[Employee]'s business did not contract with the State and her clients were referred by other [sources]. Therefore, there was no concern she would attempt to assist her private business by representing it before her own agency. In her email request, and again at the meeting, [Employee] stated that she kept her State work separate from her private business.

**C. Officials may not engage in conduct that may raise suspicion among the public that they are engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government. 29 Del. C. § 5806(a).**

This is, in essence, an appearance of impropriety test. *Commission Op. No. 92-11*. The standard is if the conduct would create in reasonable minds, with knowledge of all 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*, 701 A.2d 825 (Del. Super., 1997). Given the facts [Employee] did not [provide direct services at her State facility] she provided [services] to a different demographic, and she made a conscious effort to separate her State job from her private work, it was difficult for the Commission to envision how the public's trust could be diminished by her part-time work as long as she recused as necessary.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. §5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated at the meeting that she provided private services in the evenings after her State work hours. That arrangement was appropriate. She was also reminded that she may not perform administrative tasks related to her private business during State work hours.

The Commission found that, under the circumstances presented, [Employee]'s private interest did not create a conflict of interest with her State position.

**14-18 - Conflict of Interest—Membership on a Professional Board:** [Employee] worked for [a State agency]. [Employee]'s duties were [managerial in nature involving policy decisions]. [The State agency] was a member of a professional organization. [Employee] had been asked to serve on the Board of Directors for [the organization] as a representative for the State of Delaware.

[The organization] was a not-for-profit, public-private partnership which worked to advance [various public safety issues]. The organization collaborated with federal, state and industry decision-makers to enhance safety for both the public and private sectors. Public and private officials who served on the board authorized services, set prices and establish policies while ensuring safety and regulatory compliance. [The organization] was aware that some of its Board members may have conflicts of interest and advised Board members to recuse as necessary. [The organization] developed a program which [promoted the public interest]. The State of Delaware paid dues of \$15,000 per year to be part of [the program] and the [organization]. In turn, Delaware had two representatives on the Board, one from the public sector and one from the private sector.

**A. State employees may not review or dispose of matters in which they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1) and (2).**

[Employee] stated he would not be paid for his participation on the Board ([the organization] would cover his travel expenses to attend Board meetings). The Commission has previously found that board membership is included in the definition of a private enterprise under the Code of Conduct. *Commission Op. No. 95-24*. The Code also identifies “non-profit” entities within the definition of “private enterprise”. 29 Del. C. § 5804(9). However, under the specific facts presented here, the Commission determined that the Board was more akin to a professional organization/association rather than a private enterprise.

[The organization] and [the State agency] worked collaboratively to share information and create strategies which [the organization used] to improve [the mission of the agency]. [Employee] stated at the meeting that his presence on the Board would benefit the State because [the agency] would be “plugged in” to the latest initiatives related to safety and technology. Membership on the Board would also benefit him in his role [as a State employee]. Several of the initiatives developed by [the organization] were adopted by the State as a means to increase [customer satisfaction]. While membership [in] the [program] cost the State \$15,000 per year, [the agency] was saving money by being able to reduce the amount of money spent on staffing.

[The organization] and [the State agency] shared similar goals and responsibilities. [Employee]’s position on the Board of the professional organization was consistent with his job duties. Therefore, the Commission did not feel his judgment would be negatively affected by accepting the Board position. Indeed, it appeared that his job description encouraged collaborative planning with private entities.

**B. No state employee may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee is associated by employment. 29 Del. C. § 5805(b).**

As stated above, the Commission did not believe that [the organization] was a private interest. [Employee] stated at the meeting that [the organization] encouraged Board members to be aware of conflict of interest issues. [The organization] permits Board members to recuse as necessary. Based upon his comments at the hearing, it did not appear that [the organization] would be submitting bids to Requests for Proposals (RFPs) issued by [the State agency]. However, it was impossible to speculate and predict the possibility of such an occurrence with complete accuracy. If such a situation should occur,

[Employee] was instructed to return to the Commission for further advice. The Commission may only offer opinions based upon concrete facts. 29 *Del. C.* §5807(c).

**C. Officials may not engage in conduct that may raise suspicion among the public that they are engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government. 29 *Del. C.* § 5806(a).**

This is, in essence, an appearance of impropriety test. *Commission Op. No. 92-11*. The standard is if the conduct would create in reasonable minds, with knowledge of all 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*, 701 A.2d 825 (Del. Super., 1997). [Employee]'s membership on the [the organization's] Board was consistent with his job duties at [the State agency]. He would be well situated to provide the State's input and perspective on a wide variety of issues relative to [his State duties]. Therefore, his Board membership was not a violation of the public trust but should enhance the public's trust and reflect favorably on the State.

Ordinarily, in deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. However, in this case, the Commission did not impose a similar restriction on use of State time and resources because he would be fulfilling the duties of his State job while also serving the Board.

The Commission decided that acceptance of the Board position would not create a conflict of interest with [Employee]'s State position. In fact, membership on the Board was consistent with his State duties.

**14-11 - Private Interest—Owning a Private Business:** [Employee] worked for [a Division of] the Department of State for 17 years. He was the manager [of a section in a particular Division]. His team raised public awareness [specific to the section and oversaw State property related to his section]. In April 2014, the Division adopted a new Code of Ethics which referenced situations which required the approval of the Division Director and the Public Integrity Commission (PIC). Among the prohibited activities were outside employment [in the same subject area as his State position]. After reading the new policy, [Employee] spoke to his supervisor who referred him to PIC.

[Employee] was also an accredited [professional related to his State position]. He and [another person] owned [a business which was run out of their home]. They did not contract with, or provide services, to the State. [Employee] stated his primary involvement in the business was limited to behind the scenes tasks such as bookkeeping. He usually did not interact with customers and if he did have contact with a customer, he did not disclose the nature of his State position. On one occasion [a customer was referred to his State Division regarding an item for purchase]. [Employee] and [the other person] stepped away from the transaction. [Employee] was asking the Commission to determine if his ownership of the business created a conflict of interest under the Code of Conduct.

**A. State employees may not review or dispose of matters in which they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1) and (2).**

[Employee]’s ownership of the [private] business constituted a private interest. “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 personal or private interest automatically exists if: “Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons.” 29 Del. C. § 5805(a)(2)(a).

While [Employee] owned a business involved in [a subject matter related to his State job] he did not contract with the State. Unless his business attempted to [conduct business with the State] the Commission found it difficult to see how his interest in a related area would impair his judgment in performing his official duties. [The other person involved in the business] did tread close to that line by referring a customer to the Division regarding the sale of a particular item. Even though that transaction appeared to be for the benefit of the State, and [the other person] removed himself from the transaction, they should not have mixed their private business with [Employee]’s State agency. The statute prohibits interests that “may” tend to impair judgment. Actual violations of the Code are not required; only the appearance thereof. *Commission Op. No. 92-11*; 29 Del. C. § 5806(a); 63C Am. Jur. 2d Public Officers and Employees ' 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict). By intermingling his private business with his State agency, [Employee] could raise questions related to his independence of judgment and should refrain from doing so in the future.

As to his State job, [Employee] was not involved in [a particular area of the business]. Therefore, he would not be in a position to steer a potential [customer] to his private business. That is not to say he would do so. He is entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

The Division’s newly adopted Code of Ethics appeared to be stricter than the State’s Code of Conduct. For example, [it prohibited all conduct in any way related to the worker’s State position]. While the State Code of Conduct prohibits private interests, which would negatively affect an employee’s judgment while conducting State business. 29 Del. C. 5805(a). Similarly, the Division’s Code of Ethics contained a general prohibition against conducting [any business related to the State job]. Whereas the State Code requires the same negative effect on an employee’s judgment discussed above. 29 Del. C. § 5805(a). In this case, the agency’s Code prohibits any activity which shares common characteristics with an employee’s State job, while the State Code prohibits activities which would affect judgment and the ability to perform the State job with impartiality and integrity. No facts indicated [Employee]’s ownership of the [private] business would have an adverse effect on his judgment in his State position. This Commission’s jurisdiction is limited to Title 29 Chapter 58 of the Delaware Code. 29 Del. C. § 5808(a). The Commission did not offer an opinion as to whether [Employee]’s private business was in violation of his agency’s Code of Ethics. However, under the facts presented to the Commission, it did not violate the State’s Code of Conduct.

**B. Officials may not engage in conduct that may raise suspicion among the public that they are engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government. 29 Del. C. § 5806(a).**

This is, in essence, an appearance of impropriety test. *Commission Op. No. 92-11*. The standard is if the conduct would create in reasonable minds, with knowledge of all 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*, 701 A.2d 825 (Del. Super., 1997). [Employee]'s business was not involved in [conducting transactions with the State]. The mere fact his business was in a field related to his State position did not violate the State Code of Conduct.

The Commission decided based upon the facts presented, [Employee]'s business did not violate the State Code of Conduct and declined to determine if the business was a violation of the agency's Code of Ethics.

**14-09 - Conflict of Interest—Insufficient Facts:** PIC received an anonymous letter alleging that [two State officers] had violated the Code of Conduct. Commission Counsel decided not to contact [the parties] until the Commission had first reviewed the letter and rendered a decision as to whether it set forth violations of the Code of Conduct. Specifically, the letter alleged violations of 29 Del. C. § 5806(b)(2)(3)(4). However, those subsections refer to the acceptance of other employment, compensation, gifts, payment of expenses, or anything of monetary value which are likely to result in preferential treatment, governmental decisions outside official channels, or have an adverse effect on the confidence of the public in its government. The attached documentation did not seem to be related to acceptance of any of those things. After reading the materials, it seemed likely the anonymous person believed that subsections 2, 3 and 4 related to the entire prefatory paragraphs (a) and (b).

In addition to their [respective assigned] duties, both [officers] were also members of [a group dedicated to a specific State interest]. [Both officers] were instrumental in arranging an [agreement with another entity] which would allow them [to embark on a mutually beneficial project related to their group interest. The agreement would award a large sum of money to specific citizens]. The [anonymous submission claimed the project] was "a scheme to give preferential treatment to a [specific] group of [citizens at the expense of taxpayers]". Additionally, it was claimed the [project] was being [handled] outside of official channels and being bolstered by introduction of legislation to sanction the process. The writer claimed the [specific citizens] had been given "preferential treatment" and alleged they were now "connected" and "have access to public officials willing to cut close (sic) door deals". The writer believed the conduct of the [two State officers] would have an adverse effect on other [individuals interested in the goals of the special interest group].

Since PIC received the anonymous letter, the [proposed agreement was put on hold].

**(a) Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government. 29 Del. C. § 5806(a).**

This is basically an appearance of impropriety test; no actual violation is required, only an appearance that the [officers] are violating a provision of the Code of Conduct. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997), *Commission Op. No. 92-11*. The letter alleged that [the two State officers] were engaged in activities which were in violation of the public trust and reflected unfavorably upon the State. The letter asserted the [agreement] was the result of backdoor negotiations and implied [the individual citizens] had inside access to the decision-makers. However, it did not set forth particular facts which led to that assumption. Conclusory allegations of conflict of interest without specific factual grounds are insufficient to state a claim. See, e.g. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995). Delaware Courts, in interpreting the Code of Conduct, have noted that there is a "strong presumption" of honesty in the actions of 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).

[Subsequent information] indicated the public was concerned with the lack of public review of the [project]. However, [the information] did not necessarily indicate the [officers] were engaged in conduct which was a violation of the public trust. It indicated a difference of opinion and a call for further review. Other than the [terms of the agreement], there was no indication the [individual citizens] were singled out for special treatment for reasons other than traditional [criteria used in this sort of project]. The Commission decided that the [allegations standing alone] did not qualify as an act in violation of the public trust. Without more information, the Commission did not find this provision of the Code was violated.

**(b) No state employee, state officer or honorary state official shall have any interest in any private enterprise nor shall such state employee, state officer or honorary state official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. 29 Del. C. § 5806(b).**

The letter alleged the [agreement] was the result of a personal or private interest between the [officers and the individual citizens]. The [State special interest group] was created by statute. The [group had multiple] members, all appointed by the Governor. Both [officers] were designated members of the Board pursuant to [statute].

The author of the letter alluded to the fact the [officers] had a personal or private interest in the agreement. Specifically, the writer alleged that the two [individual citizens] had inside connections with the [officers] which allowed them to receive preferential treatment. There was no denying the [terms of the agreement] were exorbitant. However, it was not clear from the letter if there was a connection between the [officers and the individual citizens]. Taking the [terms of the agreement] alone, without any corroborating facts, was not sufficient to conclude the [officers] were acting in conflict with their statutory duties. This was especially true given the fact neither [officer] was capable of acting without the approval of other board members. The presumed influence attached to their decision-making abilities was tempered by the fact there were other board members who agreed to [the agreement].

The Commission decided the letter did not allege enough facts to determine if a violation of the Code of Conduct had occurred. Counsel was unable to inquire further due

to the anonymous nature of the letter. The Commission expressed the hope that the writer would read the synopsis of the holding on PIC's website and assured the writer that any matters before the Commission are confidential.

**13-51 - Personal or Private Interest—Doctoral Dissertation:** [Employee] worked for [a Division] within the Department of Health & Social Services (DHSS) as a Psychological Assistant II in the psychology unit. As a Psychological Assistant, he developed mental health and behavior support plans for [agency] providers to implement. Implementation of the support plans aided his provider clientele in decreasing mental health and behavior concerns for individual clients. If individual clients did manifest problematic behaviors, the providers implemented supports developed by [Employee] to reduce the concerns.

[Employee] was also enrolled in a Doctorate [program at an institute of higher learning]. As part of his educational program he was required to complete a research dissertation. As part of the research for his dissertation, he would be interviewing [members of client agencies]. The focus of the dissertation was to "understand [client agency's] managers' perceptions of leadership qualities relative to self-determination/normalization for the individuals [they serve]." In essence, he was trying to determine if the managers perform their duties with any eye towards allowing the client to achieve their maximum potential or if they perform their duties from an administrative perspective. He believed the results could lead to better ideas for training and supporting managers. He would not be interviewing individuals receiving services; only managers (about 20) would be interviewed. The identities of the agencies and managers would not be disclosed. He had prepared consent forms for participation in the study for agency directors giving permission to contact the [client agency] managers, as well as consents for the managers [themselves]. The list of authorized provider agencies was listed on [his agency's] website; however, the contact information for the agency's directors and managers [of the client agencies] were not listed on the website. The directors' and managers names would be obtained from [his] office records. During the interview process, he would not identify himself as a [Division] employee he would identify himself as a doctoral student. If he was known by the director and/or manager through [his State position] he would stress the fact that he was doing the research as an educational student, not as a psychological assistant and that his position with the State would not obligate the manager's participation in the study.

**A. State employees may not review or dispose of matters in which they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1) and (2).**

The statute prohibits interests that "may" tend to impair judgment. Actual violations of the Code are not required; only the appearance thereof. *Commission Op. No. 92-11*; 29 Del. C. § 5806(a); 63C Am. Jur. 2d *Public Officers and Employees* ' 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict). [Employee]'s dissertation topic was separate and distinct from his State job duties. The fact that he would be interviewing [client agency] managers would not have an effect on the treatment programs that he recommended for [their] clients. Therefore, he would not be reviewing and disposing of matters in which he had a private interest while performing his official duties. However, [Employee] should not use his State position to obtain contact information for the [client agency's] managers. He should pursue public avenues of information to obtain the information.

**B. Officials may not engage in conduct that may raise suspicion among the public that they are engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government. 29 Del. C. § 5806(a).**

This is, in essence, an appearance of impropriety test. *Commission Op. No. 92-11*. The standard is if the conduct would create in reasonable minds, with knowledge of all 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*, 701 A.2d 825 (Del. Super., 1997). [Employee] indicated he would interview the [client agency's] managers at public libraries or other public locations. He would not interview them in their place of employment. Additionally, he stated that he would stress that involvement in the research was completely voluntary.

The Commission decided that it would not create a conflict of interest for [Employee] to pursue his dissertation topic by interviewing [client agency] managers that he sometimes has contact with in his State position as long as he did not use his State position to obtain information related to his research. He should also not use State time and resources to complete his dissertation.

**13-54 - Personal or Private Interest:** [Employee] worked at [a State facility] as a licensed clinical psychologist. The [facility] [was in a Division] under the Department of Services for Children, Youth and their Families (DSCYF). [The facility] provided residential treatment services to [a specific population]. [The agency's] staff reviewed mental health and substance abuse treatment information for all [of the clients] admitted to the program to coordinate their behavioral health care while at the facility. Specifically, [Employee] assessed [clients] at intake and made sure they received the appropriate therapeutic services. She conducted a couple of group therapy sessions and had a caseload of 2 or 3 clients for individual therapy. In addition to her counseling work, [Employee] was a resource for other counselors at the facility. She led weekly team meetings, directed staffs' development of each [client's] individual treatment plan, and consulted with staff regarding difficult clients. Once a [client] left the facility, she didn't usually have contact with them again but if they did call and ask for her, she would speak with them.

[Employee] had been asked to serve as an unpaid board member of a community based non-profit organization that provided services such as employment counseling, affordable housing and neighborhood revitalization, youth programs, GED programs, and life skills training. [Employee] would not be providing therapy at [the organization] and wouldn't be working with youth directly. DSCYF contracted with [the organization], but [the facility where she was employed] did not.

**A. State employees may not review or dispose of matters in which they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1) and (2).**

[Employee] would not be paid for her participation on the Board but the Commission has previously found that board membership is included in the definition of a private enterprise under the Code of Conduct. See *Commission Op. No. 95-24*. The Code also identifies "non-profit" entities within the definition of "private enterprise". 29 Del. C. § 5804(9).

While [her facility] did not contract with [the organization], it was possible [Employee] could have contact with a [client] at [the facility] that she knew from her involvement on [the organization's Board]. Should such a situation occur, the Commission decided she would need to recuse herself from any involvement with the [client]. Recusal has been broadly interpreted. Under the law barring her from reviewing and disposing of matters in which she has a personal or private interest that may tend to impair judgment in performing her State duties, Delaware Courts have ruled that when such interests exist, employees should recuse "from the outset" and not make even "neutral" or "unbiased" statements on the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). Barring statements from the person who recuses is to insure they do not unduly influence their colleagues. Further, Courts have held that "mere presence" of the person with the conflict may influence their colleagues. As a practical matter, she would not be permitted to be involved with the [client] through personal counseling, group counseling, or supervising their treatment by a different counselor. Otherwise she may tend to rely on information she learned about the individual from her involvement with [the organization] to make decisions about the [client] in her State capacity. That is not to say she would do so. There is a strong legal presumption that she would not engage in such conduct. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996).

**B. No state employee may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee is associated by employment. 29 Del. C. § 5805(b).**

[The facility] did not contract with [the organization]. However, [Employee]'s supervising agency, DSCYF, did. [Employee] was instructed to recuse herself from Board discussions related to her agency. However, the prohibition was only applicable to her agency. [Employee] was permitted to assist [the Board] with contract issues and grant requests involving other State agencies.

**C. Officials may not engage in conduct that may raise suspicion among the public that they are engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government. 29 Del. C. § 5806(a).**

The Commission decided that if [Employee] recused as necessary and did not represent [the organization] before her own agency, there would not be an appearance of impropriety. Additionally, she should not use State time and resources to accomplish duties associated with her Board membership.

**13-48 Personal or Private Interest:** [Employee worked for a Division of DNREC]. Her duties included, but were not limited to, regulatory compliance assurance and assistance, pollution prevention assistance, regulatory assistance and development, project officer for remediation at hazardous waste and solid waste sites, facility permitting, and technical reviews of engineering submissions from solid waste and hazardous waste facilities. [Employee] wanted to apply for a position [in her agency] as a project officer which would have oversight of a [private company]. [The private company] had three locations in Delaware. Each [location] operated independently within the conditions of the permit issued specifically to each [facility]. Although each [facility] operated under individual permits, they all reported to a central office in Dover. The Dover office was responsible for overseeing the three facilities and submitting reports to [her agency]. As a project officer,

[Employee] would be responsible for permitting oversight, permit modifications, compliance monitoring via both on-site compliance inspections and a review of submitted documents, and enforcement actions against [the private company]. She would also be responsible for attending meetings with [private company] officials.

Her sister worked at [one of the private company's facilities]. [The Sister] [worked in an area] responsible for regulatory compliance with [specific] operations. The bulk of her work concerned the [specific] conditions of [one of the private company's facilities]. Her main duties included [monitoring specific standards and measurements]. Duties that were required by [the facility's] permit, that was regulated by [the State employee's agency], were limited to recording monitoring data from inside the on-site buildings and maintaining [various] probes on-site. In the case of [the site which employed the State worker's sister], the current project officer indicated that letters and reports were sent directly from [that facility] but not by [the Sister].

As long as [Employee] did not work [at the facility which employed her sister], she could not foresee having any physical workplace interactions with her sister because each [location] had site-specific staff. If she worked as a project officer, she anticipated that she could make decisions which would impact regulations for all three [private company] facilities, including her sister's facility. However, at the hearing, [Employee] indicated that she did not have sole decision-making power at [her agency]. Most decisions made by her agency originated with her supervisors.

**A. State employees may not review or dispose of matters in which they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1) and (2).**

[Employee]'s familial relationship with her sister constituted a private interest. "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). As a matter of law, an interest which would tend to impair judgment is one where a close relative would receive a greater benefit or detriment than members of the same class or group. 29 Del. C. § 5805(a)(2). The definition of close relative includes siblings. 29 Del. C. § 5804(1).

[Employee] indicated that each facility operated independent of the other, with each facility having their own permitting and compliance requirements set by [her agency]. As a project officer for either of the two sites that did not employ her sister, she would not be working directly with her sister. A noteworthy distinction between the sisters' duties was that [Sister] was responsible for monitoring and compliance related to [one specific area] while [Employee]'s agency regulated [a different area]. However, [Employee] stated that decisions made by a project officer at one site could affect operations at all the other sites. Therefore, even if she did not work at her sister's site, she may make decisions which would affect [her Sister]'s work. She also qualified that statement by pointing out that she was not a sole decision maker. Changes in [her agency's] regulatory authority were made by her supervisors, and then only after a public comment period. Those changes would affect all of the facilities equally and would not affect her sister individually.

The Commission decided that if [Employee] were to work as a project officer overseeing [the private company], including [her sister's facility], there would not be a conflict of interest under the Code of Conduct. First, she would not have supervisory authority over her sister. Second, the regulatory authority of [her agency] could only be

changed after a period of public comment. Third, regulatory decisions made by [her agency] affected all of the [private company's] facilities equally. Finally, those decisions were made by her supervisors. Those four factors mitigated the danger that her judgment would tend to be impaired while she was reviewing and disposing of matters in which she had a private interest. If a situation occurred where she would be required to make a decision which would affect her sister individually, she should recuse.

Under the law, the scope of "recusal" has been broadly interpreted. When there is a personal or private interest, an official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). This is to ensure that co-workers are not influenced by nonverbal cues such as gestures, etc.

**B. Officials may not engage in conduct that may raise suspicion among the public that they are engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government. 29 Del. C. § 5806(a).**

This is, in essence, an appearance of impropriety test. *Commission Op. No. 92-11*. The standard is if the conduct would create in reasonable minds, with knowledge of all 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*, 701 A.2d 825 (Del. Super., 1997). The Commission discussed the fact that the danger of raising the public's suspicion was greater at [her sister's facility] than it was at the other two sites. Even though [Employee] would not have sole authority to make decisions which would affect her sister, it could appear suspicious to the public if they were aware of the familial relationship. However, as previously discussed, there would be a great deal of separation between her work and the effect it could have on her sister's job duties. That separation, along with the appropriate recusal, would serve to allay any concerns held by the public.

The Commission concluded that it would not be a conflict of interest for [Employee] to work as a project officer for [her agency] at [any of the private company's] sites as long as she recused herself appropriately. The need to recuse would likely be greater if she accepted a position at [her sister's facility] but it was not an impediment to her doing so. [Employee] was also instructed to contact the Commission for further advice if her, or her sister's, job duties changed.

**13-38 – Private Interest—State Employee:** [Supervisor] worked for the Department of Social Services (DSS) within the Division of Health and Social Services (DHSS). Her employee was a Social Worker. [Employee] determined eligibility for [a program]. [The] program encouraged parents to work by paying or subsidizing their childcare expenses. The daycare was selected by the parent based upon the geographic location of their home or work.

[Employee]'s mother owned a home daycare facility. The facility contracted with the State and received funds from DSS. According to one source, the daycare was originally in [employee]'s name and was later changed to her mother's name. [Employee] resided in the home where the daycare was operated and was the business' bookkeeper. [Employee] was submitting invoices to, and processing payments from, her own agency. Additionally, the childcare facility was monitored by DSS. [The monitor] provided PIC with

copies of correspondence documenting [employee]'s active involvement with the childcare facility. Additionally, [the monitor] said [employee] had tried to correspond with her about attendance and regulatory issues. [The monitor] told her she could not talk to [the employee] about the issues because it was a conflict of interest for [employee].

[Supervisor] was concerned about the conflict of interest and sought an opinion on behalf of DSS from the Commission regarding the propriety of her employee's conflict of interest. The agency was concerned about the exchange of monies between the employee's agency and her mother's business.

The Commission considered the applicable law. First, State employees may not review or dispose of State 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). Second, State employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). Third, State employees are not to deal with their own agency to ensure decisions by their colleagues and coworkers are not unduly influenced by another employee's connection to the private enterprise. [Employee] had a private interest in the daycare by way of her familial relationship with her mother. As a matter of law, an interest which would tend to impair judgment is one where a close relative would receive a greater benefit or detriment than members of the same class or group. 29 Del. C. 5805(a)(2). The definition of close relative includes parents. 29 Del. C. 5804(1). State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).

[Employee] attended the hearing with her husband. Also, in attendance were [the supervisor], [the monitor], and [a program administrator]. During the course of her official duties, [employee] met with clients, evaluated their income and determined their eligibility for aid. If eligible, [employee] provided the client with a list of childcare facilities (including her mother's facility) and asked them to choose one. The client told [employee] which childcare facility they had selected and [employee] entered the information into the computer. Thereafter, DSS directly reimbursed the childcare facility for the client's childcare expenses. [Employee] denied working with clients whose children attended her mother's daycare. However, she did verify that most of the children at the daycare were [the program's] clients. She also confirmed she was the bookkeeper for the daycare. She billed DSS for attendance, sent out flyers, and served as a substitute daycare provider. [Employee] said her mother did not pay her. The facility was monitored by DSS, [employee]'s agency. If there was a discrepancy about attendance, fees, etc., [employee] was the contact person for the facility. She admitted to contacting other employees in her own agency to resolve billing issues and provide documentation. [Employee] claimed she accomplished those tasks on her lunch break. When asked if she would be willing to stop working for the daycare, [employee] said she could pass the duties to her husband. She was informed that would not cure the conflict of interest.

After considering the facts, the Commission found [employee] was reviewing and disposing of matters in which she had a private interest as well as representing her private interest before her own agency. Additionally, she was engaging in conduct which would raise suspicion she was violating the public trust. The Commission decided she may not be involved with the daycare in any way. If she continued to act on behalf of the daycare, she would be subject to a formal complaint. If the Commission made a formal finding of a

violation, the Commission has the power to impose disciplinary sanctions up to, and including, termination.

**13-33 - Personal or Private Interest—Nepotism—State Employee:** PIC received information alleging an employee at [a State building] was in violation of the Code of Conduct. The reporting person would like to remain anonymous. [Employee] worked for Facilities Management within the Office of Management and Budget. The information alleged [employee] had direct supervisory power over his two [children]. One child, [X], was a full-time State employee. The other child, [Y], worked as a temporary State employee. According to the email, [employee] signed all of [X]'s timesheets. Counsel sent an email to [employee] to determine if he would like to seek the advice of the Commission. A response was sent by [employee]'s supervisor. The supervisor did confirm that two of [employee]'s children work in the same [building] as their father. After counsel discussed the potential issues with [the supervisor], he agreed to seek the Commission's advice on behalf of his agency. He also provided PIC with an organizational chart which documents the supervisory hierarchy.

In their official capacity, State employees 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). State 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 supervisor] appeared at the hearing with [a representative of the agency]. [The supervisor] contested the fact [employee] was signing his [children's] timesheets and brought copies to verify the timesheets were being signed by another supervisor. [X] was transferred to the [building] two months ago so he could be directly supervised by [someone in the same specialized field]. [Y] was now under the direct supervision of [another employee]. Both [people supervising X and Y] were of equal rank to [employee]. When asked who [X and Y] would report to in the event their supervisor was ill or on vacation, [the supervisor] stated they would both report to [a manager higher in rank than employee].

In discussion, the Commission expressed concern the employees assigned to supervise [X and Y] shared equal rank with [employee]. It was reasonable to assume their supervision of [X and Y] would be affected by their co-worker status with [employee]. Each supervisor would know that any decision they made regarding [X and Y] would come to the attention of [employee]. Depending on their relationship with [employee], the decisions made about [X and Y] could be based upon like or dislike of their father. Neither is permitted under the Code of Conduct. Of additional concern was the fact other employees in the department were aware of the familial relationship. Routine job assignments would spark speculation about the reasons certain employees were given specific tasks. Aside from damaging the operating efficiency of the department, it was damaging to the morale of the other employees.

The Commission decided three family members working in the same facility created an appearance of impropriety. The Commission recommended two of the three employees be transferred to separate facilities. The Commission also stressed that failure to remedy the situation could result in a formal complaint being filed against the agency. If the Commission made a formal finding of a violation, the Commission could require the transfers.

**13-19(A) - Personal or Private Interest – Unpaid Consultant Work—State Officer:** The applicant was a State Officer. He had a friend that was starting a business, which would create training programs for corporations and government agencies on leadership, management, employee development and crisis management. The Officer had been asked to write some of the curriculum, which he would do without pay. However, the new business wanted to credit the Officer in the marketing materials and include his current position. He said his initial reaction was to say “no.” The Officer emphasized that the marketing materials would list all of his prior employment and not just his current position. He stated he would not be part of any merchandising of the product and he would not be using State hours to do the consultant work. He also mentioned that the unpaid position may lead to employment with this company when he retired.

The Officer did not know if the product would be sold to any Delaware agencies, but it may be. He was aware that he could not be involved in decisions to buy the product if it were offered to State agencies because of the personal interest arising from his private association with the company owner and the potential for a future paying job. 29 Del. C. § 5805(a)(1). He also said that he would not solicit business from the State for the company, which is consistent with the restriction on State officers not representing or otherwise assisting a private enterprise before any State agency. 29 Del. C. § 5805(b)(1) and (b)(2). He did acknowledge that his validation of the training program was his “gift” to his friend’s new business. The Commission asked if he had considered only attributing the materials by name and omitting the Officer’s position. The Officer stated that he had but was concerned that it would appear he was trying to hide something. The Commission advised that the use of the Officer’s name and State position would create an appearance of impropriety as it may appear to the public as an official endorsement of the company/product. 29 Del. C. § 5806(a); *Commission Op. Nos. 95-36; 96-62; and 98-30*. However, it would be permissible for the Officer to author the curriculum for the private company as long as his name and position was not used.

**13-19(B) – Personal or Private Interest—Reconsideration Request:** [Official] appeared before the Commission on July 16, 2013, to seek advice about endorsing his friend’s business through use of his name and title in marketing materials. At that time, the Commission issued an opinion stating [the official] could not use his name or State title on any marketing materials related to the business for fear it would create the impression that he was leveraging his State position to benefit his friend. *See Commission Op. 13-19*.

On June 19, 2014, Counsel was present [when the official told a group of people that the Commission had approved the use of his name in association with his friend’s business]. Commission Counsel’s recollection was the Commission had ruled he could not use his name or State title as it related to his friend’s business. Upon returning to the office, Counsel conducted [a] ‘Google’ search and found [the official’s] biography on the [business’s] website. Counsel contacted [the official] that evening and inquired about the use of his name when the Commission had specifically said he could not do so. [The official] responded that he understood the ruling to be that he could not allow the use of his State title, but he could allow the use of his name for endorsement purposes. Counsel forwarded the prior opinion to [the official] to which he responded that after re-reading the opinion, he still believed that it allowed the use of his name but not the use of his State title. He then sent Counsel an email he received from [former Commission Counsel] after the July 2013, hearing in which the following statement appears:...”the Commission found that it would be improper for the company to use your name **and** current State job in any marketing materials...”(emphasis in the original).

[The official] then asked to meet with the Commission for reconsideration. He did not believe that the use of his name alone, without his State title, was problematic. He wanted the Commission to clarify its prior opinion.

The primary concern raised by the Commission during the last hearing was the appearance of impropriety which may be generated by [the official]'s perceived endorsement of his friend's business venture. The minutes from the June 17, 2013, hearing indicated Commissioner Dunkle asked [the official] if he had considered attributing the materials only by name and omitting the title. [The official] stated that he had but was concerned that it would appear he was trying to hide something. While there was a discussion about using only his name, the final decision of the Commission was he could use neither his name nor his State title in any marketing materials for [the business]. The concern was the marketing materials may make their way to Delaware where his name, even without his State title, was recognizable as a high-ranking State official. [The official] was not privy to the deliberations of the Commission after the hearing had ended.

[The official] updated the Commission on his friend's business. The business appeared to have drastically reduced its projected geographic scope. [The official]'s involvement as an advisor in the business had been limited to two hours of discussion over the past year. [The official] stated he could not understand the prohibition against using his name. In fact, he stated that if he were not allowed to use his name in his friend's marketing materials, he would retire from State service. He further stated the holding would be "draconian" in nature.

**A. The Code of Conduct bars officials from engaging in "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 29 Del. C. § 5806(a).**

As the purpose of the Code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treated this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, may still perceive that the official cannot perform their duties with honesty, integrity, and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

At the hearing, [the official] placed a great deal of emphasis on the fact he would not be paid for his role as an advisor in his friend's business. Compensation, or the lack thereof, is not a consideration in determining whether conduct creates an appearance of impropriety. If it was, State employees and officials would be permitted to engage in a whole host of prohibited conduct as long as they were not paid.

The Commission was taken aback by [the official]'s statement that he would retire from State service if he was not permitted to use his name for his friend's business. It was not clear what the [the official]'s intent was in making the assertion. However, the Commission set aside the comments and based their decision solely on the facts and the law.

Setting aside the issue of compensation, the scope of his friend's business appeared to have been dramatically reduced. At the time of the June 2013, hearing, [the official] indicated State agencies could potentially become customers of his friend's business. That fact played a major role in the Commission's decision to deny the use of

his name as well as the use of his State title. In Delaware, even without mention of his State title, the public would be able to associate his name with his State position. However, the circumstances had changed. There were no plans to contract with the State of Delaware or conduct any type of business in the State. In fact, he stated most of his friend's business dealings were conducted in Florida. After considering the change in circumstances, the Commission agreed that the use of his name, without his State title, would be unlikely to create an impression of impropriety. However, he was instructed that if his friend should start conducting business in Delaware, or even directing marketing efforts within Delaware's boundaries, he should return to the Commission for further advice.

**13-18 - Personal or Private Interest—Nepotism:** Applicant was a municipal Councilman. He appeared before the Commission accompanied by his wife. As one of eight Councilmen, applicant was elected for a two-year term. He was Chairman of one specialty board and a member of another. Applicant's son worked for the municipality and had worked there for 25 years. Because of his son's employment with the municipality, applicant had recused himself from voting on any matter directly related to his son. (i.e. pay raises, promotions). However, the Commission received a letter that stated applicant continued to vote on the municipality's budget, which included funds for his son's department.

The Commission had jurisdiction over the applicant because the municipality had not adopted their own Code of Conduct. *29 Del. C. §5802(4)*. Applicant confirmed that he did, in fact, vote on the budget. He explained to the Commission that the budget was presented by the Finance Committee to the council for a vote. Applicant noted he did not have specific input regarding the budget for his son's department. However, members of the council did not vote on each component of the budget separately, the whole budget was voted upon as a package. Therefore, if applicant voted on the total budget, he voted on the budget for his son's department.

Applicant's relationship to his son constituted a personal interest. *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)*. Through his votes, or even his influence, applicant had reviewed and disposed of matters in which he had a private interest. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center*. When asked if he could recuse from the budget vote, applicant said that if he did not vote on the budget, he would not be adequately representing his constituents. The Commission then inquired as to whether the budget could be voted on in separate components, allowing applicant to recuse from voting on the budget related to his son's department. Applicant did not know the answer to that question.

The Commission determined that if applicant recused himself from voting on the portion of the budget related to his son's department, he would no longer have a personal interest. He should also continue to recuse himself from any other matters involving his son's department. The Commission requested the opinion letter to applicant explain recusal not only required that he did not vote, but also that he did not remain in the room when any of the above described matters were being discussed. The Commission recommended that applicant follow-up with the municipality's attorney to determine if the

budget could be voted on as individual components. If it cannot be voted upon separately, he could not vote on the budget at all.

**13-12 and 13-13 Board Members Seek Full-Time State Position:** The Commission granted a waiver so they could remain Board members even though they had applied for the full-time position. The basis for the waiver is given in the opinion which by reference is incorporated into this synopsis. When waivers are granted, they become public records. 29 *Del. C.* § 5807(a).

**13-12 – Hiring an Honorary State Official in a Full-Time State Position**  
**Hearing and Decision by:** Wilma Mishoe<sup>3</sup>, Chair; Andrew Gonser, Esq., Vice Chair; Commissioners Lisa Lessner, Jeremy Anderson, Esq., and William Tobin

Dear Ms. Wisnauskas:

The Public Integrity Commission reviewed your request for an opinion on whether you could apply for the full-time position of the Executive Director of the Professional Standards Board (PSB), when you are concurrently a member of that Board. Based on the following law and facts, a majority of the Commission concluded it would grant a waiver to allow you to remain a Board member while being considered for the full-time position.

Under the Code of Conduct, appointees to State Boards and Commissions are “honorary State officials.” 29 *Del. C.* § 5804(6). In their official capacity, Honorary State officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing their official duties. 29 *Del. C.* § 5805(a)(1). You stated that you would recuse from any Board decisions pertaining to the hiring of the Executive Director. That recusal would resolve that conflict. As far as recusal, you should recuse “from the outset” and not make even “neutral” or “unbiased” statements about any applicant. *Beebe Medical Center v. Certificate of Need Appeals Board*.

In a prior decision, we held that while recusal by the applicant who was on the Board could cure their personal conflict, the difficulty with having a fellow Board member apply and remain on the Board, is that it could, at a minimum, raise suspicion among the public that the decision may not have been based on the merits, but rather on personal relationships arising from the collegial association of the other Board members; that as a fellow Board member, he could receive preferential treatment over other candidates; or that he was using his appointed position to secure a personal gain or benefit by parlaying the appointment into a full-time position. Commission Op. No. 97-34. It found that would be contrary to both the letter of the law which bars contact that may raise public suspicion, 29 *Del. C.* § 5806(a); that he used public office for personal benefit, 29 *Del. C.* § 5806(e). It also found it would be contrary to the spirit of the law—the purpose—which is to instill the public’s respect and confidence in its government. 29 *Del. C.* § 5802(1) and (2). As a consequence, the Commission held it would create at least the appearance of impropriety if he remained on the Board while seeking the full-time job and would not grant a waiver on the grounds that the literal application of the law was not necessary to serve the public purpose. *Commission Op. No. 97-34*.

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<sup>3</sup> The Chair abstained from voting.

However, that opinion also weighed the General Assembly's findings "that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 Del. C. § 5802(3).

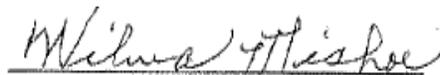
We weighed those two competing interests based on the particular facts of your case as they related to a waiver. 29 Del. C. § 5807(a). First, when a waiver is granted, it becomes a matter of public record. Thus, the public would know about your relationship to the Board, and other facts pertaining to your situation. It will also know that there are specific criteria for every applicant: 10 years experience as a professional educator in a public school system and 5 years experience as a classroom teacher in a public school. That lengthy term of experience helps ensure a level of expertise related to the duties of the job which include educator licensure, certification and professional development with a goal of improving the educator workforce and as a result, improve student achievement. That not only speaks to the merits of the candidates, but also narrows the field of who may apply. If Board members could not apply, it could further reduce the field. Moreover, it may unduly circumscribe their activities when they, by already serving voluntarily in a non-paid Board position that deals with educator's qualifications, have evidenced an interest in that field. We understand that all Board members apparently were encouraged to consider the job. That means you could be competing with other Board members, making it less likely that the remaining Board members would select you simply because you are a Board member because that single criteria would apply to any other applicant Board member. This helps ensure the remaining Board members who make the decision would have to use some quality beyond being a Board member to distinguish between the candidates.

Finally, as a practical matter, you were recently re-nominated (March) for a 3-year term. In effect, if we dictated that you leave the Board to apply for the job, which has an expected starting date of May 22, 2013, if you were not selected, you could end up being reappointed again to fill your own open position and serving anyway. Conversely, if you are selected as the Executive Director, you would be on the Board anyway, because the statute provides that the Executive Director serves as a non-voting Board member.

## **II. Conclusion**

Based on the above law and facts, we grant a waiver to allow you to continue to serve on the Professional Standards Board while applying for the position of Executive Director.

FOR THE PUBLIC INTEGRITY COMMISSION

A handwritten signature in cursive script that reads "Wilma Mishoe". The signature is written in dark ink and is positioned above a thin horizontal line.

Wilma Mishoe, Chair

**13-13 – Hiring an Honorary State Official in a Full-Time State Position**  
**Hearing and Decision by:** Wilma Mishoe<sup>4</sup>, Chair; Andrew Gonser, Esq., Vice  
Chair; Commissioners Lisa Lessner, Jeremy Anderson, Esq., and William Tobin

Dear Mr. Kenton:

The Public Integrity Commission reviewed your request for an opinion on whether you could apply for the full-time position of the Executive Director of the Professional Standards Board (PSB), when you are concurrently a member of that Board. Based on the following law and facts, a majority of the Commission concluded it would grant a waiver to allow you to remain a Board member while being considered for the full-time position.

Under the Code of Conduct, appointees to State Boards and Commissions are “honorary State officials.” 29 *Del. C.* § 5804(6). In their official capacity, Honorary State officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing their official duties. 29 *Del. C.* § 5805(a)(1). You stated that you would recuse from any Board decisions pertaining to the hiring of the Executive Director. That recusal would resolve that conflict. As far as recusal, you should recuse “from the outset” and not make even “neutral” or “unbiased” statements about any applicant. *Beebe Medical Center v. Certificate of Need Appeals Board*.

In a prior decision, we held that while recusal by the applicant who was on the Board could cure their personal conflict, the difficulty with having a fellow Board member apply and remain on the Board, is that it could, at a minimum, raise suspicion among the public that the decision may not have been based on the merits, but rather on personal relationships arising from the collegial association of the other Board members; that as a fellow Board member, he could receive preferential treatment over other candidates; or that he was using his appointed position to secure a personal gain or benefit by parlaying the appointment into a full-time position. Commission Op. No. 97-34. It found that would be contrary to both the letter of the law which bars contact that may raise public suspicion, 29 *Del. C.* § 5806(a); that he used public office for personal benefit, 29 *Del. C.* § 5806(e). It also found it would be contrary to the spirit of the law—the purpose—which is to instill the public’s respect and confidence in its government. 29 *Del. C.* § 5802(1) and (2). As a consequence, the Commission held it would create at least the appearance of impropriety if he remained on the Board while seeking the full-time job and would not grant a waiver on the grounds that the literal application of the law was not necessary to serve the public purpose. *Commission Op. No. 97-34*.

However, that opinion also weighed the General Assembly’s findings “that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed.” 29 *Del. C.* § 5802(3).

We weighed those two competing interests based on the particular facts of your case as they related to a waiver. 29 *Del. C.* § 5807(a). First, when a waiver is granted, it becomes a matter of public record. Thus, the public would know about your relationship to the Board, and other facts pertaining to your situation. It will

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<sup>4</sup> The Chair abstained from voting.

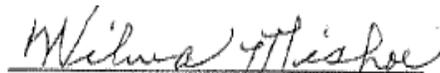
also know that there are specific criteria for every applicant: 10 years experience as a professional educator in a public-school system and 5 years experience as a classroom teacher in a public school. That lengthy term of experience helps ensure a level of expertise related to the duties of the job which include educator licensure, certification and professional development with a goal of improving the educator workforce and as a result, improve student achievement. That not only speaks to the merits of the candidates, but also narrows the field of who may apply. If Board members could not apply, it could further reduce the field. Moreover, it may unduly circumscribe their activities when they, by already serving voluntarily in a non-paid Board position that deals with educator's qualifications, have evidenced an interest in that field. We understand that all Board members apparently were encouraged to consider the job. That means you could be competing with other Board members, making it less likely that the remaining Board members would select you simply because you are a Board member because that single criteria would apply to any other applicant Board member. This helps ensure the remaining Board members who make the decision would have to use some quality beyond being a Board member to distinguish between the candidates.

Finally, as a practical matter, you indicated your 3-year term has expired. In effect, if we dictated that you leave the Board to apply for the job, which has an expected starting date of May 22, 2013, if you were not selected, you could end up being reappointed again to fill your own open position and serving anyway. Conversely, if you are selected as the Executive Director, you would be on the Board anyway, because the statute provides that the Executive Director serves as a non-voting Board member.

## II. Conclusion

Based on the above law and facts, we grant a waiver to allow you to continue to serve on the Professional Standards Board while applying for the position of Executive Director.

FOR THE PUBLIC INTEGRITY COMMISSION

A handwritten signature in cursive script, appearing to read "Wilma Mishoe", is written over a horizontal line.

Wilma Mishoe, Chair

**13-10 - Personal or Private Interest—Nepotism:** Applicant did not appear before the Commission, he was out-of-state. Rather than rescheduling, the Commission decided that the written emails submitted by applicant provided enough information from which to issue an opinion. The Commission may provide advice based on a written statement. 29 Del. C. § 5807(a). Applicant worked for the Division of Substance Abuse and Mental Health (DSAMH) within the Department of Health and Social Services (DHSS). DSAMH had an RFP for licensed professional staff, including the profession to which applicant belonged. Applicant was on the review panel for the RFP. Applicant's relative was a licensed professional and told applicant that he planned to apply for a position (or bidding for a contract) in response to the RFP. As soon as applicant received this information, he notified his supervisors. He told them that because of his relative's pending application, he

would need to recuse himself from the review panel. His request was granted. Further, applicant stated if his relative was successful in his contract bid, applicant would not have anything to do with the management of his contract, his reimbursement or the volume of his work.

The Commission moved to adopt legal counsel's advice to applicant. Applicant was instructed that the Code of Conduct bars him, as a State employee, from "reviewing or disposing of matters" in which he has a personal or private interest. 29 Del. C. 5805(a)(1). Additionally, he is also barred from "representing or otherwise assisting" his relative in responding to the RFP. 29 Del. C. § 5805(b)(1). As far as "reviewing or disposing of matters," he was no longer on the selection committee for the RFP. Therefore, he would not be reviewing or disposing of a decision to contract with his relative. Assuming applicant's relative was hired, then he would not be able to "review or dispose of matters" pertaining to him, e.g., supervision, etc. Applicant had already indicated he would not be involved in managing his relative's contract, work volume, etc.

**12-40 – Contracting with State Agency:** A State employee filed a disclosure because his private company contracted with a State Commission to provide services for an annual event. It is a condition of commencing and continuing employment with that State, that if a State employee has a financial interest in a private enterprise that does business with the State, they must file a full disclosure so it can be determined if there is a conflict. 29 Del. C. § 5806(d). The employee worked for a completely different Department from the Department under which the State Commission operated. Thus, he had no responsibility in his State job to review or dispose of the contract, or any other matters pertaining to that Commission. 29 Del. C. § 5805(a)(1). Also, because that Commission is under a totally separate department, he did not represent his private company before his own agency. 29 Del. C. § 5805(b)(1). The contract was for less than \$2,000, so it did not require public notice and bidding. 29 Del. C. § 5805(c). The contract was for \$700 and must reflect arms' length negotiations. *Id.*

Arms' length negotiations require that there be some distance between the contracting parties. The Code of Code aids in insuring arms' length negotiation by barring State employees from putting together a State contract and then awarding it to themselves (self-dealing) by barring them from reviewing and disposing of the matter. It creates further distance between the contracting parties by barring State employees from dealing with their own agency because their colleagues and co-workers may have their judgment impaired because of the State employee's affiliation with the contract. Finally, arms' length negotiations require that the contract reflect a fair market price. *Commission Op. No. 98-23 (citing Oberly v. Kirby, 592 A.2d 445 (Del. 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")*. Normally, when there is no existing State contract to provide the services, and the contract is a small amount, the agency contacts at least 3 sources to determine the market value. The Commission found there was no conflict as the private contract was disconnected from the employee's State job and duties; was a limited event; he filed a disclosure as required; and the amount was only \$700.

**12-38 – Outside Employment with a Company Doing Business with a Different Agency:** A teacher filed a disclosure on his part-time job with a private enterprise that contracted with a completely different State agency. 29 Del. C. § 5806(d). As the private

employer did not do business with his agency, he did not review or dispose of matters pertaining to the company's contract in his State job. 29 Del. C. § 5805(a)(1). At the private company, he would be involved in working with children, but none of them were his students. Thus, he would not have occasion to represent or assist the private company on either its contract or its clients before his own agency. 29 Del. C. § 5805(b)(1). He said he would not use State time or resources to perform his private work. He is entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). The Commission found there was no conflict, but that if his circumstances changed, he should seek further guidance.

### **12-37 – State Employee Request for Guidance on Recusing when Close Relative**

**Works for Vendor:** A State employee's duties included oversight of certain vendors who operated certain facilities. As a result of her State employment, she had known a particular vendor for more than a decade. Aside from that official connection, a close relative worked for the vendor in a second job that he held. The State employee approached him and had coffee to discuss a personal matter on which she was making a decision. The decision pertained to a matter unrelated to her oversight duties, but she thought he would be a good person to discuss the matter with because she was aware that he had some experience in that area. Later, she assigned one of her employees to oversee the review of his facility. She said she did so because there may be a perception of a conflict because of the close relative's affiliation with the vendor. Several of her employees reviewed the facility. An issue was raised that the vendor's facility would be approved because of her personal connection to it, not only because of her close relative's employment but because of the personal decision she had involved him in. He learned of that concern and they spoke about his license. She told him that in her review of her employee's evaluation of his facility that she saw no problems. She also contacted the person who had told him about the situation to discuss the matter. Later, he went to a senior level official and asked for a second review. The review was to be conducted under the supervision of the State employee's supervisor. The State employee said she was recusing. Subsequently, she was involved in discussions about when the 2<sup>nd</sup> review would occur; suggested a specific person who she supervised to assist her supervisor, etc., and engaged in other conversations about the matter. The agency directed her to obtain an opinion from the Commission regarding her involvement.

The Code bars State employees from reviewing or disposing of matters when they have a personal or private interest that may tend to impair their judgment in performing official duties. When a conflict exists, they are to recuse "from the outset." *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd* No. 304 (Del. January 29, 1996). The Commission decided there was a conflict because of the personal and private relationships, and she did not properly recuse because she continued to discuss and intervene in the matter.

**12-36 – Contract with a Different State Agency:** A State employee in one Department wanted to contract with another Department. She filed the disclosure required when a State employee wants to seek a State contract. 29 Del. C. § 5806(d). State employees may not seek a State contract of more than \$2,000, unless it publicly noticed and bid. 29 Del. C. § 5805(c). The contract was publicly noticed and bid. The State employee was a successful bidder, and the contracting agency was finalizing the agreement. The contract dealt with certain aspects related to federal funds. Her State work was not in any way

connected to the State contract or the federal funds. Thus, she did not, and will not, review or dispose of matters related to the contract. 29 Del. C. § 5805(a)(1). Also, a representative from the contracting agency confirmed that neither the contract, nor its substance, involved the State employee's office, or even her Department. As there was no connection to her agency, she also would not represent or assist her private company before her own agency, 29 Del. C. § 5805(b)(1).

She said she would not use State time or resources to perform her private work. 29 Del. C. § 5806(e). Specifically, in her State job, she already worked a shortened workweek (e.g., flextime) and would use that time, and evenings and weekends, to perform the private work. She is entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). The Commission decided there was no conflict of interest.

**12-31 – Contracting with One's Own Agency:** The manager of an agency's grant program sought an opinion on whether the agency could use grant funds for the cost of rental of equipment from a State employee who worked for the Division that issued the grant. The agency and a local government entered an agreement requiring the local government to provide certain services, e.g., volunteer workers, and provide some matching funds, in order to be entitled to the grant funds. In return, the agency would reimburse some expenses, and provide equipment for the project if the State equipment was available. Later, the manager received a reimbursement request for the equipment rental. The local government had collaborated with a non-profit organization, and it rented the equipment from the State employee while working on the project. It sought reimbursement not only for the days the equipment was used, but also for everyday it was on the site, even if it were not used. In evaluating how much to reimburse, and to whom, the manager noted that the check issued by the non-profit for the rental was issued to a Division employee. The manager had refunded a portion before he realized the equipment was rented from an agency employee. The amount already paid was more than \$2,000. The remainder also exceeded \$2,000. The Code bars State employees from accepting State contracts if the contract is for more than \$2,000 and is not publicly bid. 29 Del. C. § 5805(c). It was not publicly noticed and bid. The Code also bars State employees from representing or assisting a private enterprise on matters before their own agency. 29 Del. C. § 5805(b)(1). The manager did not want to make more payments until the Commission decided if it was a conflict for his Division to pay for the rental of equipment from one of its employees.

The manager said the employee knew this was an operation between the local government and his Division because he works for the Division on these types of grant funded projects. Also, the agreement required a sign at the location of the project saying it was funded by the agency's grant. He explained that the State had the type of equipment rented; that the particular type of equipment was vital for this type of project and gave some examples of why. The manager was not asked by the local government if it could use State equipment or rent from a Division employee and be reimbursed. He did explain that because of the way the project had to be managed, it required duplicate equipment; that there was a lot of effort involved in getting the equipment back and forth and if they had returned the rental while not in use, and obtained it again later, it would have created more work. He also said the State's equipment was not always available. Other reasons for having the equipment on site rather than returning it, when not in use, were weather issues and availability of volunteers who could operate it. He said it would be complicated

to return. They might return it thinking the weather would be too bad for use, but it might not rain, and the equipment would have to be returned. Or, they might return it thinking no one was available to operate it, but end up with a volunteer who could, and again it would have to be returned. He also pointed out that the State's equipment was purchased with federal funds. The federal funds were contingent on use solely for State projects. Thus, the local government's use would have been an ineligible use. The manager did say the local government realized they were assuming a risk of out of pocket expenses for the rental, up to the level of the local match of contribution funds. He believed the State employee has used his equipment for other projects and the non-profit had worked on prior projects with him. He believed the non-profit thought it could save money because renting from other places could be higher. He said this way was easy; convenient; and it would be available every day to them. Also, the manager did not call other possible vendors after the equipment was rented and reimbursement sought, to ascertain if the equipment could be rented elsewhere, and at what price, to ascertain fair market value. Id. He said that of the calls he made, some did not have that type of equipment for rent.

The Commission found that there were insufficient details on such things as how the non-profit selected the State employee to rent his private equipment. The agency was given options to consider: (1) get more facts from the State employee and the non-profit that rented from him; so it can be determined if: (a) there was a violation; or (b) if a waiver should be granted if there was a violation; (2) regarding whether further payments should be made, even if the Commission found a conflict, the Code provides that the agency—not the Commission--makes that decision; 29 *Del. C.* § 5805(g) or (3) file a complaint against the employee.

**12-31 – State Agency Request on Reimbursing one of its own State Employees on a Contract:** An agency previously sought advice on whether it was a conflict for it to reimburse a vendor for the costs it paid to an agency employee for his private company's subcontract work. The agency also asked if a conflict existed, would the agency have pay because of the contract language. At that time, PIC found it lacked sufficient facts to render a final decision on the conflict issue but did determine that if the contract had to be voided, PIC had no authority to do so. Rather, the statute specifies that only the agency can void the contract if it violates the Code, after it considers if innocent third parties would be injured by the decision to void the contract. *Commission Op. No. 12-31 (citing 29 Del. C. § 5805(g))*. At this hearing, the agency representative, the State employee, and a representative from the private company involved, appeared before the Commission to discuss facts related to the possible conflict. The employee's agency contracted directly with a contractor, who could then use other companies on certain work. The agreement provided that the agency could, in some instances, assist the contractor by letting it use some of its equipment, and also reimburse certain costs incurred in performing the work, whether done by the immediate contractor or others. In return, the contractor was to provide such things as matching workforce, etc. The contractor then brought in persons from a private company for the work. That company subcontracted with the State employee for use of his private equipment.

State employees may not review or dispose 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). The State employee worked in the section where he made decisions on whether certain State equipment could be used to perform the work under the contract. He stated that he privately contracted with the vendor because the State equipment was being

used elsewhere. He said he does not make the final decisions on such matters. The law bars not only disposing of the matter but reviewing the matter.

State employees may not represent or assist a private enterprise with respect to any matter before the agency with which the employee is associated by employment. 29 *Del. C.* § 5805(a)(1). "Private enterprise" means any activity conducted by any person, whether conducted for profit or not for profit. 29 *Del. C.* § 5804(9). The State employee said he knew his agency was involved in the funding of the work but said he did not know how much. He submitted an invoice to the private company for reimbursement. That company then sought reimbursement from his agency through the contractor. By submitting his bill for reimbursement, even though it was through the private company not directly to his agency, he was representing/assisting his private enterprise before his own agency.

Even if a State employee could deal with his own agency, for a State employee to contract for State funds, if it is more than \$2,000, it must be publicly noticed and bid. 29 *Del. C.* § 5805(c). It was not publicly noticed and bid. The contract was for more than \$2,000. Also, if a State employee has a financial interest in a private enterprise that does business with the State, they are to file a full disclosure. 29 *Del. C.* § 5806(d). No disclosure was filed. The State employee said that previously, when he was offered an opportunity to subcontract for a contractor that was directly doing business with his agency, he thought it would be improper and declined to do so. He said in this case he did not think it would be a problem because he was not contracting directly with the contractor with whom his agency had the agreement.

The Commission decided there was a conflict of interest because he was subcontracting with his own agency and even if he could contract with his own agency, the contract was for more than \$2,000 and was not publicly noticed and bid.

**12-31 - Conflict of Interest—Penalty for State employee contracting with own agency:** Pursuant to 29 *Del. C.* § 5807(c), an administrator for a State agency sought an opinion on behalf of the agency, he asked if it was a conflict of interest for an employee to lease his private company's equipment for use by his own State agency. The employee's private enterprise would then be reimbursed by his own State agency. The initial filing lacked sufficient details to establish "full disclosure" as required when seeking an advisory opinion. 29 *Del. C.* § 5807(c). *Commission Op. No. 12-31*, August 3, 2012. The administrator was given several options on ways he could proceed. Subsequently, the administrator and the employee, along with other parties involved in the project, appeared before the Commission to disclose the details of the employee's dealings with the other parties. After the details were obtained, the Commission found that the employee would be reimbursed by his own agency and it was contrary to the Code of Conduct. *Commission Op. No. 12-31*, February 7, 2013. The Commission advised the agency and the employee that PIC could decide if it would impose a penalty on the employee personally. PIC asked that it be notified of any decision reached by the agency so that PIC could factor in the results in making the penalty decision. *Commission Op. No. 12-31*, April 23, 2013.

The agency's administrator, the employee, and the other parties involved in the project reached an agreement to which the Commission was not a party. However, the agreement incorporated a reference to the Commission's finding of a violation. As part of that agreement the employee's private enterprise would not be fully reimbursed for the

equipment rental. The Commission accepted the penalty as a sufficient sanction and decided not to pursue any other action against the employee. 29 Del. C. § 5805(c).

**12-30 – Personal or Private Interest – Dual Government Positions:** A State employee asked if he could continue to serve on a State Board. As his State duties did not require him to be on the Board, he had a personal or private interest in continuing to serve. 29 Del. C. §5805(a)(1). He became a member while with one State agency and was now employed full-time in the State agency that regulated that Board. That could raise issues in two ways: (1) it may appear that in making Board decisions, he might, even inadvertently, base them on what he believed his full-time employer would want to insure job security rather than basing decisions on the merits; and (2) other Board members and/or the public may think his “inside” connection to the regulatory authority could be used to obtain advantage over those similarly situated in a “beneficial way” in the regulatory process. See, e.g., *Commission Op. Nos. 03-29; 02-22 & 02-23*. Also, appeals of certain decisions he would make as a Board member would be made to his full-time agency. That meant his full-time employer not only would regulate his conduct as a Board member; but his colleagues and co-workers would review his decisions on appeal. That could raise, at least, the appearance that his colleagues and co-workers might uphold decisions because of his connection to them, or they may lean too far in the opposite direction to avoid allegations of preferential treatment and thus fail to uphold a legitimate decision. Also, he gave an example where he had to recuse at a Board meeting because of his full-time State job. In describing that event, he said he was recusing and took a seat in the audience. He said he did not want to intimidate the Board members. However, he ended up telling the Board its plan of action was not legal, which was based on his knowledge from his State job.

First, Delaware Courts have held that where a Board member has a conflict, he should recuse from the outset and not make even neutral or unbiased comments. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). Second, although no harm occurred from his action it illustrated the difficulty in ascertaining whether he was acting as a Board member, a State employee, or a private citizen. See, e.g., *Commission Op. No. 02-23*. Third, the Board members could have been intimidated, or the public may think they were, or could be, intimidated because of his State position, and thus hesitate to be independent in their judgment. Aside from that, the Commission has ruled that where a State employee has State duties that conflict continuously with their Board duties, recusal would mean they either would be unable to perform their full-time State duties or their Board duties, meaning they were not giving their State duties precedence over their personal or private interest in serving on a Board. See, e.g., *Commission Op. Nos. 02-22; 02-23; 03-29*. The Commission is required to strive for consistency in its opinions. 29 Del. C. § 5809(5). The Commission found that he had a conflict that could not be cured by recusal.

**12-29 – Personal or Private Interest – Nepotism - Spouses Working in Same Agency:** A State employee worked in a senior level administrative position. Her spouse was on a State Board that regulated her agency. The Board made decisions about her salary, the budget for the office she headed, etc. In her State job, she routinely had other matters to handle that the Board became involved in, many of which occurred in executive sessions. She said if issues such as her salary arose, where she would have a direct financial interest, her husband would recuse. The Commission discussed the areas of her work that resulted in matters before the Board that were not direct financial interests because the

Code restriction on reviewing or disposing of matters where there is a personal or private interest applies to situations other than a direct financial interest. See, e.g., *Prison Health Services, Inc. v. State*, C.A. No. 13,010 (Del. Ch. July 2, 1993). (State employee should not have participated in discussion where wife's employer would be affected by the decision, although the Court noted she was a "low-level employee"). Recusal could be appropriate when no financial interest exists. See, e.g., *Harvey v. Zoning Board of Adjustment of Odessa*, C.A. No. 00-04-007CG, J. Goldstein (Del. Super. November 27, 2000) *aff'd.*, 781 A.2d 697 (Del., 2001) (would be prudent for Town officials to recuse when decision made by their spouses, who were also Town officials, was under review, but it would be impossible to get a decision if all 3 recused). She said if she had matters for the Board, she took them to her Supervisor, who brought them before the Board. She also said another employee presented her office's budget to the Board. However, she worked on the budget before it was presented.

The Code provides that a State employee or official may not review or dispose of matters where they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). Although her Supervisor took matters to the Board, she had worked on those matters which her spouse was in a position to review, e.g., the budget for her office, etc. Either she would have to cease performing her State duties related to all the matters she had been giving to her Supervisor, which were numerous, or her spouse would have to recuse from reviewing or disposing of the matter, limiting his effectiveness as a Board member. She had already ceased fulfilling one of her State duties—acting in her Supervisor's absence—because she would have to deal directly with the Board. Additionally, the conflict with her spouse created a conflict for her Supervisor, who reports to the Board. The Board hires, fires, etc., the person in that position. In fact, one reason her spouse wanted to be on the Board was so he would be involved in hiring the new Supervisor. Now, that person was the only barrier between their conflict. Her supervisor, like her, had a personal or private interest in his full-time employment. The public and her colleagues and coworkers may believe he would be hesitant to make a negative comment in evaluating her performance to avoid a problem with her spouse, who had a vote on keeping him in his job; conversely, he may hesitate to recognize her good work for fear it would be interpreted as preferential treatment because of her relationship with a Board member.

Regarding confidential matters that arise in which she was involved and which are considered in Executive Session, they assured the Commission they do not "talk shop" at home on such things as confidential issues that her spouse might not be entitled to know about, or matters that the Board would have to act on. However, the public may suspect that such discussions would occur, and no one would ever know. The Commission decided they had a conflict of interest because of their duties which required them to review or dispose of matters where the other spouse was involved, and that the multiple conflicts could not be resolved by recusal.

**12-29 Nepotism –Reconsideration:** PIC previously advised a State employee, whose spouse served on a Board directly connected to her State agency, that it would be a conflict for either of them to review and dispose of matters on which the other was involved. It concluded that because of the potential for multiple conflicts, recusal would not be a sufficient means of resolving the problem. They sought reconsideration of that opinion. While the Code, nor PIC rules, require reconsideration of advisory opinions, the Commission has done so in the past. The standard for reconsideration is Superior Court Rule 59. Rule 59 motions are to give an opportunity to correct errors. It is not a device for

raising new arguments. The motion will be denied unless a controlling precedent or legal principle was overlooked, or the law or facts that would change the outcome were misunderstood. *Beatty v. Smedley*, C.A. No. 00C-06-060 JRS, J. Slight III (Del. Super., March 12, 2004).

The only factual changes were that the agency was hiring an individual who would supervise the State employee, and that the Board member was now head of the Board. Neither fact changed the outcome: they both would be in multiple situations to review or dispose of each other's work. It was also argued that PIC had not held an evidentiary hearing, so it was alleged PIC lacked the facts to reach its conclusion. However, advisory opinion decisions, unlike complaints, do not require a full-trial hearing. Rather, the Commission can base its opinion on just a written statement. 29 *Del. C.* § 5807(c). However, it went beyond that. In addition to reviewing the State employee's written statement, minutes from Board meetings, and the agency's policy on conflicts, at the hearing both were given the opportunity to speak on the issues and respond to Commission questions. The law mandates that when an individual seeks an advisory opinion, they are to "fully disclose" the matter to the Commission. Thus, if facts were lacking, they needed to disclose those facts. As indicated above, the only new facts were that there was now a supervisor added to the mix, but the conduct regarding reviewing and disposing of matters still existed, as adding the supervisor only meant that the work performed by the State employee was still being done, only given to the Board through that extra layer. The result was the same. As far as the spouse now being head of the Board, that information was not raised by them but raised by Commission Counsel, and they then confirmed that was correct. They argued that having the spouse as the head of the Board did not mean more involvement than other members. They further argued that the State employee would *never* recuse because it was her State job to perform those duties. They believed if the head of the Board recused on certain issues, then the problem would be resolved.

They also disagreed with the Commission's interpretation of several Delaware cases. In one instance, it was argued that the Court had found there was not a sufficient conflict to overturn the State Contract. *Prison Health Services v. State*. However, PIC does not make decisions on whether a contract is to be voided, as under the Code of Conduct the State agency makes that decision. 29 *Del. C.* § 5805(c). It makes a decision on conflicts, and in *Prison Health*, the Court found that the State employee had a conflict because he participated in discussions pertaining to the contract when his spouse was employed by the company seeking the contract. The Court found that even though his participation was "indirect" and "unsubstantial" that it still was "undoubtedly improper" for him to have participated at all. In *Harvey*, the Court found that the marital partners reviewing each other's work did not have a financial interest in the matter, but still held that it would be "prudent" for them to recuse. However, as there was no means of having the decision made without their participation, the Court used the "rule of necessity" and concluded because the decision could not be made otherwise, their conduct was permitted. Here, the State employee had a direct financial interest in State employment, which included performing those duties, and the spouse would be rendering decisions based on the State employee's input. PIC asked if the submission of certain documents and the proceedings were sufficient factual evidence, their attorney responded: "I think it helps."

The Commission decided on the review of the motion for reconsideration and the presentation, including the additional facts submitted by affidavit, there was no mistake that would change the outcome of the original decision; that this was an advisory opinion and the applicant was required to fully disclose the details.

**12-25 – Personal or Private Interest:** A citizen filed a complaint against an official, alleging the official should not vote on certain land use variances because he owned property that complainant alleged created a conflict. Previously, the Commission dismissed the complaint on the basis that his property was not zoned like the one seeking a variance; that even if it were, when he reviewed and disposed of matters pertaining to such variances, those “matters” did not involve his own property; the variance pertained only to specified property held by another that was about 30 minutes away so his property was not even contiguous to the effected property; and that while she alleged he should recuse from all matters pertaining to such variances, complainant gave only that one particular example. She subsequently asked the Commission to consider the same facts but apply different legal definitions. The Commission decided that the facts did not establish that the legal definitions she wanted applied were correct as a matter of law because the definitions were clearly and specifically related to a law that was not pertinent to these allegations. Moreover, even if they were applied, it would not change the outcome of the Commission’s prior decision.

**12-24 – Conflict of Interest:** An appointee to a State Board asked under what circumstances she would be required to recuse from Board decisions if a matter pertaining to members belonging to her private company came before the Board. She had no particular circumstances on which the Commission could base an opinion. 29 Del. C. § 5807(c). She also indicated that when she did recuse, she still answered questions about areas with which her private company dealt. The Commission must base its opinions on a “particular fact situation,” and there were no particular facts on which to base an opinion. 29 Del. C. § 5807(c). However, she should be advised that when she recused, she should follow what the Court said in *Beebe*: recuse “from the outset,” and not make even “neutral” or “unbiased” statements. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996).

**12-23 – Personal or Private Interest:** A member of a State Professional Board asked if another Board member had a conflict because he had personally taken a position opposing a proposed change to the Board rules which the Board would have to consider. The Delaware Superior Court has upheld the process of allowing an official who is subject to the Code of Conduct, to seek advice on the conduct of another. *Post v. Public Integrity Commission*. The Commission has clarified that it will issue such advice if the applicant has sufficient information to allow for such decision. *Commission Op. No. 11-13*. The member was one of several members of the Board whose appointment required that they be, and remain, qualified in that particular profession. A change in the rule would impact on persons in that profession in one of Delaware’s counties. He worked in that county. The other two counties already had to comply with the change proposed for the 3<sup>rd</sup> county. Here, the applicant had minutes from Board meetings and a personal letter written by the Board member to his clients. The letter, over his signature, as a corporate officer, said his company and others were committed to making sure the rule did not pass. The letter was also used to attempt to recruit opposition encouraging people to write and enclosing a self-addressed stamped envelope. The Commission previously held that a local Board member who expressed his personal opinion on a zoning issue, and wrote to persons expressing his personal view, when he knew the matter would come before his Board, should recuse because he should not review or dispose of matters where he has a personal or private

interest. 29 Del. C. § 5805(a)(1). *Commission Ops. Nos. 07-05 and 07-42. See, 2008 Annual Report, Appendix C.* The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5).

At one Board meeting, the member handed out letters from people writing in opposition to the rule. This was not the usual procedure for getting input on rules and regulations and changes. The Board had announced the proposed rule change in the Register of Publications and gave the Board's official mailing address as the place to respond. Nothing suggested they wrote to individual Board members. In light of his letter to his clients, it appeared they wrote the letters pursuant to his request in his letter. There were additional discussions on several other occasions where he expressed his personal opposition. State officials are not to represent or assist their private enterprise before the agency to which they are appointed. 29 Del. C. § 5805(b)(1). The proposed change did not move forward but had come up again. The applicant asked if the Board member could participate in decisions on that rule. According to the applicant, the Board's attorney, told the Board member that he did not have a conflict. However, this Commission is the only entity authorized by law to render advisory opinions. 29 Del. C. § 5807(c); *See, also Ethics Bulletin 009 ¶¶ 6-8.* The issue was whether his conduct reflected a personal or private interest that may tend to impair judgment in performing his official Board duties, 29 Del. C. § 5805(a)(1); whether his conduct before the Board constituted representing or assisting his private enterprise before his own agency, 29 Del. C. § 5805(b)(1), or creates the appearance thereof. 29 Del. C. § 5806(a). The Commission decided that the member should recuse based on his statements that were reflected in the records of the Board, including the letter he wrote to clients which was given to the Board, and that he be notified and given the opportunity to dispute the findings of fact, if necessary.

**12-21 – Nepotism:** A State employee was responsible for regulating a private enterprise. According to her written request, her official duties were to ensure the private enterprise and its employees comply with applicable laws, rules and regulations. She was on-site all day observing the operation and the activities of employees. Her husband is privately employed by that private enterprise. He worked in an area that was heavily regulated by her State office. He worked the same hours as she did. She said she did not directly supervise him, but agreed he was involved in activities she regulated. Moreover, it was possible she could personally observe him acting contrary to the regulations. She said if she saw him engage in activities contrary to the rules and regulations, she would notify the supervisors/directors of the private enterprise. However, she also indicated that she and her staff do question employees on regulatory compliance, and conduct investigations regarding compliance.

A State employee may not review or dispose of matters where they have a personal or private interest that may tend to impair judgment. 29 Del. C. § 5805(a)(1). She said the private enterprise had 2 different departments that would react if she reported her husband. However, she also regulated those departments. She also said her State Office managers would have access to that information, so she did not directly make a decision. The statute does not require that the employee be the final decision maker, as it even precludes "reviewing" the matter. *Id.* She said she could transfer to a different shift if necessary. However, even if she changed shifts, she supervised all the State employees who would be observing and reporting any improper conduct by her husband, and she had access to all reports they prepare on any incidents. The Commission has previously ruled that delegation to those who work for, and report to, the person with the conflict, is generally contrary to the Code because it creates a conflict for that employee. It places them in a position where they may: (1) be subject to retaliation if the supervisor is not

pleased with their decision, or (2) receive preferential treatment from the supervisor if they act only as the supervisor desires. See, e.g., *Commission Op. Nos. 02-22 and 11-03*. The Commission is required to strive for consistency in its opinions. 29 *Del. C.* § 5809(5). The Commission found that it would be a conflict of interest even if she transferred to another shift because the only persons who would be making decisions about his conduct would be the employees who work for, and report to her, and that the only way to cure the conflict would be for one of them to work at a different location.

**12-18 – Nepotism** - A State employee had oversight of contractors in her State job. Her daughter had been hired by a company that contracted with her agency. Her daughter would perform work related to the State contract. She asked if she needed to recuse from contracts dealing with that company. Normally, she served on the contract selection panels, and this company had a bid pending. She removed herself from that panel pending the Commission's decision. As far as contract oversight, she worked with the Division Director, and others, to implement decisions. For example, if there was a change to a contract, she would be notified by the Division Director, or other appropriate authority. She would communicate those changes to her staff to put together the language and send it back to the program reviewers before it was sent out to be executed. The same thing occurred with invoices. As the vendor sent in the invoices each month, her contract, and fiscal staff, reviewed them and then processed the payment. She normally was responsible for signing off on anything over \$5,000. She was involved in making sure the contract and the payment match the program design. If she had to recuse, it be a little difficult because of her many years of experience with the contracts and the program design. She had oversight of the program, the contract, and the financial side, which made her experience unique in the agency. If she recused, there were 8 people on the panel, and they could decide without her. She understood that bids can become contentious, and a vendor might challenge her participation because of her daughter's employment. She agreed that if she participated, she would see how that company was doing financially versus its competitors, etc. She said that if she had to recuse, it would be a minimal amount. She would delegate it to her staff who would communicate directly with the Division Director, if there were any problems. The Commission decided that she should recuse from all matters related to the company, as she should not review or dispose of matters where she has a personal or private interest. 29 *Del. C.* § 5805(a)(1).

**12-16 – Personal or Private Interest:** A State employee participated in decisions to award contracts. He also heard appeals on contract decisions. His daughter had accepted employment with a firm owned and operated by the wife of the owner of a company that contracted with his agency. Also, the contractor's wife and his wife previously worked for the same firm a number of years ago. He asked if he should recuse from decisions about the husband's company. He said the company does not have many contracts with his agency, and that on those rare occasions that an issue might arise, his supervisor could take over. As far as having access to information on any bids from the husband's competitors, that would not occur because they were sealed bids, and no one knew the bid until it was announced at a public meeting. This was normally handled by a contract coordinator, who, if any issues arose, would report to the State employee's Supervisor.

State employees may not review or dispose of matters if they have a personal or private interest which may tend to impair judgment in performing official duties. 29 *Del. C.* § 5805(a)(1). They also may not improperly use or disclose confidential information. 29 *Del. C.* § 5806(f) and (g). The Commission decided that he should recuse from all matters

pertaining to the husband's company, and not improperly use or disclose information pertaining to the bids of other contractors, and he was entitled to the strong legal presumption of honesty and integrity that he would not engage in such conduct. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996).

**12-12 Personal or Private Interest:** The head of a State agency asked if it would be a conflict for one of her employees to be involved in a Memorandum of Agreement (MOA) with a private enterprise, when the employee also had a part-time job that entity. The employee was not involved in putting together the MOA. The MOA had nothing to do with the employee's part-time job, and she would not in any way benefit from the MOA. Her duties were that pursuant to the MOA, she would issue checks to, or accept checks from, the entity based on an amount specified in the MOA for a specific event, involving a specific number of people. Thus, she could not affect the amount received from, or paid to, her private employer. Because her official duties were assigned with certainty, with no room to deviate, it was a ministerial action, and a conflict could not arise because the official's judgment could not be impaired—a necessary element. A "matter" is "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Commission Op. No. 00-18 (citing Darby v. New Castle Gunning Bedford Education Assoc., 336 A.2d 209, 211(Del., 1975))*. The Commission found that because she had no personal or private interest in the MOA, and as her duties were ministerial, she could perform the duties that pertained to the MOA.

**12-07 – Personal or Private Interest:** The Commission had previously ruled that an official should recuse from certain local government matters because of his personal interest due to property ownership and his personal involvement in certain actions to which local ordinances would pertain. The official sought clarification on whether he could participate in discussions pertaining to an ordinance that would apply across the board to the entire City, not just the areas where he had a personal or private interest. He said if the discussions should turn to a narrower focus and specifically target areas where he had a personal or private interest, he would recuse or come back to the Commission. The Commission found that he could participate in the discussions as long as they did not target the area where he had a conflict.

**12-06 – Personal or Private Interest: Prior Board Membership -** A local official asked if another local official had a conflict in acting an ordinance because of a past position as a Board member of private enterprise that had taken positions on government issues. The official had not been a Board member for almost a year, meaning no fiduciary duty of loyalty had existed in all that time. No facts were presented indicating the official still had any personal or private interest in the organization, and no facts were presented that showed that as a Board member, the official participated in decisions related to taking any position on government issues. The Commission decided that no advisory opinion be issued, as there was not "full disclosure."

**12-04 - Personal or Private Interest - Property Ownership:** A local official asked for an opinion concerning the conduct of another official. Courts have upheld a decision where one local official sought an advisory opinion on the conduct of another. *Post v. Public Integrity Commission*. However, in a later decision, the Commission held that the

requesting official had to be able to provide “full disclosure,” as occurred in *Post* for it to issue advice. *Commission Op. 11-13 (citing 29 Del. C. § 5807(c))*. Here, the requestor knew the pertinent facts pertaining to one issue—that the other official owned properties that would be directly affected by an ordinance that was to be considered. Those facts were independently confirmed by Commission’s Counsel. An official may not review or dispose 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)*. It was also alleged that the official was a Board member of a private enterprise that had taken a position on certain government issues. Again, that information was independently confirmed. The requestor did not know if, as a Board member, the other official had participated in decisions pertaining to a corporate position on the government issues. The Commission decided that the requestor, and the official on whom he sought an opinion, be notified that the Commission has held that being a Board member creates a fiduciary duty that may raise a conflict of interest. See, e.g., *Commission Op. Nos. 02-22 and 02-23*. However, without full disclosure on whether the official participated in Board decisions pertaining to positions on local government issues, advice cannot be provided on that issue; however, the local official can request his own opinion about that potential conflict. It was also moved that because of the financial interest in the properties that would be affected by the ordinance decision, that the requestor and the official/property owner be advised that the owner should recuse. Further, the official with the property should be advised that he may need to recuse on future discussions that could impact on his property, but he was free to seek advice from the Commission on those issues.

**12-01 – Personal or Private Interest - Future-in-Law:** State employees may not review or dispose of State 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)*. A State employee was engaged, and the future spouse’s father was a 50% owner and silent partner in a private enterprise that did business with the State employee’s agency. The fiancé had no interest in the company: did not work there; had no present investment interest; etc. It was one of a few companies that contracted with the agency for a particular service, and the State employee’s duties included selecting which company will provide the service. Notice of the work to be done was sent to all companies and then they send in unsealed bids. In about a 3-year span, the State employee had selected a company twice. Other selections were made by other employees for about a total of 10 contracts. Those employees could make the decision if this employee must recuse. The contracts were very competitive, and some contractors already ask to see the selectee’s bid to see why they were not chosen. The employee asked if recusal was appropriate on those relatively few decisions. Additionally, the future in-law’s company was one of more than 20 companies certified to perform certain work if the Agency found a problem when inspecting. The State employee was one of the inspectors. After a problem was identified, the company with the problem decided what certified vendor to use. The State employee was not involved in that decision. It was strictly up to the company needing the vendor. Her agency did have a list of certified vendors. Once the company had the problem corrected, the vendor notified the agency, and submitted any required paperwork. When the paperwork came in, the case was closed. No close out letter was sent. No inspection to see if the work was properly performed was conducted, as the vendors were certified. Thus, she did not in any way deal with the vendors. The issue was whether recusal was needed since the State employee did not select the vendor, did not follow up on their work, and merely closed the case. Where a State employee has a purely ministerial duty, it does not require judgment. *Commission Op. No. 00-18*. Another issue was whether any restrictions in these 2 work areas apply at present, or if they would not apply until after the marriage.

The Commission decided that the State employee needed to recuse on those few occasions where one of the few vendors was being selected to perform the work for the agency, and it was recommended that sealed bids be submitted, or other measures taken so the State employee did not have access to competitors' bids, to avoid even an appearance of impropriety, such as misuse of confidential information. 29 *Del. C.* § 5806(g). As far as the inspection work, if a list of certified contractors was provided, the State employee may not opine on it or give any recommendations, even if asked. The restrictions should be applied immediately, rather than after the marriage.

**11-57 - Personal or Private Interest:** 29 *Del. C.* § 5805(a)(1). A local official sought an advisory opinion after it was publicly suggested he had a conflict. It was assumed he did business with an applicant appearing before him and received a product at reduced rates. The official said on two separate occasions, once about 20 years ago, and again about 2-3 years ago, he did buy a product from the individual, but he paid the full market value. Moreover, he had no financial interest in the work done by that individual under independent contracts. He said he bought products from that individual because he went through a State agency who gave him that name as a source, on both occasions. He said he is not close personal friends with the individual, e.g., socializing, etc. However, he did call him by his first name because it's not uncommon for an older man to call a younger one by their first name, and that they just do not stand on such formalities in the types of businesses that use those particular products.

The Commission dismissed the allegations for failure to establish facts sufficient to support a claim that the official had a close personal and/or business relationship with the applicant.

**11-38 – Personal or Private Interest – Board Member –** An appointee to a State Board was privately employed as a senior level employee for a corporation that had corporate clients. The corporate clients were subject to laws administered by her State Board. They paid dues to her private company, and its Board of Directors was comprised of persons from their corporate clients. A corporate entity, which was not a client of her company, appeared before her Board, on a regulated matter. Her private company had not taken a position, but one of its corporate clients was opposed to the matter. Advocates for the applicant corporation told her company that she should recuse. She did so, but subsequently asked for an opinion on whether she would have been required to recuse. She also asked if she must recuse if a corporate client of her private employer appears before the Board, when her employer had not taken a position. She, and the company CEO, did not believe she should have to recuse unless the company took a position. They pointed out that the Board's enabling statute required them to designate an appointee, subject to the Governor's appointment, and by law that appointee could not provide the types of services provided by entities regulated by her State Board.

The State employee did not have a personal or financial interest in the corporate client that opposed the applicant; would not financially benefit from the decision; was not an employee, or on the Board of Directors, of any of her company's corporate clients. 29 *Del. C.* § 5805(a)(1), (a)(2)(a) and (a)(2)(b). Her private company's Board had taken a position only once on a matter related to the State Board. Unanimous consent was required for it to take a position. The Commission found that she would not have been required to recuse from the application hearing because she had no personal or private

interest in the application or in the corporate client that opposed it, as far as a personal or private interest arising from her employment, her employer is not subject to the State Board laws; did not take a position on the application; rarely took such a position; and the statutory structure worked to limit the possibility of a conflict based on the particular facts of this case.

**11-33 – Personal or Private Interest:** A local government official had issues raised about his participation in two matters and subsequently sought advisory opinions on both issues. In an unsworn complaint, it was alleged that he had a personal or private interest in the decision because complainant believed he owned properties that are zoned like the ones on which he voted. From that belief, complainant thought he had a conflict of interest in voting on any property so zoned. The statute requires sworn complaints. 29 Del. C. § 5810(a). The official said that although the complaint was not sworn, he would like to address the issues and obtain an advisory opinion. He presented documents from the local zoning office showing his property was never zoned like the property in the decision he voted on. They were not only zoned differently, but the sizes of lots, setbacks, etc., were different depending on that zoning. Also, as a matter of law, the local ordinances showed the zoning laws were different, with the properties treated differently. The County tax records showed his properties were zoned different from the matter considered.

Complainant pointed to a specific decision, he participated in. Again, the allegation was based on the belief that the properties were zoned the same. The tax records showed they were not. Beyond that, he had no financial interest in any properties zoned that way and no financial interest in the owner's company 29 Del. C. § 5805(a)(2)(b). Further, what occurred on the re-zoned property did not impact the official's properties, so he would not experience a financial benefit or detriment because of the decision. 29 Del. C. § 5805(a)(2)(a). The properties were miles apart. The Commission dismissed the complaint pertaining to the allegations that the official owned property zoned like the properties in which he participated in the decisions, because as a matter of law, as a matter of law, and fact, they were not the same, and no facts showed he had any other personal or private interest.

**11-27 Personal or Private Interest:** State employees may not review or dispose of matters if they have a personal or private interest in the matter which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). A State employee asked if he could rent a house to a State employee in his own agency. The requestor is not the direct supervisor, but he did supervise the employee's supervisor. The requestor had oversight over certain statewide aspects of enforcement and compliance, and the prospective renter had oversight of the enforcement and compliance in a more local area. Both would have a personal or private interest in the rental transaction. 29 Del. C. § 5805(a)(1). Both would be required to recuse from matters pertaining to each other. *Id.* However, as the requestor made all decisions about their area of enforcement and compliance, even if the requestor did not deal directly with the employee, his decisions would affect the employee's duties. Also, part of the requestor's duties involved dealing with complaints on how the local area operated, which could put him in direct contact with the employee. Other duties also could result in such contact. The Commission previously ruled where a State employee and someone she supervised wanted to go into business together, that there were many potential conflicts and ruled that they could not enter a business together, in part, because of their supervisor/employee positions in their State jobs. *Commission Op. No. 09-29.*

The requestor said he did not deal with the prospective renter outside of work. The prospective renter and his family lived around the corner from him. The employee learned about the fact the requestor was looking for a renter through a personal conversation with him at work. When asked if there were any shortage of other potential renters, the requestor said he had not yet advertised it. He said if the Commission found even an appearance of a conflict, he did not see a problem finding another renter. The Commission found that the situation could create, at least, an appearance of impropriety.

**11-23 - Personal or Private Interest – Private Employment:** A State employee asked if he could accept a paid position with a company that received grants from the Division he headed. He previously worked for them “gratis.” He said he now understood a possible conflict could exist even if he were not paid. He said he recused on matters pertaining to any company he worked for and that his deputy made those decisions. However, he admitted he knows the contents of their grant applications. He explained the grant process pointing to the fact that advisory panels have public hearings during part of the consideration of grant applications. However, the agency’s rules on the process result in only advice to him as the Division Director. He was tasked with the final decision and the dispersing of funds. The Commission noted to him that it previously ruled that when a superior tasks a subordinate with performing duties the superior cannot perform because of a conflict, it creates another conflict because the subordinate may fear making a decision that the supervisor will not like because of a personal interest in keeping their job. *Appendix B, 2002 Annual Report, Commission Op. No. 02-23.* Also, the supervisor was in a position to show preferential treatment to that employee. *Id.* The applicant said he could ask someone in another Division to act for him. However, if he recused, he would be giving up a critical part of his State duties. Delaware Courts have held that as between a personal or private interest and State duties, the State duties must command precedence. *In re Ridgely*, 106 A.2d 527 (Del. 1954).

He asked if a conflict existed that a waiver be considered. For a waiver to be granted, there must be an “undue hardship” on the State agency or State employee. 29 *Del. C. § 5807(a)*. No information from the agency, which was aware of his request, suggested an “undue hardship” on the State agency. The Commission decided a conflict existed, or at least the appearance thereof, and the facts did not establish an “undue hardship” on the employee or the agency.

**11-19 Complaint – Personal or Private Interest:** The Commission previously issued an opinion advising an official to recuse from certain matters and inform the necessary persons in the organization of the Commission’s advised restrictions. The Commission received information that recusal, and informing the agency of the restrictions, did not occur. The Commission notified the attorney assigned to the agency of the concerns and asked him to communicate with the official to obtain information that would indicate compliance and explain the failure to recuse. The letter provided 30 days to respond.

**11-14 – Personal or Private Interest--Investment/Board Member:** In her private capacity, requestor was a stockholder in, and Vice President of, a private company. The company sometimes dealt with clients who qualify for assistance under a federal program managed by her State agency. She was not sure if she was required to file a disclosure because she was not sure if the contact between the private company and her agency was sufficient to make it fall into the category of “doing business with the State.” The private

company did deal with another section of her agency on at least an annual basis as it pertained to a federal program that other sections of her State agency handled. She was not involved with those matters. However, it was possible that some of the company's clients may come to the section where she works regarding hearings on the federal program. Hearings are held each quarter. She never participated in those matters if it involved a company client. Thus, in her State job, she did not review or dispose of matters where she had a personal interest. 29 Del. C. § 5805(a)(1). Regarding the periodic interaction between other sections of her agency, and the private company, all day-to-day matters were handled by other employees in the company of which she is a Board member. She said the Board normally met once a year. She said it was possible that one of the employees might brief the Board on matters pertaining to the Federal program administered by her agency. However, she said she could recuse from participating as a Board member if anything pertaining to her State agency arose. Thus, she would not be representing or otherwise assisting the company before her own agency. 29 Del. C. § 5805(b)(1). The Commission recommended that to avoid a conflict, she should continue to recuse in her State job on matters related to her company/its clients; and also recuse from Board meetings if an issue on the federal program arises.

**11-05 – Prior Private Employment:** A State employee was recently hired as a Division Director at a State agency where he had worked a little over 2 years ago before leaving the State for the private sector. In his new job, he heads the agency staff which normally provides a legal position and course of action to the regulatory body.

Prior to this position, in the private sector he worked for a regulated industry subsidiary outside the State of Delaware. His employer had contributed stock funds to his 401(k). He is disposing of that financial interest. While working for the company he never represented it or any of its subsidiaries before his current agency. He did appear before a similar regulatory body in another State. There would be no actual case proceedings that he dealt with in that position that would come before his agency. However, he did provide legal advice on one matter where a similar type issue is likely to come up before his agency. He will recuse. He also said he handled certain similar regulatory matters out-of-State but the out-of-State decisions were based on the laws, rules and regulations in that State and on the particular case, and any Delaware agency decision on the regulatory matters would be based on Delaware laws, rules, and regulations and the particular facts of the Delaware cases. He normally would hand matters over to his Deputy Director if he recused. However, he also said the agency has some Deputy Attorneys General (DAG) assigned to represent staff and advise the regulatory body. He also said he is aware of his obligations under the Delaware Lawyers' Rules of Professional Conduct regarding such matters as issues dealing with former clients, confidentiality, etc.

He said that a controversial matter regarding a subsidiary of his former company had recently come up, but he was not hired until after that matter was completed. As far as relationships with the company's personnel, he said he knew the attorney who represents it before his current agency. However, that is because he formerly worked for the agency before leaving for the private sector. It is only a professional relationship. He said while with the company, he did attend meetings where the attorney was present, but that was because they had the same supervisor, and they never actually worked together because they handled matters from different States.

The Commission decided he would be required to recuse until after he disposed of his 401(K) stock holdings in the company, and that when he needs to recuse, he should delegate to one of the DAGs.

**11-03- Nepotism Deborah Wicks/ Patrik Williams:** The Commission decided to grant a waiver in the below matter. Additionally, Ms. Wicks must recuse from all matters related to her son and must leave the room if such matters are discussed. **NOTE: As a waiver was granted, this matter is no longer confidential. 29 Del. C. § 5807(a). The entire opinion is printed below.**

### **11-03 – Personal or Private Interest - Nepotism**

Dear Superintendent Wicks:

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

#### **I. Facts**

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

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

On November 17, 2010, Mr. Williams made his presentation to the Board. The plan was to keep the present HVAC Supervisor in the first position and advertise

the second position. You apparently were present as you a member of the School Board as the Board's Executive Secretary, but you cannot and did not vote. The Board told him to proceed, with a few minor modifications to the proposed posting.

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

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

## **II. Application of Law to Facts – Financial Interest**

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

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

However, that is not the end of our inquiry.

## **III. Application of Law to Facts – Personal Relationships**

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

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

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

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

Your participation appears to be less than that in *Prison Health*. However, we must still look at whether, at the time you discussed the position and reviewed the job description, you had a personal or private interest. The position description was worked on in November and was posted November 22, 2010. You said you told your son about the job in late November. You are entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff'd.*, Del. Supr., No. 304 (January 29, 1996). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. We also note that State employees are not barred from telling people, even a close relative, a job is open, even if a conflict exists. That is because it would not constitute "reviewing and disposing of a matter" that would "tend to impair judgment." A "matter" is considered "ministerial" when nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc.*, Del. Supr., 336 A.2d 209, 211(1975). If a matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. *Id.* It was public knowledge that the Board had decided the jobs could be split; and that posting was to occur after some minor changes the Board requested on November 17, 2010. Telling him of an opening when it was public information is not reviewing or disposing of a matter in an official capacity, misusing confidential information, or giving him any preferential treatment.

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

#### **IV. Application of Law to Facts - Appearance of Impropriety**

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

This is basically an appearance of impropriety standard. The test for appearances of impropriety is if a reasonable person, knowledgeable of all the

facts, may still believe the employee could not perform their duties with honesty, integrity, and impartiality. *In re Williams*, 701 A.2d 825 (Del., 1997).

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

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

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

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

Because of that we discussed at length the School District's "chain of command." The bottom line was that anyone who would oversee your son has a direct connection to your position just like Mr. Williams. Moreover, that would require a change to remove Mr. Williams from any duty for facilities and impose a new duty on anyone else selected. On the positive side, you cannot fire Mr.

Williams as that must be done by the Board, so that type of retaliation if he did not do as you suggested appears remote. We combined that with the strong legal presumption that you would not engage in such conduct.

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

To achieve that purpose, the law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related to them. 29 Del. C. § 5805(a)(1). Here, you can recuse, but the delegation to your Assistant may still raise public suspicion that the conduct appears improper. As it would appear improper, we then considered whether to grant a waiver.

## **V. Application of Law to Facts - Waiver**

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

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

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

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

Additionally, you are to ensure that in addition to Mr. Williams, your staff and the Board are aware of these restrictions. This ensures that Mr. Williams, or any other District employee, have the comfort and protection to speak freely.

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

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

## **VI. Conclusion**

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

**11-03 - Personal or Private Interest – Deborah Wicks:** State employees may not review or dispose of matters if they have a personal or private interest in the matter which may tend to impair judgment in performing official duties. 29 *Del. C.* § 5805(a)(1).

The Commission previously granted a waiver to Ms. Wicks with certain restrictions as it pertained to her son working in the Smyrna School District where she is the Superintendent. As a waiver was granted, all proceedings related to the matter are public. 29 *Del. C.* § 5807(a). The Commission received information that Ms. Wicks may not be complying with the restrictions and contacted the School District's Attorney to ask that Superintendent Wicks: (1) provide the Commission with information that the School Board and the staff were informed of the restrictions on her conduct; (2) explain why she was communicating with her son about his job; and (3) explain why she did not inform the Commission that her son had applied for essentially the same job in May 2010. When she appeared before the Commission, she said she did not discuss the maintenance job with him until after the job was posted in November 2010. Information provided to the Commission was that a nearly identical job was open in May 2010, and her son applied for that job but was not selected. The Commission asked, through the School District's Attorney, that she provide additional information within 30 days.

**11-03 – Personal or Private Interest - D. Wicks – Nepotism:** A citizen contacted the Commission about filing a complaint regarding Deborah Wicks' son being hired by the Smyrna School District, where she is the District's Superintendent. Ms. Wicks was offered an opportunity to request an advisory opinion before a complaint was filed because the citizen said she was interested more in seeing the matter resolved. Ms. Wicks sought an

advisory opinion. She and the Asst. Superintendent, Patrik Williams, appeared before the Commission. The Commission issued an opinion stating that normally it would not approve having a subordinate take on the duties of the person recusing because that creates tensions between the employee' and the supervisor. However, Ms. Wicks and Mr. Williams indicated the Assistant Superintendent had always supervised the Facilities' Supervisors; that the structure of the school district resulted in basically anyone supervising her son would be someone who reports to her; etc. Based on their statements, the Commission concluded: (1) she must recuse from any issue pertaining to her son; (2) it granted a waiver so all matters related to him could go to Mr. Williams; and (3) Ms. Wicks was to inform the School Board and her staff of the restrictions.

Since then, the Commission learned: (1) Ms. Wicks was not recusing from all issues pertaining to her son; (2) the person in that position had not "always" reported to the Assistant Superintendent, but had reported to her; (3) her son applied in February 2010 for basically the same job but was not selected, but Ms. Wicks did not disclose that information; (4) Ms. Wicks did not inform her staff and the Board that she was barred from involvement in "any issue" pertaining to her son; (5) Ms. Wicks did not inform her staff of the restriction until the Commission notified her that it was aware she had not informed the staff even though the opinion was issued 4 months earlier. The Commission requested she respond to those issues within 30 days. When she responded, she did not say why she delayed informing her staff that she was to recuse; she did not explain why she did not tell them she had to recuse from "any issue" pertaining to him, after finally informing them 4 months later but instead delineated some areas where she would not participate. The Commission decided that Ms. Wicks should be notified that at its September meeting it will review her case and vote on whether to rescind her waiver and recommend that she attend the meeting to explain her actions. As a waiver was granted, these proceedings are not confidential. 29 *Del. C.* § 5807(a).

### **11-03 – Superintendent of Smyrna School District Deborah Wicks – Nepotism –**

**Update on Waiver:** Ms. Wicks had a conflict due to a personal or private interest in her son's employment with the School District. 29 *Del. C.* § 5805(a)(1). The Commission previously granted a waiver so that the Assistant Superintendent could supervise Ms. Wicks' son. Ms. Wicks was to recuse from any issues pertaining to her son. She also was to advise the Board of Education and her employees of the restrictions. The Commission received information that she participated in a matter related to her son's work; had not informed her staff of the restrictions although she had had the opinion for about 4 months; and had not informed the Commission that her son previously applied for essentially the same job, just months before his present job was posted. The Commission gave her 30 days to respond to its concerns because it concluded she had not followed its advice regarding putting employees on notice of her restrictions; she had not restricted her conduct as directed; and had not "fully disclosed" the facts pertaining to her son's prior consideration for essentially the same job. Her response did not satisfy the Commission and she was notified that it would meet to decide if it would revoke the waiver. Ms. Wicks appeared with Assistant Superintendent Patrick Williams, and the School District's Attorney. She stated there was a misunderstanding on the limits of her restrictions; she did not think that it would be important to the Commission for her to tell them about a job her son did not get; and she was delayed in notifying her staff of the restrictions due to a family illness. Mr. Williams said it was Ms. Wicks' managing style to be directly involved in the work of all her employees. The Board requested that the waiver be extended to allow Ms. Wicks to work directly with her son.

The Commission reaffirmed its earlier findings of a conflict, with the additional details added; that it continued to be a conflict; that the Commission would not revoke the present waiver, but it would not grant a broader waiver that would allow her to work directly with her son as that would defeat the purpose; and that after the written opinion was issued, she would have 30 days to advise the Commission of whether there has been compliance.

**11-03/11-19 - Personal or Private Interest - Nepotism – Wicks - 29 Del. C. § 5805(a)(1). As a waiver was granted, these decisions are not confidential. 29 Del. C. § 5807(a).**

The Commission rescinded its prior opinion, 11-03, to the Superintendent of Smyrna School District, Deborah Wicks, and issued 11-19, with directives on areas where she was to provide the Commission with additional information. She responded to the directives, but 184 pages of material was received in PIC's office shortly before the meeting. PIC acknowledged receipt of the materials, which would be reviewed.

**11-19 – Nepotism –D. Wicks:** In Opinion No. 11-19, the Commission issued 5 directives with which Ms. Wicks needed to comply, to insure proper and full disclosure regarding her conflict which arose because her son was hired to work for the Smyrna School District, where she is the Superintendent. The determination at this meeting was whether she complied with the directives. Additionally, when the Commission issued its opinion, it received an e-mail from Patrik Williams, Assistant Superintendent, which raised concerns of whether he could exercise independent judgment in supervising Ms. Wicks' son because the correspondence indicated he was taking a personal and private interest in the Commission's decision pertaining to Ms. Wicks, which could tend to impair his judgment. 29 Del. C. § 5805(a)(1). Regarding compliance with the 5 directives, The Commission decided that there was minimal compliance with the directives for the reasons discussed. Additionally, Ms. Wicks' must notify all School District employees and the Board of the restrictions on her conduct on an annual basis, as was suggested by her response to that directive. The Commission also decided that Patrik Williams had a personal conflict that impaired his judgment, and so he should no longer supervise Ms. Wicks' son, and the duty should be assigned to Mr. Scott Holmes, who already was responsible for such matters if Mr. Williams was not available.

**10-36 Personal or Private Interest Complaint:** A citizen's complaint alleged a personal and private relationship between a State employee and a Supervisor. It alleged the supervisor was reviewing or disposing of matters pertaining to the employee, e.g., time off with pay, when they have a personal relationship contrary to 29 Del. C. § 5805(a)(1). The complaint also alleged matters over which PIC had no jurisdiction, even assuming all facts as true, as required by 29 Del. C. § 5808(A)(a)(5): They are: (a) whether the State employee is qualified for the job held; (b) if the hiring process was proper; and (c) if the State employee could engage in political activities, during State work hours. The Commission dismissed those 3 allegations for lack of jurisdiction and notified complainant. The complainant was asked to provide more specific information on the Code of Conduct issue (i.e. the supervisor reviewing and disposing of personnel matters related to the employee). Based upon the facts provided, the Commission did not have enough information to determine if the complaint was substantiated.

**10-34 – Personal or Private Interest:** A private citizen had a complaint against a local official but said he would defer the complaint if the official sought an advisory opinion. The official did so. The concern was that he had participated in a decision when he had a personal or private interest that arose from his private involvement in a matter that involved the citizen and others. The official had a private complaint about the conduct of the citizens but went beyond merely filing a complaint with the appropriate local officials. Instead, he called a meeting of the officials; participate in the discussions; identified what he had concluded were violations of a local ordinance; and then after the Town took action based, at least in part, on his input, he then participated in another discussion about how the local laws might be changed to handle these types of situations. He said that there is a matter which would be coming before the Town dealing with this private citizen and he planned to recuse. The Commission decided that he should not have participated; that for the future, he should not participate in official matters if: (1) he, his spouse or tenants are the complainants; (2) it is a matter related to the property abutting his property; and/or (3) they are directly derivative from his personal actions related to this particular matter.

**10-33 Personal or Private Interest:** An individual was asked to serve as a Board member of a Charter School, but before accepting wanted to know if it would be a conflict because he had relatives working at the School. He said he would recuse from anything that would directly impact on his relatives differently than on other staff, teachers, etc. He believed all Board members, including the community member, voted on most things, but there may be some administrative duties performed by Board members that are not voted on. He believed the Charter School Board functions similar to a traditional school board. He said he spoke with his relatives before sending his resume to the Board Chair, to be sure they would be comfortable if he served on the Board. They told him they do not interact with the Board on a daily basis. He believed the Board would be acting on broader policies, and longer-term issues, and the Board gives the head of the school a lot of authority to act regarding daily operations. His relatives suggested he seek out the Chair, or Principal, to see if it might be possible to serve on the Board. The applicant verified the Board leaves many of the decisions to the School Leader, but the Board signs for the building; often ratifies the School Leader's decisions; and would be accountable. Additional information from the Charter School showed that Board members would have significant involvement in decisions regarding salary, bonuses, etc. The Commission found the conduct would raise public suspicion that the applicant was in a position to act in the best interest of his relatives, he could unduly influence other Board members, or his relatives could unduly influence him. Even if he recused from specific issues, there would still be suspicions of undue influence, and more importantly, he would be recusing in areas critical to the School, which would limit his ability to serve. The Commission determined that accepting the Board position would be a conflict.

**10-31 Personal or Private Interest:** A sworn complaint was filed against a local official alleging that due to a personal or private interest in an ordinance that the official should have recused. The complaint also alleged such matters as an unconstitutional act by the entire Council concerning the ordinance. The Commission dismissed the matters identified as issues over which the Commission had no jurisdiction and/or failed to state a claim. Regarding the alleged personal or private interest, assuming the facts as true, were sufficient to establish a reason to believe that a violation may have occurred.

**10-31 - Personal or Private Interest:** After a preliminary hearing on this matter, the Commission found probable cause to believe a violation may have occurred and notified the official to respond to the preliminary hearing findings. A written response combined with a motion to dismiss was filed. The official also testified under oath, as did two witnesses. Beyond providing testimony on certain factual issues, Respondent moved to dismiss on several grounds: (1) public policy; (2) Constitutional protection; and (3) failure to state a claim.

The Commission denied her motion to dismiss; and decided she did have a personal or private interest conflict.

**10-21 Personal or Private Interest:** An appointee to a State Commission filed a full disclosure because her private business was regulated by another State Board. If an issue came before her agency dealing with the other State Board, she would recuse. Also, while unlikely, if an issue pertaining to her private employer came before her Commission, she would recuse. The Commission decided there would be no conflict as long as she recused if those circumstances arose.

**10-20 Personal or Private Interest:** A State employee's son started a business, and a company offered him certain products, at no charge, that he can recycle and sell. The employee's agency contracts with other companies that have that product. The company has contracted with the agency in the past but does not presently have a State contract. The employee asked if his son may engage in that business venture. The Commission cannot make decisions about his son, as he is not a State employee. However, if the company starts doing business with his agency again, the State employee cannot participate in decisions about that company, such as reviewing the contract, or supervising their work. The State employee said he will not approach any of the State contractors who have similar products on his son's behalf to avoid any appearance of misuse of public office.

**10-15 – Personal/Private Interest: Local Officials who are Board Members of a Private Enterprise. (As a violation was found, and as a waiver was given for some parts of the Code, the full opinion is a matter of public record. 29 Del. C. § 5807(b)(4) and § 5810(h)(1)(ii). Mr. Richard Kough, Mr. Kevin Phillips and Ms. Anna Robinson are all Bethel Councilmembers and also are all Board members of the Bethel Historical Museum. They are barred from reviewing or disposing of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Board membership on a private enterprise is a personal and private interest. Commission Op. No. 02-22. If they cannot recuse, they must file full disclosures explaining why. 29 Del. C. § 5805(a)(3). They also may not represent or assist a private enterprise before their own agency. 29 Del. C. § 5805(b)(1). Ms. Robinson asked Town Council to consider getting federal stimulus funds for the Community House, which is a municipal building used for meetings, etc. An energy audit needed to be conducted before the application for the funds could be submitted. Mr. Phillips said he would look into the matter. He met with the energy auditors as the Town's Representative. However, he also is the President of the Historical Museum. When he returned to Council, he had not only had the Community House audited, but also the Museum, and asked that the privately-owned Museum be included in the request for funds. At that meeting, only three Councilmembers were present: Mr. Kough, Mr. Phillips, and Mr. John Parker. Three members constitute a quorum. Mr. Phillips said there was a deadline for submitting the**

applications for the funds, but there was no indication when the deadline would occur. No suggestion was made to table the matter until other Councilmembers were available. The motion to include the Museum was approved by the three Councilmembers, two of which are Museum Board members, with a fiduciary duty to act in its best interest.

No disclosure was filed until another Councilmember contacted this Commission about the possible conflict for them to vote on matters pertaining to the Museum. At that point, a disclosure was filed by Mr. Kough. Subsequently, Council met and acted on other matters pertaining to the Museum and these funds. All three Councilmembers who are also Museum Board members participated in those discussions and votes, meaning 3 of 5 Councilmembers were voting on a matter when they had a personal or private interest. Mr. Kough did not update his written disclosure of participating in the matter. Mr. Phillips and Ms. Robinson never filed the required written disclosure but asked that the Commission consider Mr. Kough's written statement, and facts from their attorney as their disclosure. The Commission decided that it was a conflict for them to participate in decisions where they had a personal or private interest. To resolve the conflict so Council decisions could be made about the Museum without having Museum Board members participate, the following approaches could be used: (1) all Councilmembers leave the Museum Board; or (2) enough Councilmembers leave the Museum Board so that a quorum exists to decide Museum issues without a Museum Board member participating; or (3) leave public office.

**09-50 Complaint against Local Official:** To decide if there is "reason to believe" a violation occurred; all alleged facts must be assumed true. A private citizen wanted to re-zone his property. The matter first went to the Planning and Zoning Board, then the local government's legislative body. Complainant alleged that a legislative official attended the P&Z meeting on the issue. No facts suggested any comment, participation, etc., by the official. The record was then left open for public comment before it went to the legislative body. While the record was open for comments, it was alleged that the official corresponded with some constituents and an official from another local government, who opposed the re-zoning. The official said they needed to contact all the legislative members if they wanted to be effective. The official also forwarded the other local official's questions to another legislative member, saying the questions should be answered. The other legislator replied that the information would become part of the record. When the issue came to the legislative body, the official distributed some information before the hearing. Complainant's attorney alleged the official was trying to influence the vote by the distribution. During the process of the hearing, the attorney for the re-zoning said the official appeared to have already made up her mind.

**(1) Attending the P&Z meeting:** PIC has held that any person, including elected officials can go to a government's open meeting. Absent any Code of Conduct violation in doing so, the official has the right to attend. PIC did bar a local official from participating in a Town meeting in her official capacity when an ordinance that affected her private business was to be decided. That is because under the Code, an official may not review or dispose of matters if they have a "personal or private interest." Here, the official was not on the P&Z Board. Thus, the elements of "reviewing or disposing of the matter" were not met. Even assuming the official was on the board, no facts suggest a "personal or private interest" in the re-zoning issue, e.g., property ownership, etc. In the opinion mentioned above to a local official, PIC also told her that she could not actively participate in the public meeting in her private capacity because the Code barred her from "representing or otherwise assisting a private enterprise before her own agency." Here, the official was not

at a meeting of her own agency. Even assuming that fact, no facts suggested any representation or assistance of a private enterprise.

**(2) E-mail correspondence:** No Code of Conduct provision dictates when a government entity will open or close the records for public comment, or bars constituents from commenting to their elected officials. As for the official responding to comments, absent any conflict (e.g., having a personal or private interest that would bar reviewing or disposing of matters affecting that interest—which are not even suggested by the facts), no provision bars the official from responding. Dismissed for lack of jurisdiction because PIC does not have jurisdiction over a determination of a public meeting/comment period.

**(3) Distribution of the Printed Materials:** PIC has no authority to decide a local government's hearing procedures and/or how they apply to distribution of such materials. Its jurisdiction is limited to the law in *29 Del. C.*, Ch. 58. Again, the complaint, relative to this act, gives no facts establishing a personal or private interest in the matter or of any representation of, or assistance to, a private enterprise before the official's agency.

**(4) Alleged bias:** To state a claim under the Code of Conduct, the alleged bias must arise from a connection to a provision of the Code of Conduct. The Commission has no jurisdiction over any other types of alleged bias. Here, no facts suggested the official's alleged bias arose from a "personal or private interest," or that it arose in the context of her "representing or otherwise assisting a private enterprise." For example, one type of bias Courts address that is not conflict of interest driven is pre-judgment, rather than hearing and acting on the merits. To the extent that is what complainant alleged, that issue was raised by his attorney at the hearing, and if there is a right to appeal could proceed by that route.

Commission dismissed the complaint as PIC had no jurisdiction and no facts substantiated a connection to a violation of the Code.

**09-20 Appointment to Charter School Board:** A State employee asked if it would be contrary to the Code if he served on a Charter School Board, concurrently while employed by the State, and after he terminated. He has no responsibilities for Charter Schools in his State job. While he is now employed by the State, he expects to retire in mid-2009. At that point the post-employment law would apply. It says for two years after leaving the State, former employees may not represent or assist an organization on matters where they were directly and materially responsible. *29 Del. C. § 5805(d)*. Again, he had no occasion to work on Charter matters in his State job, which means he would not have been directly and materially responsible for the matter. He said that it was very unlikely that a Charter School issue, for which he was responsible, would come up in his current job or in post-employment. If so, he would recuse. The Commission found no conflict.

**09-12 – Personal or Private Interest—Local Government Conflict:** Allegedly, a local government councilmember was participating in decisions where he had a personal or private interest, as it related to a Planning and Zoning (P&Z) issue. He had submitted an application more than a year ago, but P&Z had not acted. This meant that the matter had not come before Council, so he could not have reviewed or disposed of the subdivision matter in his official capacity. *29 Del. C. § 5805(a)*. It also was alleged that he used his public office to secure unwarranted privileges for personal gain because he knew the Town would be re-writing its zoning ordinances and deliberately filed before that was completed.

29 Del. C. § 5806(e). The choice of when to file is not unique to him—anyone could have done so. It was public knowledge that the Town’s comprehensive development plan might require some changes to the existing zoning laws. Also, he voted “no” on having a newspaper ad announce a public hearing, which allegedly benefitted his personal interests. 29 Del. C. § 5805(a). His vote was not on his subdivision application, so he still did not review or dispose of the application filed with P&Z. Moreover, PIC had no jurisdiction over laws that govern notices of public meetings.

It was alleged that he used his public office to force a consultant to quit assisting the Town on its comprehensive development plan. 29 Del. C. § 5806(e). Even assuming the allegation were true, again, this was not a decision on his application. It also was alleged that he said he might speak to State Representatives. Any private citizen has a right to contact elected representatives, and elected officials have the right additionally under the speech and debate clause. Nothing suggests he made the consultant quit. It was the consultant’s decision. Also, whether the consultant left or stayed, their conversation was not about his application. Also, PIC has no jurisdiction over how, when or where any consultant should perform their duties. Another allegation was that he filed complaints against other council members and appointees to the P&Z committee. The record shows that he did not file a sworn complaint. Rather, he sought advice on his conduct regarding recusal, but also asked if those persons should recuse in certain situations. By law, any official can request an advisory opinion, even if it pertains to another official. The statute permits that action, and it has been upheld by the Superior Court. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). It also is alleged that the P&Z could not do its job without the consultant because they lacked competency and lacked funds to hire another consultant. PIC has no jurisdiction over the competency of any appointee, and no jurisdiction over any agency funding. The Commission dismissed the complaint for failure to state a claim, and reminded the official, as previously indicated to him, that he should recuse from decisions on his application.

**09-11 – Personal or Private Interest—Review of Spouse’s Official Decisions:** Several local government Council members previously came for opinions on whether it was a conflict for them to make decisions on: (1) work by their spouse as an appointee to a Town Board; and (2) work by a close personal friend as an appointee to a Town Board. The Code bars officials 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). PIC said it would not be proper to review each other’s work. One appointee expected the Town Board on which both persons served would be disbanded as it had completed its project. That would totally remove any possibility of a conflict. Thus, the possibility of such review was unlikely. However, at this meeting, the Commission was notified that the Board had not been disbanded. One appointee tendered her resignation, but the Board would not accept it. The Commission notified the Board that their charter makes Council President the appointing authority with Council’s approval. The Code of Conduct provides that with respect to an honorary state official, the Commission can recommend that appropriate action be taken to remove the official from office. 29 Del. C. § 5810(d)(3). However, if they have an “undue hardship,” they can submit the facts.

**09-10 – Personal or Private Interest—Spouse’s Financial Interest:** A State employee worked at a facility where her spouse’s business had some dealings on certain applications and licensing. By law, if there is a financial interest in a private enterprise that does

business with, or is regulated by the State, they must file a full disclosure. 29 *Del. C.* § 5806(d). Beyond the above facts, the State employee said her section had three separate offices, and her spouse would deal with one of the other offices. That was on rare occasions and might not continue after this year as he is considering giving up his private business. If he came to her office, she would recuse, and pass it to her Supervisor, as she was aware that she could not review or dispose of matters related to him. 29 *Del. C.* § 5805(a). She also said that if the other office sent work related to his dealings because of a backlog, she would return the work to that office. The Commission found no conflict as long as she did not deal with her husband's business.

**09-07 - Personal or Private Interest - Private Business Conflict if Promoted by**

**Agency:** A State employee was being considered for a promotion. Before the agency made any decision, the employee and the agency sought an opinion on whether her private business would create a conflict. Although some of the matters that pertained to her private business would go to her State agency, they would not come to her. Thus, she would not review or dispose of the matter. 29 *Del. C.* § 5805(a). In fact, her documents would be processed in a different County, thus, her immediate colleagues and coworkers would not review the documents, which were primarily administrative in nature. She also was advised not to use State time and resources to perform her private work. 29 *Del. C.* § 5806(e).

**09-06 – Personal or Private Interest - Sole Proprietor Dealing with Own Agency:** A State employee was an accountant in her State agency. In her private capacity, she was the sole proprietor of a business. Some of the documents she prepared in her private business did go through her State agency, thus she filed a disclosure. 29 *Del. C.* § 5806(d). The documents would not go to her in the normal course of business. As she may not review or dispose of matters in which she has a personal or private interest, 29 *Del. C.* § 5805(a), if they did, she would recuse. The entries in the private documents were ministerial in nature, e.g., identification numbers, loaning institution, etc. She did not advocate for her business, or for the clients, with whom she had a subcontract on any administrative or legislative decisions. 29 *Del. C.* § 5805(b)(1). The entries could not assist them in effecting administrative or legislative changes. The Commission found no conflict.

**08-39 – Personal or Private Interest—Local Officials' Private Memberships:** PIC previously disposed of some non-jurisdictional issues on this matter. This opinion focuses on just potential conflicts for three local officials. One is a social member of a Volunteer Fire Department. Under State law, volunteer Fire Departments are considered State agencies. 16 *Del. C.*, Ch. 66. The official would normally review matters related to funding, which generally includes funding decisions on the fire department. The official has never participated in any Fire Department decision. The last decision was made before he became an official. If the Fire Department comes before his agency for any purpose, he can recuse. 29 *Del. C.* § 5805(a).

Another local official is a non-profit Board member. It also may seek funds. It uses a facility owned by the Town. The third official is a member of an organization that the local legislative body authorized the Chief of Police to create. It was solely at the Chief's discretion to create the organization and seek volunteers to participate. The group has its own duty office; it uses Town space; it seeks funding; and for other reasons comes before

this third official. The official is also a very active volunteer in the organization. The Commission found that none of the 3 officials should, in their official capacity, review or dispose of matters pertaining to the organizations. *Id.* If they cannot delegate on such matters as the Town's budget, they must promptly file a full disclosure with the Commission explaining why they cannot recuse or delegate. 29 *Del. C.* § 5805(3). They also have the option to resign from the private organizations and avoid any possibility of a conflict. Approved by a majority with one Commissioner dissenting on 2 officials.

**08-30 & 08-32 – Personal or Private Interest—Close Relative's Land Issues, Review of Decisions by Spouse and Close Personal Friend:** A local Town official called PIC's Counsel for guidance on recusal if a decision on a close relative's properties came before him in his official capacity. He said he would recuse if that occurred, PIC's Counsel's duties are to give guidance, which was to recuse. He did so.

He also asked about potential conflicts of two other officials. Any official or agency may seek advice on other officials. 29 *Del. C.* § 5807(c). That process was upheld by the Superior Court. *Post v. Public Integrity Commission*, 07A-09-08, J. Witham (Del. Super. April 30, 2008). He asked if they should recuse on certain matters because of personal and private relationships with persons who prepared the official matter for consideration. In one instance, it was a spouse, and in the other a close personal friend. Based on just the facts available at that time, and because PIC would not be meeting before the decision, Counsel notified the Town Solicitor suggesting recusal could be appropriate, and it would protect them against allegations of a conflict. Counsel sent a prior PIC decision ruling in a similar situation that a personal and private marital relationship between officials where one must decide on work prepared for a decision, would be a conflict, *citing Harvey v. Zoning Board of Adjustment of Odessa*, C.A. No. 00-04-007CG, J. Goldstein (Del. Super. November 27, 2000), *aff'd.*, 781 A.2d 697 (Del., 2001). The Solicitor so advised the night of the meeting. However, both participated, saying without their vote there was no quorum. One also said he did not think the guidance applied to him as his was not a marital relationship. The other official said he believed the Town Charter precluded abstention.

PIC's Counsel, learning of the participation, advised the Town Solicitor that if an official cannot delegate their duty, they must promptly file a "full disclosure" with PIC saying why. 29 *Del. C.* § 5805(a)(3). Both filed. One official, plus spouse, appeared before PIC. They explained that the substantive part of the matter was completed by the spouse's agency before the election of the other spouse. A review of the work also was completed by an outside agency. It returned comments pointing out only what were essentially typographical errors. Also, the Town Attorney suggested adding a standard legal phrase providing that if one part was invalid, the remaining parts would stand. The spouses discussed the work before the election. Any citizen may discuss such work. The issue is whether after being elected, one spouse may review and dispose of the proposed changes. PIC noted that the changes being considered were administrative changes, but apparently, the voting was on approving the entire package, not just the administrative changes.

Regarding the other official, the personal friend only began official duties a month or so before the vote. Again, the substantive work was completed before the friend became an official. Apparently, only one meeting was attended by the friend, and there was no substantial involvement.

(1) future work completed by the two officials should not be reviewed by their spouse and/or friend; or

(2) the two officials should recuse on matters that would be reviewed by their spouse or friend; or

(3) even the possibility of the appearance of a conflict could be resolved if the two who would be part of preparing matters to go to their spouse and/or friend elected to leave the agency to which they were appointed; and;

(4) In the future, if the officials cannot recuse when they have a conflict, full disclosure should be filed in advance (e.g., table the matter until PIC can review and give advice, protecting the official from complaints or disciplinary actions).

**08-27 – Personal or Private Interest—Father’s Interest in Ordinance:** A local official asked if he could participate in a decision when the ordinance would apply to everyone in the Town. However, his father was the only citizen that approval would affect. The Code bars officials from reviewing or disposing of matters where they, or their immediate family members, would benefit to a great extent than others. 29 *Del. C.* § 5805(a)(1) and (a)(2). The official said he would not vote on his father’s application but asked if he could vote on the package of options as a whole. PIC concluded that if he voted on the entire package, he was still voting on what might appear to be “private legislation” for his father. The Commission advised that the Councilman recuse. PIC specifically noted that this local government tabled decisions until PIC could give advice.

**08-13 – Personal or Private Interest—Brother’s Financial Interest:** Local Town official sought advice on another Town official’s participation in Town matters that might impact on his or his brother’s financial interests. One official may seek an opinion on the conduct of another, if there can be full disclosure. 29 *Del. C.* § 5807(c). *See, Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008) (subsequently upholding PIC decision where one official sought advice on the conduct of another). The official and his brother were found not to have any financial interests in the particular matter at this time, and recusal would be premature because too many events were speculative but would have to occur before recusal would be required. The official said he would recuse later if required. If he cannot recuse (e.g., lack of a quorum) he knows to file a disclosure on why he could not delegate. 29 *Del. C.* § 5805(3).

**08-04, 08-05, and 08-06 – Personal or Private Interest - Local Officials’ Employment Disclosures:** The local officials waived their right to confidentiality pursuant to 29 *Del. C.* § 5807(b)(1).

**08-04, 08-05, and 08-06 – Disclosure of Interest in Private Enterprise**

**Hearing and Decision by:** Chair Terry Massie; Vice Chairs Barbara Green and Bernadette Winston, Commissioners William Dailey and Wayne Stultz

Dear Mr. [Scott] Chambers [attorney for the local officials]:

As you know, the Public Integrity Commission (PIC) reviewed disclosures of outside employment by Middletown officials: Mayor Kenneth Branner and Councilmen Jason Faulkner and James Reynolds. Based on the following, PIC

finds no violation.

## I. Law and Facts:

**A. Disclosure Filing:** 29 *Del. C.* § 5806(d). If employees, officers and officials have a financial interest in a private enterprise that does business with their government, they must disclose it to PIC. *Id.* “Financial interest” includes private employment. 29 *Del. C.* § 5804(5)(b). Disclosure is a condition of commencing and continuing government “employment” or “appointed status.” *Id.* It is confidential [unless waived]. *Id.*

1. Financial Interest: All three are employed by private firms.
2. *Id.* All three elected officials filed. Who must file: “Employees,” “officers” and “officials.”
3. Conditions: Disclosure is “a condition of commencing and continuing “employment” or “appointment.” 29 *Del. C.* § 5806(d). Elected officials are “employees” or “appointees.” This condition cannot apply to elected officials as PIC cannot impose conditions for office on elected officials; nor remove them. The public decides whom to elect and whom to remove. This does not mean they are exempt from the rest of the Code. For example, [financial] conflicts can require recusal. 29 *Del. C.* § 5805(a)(2)(a).
4. Timing of Filing: The law gives no deadline. We address this issue further at the end of this opinion.
5. Purpose of filing: Disclosure gives PIC the chance to provide advice to filers on their conduct as it relates to their financial interests. Disclosure does not necessarily mean there is a conflict, nor that recusal has not occurred if there is a conflict.
6. Confidentiality: Disclosure is confidential. *Id.* Confidentiality rights belong to filers, who may waive it. 29 *Del. C.* § 5807(d)(1). All three waived that right.

**B. Town Policy:** The Town has had a conflict policy since June 22, 2001. Recusal is required for conflicts. Those recusing must give a reason. Policies can be more stringent, but not less stringent, than the law. *Nardini v. Willin*, 245 A.2d 164 (Del., 1968). State law does not require a reason for recusal. 29 *Del. C.* § 5805(a)(1) and (2). To that extent, the officials followed a more stringent Town policy.

**C. Acting in a Government Capacity:** The law bars reviewing or disposing of matters if a personal or private interest exists in the matter. 29 *Del. C.* § 5805(a)(1). It is an automatic “personal or private interest” if participation would result in a financial benefit or detriment to the official, close relatives or a private enterprise, to a lesser or greater degree than others similarly situated. 29 *Del. C.* § 5805(a)(2)(a) and (b).

(a) **Councilman Reynolds:** Employer--Contractors Material. It has no Town contracts. Contractors Material supplies private contractors, e.g., hot mix, etc. The private contractors may do business with the Town. The firm had the private contractors for clients prior to Mr. Reynolds’ June 1, 2003 employment. The Town does not select suppliers for private firms. The contractors decide which suppliers to use.

As his private employer does not do business with the Town, he did not have to file a disclosure under 29 *Del. C.* § 5806(d). He did so. That exceeds the

law. If matters on his employer arise, he will recuse.

**Councilman Faulkner:** Employer--Austin & Bednash Construction. The firm has bid on Town contracts, with one success—a street maintenance contract. The multi-year contract was publicly noticed and bid in 2007. The Town minutes show he publicly recused from participating in who would get the contract and gave the reason. *Council Minutes ¶ 7, June 4, 2007*. State law does not require a reason. 29 *Del. C.* § 5805(a). By announcing the reason, his conduct exceeded the law. By recusing, he complied with the bar against reviewing or disposing of the matter. *Id.*

**Mayor Branner:** Employer--Artisan. Artisan contracts with the Town on wastewater. It has had the contract for more than 7 years. The Mayor accepted a job approximately 7 months ago when Artisan already had the contract. It has not come up for renewal or rebidding since he went to work at Artisan. He can avoid participating in Artisan matters because the Town Manager, or the Council member responsible for the Water and Sewer Department, can work with Artisan. Mayor Branner does not expect any upcoming contracts in the future. When the contract comes up for renewal or rebidding, or any other matter, he will recuse. The Mayor said he only votes if there is a tie. If he finds he has to break a tie on Artisan matters, the law requires disclosure to PIC on why the decision cannot be delegated. 29 *Del. C.* § 5805(3).

**D. Acting in a Private Capacity:** State law bars representing or otherwise assisting a private enterprise before one's agency. 29 *Del. C.* §5805(b)(1).

**1. Councilman Reynolds:** No facts suggest he has represented or assisted Contractors Material on Town matters. He said if any Town matters came to his firm, he would not work on them.

**2. Councilman Faulkner:** No facts suggest he has represented or assisted Austin & Bednash on Town matters. A different Project Manager handles Middletown. Mr. Faulkner is specifically excluded from his firm's discussions or meetings on Town projects. He does not make bidding decisions for the firm or its private clients.

**3. Mayor Branner:** No facts suggest he has represented or assisted Artisan on Town matters. When Artisan deals with Town matters, he does not represent or assist the firm. His job covers other municipalities. He and Artesian worked that out before he accepted the job.

**E. Timing of Disclosure:** Other Code of Conduct provisions give a set time for filing documents with PIC. 29 *Del. C.* § 5813(c); 29 *Del. C.* § 5832(a) and (c), 29 *Del. C.* §5833 and §5835(a). This provision does not. 29 *Del. C.* § 5806(d).

As Councilman Reynolds' employer does not do business with the Town, the filing date is a moot issue for him.

The statute does not give a specific time frame for this Subchapter I disclosure. It does for Subchapter II public officer financial disclosure and Subchapter IV lobbying expense disclosures. 29 *Del. C.* §5813(c); 29 *Del. C.* § 5835(a). Had the General Assembly wanted to give a specific time frame for this disclosure, it could have done so.

As no time frame is set, the Commission considers the particular facts of

this case as they relate to the public purposes of the law. 29 Del. C. § 5807(a) and (c). Here, (1) they immediately responded once notified of the filing requirement; (2) nothing suggests they were “hiding” a financial interest that may be a potential conflict; (3) where appropriate, recusal occurred; (4) in some instances they more than complied with the Code; (5) they have not represented or assisted their private enterprise on Middletown matters; (6) their conduct is consistent with the purpose of the statute--to avoid conduct that would create a justifiable impression among the public that the public trust is being violated. 29 Del. C. § 5802(1); (7) they are entitled to a “strong 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 (January 29, 1996); and (7) to encourage citizens to assume public office and employment, the law “should not be unduly circumscribed.” 29 Del. C. § 5802(3).

The question of an exact date of when they should have filed must encompass all the facts showing compliance with the letter and purposes of all other provisions. Even Courts, and the attorneys representing local governments, are not always aware that the Code of Conduct applies to local governments. *Harvey v. Zoning Board of Adjustment of Odessa*, Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001) *aff’d.*, 781 A.2d 697 (Del., 2001). When there is more than substantial compliance, it would seem to be “unduly circumscribing the law,” and would not be considering the “particular facts” of this case, if the filing date were the lone basis of a violation.

**Original Signed by Chair Terry Massie**

**07-70 – Personal or Private Interest - Disclosure Not Mandated for Local**

**Appointment:** Lawrence Steele was being considered for appointment to the Town of Bethel’s Zoning Commission. He was told by local authorities that he was required to file a financial disclosure. He is not required by law to file, as local officials are exempt from subchapter II disclosures, and only need to file under subchapter I if they have a financial interest in a private enterprise that does business with, or is regulated by, their government. He authorized release of the opinion. 29 Del. C. § 5807(d)(1). Thus, it is a public record.

**07-70 - Appointment to Local Board and Outside Employment *Hearing and Decision by:*** *Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners Dennis Schrader, William Dailey and Wayne Stultz, Jr.*

Dear Mr. Steele:

The Public Integrity Commission (PIC) reviewed your disclosure on your appointment to the Town of Bethel’s Zoning Commission and your private employment as an attorney. Based on the following law and facts, we find no conflict of interest.

First, PIC understands that you were advised that you must file a financial disclosure with PIC. PIC administers two disclosure provisions. We wish to clarify the two requirements.

(a) Annual requirement for “public officers” to disclose certain assets,

creditors, etc. 29 Del. C. § 5811, et. seq. You are not required to file under that law as it specifically exempts local officials. 29 Del. C. § 5812(n)(2).

(b) Immediate requirement if employees, officers or officials have a financial interest in a private enterprise that does business with, or is regulated by, their agency. 29 Del. C. § 5806(d). This does apply to local officials if the elements are met. 29 Del. C. § 5802(4). Based on your filing, your private law firm is not doing business with, nor is it regulated by, the Zoning Commission or any other Town entity.

As you had no affirmative duty to file with PIC, you have more than complied with the above.

Second, without any link between your private activities and your Town position, we find no conflict and can only give you general guidance unless the facts should change.

**(1) In your Town capacity:** You may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a). If, for example, your firm and/or clients come before your Commission, i.e., variance, as a general rule, you should recuse yourself. PIC understands that your firm and your private clients, including those who may be Town officials, have no matters before your Commission. However, if circumstances change you may seek advice on any “particular facts.” 29 Del. C. § 5807(c).

**(2) In your private capacity:** You may not represent or otherwise assist your private enterprise and/or its clients before your Commission in your private capacity. 29 Del. C. § 5805(b)(1). As your firm, nor your clients, have matters before your Commission, it does not appear you would have a reason to represent or assist them in your private capacity. Again, should particular facts arise, you may seek advice.

**(3) Confidentiality:** You may not misuse confidential information gained from your public position. 29 Del. C. § 5806(f) and (g). At this time, you are not aware of any confidential information you would obtain in your official capacity. As you know, you also are bound by the Delaware Lawyers’ Rules of Professional Responsibility from improper use of confidential government information. Rule 11.1.

Based on the above law and facts, we find no conflict, and if the facts should change and you need specific advice, please feel free to contact PIC.

**Original signed by Chair Terry Massie**

**UPDATE:** Mr. Steele withdrew his nomination for other reasons.

**07-56 Personal or Private Interest - Financial Interest in Private Enterprise that Contracted with State:** The Commission (PIC) reviewed a request for advice asking if the private firm of two State employees, a husband and wife, would violate the Code of Conduct. It found no violation if the facts did not change. A current State employee asked

if he could contract with a State agency. State employees are barred from privately contracting with their own agency. 29 Del. C. § 5805(b)(1). The contract was not with his agency. State employees also may not review or dispose of a matter in which they have a personal or private interest. 29 Del. C. § 5805(a)(1). He was in no way involved in the contract as a State employee because it was not handled by his agency. The contract exceeded \$2,000. It was publicly noticed and bid, as required. 29 Del. C. § 5805(c). His spouse was a State employee at the initiation of the request, but left State employment. As a former employee, for 2 years after leaving State employment, she may not represent or otherwise assist a private enterprise on State matters where she gave an opinion; conducted an investigation or was otherwise directly and materially responsible. 29 Del. C. § 5805(d). As a State employee, she was in no manner involved with the contract, which was not with her agency. The Commission found no conflict for either of them.

**1. Financial Interest Filing.** Both were State employees when the request was filed. Both filed the required disclosure. 29 Del. C. § 5806(d). One employee subsequently left State employment.

**2. Cannot review or dispose of State matters if financial interest exists.** 29 Del. C. § 5805(a)(1). In their State jobs, they were not involved in the State contract. The contract is not with their agencies. The current State employee had no reason to believe he would be involved in his State capacity in matters related to the contract.

**3. Cannot represent or assist a private enterprise on certain State matters.** 29 Del. C. § 5805(b)(1) and § 5805(d). The current State employee would not engage in such conduct before his own agency on any matter. 29 Del. C. § 5805(b)(1). As a former employee, the other person may not engage in such conduct on matters for which she was directly and materially responsible. 29 Del. C. § 5805(d). No facts suggested that would occur. If the facts changed, one could seek concurrent employment advice; the other could seek post-employment advice.

**4. Public Notice and Bidding.** State employees may not seek State contracts over \$2,000, unless publicly noticed and bid. 29 Del. C. § 5805(c). This contract was publicly noticed and bid.

**07-54 Personal or Private Interest – Disclosure of Contract with State:** A State employee filed a disclosure of a contract with a State agency (not his own). 29 Del. C. § 5806(d). The facts were like a previous filing he made several years before, where the Commission found no conflict, e.g., not doing business with his own agency, 29 Del. C. § 5805(b)(1); not writing, drafting, approving, etc., the other agency's contract. 29 Del. C. § 5805(a)(1). Limited term contract. *Commission Op. No. 03-31*. The Commission again found no conflict.

**07-52 – Personal or Private Interest—Financial Interest as Spouse:** A new State employee filed a disclosure of a financial interest in a private firm that does business with the State.

Disclosure of such interest is a requirement of commencing State employment. 29 Del. C. § 5806(d). He asked if he could work for a State agency when his spouse's firm had some contracts with that agency. He said he will resign as corporate officer. He also would not work on matters related to her firm in his State job. 29 Del. C. § 5805(a)(1). Further, he would not privately represent, or in any way assist her firm, before his agency. 29 Del. C. § 5805(b)(1). Prior to the State job offer, he did some work for this agency as an independent contractor. The Commission found no violation if he followed the terms

above, and also did not improperly use or disclose confidential information to her or others gained from his State job. 29 Del. C. § 5806(f) and (g). As to his prior private work, if the agency cannot obtain information it needs on that work from any other source, he may respond to questions if asked. 29 Del. C. § 5805(a)(1).

**07-42 & 07-47 – Personal or Private Interest – Personal Bias in Decision Making:** In the following opinions, the Commission advised a local official it would violate the Code of Conduct if he participated in decisions pertaining to a developer when he had issued statements against the developer and the development, and knew the matters would come before him on the Zoning Board. After the first opinion, he moved for reargument. The Commission again advised him it would be a violation. He then filed an appeal in Superior Court. It had already ruled that advisory opinions cannot be appealed. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). PIC moved to dismiss, and he withdrew his appeal. However, he apparently decided to act against the Commission's advice. Subsequently, he was personally sued in Federal Court by the developer for participating in the decisions when he had a conflict. *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach; Dell Tush in her individual capacity; David King in his individual capacity; Diane Hanson, in her individual capacity; and Richard Hanewinkel, in his individual capacity*; C.A. No. 09-507- GMS, J. Sleet, (July 30, 2010). That case was dismissed without prejudice after the Town and the developer reached an agreement. However, Town residents challenged it. *Murray v. Town of Dewey Beach*, C.A. No. 6785-VCN, V.C. Noble (Del. Ch., May 21, 2012). The Court dismissed the case. On reargument, it was again dismissed.

July 24, 2007

John F. Brady, Esquire  
Brady, Richardson, Beauregard & Chasanov, LLC 10 E Pine St.  
P.O. Box 742  
Georgetown, DE 19947

**Advisory Op. 07-42 – Local Land Use Issue**  
**Hearing and Decision by:** *Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey and Wayne Stultz*

Dear Mr. Brady:

At your request, the Public Integrity Commission reviewed the letter from Michael Eisenhower, Vice Chair, Dewey Beach Ruddertowne's Architectural Committee. He asked if it was a conflict for David King, Vice Chair, Planning and Zoning Commission to write to all Residents and Property Owners on a land use issue. Based on the following law and facts, we find he should not participate in his official capacity on the re-development of the Ruddertowne Property.

Under the Code of Conduct, officials may not have any interest that may tend to substantially conflict with their official duties. 29 Del. C. § 5806(b).

The letter clearly expresses his position, which is against the Architectural Committee and developer before any hearing by his Board. His "loud and clear" position may, at a minimum, raise the specter of bias in participating in the zoning decision. Delaware Courts have imputed bias to a School Board member who made negative public

statements in advance of an individual coming before his Board for a decision. *Jones v. Board of Educ. of Indian River Sch. Dist.*, C.A. No. 93A-06-003, J. Graves (Del. Super., January 19, 1994). Such action is considered prejudgment, when the official duties require an official to hear all the facts, and without bias render a decision. The Court considered the argument that officials are entitled to a strong presumption of honesty and integrity. However, it concluded that even with that legal presumption, it still must impute bias.

Accordingly, he should not participate as a board member in decisions on this matter.

**Original Signed by Chairman Terry Massie**

**07-47 – Personal or Private Interest--Motion for Reconsideration:**

Mr. Craig A. Karsnitz  
110 West Pine St.  
P.O. Box 594  
Georgetown, DE 19947

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

Dear Mr. Karsnitz:

The Public Integrity Commission (PIC) reviewed the Motion for Reconsideration of its advice that David King, Vice Chair, Dewey Beach Planning and Zoning Commission, recuse from matters on the Ruddertowne property. *Tab A, Op. No. 07-42*. No controlling precedents or legal principles were overlooked; nor were the law or facts misunderstood. The advice is the same: Mr. King, as Zoning Commissioner, must recuse on the Ruddertowne development matters.

**I. Standard for Reconsideration**

PIC's statute does not address reconsideration. *29 Del. C. § 5807 and § 5810*. PIC's Rules allow it in complaints. *PIC Rule IV (C)(p), p. 7*. Mr. King's reconsideration motion acknowledged that the Rule applies to complaints, but not advisory opinions. *Tab C, Motion for Reconsideration, p. 1. (July 31, 2007)*. Mr. Eisenhower's filing was treated as an advisory opinion request. *See, infra*. While the statute, nor the Rules, provide for reconsidering advisory opinions, we do so here.

**[NOTE TO READER: The Tabs referred to in this opinion are not included but are public records. The footnotes in this opinion have been removed for ease of publication.]**

Superior Court Rule 59 is the standard. The motions are to correct errors; not add new arguments. *Del. Super. Ct. Rule of Procedure 59*. They are denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

## II. Background

Dewey Beach's Town Council appointed the Ruddertowne Architectural Committee (RAC) to evaluate and negotiate development of the Ruddertowne property. *Tab E, RAC Chair Eisenhauer, e-mail filing (June 14, 2007); Tab F, Town Minutes, December 9, 2006.* As an appointee, Mr. Eisenhauer, may seek an advisory opinion. 29 Del. C. § 5807(c). He asked PIC if Mr. King's conduct in expressing a personal opinion on RAC's work and the development violated the Code since the Zoning Commission considers these matters. *Tab E, Eisenhauer email.* The Mayor appoints and Council confirms Zoning Commissioners, such as Mr. King. *Dewey Beach Code, Ch. 185 § 33-2.* The Zoning Commission acts on developers' draft ordinances affecting their property; building height, site plans, etc. *Dewey Beach Code, Ch. 181-1; 185-43, 185-68, etc.; Tab G, Transcript, PIC meeting, see, e.g., p. 20, line 272 (Zoning Commission makes recommendations to Council on "substantive matters"); pp. 39-40, lines 530- 546 (Zoning Commission reviews draft ordinances and the Ruddertowne developer has submitted a draft).*

## III. Arguments and Responses

**Argument 1. The Advisory Opinion was not in accord with 29 Del. C. 5802(4); and is outside PIC's jurisdiction. See, also, 29 Del. C. § 5812. – New Argument.**

Mr. King gives no legal or factual understanding of why PIC has no jurisdiction. He only gives the two Code sections without any reasoning on why they preclude PIC's jurisdiction. Accordingly, we will try to cover numerous legal principles as they relate to jurisdiction under those two provisions.

### **RESPONSE (A): Jurisdiction Under 29 Del. C. §5802(4)**

The statute provides:

"It is the desire of the General Assembly that all counties, municipalities and towns adopt Code of Conduct legislation at least as stringent as this act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. *Subchapter I, Chapter 58, of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29. Any change to an approved Code of Conduct must similarly be approved by the State Ethics Commission to continue the exemption from Subchapter I, Chapter 58, Title 29.*" 67 Del. Laws, c. 417, §§ 1, 2; 68 Del. Laws, c. 433, § 1 (emphasis added).

To the extent it is argued that Subchapter I does not apply to local officials because Subchapter I defines "State agency" as exempting "political subdivisions," that is a definition, not the substantive law. 29 Del. C. § 5804(11). Substantive law is clear: "This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993...." 29 Del. C. § 5802(4). That law specifically tells local governments how they can be "exempt" and how to "continue that exemption." *Id.*

**Application of Facts and Law:** (1) Dewey is a Town; and (2) has no approved Code. Thus, it has not established the “exemption.” Its employees, elected, and appointed officials are subject to Subchapter I. 29 *Del. C.* § 5802(4). Mr. King is a Zoning Commission appointee. Subchapter I gives PIC jurisdiction.

**RESPONSE (B) - Jurisdiction under 29 *Del. C.* § 5812.**

The motion does not refer to a specific provision in § 5812. Section 5812 defines the terms in *Subchapter II*, Financial Disclosure. It applies to “public officers” as specifically listed, but exempts “elected and appointed officials of political subdivisions of the State....” 29 *Del. C.* § 5812(n)(2). If it is argued that by exempting them from Subchapter II that they are exempt from Subchapter I, that is contrary to the plain language. Subchapter I says the only way local officials are exempt, and can “continue the exemption from Subchapter I,” is to have their own Code and changes approved by PIC.

**Legal Principle:** “Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.” *See, generally, Cede & Co. and Cinerama, Inc., v. Technicolor, Inc.*, 758 A.2d 485 (Del., 2000); *Coastal Barge Corp. v. Coastal Zone Indus. Control Board*, 492 A.2d 1242, 1246 (Del., 1985).

**Application of Facts and Legal Principle:** The language of both Subchapters is clear. Subchapter I gives PIC jurisdiction over local officials; Subchapter II does not.

**RESPONSE (C) - Jurisdiction - Consistency with Rules of Statutory Construction**

**(1) Legislative Intent.** The law requires construction consistent with the General Assembly’s manifest intent. 1 *Del. C.* § 301.

(a) In deciding legislative intent, Courts look first to the statutory language. *Tab N, Goldstein v. Municipal Court, Del. Super.*, C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991). Where the persons and things to which a statute refers are affirmatively or negatively designated, it infers the legislative intent. *Id.* (citing *Norman v. Goldman*, 173 A.2d 607, 610 (Del. Super., 1961)).

**Application of Principle:** The law affirmatively declares local officials subject to Subchapter I, absent an approved Code. It negates Subchapter II application to them.

**(2) Legislative History:** Courts also look to the legislative history to aid in deciding legislative intent. *Cede & Co., supra*. The original Subchapter I did not mention local officials. 59 *Del. Laws*, c. 575 and 64 *Del. Laws*, c. 110. Later, the 135th General Assembly asked the Delaware State Bar Association’s Special Committee on Public Officials’ Code of Conduct *to assist in drafting ethics legislation. Tab H-1, Committee Report, June 7, 1990*. The Committee said to General Assembly leaders:

“Your request indicated *an intent* that our proposed legislation should provide rules for the Executive branch of State government *and for local government officials* similar to the rules we proposed in 1986 for the members of the General Assembly.” *Id.* (emphasis added).

In discussing local officials and employees, they noted that elected and appointed officials of political subdivisions... “are not deemed public officers within the meaning of the

*financial disclosure law.” Tab H-4 and 5. (emphasis added) Regarding the Code of Conduct, [Subchapter I], the report said local political subdivisions could enact their own Codes. Tab H-4. (emphasis added). It also said local ordinances were not reviewed for purposes of the report. Id.*

The Committee proposed that the legislation include the General Assembly’s “desire” that local governments adopt their own Code within two years. *Tab H-2 and 3.* In 1991, when Subchapter I was rewritten, passed and approved, it included the language about its “desire” that all local governments adopt Code of Conduct legislation similar to the act to apply to their public officials. *Tab H-6, 67 Del. Laws, c. 417 § 2.* It also directed the State Ethics Commission [now PIC] to report to the General Assembly within two years the existence of local legislation and make a recommendation on legislation to be adopted and to cover such officials. *Id.* The exemption of local officials from Subchapter II, Financial Disclosure, was not changed.

In 1992, the General Assembly adopted new language. Rather than a “desire,” for local Codes, it mandated that local officials were subject to Subchapter I, unless they had an approved Code. *Tab H-6, 68 Del. Laws, c. 433.* That is the present law. *29 Del. C. § 5802(4).*

**Application of Principle:** The legislative history repeatedly reflects the manifest intent of the General Assembly that local officials are subject to Subchapter I, absent a PIC approved Code, with changes also approved. It is the only means of “continuing exemption.”

**(3) Unreasonable results:** Interpretations of statutes should not lead to a result so unreasonable or absurd that it could not have been the legislature’s intent. *Synder v. Andrews*, 708 A.2d 237 (Del., 1997).

**Application of Principal:** To conclude PIC has no jurisdiction would lead to the unintended result that most local governments would not have a Code of Conduct. Such conclusion would be an attempt at an implied repeal of 29 Del. C. § 5802(4). Implied repeals are not favored at law. *Silverbrook Cem. v. Board of Assm’t Review*, 355 A.2d 908 (Del. Super., 1976), *aff’d.*, as modified, 378 A.2d 619 (Del., 1977). Further, that conclusion would ignore: (1) the clear language in Subchapter I mandating application; (2) the clear distinction between Subchapter I jurisdiction, as opposed to Subchapter II; (3) the repeated legislative acts that lead to including local officials; and (4) the rules of statutory construction.

**(4) Consent to Jurisdiction:** Delaware Courts have long recognized the ability to consent to jurisdiction. “The consent doctrine has been enunciated in many judicial decisions and is a satisfactory enough explanation of the basis of jurisdiction where consent is in fact given.” *Standard Oil v. Superior Court*, 44 Del. 538 (Del., 1948). Jurisdiction is appropriate when persons waived defenses to personal jurisdiction by their conduct. *Hornberger Management Company v. Haws & Tingle General Contractors, Inc.* 768 A.2d 983 (Del. Super., 2000).

**Application of Law and Facts:** At the time of the filing, Dewey Town Solicitor, John Brady, represented Mr. King. He had a copy of Mr. Eisenhower’s filing; was advised it would be treated as an advisory opinion; advised of the meeting date; and said PIC could proceed, but he would not be available. PIC’s underlying opinion states that the decision was “at your request.” *Tab A-1.* That is not disputed. No jurisdictional objection to

jurisdiction was made between the time of the filing through the issuing of the underlying opinion. Jurisdiction issues can be considered waived if they are not raised. Here, it was newly raised in this motion. Motions for Reconsideration are not for new arguments. *Del. Super. Ct. Rule of Procedure 59*.

**CONCLUSION:** No jurisdictional precedents or legal principles were overlooked. No law or facts were misunderstood. The underlying decision is not changed. PIC has Subchapter I jurisdiction of local officials, including Mr. King. 29 *Del. C.* § 5802(4). It does not have Subchapter II jurisdiction over locals. 29 *Del. C.* § 5812(n)(2).

**Argument 2. This complaint was not based on sworn testimony and is in violation of the law and the Rules of this Commission.** See, *Public Integrity Commission Rule III*.

**RESPONSE:** 29 *Del. C.* § 5807(c) and 29 *Del. C.* § 5810(a).

Complaints require a “sworn complaint of any person” or PIC may act on its own. 29 *Del. C.* § 5810(a). If PIC acts on its own, after an investigation, a complaint must be filed with PIC by Commission Counsel, the Attorney General, or Special Counsel. 29 *Del. C.* § 5809(a); *PIC Rules, III. INVESTIGATIONS, (C) (1) Report of Investigation*.

**Application of Law to Facts:** Neither Mr. Eisenhower, nor PIC, instigated a complaint. It was a request for an advisory opinion which only requires a “written statement.” 29 *Del. C.* § 5807(c). They may be filed by employees, officers, honorary officials, an agency or a public officer. *Id.* Mr. Eisenhower was appointed to RAC, a Town Council created body. RAC acted on Council’s behalf on Ruddertowne negotiations. Mr. Eisenhower was authorized to seek an advisory opinion. *Id.* The law and procedures used were for advisory opinions, not complaints. *Id.*; *PIC Rules, (VI) “Requests for Advisory Opinions and Waivers,” § (A)(1)-(5)*. PIC treated the filing as an advisory request at the proceeding. The underlying opinion was captioned “Advisory Op. 07-42.” *Tab A*. Mr. King’s motion acknowledged it as such and called it an “advisory opinion.” *Tab C, Motion for Reargument, pp. 1 & 2*. The motion also acknowledges that *Rule IV(C)(p)* “applies to hearings and decisions on complaints and does not appear to apply to requests for Advisory Opinions.” *Id. at p. 1*. The argument that it was a “complaint” was made at the reargument motion. PIC’s deliberations covered the “complaint” versus “advisory opinion” issue. *Tab G-58 lines 778-817 and G-79 lines 1062-1064*. PIC again concluded it was an “advisory opinion.”

Aside from the use of the word “complaint” in this argument and argument 4, the motion refers to a “complaint” one other time. It says: “it is believed” that “the true nature of this dispute is a complaint....” *Tab C-1 ¶ 1*. No facts are given to support that belief. Mere allegations, without supporting facts, are insufficient. *Del. Super. Ct. Procedural Rules 6(b) and 56*.

**CONCLUSION:** No law or facts change the underlying decision, not is it shown that any legal principle was ignored in treating the filing as an advisory opinion.

**Argument 3. This entire process violated Mr. King’s right to due process since he had no notice of the complaint against him and no opportunity to be heard on any of the issues. - New Argument**

**RESPONSE:** Notice and Due Process

The complaint provision provides for “notice and opportunity to be heard.” 29 Del. C. § 5810(a). Again, it was not a “complaint,” or treated such. See, above. The advisory opinion provision does not require appearance, only a *written statement* by the requesting official. 29 Del. C. § 5807(c) (emphasis added). PIC’s Advisory Opinion rules only require written statements. *Tab B, PIC Rules, Advisory Opinions and Waivers.*

Attendance is at PIC’s discretion:

**Rule IV(A)(5) Attendance at Meeting - Decisions Without Attendance** - Prior to reaching its decision on the Application for a Waiver or an Advisory Opinion, the Commission *may* require the applicant and others, with pertinent knowledge of the facts necessary for the Commission to reach a decision, to attend a meeting of the Commission and testify. The Commission may in its discretion require that the testimony be under oath. The Commission may in a clear case grant or deny a Waiver or issue an Advisory Opinion based on the written application without requiring the attendance at a meeting of the applicant or others. (*emphasis added*).

**Application of Law and Facts:** It is undisputed that: (1) Mr. Eisenhower had authority to make a request; (2) he filed a written request with pertinent knowledge of the facts, attaching Mr. King’s e-mail; and (3) it is undisputed that Mr. King wrote the e-mail. Mr. King does not deny the contents, but says the email was: a “note;” “a draft;” “a brain dump,” and/or a “scenario.” No matter what it is called, the factual contents are not questioned. Those facts were used for the underlying decision. *Tab A, Commission Op. No. 07-42.* This argument does not identify the basis of any notice and due process denial. Assuming the basis of this argument is that he was entitled to notice and process under: (1) a Constitutional right; (2) the Code and Rules for complaints; or (3) the Code and

Rules for advisory opinions, we previously addressed those issues in Commission Op. No. 07-05. *Tab D-2 and D-3.* We also addressed Counsel’s duty of notice. *Id.* To the extent those notice, and due process requirements are the basis of this argument, the same laws and procedures apply.

Even the complaint provision, says “notice and the opportunity to be heard.” That does not necessarily mean physical appearance. For example, a motion to dismiss may be filed by Counsel, and the subject of the motion need not physically appear. He is “heard” through Counsel. *Commission Op. No. 07-05.* Aside from notice and opportunity to be heard given prior to the first ruling, Mr. King had the opportunity to physically appear, and did so, to give facts at this motion.

**CONCLUSION:** The facts nor the law were ignored, and no facts or law in the reargument change the underlying opinion.

**Argument 4: The complaint against Mr. King is factually incorrect. At the time of the preparation of the material of which Mr. Eisenhower now complains, there was no pending proceeding by any individual regarding “Ruddertowne” before the Planning and Zoning Commission. In addition, Mr. King’s notes were talking points only and in no way indicated any prejudice for or against any particular development. - New argument**

**RESPONSE: Use of term “complains.”**

**Argument 5:** The filing was not a “complaint.” See, above.

**Argument 6:** There were no pending proceedings.

**RESPONSE:** In his e-mails, Mr. King repeatedly refers to upcoming zoning matters as they relate to the Ruddertowne Development. The Town ordinance identifies specific areas with which the Zoning Commission deals, e.g., height, footage, site plans, Comprehensive Development Plan (CDP). *Dewey Beach Code, Ch. 181-1; 185-43, 185-68, etc.*

**(a) June 3, 2006** – “Thoughts from the last RAC meeting.” *Tab K.* He specifically identified the Ruddertowne developer selected by Highway One LLP, Harvey Hanna & Associates (HHA). He said the developer “had read the new Comprehensive Development Plan (CDP)...walked into this deal planning to build a mega mall and include a large hotel...with an understanding that they could build to a height that is more than twice the current height limit ...planned on an expanded structured parking which will require developing to a higher total square footage...a primarily residential along the Van Dyke side --image six or seven floors of new condos from SR-1 to the Bay...they want a major re- development statement and intend a convention hotel as the keystone to this project.” He said three meetings were scheduled, June 15, 22 and 29...that “will build sequentially to a final design concept that will be launched into the Town’s preliminary zoning approval process at the July Town meeting. *Id.*

**(b) June 5, 2006**-- “HW1 coming through the back door.” He said RAC is talking about special zoning for the proposed RB1, to permit 70 feet. ...there is strong concern from many town residents that this will spread to other zoning districts, it is clear that this dramatic change in zoning will apply to the Highway One Rusty Rudder property.” *Tab K.*

**(c) June 7, 2006** - “Call to arms.” Said there was a “strong concern that the starting point will be “too high/too big.” *Tab K.* He then proposed a course of action on these particular issues as it related to opposing the Ruddertowne Development:

(1) “get as many like-minded residents and property owners to-” “attend the Town meeting, we need voices to say they strongly favor retaining commercial or mixed us in Ruddertowne, but not at the cost of a too-massive development. He said, “see talking points in my earlier e-mails.” *Id. at ¶1.*

(2) “get as many like-minded residents and property owners to”– “meet on Saturday at 2:30 behind my condo to discuss what we heard at the Friday meeting and to plan a contingent course of action pending the 6/15 presentation by HHA. I am assuming we will respond to an undesirable proposal with a two-to- three page mailing to all town voters and would like to collect names of residents and property owners who support our efforts and are willing to be identified in any such mailing at this meeting and/or are willing to help finance this mailing.” *Id. ¶2.*

(3) “get as many like-minded residents and property owners to” attend, listen, and as appropriate voice their concerns at the June 15th RAC meeting at which HHA is to present their design concept—presuming including drawings, specifications, etc., of their proposed development. *Id. at ¶3.* He said he was hopeful that when the RAC and commissioners were confronted with strong community opposition to any massive development project “grossly exceeding current zoning restrictions” that they will require a downscaling of the proposed development or rejection of such a plan.”

**(d) June 8, 2006.** “Change in plan and role.” He said he was advised by a Town official that it was premature for him to appear to be “taking sides” in the developing Ruddertowne discussions. *Tab K.* He continued:

“It has been my intent in circulating the ‘convention/resort hotel complex’ scenario—now as throughout the entire comprehensive plan development process....”...Although I have not taken a position for or against any specific proposal or future zoning applicant, there is the possibility that convening/hosting a meeting that might lead to the formulation of a defensive plan of action against a potential future zoning applicant might be perceived as bias on my part against any such application. This would be improper and has not been/is not my intent.”

“Therefore, to avoid an appearance of conflict of interest *I must retract my offer to host a meeting of Dewey Beach citizens concerned about any potential developments inconsistent with current town zoning*” (*emphasis in original*). *Tab K.*

The e-mails alone identify areas where, as a Zoning Commissioner, he could expect to be involved. He confirmed that at PIC’s meeting on this motion.

**(e) December 9, 2006**—The Town minutes show he discussed the CDP. He was specifically asked how he about the recent site plan from Highway One would affect the CDP. *Tab F, Town Minutes, “Discuss and Vote—To approve a draft of the Town of Dewey Beach Comprehensive Plan.”(December 9, 2006).* The facts show Mr. King knew about the Ruddertowne development; its connection to the CDP and zoning approval process. He repeatedly spoke against it on zoning issues, and specifically said zoning issues would be considered the very next month after his e-mails were sent. *Tab K.* To say nothing was pending pertaining to the Ruddertowne zoning, or that he did not recognize zoning issues in which he would be involved, is inconsistent with:

- (1) his undisputed correspondence, and the Town minutes;
- (2) his presumed knowledge of his legal and official duties to act on Zoning matters. *Dewey Beach Code, Ch. 181-1; 185-43, 185-68, etc.;*
- (3) his own recognition that he had to make a “change in role and plans,” because of his official position;
- (4) his own concern that his actions could raise an appearance of impropriety because of his remarks as they related to his official duties;
- (5) his own concern that his actions could be perceived as “bias.” If he did not believe any of this would come before the Zoning Commission, what would be his reason for any concern about appearance or bias?

**CONCLUSION.** The facts were not incorrect. The facts used were Mr. King’s own statements. PIC arrived at the very same conclusion he did— his conduct could raise an appearance of impropriety and of bias. It said it could “raise the specter of bias.”

**Argument 3: Mr. King’s notes were talking points only and in no way indicated any prejudice for or against any particular development.**

**RESPONSE:**

(a) The e-mails show that Mr. King’s “note” refers only to the Ruddertowne development—a “particular development.”

(b) The “note”—the initial e-mail—is five pages, formatted with headings, bullets, issues, etc. The plain and ordinary meaning of “note” is “a condensed or informal record;” “a brief comment or explanation.” *Webster’s Collegiate Dictionary*, p. 794, 10th ed. (1994). It means “to make a brief written statement.” *Black’s Law Dictionary*, p. 1060, 6th ed. (1990). Mr. King’s e-mail initial e-mail refers to it as a “draft” and a “brain dump.” *Tab K-1*. In later emails, he says he is proposing “the following course of action;” that “like-minded residents,” use them as “talking points.” *Tab K-8*. At the reargument motion, he says it was a “scenario” that “I thought” the town should discuss. *Tab G-11 and 12, lines 150 to 163*. He referred to that scenario as a “massive development” with townhouses and hotel. *Tab G-12*. That is the same description in his initial e-mail. *Tab K-3*. Although he said it thought was for the “town” to discuss, he then said his e-mails were sent to about 12 people who were “friends.” *Tab G-12*. He had asked those “friends” to pass the talking points to their network of “concerned friends.” *Tab K-7*. As a factual matter, just his initial e-mail was more than a mere note. He wanted it used for much more.

(c) In the e-mail he: expressed “disappointment that these developers:

- (1) seemed so poorly informed/mis-informed about the needs and desires of the Town’s residents and property owners, and;
- (2) seemed into a massive redevelopment rather than something more in scale with the rest of Dewey Beach and more closely mated to the ‘way of life’ that brought us here.” He called it a “white elephant.”

(d) He consistently found faults. After just one meeting, he said RAC “seems unwilling to make critical comments and/or to take a hard stand.” *Tab K-2*. That comment is interesting in light of his many statements that he did not know what the proposal would be. RAC’s officials, like all public officials, are to stay open-minded and base their decisions on the merits. Courts have noted that requirement when decision makers are involved in zoning. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island*, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6 (“Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed); *Brittingham v. Board of Adj., City of Rehoboth Beach*, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9 (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another). If the proposal is not known, taking a hard stand would be inconsistent with the need for open-mindedness. Mr. King was the one who took a hard stand, when he says he did not know the proposal. *Tab K-2 through 8*. Assuming he did not know the proposal, he still was able to find faults with the developer and the development. The developer was “poorly informed/misinformed;” had “no sense” of the Town’s “needs/desired; did not “read the new Comprehensive Development Plan;” etc. *Tab K-2*. Again, assuming he did not know their proposal, he was able to identify very specific items that were problems: the footage size, the height, the “structured parking lot” that would “raise the construction costs;” result in a “twenty-fold” increase in vacant stores; etc.

(e) He acknowledges that “then it hit me. The RAC is talking about special zoning.” *Tab K-7*. After sending out more e-mails, he notified his “friends” that a Town official advised him that it was “premature for him to ‘take sides’ in the developing Ruddertowne discussions.” *Tab K-9*. Regarding his earlier offer to have “like-minded residents” meet as his home to “plan a contingent course of action,” *Tab K-8*, he said: “there is a possibility that convening/hosting a meeting that might lead to the formulation of a ‘defensive plan of action’ against a potential future zoning applicant might be perceived as bias on my part against such application” and “this would be improper....” *Tab K-9*.

**CONCLUSION:** The Town official's concern and Mr. King's concern about, at least the perception of, bias was on target. Contrary to the argument, the facts show he: talked only of one "particular development;" criticized the developers and the project; even before he allegedly knew the proposal; sought to allay a force of "like-minded" persons to develop a "defensive" plan, etc. The plain and ordinary meaning of "prejudice" is: "an adverse opinion or leaning formed without grounds or before sufficient knowledge." *Webster's 10th Collegiate Dictionary*, p. 919. It arises from: prejudging or "bias." *Id.* The facts are his written facts. We find as before--his acts at least raise the "specter of bias."

**Argument 5: The citation to *Jones v. Board of Edu. of Indian River Sch. Distr., C. A. No. 93A-06-003, Graves, J. (Del. Super., January 19, 1994)*, is inapposite. The reasoning in the *Jones* case involved the review of a decision maker in a teacher dismissal case whose own children had been taught by the teacher in question and had certain negative experiences in that teacher's classroom. This is far from the circumstances of this case. Had the Board allowed a full record to be developed, this distinction would have been made clear.**

**RESPONSE:** The Code of Conduct states that an official cannot review or dispose of official matters where he has a "personal or private" interest that tends to impair judgment in making official decisions. 29 *Del. C.* § 5805(a)(1). In *Jones*, a government official's "personal or private interest" was the result of a familial relationship with a teacher, when he knew his official duties were to hear termination proceedings for that particular teacher. Before performing those duties, he made negative statements about her. It was decided his statements showed pre-judgment and he should not have reviewed or disposed of that matter. Here also, Mr. King expressed his "personal and private interest" on a particular matter --the Ruddertowne development--when he knew, or should have known, his official duties were to participate in proceedings on that particular development. He made personal and negative statements about the particular development and developer. His "personal and private statements" were negative and showed prejudgment. Thus, *Jones* is not inapposite.

"Personal or private interests" need not be familial as in the *Jones* case, nor do the proceedings have to be termination proceedings. They are "any matter" in which the official has a "personal or private interest." 29 *Del. C.* § 5805(a)(1). If the "personal or private interest" may result in a financial benefit or detriment to the official or their close relatives, those are automatic conflicts under the law, rather than a conflict that must be decided on the particular facts. 29 *Del. C.* § 5805(a)(2).

Delaware Courts have held under the common law that personal interests can arise from a relationship between an official and parties to planning and zoning matters. *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del., 1967) (alleging "personal interest" or "conflict of interest" where church of decision maker would benefit from decision was sufficient to raise factual issue for Court). The common law has not been abrogated; it is codified in 29 *Del. C.* § 5805(a)(1). *Tab L-and 2*.

Thus, it is an issue of fact of whether the relationship is sufficient to create a "personal interest" or "conflict." Recusal, when there is an interest that rises to the level of a conflict, is so that judgment will not even *tend to be impaired*. 29 *Del. C.* § 5805(a). No actual impairment is required; only the appearance thereof. *Commission Op. No. 92-11*. Recusal ensures that the conduct will not "raise suspicion among the public" that the public trust is being violated. 29 *Del. C.* § 5802 and § 5806(a). Thus, in a re-zoning case, the Court found no actual violation of the requirement to recuse when close relatives and/or the

official had no financial interests, but as a factual finding said the Board members would be “prudent” to recuse themselves, but because of the rule of necessity—recusal was not possible. *Harvey v. Zoning Board of Adjustment of Odessa*, Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001). As in *Harvey* and *Jones*, this case does not show Mr. King has any financial interest. PIC has never said he did. That does not mean he should not recuse. He still has a “personal or private interest” in a matter for which he would also have official authority, and, thus, should not “review or dispose of the matter.” 29 *Del. C.* § 5805(a)(1).

In interpreting that very provision, Delaware Courts assumed a conflict because a Board appointee to an unpaid position said he might have a conflict. The Court said even though his statements were “neutral” and “unbiased,” and he did not participate in the final vote, he should have recused himself “at the outset.” *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. (January 29, 1996). The Board member’s participation was challenged by an applicant who was not successful with the Board, and alleged the Board member had a “personal or private interest” because his private employer had an indirect business relationship with the other applicant, and his failure to recuse rose to the level of a violating his due process rights before the Board. Thus, it does not matter if the official statements are unbiased, nor is actual bias required.

Like *Beebe*, Mr. King is an unpaid appointee. He has a “personal and private interest” in an official matter that would come before him. Unlike *Beebe*, his comments were not neutral and unbiased, but slanted against the party who would have to deal with Mr. King’s Board. Once a conflict arises, recusal should occur “from the outset.” *Beebe*. The reason is not only to avoid actual bias, but the appearance thereof. As in *Beebe*, we gave Mr. King the strong presumption of honesty and integrity, even though his biased remarks were made when the CDP was to be considered the next month, and he spoke about the site plans at the December Town meeting. These final facts may suggest he did not recuse himself on the matter, however, he was given every benefit of the presumption of honesty.

**CONCLUSION:** *Jones* is not inapposite. Not only does *Jones* apply, but so does *Beebe*, which interpreted the same provision at issue here—29 *Del. C.* § 5805(a)(1). Again, PIC did not misunderstand the law or facts, or the legal principle.

**Argument 6: The opinion of the Public Integrity Commission is so broad and sweeping as to cast doubt on Mr. King’s ability to participate in any zoning decision. The decision itself is not clear in what “decisions on this matter” Mr. King should not participate.**

(a) “Matter” is the term used in the statute. 29 *Del. C.* § 5805(a)(1). “Matter” is defined in the statute. 29 *Del. C.* § 5804(7)). It means: “any application, petition, request, business dealing or transaction, of any sort.”

(b) “Matter” is framed in the context of the “personal or private interest,” as it relates to Mr. King’s duties pertaining to the Ruddertowne development, as the Commission bases its findings on the law and the “particular fact situation.” 29 *Del. C.* § 5807(a). That was identified in the underlying opinion. As the decision must rest on the particular facts, we cannot speculate on all of the “matters” that could arise for Mr. King, as it would be engaging in hypotheticals, not “particular facts.”

(c) At least one “matter” example was given by Mr. King at the meeting. (*Tab G, transcript, pp.26, lines 349-355*). He said “it was his understanding” that if read literally it [the underlying opinion] would mean he could not participate in a review of a site plan on the Ruddertowne property. He then said that site plan review would not come to the Zoning Commission. Again, that statement is contrary to the Dewey Code which says the Zoning Commission reviews site plans. It also is contrary to the Town Minutes which show he was asked to comment on this specific site plan. *Tab F-2*. However, the significance of his statement is that he identified an action [review of a site plan] and the particular property [Ruddertowne] on which he made his statements. This shows the layperson’s grasp of the term “matter.” In fact, Argument 9 of this motion asks that Mr. King be able to respond on “this matter” but “this matter” is not specified. It is from the particular facts—the context—that it is understood that “this matter” means the subject of this particular motion—PIC’s opinion, just as Mr. King understood the advisory opinion as referring to “matter” within the factual contents.

(d) As “matters” arise, if clarification is needed, Mr. King can request additional guidance, just as guidance was requested on the same day as a Town meeting he was attending after the underlying opinion. Guidance was given to the Town Solicitor for him that same day. *Tab J-14*. The guidance given was also sent to Mr. Karsnitz that same day. *Id.* Guidance, when the Commission is not available, is Commission Counsel’s duty, based on PIC’s prior rulings. 29 *Del. C.* § 5808(A)(a)(1).

Any upcoming matters of which he is now knowledgeable can be asked now. As agendas for the Zoning Commission’s upcoming meetings are normally posted at least 7 days in advance of a hearing, he would have time to get guidance. To be able to post in advance, he might even know before the posting date if he has any need for guidance.

**CONCLUSION:** This argument does not change the underlying opinion. That opinion found he should recuse from “matters” on the Ruddertowne Development/its developer. It does not apply to other zoning “matters” unrelated to that development. The statute defines “matter,” and examples of the definition are that, “application” or “petition” or “request” would include such things as requests for variances (e.g., height, footage), review of site plans, review of draft ordinances, etc., as they relate to the particular development/developer which was the subject of Mr. King’s statements.

**Argument (7): Fundamental due process requires an ability to respond on behalf of Mr. King in this matter.**

**RESPONSE:** “Due process” is the opportunity for notice and the opportunity to be heard. No facts or law suggest this argument is different from Argument 3 on Mr. King’s right to “due process” was denied. *See, Argument 3 response.*

The following arguments were not raised in the written reargument motion but raised at the meeting for the first time.

**Argument (8): Mr. King does not know the length of time the advice should be followed.**

**RESPONSE:** Again, this argument would require speculation rather than “particular facts.” 29 *Del. C.* § 5807(c). It could entail such speculation as: *if* the development submits a proposal; *if* the proposal is accepted by the Zoning Commission; *if* it is accepted by the Town Council put in the CDP, *if* the CDP is kicked back; *if* a basis of the rejection relates to

this development; etc. The basic rule is that he recuses in the Ruddertowne development “matter.” He has indicated an ability to spot a “matter.” Further, he can seek guidance from the Commission.

**CONCLUSION:** This argument does not change the underlying opinion. He is to recuse from matters on the Ruddertowne Development.

**Argument 9: The Zoning Commission acts in a legislative capacity, not a quasi-judicial capacity.**

**RESPONSE:** Mr. King said the Zoning Commission does not act as a legislative body. *Tab G, p. 4, line 50, e.g.* The Zoning Commission is appointed by the head of the Executive Branch (the Mayor). No law or facts are given to substantiate that the Zoning Commission is an arm of, or operates as, a legislative body. No facts or law suggest the Zoning Commission can pass laws, which is the purview of the legislative body. Delaware Courts have recognized the quasi-judicial nature of zoning entities. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6 (“Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed); Brittingham v. Board of Adj., City of Rehoboth Beach, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9 (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).*

In a prior decision, we discussed at length why the judicial standard is relevant in interpreting the State Code of Conduct. *See, Extract of Commission Op. No. 02- 23, see fn. 18, infra.*

**CONCLUSION:** No law or facts were misunderstood.

**Argument (10) Right to Free Speech: Mr. King is entitled to free speech.**

**RESPONSE:** To the extent this is a Constitutional question, PIC has no jurisdiction. *See, Argument 3, supra, citing Commission Op. No. 07-05.* The State statute does limit the matters on which an official can speak. Applicable here is that they may not review or dispose of matters where they have a personal or private interest. 29 *Del. C. § 5805(a)(1).* When they have such interests, they are required to recuse themselves from speech in their official capacity. *Id.* Delaware Courts have recognized that it can restrict speech. *Beebe, supra.* (State Board appointee should not have made even “neutral” or “unbiased” statements because of possible conflict). This restriction is not uncommon in conflict of interest rules for both public officials and private persons, e.g., Judicial Code of Conduct; Legislative Conflict of Interest Law, 29 *Del. C. § 1002(a)* (Legislator cannot participate in debate nor vote if there is a personal or private interest). The ban on General Assembly members voting if they have a “personal or private interest,” is also found in the Delaware Constitution. *Del. Const., art. II § 20.* Corporate entities can have by-laws on such restrictions. *Commission Op. No. 02-23.* Attorneys can be made to withdraw from a case because of a conflict. *Delaware Lawyer’s Rules of Professional Responsibility.*

To the extent it is argued that elected officials can speak on their platform on a particular issue, they have the right to political expression to their constituents because their duty is to represent those persons. Mr. King is not an elected official who can run on platforms. He was not elected to office to represent the people. He was appointed to a board to make fair and unbiased decisions in his official duties. If there is a “personal and

private interest,” the government duties must “command precedence.” *In re Ridgely*, 106 A.2d 527, 530-31 (Del. Super., 1954). The 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, “his private interest must yield to the public one.” *Id.* at 531. In *Ridgely*, the Court concluded the official duties were so significant that it did not need to interpret the Lawyer’s canons which also would apply to Mr. Ridgely. *Id.* Mr. King placed the “personal interest” before the public one, so he must now recuse himself from his public responsibility on this matter.

**CONCLUSION:** Mr. King’s argument is contrary to the statute and case law. The argument does not change the underlying decision.

**D. Ms. Joan Claybrook’s letter was incorporated into the motion for reconsideration.**

**RESPONSE:** She states that she is not a lawyer. Yet, her letter makes strictly legal arguments on such things as jurisdiction, due process, statutory interpretation, etc. *Tab C-4 thru 7*. She also is not a Town employee, officer or appointed official. We first address a concern about her right to intervene and then a concern about incorporating her letter, as it relates to the legal arguments as part of the motion.

**(1) Right to Intervene:**

Delaware Superior Court Rule 12 addresses the circumstances of intervention. A person desiring to intervene must state the grounds for intervening. She states no grounds to intervene.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when an applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

The advisory opinion statute limits the persons who can seek an opinion and to whom an opinion can apply. 29 *Del. C.* § 5807(c). It authorizes only government employees, officers, officials or agencies to seek opinions, and the advice applies only to government officials. *Id.* Ms. Claybrook is not a government official. The statute does not confer any unconditional or unconditional right to intervene. She has no legal interest or claim or defense in the “matter.” The disposition of the action would not impair or impede her ability to protect a legal interest, as she has none in this “matter.” She may have a personal and private interest, but not a legal interest. *Tab N, e.g., Gamble v. Thompson*, Del. Super., C.A. Number 98A- 07-007-JOH, Herlihy, J. (October 27, 1999) (individual had no standing as a complainant).

**(2) Practice of Law:** As noted, she is not a lawyer but mainly makes legal arguments, statutory interpretations, etc. They are mainly the same legal arguments as in motion submitted by Mr. King through his Counsel. As her legal arguments were incorporated into the motion for Mr. King, the question is if her acts constitute representation of him, and if she is interpreting the law, preparing legal instruments, etc. *Tab N, see, e.g., In re Mid-Atlantic Settlement Services, Inc., Board on the Unauthorized Practice of Law, File No. UPL 95-15*. Again, we note the concern, but have do not entertain

whether her conduct is contrary to nonlawyers acting as lawyers.

**(3) Fact Witness:** To the extent Mr. King may want her considered a “fact witness,” that has not been indicated. However, as the letter supports him, and it includes many of the same things in Mayor Tesh’s letter and the facts she stated at the PIC meeting, we will assume Mr. King wanted her as a fact witness. We also received additional correspondence and calls supportive of him and considered them.

**(a) Letters of Good Will and Good Intentions:** Ms. Claybrook’s letter and letters from others, and phone callers spoke to the important role of Mr. King on the Zoning Commission, his value to the community, that he is honest, etc. (*e.g.*, *Tab C-4 thru 7, Ms. Claybrook; Tab M, Mr. Cooke and Mayor Tesh*). We have never suggested Mr. King’s work is not of value to the Zoning Commission, the community, etc. However, the law does not distinguish between the “good” and the “bad,” the “honest” and “dishonest.” 29 Del. C. § 5805(a)(1). It applies to all officials--that is what insures the public’s confidence in its government. 29 Del. C. §5802. Mr. King, and these persons, say he had no intent to violate the law. He is entitled to a strong legal presumption of honesty and integrity, as are all public officials. *Beebe, supra*. Mr. King was given that presumption, even though he apparently did, at a minimum, review the draft ordinance. He was given an advisory opinion, which requires no sworn statements, from Mr. King, or any others. 29 Del. C. § 5807(a). A violation of this law may be found during an advisory opinion request and may then be referred for prosecution. 29 Del. C. § 5807(b)(3). The filing was not treated as a criminal prosecutorial matter. If so, the law would require “knowingly or willfully violating any provision,” carrying up to a year in prison and/or up to a \$10,000 fine. 29 Del. C. § 5805(f). Thus, he received the benefit that he did not intend to violate the law.

What the advisory opinion section requires is “full disclosure” of all the material facts. 29 Del. C. § 5807(c). Although Mr. King did not disclose, he wrote e-mails other than the June 3, 2006 e-mail, PIC and the Town Solicitor were sent copies of additional e-mails by him attached to a “complaint.” That complaint alleged violations of the Dewey Beach Code, not the State Code. It was dismissed because, among other things, PIC has no jurisdiction to interpret the local ordinance, only the State law. *Tab J, Commission Op. No. 07-47*. Specific reference to the June 8 e-mail was made in PIC Counsel’s e-mail to Mr. King’s Counsel, as was the letter from Mayor Tesh. *Tab J-13*.

It is PIC’s Counsel’s statutory responsibility to “review information coming to the attention of the Commission relating to potential violations of this chapter.” 29 Del. C. § 5808A(a)(3). Mr. Eisenhower’s request was already pending at the time of the “complaint” referred to above. Counsel, pursuant to those duties, brought the information to PIC’s attention, to aid in “full disclosure” as required by 29 Del. C. § 5807(a).

Mr. King cannot have it both ways--have PIC consider the letters of goodwill, but not the e-mails he wrote on this matter.

Ms. Claybrook’s other facts:

- (1) She repeatedly refers to PIC’s ruling as an advisory opinion. (*Tab C-4 and 5*).

**RESPONSE:** Her factual statement, like the fact that the motion refers to PIC’s ruling as an advisory opinion, supports PIC’s position that the filing was, as a factual matter, treated as an advisory opinion. Using that term is also contrary to the argument previously addressed that there was a “belief” that it was a “complaint.” *See, Argument (3)*. An argument that

had no factual basis.

(2) PIC is inconsistent in its opinions because it previously ruled it had no jurisdiction over a school board member under 29 *Del. C.* § 5812 [financial disclosure].

**RESPONSE:** PIC is not inconsistent. Had it had been asked to consider how the financial disclosure law applied to Mr. King, it would have found no jurisdiction under that Subchapter. See *Tab H-1, Legislative History, and Response to Jurisdiction argument*. (Subchapter I, Code of Conduct, applies; Subchapter II, Financial Disclosure, does not apply).

(3) PIC's decision was "a very brief opinion less than one page in length" on a "highly controversial issue" and "800 voters" who registered their concerns.

**RESPONSE:** This argument is factually and legally incorrect.

(a) As a factual matter, the 800 registered voters were not expressing their concern about PIC's opinion, but about the development.

(b) As a matter of law, no Code provision or rule gives the number of voters as a basis for the length of an opinion, or the basis to exempt officials from the law. *Commission Op. No. 01-20*. In that opinion, it was argued that a local official had been elected by a large number of voters, and so he should not have to recuse. PIC said: "No Code provision states that the number of votes received is a basis for letting an elected official participate in the face of a conflict of interest. If those were the rules, no elected official would ever have to recuse themselves when they had a conflict of interest. The restrictions would then become meaningless." In essence, we would be putting an exemption in the law. Language cannot be grafted onto the law. *Goldstein, supra*.

As a matter of law and fact: Land use issues are usually controversial, so that fact is not unique to Dewey. Delaware Courts have recognized some issues can be so "highly controversial," that a State official should not even serve on a committee at all. *Tab N, Your [Judge's] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999*. The Court concluded that even though it was unlikely any matters related to the education committee, on which he wished to serve, may come before him, or that he could recuse himself, that it may raise the appearance of impropriety if he served on the committee at all. Similarly, PIC concluded that Mr. King's participation (but only on this particular matter) could "raise the specter [appearance] of "bias" [impropriety]. PIC did not go so far as to bar him from being on the Zoning Commission; it only required that he properly recuse.

(4) PIC cited only one case.

**RESPONSE:** No law or procedure mandates the number of cases to cite. No facts are given to suggest that when a person goes for advice on the law that the advice must be a legal treatise. It is advice--non-binding--not a Court briefing. As a factual matter, when advice is given, including legal, it is difficult to image that every case, regulation, etc., would be identified.

(5) PIC's practice is to treat correspondence about the behavior of third parties as a complaint.

**RESPONSE:** Ms. Claybrook gives two opinions she believes support that fact. *Commission Op. No. 00-28 and 93-15*. Both were filed by private citizens, not officials or agencies. Advisory opinions are not given to private citizens. 29 *Del. C.* § 5807(a). Any person, including private citizens, can file complaints, but they must be sworn. 29 *Del. C.* § 5810(a). The private citizens did not file a sworn statement. They were told of the law and rules on the requirement. PIC also advised that “even assuming a complaint,” the law gave PIC no jurisdiction over a school board member or General Assembly members. Ms. Claybrook is factually incorrect about the implications of those opinions. Aside from the law given in the opinion, as a factual matter, it would be a waste of the citizens’ time to be told only about the need for a “sworn complaint,” and not be told about the jurisdictional limits. They would then file a sworn complaint, only to have it dismissed for lack of jurisdiction.

(6) Mr. King has no “financial” interest in the matter, and no “personal” interests have been asserted for Mr. King.

**RESPONSE:** As addressed in detail above: (1) PIC has never said or suggested that he has a financial interest; (2) the law is not limited to pecuniary interests; (3) his “personal interest” was given in his own e-mails; identified in the underlying opinion; and (4) his own remarks at reargument. *Tab A, Tab G* (“I personally would have started at the other extreme, start low and build up rather than start up and build low....”) and *Tab K*. Ms. Claybrook refers to his e-mail as “the musing of a private citizen.” That shows even a laypersons understanding of the “personal” or “private interest.” A “personal and private interest” for Mr. King has been established, and he should not “review or dispose” of matters related to the Ruddertowne development. 29 *Del. C.* § 5805(a)(1).

(7) PIC called Mr. King’s e-mail an “open letter” to the community, but it was only e-mailed to nine people.

**RESPONSE:**

(a) PIC called it by the name Mr. King used. *Tab K-1, “Open Letter to Dewey Beach Residents and Property Owners.”*

(b) Mr. King asked those persons to pass this along to “your network of concerned friends.” *Tab K-8.*

(c) Regardless of the number of people to whom it was sent; who received it; saw it; had it read to them; were told about it, etc., the content is the same—it gives his personal position on the development. Conflicts are not based on the number of persons who are aware of an official’s personal or private interest. It is the official’s duty to recuse even if no one else is aware of the conflict. There is no legal or factual basis for such an exemption. 29 *Del. C.* § 5805(a)(1).

**FINAL CONCLUSION:** Based on the above law and facts, we find that no law or facts were misunderstood, nor were facts or legal principles overlooked. The underlying opinion is not changed: Mr. King has a “personal or private interest” in the Ruddertowne matter. His personal statements about the development and developer, when he knew, or should have known, the development matter could come before him, at a minimum raise the “specter of bias,” and he should recuse from those matters.

***Original signed Terry Massie, Chair***

**07-47 - Follow-up guidance. Matter appealed to Superior Court so is a public record. David King, Town of Dewey Beach, sought guidance on participating on matters that PIC previously found to be a conflict— reviewing and disposing of matters pertaining to the Ruddertowne Development. The only change to that situation was that an overlay, with the same information as before, was to be considered. As there was no substantial change, he was advised by Counsel and the Town's Attorneys to recuse. PIC's Counsel notified the Town's Attorney, as the official had not.**

At the meeting, PIC discussed concerns about officials waiting until the last minute before a meeting to obtain guidance. Specifically, Mr. King was advised in the prior opinion that as his agency, the Zoning Commission, had to post notice of meetings at least 7 days in advance under the Freedom of Information Act, he should have at least that much of a lead-time to get guidance, or the matter, or it could be tabled until PIC would meet. Here, Mr. King said he was waiting for another Board to act on a matter. However, that matter was not something that was coming to his agency. PIC's discussion concluded the following:

- (1) Send a letter reinforcing the above, with copies to the Town's Attorneys; his requests;
- (2) State that the official needs to include the Town's Attorneys on
- (3) When he seeks guidance, Counsel is to ask if he spoke with those Attorneys, the guidance they gave, etc.; and
- (4) Counsel is to continue responding only in writing and copying the Town's Attorneys, as in this case.

**07-32 – Personal or Private Interest - Local Government Officials' Disclosure:** Two local officials filed their annual disclosures on contracts with their local government. 29 *Del. C.* § 5806(d). One official's contracts were: one for \$151.00 and one for \$155.00-- totaling \$306. Thus, public notice and bidding was not required. 29 *Del. C.* § 5805(c). He did not contract with his own agency, review, or dispose of the contract in his official capacity. 29 *Del. C.* § 5805(a)(1). The other official had eight contracts totaling \$1,932 with individual contracts ranging from \$10 to \$638. Again, public notice and bidding was not required. 29 *Del. C.* § 5805(c). He did not contract with his own agency, review, or dispose of the contract in his official capacity. 29 *Del. C.* § 5805(a)(1). Neither represented nor assisted their private enterprise before the agency with which they were associated by employment. 29 *Del. C.* § 5805(b)(1). The Commission found no violation for the reasons stated in a prior opinion to them. Commission Op. No. 06-29. The only difference: these contracts were for a lesser amount. The Commission is to strive for consistency in its opinion. 29 *Del. C.* § 5809(5).

**07-05 – Personal or Private Interest—Appointing Brother to Local Government Board:** On request for an advisory opinion from a local official, the Commission found the Conduct of another official violated the Code. In a motion for reconsideration, the Commission still found a violation. He was censured, as that is the only administrative penalty that can be imposed on an elected official. Tabs are not included but are public records. He appealed to the Superior Court. The Court

upheld PIC's process and decision. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). (Footnotes have been omitted for ease of publication).

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### Advisory Op. No. 07-05 – Nepotism

*Hearing and Decision by: Vice Chairs Barbara Green and Bernadette Winston;  
Commissioners William Dailey, Dennis Schrader and Wayne Stultz*

Dear Mr. Brady:

The Public Integrity Commission (PIC) reviewed nepotism allegations that Milton's Mayor when he nominated his brother as a Board of Adjustment alternate. (*Complaint*) Based on the following law and facts, we find reason to believe a violation occurred.

#### I. Jurisdiction:

The State Code of Conduct gives PIC jurisdiction over local governments unless they adopt a PIC approved Code. 29 *Del. C.* § 5802(4). Milton has not.

#### II. Standard of Review

All facts are assumed as true at the preliminary stage. 29 *Del. C.* § 5808A(a)(4). A Commission majority must find reason to believe a violation occurred. Officials have a "strong legal presumption of honesty and integrity," which the facts must overcome. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff'd.*, Del. Supr., No. 304 (January 29, 1996). *Town of Cheswold v. Vann*, Del. Supr., C. A. No. 05C-08-07, No. 445, 2006, J. Ridgely (April 23, 2007) (facts did not overcome presumption).

#### III. Application of Law to Facts:

Officials cannot review or dispose of matters if a personal or private interest may tend to impair judgment in performing official duties. 29 *Del. C.* § 5805(a).

**(1) FINANCIAL INTEREST:** A conflict is automatic if financial interests in the decision exist. 29 *Del. C.* § 5805(a)(2)(a). No facts suggest any financial interests.

**(2) OTHER PERSONAL OR PRIVATE INTERESTS.** The Code covers more than pecuniary interests. *Commission Op. No. 97-24*. Associative relations can be a "personal or private interest." *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del. Super., 1967) (alleging "personal interest," "conflict of interest," "using public office" due to "personal interest," and the decision was not on the merits but: (1) a desire to help co-religionists; (2) a close attorney-client and business relationship with the attorney for the group seeking action; and (3) a colleague's wife's membership in the Church affected by rezoning). These facts, even absent a financial interest were enough to deny dismissal. *Id.* This

relationship is even closer.

Town Charter and ordinances duties are "the Mayor shall appoint all committees." His "personal interest" was a family member whom he appointed. These are not conclusory allegations without support. Independent of the allegations, the official Town minutes show that it occurred. Those facts meet the statutory elements. It is of no moment that he took no other action. Even without facts to show "undue influence," "indirect" and "unsubstantial" participation is "undoubtedly improper" when a close relative is involved. *Prison Health Services Inc. v. State*, C.A. No. 13,010, Ch. Ct., KC. Harnett III (June 29, 1993). In interpreting this very restriction, the Court said an official's comments were "neutral" and "unbiased" and showed no "undue influence" but still said he should have recused himself. *Beebe, supra*.

**(3) GENERAL PUBLIC PURPOSE:** The Code's general purpose is to instill public confidence that officials do not actually violate the law or create a justifiable impression of a violation. 29 Del. C. § 5802(1).

**(4) PUBLIC PURPOSE OF "PERSONAL INTEREST" RESTRICTION:**

Barring action if a personal interest exists insures fair decisions. Apparently, the Mayor's brother has some experience with historic land use. That may show some merit in the act. However, the letter of the law has no exemptions if the official's act has merit or is unbiased.

Again, Delaware law says "unbiased" participation is improper. *Beebe, supra*.

Here, the brother would have a public office which has significant community prestige because of land use issues. The benefit to the Mayor would be having a relative involved in historic preservation when his political platform includes "expanding and protecting the Town's historic district" and "preserving Milton's heritage." *Town of Milton, website*. While they may be good causes, the public may suspect the Mayor may be "stacking the deck," to advance his political programs, or may suspect the brother would act to benefit those platforms rather than decide on the merits.

A complete bar insures-actual compliance with the letter of the law; it also ensures compliance with the spirit of the law-instilling public confidence. Thus, with or without actual bias, recusal limits the public's "justifiable impression" of a violation.

**V. Conclusion:**

Based on the above facts and law, we find that appointing his brother is sufficient reason to believe that both the letter and the spirit of the law were violated.

**Original Signed by Vice Chair Bernadette Winston**

Cc: George Dickerson, Town Manager Don  
Post, Mayor  
Marion Jones  
Keith Brady, Assistant State Solicitor

**(Note to reader Tabs are not included here but are part of the public record. Footnotes have been omitted for ease of publication).**

**07-05 – Motion for Reconsideration:**

**Hearing and Decision by:** *Terry Massie, Chairman and Vice Chair Barbara Green; Commissioners Dennis Schrader, William Dailey and Wayne Stultz*

Dear Mr. Brady:

The Public Integrity Commission considered the Motion for Reconsideration of its prior decision that concluded Milton's Mayor, Donald Post, should not have appointed his brother as an alternate on Milton's Historic District Commission. Tab A, Motion; Tab B, *Op. No. 07-05*. Based on the following law and facts, we reach the same conclusion.

**I. Standard for Reconsideration**

Reconsideration is not addressed in the statute. *29 Del. C. §§ 5807(c) & 5810*. PIC's Rules specifically allow reconsideration in complaint proceedings; not advisory opinions. *PIC Rules, Rule IV (C)(P), p. 7*. PIC treated the filing as an advisory opinion. (¶ (B)(3) below). However, PIC has reconsidered advisory opinions. *Op. No. 96-21*. We do so here.

We use Superior Court Rule 59 as the standard. Rule 59 motions are to correct errors; not add new arguments. *Beatty v. Smedley*, C.A. No. 00C-06-060 JRS, J. Slights III (Del. Super., March 12, 2003). It is denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

**II. Application of Legal Principles and Facts**

**Argument 1. Mayor Post did not receive written notice of the hearing as required in the Public Integrity Commission Rules, nor was he able to attend that meeting in person.**

**(A) Legal Principle:** Mr. Post may be alleging denial of notice and opportunity to be heard.

**(1) Constitutional Due Process.** If he is alleging Constitutional due process denial, PIC has no jurisdiction. Generally, administrative agencies have only the jurisdiction conferred by statute. *2 Am. Jur. 2d Administrative Law § 275 (1994)*. PIC's jurisdiction is only the Code of Conduct. *29 Del. C. §§ 5809(2) & (3) and 5810(a)*. Courts have held that Constitutional issues are in the courts' expertise; not an administrative agency's. *Plano v. Baker*, 2d Cir., 504 F.2d 595, 599 (1974); *Matters v. City of Ames*, Iowa Supr., 219 N.W.2d 718 (1974); *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823, 833 (D. Del., 1972).

**(2) Complaint Process:** If he is alleging due process denial under the statute or rules, those rights apply only to the complaint process. *29 Del. C. § 5810(a); PIC Rules*,

*Rule IV (C), (D) and (E), p. 5.* This filing was treated as an advisory opinion. See, ¶ (B) (3) below.

**(3) Advisory Opinion Process:** The statute does not require appearance. PIC may proceed on a “written request.” *29 Del. C. § 5807(c); PIC Rules, Rule VI (A)(1) and (4), pp. 8-9.* The Rules address attendance. *PIC Rules, Rule VI (A)(5), p. 9.* It is the Commission’s option. *Id.*

**(B) Process in this Particular Case.**

**(1) Complaint Process:** A sworn complaint, or PIC acting on its own, triggers this process. *29 Del. C. § 5810(a).* Either way, PIC can refer it for investigation and a report. *PIC Rules, Rule III (A) and (E).* Then, its Counsel, the Attorney General, or Special Counsel may file a complaint. *PIC Rules, Rule III (C)(1).* If a complaint is filed, notice and hearing rights arise. *29 Del. C. § 5810(a); PIC Rules, Rules III (D) and IV (D) and (E).* This was not a sworn complaint. *Tab D, Jones Filing.* PIC did not pursue a complaint on its own.

**(2) Advisory Process: Official’s written filing.** Marion Jones is a Commissioner, Board of Adjustment-Historic District Commission, and on its Ordinance Review Committee. *Tab E, Minutes, pp. 2, 3.* She was present at the meeting. *Tab E, Minutes, pp. E-4.* She wrote the filing. *Tab D, Jones Filing.*

**(3) Notice of the Advisory Process and Written Statement:** Advisory requests do not require notice. However, the Town Solicitor was told by phone that PIC could treat the filing as an advisory request. A letter to him cites advisory opinion sections—*29 Del. C. § 5807(c)*, not the complaint section-- *29 Del. C. § 5810.* It says, “if an official obtains advice,” and calls it a “filing.” Mr. Post was copied. *Tab F, PIC Counsel Ltr., June 5, 2007, p.1 ¶(3).* The Solicitor reviewed the filing; asked for dismissal; and copied Mr. Post. *Tab G, Brady Ltr, April 30, 2007.* Informing Mr. Post is consistent with Mr. Brady’s duty of client communication, not PIC’s Counsel. *Delaware Lawyer’s Rules of Professional Conduct (DLRPC), Rules 1.2, 1.4 & 4.2.*

**(4) Notice of PIC’s meeting and Opportunity to Be Heard:**

(A) The dismissal request was one opportunity to be heard. Like advisory opinions, they are decided on the pleadings—the “paperwork.” *Super. Ct. Rule 12.* As a responsive filing, it is equal to a general appearance. *Canaday v. Super. Ct., 119 A.2d 347 (Del., 1956).*

(B) A second opportunity was when PIC set a meeting date and time for Mr. Post and Counsel to appear. They did not, as they were at the County’s budget hearings. *Tab A, Reargument Motion ¶ (3).* The Town Manager appeared. *Id.* He contacted the Solicitor on whether to proceed. He proceeded. (*Tab H, PIC Transcript, pp. 1-2*). It was presumed then, and confirmed by the Reargument Motion, that he was the Town’s representative. *Tab A, Reargument Motion, ¶ (3).* He said his knowledge was from “review of the files and minutes” and “meetings.” *Tab H, PIC Transcript, p. 4.* He also was copied on correspondence. See, *Tab G, Brady Ltr, April 30, 2007.* PIC presumes Mr. Post and his Counsel, communicated on the decision to have Mr. Dickerson speak, and knew where his knowledge came from. *DLRPC 1.2 and cmt 1.* (With respect to the means by which a client’s objectives are pursued, the lawyer shall consult with the client and take such action as impliedly authorized). An extension of time or rescheduling was not sought.

Mr. Dickerson was not treated as, nor acted as, an attorney. He was a fact witness. *Tab H, PIC Transcript, pp. 1-11.*

**Argument 2: PIC's Counsel did not ask the Town Solicitor questions about Mr. Post except on another appointment.**

No facts or laws are cited requiring PIC's Counsel to ask questions about Mr. Post's appointment of his brother. If this seeks Counsel's work-product or thought processes, those are privileged. *Carlton Investments, v. TLC Beatrice International Holdings, Inc.*, C.A. No. 13950, Del. Ch., M.C. Parker (Sept. 17, 1996). Mr. Post's Counsel had the filing. *Tab G, Request to Dismiss*. The filing specifically refers to Mr. Post appointing his brother. *Tab D, Jones Filing* ¶ 2. The Minutes were attached in support. *Tab E, Minutes pp. 2, 4*. These facts could have been challenge if desired. The motion to dismiss did not do so. *Tab G, Request to Dismiss*. PIC considered the facts in the filing, the minutes, Mr. Dickerson's statements, and the Request to Dismiss. It did not consider questions that PIC's Counsel did not ask.

**Argument 3.**

**(A) Due to a required appearance of the Town Solicitor's other duty as the Recorder of Deeds for Sussex County, Counsel did not arrive in time for the hearing.**

**(B) The Town was represented by the Town Manager, George Dickerson, who is not a member of the Delaware Bar.**

**(C) No questions were asked about Mr. Post.**

(A) See, (B)(4) above. PIC learned the morning of its meeting that the Solicitor would be late. *Tab H, PIC Transcript, p. 1*. The Solicitor authorized Mr. Dickerson to proceed. *Id.* See discussion, *Argument 1, ¶(B)(4)(b)* above.

(B) Mr. Dickerson was a fact witness. PIC had the legal position--a motion to dismiss.

(C) The transcript shows questions and discussions about Mr. Post. *Tab H, PIC Transcript, pp. 3, 6, 7, 8, 9*, and in general.

**Argument 4.**

**(A) The opinion characterizes that Mayor Post "appointed" his brother. When in fact, Mayor Post who was reading a list of nominees, withheld his brother's name to seek a legal opinion.**

**(B) No appointment took place and Mayor Post's brother does not, nor has he held any position on a Board since Mayor Donald Post was sworn into office in April of 2006.**

(A) "Appointments" are the selection or designation of a person, by the persons having authority to do so, to fill an office or public function and discharge those duties. *Black's Law Dictionary, p. 99, (6th ed., 1990)*. The Mayor has the authority; used it; and no one except those on his list was "nominated" or "appointed" by any person for any position. The law on his "appointment" authority was attached to the underlying opinion. See, *Tab B, p. 2, III (2), ¶ 2*.

(B) The Mayor did not just read. "Someone" created the list and named the

positions. That was his duty. Also, the Minutes show he did not just read; he commented on his brother's qualifications. *Tab E, Minutes, p. E-4.*

(C) The Mayor did not withhold his brother's name. It was on the list that he moved for acceptance. *Tab E, Minutes, p. E-2.* The Minutes say a vote occurred before Ms. Jones asked about a conflict. *Tab E, Minutes, p. E-4.* The Mayor then said he wanted to see the law precluding his brother from serving. *Id.* At best, he tabled the name.

(D) The issue is not if his brother held or holds a position. It is if the Mayor, in his official duties "reviewed or disposed" of his brother's appointment. 29 Del. C. § 5805(a). The underlying opinion cites the law and facts establishing the elements. See *also*, Response to Argument 4(b). "Someone" exercised the Mayor's duty, giving specific names for specific Boards. Mere logic says he, at a minimum, "reviewed" those before acting. Moreover, the law does not require Council's approval, so he has legal authority to completely "dispose" of the matter. Even the Reargument Motion concedes that the Town Charter may not require Council to approve. *Tab A, Reargument Motion, ¶ 5.* We address the Council's "practice" in Argument 5.

(E) The Minutes do not show he withdrew his brother's name. *Tab E, Minutes, p. E-4.* They say the vote was taken with no discussion before Ms. Jones raised the conflict issue. *Id.* The Mayor then said he wanted to see in writing what precluded his brother from serving. *Id.* At best, he tabled the appointment, as he did with Ms. Louise Frey, when a conflict was raised. Only after learning that another law barred him from appointing any alternates, did he cease to proceed.

(F) At the reargument meeting, it was said that the Minutes are not always accurate. That argument was not in the motion to dismiss, although a copy was sent with that motion. It was not in the motion to reargue, although the opinion cited the Minutes as a fact basis, and Mr. Post relies on them in the next argument. Reargument is not for new arguments. However, we address it.

They are the official Minutes. Mr. Dickerson relied on them, and meetings, for his knowledge. He was asked to be the factual representative, presumably with knowledge of where he obtained his facts, and what those facts were. The Minutes show the facts which Ms. Jones also personally observed. No one says the Minutes are inaccurate in the list of appointees which include the Mayor's brother. The Minutes call the acts "appointments." It is the statutory term for the Mayor's duty, so that is not inaccurate. Even the reargument motion says his acts were "appointments," except somehow it was not an "appointment" of his brother. We address that below.

**Argument 5. A common practice has been that all nominees receive council approval, although the Charter may reflect different. The minutes show that this was the process that the Mayor was performing; that he put all names in for consideration by council and since neither the Town Solicitor not the Town Manager were present due to the fact that both positions were vacant. The Mayor then contacted the Attorney General's office to get the opinion of Assistant State Solicitor, Keith Brady (no relation to the Town Solicitor).**

(A) The legal issue is not Council's duties or practice. The fact issues are not if Council approved or not; or if the Solicitor or Town Manager were present. The issue is the Mayor's duties and acts. The "process" he used was consistent with his statutory duties to appoint, and he appointed his brother. Delaware Courts have held that officials do not

have to be the final decision maker or show actual bias or undue influence. *Beebe, supra; Prison Health Services Inc. v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993). In those cases, the officials were not the final decision makers; did not vote; had only “indirect” and “unsubstantial” involvement or made only “neutral” and “unbiased” comments. Their interests still required that they not participate. Thus, even if the law or practice was for Council to approve, by appointing his brother, the Mayor’s conduct still would be prohibited. Similarly, even if the conduct were not an actual violation, it has been that it would be “prudent” for the Mayor of Odessa and certain Council members to recuse themselves because of their close relative’s interest in a zoning matter, even without a financial interest. *Harvey v. Zoning Board of Adjustment of Odessa*, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000). In essence, the Court was saying that even without a legal conflict, the appearance of impropriety could require recusal.

(B) PIC had the Attorney General opinion to consider. However, that does not protect Mr. Post from PIC's conclusion. Only PIC has statutory authority to interpret the Code of Conduct. Courts have held that if an official gets advice from sources other than the one designated, the advice cannot be used as a defense. Ethics Bulletin 009 ¶¶ 6-9. Also, it cannot be argued that he did not know the law required PIC to make the decision. "Ignorance of the law" is no excuse in Delaware. *Kipp v. State*, 704 A.2d 839 (Del., 1998). Moreover, as a factual matter, he knows PIC decides conflicts. We do credit officials who seek advice, even if not from PIC. However, it is only one fact, among the rest. PIC gave him the presumption that he did not intentionally "create" alternate positions and appoint his brother to circumvent the Code or other laws. PIC did not go forward with a complaint or refer it for prosecution. It merely advised that the conduct was improper.

**Argument 6: The issue appears to be one of first impression and the Mayor has not had the opportunity to appear before the Commission in order to respond in a formal manner.**

(A) This is not an issue of first impression. Delaware case law on officials' participating if close relatives are involved is cited in the underlying opinion. *Prison Health, supra; Harvey, supra*. Also, as a factual matter, Mr. Post has obtained advice from PIC on an official participating if a relative may be involved and filed complaints against other officials on close relative issues.

(B) We addressed his opportunity to be heard. Also, he appeared at the meeting on this motion, with Counsel. He made statements at the meeting.

### **III. Conclusion**

The motion is denied. Controlling precedents or legal principles were not overlooked. PIC, as the fact finder, did not misunderstand the law or facts that would change the underlying decision.

#### **Original Signed by Chair Terry Massie**

**06-85 – Personal or Private Interest—Renting Property:** A State officer asked if he could review and dispose of a matter before him. An applicant appearing before him was represented by an attorney who was renting from the officer. 29 Del. C. § 5805(a). The attorney-tenant is vacating on, or about, the time of the hearing. The statute requires recusal if the official has a personal or private interest in the "matter" pending. *Id.* "Matter" means any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(7). Here, the matter had nothing to do with the landlord tenant relationship or the rented property, or anything having to do with his relationship the attorney-tenant. Also, at the time of the hearing, the officer would no longer have a financial interest connected to the attorney. Thus, there was no technical violation of the statute. Further, other relevant facts were that the parties to the application were not opposed. Based on all the relevant facts, the Commission found his financial interest in the tenancy was too remote and speculative to create a conflict.

**06-74 – Personal or Private Interest—Political Activities:** A State employee asked if it would be a conflict if he continued to participate in the review of a State matter when he knew the attorney who was representing one party, and the attorney's spouse, through his own heavy

involvement in a political party. Additionally, he was concerned that the other party's counsel may file a complaint against him with the State's professional board for his occupation. His supervisors were not so sure the political affiliation was sufficient, in and of itself, to create a conflict. The applicant's written request and correspondence between the applicant and his supervisor were reviewed by the Commission. The State employee, and a Deputy Attorney General for the agency, appeared before the Commission.

The State employee detailed his involvement in a political party at great length, identifying numerous persons in the political party and his personal involvement and private socialization with them. Also, the spouse of the attorney representing the company before the agency supervised him in the recent elections at the political party's headquarters to deal with calls for a specific Candidate. Beyond expressing and stressing his heavy involvement with the persons who happened to be involved in politics, the State employee specifically said he could not participate in the State matter with an open mind; that his personal or private interest would, in fact, impair his judgment. The statute prohibits review of matters if the "personal or private interest" would "tend to" impair judgment. 29 Del. C. § 5805(a)(1). Because of his emphatic and unequivocal statement that his judgment was, in fact, impaired because of his personal interest which coincidentally arose from politics; his personal and private fear that a complaint would be filed by one party to the action with the Board governing his occupational conduct; because the particular work involved more than ministerial duties; and as another individual could assume his duties, etc., the Commission found he should recuse, and no basis for a waiver existed.

**06-65 – Personal or Private Interest—Relationship of Roommates:** A State agency asked if it would violate the Code if one of its employees input certain data into a State database for a large number of part-time employees. The data was given to her by another agency employee, and they were roommates. It was possible that if she entered the data, it could benefit that individual.

State employees may not review or dispose of State matters if they have a personal or private interest in a matter that may tend to impair judgment in performing official duties. 29 Del. § 5805(a). Courts have held that close personal relationships can create conflicts. *Ford v. Dep't of Public Instruction*, C.A. #96A-01-009, J. Gebelein (Nov. 24 1997) (conflict for State employee to review and approve contracts for roommate); *State v. Ford and Thornton*, Cr. A. #s 951001830186 and 951001870191, J. Graves (Del. Super., March 26, 1996) (State employee prosecuted for awarding contract to fiancé).

The agency had the supervisor review all data before it was input by the employee, and then review it again after its input. However, regarding the roommate, the agency didn't know if the employee would be prohibited from entering all of the data or just the data related to the roommate. If the employee could not enter any of the data, the supervisor would have to make the entries. The agency said it would be a hardship for the supervisor to input the entries because of the small number of employees and the large number of entries for part-time employees. The supervisor could review the data to insure the employee did not change it.

The Commission found the Code was not violated as long as she did not review or dispose of the entries for her roommate. It said the restriction insures State employees do not show bias for or against an employee with whom they have a personal relationship. *Jones v. Board of Educ. of Indian River Sch. Dist.*, C.A. No. 93A-06-003, J. Graves (Del. Super., January 19, 1994) (bias imputed to School Board member in terminating teacher because he had a

negative personal experience with teacher). Regarding any appearance of bias, the supervisor's oversight was a check and balance against actual bias against others similarly situated to the roommate. Moreover, no facts suggest her personal interest in her roommate would make her alter records of others. In fact, her data was not relevant to that of the other persons.

**06-61 – Personal or Private Interest - Representing Private Enterprise Before Different Agency:**

State employees must file a full disclosure with the Commission if they have a financial interest in a private enterprise which does business with, or is regulated by, a State agency. 29 Del. C. § 5806(d). The disclosure is confidential unless a violation is found, and it must be filed as a condition of commencing and continuing employment with the State. *Id.* A State employee filed a disclosure that his private company was seeking a contract with a Department other than the one which employed him. As he was not representing or otherwise assisting a private enterprise before the agency with which he was associated with by employment, that was not a bar to the contract. 29 Del. § 5805(b)(1). State employees also may not review or dispose of State matters if they have a personal or private interest in a matter that may tend to impair judgment in performing official duties. 29 Del. § 5805(a)(1). In his State job, he made no decisions on contracts created by another agency. He did not prepare the contract or serve on the selection board, etc. Further, State employees may not seek a State contract of more than \$2,000 unless it is publicly notice and bid; if less than \$2,000 it must reflect arms' length negotiations. 29 Del. § 5805(c). The contract was for less than \$2,000, so arm's length negotiations were required. Arm's length insures distance between the contracting parties. Some distance is built into the Code of Conduct by prohibiting any self-dealings on a contract, 29 Del. C. § 5805(a)(1); and by not having other co-workers and colleagues make decisions about the contract. 29 Del. C. § 5805(b)(1). Also, it requires a fair market value. *Commission Op. No. 98-32.* The State employee filed the disclosure based on the Commission's prior advisory opinion telling him to file once a year, and if there were no substantial change, he need not appear in person. The disclosure was similar to a prior contract he had with another State agency, which included information on the price for the services by his company and others in that same type of endeavor. In that case, the Commission found no violation. The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5).

**06-57 – Personal or Private Interest—Board Member: When a violation is found, the proceedings may become a matter of public record. 29 Del. C. § 5807(d)(2). (Footnotes have been omitted for ease of publication).**

November 3, 2006

Alan Zaback, Director  
DHSS  
1901 N Dupont Highway  
New Castle, DE 19720

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

Dear Mr. Zaback:

The Public Integrity Commission reviewed the correspondence of CHEER, Inc., a State contractor, and your three letters, on whether it is a conflict if, as the Division Director responsible for the home-delivered meals (HDM) program, you also are a Meals on Wheels Delaware (MOWD) Board member. Beyond the written materials, we heard your statements and Ms. Nirmala Abraham's, the Division's nutritionist for HDM.

First, we note that CHEER did not file a formal complaint. It asked that you seek PIC's advice. You did so. Second, you and CHEER do not agree on most of the facts in CHEER's letter. As a State official, you are entitled to a presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995). However, even with your facts and looking only at financial areas, your dual duties create conflicts which recusal cannot remedy.

### **I. Application of Law to Facts**

The Code of Conduct provides that:

**(1) State employees may not review or dispose of State matters if they have a personal or private interest that tends to impair judgment in performing official duties. 29 Del. C. § 5805(a).**

Your personal and private interest is as an MOWD Board member. Board members have a fiduciary duty to their organization. *Oberly v. Kirby*, 592 A.2d 445 (Del., 1991) (Board Director owes fiduciary duty as corporate officer and member). MOWD is directly linked to your review and disposal of HDM contracts. Your State duties include:

- (A) staying current on HDM State and Federal rules governing program aspects;
- (B) negotiating with, and selecting contractors to provide HDM;
- (C) managing HDM State and Federal funds and contractors' administrative and meal costs;
- (D) working with contractors to cut costs or find other funds if they exhaust State and Federal funds; and
- (E) monitoring contract compliance, including use of MOWD funds

In your State job, you negotiate the contracts, considering availability of State and Federal funds, etc. If a contractor is selected, you suggest how they may cut costs on administration or meals to stretch funds. If they deplete State and Federal funds, MOWD funds only for unfunded meals, not administrative costs. Your actions affect MOWD.

**(A) Your State decision to not award a State contract:** Your non-selection cuts off MOWD as a resource for those entities. Your State decision bars *any* decision by MOWD's Board on funding that entity. You, alone, make the Board's decision through your State decision. Interestingly, while depriving the Board of its power, your State decision helps MOWD. When you make a State decision that is also the Board's

decision, you are “serving two masters” --the essence of a conflict. *In re: Ridgely*, 106 A.2d 527 (Del., 1954).

**(B) Your State decision in Negotiating Contracts.** In negotiating, you work to get contractors to reduce administrative and meal costs. Again, your decision affects MOWD. If you get the contractor to reduce meal costs, it stretches State and Federal funds, but also reduces MOWD’s costs for unfunded meals.

**(C) Your State decision to Grant a Contract.** Once you award a contract, you monitor compliance, including use of Federal and State funds. Once those funds are gone, MOWD may fund unfunded meals. You discuss with contractors what MOWD will or will not fund. You and/or your staff attend MOWD meetings on funding a contractor. Those meetings are not always limited to just funding unfunded meals. At the MOWD meeting on whether to fund CHEER’s unfunded meals, your nutritionist said that CHEER’s administrative costs were too high. Administrative costs are not MOWD funded. Those costs are what you negotiate. In discussing that information, when it apparently was not necessary, you were in a position to have your official judgment questioned (if administrative costs are too high, why did you enter the contract?) Also, if you/your staff say administrative costs are too high, it calls into question on whose behalf you are acting. It reads like a non-funding recommendation, although MOWD does not pay those costs. Your fiduciary duty to MOWD includes trying to save costs. *Oberly, supra*. (Board members have special duty to advance charitable goals and protect assets of non-profit). Also, as a Board member, you may influence its decision. Your duty to MOWD and ability to influence it, casts a shadow over whose interests you are serving.

**(D) Monitoring Use of MOWD’s Funds.** When MOWD pays for unfunded meals, you monitor use of its funds. You said this is not your official duty. That means you are working for the State and a private company concurrently. As a Board member, you have a fiduciary interest in the funds, which overlaps your State duties. Your dual duties could certainly clash, if your monitoring did not catch improper use of MOWD’s funds.

**(1) Division Directors may not represent or otherwise assist a private enterprise on matters before any State agency. 29 Del. C. § 5805(b)(1).**

You said that as a Board member, you give MOWD information on contractors; State and Federal funds; State and Federal rules; monitoring of contract compliance, etc. In effect, at MOWD you perform your State job. As a Board member, with a fiduciary duty, you are to know MOWD’s finances. In fact, you raised funds for MOWD as a member of its “Kitchen Cabinet.” *“Meals from the Masters,”* Cookbook, 2006, p. 17.

The Board listens to and evaluates your State performance as part of its decisions on fund raising, expenditures of funds, etc. For example, it seeks some funds through State grants-in-aid. In other words, you assist the private enterprise in deciding if it will seek a State grant. Further, your State program, in part, depends on MOWD. When you go through your State budget process and seek funds, you also, as a Board member, know about MOWD’s finances. If the State is low on funds for your program, you know MOWD may have to pick up the costs of more unfunded meals. When you go to the State for funding, it is likely your Department head, the Budget office, and the General Assembly are (or should be aware of) MOWD funding assistance to your contractors. Questions about that funding would be directed to you in your official

capacity. However, as you are a Board member, expected to know MOWD's finances, your response could be seen as an MOWD decision—which would be representing the private enterprise before the State.

In other words, your two roles come full circle. Your State job drives MOWD activities, and your MOWD role drives your State activities. It blurs the line of where you start and end your State and MOWD duties.

**(2) State officials may not engage in conduct that may raise suspicion among the public that they are engaging in conduct that may violate the public trust. 29 Del. C. § 5805(a). This is basically an appearance of impropriety test. Commission Op. No. 92-11.**

The Code does not require actual misconduct, only the appearance of misconduct. *Commission Op. No. 92-11; Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987) (interpreting federal restriction prohibiting any adverse effect on the public's confidence in its government. Court held that "an actual or apparent conflict of interest need not be found"). Here, your dual roles raised a contractor's concern. Before that, MOWD discussed not having a Board member from your Division. *Refine, supra*. (where just one person suspected a conflict, the Court considered that fact as some evidence of at least the appearance of a conflict). Whatever their concerns, there is a clear and significant overlap in your State and MOWD duties. State duties "must command precedence" over personal and private interests. *In re Ridgley, supra*. When you simultaneously perform the same duties, the State duties are not commanding precedence. See, *Van EE v. EPA*, 55 F. Supp. 2d 1 (D. C. District Court (1999) (interpreting Federal restriction on representing or assisting a private enterprise before Federal agency or the appearance of such—"there is a clear public interest in preventing government employees from allying themselves actively with private parties.").

Also, in negotiating contracts you are privy to confidential information. In fact, the contract you signed with CHEER, as the approving State official, had a confidentiality provision. That contract was active when CHEER met with MOWD and was subject to renewal in September 2006. See, Contract extract attached. CHEER was concerned about confidentiality. You said no names or salaries of CHEER's staff were given. The contract language does not identify what information is confidential, and we have no authority to interpret the State's contract language.

However, this is another area where contractors or the public can call your dual roles into question. You gain confidential information in the contract process. Your dual roles make you closely identified with MOWD. When your State and private duties are so overlapping, the public may well suspect that your private interests may raise suspicion that even inadvertently, you would disclose such information to MOWD.

## **II. Conclusion**

We explained how your State job impacts on MOWD, and how your MOWD decisions impact on your State job. As a result, contractors and the public could well suspect that in reviewing and disposing of the State contracts, your judgment may tend to be impaired. They also could well suspect that you are representing or otherwise

assisting the private enterprise. Because of the significant overlap in your State and MOWD activities, recusal cannot cure your conflict. To insure your State duties

command precedence, you are advised to resign from the MOWD Board.

Sincerely,

Chairman Terry Massie  
Public Integrity Commission

cc: Arlene Littleton

**06-52 – Personal or Private Interest—Prior Participation in a Lawsuit:** [State officials may not review or dispose 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)] - The requestor was an appointee to a State Board. The Board asked if its member may participate in an appeal. [State agencies may seek advisory opinions. 29 *Del. C.* § 5807(a)]. It stated that almost a year ago, the Board member acted in a private capacity in a lawsuit in opposition to an appellant in this action. The lawsuit had been resolved. The lawyers representing the appellant before the Board were not the same attorneys who represented the entity in the former action. Also, the Board member's private client was not involved in the appeal. The earlier action was about the entity's decision about the represented client only. The pending appeal related to matters between two entities on unrelated legal issues. The Board representative said the requestor had never expressed a bias for or against the entity; the appeal did not pertain to the prior litigation. Further, at the time, no parties to the appeal had objected to the Board member's participation. The Board member's subjective opinion was that there was no bias against the entity. The Board member also went to the Lawyers' Board of Professional Responsibility and was told there was no conflict under the Delaware Lawyers' Rules of Professional Responsibility. However, it advised that the Judicial Canon applies when a Board member acts in a quasi-judicial matter. The Commission found that due to the length of time between the two actions, the unrelated issues of the two actions; the unrelated attorneys; no involvement of the other party in the prior litigation, no special knowledge gained about the appealing entity in the prior litigation, and no facts indicating bias, that the Board member could participate in the appeal.

**06-39 – Personal or Private Interest - Contracts with Local Government:** Two local government officials filed their annual disclosure on contracts with their local government. 29 *Del. C.* § 5806(d). Enclosed with the disclosures was a letter from the local government's finance officer, explaining the process by which these individuals contracted with local government departments. They did not contract with their own agency. 29 *Del. C.* § 5805(b)(1). All contracts were less than \$2,000 and so not required to be publicly noticed and bid. 29 *Del. C.* § 5805(c). Neither official drafted, wrote or approved the contracts, nor selected the contractors. 29 *Del. C.* § 5805(a)(1). The Commission found no conflict and the written record reflected full disclosure.

**06-19 – Personal or Private Interest – Dual Government Positions: Waiver Granted;**

**Agency Hardship. Opinion is public record. 29 Del. C. § 5807(b)(4).**

**Advisory Op. No. 06-19 - Waiver Request - Dual Government Jobs**  
**Hearing and Decision by:** *Chairman, P. David Brumbaugh, Commissioners Barbara Green, William Dailey, Barbara Remus, Dennis Schrader, and Bernadette Winston*

Dear Mr. Kernan:

The Public Integrity Commission reviewed your letter requesting a waiver to hire Mr. Robert Ricker, Fire Commissioner, as a casual/seasonal Fire School Instructor employee. As you may know, based on Mr. Ricker's submission, we concluded that it would violate the Code for him to be a casual/seasonal Instructor when, as a Fire Commissioner, he would have authority over the persons who would be evaluating his performance as an instructor. This would be contrary to the restriction against reviewing or disposing of matters where there is a personal or private interest that tends to impair judgment in performing official duties. 29 Del. C. § 5805(a). We know that as a Fire Commissioner he would recuse himself from matters related to persons with oversight of him as an Instructor. However, the public may well suspect that the distinction is form over substance because to fulfill his duties in the dual roles means he would be in the best position to evaluate the performance of those persons from which he must recuse from evaluating as a Commissioner. It also places the Fire School employees in the uncomfortable situation of "ordering their boss around."

Where there is a conflict, the Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose or there is an "undue hardship" on the State agency. 29 Del. C. § 5807(a).

No waiver is granted on the basis that the "literal application of the law is not necessary to serve the public purpose." That is because the facts substantiate conflicts not only for the Fire Commissioner, but the employees who would evaluate him as an Instructor. Mr. Ricker said he will recuse himself appropriately and there is a strong legal presumption that he will act with honesty, integrity and impartiality. *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).

Usually, recusal resolves a conflict and the public purpose is served. No actual violation is required; only that the conduct create an appearance of impropriety. *Commission Op. No. 92-11*. The test is: whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances 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., 701 A.2d 825 (1997).

As noted above, the distinction is so blurred the public may reasonably believe, or suspect, he could not avoid being at least indirectly involved.

While the public perception is not cured by recusal, it will help diminish the perception of impropriety, as long as he recuses himself on matters related to the dual employment.

That fact, combined with the agency's statements on its difficulties in finding instructors, leads us to grant a waiver on the basis of an "undue hardship."

Your correspondence and the comments of your Deputy, Steve Martin, who appeared before the Commission, showed the Fire School suffers from a lack of qualified and certified instructors. It is especially limited in the area where Mr. Ricker would instruct firemen—Vehicle Rescue. Also, the courses require several instructors per session, which further limits the number of instructors available when up to six instructors could already be committed to giving training. Further, the training normally occurs over several weekends. Because of their work schedules in the private sector; their obligations as volunteers for independent fire companies; unavailability due to health reasons or being out of state, etc., those certified in Vehicle Rescue training, are even further reduced. Commissioner Ricker has been involved in this training in the past; is currently still certified to teach; has years of experience not only in training Vehicle Rescue, but in performing Vehicle Rescue. His knowledge and experiences can be imparted to attendees and may result in encouraging other firemen to become certified.

## **II. Conclusion**

Accordingly, we grant a waiver on the basis of an "undue hardship" for the agency. When a waiver is granted, the proceedings become a matter of public record. This aids the entire public in understanding the factual basis for granting a waiver. That, like recusal, will serve to diminish any public perception that Commissioner Ricker is circumventing the law.

**Original Signed by Chair Paul Brumbaugh**

### **05-57 – Personal or Private Interest—Interest Arising from Litigation & Elections**

**(Reconsideration):** [Law: State employees may not review or dispose of matters if they have a personal or private interest which tend to impair judgment in performing official duties. 29 Del. C. 5805(a).]

The Commission was asked to reconsider its prior Advisory Opinion No. 05-57. In that opinion it concluded that an employee should recuse himself from matters related to inspections of properties within a local government's jurisdiction, as a result of litigation and other contentions raised during several elections in which he and the property owner participated. The Commission reviewed the written request and heard statements from various supervisors, etc. According to the statements, the official had been transferred to another location to avoid a conflict; and no complaints had been raised since the Commission's prior opinion. The Commission reaffirmed its earlier opinion that recusal was required; that the date of the prior opinion be corrected; the identity of the elective office referred to in the opinion be corrected; and the Commission has no basis to believe that a violation has occurred at this point.

### **05-27- Personal or Private Interest—Misuse of Public Office to Benefit Self and Friends:**

[Law: State employers may not use their public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e)].

An anonymous letter was sent to the Commission alleging that a State employee had

used his public office to benefit himself and co-workers who were allegedly his friends. 29 Del. C. § 5806(e). Interviews were conducted by Commission Counsel of persons knowledgeable of the procedural processes in place on the particular matter within the agency to ensure decisions were not based on preferential treatment for the employee or co-workers. Not only were the procedures in place and used, but the interviewees had personal knowledge of the actions taken, and the procedures were properly followed by a committee, not the State employee, to make the decisions. Further, the interviewees had personally observed that the alleged friends were not in any manner receiving any type of benefit in this matter, and that the State employee was actually performing his duties in an appropriate manner. The Commission found no merit to the complaint, and pursuant to 29 Del. C. § 5809(3) dismissed for failure to state a claim.

**01-47 – Personal or Private Interest—Board Member of Charter School:** The State Public Integrity Commission reviewed a request for advice on whether it would violate the Code of Conduct if a State officer was a Board member of a Charter School and concluded that such service would be improper.

State officers must pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust or that would not reflect favorably upon the State. 29 Del. C. § 5806(a). This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. No actual misconduct is required; only a showing that the course of conduct could “raise suspicion” that the conduct reflects unfavorably. *Id.* Also, State officers may not incur any obligation that substantially conflicts with their official duties. 29 Del. C. § 5806(b).

Board members have a fiduciary duty to the organization which they serve. *Commission Op. No. 95-24*. That duty imposes a responsibility to act for the benefit of the organization. Under the Charter School’s by-laws, Board members are, among other things, responsible for establishing the budget; approving major expenditures; determining general policies and strategic planning, etc. As Charter Schools compete with public schools for State funding, the responsibility of the Board members would include determining how much money to seek from the State; how that State money would be spent; etc. While the State officer indicated that he would not appear before State agencies to seek money on behalf of the Charter School, the duties to the organization would still require him to make budget decisions about seeking State money, etc.

His Board membership could require advocating positions or recommending policies to the Executive (e.g., Department of Education) or Legislative branches of government regarding issues or policy initiatives on education. Even if he attempted to recuse himself, the Board, as an entity, could take public positions on education issues, and it could be difficult for the public to understand the distinction between his activities as a Board member and his activities as a Senior level official in the Governor’s administration. It has been recognized that “matters associated with public education can become extremely controversial.” *In Re: Request for an Opinion from the Judicial Ethics Advisory [sic] Committee*, Del. Super., JEAC 1999-1, J. Cooch (April 22, 1999). In fact, recent news articles addressed concerns raised because Charter Schools gain State funds for every student they recruit, while public schools lose those dollars, and public schools have expressed concerns because some districts apparently are losing bus service to Charter Schools. Those are just recent issues on which Charter School Boards may have to take a position and advocate their position to the Board of Education or the General Assembly.

Aside from the Board's need to deal with other State agencies on issues, policies, legislation, and funding, he indicated that while the Charter School would not seek monetary assistance from his agency, there would be occasions when it would request assistance with other services. Thus, in his official capacity, he could be placed in the position to make decisions on whether the Charter School would receive such services. The problem there is that, again, the Charter School could be competing against other schools for the same services. As his fiduciary duty would require him to act primarily for the benefit of the Charter School, that duty could substantially conflict with his State duties to work equally with other schools that would compete for the same services.

Finally, it cannot be ignored that there could be an advantage to the Charter School in having a member of the Governor's Cabinet on its Board. Moreover, most public-school board members are elected by the public. Thus, they could be voted out of office if they act in violation of the public trust or in a manner that would not reflect favorably upon the State. He would not be subject to that kind of scrutiny as a Board member of a Charter School. This could result in the appearance that the particular Charter School had an "inside track" or unfair advantage in obtaining State funds, obtaining State services from his agency, etc.

Considering all the above facts, his service as a Board member could raise suspicions among the public that even the passive action of just being a Board member would give the Charter School an unfair advantage over other schools that compete for such funding and such services.

We note that in our discussions, when we discussed the fiduciary duties of a Board member regarding such things as budgets, etc., he said he really did not envision becoming involved in those matters. Rather, he saw his role as being an "advisor" on certain aspects of the School, e.g., promoting leadership skills, personal responsibility, establishing the curriculum; lending a degree of credibility to the standing of the School. He said he did not envision acting as an agent of the School but looked at his role as "strictly an advisor."

The problem was that as a Board member, legal obligations to the School were imposed that were much broader than serving as an advisor. Because those obligations could raise suspicions of a substantial conflict in performing official duties, we concluded that it would be improper for him to serve as a Board member of the Charter School.

#### **01-35 – Personal and Private Interest—Family and Financial Interest:**

**NOTE: When an advisory opinion is granted, the proceedings are generally confidential. One exception is when the requestor authorizes the Commission to release the information. 29 Del. C. § 5807(a). The Commission was authorized to release the following opinion in its entirety.**

November 13, 2001

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## **Advisory Op. No. 01-35 – Family and Financial Interests**

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

Dear Mr. Kavanaugh:

The State Public Integrity Commission, based on the following facts and law, concluded that Christopher J. Castagno, President, New Castle City Council, may participate in matters on the study and possible acquisition of properties for a new police station and municipal offices, including the Van Dyke Armory, with the understanding that President Castagno will publicly disclose this ruling.

### **I. Facts**

Christopher J. Castagno is President of the New Castle City Council. Council is considering sites for a new police station and municipal offices. One possibility is the Deemer property. Another is the Van Dyke Armory. The legal ownership of the Armory is vested in Douglas J. Salter, as a Trustee for the benefit of Dennis M. Salter's children. West End Civic Association members questioned whether President Castagno has a conflict of interest as Dennis and Douglas Salter are his first cousins, and the trust beneficiaries are his second cousins.

Regarding the President's relationship with Douglas and Dennis Salter, while they are first cousins, they do not have a business or social relationship other than an occasional family party; are not social friends, golfing buddies or regularly in each other's company. Dennis Salter apparently is acting as the realtor for the Armory but will not receive a sales commission. No facts indicate that Douglas Salter, as Trustee, would receive any financial benefit.

For over ten years, Council has discussed the need for a new City Administration Building and Police Department. As early as 1996, the possibility of acquiring the Armory was discussed. Also, in 1998, Dennis Salter wrote to the then-President of City Council, Dr. Genevieve L. Miller, on the availability of the Armory. Those events occurred before Mr. Castagno moved to the City and before he was a Council member. More recently, Dennis Salter called Dr. Miller, who is no longer Council President, but is a Council member, to again discuss the City's consideration of the Armory. He then sent another letter to Dr. Miller about the Armory. The City requested proposals for an independent study of the property. There will be not only a "Police Needs Assessment" but a suitability study considering such facts as the age of the structure and various structural, electrical and mechanical system's needs. TetraTech was selected to perform the evaluation. The suitability study and "Police Needs Assessment" will be considered by Council to aid it in deciding if the Armory will be the site selected. Also, there will be an independent fair market appraisal of the property to aid the decision. Apparently, a study of the Deemer property has been completed.

President Castagno has made public his connection to the legal and equitable owners of the property. Further, he will make this opinion public so that the public is aware of the facts and law considered by the Commission in rendering its opinion.

### **II. Application of Law to Facts**

#### **(A) Personal or Private Interests arising from "Close Relatives" and "Financial**

## Interests” Create an Automatic Conflict

There are two situations where the law automatically imputes a personal or private interest to a government official that would tend to impair the official’s judgment, and therefore require the official to recuse himself from participating in those matters. They are:

- (1) if the official’s participation in the matter would result in a **financial benefit** or detriment to the officer or a **close relative** to a greater extent than such benefit or detriment would accrue to others of the same class or group; or
- (2) the official or a **close relative** has a **financial interest** in a private enterprise and the private enterprise, or the financial interest would be affected to a lesser or greater extent than like enterprises or interests by the action or inaction of the official on the matter. 29 Del. C. § 5805(a)(2)(a) and (b) (*emphasis added*).

Here, the official, President Castagno, will not receive a financial benefit, nor does he have a “financial interest” in the property. “Financial interest” means: (1) a legal or equitable ownership interest; (2) receiving income of more than \$5,000 as an employee, officer, director, trustee, or contractor; and /or (3) being a creditor of the private enterprise. 29 Del. C. § 5804(5).

President Castagno does not have a legal or equitable interest in the property; nor is he a trustee or a beneficiary; nor is he a creditor. The property is part of a trust created by his first cousin, with another first cousin serving as trustee. His second cousins are the beneficiaries.

As a matter of law, his “close relatives” would not receive a financial benefit, because “close relative” is defined as “a person’s parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.” 29 Del. C. § 5804(1). Clearly, “cousins” are not within the definition. When the language is clear, a statute must be held to mean what is clearly expressed. *Commission Op. Nos. 97-10 & 97-12* (citing, *inter alia*, *Norman v. Goldman*, Del. Super., 173 A.2d 607, 609(1961); *Labor’s Educational and Political Club Independent v. Danforth*, Mo. Supr., 561 S.W. 2d 339, 345 (1977) (“it is a well-settled rule of law that the legislature’s own construction of its language by means of definition of terms should be followed in interpreting the statute and is binding”).

Here, the statute has clear and unambiguous definitions of “financial interest” and “close relative.” We have held that where the facts do not fall within the statutory definitions of “financial interest” or “close relative,” then, as matter of law, the provisions in 29 Del. C. § 5805(a)(2)(a) and (a)(2)(b), are not violated. See, e.g., *Commission Op. No. 01-14*. We are required to be consistent in our opinions. 29 Del. C. § 5809(5). Accordingly, we find that as a matter of law, President Castagno is not required to recuse himself under those provisions.

Further, no facts indicate that even if they were his “close relatives,” that they would benefit to a lesser or greater degree than others within the same class or group. Council is having independent studies of the properties, including fair market appraisals. Thus, the benefit to each of the competitors would be based on concrete data regarding the specific property.

Having eliminated those provisions, we follow our prior rulings which require us to consider if his official participation would violate other Code of Conduct provisions. See, e.g., *Commission Op. No. 00-14*.

**(B) Other Personal or Private Interests Depend on Particular Facts to Determine if a Conflict Exists.**

The Code of Conduct not only restricts officials from participating in decisions if they have the requisite “financial interest” or a “close relative” involved, but also restricts their participation if they have any “personal or private interest” that may tend to impair judgment in performing official duties with respect to that matter. 29 *Del. C.* § 5805(a)(1).

That provision is a codification of the common law which prohibited government officials from participating in decisions where they had a “personal interest.” *Commission Op. Nos. 97-24 and 97-30*. In interpreting the common law, Delaware Courts recognized that a “personal interest” can arise even if no “close relative” or “financial interest” is involved. See, e.g., *Shellburne, Inc. v. Roberts*, Del. Super., 238 A.2d 333 (1967). After the common law was codified at 29 *Del. C.* § 5805(a)(1), Delaware Courts continued to interpret that provision to recognize that conflicts could arise absent the prerequisites of “financial interest” and “close relative.” *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). *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).

Under the common law, and its codification, “the decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.” *Prison Health, supra*; See also, *Beebe* and *Shellburne*.

Thus, we consider the relationship between President Castagno, his cousins, and the decision that needs to be made. We have noted that President Castagno will receive no financial benefit from the decision and has no financial interest in the decision. He asserts that he has no business relationship with the Trust or his cousins. Further, neither of his first cousins will financially benefit as the benefit would go to the trust if Council selects the Armory. Further, Dennis Salter, will not receive a financial benefit in the form of a sales commission as there is no listing agreement and he is not a licensed real estate agent. Any financial benefit would go to the President’s second cousins. These are not “close relatives” as a matter of law under the Code of Conduct. Moreover, President Castagno asserts that they are not “close relatives” as a matter of fact. He states that the families do not have a social or business relationship; and socialize only at a few social events such as when they might attend an occasional family reunion, or during the Christmas season. The relationship is not such that they exchange gifts. He further states that occasionally he may see Douglas Salter as his children and Douglas’ children attend the same school. In essence, he states that the relationship is too distant or remote to impair his independent judgment.

The Delaware Supreme Court has affirmed that in interpreting the State Code of Conduct, there must be a “strong legal presumption of honesty and integrity,” in the public officer’s conduct. *Beebe, supra*. We combine his statements about the financial effect, and his relationship with his cousins, with the facts that independent studies will assess the police needs and ascertain the suitability of the site, and that there will be an independent fair market assessment of the property. The independent studies and assessments help to ensure that the decision is made based on “hard facts,” rather than a remote relationship with his cousins. The reason for not participating when there is a personal or private interest is to ensure that decisions are based on the merits, rather than favoritism, conflict and the like. As the studies and assessments will be public records the public will also have an opportunity to know the “hard facts” about the property. Courts have noted how remote and nebulous alleged conflicts can be. *Commission Op. No. 00-18*. Delaware Courts have held that for the interest to be sufficient to require an official to recuse himself, the allegation of a conflict cannot be merely

conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice, Del. Super.*, C.A. No. 95A-05-008, Graves, J. (November 21, 1995). In *Camas*, the Delaware Superior Court held that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim.

In *Camas*, the familial relationship was one of husband and wife. Here, the relationship is much more attenuated. Based on news articles and the information presented at the Commission's meeting, the allegation of a conflict appears to be based on the conclusory fact that President Castagno and the Salters are cousins. Conclusory allegations based on suspicion and innuendo cannot support a claim; rather, the claim must be based on hard facts. *Commission Op. No. 96-75 (citing CACI, Inc.-Federal v. United States*, 719 F.2d 1567 (Fed Cir. 1967)).

Here, we must start with the "strong legal presumption of honesty and integrity," and consider whether the facts overcome that presumption. The mere fact of a familial relationship is weighed against the fact that he states that he does not have a close relationship with those cousins. Moreover, the other "hard facts" are that independent studies will be considered when making the decision, and the public will have access to that information, giving it concrete data on the various facilities considered. Further, the fact that Council has contemplated the Armory as a possible site before Mr. Castagno even lived in the City or was a Council member serves to diminish the impression that the Armory is being considered merely out of favoritism for President Castagno's cousins.

Courts have noted that:

"Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so, they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes said, "Universal distrust creates universal incompetency." *Van Itallie v. Borough of Franklin Lakes*, N.J. Supr., 146 A.2d 111, 116 (1958).

The facts show that neither the President nor his first cousins will receive any financial benefit; that the property had been a consideration even before the President moved to the City or became a Council member; that site selection will be based on independent studies of needs assessments, structural functionality, and a fair market appraisal; and the President asserts that he has no close social or business relationship with the cousins or the trust. No facts indicate the consideration of the Armory is a result of favoritism, undue influence or the like, especially as it, like other locations, has been proposed over a long period of time before President Castagno moved to the City. Based on those facts, we find the alleged conflict too remote and nebulous to violate 29 *Del. C.* § 5805(a)(1).

## **(B) Use or Disclosure of Confidential Information**

The Code also prohibits improper use or disclosure of confidential information. 29 Del. C. § 5806(f) and (g). In considering the properties, Council is likely to go into executive session. By law, executive sessions are “non-public.” 29 Del. C. § 10004(c). Thus, the information discussed would be considered confidential. The Code of Conduct places the responsibility on President Castagno not to improperly use or disclose that information. Delaware Courts have held that where government officials are required by law not to disclose confidential information, and where no facts indicate that the official has violated that obligation, then an allegation of a conflict of interest cannot be sustained. *Camas, supra*. Here, no facts indicate that he has improperly used or disclosed any confidential information. He asserts that he will not engage in such conduct. Again, he is entitled to a “strong presumption of honesty and integrity.” *Beebe, supra*. Further, he is aware of that obligation, and should he violate that provision, he could be subject to penalties under the Code of Conduct.

### **(C) Appearance of Impropriety**

Even if the Commission finds no actual conflict under any of the Code of Conduct provisions, it must decide if the conduct would “raise suspicion” among the public that he is engaging in conduct that would violate the public trust. 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 circumstances 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. *Commission Op. No. 01-02 (citing 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*.

Here, Mr. Castagno has an obligation, when seeking an advisory opinion to “fully disclose” the facts to the Commission. 29 Del. C. § 5807(c). Full disclosure permits the Commission to consider all of the “relevant circumstances.” Further, by making this opinion public, the public then knows the relevant information he has disclosed, and should there be facts that were not disclosed, he may be subject to disciplinary action. 29 Del. C. § 5807(c).

We have held that in deciding if there is an appearance of impropriety because of an alleged professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75 (citing CACI, Inc-Federal v. United States, 719 F.2d 1567 (Fed Cir. 1967))*. We believe that holding is consistent with the Delaware Supreme Court decision which held that: Absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the “appearance of impropriety.” It noted that appearances of impropriety claims have been criticized as being too “imprecise, leading to ad hoc results.” Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware, 592 A.2d 436 (Del. 1991)*.

Consistent with those holdings and based on the totality of the circumstances, we conclude that the mere allegation of a distant familial relationship is insufficient to establish an appearance of impropriety when weighed against the following “hard facts:” (1) neither he nor his first cousins will financially benefit; (2) his cousins are not “close relatives” as a matter of law or fact; (3) this issue was raised with Council long before he was a Council member; (4) independent studies/assessments will be used in making the decision; (5) the studies and assessments will be public records; (6) items 3, 4 and 5, diminish the possibility that the

decision will be based on favoritism; and (7) this opinion will be made public so that the public, like this Commission, is aware of the relevant facts considered in concluding that there was no violation.

### III. Conclusion

Based on the above law and facts, we find that the familial relationship between President Castagno and his cousins is too remote and speculative to raise to the level of an actual conflict or the appearance thereof.

**01-33 – Personal or Private Interest—State Officer Participating in State Contract Written by Spouse:** A State officer's spouse was counsel for, and drafted contracts for, an agency over which the State officer had decision making authority. The Commission, based on the following law and facts, concluded the State officer should not review or dispose of the contract matter.

The State officer was authorized to enter into agency contracts. Prior to assuming that State position, the agency had contracted with an organization, and the contract was up for renewal. Normally, a contract extension would be routine. However, the organization enacted a new fee structure for the contract services. A competitor for government contracts for the same services was challenging the fee structure in Court. The State officer's spouse, who wrote the proposed contract extension, which included the new fee structure, was involved in the Court action. The contract terms were identical to the fee structure language. The contract was not publicly notice and bid, and by law did not need to be bid. That meant no competition against a contract written by the officer's spouse. The Court action showed that the competition for the contract was more than willing to challenge the status quo. The officer's agency was not a party to the challenge, but the fee structure that constituted the contract was being challenged.

#### Applicable Law

(A) State officers may not review or dispose of matters if they have a personal or private interest which may tend to impair judgment in performance of their duties. 29 *Del. C.* § 5805(a)(1). Whether an interest is sufficient to tend to impair judgment is an issue of fact under this provision. *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993); see also, *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).

(B) By operation of law, an interest is automatically sufficient to impair an official's judgment if the official's action or inaction would result in a financial benefit or detriment accruing to a close relative to a greater extent than such benefit or detriment would accrue to others of the same class or group. 29 *Del. C.* § 5805(a)(2). "Close relative" includes "spouse." 29 *Del. C.* § 5804(1).

(C) State officers may not engage in conduct which may raise suspicion among the public that they are acting in violation of the public trust and will reflect unfavorably upon the State. 29 *Del. C.* § 5806(a). This is, in essence, an appearance of impropriety standard. *Commission Op. No. 00-03*.

### 3. Application of Law to Facts

Obviously, the officer's spouse was within the definition of "close relative." Further, the spouse received a financial benefit from representing the contracting organization. However, no facts indicated any direct benefit from the contract over which the officer had authority. Thus, there may not have been a technical violation of 29 *Del. C.* § 5805(a)(2). However, Delaware Courts have held that even if the close relative has no direct financial interest, it would be "prudent" for the official to recuse themselves, if possible. *Harvey v. Zoning Board of Adjustment*, Del. Super., C.A. No. 00A-04-007, J. Goldstein (Nov. 27, 2000). More significantly, the Delaware Supreme Court has affirmed a decision interpreting 29 *Del. C.* § 5805(a)(1) which held that conflicts can arise even if the official or a close relative would not receive a direct financial benefit. Rather, the close business or personal relationship alone was sufficient to require recusal. *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); see also, *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).

In *Prison Health*, the Court held that although the State employee did not select the contractor, and his participation was "indirect" and "unsubstantial," it was "undoubtedly improper" for him to discuss the contract with those making the selection as his spouse was a "low-level" employee of one of the companies seeking the contract. No facts indicated that the he or his spouse would personally benefit from the contract.

Here, the officer's spouse handled the disputed regulation which constituted the contract and wrote the contract which the State officer was to approve or disapprove. Thus, the State officer had more authority over the contract than the State employee in *Prison Health*, and the officer's spouse had a more involved interest in the contract than the spouse in *Prison Health*. It may have appeared to the public that the officer would approve the contract merely because it was written by the officer's spouse. That is not to say that the officer would do so, but the law does not require an officer's judgment actually be impaired; only that it may "tend to be," or "raise suspicions" that it would be.

If a State official has a statutory responsibility that cannot be delegated, then the official may proceed in the face of the conflict if there is full disclosure to the Commission. 29 *Del. C.* § 5805(a)(3). Here, the officer had statutory authority to delegate the contractual powers, duties or functions to a Division Director. (*Citation omitted*). The officer was aware of that provision but was concerned that delegating the responsibilities to a Division Director would not serve much purpose as that individual works for the officer, so it could still raise appearance of impropriety issues. The officer's assessment was correct. Delegating the responsibility to someone who works for the officer is not a cure-all for the "appearance of impropriety" issue. However, the test for an appearance of impropriety is if the conduct would create in reasonable minds, **with knowledge of all the relevant circumstances** 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. *Commission Op. No. 00-03 (citing In re Williams*, Del. Super., 701 A.2d 825 (1997) (emphasis added)).

Here, the relevant circumstances were that there was no other person at a higher level to whom the matter could be delegated; and the subordinate had been dealing with the contract prior to the officer assuming the current position. There was no way to eliminate all possible appearances of impropriety short of either the State officer leaving public office or the spouse's firm withdrawing from its long-standing contractual representation of the organization. The Code does not require such remedies. Rather, it states that the official who has the personal or private interest may not review or dispose of the matter. By delegating the "full power and

responsibilities,” there was no technical violation of the law. While the Division Director did work for the officer, that individual would have full authority to act without consulting the officer. The officer was aware that the power was relinquished and would not be involved with the contract. Under the Code of Conduct, there is a presumption of honesty and integrity. *Beebe, supra*. Thus, there is a legal presumption that when the full power and authority is given to that individual, the officer will not interfere or assert powers over that contract. To do so would subject the officer to disciplinary action, which is the incentive for complying with the law.

#### **(D) Conclusion**

Delegating the matter to a Division Director may not be the ideal solution. However, based on all the relevant circumstances, it was the best solution under these particular facts.

**01-23 – Personal or Private Interest—Promotion of a Relative:** It would not violate the Code of Conduct if a State officer’s close relative was considered for a promotion in the same agency if the officer were completely removed from reviewing or disposing of any matters related to the close relative’s application, consideration for selection, etc. Further, if the close relative were promoted, any subsequent matters related to that relative could not be reviewed or disposed of by the officer.

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

State officers may not review or dispose 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 independent judgment in performing official duties. *Id.* Whether an interest is sufficient to disqualify an official from participating under this provision is an issue of fact. *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).

Where a “close relative” is involved, by operation of law, there is an automatic conflict requiring recusal if action or inaction on the matter would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(a). “Close relative” includes “siblings of the whole and half-blood.”

Further, State officers may not engage in conduct that may raise suspicion among the public that the officer is engaging in conduct violating the public trust or which will not reflect favorably upon the State. 29 *Del. C.* § 5806(a). This is, in essence, an appearance of impropriety test. *See, e.g., Commission Op. No. 97-23 and 97-42.*

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

The State officer’s “close relative” was initially hired before the officer was in a position to be involved in the hiring, supervision, etc. Later, the officer was promoted to a decision-making position with authority relative to such matters. When the close relative applied for a promotion in a Division of the agency, the officer had such authority.

Because he is a “close relative” as defined by the Code, we looked first to the Code provision that creates an automatic conflict. 29 *Del. C.* § 5805(a)(2). It was clear a decision on the promotion could result in a “financial benefit” to a “close relative.” Other applicants would make up the “class or group of persons” referred to in that provision. However, the officer would

not participate in the promotion decision from which the close relative could, if selected, derive a financial benefit. The officer would not be involved: in deciding how the agency would announce the job (e.g., inter-agency; intra-agency, or to the public); selecting or participating in the promotion panel; or participating in the final selection. With those restrictions, 29 *Del. C.* § 5805(a)(2) would not be violated.

The next issue was whether the officer would be disqualified under 29 *Del. C.* § 5805(a)(1). Under that provision, we looked at more than just the narrow parameters of 29 *Del. C.* § 5805(a)(2). Specifically, while § 5805(a)(2) looks only at whether there would be a direct “financial benefit,” § 5805(a)(1) is broader. It requires disqualification in “any matter” if you have a personal or private interest which tends to impair judgment. Here, if the close relative was promoted, it would be a financial benefit. Beyond that, as he engaged in his day-to-day work, issues may have arisen which entailed no specific financial benefit for him but could be issues where the officer normally would be involved in decisions that would impact him. For example, if the officer reviewed or disposed of his performance evaluation, that may not result in a financial benefit to him, but certainly could raise the specter that the officer’s judgment could be impaired in participating in that evaluation because of the close relationship.

However, again, the officer would not participate in performance evaluations, disciplinary actions, etc., or work with the close relative on issues in his office, etc. If the officer did not become involved in those matters, no facts indicated a violation of 29 *Del. C.* § 5805(a)(1).

Finally, we decided if the conduct would violate the standard against the appearance of impropriety. The test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances 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., 701 A.2d 825 (1997). Thus, we looked at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*.

First, the officer was not involved in the original decision to hire the close relative; they worked in different divisions of the State agency; the officer was not in a position to evaluate his performance, etc. Second, the officer would not participate in any matters concerning the close relative. That is what the law requires. Moreover, the officer reviewed the Commission’s prior decisions dealing with nepotism so was conversant with the need to stay as far removed from decisions about the close relative as possible. Consistent with those opinions, the Division Director, without input from the officer, would decide how the job would be announced, based on the Merit Rules. Obviously, there would be less of an appearance that the posting was geared towards him if, rather than an intra-agency announcement, the job was open to all State employees or to the entire public. However, as long as the announcement comported with the Merit Rules, and the officer was not involved (did not write the announcement; decide how it would be announced, etc.), we did not require the Division Director to do more than required by the law in terms of the announcement.

We further noted that the panel reviewing the applications and making the promotion decisions would consist of persons other than just those from the State agency where they both worked. It was expected that 3 to 5 people would be on the panel and 50% would not be from the agency, but would be qualified to make the decision, and would proceed pursuant to the Merit Rules. The officer would not participate in the panel or select the panel.

If the close relative was promoted, the position was at least two levels removed from the officer’s position. Thus, it was not expected that the close relative would work with the officer on

matters relative to his job. Regarding decisions to be made about him, if the Division Director needed to go to a higher level, the matter would be taken to a Senior level executive in another Department. Additionally, the two were not physically located in the same building. Thus, the officer could not observe or comment on the relative's day-to-day work, nor be in a position to have the knowledge to agree or disagree with any performance evaluation, disciplinary action, etc., and would not participate in such matters.

We were very aware of how sensitive State employees and members of the public are to the issue of nepotism. However, the law does not preclude relatives from working for the same State agency. Rather, it prohibits relatives from participating in decisions about their own relatives. This would not occur. Further, the officer and Division Director were aware of the need not only to ensure that the officer did not participate, but also had taken affirmative steps to ensure procedures were in place if issues regarding the close relative arose.

We cannot overemphasize the need for the officer to stay as far removed as absolutely possible from issues dealing with the close relative. The issue of nepotism has resulted not only in complaints to this Commission, but in challenges alleging unfair hiring practices under the Merit Rules and challenges through the Court system in the award of contracts. See, *Brice v. State*, Del. Supr., 704 A.2d 1176 (1998) (court found facts surrounding the hiring of a relative were "the most blatant discrimination based on nepotism and favoritism"); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (improper for State employee to have "limited" and "indirect" and "unsubstantial" participation where close relative's private employer sought State contract).

In *Prison Health*, a Department of Corrections (DOC) employee gave a list of DOC employees to a representative from Administrative Services who was selecting a committee to decide which company would receive a State contract. The DOC employee's spouse was a low-level employee in one of the companies. The DOC employee also attended a meeting where the contract was discussed and asked three questions. He did not vote on the selection; no facts indicated that the selection committee did not make the decision based on a complete understanding of the contract requirements or that his spouse would receive any particular benefit from the contract decision. The Court twice noted that his participation was "indirect and unsubstantial," but found that "undoubtedly" even this "limited" participation was "improper." We specifically noted this case so that it was clear that even activities which may appear to be innocuous could result in a challenge based on a conflict of interest.

### **(C) Conclusion**

With that warning, and having considered all the relevant circumstances that a reasonable inquiry would disclose, at least with the facts known at this time, we found that as long as the officer did not participate and the precautions described above were taken by the officer and Division Director, there was not a perception that the officer's ability to carry out official duties with integrity, impartiality and competence was impaired. However, the officer, nor the Division Director, nor the Commission, could possibly foresee all circumstances that may arise regarding the close relative. Accordingly, if any issues arose where the officer or the Division Director needed further guidance, they were advised to return to the Commission with the particular facts of that situation.

**01-20 – Personal or Private Interest—Board Official Who Sued Board Cannot Review Similar Lawsuit:** A local government official was elected to a Board which must go into

executive sessions to discuss a complaint filed against it. A complaint had been filed against the Board by a former State employee. The local elected official was also a former employee and had filed a similar complaint against the Board. The Board intended to have executive sessions to discuss the litigation and asked if the local elected official should participate in executive sessions where the similar complaint is to be discussed. Based on the following law and facts, the Commission concluded that the official should not participate as it would constitute a conflict, or at least the appearance thereof.

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

The Code of Conduct provides that no State employee, officer or honorary official may:

(1) review or dispose of any matter pending before the State in which he has a personal or private interest. 29 *Del. C.* § 5805(a)(1). A personal or private interest is an interest which tends to impair independent judgment in performing official duties with respect to that matter. *Id.*;

(2) use public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e);

(3) engage in any activity beyond the scope of his public position which might reasonably be expected to require or induce him to disclose confidential information acquired through his public position. 29 *Del. C.* § 5806 (f);

(4) beyond the scope of his public position, disclose confidential information gained through his public position, nor shall he otherwise use such information for personal gain or benefit. 29 *Del. C.* § 5806 (g);

(5) pursue a course of conduct which will raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which reflect unfavorably upon the State and its government. 29 *Del. C.* § 5806(a).

### **(B) Facts**

Both former State employees worked for the same agency. When their employment contracts were not renewed, both then sued the Board. Both suits were against not only the Board but individual board members. The defendants were identical in both suits, except for one person. The board's legal counsel asked the elected official to recuse himself from executive sessions discussing the other suit because it was believed that the suits were sufficiently similar that the elected official could obtain information during the legal strategy sessions that could assist him in his complaint. The elected official's position was that as an elected Board member, he had a duty to the public to be present. Further, he did not believe that the cases were so sufficiently similar that he would gain any advantage from participating in the legal strategy sessions.

The first issue was whether the complaints were similar.

While the specific facts differed, the allegations that were the foundation of the complaint were essentially the same--misuse of State funds and resources. Each complaint was further similar in that both: (1) were suing the same Board;(2) were suing identical board members individually, except for one named defendant; (3) alleged misuse of government funds; (4)

alleged their performance reports were unfairly rated; (5) alleged their contracts were not renewed and no reasons were given; and (6) alleged the reason for the low performance reports and non-renewal of the contracts was retaliation for observing, reporting and discussing conduct they believed was contrary to policies, practices and law. The complaints overlapped substantially in legal theories. Both alleged that their conduct in speaking about what they considered was improper conduct was protected by the First Amendment; that retaliation for such speech deprived them of their civil rights. Both brought claims of civil rights violations under 42 U.S.C. § 1983. Both alleged that their conduct was protected under the State's "Whistle blower" statute. Both alleged breach of an implied covenant of good faith and fair dealing and intentional interference with a contractual relationship.

Based on the above facts we concluded there was a substantial overlap in the two complaints.

### **(C) Application of Law**

Having found a substantial overlap in the complaints, the next issue was whether the facts were sufficient to require the official to recuse himself from confidential legal strategy sessions on the other former employee's complaint.

#### **(1) Applying Restrictions If there is a "Personal or Private Interest"**

The Code of Conduct prohibits State employees, officers and officials from participating in reviewing or disposing of matters before the State in which they have a personal or private interest. 29 *Del. C.* §5805(a)(1). A personal or private interest in a matter is an interest which tends to impair a person's independent judgment in the performance of his duties with respect to that matter. *Id.*

The official's legal counsel appeared to suggest that the legal parameters of the above provision, § 5805(a)(1), were defined by § 5805(a)(2). Reading the law in that manner, he concluded that for the law to apply, the "personal or private interest" must result in a financial benefit or detriment to the State official or a close relative or that the official or close relative have a financial interest in a private enterprise which would be affected by action or inaction on the matter to a lesser or greater extent than others similarly situated as provided by § 5805(a)(2)(a) and (b). He said the financial benefit must be a "direct, substantial, pecuniary interest in the subject matter" and it could not be said the official would gain directly from any knowledge acquired in discussing the other complaint.

For a number of reasons, we did not agree that § 5805(a)(2) defined the parameters of § 5805(a)(1). First, the Code of Conduct has a clear and specific definition section. See, 29 *Del. C.* § 5804. Second, within the clear text of § 5805(a)(1), the second sentence reads that "a personal or private interest is one which tends to impair independence of judgment. . . ." Thus, within that provision the law spells out what constitutes a "personal or private interest." Third, the Delaware Supreme Court has affirmed an interpretation of § 5805(a)(1) independent of § 5805(a)(2). See, *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). Fourth, we have held that § 5805(a)(1) is a codification of the common law restriction on public officials having a personal or private interest. *Commission Op. Nos. 97-24; 97- 30; and 00-04*. That is because conflict of interest statutes generally does not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253 (1997)*.

Under the common law, the restriction on government officials participating when there was a “conflict of interest” or a “personal or private interest,” was not limited to close relatives and/or a direct financial interest. (See cases cited in *Commission Op. Nos. 97- 24; 97-30; and 00-04*). Those Delaware cases show that conflicts can arise from more than just a familial relationship or from a direct financial benefit. Subsequently, the General Assembly codified the restriction on Executive Branch officials participating if they have a “personal or private interest” in 29 *Del. C. § 5805(a)(1)*.

The Delaware Supreme Court affirmed an interpretation of § 5805(a)(1), where the alleged “personal or private interest” of a State official did not involve a “close relative” or a direct pecuniary interest. *Beebe, supra*; See also, *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (no direct pecuniary interest). Neither *Beebe* nor *Prison Health* considered the statutory terms of § 5805(a)(2). *Harvey v. Zoning Board of Adjustment of Odessa*, Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001), cited by the official, is a decision by the Superior Court (not by the Delaware Supreme Court) and is distinguishable. For example, “close relatives” were involved so 29 *Del. C. § 5805(a)(2)* would be the logical starting point for the Court’s inquiry. The Court found no violation of that provision but went on to note that while the Board members were not required to recuse themselves due to any financial interest, it may have been “prudent” for them to do so, “had it been possible.” Under *Beebe* and *Prison Health*, we must consider 29 *Del. C. §5805(a)(1)* and make a factual determination of whether the official’s “personal or private interest” is sufficient to require his recusal. We also considered other Code of Conduct restrictions.

## (2) The Official’s “Personal or Private Interest”

First, the official’s “personal or private interest” was his interest in seeing a positive resolution to the complaint he had brought against the Board and the individually named officials. A positive resolution may have served to “clear his good name,” as he alleged that the defendants’ actions resulted in his character and professional reputation being maligned. Moreover, he asserted that the defendants’ conduct resulted in pecuniary damages. Thus, he had a financial interest in a positive resolution, even though under the applicable authorities (*Beebe, etc.*) a direct financial interest is not required for there to be a Code violation.

Were those interests sufficient to tend to impair his independent judgment in performing official duties related to the other complaint? The law does not require that his judgment actually be impaired; only that it would “tend” to be. See, 29 *Del. C. § 5805(a)(1)*. Moreover, under the appearance of impropriety standard, the conduct need not actually result in a violation of the public trust, it need only “raise suspicion” of a violation. See, 29 *Del. C. § 5806(a)*.

Here, if the official participated in legal strategy sessions where the other complaint was discussed, he would gain insight into what strategy may be used in defending against his complaint, which we found raised similar issues, identical legal theories, and was against the same defendants, with one exception. In discussing the strategy, the Board’s attorney, who represents the Board and identical named defendants (except one), in both suits, could certainly discuss the same defenses, same applicable case law, and same applicable statutes. Further, in discussing if the Board should consider settlement, the amount of settlement, or whether to press forward to trial, counsel would have to reveal what he saw as the likelihood of success under various scenarios, reveal what figures might be used in settlement discussions, etc.

The official posited that because the cases were not factually similar, he would not gain any benefit from participating in those discussions. We disagreed. First, some strategy

discussions are not based on the facts. For example, the Board's attorney may have wished to discuss with the defendants whether, regardless of any facts, it wanted to further expend government funds by going to trial or strive for a settlement to resolve the matter without further expense. Alternatively, the Board's attorney may have wanted to discuss with the defendants the federal Court's recent ruling in the other case and how that may affect the Board's decision on its next course of action. That particular ruling was decided as a matter of law, not of fact. The Board's attorney may have also wished to discuss the implications of the Court's decisions on dealing with the official's similar suit. As the Board members were defendants in both suits, they would certainly see the parallels and may wish to discuss the implications. Further, as both complainants raised a 42 U.S.C. § 1983 claim, decisions on one could affect the other because §1983 recognizes that civil rights claims can sometimes be established by proving a pattern of misconduct by government officials.

If the official participated, his "personal or private interest" in his own suit may have tended to impair his judgment in making decisions regarding the other complaint, in violation of 29 *Del. C.* § 5805(a)(1), or his participation in such discussions may have "raised suspicions" that his judgment tended to be impaired, in violation of 29 *Del. C.* § 5806(a).

### (3) Use of Confidential Information/Use of Public Office

We noted that by law, strategy sessions, including those involving legal advice or opinion from an attorney-at-law, are closed to the public under the Freedom of Information Act when an open meeting would have an adverse effect on the bargaining or litigation position of the public body. 29 *Del. C.* § 10004(b)(4). In other words, the proceedings are confidential. That law recognizes that those who have an adverse interest in the pending or potential litigation against the government may glean helpful information in their own legal actions against the government, whether or not their facts, legal theories, etc. are identical. Here, the official had that adverse interest in pending litigation. Beyond those who have adverse interest, the General Assembly excluded the entire public from such sessions, even those who did not have a legal action pending and may gain no benefit from hearing the discussion. By exempting even those without any adverse interest, the General Assembly recognized that discussions on legal strategy between government attorneys and their government clients must be shielded. This permits the attorney to fully explore the matter with his clients and gives his clients the freedom to engage in conversations that those with an adverse interest are not entitled to discover. It is difficult to believe that the defendants who were being sued by two former State employees would feel free to have an open discussion with their legal counsel in front of one of those people, because of the similarity in the cases. Further, it would impose on defendants' counsel an obligation to basically screen every word said by the defendants to insure they did not make statements in one case that could be construed as admissions in the other; that they did not speak on matters which may be protected under the attorney-client privilege; that they did not speak on matters that would not normally be discoverable; etc.

Legal counsel for the board, who represented the Board and the named defendants in both complaints, believed that there was a sufficient overlap between the two complaints that discussions of the other complaint could benefit the official in his similar complaint. As he is defending both suits with essentially the same defendants, allegations, legal theories, etc., we must give weight to his evaluation of the two cases. Further, we must couple that fact with our own evaluation of the overlap between the complaints based on reviewing the two complaints. As noted above, while there were factual differences, there was a substantial overlap between the named defendants, the types of alleged improper actions, the legal theories, and the law on which those theories were based.

By contrast, the official's legal counsel was not involved in the other complaint. Thus, he was not as intimately conversant with both complaints. By hearing what defense theories the Board would use and identifying the law it would argue, the official would be in a position to pass the confidential information to his legal counsel which could gain for him an advantage that no other person with an adverse interest against the government would be entitled to hear. Also, a discussion on what figures may be available or appropriate for a similar case, could assist the official in negotiations he might subsequently have with the same defendants in his similar complaint.

If the official participated in the discussions, he could gain confidential information as a result of his public position, and might reasonably be expected or induced to use such information for his personal gain or benefit in violation of 29 *Del. C.* § 5806(f) and (g), or his participation in the meetings could "raise suspicions" that he might reasonably be expected or induced to improperly use or disclose such information, in violation of 29 *Del. C.* § 5806(a).

#### **(4) There was No Exemption from the Code of Conduct for Elected Officials**

It was argued that because the official was elected by a large number of voters that he had a public obligation to attend the meetings. No Code provision states that the number of votes received is a basis for letting an elected official participate in the face of a conflict of interest. If those were the rules, no elected official would have to recuse themselves when they had a conflict. The restrictions would then become meaningless.

Finally, no facts indicated that other elected Board members, who were not named defendants, and did not have a personal or private interest, could not fulfill the "public obligation," to the extent there was one. Thus, this was not a situation as in *Harvey, supra*, where, although the recusal would have been prudent, it was impossible for others to perform the function. We also noted that the official was not a named defendant in the other complaint. Thus, his presence was not required to participate in his own defense.

The official's "public obligation" under the Code of Conduct is that his conduct, like all employees and officials subject to that law--elected or not-- "must hold the respect and confidence of the people," and 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.* § 5805(1). To achieve that goal, the General Assembly provided standards to guide their conduct and noted that "some standards of this type are so vital to government that violation thereof should subject the violator to criminal penalties." 29 *Del. C.* § 5802(3).

Here, the standard prohibiting State officials from reviewing or disposing of State matters if they have a personal or private interest in the matter is one that carries a criminal penalty of up to one year's imprisonment and/or a fine not to exceed \$10,000 for knowingly and willfully violating that provision. 29 *Del. C.* § 5805(f). Thus, compliance with that provision is deemed "vital."

The restrictions on improperly using or disclosing confidential information; using public office for public gain; and engaging in conduct that will raise suspicion of a violation of the public trust, carry administrative penalties. However, compliance with those provisions can be achieved here by not violating the criminal provision.

#### **(D) Conclusion**

Based on the above law and facts, the official has a “personal or private interest”-both pecuniary and non-pecuniary--in his complaint against the Board and the named defendants that prohibited him from participating in executive sessions of the School Board where legal strategy on a similar complaint was discussed with counsel.

**01-14 – Personal or Private Interest—Decision’s About Uncle’s Organization:** If a State officer has a “personal or private interest” in a matter but has no authority to delegate the decision to another, he must promptly file a full written disclosure on becoming aware of a conflict. 29 *Del. C.* § 5805(a)(3). We held in a prior opinion that this officer had no authority to delegate his statutory responsibilities. *Commission Op. No. 01-05*. Thus, we do not address that issue again. Here, as his disclosure was “promptly” filed, his conduct fully comported with the law.

However, he asked if, as a matter of law or fact, there was a conflict so he would have a definite ruling and not have to “assume” a conflict if a similar situation arose. He asked because his uncle had a close affiliation with an entity which was seeking a license extension through his office, and he was the only person authorized by statute to make the decision.

The Code of Conduct has two provisions dealing with “personal or private interests.” The officer noted in his disclosure that he did not believe he had a conflict under 29 *Del. C.* § 5805(a)(2)(a) and (b). That section identifies two situations which automatically create a “personal or private interest” which tends to impair judgment. They are where: (a) a State officer or his close relative would accrue a financial benefit or detriment to a greater extent than others in the same class or group of persons; or (b) a State officer or his close relative’s private enterprise has a financial interest that will be affected to a lesser or greater extent than other similarly situated private enterprises. In other words, by operation of law, there will always be a conflict under that section if the person is a “close relative” and would receive a “financial benefit” that others similarly situated would not receive. He noted that the definition of “close relative” does not include “uncle” and his uncle would not receive a direct “financial benefit.” 29 *Del. C.* § 5804(1). We agreed that, as a matter of law, the situation did not substantiate a conflict under 29 *Del. C.* § 5805(a)(2)(a) and (b).

However, that cannot end the inquiry because we must decide if the facts would substantiate a conflict under any other provisions. See, e.g., *Commission Op. Nos. 96- 61 and 00-04*. (State officers said there was no conflict because their situations did not fall within the definitions of terms in 29 *Del. C.* § 5805(a)(2), but Commission found conflicts under other provisions).

The other section dealing with “personal or private interests” is 29 *Del. C.* § 5805(a)(1). That section is not limited to narrow definitions such as “close relatives” and “financial interest.” Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

At common law and since its codification, Courts and this Commission have recognized that the provision covers various relationships that may create a “personal or private interest,” that are not enumerated as they are in the other section. See, cases cited in *Commission Op. Nos. 00-04 and 00-18*. Delaware Courts have held that under the common law, which has been codified, the issue of whether the “personal or private interest” is sufficient to “tend to impair

judgment” is an issue of **fact**, not of law as in § 5805(a)(2). See, e.g., *Shellburne, Inc. v. Roberts*, Del. Ch., 238 A.2d 331 (1967) (under common law, where complainant alleged government official had “personal interest,” and “conflict of interest” because of friendship and social relationships, and used public office in furtherance of such personal interest, court held determination was issue of fact); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (Court held that whether there was a sufficient personal interest to require recusal under the State Code of Conduct was an issue of fact). Thus, at common law and as codified, this section permitted consideration of whether a particular relationship was either sufficient to create a conflict or too attenuated to create a conflict. See, *Commission Op. No. 96-42* (improper for State employee to participate where brother-in-law would be affected by decision); but see, e.g., *Commission Op. No. 00-18* (allegation of “personal or private interest” that State officer would financially benefit from decision was too remote and speculative).

Where a relationship is not within the definition of “close relative,” the facts can still give rise to a conflict under 29 *Del. C.* § 5805(a)(1). *Commission Op. No. 96-42* (improper for State employee to participate in decision where brother-in-law’s company would benefit). “In-laws,” like uncles, are not defined as a “close relative,” so § 5805(a)(2) would not apply, but § 5805(a)(1) could.

Aside from the § 5805(a)(1) restriction, the Code prohibits State employees from engaging in conduct that may “raise suspicion” among the public that he is acting in violation of the public trust and his actions will not reflect favorably upon the State and its government. 29 *Del. C.* § 5806(a). This is basically an “appearance of impropriety” test. *Commission Op. No. 91-02*. The Commission has held that:

[T]he 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*.

Here, the provision which appears to be violated is the restriction on reviewing or disposing of matters if there is a “personal or private interest” which would tend to impair judgment in performing official duties. 29 *Del. C.* § 5805(a)(1). His official duties required him to decide certain licensing issues. His uncle was on the board of an organization seeking to have its license extended. As a board member, and because of a past elected position, the uncle had substantial power and influence in the State. While he may not receive a direct financial benefit from his nephew’s State decisions, an approval certainly benefitted the organization--if not, the Board on which he sat would not want the extension. This was not a remote and distant relative. The issue of whether the license should be extended had been contentious. In fact, members of the public had questioned why he was making the decision and noted the familial relationship. The public could well suspect, and it was clear that at least some of the public did suspect, that his decision could result from favoritism or preferential treatment for his uncle’s organization.

Based on those facts, the majority of the Commission concluded that, at a minimum, there was an appearance of a conflict. This is not to say that his judgment was, in fact, impaired, only that it could raise suspicions among the public that it was. However, we also noted that when he encountered the situation, he promptly and fully complied with filing the full disclosure mandated by law. That is all the law required, and it provides that such full disclosures are confidential. 29 *Del. C.* § 5805(3). However, he elected to disclose the situation

more fully by making it a matter of record at the application hearing. Moreover, his decision could be appealed. Accordingly, while concluding that a conflict existed, the law permits him to act after filing a disclosure, and he fully comported with the law, as required by 29 *Del. C.* § 5805(a)(3).

**01-05 – Personal or Private Interest—Inability to Delegate Conflict:** A State officer notified the Commission of a possible conflict of interest because as a private attorney he had assisted some clients in purchasing real estate. At that time his clients discussed the possibility of applying for a certain type of State license. However, they planned to pursue that on their own. Thus, he was not involved in any matters related to their license application. At the time of the purchase, he was not aware that he would be considered for the position of the State official who was responsible for issuing this type of license.

After he accepted the State job, his former clients' application was scheduled for a hearing. By statute, he was required to decide if the application would be approved. State officials may not review or dispose of matters if they have a personal or private interest that would tend to impair independent judgment in performing their official duties. 29 *Del. C.* § 5805(a)(1). However, there is an exception which provides that, if there is a statutory authority that cannot be delegated, the State employee may exercise responsibility with respect to the matter, if promptly after becoming aware of the conflict he files a written statement with the Commission disclosing the personal or private interest and explains why the responsibility could not be delegated. 29 *Del. C.* § 5805(a)(3). After a review of his statutory duties, the Commission concluded that, as a matter of law, there was no one to whom he could delegate his statutory duty to rule on the application.

Here, he immediately contacted the Commission's office and prepared a written statement and faxed it to the Commission to comply with the prompt disclosure requirement. While the Code states that such disclosure is confidential, 29 *Del. C.* § 5805(a)(3), he chose to disclose the situation to the participants at the application hearing and make it part of the record.

**00-32 – Personal or Private Interest—Representing Private Enterprise Before Own Agency: WAIVER GRANTED.** NOTE: When a waiver is granted, proceedings before the Commission become a matter of public record. 29 *Del. C.* § 5807(a).

Dear Mr. Carter:

The State Public Integrity Commission, based on the following law and facts, grants a waiver for you to accept a grant from the Delaware Heritage Commission (DHC), of which you are a member, to update a history you wrote in 1984 on former Governor John Townsend. When a State employee, officer or honorary official does business with the State, they must submit a "full disclosure" to the Commission. 29 *Del. C.* § 5806(d). "Full disclosure" means sufficient information to decide if the conduct violates the Code. Here, you and the agency acknowledged that accepting the grant would result in a violation and asked for a waiver. The prohibitions requiring a waiver are: (1) the restriction on contracting with the agency to which you are appointed, 29 *Del. C.* § 5805(b)(1); and (2) the requirement for public notice and bidding, 29 *Del. C.* § 5805(c). The Commission may grant a waiver if the literal application of the prohibition is not necessary to achieve the public purposes of the statute or would result in an undue hardship on the employee or the agency. 29 *Del. C.* § 5807(a).

The public purpose served by prohibiting contracting with one's own agency was noted in a 1971 Court opinion. *W. Paynter Sharp & Son v. Heller*, Del. Ch. 280 A.2d 748, 752 (1971). In *Heller*, the Court upheld an agency's decision not to contract with one of its appointees, saying 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 State officials from dealing with their own agency. 29 *Del. C.* § 5805(b)(1). This ensures 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. 98-23.

As the public purpose is to ensure the contract does not result from favoritism, undue influence, etc., we looked at why DHC wants to contract with you. DHC selected you to update the history of former Governor Townsend because in 1984, many years before you were a DHC appointee, you wrote a lengthy history on Governor Townsend. In writing that book, you obtained historical documents, conducted interviews, established a trusting relationship with the family, etc. DHC is now publishing histories on all of Delaware's former Governors as part of a series. Thus, you are the person most familiar with the history of the former Governor and have the information and expertise to update the book. Further, other authors have been selected to write histories of other former Governors. Thus, this is not a unique opportunity created solely for you. The histories will be completed in a consistent format and made available for purchase at \$5. You will not receive any portion of those sales. In updating your 1984 book, you will accomplish such things as adding footnotes to make it more scholarly, adding information that was not included in the initial writing, etc. Also, you will scan the existing book into a desktop publishing program to reformat it so it will be consistent in appearance with the other histories in the series. An additional step you will take that other authors are not taking is to make the book camera ready.

Based on those facts we conclude that the public purpose--ensuring that the contract was not based on favoritism, undue influence, etc.--has been served. Thus, the literal application of the restriction against contracting with one's own agency is not necessary to serve the public purpose and a waiver is granted.

Regarding the requirement for public notice and bidding, Delaware Courts have held that: "Statutes dealing with bidding on public work are to be construed in the light of their primary purpose--to protect the public against the wasting of its money. These statutes seek to prevent waste through favoritism and yet permit proper supervision over the qualifications of the bidders. Thus, there is the desire to see that public officials have public work done as cheaply as possible." *Fetters v. Mayor and Council of Wilmington*, Del. Ch., 72 A.2d 626(1950); *Heller*, supra; and *Delaware Technical and Community College v. C&D Contractors, Inc.*, Del. Supr., 338 A.2d 568 (1975). The Code of Conduct includes two methods by which the Commission can address the issue of expenditure of funds on a State contract: (1) public notice and bidding or (2) ensuring that there is arms' length negotiation. 29 *Del. C.* 5805(c). Public notice and bidding aids in avoiding favoritism by creating a public record that insures such things as qualifications of bidders and fairness in prices. Here, public notice and bidding would be

merely perfunctory because of the reasons given above concerning why your qualifications resulted in your selection. Thus, to ensure the public purpose is served we review your situation under the arms' length negotiations standard.

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." Commission Op. Nos. 98-23; 99-17 (*citing Oberly v. Kirby*, Del. Super., 92 A.2d 445(1991)). Here, DHC plans to contract with you for \$4,000. It said that authors of history books on other former governors are being paid \$3,000, but the additional money is because you will make your book camera ready, while the other authors will not. DHC will undertake the tasks and associated costs to make the other authors' books camera ready. Thus, the actual costs to the agency is essentially the same for all authors. Accordingly, your contract appears to be no more favorable than what is being paid as the market price to other authors writing histories of former governors. We also note that when a contract is publicly noticed and bid, the results become a public record so that the public has access to information on the contract. Access to this information instills public confidence that the contract was not issued out of favoritism, etc. While public notice and bidding will not occur in this case, by law, when we grant a waiver the proceedings become a public record. 29 *Del. C.* § 5807(b)(4). Thus, the public will know that its concerns, such as the potential for favoritism, use of public office for an unfair advantage or gain, etc., were addressed. Therefore, the literal application of the requirement for public notice and bidding is not necessary to serve the public purpose, and a waiver of that prohibition is granted.

## **00-19 – Personal or Private Interest—Self-Employed as a Licensed Professional:**

### **I. Facts**

A State employee was a licensed professional in his capacity as a State employee. He also had a private professional practice. As a result of his private practice, he had, on occasion, been hired to conduct certain evaluations on persons who were prosecuted by the State and been asked to serve as the defendant's expert witness. In a case where he was to serve as the defendant's expert witness, the State represented a Division of his Department in bringing the prosecution. The question was raised about whether his private representation created a conflict of interest. As a result, he did not see the client or testify in that case. In his private practice, he also evaluated minors who may have been involved in criminal matters who may concurrently be active with other Divisions in his Department. Although he also evaluated minors in his State practice, the private clients were not State clients in his Division. In those cases, he was hired by the minors' public defender or private attorney to conduct certain evaluations. He gave his written evaluations to the attorneys. He may have to testify concerning the evaluations in criminal litigation prosecuted by the State, but not by, or for his Division. The request indicated that he also may be hired as a defense expert when the State represented agencies other than his own. No further facts were given regarding those cases.

### **II. Background to Decision**

The State employee and his agency sought as much guidance as possible, not only for him, but for other licensed professionals in the agency. This Commission must base its

opinions on the particular facts of each case. 29 Del. C. § 5807(c). However, the purpose for issuing synopses of advisory opinions is to be used as guidance. 29 Del. C. § 5809(9). For example, the Commission has issued decisions on a State employee seeking outside employment as an expert witness and to a State employee who might be called as a fact witness. Commission Op. Nos. 91-19 and 99-53. Also, this opinion may assist in guiding other licensed professionals in the agency.

### III. Applicable Law

#### (A) Requirement for a Full Disclosure if Regulated by, or Doing Business with, the State

Any State employee who has a financial interest in a private enterprise which does business with, or is regulated by the State, must file a written statement with the Commission fully disclosing the same. 29 Del. C. § 5806(d). The filing of such disclosure is condition of commencing and continuing employment or appointed status with the State. *Id.*

As a licensed professional, this individual's private practice was regulated by the State. (Citation omitted). Thus, a full written disclosure was required. "Full disclosure" means sufficient information for the Commission to decide if there is compliance with the Code of Conduct. See, e.g., *Commission Op. No. 98-23*. As noted above, some details of his outside employment had not been fully disclosed. Further, nothing indicated if his private practice was limited only to being an expert witness against the State and/or its agencies, or if his practice was broader, e.g., fact witness, representation before State entities other than the Court, etc., such that the Commission would need to consider those factors. Thus, no attempt was made to decide if those situations created a conflict of interest.

#### (B) Restrictions on Holding Other Employment

There is case law interpreting government restrictions on its employees who have outside employment. See, *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 671. However, there are few cases interpreting outside employment restrictions based on the particular fact situation of a government employee who, in his outside employment, testified against the government as an expert witness for a private party. See, *Hoover v. Morales*, 5th Cir., 164 F.3d 221 (1998); *FDIC v. Jefferson Bank and Trust*, D. Colo., 46 F. Supp. 2d 1109 (1999); *Young v. United States*, W. D. Texas, 181 F.R.D. 344 (1997); and *Dean v. Veteran's Administration*, N. D. Ohio, 151 F.R.D. 83 (1993); *Conrad v. United Instruments, Inc.*, W.D. Wisc., 988 F. Supp. 1223 (1997); and *EEOC v. Exxon Corp. v. United States Department of Justice*, 5th Cir., 202 F. 3d 755 (2000).

As guidance to the agency, we noted that in *Morales*, a State statute and policy imposing a complete ban on outside employment as an expert witness, without applying any criteria other than the fact that the expert witness would take a position contrary to the State, were found unconstitutional because they were based solely on speech content (State employees would testify opposite to the State). However, the Court said restrictions based on factual justifications such as ethics laws on outside employment dealing with conflicts of interest did not pose the same problem. *Id.* That statement was confirmed by cases in which various States and the United States Supreme Court have upheld restrictions on outside employment by government employees which deal with conflicts of interest. See, 62 ALR 5th 671; See, *Sector Enterprises Inc. v. DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991) (dealing with 1st Amendment issue and citing a line of Supreme Court cases).

Unlike the statute in *Morales*, Delaware's Code of Conduct does not ban outside employment based solely on speech content. Rather, it prohibits a State employee from having any interest in any private enterprise or incurring any obligation which is in substantial conflict with the proper performance of his duties in the public interests. 29 *Del. C.* § 5806(b). It specifically restricts accepting other employment 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 the integrity of its government. 29 *Del. C.* § 5806(b) (emphasis added).

In a New York case, the Court addressed the concerns raised when State employees had a private business which offered the same type of services privately, as they did on their State job. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Court said that "multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture." First, it noted that: "the exigencies of private practice and the convenience of private clients require communication and sometimes actual representation, with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official library, telephone and other facilities to accommodate the temporal and other necessities of private practices." The Court added that there was an "inevitable conflict created by the limited time and resources for the employee to perform two jobs." *Id.* at 246. Likewise, this Commission considered the time involved to hold a second job and considered when the employee will perform the private activities in deciding if the other employment creates an interest which is in "substantial conflict" with performing official duties, which is prohibited by 29 *Del. C.* § 5806(b). See, e.g., *Commission Op. No. 98-14*.

Here, no facts were given to indicate that the employee was operating his private enterprise during the hours when he should be performing his official public duties. However, because his private practice involved litigation, the Commission noted that the inherent nature of preparing for litigation may result in the attorneys/clients who hire him from his private practice seeking him out during State duty hours. While this raised some concern, by law, public officials are entitled to a presumption of honesty. *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). Thus, we assumed that he was not conducting his private business during State duty hours. However, even assuming that was true, it did not cure the other concerns raised below.

One concern is that his professional expertise was in an area where there were few other licensed professionals. Thus, if his own agency needed access to his expertise, and he already had a client/case in his private practice in that matter, he would not be available to his own agency. That could result in his having an obligation that could preclude him from performing his public duties. The other concerns arose in the context of the specific restrictions on outside employment if "it may result in" (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b) (emphasis added).

First, we emphasized that 29 *Del. C.* § 5806(b) only requires a showing that a course of conduct "may result in" a violation of the Code provisions. *Commission Op. Nos. 92-11; 99-34.* Second, the restriction prohibiting conduct that may result in "any adverse effect on the public's confidence in the integrity of its government," is basically an "appearance of impropriety" test, as is the restriction, found in 29 *Del. C.* § 5806(a), against engaging in any conduct that may "raise suspicion" that the public trust is being violated. *Commission Op. Nos. 98-11; 98-23; 98-31.* Thus, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14.* It only requires that it "may result in an adverse effect on the public's confidence" or that it may "raise suspicion" that the dual employment holder is acting in violation of the public trust. *Id;* See also, 29 *Del. C.* § 5811(2) (public officers and employees should avoid even the appearance of impropriety where they have a financial interest); See also, *Commission Op. No. 99-35* (citing 63C Am. Jur. 2d *Public Officers and Employees* § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict)). To decide if there was an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78.* We weighed the following facts and law to conclude that the totality of the circumstances creates, at a minimum, the appearance of a conflict if this State employee served as an expert witness for a private client against another Division in his own Department.

**(1) Impaired judgment in performing official duties.** In his State capacity, no facts indicated he reviewed or disposed of any matters related to the adult client who was prosecuted. That was because his official responsibilities within his Division entailed evaluating minor children, not adults. It also did not appear that in his State capacity his judgment involved making decisions about the private adult client's minor child because the request for the advisory opinion stated that he had no contact with the client or the client's family previously. Rather, it appeared that the official decisions on this particular case were made by a separate Division within his Department, which is statutorily tasked with bringing these types of cases. Additionally, since the matter was to be prosecuted by the Attorney General's office, that agency also would be responsible for State decisions regarding the case. No facts indicated that he was involved in those State decisions. Those facts diminished the possibility that his judgment would tend to be impaired, which is prohibited by 29 *Del. C.* § 5805(a)(1) and 29 *Del. C.* § 5806(b)(1).

**(2) Preferential treatment to any person:** As noted, he had no official decision-making authority over the adult private client, or the private client's minor child in this particular case. Those facts diminished the possibility that he could have given preferential treatment to his private client, (e.g., used information from or about the minor child obtained in his official capacity to aid the private client). Further, in this case, he decided not to testify after a question of a conflict was raised. Thus, any interest in ensuring preferential treatment for his private client apparently became moot. However, had he proceeded to serve as the expert in this action brought by another Division within his Department and prosecuted by the Attorney General, it would raise a number of possibilities that may have resulted in preferential treatment for the private client, and raised the appearance of, or actual possibility of, violations of other Code provisions. Specifically, had he proceeded as the defense's expert in this case, it may have resulted in his representing or otherwise assisting his private enterprise before his own agency, which is prohibited by 29 *Del. C.* § 5805(b)(1). That is because the agency and the Attorney General's office, in deciding whether to proceed with a prosecution may have wanted to consider such things as information from the defense's expert witness. That could mean that he would have to represent his expert opinions to his own agency in order for it to evaluate his expertise in making their decision on whether to proceed with a prosecution. The purpose for

prohibiting State employees from representing or otherwise assisting a private enterprise before one's own agency, is to ensure that one's connection to the agency does not result in the use of undue influence, preferential treatment, and the like. *Commission Op. No. 98-23*. Because his own colleagues would evaluate his private expertise as an aid to deciding if they would proceed, it could raise the specter that he had used undue influence on his colleagues or that their judgment was impaired in their decision making, raising the appearance that his client would receive preferential treatment because of his status within his agency. Similarly, if he testified at trial, his own agency's expert would have to evaluate his testimony, expertise, etc., for such purposes as cross-examination, etc. Again, it would have raised an appearance of impropriety concerning the validity and fairness of such evaluations by a representative for his own agency.

**(3) Official decisions outside official channels:** No facts indicated that this provision may have been violated in this particular case. However, when a private client of his had a connection to another Division within his own agency, it placed him in a position where it may raise the appearance that because of that connection, he could circumvent official channels to obtain a benefit for his private client.

**(4) Other Adverse Effects on the Public's Confidence in its Government:** Additionally, serving as an outside expert in cases against his own agency may result in an adverse effect on the public's confidence in its government, because it may appear that he was acting in violation of other provisions of the State Code of Conduct. As noted by the agency, it had an electronic database with confidential information on agency clients. The Code of Conduct prohibits the improper use or improper disclosure of confidential information gained as a result of one's public position. 29 *Del. C.* § 5806(f) and (g). This is not to say that he had, or would, use confidential information from his agency's database to assist him in preparing as an expert, or deciding whether to undertake representation. Moreover, the agency said that there were restrictive measures used to limit access to the information. However, because of the possibility of accessibility to data from another Division within his agency that could assist him in preparing as an expert in his private cases, it may result in at least an appearance of improper use of confidential information which would benefit his private client, and his private practice. While he stated that any expert hired by the defense would have been able to obtain that information through discovery, we noted that the rules of discovery do not necessarily require that all information held by one party be given to the other party. Thus, he might have the benefit of information that would not have been discoverable. Further, other experts would not have personal access to the database in advance of discovery, while the State employee would be in a position to have access to the data which might aid him in deciding if he wanted to consider taking a case.

In *Sector*, the Court noted that where State employees hold outside employment in the same field as their State work, it "creates an appearance of impropriety" because of the perception that the State employees have an unfair advantage. The Court specifically noted that the State employees in *Sector* had access to the State's computer system, which could be an aid to them in their private business. Here, the agency also raised the issue of loyalty to his agency if he testified against his own agency. The Delaware Supreme Court has specifically addressed some issues that arose when a licensed professional, as a result of outside employment, represented an opposing interest in a matter involving the State. *In Re Ridgely*, Del. Supr., 106 A. 2d 527 (1954). While *Ridgely*, was a common law decision, the Commission has held that pursuant to the rules of statutory construction, since the General Assembly did not specifically overrule common law, such decisions have precedent in interpreting the statutory provisions. *Commission Op. Nos. 97-24 and 97-30*. In *Ridgely*, the Court held that where the licensed professional (a lawyer) held outside employment that "his private interest (outside

employment) must yield to the public one." *Id.* at 4 and 7. The Court said because the private employment must yield to the public one, it need not decide if his dual employment resulted in a violation of the professional code of ethics for lawyers. The Court held that it was "manifestly improper" for him to accept private employment in State matters and "engage in litigation or the prosecution of claims against a fellow member" of his agency's (Attorney General) staff. *Id.* at 7. The Court also said that when Ridgley represented the opposing side against an administrative board which he represented in his State position, "the result was the unseemly appearance in the court of two State's attorneys, one endeavoring to uphold the State's case and the other to overthrow it." *Id.*

Since that common law decision, the General Assembly enacted a provision which requires that: "Each state employee, state officer and honorary state official 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 his public trust and which will not reflect unfavorably upon the State and its government." 29 *Del. C.* § 5805(a). Here, the State employee, like the attorney in *Ridgley*, was a licensed professional. Similarly, if he were to serve as an expert witness in a case against his own Department, it may result in "the unseemly appearance in Court" of him contesting his own Department's case, while an official representative of his agency attempted to uphold the Department's decision to prosecute. Moreover, had he and his agency's representative both testified in this matter, it would have placed him in the position of evaluating the testimony and expertise of colleagues of his own agency.

#### **IV. Conclusion**

Based on the foregoing facts and law, we concluded that his outside employment as an expert witness in cases being prosecuted by or brought on behalf of another Division within his own agency, may result in, at least an appearance of a conflict, if not an actual conflict.

**00-18 – Personal or Private Interest—Ownership in Business: NOTE: Generally, advisory opinions or complaints are confidential. 29 *Del. C.* § 5807(d) & § 5810 (h)(1). However, applicants for advisory opinions, or the person charged in a complaint, can give the Commission written authorization to release the information. 29 *Del. C.* § 5807(d)(1) & § 5810(h)(1)(I). In the next case, such authority was given.**

#### **I. INTRODUCTION**

The State Public Integrity Commission issued a ruling on March 31, 2000 holding that Dale R. Dukes, a Sussex County Council member, and the other Sussex County Council members did not have conflicts of interest which would disqualify them from participating in a rezoning matter scheduled for presentation at the April 4, 2000, meeting of Sussex County Council. That ruling stated that an opinion providing a more detailed discussion of the law would be forthcoming. What follows is that further discussion of the law.

#### **II. JURISDICTION AND FACTS**

On March 7, 2000, a complaint was filed with the Public Integrity Commission alleging that Mr. Dukes (hereinafter "Respondent"), a Sussex County Council member, may have a conflict of interest and should not participate in a vote on a re-zoning matter on April 4, 2000, or thereafter. The matter to be considered was Carl M. Freeman Communities' (hereinafter

“Freeman”) proposal to develop approximately 887 acres near Fenwick Island into a 2,895-home development. The Freeman proposal needed County Council’s approval to re-zone the acreage from its status as Farm and Agriculture to a high-density zone. It was alleged that if Mr. Dukes’ participated, his private company, Dukes’ Lumber Co., might profit if the development was approved, and if Freeman or his subcontractors then decided to buy building supplies from his company. By statute, when a complaint is filed, the Respondent has statutory rights to such things as personal service of the complaint, a specific time to answer, an opportunity to be heard, and the right to subpoena witnesses, etc. See, 29 *Del. C.* § 5810. Mr. Dukes waived such rights so the Commission could expedite its proceedings and render a decision before the April 4, 2000, Sussex County Council meeting. Mr. Dukes did, however, request an advisory opinion under 29 *Del. C.* § 5807(c) concerning the issue.

Because other County Council members had private business interests which could allegedly profit, the County’s legal counsel, Richard Berl, also asked for an advisory opinion on their situations. The other Council members and their private enterprises were: (1) Lynn J. Rogers, President, Rogers Sign Company, Inc., a commercial sign and outdoor advertising company; (2) Finley B. Jones, Jr., President, M.A. Willey & Sons, a steel material supply company; (3) George B. Cole, Realtor, Sea Coast Realtor (Eastern Sussex County) and owner, Beach Plum Antiques; and (4) Vance C. Phillips, president, Vance Phillip, Inc., Woodrow W. Phillips Spray Co., V.P. Produce, and Realtor, Laurel Realty (Western Sussex County). The only Council member who had a contract or an account with Freeman was Mr. Rogers, who did approximately \$1,000 worth of sign work as a subcontractor for a company which contracted with Freeman on an earlier and different project. All Council members denied that they had: (1) an agreement with Freeman for future contracts; (2) sold any real property to Freeman; or (3) own or had an interest in any land in the vicinity of the development which would benefit from this project if it was approved.

### **III. APPLICABLE LAW**

Complainant alleged that common law decisions prior to the enactment of the State Code of Conduct were not applicable. We decided that issue in 1997. See, e.g., Commission Op. Nos. 97-24 and 97-30. We held that the Code of Conduct provision which restricts government officials from reviewing or disposing of matters before their government entity if they have a personal or private interest which tends to impair their independent judgment in performing official duties is a codification of the common law. Conflict of interest statutes do not generally abrogate the common law unless expressly so provided. *Id.* (citing 63 Am. Jr. 2d *Public Officers and Employees* § 253). The General Assembly did not expressly abrogate the common law. Nor did it impliedly repeal the common law restricting officials from participating when a conflict of interest was alleged in a zoning situation. Delaware courts have recognized that there must be order, certainty, and stability in land use laws. See, e.g., *Stafursky v. County Council of Sussex, Del. Ch.*, C.A. No. 1242, C. Allen (August 12, 1987); *Acierno v. Folsom*, Del. Supr., 337 A.2d 309 (1975). To hold that the common law did not apply could result in the Commission de-stabilizing long-standing Delaware decisions on zoning and conflict of interest restrictions.

At common law, when government officials acted on zoning matters and a conflict of interest or personal interest was alleged, the standard to be applied depended on whether the government officials were acting in a: legislative, ministerial, or quasi-judicial capacity. (See cases cited herein). The decision on which standard to apply turns on the particular facts--e.g., what is the alleged “personal or private interest”; how would such an alleged interest affect the official’s judgment; what type of zoning interest is being considered; and what is the official’s

capacity (role) in deciding the zoning issue. Having concluded that common law decisions apply in this situation, we next addressed the facts in the context of the three common law standards which Courts have applied when an alleged conflict results from a zoning matter.

#### **IV. BACKGROUND TO THE DECISION**

##### **(A) Zoning Decisions in General**

Council Member Dukes' authority to vote on the zoning issue was being challenged because he had a private business which might allegedly benefit from a favorable decision on the matter. When Delaware Courts review challenges to zoning decisions, a threshold issue is whether the decision maker was participating in: (1) a "legislative" capacity; (2) "judicial" capacity; or (3) a "ministerial" capacity. This is true regardless of the basis of the zoning challenge, e.g., due process, Freedom of Information (FOIA) violation, or conflict of interest. See, e.g., *Lawson v. Sussex County Council*, Del. Ch., C.A. No. 1615-S, C. Allen (August 6, 1995) p. 8 (zoning is a "legislative action," but some aspects are "quasi-judicial"); *Conner v. Shellburne, Inc.*, Del. Supr., 281 A.2d 608 (1971) (zoning hearings of Levy Court were quasi-judicial in nature); *Green v. Sussex County Planning and Zoning Commission*, Del. Ch., 340 A.2d 852(1974) (zoning hearing of County Council is basically similar to the law making process of any legislative body); *East Lake Partners v. City of Dover Planning Commission*, Del. Super., 655 A.2d 821(1974)); See also, other cases cited herein).

If the capacity in which the official acts is legislative, then substantial deference is given and courts will decline to question the motives of the official who participated in the zoning decision, even if a possible presence of a conflict of interest is alleged. See generally, *Zoning: Proof of Bias or Conflict of Interest in Zoning Decision*, 32 Am. Jur. Proof of Facts 3d § 5 (hereinafter "Zoning: Proof of Bias or Conflict"); See, e.g., *Lawson* at 8-10 (when zoning is viewed as a legislative action, the court will not substitute its judgment for the legislative body, absent fraud or bad faith); *Krahmer v. McClafferty*, Del. Super, 288 A.2d 678 (1972) (when government body acts in legislative capacity, courts will not inquire into the motives of, or inducements to, the officials as to what may have influenced them in passing the act or resolution, absent fraud or bad faith).

A more probing standard is used if the act is characterized as quasi-judicial. *Id*; See, e.g., *Shellburne, Inc. v. Roberts*, Del. Supr., 238 A.2d 331(1967) (when quasi-judicial body acts, there is a presumption of honesty and integrity and court will look at motive if complainant establishes a prima facie case to overcome the presumption). A "matter" is considered "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc.*, Del. Supr., 336 A.2d 209, 211(1975). Where government officials are bound by zoning regulations, there is no discretion of choice involved. *State ex rel. Rappa v. Buck*, Del. Super., 275 A.2d 795 (1971). Thus, if the matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. Since Mr. Dukes and the other Council members do exercise discretion and judgment in ruling on zoning matters, we held that the "ministerial" standard did not apply.

##### **(B) Identifying the Capacity in Which the Council Members are Acting**

Having disposed of the "ministerial standard," the threshold issue was whether the County officials would be acting in a legislative or judicial capacity. Delaware Courts decided if an official is acting on a zoning matter in a legislative or quasi-judicial capacity; or a combination thereof by looking at the specific structure of the land-use laws. There is no Delaware case

dealing directly with which test would be applied to Sussex County Council members in a rezoning situation. However, Delaware Courts have decided the standard to be applied under the specific zoning laws of other counties and cities. See, *Lawson*, C.A. No. 1615-S (zoning is a “legislative function,” but some aspects are “quasi-judicial”); *Conner*, 281 A.2d 608 (zoning hearings of Levy Court are quasi-judicial); *East Lake*, 655 A.2d 821 (comparing site development decision to subdivision decision, Court recognized that the City’s Planning Board could act, in part, in all three capacities). From those decisions it is clear that the capacity in which an official act turns on the complexities of the particular area’s zoning laws. As this Commission found no authority interpreting which capacity would apply to Sussex County Council members based on the structure of the Sussex County Zoning laws, we tested the issues under both the legislative and quasi-judicial standards.

### (1) LEGISLATIVE CAPACITY STANDARD

Delaware Courts will not inquire into the motives of public officials who act in a legislative capacity on zoning actions if they act within the scope of their admitted powers, unless the complaining party proves bad faith or fraud on the part of the official. *Campbell v. Commissioners of Bethany Beach*, Del. Supr., 139 A.2d 493 (1958). In *Campbell*, it was alleged that zoning Commissioners approved the zoning of a new state highway through Bethany Beach, because it would increase their individual property values. *Id.* at 496-497. The Delaware Supreme Court said there was “absolutely no evidence of capriciousness or bad faith or fraud.” *Id.* at 496. It noted that as a matter of law, the Commissioners had complete power to act on the matter. *Id.* Regarding the allegation that they were motivated to approve the request because of their desire for personal gain, the Court said “[T]he short answer is:” most of the property lying east of Delaware Avenue would presumably benefit from any increase in value as a result of a new highway. *Id.* at 497. “The mere fact of possible enhancement” of their personal properties did not preclude their participation, because as a practical matter, no Board of Commissioners could then be obtained to validly consent to a new highway since, by law, all Commissioners were property owners. *Id.*

As in *Campbell*, it is “possible” that all Council members could personally gain if the ordinance was passed. For example, Freeman “might” decide he wants: Mr. Dukes’ building supplies; Mr. Findley’s steel materials; Mr. Cole and Mr. Phillip’s real estate sales expertise; Mr. Cole’s antiques to dress up the developer’s show home; or Mr. Rogers signs to announce the coming of the new development or identifying the location, etc. But Mr. Dukes and the other Council members each represented that they: (1) had no agreement with Freeman for future contracts; (2) had not sold any real property to Freeman; and (3) did not own or have an interest in any land in the vicinity of the development which would benefit from the project if it was approved. Under the statute, and at common law, to prove that an official has a “personal interest,” sufficient to impair his judgment, complainant must overcome “a strong presumption of honesty and integrity.” *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff’d*, Del. Supr., No. 304 (January 29, 1996); See also, *Shellburne*, 238 A.2d 331 (when acting within scope of authority, there is a rebuttable presumption of good faith and propriety of conduct that inures to all public officers); *Mack v. Kent County Vocational-Tech Sch. Dist.*, Del. Super., C.A. No. 86AAU-2, J. Bush (May 20, 1987). However, the complaint recited “the mere fact” that if the ordinance was passed, then Mr. Dukes “might” profit. All well-pleaded allegations must be accepted as true. *Kershaw Excavating v. City Systems, Inc.*, Del. Supr., 581 A.2d 1111 (1990). However, inferences and speculative facts are not to be assumed as true without specific allegations of fact to support such inferences or conclusions. *Bergstein v. Texas Int’l Co.*, Del. Ch., 453 A.2d 467 (1982), *appeal den.*, Del. Supr., 461 A.2d 695 (1983) (alleged Board member’s private enterprise would

benefit from decision). Here, it was merely alleged that the officials “might” profit if the ordinance was passed and if the developer then decided to do business with one or all of those officials. This allegation was more tenuous than in *Campbell*, where the Court ruled that there was no evidence of fraud or bad faith. *Id.* at 139 A.2d 493. Where there is no showing of bad faith or fraud, Courts will dismiss the complaint. *Klaw v. Pau-Mar Construction Co.*, Del. Supr., 135 A.2d 123 (1957). Accordingly, we dismissed the complaint against Council Member Dukes, and advise Mr. Dukes, and all Council members, that to the extent any action on the re-zoning matter would be in their legislative capacity, they were not precluded from participating.

## **(2) JUDICIAL CAPACITY STANDARD**

We found that even under the stricter judicial/quasi-judicial standard there was no violation of the State Code of Conduct. When the judicial standard is applied, complainant must again overcome “a strong presumption of honesty and integrity.” *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff’d*, Del. Supr., No. 304 (January 29, 1996). Delaware Courts have noted how remote and nebulous alleged conflicts can be. Thus, for the interest to be sufficient to require an official to recuse himself, the claim cannot be merely conclusory. *Shellburne*, 238 A.2d 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995). We have held that claims cannot be based on suspicion and innuendo. There must be hard facts. Commission Op. No. 96-75 (*citing CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567(1967)). Here, the hard facts supported the presumption of honesty and integrity.

### **(C) There is no evidence of a violation of 29 Del. C. § 5805 (a)(2)(b) or (a)(1).**

Officials may not 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). By law, an official’s judgment would tend to be impaired if their financial interest would benefit to a lesser or greater extent than other private enterprises similarly situated. 29 Del. C. § 5805 (a)(2)(b). Here, the allegations merely said that Mr. Dukes’ private business “might” profit “if” the ordinance was passed, and “if” Freeman or his subcontractors then decided to do business with Mr. Dukes. The allegations required several assumptions before any interest would exist: (1) the ordinance would pass; (2) the developer or his subcontractors would use Mr. Dukes’ company or the companies of other Council members; and (3) their companies would benefit to a greater or lesser extent than other similar private enterprises. Such assumptions were too indefinite and speculative to support a finding of a disqualifying conflict of interest, particularly in light of each member of Council’s denial of the existence of any agreements related to the planned project.

Even assuming the first two speculative requirements were met, no facts supported the allegation that their private enterprises would benefit more than other private enterprises which offered similar products or services. For example, the developer could deal with a building supply company other than Mr. Dukes’ from the same local area, such as Masten Lumber and Building Supply. Similarly, he could select companies other than those of the remaining Council members for the other goods and services he needed. As no facts indicated that the Council Members’ businesses would benefit to a lesser or greater extent than other similarly situated private enterprises, the allegations failed to meet the element required by law--that their financial interests would benefit to a greater extent than others similarly situated.

The next question was whether the speculative, prospective interests would be sufficient

to create any associational relationship “personal or private interest” between the Council members and Freeman which would tend to impair judgment under 29 *Del. C.* § 5805 (a)(1). “The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.” *Prison Health Services Inc. v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993) (citing *Van Itallie v. Borough of Franklin Lakes*, N.J. Supr., 146 A.2d 111, 116 (1958)). In *Van Itallie*, it was alleged that an official who participated in a zoning decision had a personal interest because his brother-in-law held a low-level position with the company seeking the zoning action. The Court held that the official’s familial relationship with an employee of the company which was seeking the decision was not an interest sufficient to require recusal. Similarly, Delaware Courts have held that the mere allegation of a relationship without additional facts to support a charge of a conflict of interest is insufficient to state a claim. *Camas v. Delaware Board of Medical Practice*, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995) (no facts were given to support an allegation that a State officer’s marital relationship created a conflict of interest where her spouse investigated a claim of improper medical practice for his employer, a private hospital, against a doctor of that hospital, and the same matter came before her State board). Here, all Council members denied that they had any agreement with Freeman for future contracts, etc. No facts indicated any personal or private ties to Freeman. Thus, the allegations of a personal or private relationship were speculative and conclusory, without facts to support the type of relationship between the officials and Freeman that was sufficient to create the type of interest which Courts deem to be sufficient.

#### **(D) The Facts Do Not Support the Claim of an Appearance of Impropriety**

As the conclusory and speculative allegations were insufficient to establish that the officials had the requisite “personal or private interest,” the question became whether the facts were sufficient to support the allegation of an appearance of impropriety. In deciding if there was an appearance of impropriety, we considered the totality of the circumstances. *Commission Op. No. 96-78*. However, those circumstances must be contained 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). To achieve that balance, we must start with the strong legal presumption of honesty and integrity to which public officials are entitled. *Beebe*. Added to that presumption were the following legally significant facts:

(1) Capable Citizens Would be Discouraged from Holding Public Office if Remote and Speculative Interests were Enough to defeat the Purpose of the Code of Conduct. The balance that must be struck when public officials are alleged to have remote and speculative interests was well expressed by the Court in a New Jersey zoning decision. The statute, similar to Delaware’s, restricted local planning officials from acting “on any matter in which he has either directly or indirectly any personal or financial interest.” The Court said:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous

interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes said, "Universal distrust creates universal incompetency." Van Itallie at 269.

Similarly, we have held that in deciding if there is an appearance of impropriety because of an alleged prior professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo; not on hard facts. *Commission Op. No. 96-75* (citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567(1967)). That conclusion is consistent with a Delaware decision where it was alleged that there was an appearance of impropriety under a provision of the Lawyer's Rules of Professional Conduct because of the business relationship created by the individual's State role and his private employment. The Court said: Absent the existence of a conflict, it would not disqualify the individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

As in *Seth*, here, the public position and private employment created the alleged appearance problem, but there were no articulated, specific facts to support the claim. Just as the rules of conduct for lawyers are not to be used for tactical purposes to disqualify officials when there is no conflict, so too the State Code of Conduct should not be used for tactical purposes to disqualify public officials when there is, in fact, no conflict. Here, based solely on appearances without any supporting facts, it is alleged that Mr. Dukes should be disqualified because he "might" profit--if the developer's proposal is approved; and if the developer or if his subcontractor decides to buy supplies from Mr. Dukes' company. Apparently, no other Council members were questioned about the possibility that their private businesses might be enhanced. The only complaint filed was against Mr. Dukes. After he was charged, the Town attorney, understanding that if the charges against Mr. Dukes constituted a conflict of interest, then all Council members would have the same conflict, sought an advisory opinion not only for Mr. Dukes but for all Council members. Delaware Courts have noted that zoning decision makers are residents of the town or county for which they are responsible. As such, they bring their experience as citizens and residents of the town or county. When exercising judgment, they are required by their office to follow a process set-out by statute or dictated by due process. They need not approach their duties with no preconceptions about the course that would best promote the public good. *Pettinaro Enter. v. Stango*, Del. Ch., C.A. Nos. 1488, 1501, C. Allen (July 24, 1992).

(2) The Council Members' Discretion is Restrained by State and Local Zoning Law. Having concluded that speculative claims do not support the purpose of the Code, we also note that Sussex County Council Members were to comply with the State Comprehensive Development law when making zoning decisions. 9 *Del. C.*, Chapters 68 and 69. Delaware courts have held that the State law limits the discretion of those making land use decisions and that such "limits on discretion" are legally and judicially significant. *Lawson*, C.A. No. 1615-S; See, *Green v. County Council of Sussex County*, Del. Ch., 508 A.2d 885 (1986). Land use decisions are also restrained by local zoning laws and regulations. See, *Sussex County Code*, Chapter 99. The local restraints include the requirement that the developer must consult with such sources as the County's Land Use Planning staff; the County Engineer; the State's Department of Natural Resources; the State Fire Marshal's office; and other professional and

technical representatives as deemed necessary. *Id.* Public hearings are held so property owners can provide input, and a Committee then submitted a report with recommendations to the Council. *Id.* Thus, the developer's application was reviewed by a multitude of persons for compliance with not only the State comprehensive plan, but local ordinances and regulations, with public input, before Council ever voted. As zoning laws limited the discretion of those making land use decisions, such "limits on discretion" are of importance when it is alleged that there may be an appearance that an official's discretion/judgment would be impaired because of a mere possibility that he might benefit from a land use decision.

(3) Like Delaware, other jurisdictions have held that claims of conflicts of interest in the zoning context can be too remote and nebulous to require an official to recuse. A review of case decisions from other jurisdictions, revealed that before the courts would hold that an interest in the zoning "matter" being considered, was sufficient to create a conflict, they required some ascertainable benefit; not speculative benefits based on conclusory allegations. See, "Zoning: Proof of Bias and Conflict," *Van Itallie* 146 A.2d 111 (1958) (cited by Delaware Court in *Prison Health*); *Moody v. University Park*, Tex. App., 278 S.W.2d 915(1955); and *Touphoeus v. Joy*, N. J. Super., 196 A.2d 250 (1963). Complainant must overcome a strong legal presumption of honesty and integrity. *Beebe*, C.A. No. 94A-01-0004; *Mack*, C.A. No. 86A-AU-2. Here, the presumption of honesty and integrity was bolstered by facts which Delaware Courts have found to be legally significant, such as the legal restraints imposed by State and local zoning laws. In stark contrast, was the conclusory allegation that the activity could create a strong potential for a conflict.

## V. CONCLUSION

Based on the foregoing law and facts, the complaint against Council Member Dale Dukes was dismissed as the speculative allegations fail to establish either a conflict of interest or even the appearance of a conflict. Further, we found that all Council members, like Mr. Dukes, might possibly enhance their private interests if the re-zoning request was approved. However, they, like Mr. Dukes, could only be said to have a potential speculative interest, which was insufficient to require recusal.

**00-11 - Personal or Private Interest—Representing Clients Before Own Agency:** An individual was considering accepting an appointment by a Cabinet Secretary to serve on the agency's strategic planning policy subcommittee to develop policies by one of the agency's Divisions and one of its Commissions. He asked if accepting the appointment raised any Code of Conduct issues. Based on his correspondence, the Commission found that the appointment would raise an issue under the provision which restricts honorary State officials from representing or assisting a private enterprise on matters before the agency to which they are appointed. 29 *Del. C.* § 5805(b). The State appointment would require him to develop policy for the particular Commission and Division, and he and members of his private enterprise would be representing complainants or respondents before the same Commission and Division on issues dealing with the policies. Under those circumstances, it would violate the Code of Conduct if he accepted the appointment and he or his law firm represented clients before that same agency.

**00-10 – Personal or Private Interest--Interests Arising from Outside Hobby & Employment:** NOTE: Generally, requests for advisory opinions are confidential. 29 *Del. C.* § 5807(d). However, an exception to the rule of confidentiality is that the applicant for

**an advisory opinion may give the Commission written authorization to release the information. 29 Del. C. § 5807(d)(1) and § 5810(h)(1)(l). In the instance below, such authority was given.**

Dear Mr. Schrader:

This is the State Public Integrity Commission's written opinion on the two issues you raised in your request for an advisory opinion. You wanted to properly advise your Town clients on complying with any Code of Conduct restrictions on their participation on a land use ordinance. As you know, we concluded that: (1) Council President Orem was not required to recuse himself; and (2) Council Member Susan White, who has recused herself from participating, should comply with the post-recusal conduct discussed below.

### **I. Applicable Law**

(A) Officials are restricted from reviewing or disposing of matters if they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 Del. C. § 5805(a)(1).

(B) Officials are restricted from representing or otherwise assisting a private enterprise before the agency by which they are associated by employment or appointment. 29 Del. C. § 5805(b)(1).

(C) Officials may not engage in conduct which may raise suspicion among the public that they are engaging in conduct which would violate the public trust. 29 Del. C. § 5806(a).

(D) Officials are restricted from participating in official decisions if as a result of their outside employment, their participation 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 the integrity of its government. 29 Del. C. § 5806(b).

### **II. Facts Applied to the Law**

ISSUE 1 - Does Robert H. Orem, Town Council President, have a personal or private interest in the home-occupation ordinance such that he should recuse himself from participating?

Town Council is to consider a zoning amendment on the use of private residences as "home occupation" sites. At a town meeting on February 1, 2000, Council President read a letter signed by 17 persons. It suggested that Mr. Orem and Ms. White may have a conflict of interest if they participate in a zoning ordinance decision. It alleged that Mr. Orem has a "possible conflict of interest" because he "may, in the future, have a home-based craft workshop for the sale of handcrafted items." By affidavit, Mr. Orem stated: "I have at no time nor do I have any plans to, receive any monetary reimbursement for any object constructed in my woodworking shop which is located in a garage on my property...." He said woodworking is a lifelong hobby and he develops such things as furnishings for his church, furniture for his home and for others free of charge.

Mr. Orem may participate in the decision on the home-occupation ordinance. For Mr. Orem to have a conflict, he must have a "personal or private interest" in the home occupation ordinance. "Home occupation" means: "any enterprise or activity conducted solely by one or more members of a family." That definition does not say if the ordinance applies only to commercial enterprises. However, another ordinance section refers to "Business Licenses."

Reading the business license ordinance in conjunction with the zoning amendment, leads to the conclusion that the zoning ordinance applies to commercial ventures, not hobbies. Mr. Orem's "personal and private interest" is in maintaining a hobby, not in making money. Thus, his interest is not one that would be affected by the ordinance. The citizens who wrote the letter of complaint said that he had "a possible conflict of interest" because "he may, in the future, have a home-based craft workshop for the sale of handcrafted items." This is a speculative and conclusory allegation. Delaware Courts, in interpreting the Code of Conduct, have noted that is a "strong presumption" of honesty in the actions of 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). Mr. Orem has submitted an affidavit that he does not have a pecuniary interest at present or in the future in "home occupation" ventures. Against that statement, which carries the "strong presumption of honesty," is the conclusory and speculative allegation. Conclusory allegations of conflicts of interest without specific factual grounds are insufficient to state a claim. *See, e.g. Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995). Accordingly, we hold that Mr. Orem may participate in the decision on the zoning ordinance.

ISSUE 2 - As Ms. White will not be participating in her official capacity, what is the proper post-recusal conduct to insure compliance with the Code of Conduct?

Because Ms. White has a home-owned business, she contacted the Public Integrity Commission in December 1999 and was sent information on the Commission's prior rulings, Delaware Court decisions, etc., which discussed when officials should recuse themselves. In that correspondence, she was advised that the Commission had never specifically ruled on what limits would apply to officials after they recused themselves, and that she may, therefore, wish to seek an advisory opinion. Based apparently on that correspondence, she decided to recuse herself. However, her post-recusal conduct was questioned because, among other things, she was attending and participating in public meetings, and had signed the "letter of protest" which said she and Orem may have conflicts of interest and they should obtain an advisory opinion. Those events occurred at a public meeting and were reported in *The Wave*. The editorial concluded that if Ms. White had truly recused herself on the home-based business ordinance, then her obligation was to remain neutral--even outside of Council Chambers. At that point, your request had been sent to the Commission, identifying some post-recusal conduct which you believed required advice from this Commission. The facts regarding Ms. White's signature on the "letter of protest" were not in your request as that event happened after your request was submitted. A private citizen sent *The Wave* article to this Commission on the date before it met. That information was given to the Commissioners and you at the meeting, so we could decide if those facts had relevance. As the Town Attorney, you recommend to Town Council members who have been recused that they leave the meeting during consideration of the matter. This precludes them from participating in any way in the deliberation. Further, you advise them not to express oral opinions on the matter; not to gesture or request third parties or others to participate or express opinions on their behalf; and to generally conform themselves to the standards expected from judiciary members. You asked if you should continue giving that advice to your Town clients in this matter.

Ms. White wanted to attend the public meetings on the ordinance; did attend an ordinance workshop; and wanted to know if she could speak at these public meetings. In response to her inquiry, it was noted that the Commission had not specifically addressed an official's post-recusal conduct, and it was suggested that she could seek an advisory opinion.

See, Ltr to Ms. White, p.2. As Town Attorney, you are now acting on her behalf to obtain clarification on the advice you should give her.

First, the statute clearly states that even if an official recuses himself, he may respond to questions if asked. 29 *Del. C.* § 5805(a)(1). From that language, it appears the official would not have to leave the meeting and could comment if asked. However, it appears that Delaware Courts have indicated that where it is proper for the official to recuse, it is then improper to comment even if the comments are “neutral and unbiased” and even if the participation is “indirect and unsubstantial.” See, *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) and *Prison Health v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993). Also, the Code restricts officials from representing or otherwise assisting a private enterprise before their own agency. 29 *Del. C.* § 5805(b)(1). The purpose of that restriction is to ensure that there is no undue influence and/or that they will not receive preferential treatment from their colleagues. Thus, to the extent Ms. White’s participation could be construed as “representing or otherwise assisting” her private enterprise before her own agency (the Town Council), then her participation should be restricted.

We note that “representing and otherwise assisting” after a recusal is discussed not only in Delaware cases, but also in a federal court decision interpreting a similar federal ethics law. *Van EE v. EPA*, D.C. Dist. Ct., 55 F. Supp. 2d 1 (1999). In *Van EE*, the employee wanted to speak at public meetings regarding the use of certain federal lands. The meetings were not before his own agency. The Court held the government had a compelling interest in restricting a federal employee’s speech before federal agencies. It said his speech was not prohibited in all circumstances, only before the federal agencies. The applicable Delaware law, in this situation would only restrict her activities before her own Town agency. The government’s interest is to insure not only compliance with the law, but also ensure that there is no appearance of impropriety. The concerns of improper appearances “surely are greater” when an employee addresses their own agency, and when the audience is aware that the speaker is an employee of that agency. *Van EE*.

Here, Ms. White wants to engage in conduct which the Code restricts--representing or otherwise assisting a private enterprise before her own agency. Moreover, as noted in *Van EE* the appearance of impropriety is “surely greater” because she would not only be addressing her own agency, but certainly the audience at the Ocean View town meeting will know she is a Town official because they elected her to that position. Other federal case law supports the restriction on her activities, such as having others speak on her behalf. Where one purpose of the ethics restrictions is to insure the official does not exercise undue influence on their colleagues, even if the official does not participate at all in the meeting, by being in attendance he potentially could have used his inside knowledge to help direct the statements and activities of those participating. *United States v. Schaltenbrand*, 11th Cir., 922 F.2d 1565(1991). Accordingly, based on the above law and facts, we conclude that the advice you have been providing to your Town Council clients regarding post-recusal conduct comports with the Code of Conduct in this particular situation.

### **III. Conclusion**

We find and hold as follows: (1) Mr. Orem does not have a “personal or private interest” in the zoning matter, and, therefore need not be recused; (2) Ms. White has properly recused herself from participating because of her “personal or private interest” (her private business);

and (3) Ms. White should continue complying with the Code by not “representing or otherwise assisting” her private enterprise before her own agency.

**00-09 – Personal or Private Interest—Hearing Officer’s Interest in Board Decision:** The Commission was asked if any restrictions applied to a State Board’s hearing officers, and the Board’s members, concerning participation in a claim against the State by one of the Board’s hearing officers. The Commission found that some restrictions do apply. The agency, in most instances, had already implemented ways to avoid violating the Code of Conduct.

### **I. Applicable Law**

State employees, officers and honorary State officials 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.* § 5805(a)(1). Such persons also may not engage in conduct that may raise suspicion that the public trust is being violated. 29 *Del. C.* § 5806(a). An actual violation is not required as this provision only requires conduct that “may raise suspicion,” and is, therefore, basically an “appearance of impropriety test.” Commission Op. No. 93-12.

### **II. Application of Law to Facts**

Several State employees were legal advisors to a Board. They also may serve as hearing officers, in lieu of the Board, if the parties’ consent. One hearing officer petitioned for certain benefits, and the decision on her petition would normally be heard by this Board, or one of its hearing officers. The hearing officer had a lawyer to represent her before the Board. Another lawyer will represent the opposing side. The lawyers, and members of their firms, regularly appeared before the Board or its hearing officers. The hearing officer who filed the claim would not participate in her official capacity on her own case. However, the agency asked if the circumstances created other conflicts and, if so, how to resolve those issues. The agency’s questions and our conclusions are as follows:

**(A)** Would it violate the Code of Conduct for the State employee who sought the benefits to provide legal advice to the Board on cases being handled by: (1) her lawyer or her lawyer’s law firm; and/or (2) the opposing side’s lawyer or his law firm?

The State employee’s duties required her to give legal advice to the Board and draft its decisions. Her personal or private interest was her business relationship with her attorney who regularly appeared before the Board. Business relationships can create a personal or private interest that requires recusal of a State employee, even where the official would not directly benefit from the decision and where any comments by the official were neutral and unbiased. *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). Moreover, even where the official’s participation was “not direct and substantial” it was held that he should not have participated. *Prison Health Services Inc. v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993).

While the State employee might not directly benefit from her decisions on other cases

handled by her lawyer or her lawyer's firm, the State employee's participation would be direct and substantial as she would be giving legal advice to the Board and drafting its opinions. The same rationale applied to her reviewing and disposing of matters involving the opposing lawyer or his law firm. As in *Beebe* and *Prison Health*, it could appear that her judgment in performing official duties could be impaired because of her business relationship. The agency had assigned other hearing officers to hear cases presented by those two attorneys and their firms. It expected to continue the arrangement. Thus, if the State employee did not serve as legal counsel to the Board in cases presented by the two attorneys, or their firms, she would not be violating the restriction against reviewing or disposing of matters where there is a personal or private interest.

**(B)** Assuming the parties consent, could the State employee adjudicate a case in lieu of the Board if the case is handled by the employee's attorney, the opposing attorney, or their firms?

Such activity would create even more direct and substantial involvement by the State employee. Thus, based on the law cited above, this too would be a conflict. While the parties' consent may be appropriate under the Delaware Lawyers' Rules of Professional Responsibility, under the Code of Conduct, consent of the parties is insufficient, by itself, to cure the conflict. See, *In re: Ridgely*, Del. Supr., 106 A.2d 527 (1954). In *Ridgely*, a "personal interest" created a conflict for a State attorney. The Court noted that under the lawyer's rules of ethics he could proceed in the face of a conflict if the parties agreed. However, the Court said it need not consider the lawyer's rules of ethics because the lawyer was a State officer and, therefore, his duty to the public commanded precedence over the lawyers' rules of ethics. We have followed that ruling and held that where a hearing officer has a conflict of interest, the parties' consent, by itself, cannot resolve the conflict for a State officer. Commission Op. No. 99-51. Again, the agency has arranged the cases to avoid the State employee's participation as a hearing officer on cases presented by her attorney, the opposing attorney, and their firms. If that continues, the Code of Conduct would not be violated.

**(C)** Would it violate the Code of Conduct if: (1) the present Board members, who are appointees, or (2) other hearing officers presided over the hearing, participated in the hearing or deliberations, adjudicated the State employee's claims, and/or drafted the written decision?

(1) Effect on Board Members

The Code requires that the interest be "personal and private." We assume the relationship between the State employee and the Board members is official; not "personal and private." However, even assuming a conflict, if Board members decided her claim, the statute provides that if there is a statutory duty that cannot be delegated, then the officials may proceed, if the matter was fully disclosed to the Commission. 29 *Del. C.* § 5805(3). Here, the Board has the statutory duty to decide these types of cases. (Citation omitted). The only clear delegation authorized by the statute is that the Board may delegate its authority to a hearing officer, if the parties consented. However, if Board members had a conflict in the situation, the hearing officers would have even more of a conflict: They have the same status and authority as the State employee who filed the claim; she is their colleague; and unlike Board members, the hearing officers worked in the same office with her on a daily basis. Their participation as a hearing officer to decide her claim raises an appearance that their relationship with her was closer than her relationship with Board members. Moreover, if they acted as hearing officer, as the single decision maker they would have the opportunity to make subjective decisions about

their own colleague, e.g., credibility, etc. Because their decision would be subjective it could appear that the hearing officers would give their co-worker favorable treatment. Also, it put them in an unnecessary and probably uncomfortable position of judging their own colleague. Thus, given the two options, having it heard by the Board, or by a hearing officer, the latter was the least attractive. We, therefore, concluded that the Board members could proceed to make the decision based on the statutory exception which permitted them to proceed if they could not delegate. The agency had discussed with the law firms the possibility of having an independent mediator for the State employee's claim. Our ruling did not preclude the parties from pursuing other legal avenues that could result in the decision being made by someone other than the Board.

## (2) Effect on Hearing Officers

That left the issue of whether the other hearing officers could act as legal advisors to the Board when her case came before it. When the hearing officers acted as legal counsel it did not require the same type of decision-making required if they acted as the hearing officer, e.g., they insured the Board was informed of the applicable law; they did not make factual determinations, etc. Accordingly, they would have less of an opportunity to make more subjective decisions, such as credibility of witnesses, etc., if they were a legal advisor. Moreover, this was one of their statutory duties. As noted above, if there is a statutory duty that cannot be delegated, then they can proceed after disclosure to this Commission. We understood that the agency was considering having a legal advisor from another agency (e.g., the Attorney General's office) advise the Board on the State employee's case. Again, we did not, preclude use of other legal avenues that could result in a legal advisor other than a hearing officer from the agency.

**(D)** If the Board or the hearing officers are or are not permitted to preside over the State employee's petition, what, if any, procedural or administrative measures must the Board and hearing officers take to avoid violating the Code of Conduct?

First, by law, when an advisory opinion is issued, if the persons seeking the opinion fully disclosed the matter to the Commission and acted in good faith reliance on that advice, then they shall not be subject to discipline or other sanction under the Code with respect to those matters. 29 *Del. C.* § 5807(c). Thus, all Board members and hearing officers should be made aware of this opinion in order to comply with it. Second, after reviewing the opinion, if there was additional factual information that needed to be disclosed to this Commission by a particular hearing officer or Board member, then they should so advise the Commission. For example, if a hearing officer or Board member has some "personal or private interest," in the State employee's situation, which created a conflict for them, e.g., if they were related to her; if they expected to be called as a witness; if they had a close personal friendship outside the office, etc., then they should bring that to the Commission's attention to insure full disclosure, and further guidance if necessary.

**00-08 – Personal or Private Interest—Dual State Employment:** A State employee asked if she could be paid for attending meetings of a State Council to which she was appointed, if she took leave from her full-time State job to attend the meetings. Based on the following law and facts, the Commission held that she could be paid for attending the Council meetings when she was on leave from her full-time State job.

The "double dipping" law was passed in 1986 because, in some instances, it was believed that State officers were being paid from one fund for discharging their appointed or elected duties, and simultaneously, were paid from other public funds for regular State employment. *Att'y Gen. Op. No. 87-1016*. The General Assembly expressly provided that the State should not pay an individual more than once for coincident hours of the workday. 29 *Del. C.* § 5821 (emphasis added). To insure that persons holding dual State positions were not paid from two sets of public funds for coinciding hours, the law set procedures to follow when holding dual positions, such as: requiring additional time records; audits of those records; and referral by the State Auditor to this Commission or the Attorney General if false records or discrepancies were revealed in the audits. 29 *Del. C.* §§ 5822 and 5823. Regarding payment, the statute states:

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

Thus, the statute does not prohibit her from being paid by the Council; rather, her full-time State salary could be prorated. However, the statute then expressly excluded vacation time from being prorated. It said: "Any hours or days during which an employee uses vacation or personal days to which he or she is entitled shall not constitute hours or days which fall within the scope of this subchapter." 29 *Del. C.* § 5822(e). Accordingly, the language is clear--if she was on vacation or used personal days when she attended the Council meetings, then her State salary was not prorated for the time she was absent from her full-time State position. Copies of the Merit Rules, which also have provisions on dual employment by State agencies, were included in the information sent to us. See, e.g., Merit Rules 5.0400; 5.0500; and 18.0200. We cannot interpret the Merit Rules as our jurisdiction is limited to Title 29, Chapter 58. *Commission Op. No. 96-17*.

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

#### **00-05 – Personal or Private Interest—Local Official Contracts with his Local Government:**

The State Code of Conduct applies to all local government employees and officials unless the local government adopted its own Code which must be as stringent as the State Code. 68 *Del. Laws*, c. 433 § 1. Here, the local government had not adopted its own Code. If an employee or official has a private enterprise which does business with their government entity, they must file a full disclosure with the Commission. 29 *Del. C.* § 5806(d). "Full disclosure" requires sufficient information for the Commission to decide if there is a conflict of interest. *Commission Op. No. 98-11*. Such disclosures are a condition of commencing and continuing employment. 29 *Del. C.* § 5806(d). The local official filed a disclosure of his private business dealings with his local government. Specifically, the town entered two contracts with his private company.

Absent other conflicts, local officials may contract with their government. However, if the contract is: (1) less than \$2,000, it requires arms' length negotiations; and (2) if greater than \$2,000, it requires public notice and bidding. 29 *Del. C.* § 5805(c). Here, the official contracted with the town in two emergency situations when other contractors were not available, or the cost was too high because of the distance they would have to travel to do the work. The contracts were for less than \$2,000, so public notice and bidding was not required, but arms' length negotiations were required. "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. 98-11, 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)).

The first contract was to repair a main sewer line that was destroyed by the use of heavy equipment because the sewer line was not properly marked. The town employees could not handle the repair and the town contacted the official's firm because it had the expertise and could quickly respond to eliminate the possibility of a hazardous spill. It was our understanding that when a sewer line breaks, the Department of Natural Resources and Environmental Control (DNREC) requires immediate repair, or it could impose a fine of \$10,000 per day on the town. Aside from the official's firm, the town's representative told the Commission that the nearest firm that did the work was in Dover and it would charge not only for the repair, but also for travel time to and from the site. The local official's firm did not charge the town for travel time to and from the site. Thus, the price paid, \$698, was less than could be obtained in an alternative transaction.

The second contract was to repair an underground water main. The main was too deep for town employees to repair. As there was a construction firm in town working on another site, the town's representative first contacted that firm for a quote. It said repairs would cost between \$1500 and \$2000 as it did not have workers on the site who could do the work and would have to bring in them in. The local official's firm made the repair for \$450. Thus, his price was less than could have been obtained in an alternative transaction.

Aside from contracting at a lower price, the official did not: (a) violate 29 *Del. C.* §5805(a)(1) which restricts officials from reviewing or disposing of matters where there is a personal or private interest, because in his official capacity he was not involved in the town's decision of which firm to use; (b) violate *Del. C.* § 5805(b)(1) which restricts officials from representing or assisting a private enterprise before their own agency because the contract was not with the agency by which he was employed, but with another town agency; (c) violate 29 *Del. C.* § 5806(e) which prohibits officials from using public office for unwarranted privileges, private advantage or gain because he charged only the costs of repair which was not only less than another firm would have charged, but resulted in no profit for his firm. Based on those facts, we found no violation.

**00-04 – Personal or Private Interest--Board Member Cannot Hear Cases Presented by His Law Firm:** The Chair of a State Board which regulated a certain industry sought advice on restrictions to participating in matters related to an industry member when the industry member was also a client of his law firm and was represented by his partners in the law firm on several matters, as described below. Based on the following law and facts, the Commission held that

he should not, as an appointee to the Board, be involved in matters regarding this company while it is a client of his law firm.

## **I. Background to the Decision**

Our jurisdiction is limited to interpreting the State Code of Conduct and does not include authority to interpret the Lawyers' Rules on Professional Conduct. *Commission Op. 94-01*. Therefore, we did not decide what restrictions may be imposed under those rules of conduct. Moreover, Delaware Courts have held that where there is a possible conflict under the Lawyers' Rules of Professional Conduct, and a possible conflict arising from an individual's duty as a public officer, the ruling would be based on the duties owed by public officers. *In re Ridgely*, Del. Supr., 106 A.2d 527, 530-31 (1954). *Ridgely* was decided before the Code of Conduct was enacted; thus, it interpreted the common law restriction against public officials having a personal or private interest which would impair judgment in performing official duties. The 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, "his private interest must yield to the public one." *Id.* at 531. In *Ridgely*, the State officer derived a direct financial benefit from his outside law practice.

Here, the appointee addressed at length the restrictions on participating in decisions when a State official has a financial interest in a private enterprise that would be affected, to a lesser or greater extent than others similarly situated, by the official's action or inaction. See, 29 *Del. C.* § 5805(a)(2). By operation of law, such pecuniary interests tend to impair judgment. *Commission Op. No. 96-61*. However, we did not focus on § 5805(a)(2), because § 5805(a)(1) --the restriction on reviewing or disposing of matters where there is a "personal or private interest" --is not limited to direct pecuniary benefits. See, e.g., *Commission Op. Nos. 97-24 and 97-30*. We based those decisions on both common law decisions on conflicts arising from "personal or private interests," and later decisions interpreting the codification of that common law. At common law, Delaware Courts recognized that relationships between a government official and a law firm or other business or social interest could raise issues of conflicts. *Commission Op. Nos. 97-24 and 97-30*. Conflict of interest statutes generally do not abrogate common law conflict of interest principles. *Commission Op. Nos. 97-24 and 97-30 (citing 63C Am. Jur. 2d Public Officers and Employees § 253 (1997))*. Moreover, the common law restriction on participating where there is a personal or private interest was codified at 29 *Del. C.* § 5805(a)(1).

The common law concern against public officials participating in decisions if they have a "personal or private interest" is the same as arises under the State Code which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." 29 *Del. C.* § 5805(a)(1). Delaware Courts have twice interpreted 29 *Del. C.* § 5805(a)(1). *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996), and *Prison Health Services, Inc. v. State of Delaware*, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993). In both cases, Delaware Courts continued to hold that an outside business relationship of an official can raise a "personal or private interest" which tends to impair independent judgment, even where no facts alleged any direct financial benefit to the official.

## **II. Restriction on Reviewing or Disposing of Matters if There is a Personal or Private Interest**

In *Beebe*, a State appointee was one of a five-member committee which had to recommend whether a hospital's application should be approved. The agency made the final decision. The official said he thought he had a conflict but proceeded to discuss the application. After the discussion, he declared a conflict and did not participate in the vote. It was not alleged that he violated 29 *Del. C.* § 5805(a)(2) because he or his private employer would experience a financial benefit to a lesser or greater extent than others similarly situated. Rather, it was alleged that the business relationship between the official's private employer and the applicant created a "personal or private interest" which tended to impair his judgment in violation of 29 *Del. C.* § 5805(a)(1). The Court found that his comments were "neutral and unbiased," but said he should have recused himself from the outset. Similarly, in *Prison Health*, a State official attended a meeting of his agency's contracting committee which discussed the awarding of a State contract. The official was not on the committee, but he gave it a list of his agency's employees from which to select an agency representative for the committee. Also, he asked several questions. The contract was awarded to a company which employed his wife. It was not argued that as a result of the decision his wife or her employer experienced a benefit or detriment to a greater extent than others of the same class or group, under 29 *Del. C.* § 5805(a)(2). Rather, it was argued that he had a "personal or private interest" because of his wife's employment. The Court said: "his personal participation was not direct and substantial," but went on to hold that: "Undoubtedly [his] conduct was inappropriate and he should have abstained from even this limited role in the procurement process because his wife is an employee (albeit a fairly low-level employee) of one of the bidders." *Prison Health, supra*.

We apply those decisions to this situation as follows:

Like the *Beebe* official, this official was appointed to a State Board, and therefore, an "honorary State official" under the Code of Conduct. 29 *Del. C.* § 5805(13). His Board, like the *Beebe* Board, made decisions about applications. Also, as in *Beebe*, his employer had an alliance (attorney-client relationship) with an applicant. However, while the *Beebe* Board only made a recommendation to the State agency, his Board was the final authority on whether applications would be approved. By statute, the applicant must file certain documents for his Board to review. (Citation omitted). Those documents included a statement of its resources and liabilities. (Citation omitted). Moreover, the Board was to have access at all times to the books, records and accounts of the applicant. *Id.* A partner at his law firm provided legal services to the applicant on financial and tax-related matters, business organizational questions, and some commercial transactions. His partner's work would be an underlying basis for the source materials of the applicant's resources and liabilities. Thus, in reviewing the application, his Board would consider the underlying work of his law firm. While this may seem remote, the *Beebe* situation appeared to be more attenuated, as there was no indication that the official's outside employer was involved with the application being considered. The Board addressed complaints against the regulated company by users of the facilities and could sanction the company. He said that if that situation arose, his law firm would not represent the company, but even if it did, he concluded that the disposition of the matter would not result in a financial benefit or detriment to his firm, "at least not directly." However, that type of relationship is what created the conflict in *Beebe*--the outside employer was not involved in the proceedings and it was not argued that the official's company was benefitting from the official's participation in the application decision; rather, it was argued that the business relationship, by itself, tended to impair the official's judgment, and resulted in a benefit to a party seeking the decision.

Here, the honorary official said there could be no matter pending before the Board where the disposition would augment or detract from the law firms' compensation, although "it certainly might result in a financial benefit or detriment to the law firms' client" (the applicant). Again, in

*Beebe*, no facts indicated that the official's outside employer would directly benefit from the Board's decision; rather, the applicant who had an alliance with the official's outside employer would benefit. Here, also, the appointee's law firm might not directly benefit, but the applicant who had a business alliance with his firm could directly benefit from the Board's decision. Like the official in *Beebe*, his outside employment was his primary source of income; he had a duty to his private employer which had a vested interest in seeing its business alliance be successful. In *Beebe*, that relationship was enough for the Court to conclude that the official should not have participated even to the limited extent of making "neutral and unbiased" comments. Aside from the partner who advised the company on its finances, a commercial transaction involving the applicant's caterer resulted in litigation, and another of his partners represented the applicant in that matter. That litigation would not be considered by the Board. However, the litigation could impact the assets/liabilities of the applicant, which were considered by the Board. We addressed the concerns that this raised in the latter part of our opinion dealing with appearances of impropriety. Consistent with *Beebe*, we held that it would be improper for him to review or dispose of matters related to the company's annual application for a license, or complaints against the company. As indicated in *Beebe*, he should have recused himself from the outset of such matters even if the Board's ruling was only a recommendation, not a final decision; and he should not have engaged in even neutral or unbiased comments on the matters.

In *Prison Health*, the Court noted that the official's spouse was a low-level employee, and that his participation was not "direct or substantial." The record showed that some of his conduct appeared to be purely ministerial, e.g., providing a list of his agency's employees to the committee making the decision. Here, the official's partners were not employees of the company, but had a significant role in dealing with its finances, liabilities, etc., which impact its applications, a matter for which he normally would be directly and substantially responsible. Moreover, we understood that as Chair, he had been routinely called by companies which his Board regulated to discuss various matters. Thus, in matters affecting the entities over which he made decisions, his participation had been more direct and substantial than occurred in *Prison Health*. Consistent with *Prison Health*, we held that: it would be improper for him to participate in discussions on matters relating to the applicant which was a client of his law firm, even if he was not voting on the matter; and he should attempt to avoid *ex parte* communications with the company. "Persons charged with upholding the integrity of the administrative process must be scrupulous in ensuring that all claimants receive a fair and unadulterated examination of the merits of their individual claims. Any conduct giving the appearance that impropriety is involved therein should be studiously avoided." *Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (noting the importance of avoiding *ex parte* communications). We understand that recently his Board hired an administrator, and the administrator should be able to deal with those types of issues, rather than the company calling him.

### **III. Appearance of Impropriety**

While the restrictions may appear rather stringent, we believe they are consistent with the Court's interpretations of 29 *Del. C.* § 5805(a)(1). Moreover, as the appointee noted, the Code also requires that he not engage in conduct that may raise suspicion among the public that the public trust is being violated. 29 *Del. C.* § 5806(a). It also restricted his activities if he had any interest that was in substantial conflict with performing official duties and if outside employment may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; and (4)

any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). We have held that actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" or "may result in" conduct that reflects unfavorably or adversely on the public's confidence in its government. See, e.g., *Commission Op. No. 92-11*. Thus, it becomes a question of whether there was an appearance of impropriety. He was clearly aware of that issue and believed that acting on matters related to the company when it was a client of his firm may raise an appearance of impropriety. Moreover, he advised us that previously one of his partners represented another company in a personal injury matter. That company, which is also regulated by his State Board, raised a concern about the involvement of his partner in the lawsuit because of his status as Chair of the Board. We know that matter was addressed by the Bar Association's Committee on Professional Ethics. It concluded that under the lawyers' rules of conduct he should not participate in his official capacity on matters that directly relate to that company and should recuse himself not only from any formal proceeding before, or decisions, of the Board, but his isolation should extend to any informal discussions, contacts or the like.

The significance of that situation was that he was now in a similar position where a partner in his law firm represented another company in a civil matter, when that company was regulated by him in his State capacity. Clearly, under similar circumstances the law firm's client and the Committee on Professional Ethics thought his participation on the Board in matters related to the company, when his firm represented it, "may raise suspicions" of at least an appearance of impropriety. Similarly, we believe that his participation on matters related to this applicant could raise the same suspicions. His firm obviously had an interest in maintaining the company as its client, and in providing it with the legal services on finances, taxes, liability issues, etc., that can have some impact on decisions by his Board. Also, his firm had an interest in the outcome of the litigation referred to above. His law firm's connection to the company, combined with his official responsibilities which could impact the company's application, complaints against it, etc., could raise suspicion that: his judgment may be impaired; he would be in a position to make official decisions outside official channels; or the company may receive preferential treatment in Board decisions because of its status as a private client with his law firm. For example, if he participated in State decisions affecting the company, such as ruling on complaints, it may appear that he would give it a favorable decision because he would not want to sanction his law firm's client, or if he continued taking calls from the company to discuss various matters, it may appear that while officially recusing himself, he was making decisions outside official channels. These are merely examples of how the public may perceive the conduct and are certainly no indication that he would actually engage in such activities. However, by imposing those restrictions, the possibility of such perceptions is greatly diminished.

#### **IV. Conclusion**

Based on the foregoing, he should recuse himself from participating as a Board member in "matters" related to the company as long as it was a client of his firm. "Matters" is broadly defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(6). "Matters" are not limited to just formal proceedings. Thus, as indicated above, he should recuse himself not only in formal proceedings, such as the company's annual application or complaints against it, but refrain from discussing matters related to the company, even if the comments would be neutral and unbiased; delegate discussions of matters pertaining to the company to the Board's administrator; and exercise caution even in purely ministerial matters dealing with the company.

**99-51 – Personal or Private Interest – Personal Interest in Private Employment: WAIVER GRANTED.** Under the Code of Delaware Regulations (CDR), the Delaware State Secondary Athletic Association (DSSAA) is the Secretary of Education's official designee to implement the Department of Education's (DOE's) rules and regulations on interscholastic athletics, including a student's eligibility to participate in such sports. Disputes over interscholastic athletics rules and regulations are subject to final review by the State Board of Education (the Board). *CDR 72-000-003 (1999), Chapter 3 ¶ 6.* The Board, pursuant to its statutory authority, 14 *Del. C.* § 122 and the Administrative Procedures Act, established procedures for such proceedings. The procedures included timelines, such as 20 days to respond to notice of hearings, etc. *CDR 72-000-003 (1999).*

The New Castle County Technical School District (hereinafter "District") submitted an application to DSSAA's Director, seeking a waiver of DSSAA's eligibility requirements so one of its students could participate in interscholastic athletics. DSSAA twice denied the waiver, and an appeal was filed with the Board. The named parties to the appeal were the student and DSSAA. The District was not a named party. Basketball, one of the sports the student wanted to play, was already underway. If the normal procedural timeline for Board proceedings was adhered to, the final decision would not be obtained until after the season was over. The parties asked the Board to expedite the hearing, and they waived their rights to the timelines established in the Board's procedures.

The Board appointed David Blowman, Executive Assistant to the Secretary of Education, as the hearing officer. After the hearing, he was to decide if a waiver should be granted and issue an order with his findings of facts and ruling, which would be a recommendation to the Board. Ten days before he was appointed as the hearing officer, he applied for a job with the District. Two days before the hearing, he interviewed for the job with the District's Board of Education, its Superintendent, and its Deputy Superintendent. According to Blowman, they did not discuss the pending hearing at the interview. The hearing was held as scheduled and "during the course of the hearing," Blowman "realized for the first time the potential conflict between my role as hearing officer and my application to the school district attended by the student in the appeal..." While recognizing a "potential conflict," he proceeded with the hearing. Immediately afterwards, he spoke with Deputy Attorney General (DAG), Louann Vari, expressing his concern about a possible conflict. At that time, he also said he intended to rule in the student's favor. Within an hour after the hearing, he learned that he did not get the District job. This Commission's office was contacted, and it was decided that he would seek an advisory opinion. That same day, he notified the parties of the employment situation; asked if they would object if he continued as the hearing officer; and advised that he was requesting an advisory opinion from this Commission. Subsequently, the parties notified him that they did not object. At the time of the Commission's meeting, January 12, 2000, he had not issued his order to the parties or the Board. He did not believe his job application impaired his neutrality and did not believe that the denial of the job would impair his judgment. He asked if his conduct violated the Code of Conduct, and if so, sought a waiver. The basis for a waiver was that the parties specifically asked the Board for expedited proceedings. The next Board meeting was set for January 20, 1999. If a new hearing officer must be appointed to re-hear the appeal, it could preclude a Board ruling in January. A delay would mean additional time and costs to reargue the appeal and could negate the decision to expedite the hearing.

## **I. Applicable Law**

The State Code of Conduct restricts State employees from reviewing or disposing of matters if they have a personal or private interest which tends to impair their independent judgment in performing official duties. 29 *Del. C.* § 5805(a). Delaware Courts, in interpreting 29 *Del. C.* § 5805(a), have held that whether the personal or private interest is sufficient to require a State employee to recuse himself from participating in a matter is an issue of fact. *Prison Health Services, Inc. v. State of Delaware*, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993).

**A. ISSUE 1: Was Blowman's "interest" sufficient to require him to recuse himself?**

The "personal or private interest" was his pending employment in the same District which requested a waiver for its student. He interviewed with the District two days before the hearing. Government decisions are to be based on a "fair and unadulterated examination of the merits" and "any conduct giving the appearance that impropriety is involved therein should be studiously avoided." See, *Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (Court expressed concern for any deviation from the administrative process as provided by law or participating in ex parte communications between one party and those charged with reviewing the merits for the State agency). In the specific context of restrictions against public officers or employees participating in decisions when employment is being negotiated, ethics laws have noted that the rationale is to avoid putting the official in a position where his public office could be exploited for private gain; and preferential treatment or an unfair advantage for a prospective employer. See, e.g., Comment, Delaware Lawyers' Rules of Professional Conduct, Rule 1.11(c)(2). There was no Delaware case, interpreting 29 *Del. C.* § 5805(a)(1), directly on-point where employment was pending. However, there were Delaware cases interpreting that provision where State officials, who participated in administrative proceedings, had an indirect interest as a result of existing outside employment. In both cases, it was held that they should not have participated, even though their participation was limited; they did not vote on the matter; and no facts indicated that they personally benefitted from their limited participation.

In the first case, a State official, Glen Davis, was one of five appointees to a State Council which reviewed applications submitted by hospitals regarding their facilities. *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). The Council did not make the final decision but made recommendations to the State agency on whether applications should be granted. Davis' outside employment was as a Milford Hospital administrator. The named parties to the administrative proceeding were Beebe Medical Center and Nanticoke Hospital. Milford Hospital was not a named party. At the hearing, Davis said he might have a conflict, but reserved declaring a conflict until later. When the applications were discussed, Davis made what the Court called "neutral comments." At the end of the meeting, Davis said he had a conflict, and did not vote. Beebe's application was denied, and Nanticoke's was granted. Fourteen days after a final decision was made, Milford and Nanticoke Hospitals announced an alliance. Beebe appealed, alleging that Davis had a personal or private interest which tended to impair his judgment, and should have recused himself under 29 *Del. C.* §5805(a)(1). Beebe alleged that Davis' conflict, among other things, resulted in an unfair hearing and violated Beebe's due process rights. One fact looked at by the *Beebe* Court was the timing of the hearing and when the discussions regarding an alliance occurred. The Court found that the record did not clearly establish bias because the record was not clear on when the concept of the alliance between the two hospitals was first discussed-before or after the favorable decision.

Here, the "concept of the alliance" (Blowman's employment by the District) was discussed in his interview with the District's Board of Education, its superintendent, and deputy superintendent two days before the hearing. At that time, Blowman knew he would be hearing the case. Here, the District was not a party, just as Milford Hospital was not a party in *Beebe*. However, the District submitted the application to DSSAA for its student. If the student prevailed, the District would have the benefit of her participation in its interscholastic sports. In *Beebe*, the Court noted that Delaware law holds that bias can be imputed and that since Davis ultimately declared a conflict, the court "would assume" he was biased and therefore had a conflict. It also noted that Davis' comments were "extremely limited and neutral;" he did not vote; and the Council's decision was a recommendation, not the final decision on the application. While it found that his conduct did not rise to the level of a due process violation, it said that "since Davis admittedly had a conflict, he should have recused himself from participation in this matter at the outset." Here, Blowman, during the proceedings, like Davis, thought there might be a conflict. He proceeded to participate. Unlike the *Beebe* situation, where other State officials who were Council members made the decision to recommend approval of the application, Blowman was the sole hearing officer on whether to recommend approval on the eligibility waiver application and wanted to continue participating. Thus, his participation was not as "limited" or "neutral" as in *Beebe*.

In *Beebe*, no facts indicated that Davis could personally benefit from a favorable decision for Nanticoke. Rather, a favorable decision would benefit Nanticoke, a party to the hearing. Because Davis' company was negotiating with Nanticoke, the indirect implication was that Davis' employer could indirectly benefit, or that a party to the proceedings would receive preferential treatment because of the official's outside employment interest. Similarly, in Blowman's case, a favorable decision for the student would indirectly benefit the District which submitted the application on her behalf, as it would result in her playing sports for the District. Since Blowman's employment was pending at the time of the hearing and when he told the DAG immediately afterwards that he intended to rule for the student, it could appear that a favorable decision for the District's student may be the result of preferential treatment, and/or may result in a personal benefit to Blowman, since at the crucial time he did not know that the District did not select him.

In *Prison Health*, the Court held it was "improper" for a State official, Henry Risley, to be involved in matters related to a contract which was awarded to ARA where his wife was employed. The Court said the record showed that Risley was not a member of the five-member Evaluation Committee that recommended ARA for the contract. It found his activities were limited to:

"1) providing a list of Bureau of Prisons employees from which Larry Sussman-- the Department's Administrative Services Division employee who oversaw the award of the contract--could select a Bureau of Prisons' representative, and 2) attending and asking three questions (but not voting) at the Department's Executive Committee's meeting that was comprised of the Department's four division chiefs when Sussman presented the selection committee's recommendation to Commissioner Watson, chief of the Department. The Court found no evidence that any of the members of the Evaluation Committee or the Executive Committee were not disinterested or not fully informed."

The Court found "his personal participation was not direct and substantial," but held that: "Undoubtedly Risley's conduct was inappropriate and he should have abstained from even this limited role in the procurement process because his wife is an employee (albeit a fairly low-level employee) of one of the bidders."

Thus, *Beebe* and *Prison Health* narrowly construed the permissible activities under 29 Del. C. § 5805(a)(1). In both cases, although the officials' participation was limited to comments during the proceedings; they did not vote; the decision was made by other officials; and their interest was indirect, the Court still concluded that they should not have participated even to that limited extent. In *Beebe*, the Court said that officials were entitled to a "strong presumption of honesty and integrity." Thus, Blowman was entitled to that "strong presumption." He stated that there was no discussion with the District regarding the case when he interviewed for the job and that his judgment or neutrality were not impaired. However, as noted in *Beebe*, even neutrality does not preclude the need for the official to recuse himself. Based on *Beebe* and *Prison Health*, we conclude that even though Blowman's interest was indirect, and no facts indicated that he benefitted from the decision or gave preferential treatment, etc., he should have recused himself.

#### **B. ISSUE 2: Did disclosure to the Parties permit Blowman's continued participation, if the parties did not object?**

The plain language of the Code of Conduct does not have an exemption that permits a State official to proceed in the face of a conflict, even if the parties agree. This Commission is to be consistent in its opinions. 29 Del. C. § 5809(5). We have held that where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. Commission Op. No. 95-01 (*citing Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)). The only exception permitted by the plain language was if a State official had a statutory responsibility that could not be delegated, then he may proceed if he filed a full disclosure with the Commission explaining why the matter could not be delegated. 29 Del. C. § 5805(a)(3). No facts indicated that Blowman had a statutory responsibility that could not be delegated.

Aside from the plain language, which did not include an exception if the parties agreed, the Delaware Supreme Court addressed a similar situation in *In re: Ridgely*, Del. Supr., 106 A.2d 527 (1954). A State employee, who was an attorney, also held outside employment. Because of a conflict of interest between his State job and his outside employment, he was alleged to have violated: (1) the Canons of Professional Ethics for lawyers; and (2) his duty as a public officer by placing himself in a position where "his personal interests were opposed to his duty to the public." The Court noted that under the canons of ethics for lawyers, "in civil cases he may ordinarily choose between two clients whose interests' conflict, with full disclosure when required." However, the Court said that it need not address his conduct under the lawyers' ethics, which would permit him to continue if the parties agreed, because as a public servant "his private interest must yield to the public one." Thus, Delaware Courts have frowned on merely disclosing the conflict to the parties as a remedy when the conflict arose in the context of a public servant's outside employment. *Ridgely* was decided before the Code of Conduct was enacted. Thus, it interpreted the common law restriction on public officials having a "personal interest." Again, the Commission must be consistent in its opinions, and has held that: "The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." See, 29

*Del. C. § 5805(a)(1)*. Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253* (1997). Thus, the State Code is basically a codification of the common law restrictions. *Commission Op. Nos. 97-24 and 97-30*. Thus, we concluded that merely informing the parties of the conflict, without more, was not a remedy.

### **C. ISSUE 3: Should a Waiver be Granted?**

The statutory remedy available is this Commission's authority to grant a waiver if the literal application of the law is not necessary to achieve the public purpose or there is an undue hardship on the State employee or State agency. *29 Del. C. § 5807(a)*.

#### 1. Is the literal application of the law necessary to achieve the public purpose?

The public purpose of the Code of Conduct is so the conduct of officers and employees of the State hold the respect and confidence of the public. *29 Del. C. § 5802(1)*. Thus, "they must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." *Id.* In the specific context of prospective employment, the concern is the official may use his public position to obtain a private benefit; or may give preferential treatment that benefits the prospective employer. The law does not require that these events actually happen. Rather, it imposes on State employees that they not engage in conduct which "tends to impair their judgment"; or may result in impaired judgment or preferential treatment to any person; or which may raise suspicion among the public that the public trust is being violated. *See, 29 Del. C. § 5805(a)(1); 29 Del. C. § 5806(a) and 29 Del. C. § 5806(b)(1), (2) and (4)*. Here, as in *Beebe*, participating in the decision "raised suspicion" in the official's own mind that he should not participate. Thus, it appeared that the literal application was necessary to serve the public purpose.

#### 2. Undue Hardship

Regarding any "undue hardship," we have held that "undue" means "more than required" or is "excessive." *See, e.g., Commission Op. No. 97-18*. Here, the Board, pursuant to its statutory authority, had established procedural rights for the parties who sought an appeal. The parties specifically waived those rights so the Board could expedite the hearing because the student was in her Senior year and wanted to play basketball. The basketball season was already underway and would end in February or March. The parties wanted the Board's final decision at its meeting on January 20, 2000, so that if an eligibility waiver was granted the student could participate in the last part of the basketball season. If Blowman could not participate by issuing his findings of fact, conclusion of law, etc., the Board could take two possible actions: (1) appoint a new hearing officer to re-hear the case and give the Board a recommendation; or (2) the Board, rather than a hearing officer, could re-hear the case and make a final decision. If option (1) were exercised, the parties would have to re-argue their cases, costing additional time and money, and it was not clear if all of that could occur before January 20. If the Board exercised option (2), it was possible that it would not re-hear the case on January 20, 2000; rather, it would just take that occasion to schedule a hearing before the Board. If no waiver were granted, in effect, we would be negating the Board's decision to let the parties expedite the proceedings. The timelines established by the Board in its rules and regulations were to ensure that the parties know of pending actions; have an opportunity to be heard; and know there was a foreseeable finality. The decision to waive the Board's timelines was so the "opportunity to be heard" could occur at a meaningful time. If a waiver was not granted, the "meaningful time" would have passed. Further, as we must base our opinions "on

the particular facts" we noted that the parties waived their rights to the Board's timelines, and neither party objected to Blowman continuing. Moreover, when we grant a waiver, the proceedings become a matter of public record, so that the public understands the basis for letting the official proceed in the face of a conflict. Based on all those facts, we concluded that to, in effect, negate the Board's statutory authority to make rules and regulations regarding its hearings, including the authority to let the parties expedite the proceedings would be "excessive." Accordingly, we granted a waiver based on an undue hardship.

**99-37 – Having an Occupation Regulated by the State:** While attending an ethics class, a State employee became aware that the Code of Conduct requires State employees who have a financial interest in a private enterprise which is regulated by any State agency to file a full disclosure with the Commission. 29 *Del. C.* § 5806(d). "Full disclosure" requires sufficient information for the Commission to decide if a conflict of interest exists. *Commission Op. No. 98-23*. As she had a private business which was regulated by the State, she submitted a disclosure to the Commission. Based on the following law and facts, her submission constituted full disclosure and there was no conflict of interest.

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

State employees may not: (1) review or dispose of State matters if they have a personal or private interest which would tend to impair judgment. 29 *Del. C.* § 5805(a); (2) represent or otherwise assist a private enterprise before their own agency. 29 *Del. C.* § 5805(b); (3) contract with the State 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); (7) 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**

In addition to her State employment, she had a private business that was regulated by the Department of Administrative Services, Division of Professional Regulations. See, Title 24, Delaware Code for various businesses and occupations regulated by the State. Her private business was in no manner similar to her State position, and her private business was not regulated by her own agency, nor did her private business contract with any State agency. She performed the regulated occupation on her own time; not State time. Her disclosure worksheet indicated that she: did not review or dispose of matters regarding her private business; had no reason to believe her private enterprise would be involved in decisions she made in her official capacity; had not represented or assisted the private enterprise before her own agency; had no contracts with the State; and used no confidential information obtained as a result of her State position to benefit her private business.

As she had no decision-making authority on the regulated occupation in her State job, it did not appear that her judgment would be impaired. As her private enterprise did not do business with the State but was merely subject to licensing regulation by a State board, which was under a totally separate State agency, it did not appear that she would be in a position to obtain any preferential treatment for her company. Nor did it appear that she would be in a position to make official decisions outside official channels that would benefit her private enterprise.

Based on the above, her submission constituted "full disclosure" and there was no conflict of interest.

**99-34 – Working for a State Contractor:** A State employee was hired by a private enterprise which contracted with his State agency. He did not work on the Delaware contract, but on a contract the company had with another State. The Commission found no violation as long as he did not participate in his official capacity on matters related to the company. As he raised a number of issues regarding merit rules, collective bargaining, etc., the Commission addressed the limits of its jurisdiction.

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

Under the State Code of Conduct, State employees:

(1) Who have a financial interest in a private enterprise which does business with, or is regulated by the State, must file a full disclosure with the Commission. 29 *Del. C.* § 5806(d). The filing of such statement is a condition of commencing and continuing State employment. *Id.*

(2) May not review or dispose of matters if they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 *Del. C.* § 5805(a)(1);

(3) May not represent or assist a private enterprise on matters before the agency by which they are employed. 29 *Del. C.* § 5805(b)(2);

(4) May not have any interest in any private enterprise or incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No state employee shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:

- (a) Impaired independent judgment in exercising official duties;
- (b) An undertaking to give preferential treatment to any person;
- (c) Making governmental decisions outside official channels; or
- (d) Any adverse effect on the confidence of the public in the integrity of the government of the State. 29 *Del. C.* § 5806(b).

(5) May not engage in a course of conduct which may raise suspicion among the public that they are violating the public trust, and which will not reflect favorably upon the State and its government. 29 *Del. C.* § 5806(a).

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

#### (1) Limits of Jurisdiction

The Commission's jurisdiction is limited to interpreting the Code of Conduct. *Commission Op. No. 95-20*. Thus, as to some issues discussed at the Commission's meeting, to the extent they required interpreting other laws, we had no authority to rule on such matters. For example, the State employee discussed a grievance filed over an agency policy on other employment.

He said the matter was "settled" by an agreement that resulted in a different policy. Under separate law, his Department could "develop and implement rules, regulations, standards and policies governing the internal operation and administration of the Department and provision of services." (citation omitted). Delaware Courts have upheld an agency's policy that was more stringent than a statute when the policy was justified because of the potential for favoritism, undue influence and conflicts of interest if a State official participated in a contract with his agency. *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). However, the Commission had no authority to interpret either: (1) the scope of his Department's legal authority to issue policies; or (2) any agency policy that it issued pursuant to such laws. Similarly, to the extent that other employment is governed by other rules, i.e., Merit Rule 18.0200, or any collective bargaining agreement, the Commission has no authority to interpret the Merit Rules or contract terms. *Commission Op. Nos. 97-17; 95-05*. He also said other employees in his agency held other employment with contractors. Our decisions must be based on "particular facts." 29 Del. C. § 5807(a). As he did not give any "particular facts" regarding their situations, this opinion interpreted only the State Code of Conduct as it applied to his particular situation. His particular situation was that the private enterprise contracted with his division. He did not participate in awarding the contract; did not administer the contract; and did not supervise the person who did administer it. However, his position exposed him to what he referred to as "indirect" decision making on the company's contract obligations. Those activities are discussed in more detail below.

The employee wanted to contract with the company to work on its contract requirements for a program in Florida. He gained his experience in the work the company wanted him to do, not in his present position, but in a position he held a dozen years ago. He would perform the work during hours when he was not working for the State, e.g., annual leave.

First, as to the requirement for full disclosure when there is a financial interest in a private enterprise which does business with the State, we have held that "full disclosure" requires sufficient information for the Commission to decide if the conduct complied with the Code. *Commission Op. No. 97-17*. We found that his written submission and statements at the Commission's meeting, with the relevant information identified in this opinion, constituted the required disclosure. Second, as to representing or assisting a private enterprise on matters before the agency which employed him, 29 Del. C. § 5805(b)(2), he would not represent or assist the company before his agency because he would not work with, or for, the company on any contract they had with his agency. Rather, he would represent and assist it on its Florida contract. Thus, we found no violation of that provision.

However, under two provisions, we found that to comply with the Code of Conduct, he should recuse himself from participating in matters regarding the company for the reasons stated below.

The first provision is the one prohibiting State employees from reviewing or disposing of matters if they have a personal or private interest which tends to impair independent judgment in performing State duties. 29 Del. C. § 5805(a)(1). Delaware Courts have held that the provision requires State officials to recuse themselves from participating in State decisions when they have the requisite personal or private interest. *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); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993). In *Beebe*, the Court held that while the State official did not vote on the decision and his only remarks were neutral, he should not have participated even to that extent because the private enterprise for which he worked had a

business agreement with the company over which the State Board on which he served was making a decision. In *Prison Health*, the State official was not on the contract selection committee and did not vote on the contract. However, he went to a meeting and asked three questions when a Departmental employee made a recommendation to some committee members and the head of the Department. The Court said that his participation "was inappropriate and he should have abstained from even this limited role in the procurement process because his wife was an employee (albeit a fairly low-level employee) of one of the bidders." *Id.* Here, the personal and private interest which he had in the company is more direct than in *Prison Health*. He privately contracted with the company. Further, he was involved in his agency's committee which made contract decisions. Although he had no vote, he said the committee may ask him to give a "thumbs up" or "thumbs down" on a program. For that and other reasons discussed below, and based on the *Beebe* and *Prison Health* rulings, we found that he should not participate in matters regarding the company because of his private contract.

The other provision, 29 *Del. C.* § 5806(b), restricts other employment if it may result in:

**(A) Impaired independence of judgment in performing official duties--** This incorporates the same concerns raised under 29 *Del. C.* § 5805(a), but sets it explicitly in the context of having other employment. Thus, we discussed his dealings with the company under this provision. As contract administrator, a number of years ago, he participated in awarding the company a contract. After three years, he transferred the oversight responsibility to a State employee in another county, whom he did not supervise. Subsequently, the contract was not renewed. Thus, as to official duties regarding that contract, he had not made any decisions for a number of years. The Commission has previously held that the passage of time can be given "some weight" in deciding if an activity violates the Code. *Commission Op. No. 99-16 (citing CACI, Inc.-Federal v. United States, Fed. Cir., F.2d 1567 (1983))*. Here, a number of years passed between his dealings with the company on its Delaware contract and the company's subsequent offer to contract with him on its Florida program. The passage of time aided in reducing the appearance that his personal interest affected his State decisions regarding that contract, as nothing indicated that he anticipated privately contracting with the company at the time of his contract decisions. The fact that the contract was not renewed also served to diminish the appearance that he may have used public office for private gain or undue influence. The non-renewal also meant that in performing official duties for his division, no more decisions would be made on that matter. The company's contract with his division was not the type of work the company wanted him to perform under the Florida contract. He had no direct involvement with the existing contract, which was managed by a State employee in another county, whom he did not supervise.

However, he said he had some indirect involvement on that matter. In his official capacity, he gave his opinion on which program was best suited for certain clients, and one company to which he could refer a client would be the company he was contracting with. That would only occur about once in every 40 situations. He said that he constantly reviewed case files and "makes a lot of decisions" and can "redirect them" [other State employees] if their plan was "out of whack." He also said those employees were "constantly giving feedback to their regional director, supervisors, and contract administrators" on the contracts. However, his immediate supervisors had approved the forwarding of questions on the company's program to the administrator who handled the company's Delaware contract. That would remove him from any indirect involvement with the contract in that respect. He also said he was a consultant to the committee which authorized all contracted spending. He was not a voting member. He said he would not participate in any decision

regarding spending State funds on the company. However, he said as a consultant to the committee, "they might look at me for thumbs up or thumbs down," or might ask him to comment on a case. Thus, he had significant indirect decision-making authority as a consultant to the committee.

The statute does not limit its application to direct and final decision making. *Beebe; Prison Health; and Commission Op. Nos. 98-12 and 96-78*. Rather, if a State employee had significant indirect decision-making authority where they have a personal or private interest which tends to impair judgment, there may be a conflict. Here, he expressed his personal and financial interest in the company by saying that the compensation from it was "very lucrative" and that "just to go down there for 2 or 3 days of training, which is all they're asking for this time, I can make a payment, a monthly payment to [referring to college tuition for his child]. That's really what this is about." While the Commission sympathized with his situation, the purpose of not participating in matters where there is a personal or private interest, is to insure that "the line between public duty and private interest [is not] blurred." *In re Ridgely*, Del. Supr., 106 A.2d 527 (1954) (holding that State employee's private interest in other employment must yield to his public duties). Accordingly, we held that also under this provision, it was improper for him to consult with the committee or his agency on matters related to the company.

**(B) Preferential Treatment to Any Person**--The passage of time since his involvement with the company's contract with his division, and the fact that it was not renewed aided in diminishing the possibility that he gave preferential treatment to the company regarding that contract. Regarding the new contract, he said that because it was a cost-reimbursable contract, rather than a *per diem* contract, that it "is not as easy to influence." He said that was because a cost reimbursable contract was "a fully funded contract where negotiations take place at the award of the initial contract and then yearly thereafter for the budget they will have for that year." While it may not be as easy to influence, decisions still would be made regarding the initial award, contract renewals, new contracts, contract compliance, etc. The State employees referred to above work hand-in-hand with contract administrators, such as himself. Further, the committee could look to him for a "thumbs up" or "thumbs down" on a program. Thus, if he consulted with the State employees, the committee members, etc., on matters regarding the company, it not only could place him in a situation where his decision making ability might be questioned, but also could raise the specter that because of his personal, financial interest in the company, he would be in a position to show preferential treatment to it in giving a "thumbs up" to its program. However, as the calls regarding the existing contract would be delegated to another individual who worked in a different county and was not supervised by him, and if he did not consult with the contract committee members or his agency on company issues, those restrictions would serve to diminish the possibility that he could give the company preferential treatment.

**(C) Official Decisions Outside Official Channels**--With the above restrictions in place, no facts indicated that he would be in a position to make official decisions outside official channels regarding the company.

**(D) Any adverse effect on the public's confidence in the integrity of the government**--We emphasized that 29 *Del. C.* § 5806(a) and § 5806(b) do not require an actual violation, only that the conduct "may result in" or "raise suspicion" that a State employee was violating the Code. Actual misconduct is not required; only a showing that a course of conduct "may result in" or could "raise suspicion" that the conduct violates Code provisions. *Commission*

*Op. No. 92-11.* Similarly, the provision does not require actual misconduct; only an "adverse effect" on the public's confidence in its government.

At the Commission's meeting, in discussing how the public would perceive his employment with the company which contracted with his agency, he first noted that there were "a lot of people who work for both the department and the contractors that we have." As previously noted, we did not have the "particular facts" required to rule on those situations. 29 *Del. C.* § 5807(a). He also said that if he made a competitive salary with his peers in other States, he would not have to do this. We had no authority to engage in State salary matters. However, we did note that the General Assembly, perhaps in recognition that State employees may want, or need, to supplement their State salary, has not placed a complete ban on other employment with private enterprises which contract with the State as some government entities have done. See, e.g., *Refine Construction Company, Inc. v. United States*, U.S. Claims Ct., 12 Cl. Ct. 56 (1987) (federal agency issued order prohibiting its employees from performing service for a contractor or other person who contracted or did business with the agency). In Delaware, the General Assembly directed that "citizens be encouraged to assume public office and employment, and therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 *Del. C.* § 5802(3). That concern was balanced against the General Assembly's directive that State officers and employees are 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(a); 29 *Del. C.* § 5806(a) (emphasis added). We emphasized that language because he said that in his agency "nobody questioned anything that I would do with these people that would be out of line--that would violate any integrity." Courts have held that even where an agency acquiesces in the other employment, an employee's superior may not appreciate the nature of the conflict, and employees cannot claim an exemption from a conflict of interest simply because his superiors did not discern the conflict. *Refine* at 63. In *Refine*, the Court discussed the provision which prohibited any activity "affecting adversely the confidence of the public in the integrity of the Government," which is like Delaware's. *Id.* at 61. It said that "even perceived transgressions...can and do have an effect on the trust that the American people put into their government." *Id.* Thus, to ascertain if conduct would have an "adverse effect" we looked at the totality of the circumstances from the point of view of the public.

If he participated in decisions regarding the company when he had a personal and "lucrative" financial interest, the public's confidence in its government could be adversely affected because the "perceived transgression" could be that: his judgment could be impaired; he could provide preferential treatment to the company; or he was using public office for private gain, which is prohibited by 29 *Del. C.* § 5806(e). Accordingly, to interpret the provision without "unduly circumscribing" his activities and at the same time ensure that the public trust was not perceived as being violated, he must recuse himself from decisions pertaining to the company.

### **(C) Conclusion**

Based on the above law and facts, we concluded that his employment with the company which contracted with his division would not violate the Code of Conduct as long as he recused himself from participating in matters before his agency involving the company.

**99-24 – Personal or Private Interest--Wife's Employment by Subsidiary when Another Subsidiary was Regulated by Agency Hiring Her Husband:** A State agency asked if there would be a conflict of interest if it hired an individual when his wife was employed by a wholly-owned subsidiary of a corporation which had another wholly-owned subsidiary regulated by the State agency. The Commission concluded that based on existing facts, if the individual were hired it would not violate the Code of Conduct; but he should be alert for possible conflicts.

For nearly a year, the agency had tried to hire someone for a position as a regulator of certain industries. Filling the position was a problem because of the tight market arising from industry restructuring laws, which resulted in, among other things, more private industries which were regulated coming into the market and hiring people with backgrounds which the agency also needed. Also, according to the agency, pay differences between government and private enterprises limited the field of candidates. The agency identified the best qualified candidate, who had many years of experience in the industry in both the public and private sectors. At the agency, he would deal with regulating suppliers. He would work to resolve regulatory matters. If he could not, the matter would be brought before the agency's quasi-judicial board. He would be involved in those proceedings and the board would rely on him in making decisions. Among the regulated entities was a wholly owned subsidiary for a parent company. The candidate's wife worked for another wholly owned subsidiary of the same company. She did not work for the regulated subsidiary or the parent company, and the agency did not regulate the subsidiary where she was employed. She held stock in the parent company.

State employees are restricted from reviewing or disposing of matters where they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 *Del. C.* § 5805(a). Two interests which, by operation of law, tend to impair judgment are where: (1) any action or inaction on the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or (2) the person or close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 *Del. C.* § 5805(a)(2). The Code also restricts State employees from engaging in conduct which may raise suspicion that the State employee is violating the public trust. 29 *Del. C.* § 5806(a). Additionally, it restricts State employees from improperly using or disclosing confidential information. 29 *Del. C.* § 5806(f) and (g).

While the Code of Conduct requires recusal if a State employee or a close relative has a financial interest which would benefit to a greater extent than others of the same class or group of persons, the agency's statute provided, in essence, that no one was eligible to hold the job if they directly or indirectly controlled any stock of an entity regulated by the agency. Based on that provision, the spouse's stock would be sold if the individual were hired. While the Commission had no authority to interpret another agency's statute, the effect of her disposing of her stock means that, under the Code of Conduct, his "action or inaction" on matters related to the regulated subsidiary would not affect that financial interest.

Having disposed of the possibility of a conflict arising from the financial holdings, the Commission turned to whether the marital relationship was sufficient to create an interest which tended to impair independent judgment. The clear language of the statute requires more than just a relationship between the State employee and the close relative. It requires action or inaction by the State employee resulting in the close relative benefitting to a lesser or greater extent than other persons in the same group or class. 29 *Del. C.* § 5805(a)(2)(a). The

restriction insures that close relatives do not capitalize on decisions made by their relative and ensures that the State employee is unbiased in making decisions. The Delaware Superior Court has held that marital status, by itself, is not sufficient to create bias such that a State official on a regulatory board must recuse herself from a State decision, not impacting on her spouse, without facts to substantiate bias. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995). In *Camas*, the Court noted that the State official had a statutory obligation not to discuss cases with any person or party and no facts suggested that had occurred. Similarly, the Code of Conduct prohibits improper disclosure of confidential information. Thus, to the extent his agency work would entail confidential information, the individual was advised not to discuss such matters with his spouse.

The Code also restricts conduct if it may raise suspicion that the public trust is being violated. 29 *Del. C.* § 5806(a). This is basically an appearance of impropriety restriction. However, Delaware Courts have held that "an unarticulated concern of an appearance of impropriety" is insufficient to establish a conflict of interest. *Seth v. State*, Del. Supr., 592 A.2d 436 (1991). First, under the Code of Conduct, State officials are entitled to a 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 (January 29, 1996). Second, the individual's spouse was employed by a totally different subsidiary which was not regulated by the agency. Moreover, her subsidiary was not co-located with the regulated subsidiary, which limited the possibility that she would hear any company employees discuss regulatory issues that may come before her husband's agency. Additionally, her employment was not related to the regulated matters: her subsidiary offered totally different services; she did not evaluate customer needs for the regulated services; she did not solicit the work or make decisions on company proposals relative to the regulated matters. Rather, she coordinated the schedules of sales representatives and marketers, and if a customer selected her subsidiary to perform the work, she coordinated that schedule. Nothing in those facts indicated that she or her employer would benefit from her husband's regulatory decisions on a totally different wholly owned subsidiary.

The agency said that the regulated industry had its finances audited so that there was no cost-shifting to other companies, including subsidiaries. However, an independent auditor, not the individual who was offered the State job, or the agency, audited the company and its wholly owned subsidiaries. Thus, the employee would not be in a position to confer favors on the company regarding those matters.

The Commission must base its decisions on a "particular fact" situation. 29 *Del. C.* § 5807(c). Accordingly, it did not speculate on what issues may later arise if the individual accepted the position. Thus, because of the marital relationship, he should exercise caution in his activities, being sensitive to the Code restrictions. Additionally, he could seek guidance through the Commission's prior decisions on close relatives. For example, as her company might have functions to which spouses were invited, he was advised to review the *Op. No. 97-11*, dealing with attendance by State officials at corporate functions of a regulated entity when matters are pending before the agency.

**99-18 – Personal or Private Interest—Soliciting for Private Enterprise:** A State employee was a member of a private organization which asked her to solicit funding from private companies to pay for the organization's annual conference. She was worried that such soliciting might violate the Code; declined to solicit for the organization; and sought an advisory opinion for future guidance. Based on the following facts and law, the Commission held that it

would be improper for her to solicit for the private organization during State hours, using State resources.

Her State job dealt with issues that also concerned the private organization. As part of the organization's activities, it hosted conferences on those issues. Persons invited to the conference included government administrators, policy makers, teachers and people in direct service for those issues. Because of the common denominator between her State job and the interests of the organization, she had joined it. The organization to which she belonged was not the only private enterprise which provided services, such as conferences on the issues. She had attended its conferences in the past, and this year was asked to serve on its conference planning committee. Planning committee members were to solicit funds to help pay for the conference. Funding opportunities ranged from an ad in the conference program to sponsoring the awards dinner. The organization asked her to solicit a specific company, and to identify herself as associated with the private organization, not as a State employee.

To the extent that she wanted to act for the private enterprise on her own time as a member of that private organization, the Commission has ruled that where an individual was associated with an organization and the activities engaged in were not related to his public duties, it had no jurisdiction over the matter because the statute refers repeatedly to "public trust," "public interest," "official duties," "government decisions," "official capacity," etc. *Commission Op. No. 91-20*. However, acting for the private enterprise during State hours or using State resources raised a different issue. State employees are restricted from incurring any obligation of any nature which is in substantial conflict with the proper performance of State duties in the public interest, 29 *Del. C.* § 5806(b); using public office to obtain unwarranted privileges, private advancement or gain, 29 *Del. C.* § 5806(e); or engaging in conduct which may raise suspicion among the public that the public trust is being violated, 29 *Del. C.* § 5806(a).

While the private enterprise had a conference which some government employees attended, nothing indicated that the State had sanctioned the private enterprise's effort to raise money for its private venture. Thus, she had no State obligation to solicit for the private enterprise. Therefore, to use State time or resources (e.g., telephone) to solicit for a private organization in which she had a personal interest as a member could raise the public's suspicion that she was using public office to secure unwarranted privileges and that she had placed her personal interests in the private enterprise before her State duties. Further, if she solicited for one private company which offered the service, then its competitors, and the public, could view her solicitation during State hours as preferential treatment to the private enterprise.

**99-04 – Personal or Private Interest—Private Enterprise as Sponsor of State/Federal Event:** A State agency asked if an alcoholic beverage company could sponsor a Division's festival that was to be open to the public. The festival would promote recreational safety matters, including restrictions on drinking while recreating. The company would advertise the event and provide things such as safety tip cards and door prizes.

The only Code provision that may apply is the one restricting State employees or officials from accepting anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). Here, the things of monetary value would be the costs paid by the company for advertising and door prizes. The agency did not have the funding to launch the type of advertising campaign which the company could launch. It believed

if the company advertised the festival, the publicity would draw larger public attendance, resulting in wider exposure to recreational safety issues. Alcoholic beverages would not be served.

**(A) Impaired Independence of Judgment** - The division was, among other things, responsible for enforcing certain recreation related laws, regulations and rules regarding permits, licenses, and other program requirements for the agency. However, the division had no decision-making authority or any dealings with the company. Thus, it did not appear that anyone in the division would have their judgment impaired as they made no decisions regarding the company.

**(B) Official Decisions Outside Official Channels** - As the division had no decision-making authority over the company, it did not appear that anyone in the division would be in a position to make any official decisions outside official channels relative to the company.

**(C) Preferential Treatment to Any Person** - No other company had offered to sponsor the event. The agency said that if another company wanted to sponsor the event, the agency would look at their package and see how their offer would benefit the State. Thus, each offer would be treated the same as the offer from this company.

**(D) Any Adverse Effect on the Public's Confidence in the Integrity of its Government** - In deciding this issue, the Commission looked at the totality of the circumstances. Commission Op. No. 96-78. First, it noted that no agency employee had decision making authority over the company; and no facts indicated that acceptance would result in preferential treatment or official decisions outside official channels. Further, no State employee would personally benefit from the sponsorship because although the company said it would offer door prizes, the agency said that division employees would not be eligible for the prizes.

Based on those facts, a majority of the Commission's quorum found no violation of the restrictions on accepting anything of monetary value if it may result in: (1) impaired independence of judgment; (2) official decisions outside official channels; or (3) preferential treatment to any person. However, those members concluded that acceptance would have an adverse effect on the public's confidence in the integrity of its government, in violation of 29 *Del. C.* § 5806(b)(4). They concluded that it may result in an adverse effect on the public's confidence in the integrity of its government if an agency, which is responsible for enforcing certain recreational laws, accepted an alcoholic beverage company's offer to: advertise a State event; distribute literature on safety with its logo; and offer door prizes.

Dissent: I respectfully dissent from the conclusion that 29 *Del. C.* § 5806(b)(4) would be violated. I agree that it might constitute poor judgment to have an alcoholic beverage company sponsor a safety program, but in my opinion, the State Public Integrity Commission does not have jurisdiction to make that determination. Title 29 *Del. C.* § 5806(b)(4) is limited to acts which adversely affect "the public's confidence in the integrity of its government." (Emphasis added). The part of the decision from which I dissent does not deal with integrity or anything else over which the Commission has jurisdiction. See, *Commission Op. No. 93-17; Seth v. State of Delaware*, Del. Supr., 592 A.2d 436, 442-443(1991).

**99-02 – Personal or Private Interest—State Employee Conducting State Training:** A State employee asked if he could train State employees on a subject which was part of his expertise

in his other employment. In his State job he was a trainer, but not in the area of his other employment. His other employment required that he be licensed. Besides having private clients, he taught at a school, training students in the subject.

He wanted to give the training during State hours. It was expected that he would be paid his State salary while giving the training. He and his division director envisioned that the training sessions would be set-up through the State Personnel Training Unit and would be open to any State employee who desired to sign up.

The Code of Conduct restricts State employees from:

- (A) reviewing or disposing of matters where they have a personal or private interest which tends to impair independent judgment. 29 *Del. C.* § 5805(a);
- (B) representing or assisting a private enterprise on matters before the agency which employs the individual. 29 *Del. C.* § 5805(b);
- (C) having other employment 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 the integrity of its government. 29 *Del. C.* § 5806(b); and
- (D) using public office to obtain a personal gain. 29 *Del. C.* § 5806(e).

Whether he could be paid his State salary to train on matters which were part of his other employment was not an issue within the Commission's jurisdiction, as State pay issues are governed by other statutes and regulations. Similarly, it could not decide which agency would be responsible for paying, if such payment were permitted. Thus, it addressed only those issues within the purview of the Code of Conduct.

The decision of whether the State Personnel Unit could use his expertise in its training program would be made by the State Personnel Office. Thus, he would not review or dispose of the matter in his official capacity, nor would he represent or assist his private enterprise before his own agency. Here, he wanted to tell the State trainees that he was licensed, so they would know of his credentials. If he informed them that his outside business provided the service, it might create the perception that he was trying to create business for his private enterprise. Thus, it could appear that he was using public office to obtain a personal financial benefit. Such appearance could have an adverse effect on the public's confidence in the integrity of its government. Similarly, the same perception, that he was using public office to obtain a financial benefit for the school, could arise if he informed them that he provided training at the school. Thus, the Commission held that he may say that he was licensed, but he may not take State attendees as his private clients. The Commission understood that it would be unlikely because he was not seeking new clients and his primary focus was to provide training at the school. Also, he could not refer to the school in his presentation to State employees.

**98-34 – Personal or Private Interest—Board Member's Business Regulated by Board:**

The Commission was asked if licensed professionals who are appointed to the boards which regulate their profession or occupation (Title 23 or Title 24 Boards) are required to file a full disclosure with the Commission. The Commission concluded that assuming the language may require them to file, it would grant a partial waiver for the following reasons.

Under the Code of Conduct, any honorary State official who has a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee, shall file with the Commission a written

statement fully disclosing the same. 29 *Del. C.* § 5806(d). The disclosure is confidential, and the Commission shall not release the information, except as may be necessary for enforcing the Code of Conduct. *Id.*

First, no Title 23 or 24 board appointees did business with the State agency on which they serve as an appointee. If they did, it would pose a different factual situation and may require a different result. Thus, no waiver was granted as to that portion of the statute. If such situation should arise, they could request an opinion based on the specific facts. The remaining portion of the statute required appointees, who were regulated by the Board to which they were appointed, to file a full disclosure with the Commission if they had a financial interest in a private enterprise regulated by their Board. It was indicated that the licensing boards' jurisdiction was limited to its own licensees as individuals and did not extend to private enterprises in which licensees may have a financial interest. While the Commission understood that to mean that the individual, not the business, was "subject to the regulatory jurisdiction" of the licensing boards, it noted that for some professional enterprises to operate, they must have a licensed professional. As a consequence, the operation of a business may depend on the licensee maintaining that license. For example, a barber who was regulated by a licensing board may have a financial interest in the barber shop where he or she is licensed to practice the profession, and without a licensed professional that shop may not be able to operate.

The Code defines "financial interest" as: (1) having a legal or equitable ownership interest in a private enterprise; (2) being compensated more than \$5,000 per year as an employee, officer, etc., of the private enterprise; or (3) having a creditor relationship with the private enterprise. 29 *Del. C.* § 5804(8). Thus, if the licensed professional was compensated at more than \$5,000 per year, or had the requisite ownership or creditor status, the license and the private enterprise were directly connected. The Commission did not review the particular status of all Title 23 & 24 appointees, which was estimated at more than 100. Rather, it assumed they may have a financial interest in a private enterprise.

With that assumption, the issue was whether they must file a full disclosure with the Commission. The Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the State official or agency. 29 *Del. C.* § 5807(a).

The public purpose of disclosing financial interests is to ensure that government officials refrain from acting in their official capacity on matters where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independent judgment and avoid the appearance of impropriety. 29 *Del. C.* § 5811(2). We understand that the following actions are taken to ensure that such concerns are avoided:

- (1) Title 23 and Title 24 statutes require that a certain number of appointees be members of the profession or occupation which is being regulated, and the statute is a public record;
- (2) the identity of all licensed professionals is publicly available from the Division of Professional Regulation;
- (3) appointees recuse themselves from participating if there is a potential conflict of interest;
- (4) the recusal is recorded in minutes of the meetings;
- (5) questionable issues are referred to the deputy attorney general assigned as counsel to each board; and
- (6) the identity of board members as either public or professional members is recorded

at each meeting.

Thus, the information that is critical to the public, the knowledge of the appointees' direct or indirect financial interest, was a matter of public record.

Under the Code, even if the appointees filed a disclosure with the Commission of their financial interest in a private enterprise regulated by their Board, it would generally be confidential. See, 29 *Del. C.* § 5806(d). As handled, the information in which the public was interested was publicly available, and the professional or occupational interest was identified at each meeting. Accordingly, the purpose of the statute was served through the information which was publicly available. Therefore, a literal reading which would require confidential filings was not necessary to achieve that public purpose.

**98-02 – Personal or Private Interest—Negotiating with State Agency When Son Had Contracted with the Agency:** The Commission concluded that it would not violate the Code of Conduct for a State employee to participate in lease negotiations regarding a State agency when his son had contracted to provide video conference capabilities and perform other general assignments for the agency.

The Code prohibits State employees from reviewing and disposing of matters where a close relative will benefit to a greater extent than others of the same class or group. 29 *Del. C.* § 5805(a)(2)(a).

Here, the State employee did not review or dispose of the decision by the State agency to contract with his son. He did not work for the agency which needed the lease, and which had contracted with his son. Further, the agency's contract with his son had nothing to do with the leasing negotiations. Thus, the lease negotiation activities did not violate the restriction on dealings with close relatives.

**97-36 – Personal or Private Interest—Promotion of Relative:** An agency wanted to promote an individual but asked if the action complied with the Code of Conduct because the father of the individual being considered for promotion was in the same section and was a manager.

The Code of Conduct prohibits State employees from reviewing or disposing of matters if the individual has an interest which tends to impair independence of judgment in performing official duties with respect to that matter. 29 *Del. C.* § 5805(a)(1). As a matter of law, an individual has an interest that tends to impair independent judgment if action or inaction would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(a).

Here, the agency publicly announced the job; the father was not on the team which reviewed the applications from the ten candidates and recommended the son for promotion; team members were not persons whom the father supervised; and the team member who evaluated the specific technical skill required was a supervisor from a completely separate agency, who supervised persons with the technical skill. Thus, the father did not review or dispose of the promotion decision concerning his son. Moreover, the father and son would work different shifts, and the son would report to an individual who did not report to the father, to ensure that the father would not review or dispose of matters pertaining to supervising or

evaluating his son.

Under those circumstances, the Commission found no violation of the prohibition against reviewing or disposing of matters where a close relative may benefit. Moreover, the Commission noted that the agency had worked to reduce any appearance of impropriety by publicly noticing the position; by having a representative from another agency evaluate the candidates' technical qualifications; and placing the two relatives on different shifts.

**97-35 – Personal or Private Interest—Close Relative Contracting with State Agency:** A State officer asked the Commission if the Code of Conduct would be violated if his father were selected as a contractor by his agency.

The Code of Conduct prohibits State officers from reviewing or disposing of matters in which they have a personal or private interest which tends to impair their independence of judgment in performing duties with respect to that matter. 29 *Del. C.* § 5805(a)(1). By operation of law, a person has an interest which tends to impair judgment with respect to any matter when: (a) any action or inaction on the matter would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or (b) the close relative has a financial interest in a private enterprise or interest which would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises. 29 *Del. C.* § 5805(a)(2)(a) and (b).

The State Officer did not review or dispose of the contract, which was awarded to his father's firm, and normally did not review or dispose of such contracts. The contract was publicly noticed and bid, therefore, giving any class or group of persons the opportunity to bid. Further, all bidders which responded to the public notice were reviewed by a "short list" team. He did not select the team; did not review its decisions; or decide which firms were to be short listed. Once the bidders were short listed, another team was selected to decide the winning bidder. Just as with the short list team, he did not play any part in selecting the team, reviewing bids, or disposing of any decision regarding the final selection in terms of interviewing candidates engaged in contract negotiations, or made any decisions relating thereto. In short, he removed himself completely from the process. Additionally, both teams consisted of merit employees who were not supervised by him, nor were their performance evaluations signed by him. The final contract was signed by an individual who did report to him; however, that individual's signing of the final contract did not deviate from the selection team's recommendation. When the contract was publicly noticed the advertisement said the contract was subject to renewal. If the contract was renewed, he would not participate in any aspect of the contract decision.

**97-34 – Personal or Private Interest—Commission Chair seeks State position:** An appointee to a State Commission intended to apply for a full-time position with a State agency. By law, the Commission, which he chaired, had to approve all personnel actions by the agency, including the hiring of full-time employees.

**(a) The Chairman's Conflict**

A conflict arose for the Chairman because as an Honorary State Official he may not review or dispose of matters in which he has a personal or private interest that tends to impair

independent judgment in performing official duties. 29 *Del. C.* § 5805(a)(1). As a matter of law, an individual's judgment tends to be impaired if action or inaction would result in a financial benefit to that individual to a greater extent than it would to others who are members of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(a). Because the name of the recommended candidate must be submitted for approval to the Commission of which he was Chair, it appeared clear that he should not participate in selecting the recommended candidate. While the Chair could recuse himself from participating, the Commission found that if he continued as Chair while also being considered for a full-time position, it continued to raise issues of appearances of impropriety that could not be overcome by mere recusal, for reasons addressed below.

### **(b) The Commission Members' Conflict**

State employees, officers and honorary officials must endeavor to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of their public trust, and which will reflect unfavorably upon the State and its government. 29 *Del. C.* § 5805(a). The other Commission members, like the Chair, were restricted from reviewing or disposing of matters in which they have a personal or private interest that tends to impair independence of judgment. 29 *Del. C.* § 5805(a). In essence, the public trust they are charged with when making any decision, including hiring decisions, is that the decision be fairly reached. In the context of hiring, the decision must be based on merit. Because the Commission members must approve the candidate selected by the hiring official, if that candidate was also the Chair, it could, at a minimum, raise suspicion among the public that the Commission members' approval was based on their relationship with, or influence by, the Chair.

### **(c) The Hiring Official's Conflict**

By law, the Commission appointed the individual who made the hiring decision. It set his salary and approved his budget. Also, he must have its "consent and approval" when he hired employees. Thus, if the Chair retained his Commission position, it would mean that the hiring official must select a candidate from a list of candidates which included a person who has substantial authority over him. If he selected the Chair over other candidates, there may be a suspicion that his selection was based on something other than the merits. Thus, it raised the same ethical issues for him as it did for the Commission members. Consideration was given to bringing in panelists from outside the State to avoid the conflict. However, the statute required the hiring official to appoint all authorized personnel pursuant to the Merit System rules and regulations. Thus, the Chair would still have to participate in the interviewing process.

### **(d) Waiver Considerations**

A waiver may be granted if "the literal application of such prohibition in a particular case is not necessary to achieve the public purpose or would result in an undue hardship on any employee, officer, official or state agency." 29 *Del. C.* § 5807(a).

#### **(1) Public Purpose**

The purpose of the Code of Conduct is to ensure that the conduct of government officers and employees holds the respect and confidence of the people. 29 *Del. C.* § 5802(1). Thus, such persons must "avoid conduct which violates their public trust or creates a justifiable impression among the public that such trust is being violated." *Id.* Among the public trust

concerns expressed in the Code of Conduct are that government employees make decisions based on the merits, not on personal relationships and that public office not be used to secure unwarranted privileges, personal gain or benefit. See, 29 Del. C. § 5805(a) and 29 Del. C. § 5806 (e). Here, there could be a justifiable impression among the public that if the Chair continued to hold that position while being considered for full time employment that: (1) a decision to nominate him by the appointing official could be the result of the authority that the Chair exercised over him; (2) a decision by his fellow Commissioners to approve his selection could be the result of their collegial association; (3) he would receive preferential treatment over other candidates because of his relationship with both the appointing official and his fellow Commissioners; and (4) he used his appointed public office to secure a personal gain or benefit by parlaying the appointment to public office into a full-time position. Moreover, he would be doing so without risking loss of the appointed position. Thus, if he was not selected for the full-time position, he kept the prestige and authority of the appointment, where he would still exercise authority over the appointing official's budget, hiring recommendations, etc. This placed the appointing official and the Commission members on the horns of a dilemma because, regardless of how qualified the Chair was for the position, the public may well question whether the trust in unbiased and unduly influenced decision making was violated. Under those circumstances, the Commission concluded that the literal application of the prohibition was necessary to achieve the public purpose.

## **(2) Undue Hardship**

In considering whether an undue hardship waiver should be granted, the Commission examined the other purpose of the Code of Conduct which is "that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 Del. C. § 5802(3). Here, the appointing official said that if a conflict existed because the Chair wanted to retain the appointed position, the agency would still have qualified candidates for the position. Thus, it did not appear that the agency would suffer an undue hardship by disqualifying the Chair for the position.

On the other hand, did such action result in a hardship on the Chair?

He did not wish to risk surrendering an appointment on a prestigious body, and then find that he was not selected for the full-time position. The Code of Conduct requires that the hardship be "undue," which means "more than required" or is "excessive." See, *Merriam Webster's Collegiate Dictionary*, p. 1290(10th ed. 1992); *Black's Law Dictionary*, p. 1370 (5th ed. 1989). That was not the case in these circumstances. Indeed, contemporaneous service on a State Commission should not be perceived as a requirement for applying for a salaried job with the State. To hold otherwise would give little credence to the provision which mandates that conduct should be avoided "which creates a justifiable impression among the public that such trust is being violated." 29 Del. C. § 5802(1).

Here, the justifiable impression among the public would be that by retaining the appointment, the Chair used his appointed office to gain a personal benefit (a full-time position); he would receive preferential consideration from the appointing official who must have his budget, personnel decisions, etc., approved by the Chair; and he would receive preferential consideration from the Commission members who serve with him. Not only would it create a justifiable impression that he was violating the public trust, but it would force the Commission members and the hiring official into a position where their integrity could justifiably be called into question. Thus, in balancing between the need to avoid even the perception of impropriety

against the need to attract qualified people to public employment, the balance must be weighed, under these facts, in favor of serving the public purpose of avoiding the appearance of impropriety, especially as there was evidence that the State would not lack qualified candidates.

If the Chair, who was not present at the hearing, or the agency believed there were factors the Commission did not consider which would support a waiver, a hearing to reconsider the matter could be requested.

**97-26 – Personal or Private Interest—Hiring Agency Contractor for Personal Work:** An elected State officer asked if it would violate the Code of Conduct to hire a firm which contracted with his State office to perform functions for a business in which he invested.

The Code prohibits State employees, officers, and honorary officials from reviewing or disposing of matters in which they have a personal or private interest which tends to impair their independence of judgment. 29 *Del. C.* § 5805(a)(1). It also prohibits them from engaging in conduct that would raise suspicion among the public that the individual is acting in violation of the public trust and which would not reflect favorably upon the integrity of the State government. 29 *Del. C.* § 5806(a).

As head of the agency, he was required to review and decide which companies would contract to perform State work, which was the same type of work he wanted the firm to do for his private business. Because of the nature of his State duties, realistically he could not accomplish a complete delegation of his duties because the staff would still come to him for final decisions, which is only appropriate because he, not his staff, was elected to make those decisions. Moreover, he clearly had a continuing oversight responsibility. Thus, delegating his responsibility would be merely form over substance.

Aside from the reality that he would be reviewing and disposing of the matters, even if he delegated the responsibility to a deputy, it might raise suspicion among the public that a deputy would still act at the official's direction. Thus, the public could suspect that the firm would receive preferential treatment when it sought to renew its contracts or sought new contracts with the State office. That issue took on added significance because his employment of that firm would be an on-going, long-term arrangement, just as its dealings with the State would be on-going. He could hire firms for his personal needs which did not contract with the State, and the business was in another State so firms in that State could be considered by him. Thus, it did not appear that there was an undue hardship sufficient for the Commission to grant a waiver.

**97-21 – Personal or Private Interest—Private Sector to State Employment:** An individual worked for a firm which contracted with the State. The firm, which she and another individual owned, previously bid on and was awarded a State contract. She subsequently sought a full-time position with the agency with which her firm had she had contracted. The agency asked if it would violate the Code of Conduct to hire her as a full-time State employee. If it hired her, the agency would exercise its right not to renew the contract.

State employees may not review or dispose of matters in which they have a personal or private interest which tends to impair independence of judgment. 29 *Del. C.* § 5805(a). As a State employee, she would not make decisions regarding any contracts which her former firm may have with the State in the future. Regarding the existing contract, it was for one year,

subject to renewal and it would not be renewed, meaning that she would have no opportunity to make a decision on that contract. As a State employee, she would not be involved in any decisions on whether the firm would receive future agency contracts. In fact, it was understood that her partner would not seek contracts with the agency. Therefore, she would have no occasion to review or dispose of such matters.

The Commission noted that it had no authority to decide the extent of the partnership arrangement; however, if her partner decided to seek a contract with the agency, the agency could come to the Commission for any guidance that may apply.

State employees, officers and honorary officials may not represent or assist a private enterprise on matters before the agency employs them. 29 *Del. C.* § 5805(b). She would not have any connection with the former firm except as a debtor. She would not perform any functions or have any authority to engage in or make decisions for the firm concerning the seeking of contracts with the State or participate in such things as voting on whether the company would pursue contracts with her agency and would not engage in such matters as helping the firm prepare responses to requests for proposals (RFPs) issued by the agency.

As she would not: (1) review or dispose of matters related to the firm; (2) have a relationship with the firm except as a debtor; and (3) would not represent or assist the firm on matters before the agency, the Commission found no conflict.

As she would be a new employee, the Commission cautioned her about Code prohibitions against improper disclosure or use of confidential information for personal gain or benefit. 29 *Del. C.* § 5806(f) and (g). If, for example, she had access to such information as competitor's bids on State contracts, to the extent that information was protected, even if she was not the decision-maker on the contracts, she would be prohibited from improperly using or disclosing such information to her former firm.

**97-19 – Personal or Private Interest—Contracting for Part-Time Job with Employing Agency:** A State employee asked if it would violate the Code if she privately contracted to provide administrative assistance to the section where she worked full-time as an administrative assistant. State employees may not represent or assist a private enterprise on matters before the State agency which employs them. 29 *Del. C.* § 5805(b). The Commission has ruled that private contracts with the State constitute a “private enterprise.” *Commission Op. No. 94-10*. Accordingly, it would not be appropriate for her to privately contract with the section which employed her.

**97-15 – Personal or Private Interest—Private Consulting Business:** A State employee had a professional degree and opened a consulting business as part of his outside activities. Primarily, his clients were from out-of-state, but three were Delaware clients.

The Code of Conduct prohibits outside employment if it 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 State government. 29 *Del. C.* § 5806(b).

Regarding his Delaware clients, those companies must comply with the laws which the employee enforced in his State position. In his State job, he had not investigated or taken any

action against these companies. However, because those companies were subject to action by his Division, it was concluded there may be an adverse effect on the public's confidence in State government if he provided services to these Delaware clients. That was because if an employee from his office investigated those companies, they would review the documents he prepared in his consultant capacity. Although he prepared the documents based solely on what the company provided him, the State investigator from his Division could find a discrepancy between the information which the company provided to him for the reports he prepared and the actual records on which he based his reports. Accordingly, he could find himself in an adversarial position with his own Division. The Commission previously held that where a State employee wanted to engage in outside employment that could result in his private employment creating an adversarial position with his agency, it would reflect unfavorably on the employee's position of holding the public trust and, therefore, violate the Code. *Commission Op. No. 91-19*; see also, 29 *Del. C.* § 5805(b) (State employees are restricted from representing or assisting any private enterprise with respect to matters before the State agency by which the employee is associated by employment.). Accordingly, the Commission found it would be improper, under 29 *Del. C.* § 5805(b), for him to have Delaware clients who were subject to laws enforced by his Division. Additionally, such activity may result in an adverse effect on the public's confidence in State government in violation of 29 *Del. C.* § 5806(b).

Regarding clients from other states, as they were not subject to the Delaware laws enforced by the employee and his Division, and he was not performing work for them during official duty hours, the Commission found no conflict in having those outside clients.

### **97-13 – Personal or Private Interest—Waiver Request to Contract with Employing**

**Agency:** A State employee asked if it violated the Code for him to privately contract with his agency to perform certain work. He said that if the Commission found a violation, he would like for a waiver to be granted.

A State employee may not represent or assist a private enterprise with respect to any matter before the State agency which employs him. 29 *Del. C.* § 5805(b). Because the employee was representing his own company as a private contractor on business transactions with the agency which employed him, such activity would violate the provision. Additionally, State employees shall not accept outside employment or any compensation if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State government. 29 *Del. C.* § 5806(b).

His primary contract work for the agency was not part of his official duties. While the work might not result in impaired judgment, preferential treatment, or government decisions outside official channels, the real concern was the adverse effect on the public's confidence in the integrity of the State government. Because representing or assisting a private enterprise before the employee's own agency is specifically prohibited, it could appear that his company would receive preferential treatment if selected as the contractor.

Regarding the waiver request, waivers may be granted if the literal application of the statute does not serve the public purpose or there is an undue hardship on the employee or agency. 29 *Del. C.* § 5807(a). There was no indication of a specific hardship on the State employee. However, he said there were instances where other vendors would not set up a charge account with the State which prevented getting parts, and that getting other contractors was sometimes difficult because the jobs were too small. To the extent he was saying there

was an undue hardship on the agency, the Commission believed it would be more appropriate for the agency to address the difficulties it may have in getting contractors. It suggested he might have his agency submit information relative to a hardship if he wanted the Commission to reconsider if it should grant a waiver.

**96-85 – Personal or Private Interest—Stock Holdings in Publicly Traded Company:** As part of his State duties, a State officer had to find a company to fulfill a service contract. The service needed was highly technical and the State officer “did a lot of research,” and “acquired a lot of knowledge,” about companies which provided the highly technical service. Specifically, only three companies were the primary providers, and they had a substantial portion of the world market. He recommended that one of the companies provide equipment and phase-in services at more than \$1 million. After the contract was issued, he learned that the company was making a public offering of its stock. He concluded that he could use his knowledge about the company without any conflict because his investment was less than the amount defined by the Code of Conduct as a “financial interest.” He and his wife bought 340 of the 2 million shares offered.

The State officer routinely monitored the contract for compliance and could decide if his agency needed additional services. If more services were needed, his recommendation “would carry a lot of weight.” He also said other Delaware agencies and other jurisdictions might seek his recommendation on the company’s ability to fulfill the contract. He said that although any sale would make the company look better, he did not think his decisions would affect the stock price. However, he recognized that his opinion could have an impact. He said that if the Commission found a violation, he could delegate his decision-making authority or liquidate the investment.

His investment was not enough to be a “financial interest” as defined by the Code. See, 29 *Del. C.* § 5804(5). However, the Commission noted other provisions which affected its decision. First, the code prohibits reviewing or disposing of matters pending before the State where the individual has a personal or private interest which tends to impair judgment with respect to that matter. 29 *Del. C.* § 5805(a)(1). The Commission pointed out that the Delaware Superior Court interpreted the provision as requiring recusal of a decision maker on matters pending before the State where a private company employed the individual and the company was seeking a decision from his agency. The Court did not discuss the amount of any “financial interest.” See, *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).

Second, the Code restricts State employees from having “any interest in any private enterprise. . . which is in substantial conflict with the proper performance his duties.” 29 *Del. C.* § 5806(b) (emphasis added).

Third, the Code prohibits conduct which could raise suspicion that the individual is violating the public trust. 29 *Del. C.* § 5806(a). The Commission noted that in a prior decision it said: “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.’ 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*.

The Commission concluded that the State officer’s investment created perception and

possible conflict of interest problems because: (1) only three major companies provided the service; (2) the service was in a fast developing field; (2) the limited competitiveness was to be weighed against his decision making authority; (3) he would be routinely deciding if the equipment worked properly; (4) he would be the one to recommend additional services for his agency; (5) his decision making authority carried “a lot of weight” not only within his own agency but other Delaware agencies, and even other jurisdictions; and (6) no statute or rule prevented him from delegating his decision making authority.

#### **96-76 – Personal or Private Interest--Client Referral to Spouse’s Private Enterprise:**

The Code permits State agencies to seek advisory opinions. 29 *Del. C.* § 5807(c). A State agency sought a decision on whether it could promote one of its employees, without creating a conflict. If promoted, a private enterprise owned by her husband was on the list of facilities to which clients from her office could be referred. Her agency identified certain internal procedures that were in place and asked if the promotion would result in a conflict, even with the procedures in place.

State employees cannot review or dispose of matters if there is a personal or private interest which tends to impair independence of judgment in performing official duties with respect to that matter. 29 *Del. C.* § 5805(a)(1). One interest, which as a matter of law, tends to impair judgment is where action or inaction by the employee would result in a benefit or detriment for a close relative to a greater extent than for others similarly situated. 29 *Del. C.* § 5805(a)(2). “Close relative” includes a spouse. 29 *Del. C.* § 5804(8).

Here, federal and State laws prohibited State employees from referring clients to a particular facility. The agency kept a list of all qualified facilities and the client or the client’s family selected the facility from the list. Thus, the “matter” of selecting the facility was not a “matter” over which the employee had any review or disposition authority. Further, the agency had an individual who screened potential clients. After reviewing the applications, the screener assigned the clients to employees. It was agency procedure to assign employees to handle clients from a particular facility. Clients who resided in or selected the husband’s facility would not be assigned to his spouse. Thus, the “matter” of deciding eligibility for applicants at her husband’s facility was not a “matter” over which the employee had any review or disposition authority. As the agency would not assign the employee to clients who lived at her husband’s facility, she would not evaluate the quality of care given at his facility. Thus, the “matter” of deciding quality of care was not a “matter” over which she had any review or decision-making authority.

The Code also prohibits State employees from representing or assisting a private enterprise with respect to matters before the agency with which they are associated with by employment. 29 *Del. C.* § 5805(b)(1). Here, the “matters” which would be of interest to the private enterprise would be client eligibility, facility assignment, and client care. No input was required from the private enterprise regarding client eligibility as it was based on financial documents submitted by the potential client. No input was required from the private enterprise regarding facility selection as the client or the client’s family selected the facility. Thus, no occasion for the employee to represent or assist the private enterprise on “matters” before the agency on client eligibility and facility assignment would occur. The agency would not assign the employee to cases where the clients lived at her husband’s facility. Thus, she would have no information on the “matter” of client care on which she could represent or assist the private enterprise regarding the quality of care given those clients.

The agency said that one of its concerns was any appearance of impropriety as the Code prohibits conduct which would raise suspicion among the public that an employee is engaging in acts violating the public trust. 29 Del. C. § 5806(a). Here, the agency-based client eligibility principally on mathematical calculations involving income and net assets contained in documents submitted by the applicant. A supervisor routinely reviewed decisions on eligibility through the relatively simple process of reviewing mathematical calculations; not possible subjective statements by the employee. Additionally, the employee would not decide eligibility or have clients from her spouse's facility. Therefore, it was unlikely she could approve or deny eligibility in a way to benefit her spouse's facility. Additionally, the State employee had no control over the list or over which facility had space available.

The Code also prohibits disclosing confidential information gained by reason of public position or otherwise using such information for personal gain or benefit. 29 Del. C. § 5806(g). The employee, like all agency employees holding similar positions, had signed a confidentiality statement on disclosure or use information about applicants and clients. The employee said she was aware of and understood the prohibition, and never had, nor would she, violate the prohibition.

**96-64 – Personal or Private Interest--Non-Profit Organization:** A Division Director was also a volunteer member of a private non-profit organization. The organization asked the Director to consider chairing its Board of Directors. The organization did not compensate the individual as a volunteer member and would not compensate her as a Board member. The Board engaged in such activities as deciding if the organization would pursue grants-in-aid, etc. Although most of its funding was from private companies, the organization would qualify for State grants. The organization rewrote its bylaws to say that if a State employee was on the Board, it would not ask for a grant from that agency. It would seek grants from other agencies.

#### **(A) Restrictions on the Exercise of Official Authority**

The Code of Conduct restricts State employees, officers and honorary officials from reviewing or disposing of matters where they have a personal or private interest that would tend to impair their judgment in performing official duties. 29 Del. C. § 5805(a)(1)(a). It also prohibits conduct that would raise public suspicion that the individual was engaging in acts violating the public trust and that would not reflect favorably on the State. 29 Del. C. § 5806(a).

This Commission has held that where a State employee was on the Board of a for-profit private enterprise, although the entity did not compensate her, it would be inappropriate for her to review or dispose of the company's contract application as part of her official duties because, at a minimum, it might appear improper, which the Code prohibits. See, *Commission Op. No. 95-24*. "Private enterprise" includes "non-profit" entities. See, 29 Del. C. § 5804(8).

Here, the organization's bylaws barred it from seeking funds from a State agency if an individual from that agency was on its Board. Thus, the Division Director would not review or dispose of any funding request from the organization because it would not seek funds from her agency, if she accepted a Board position. However, if she did not become a Board member, but remained a volunteer, the bylaws did not bar the organization from seeking funds from her agency. The Commission concluded that she could not review or dispose of such request as part of her State duties. At a minimum, it might appear that because of her personal interest as a member, she might give preferential treatment to the organization if it requested funding. If such situations arose, she was directed to consider whether she should: (1) recuse herself; or

(2) return to the Commission for an opinion on that specific situation; or (3) request a waiver from the Commission. The Commission may grant a waiver if it “determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would result in an undue hardship on any employee, officer, official or state agency.” 29 *Del. C.* § 5807(a).

**(B) Restrictions on representing another’s interest before the State.**

The Code also restricts State employees, officers and honorary officials from representing or assisting a private enterprise with respect to any matter before the State agency with which the employee, officer or official is associated by employment or appointment. 29 *Del. C.* § 5805(b). The organization’s bylaws made it clear that if the Division Director took a Board position, it would not seek funds from her Department. Thus, it appeared she would have no occasion to represent or assist the organization before the agency where she worked, if she served on the Board. However, if she were not on the Board but just a member, then the organization’s bylaws would permit it to seek funds from her agency. The Commission concluded that it appeared the Code restricted her from assisting the private enterprise before her own agency, meaning that she could not, e.g., help prepare the organization’s funding request. See, 29 *Del. C.* § 5805(b)(1).

“State officers” are further restricted. They may not represent or assist any private enterprise with respect to any matter before the State. 29 *Del. C.* § 5805(b)(2). “State officers” are persons who must file a financial disclosure form. 29 *Del. C.* § 5804 (12). Division directors are required to file. 29 *Del. C.* § 5812(a)(15). Thus, as a “State officer,” she would be restricted from assisting or representing the organization, not only before her agency, but before any State agency. For example, if the organization wanted funds from an agency other than hers, the Commission concluded the Code prohibited her from such things as preparing its grant request as that would be assisting the private enterprise in seeking funding from another agency.

**96-62 – Personal or Private Interest—Endorsement:** A private retirement home asked a State officer to sign a letter soliciting funds. The letter mentioned that he had family members who were cared for at the facility. Although his agency did not regulate the facility, the State did. He would sign the letter as the son of a resident, not as a State official. However, he believed they asked him to sign the letter because of his name recognition that resulted from being in public office. No other persons with family members at the facility were asked to sign a solicitation letter. While he was very satisfied with the care given to his parent, he asked if signing the letter was appropriate.

The Code prohibits State employees, officers and honorary officials from using public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e). It also prohibits conduct which may raise public suspicion that the individual is engaging in acts violating the public trust and acts which will not reflect favorably upon the State. 29 *Del. C.* § 5806(a).

The Commission found that signing the letter would be inappropriate for the State officer as it might appear that because of his name recognition, which was based on being in public office, he (through his parent) would secure some private gain or privilege from soliciting funds and/or it might be seen by the public as an official endorsement of the private enterprise.

**96-61 – Personal or Private Interest-- Stock in Private Enterprise:** A State officer owned a single share of stock in a small Delaware corporation, valued at approximately \$600. The stock holding was not for investment purposes, but a “gesture of community support.” The private corporation rented property it owned to a second corporation in which it held stock. The second corporation had a sublease agreement with the State. The private corporation did not receive any proceeds from the sublease agreement. The State officer was responsible for selecting someone to ensure that the second corporation complied with its sublease agreement. As a State officer, he had no decision-making authority over the corporation in which he held stock, and the amount of stock did not constitute a “financial interest” as defined by the Code of Conduct. However, he asked if holding stock in the first corporation would violate the Code of Conduct because he selected the person who would ensure that the second corporation complied with the sublease.

The Code prohibits State officers from reviewing and disposing of matters in which they have a personal or private interest which tends to impair independent judgment in performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1). As a matter of law, a person has an interest which tends to impair judgment if they have a “financial interest” in a private enterprise and any action or inaction would affect that interest to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 Del. C. § 5805(a)(2)(b). A person has a “financial interest” if he: (a) has a legal or equitable ownership interest of more than 10%; (b) expects to receive more than \$5,000 in income during the year as an employee, officer, director, trustee or independent contractor; or (c) is a creditor in an amount equal to 10% or more of the debt of that enterprise. 29 Del. C. § 5804(4).

Here, the individual’s ownership interest was less than 10%; he received no income from the corporation; and he was not a creditor of the corporation. While his stock holding did not meet the statutory definition of “financial interest”, the Commission pointed to a Delaware Superior Court decision in which the Court relied only on the general prohibition against having an interest which tends to impair judgment, 29 Del. C. § 5805(a)(1), without any reference to the “financial interest” provision, 29 Del. C. § 5805(a)(2)(b), for an assumption that an individual had a conflict of interest. *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). The Code also prohibits engaging in conduct which could raise suspicion that they are violating the public trust. 29 Del. C. § 5806(a).

The Commission said that although the \$600 stock did not constitute a “financial interest,” the question was whether the holdings might create a perception of impropriety. The Commission held that under these facts, it found no justifiable impression because: (1) the holding was small; (2) it was fully disclosed; (3) the basis of the holding was a “gesture of public support,” as opposed to an investment opportunity; (4) the State officer would recuse himself from reviewing decisions on whether the second corporation was complying with the sublease; and (5) the first corporation received no proceeds from the sublease agreement with the State.

**96-56 - Personal or Private Interest--Holding Stock Interest in Non-Profit Organization:** A State agency asked if it would raise ethical issues if a non-profit 501(c)(3) private corporation were formed to promote the exchange and dissemination of certain client information between the State and private enterprises. According to the proposed bylaws, the private corporation would issue stock to certain State officers, such as an elected official, cabinet secretaries, and division directors. Representatives of private enterprises, which the State regulated, would hold the majority of the stock. The stock held would be voting stock and holders would, among other

things, vote to elect the board of directors, which might include these State officers. Alternatively, it was asked if ethical issues could be eliminated if the State, instead of the individuals, held the stock.

The bylaws provided that the entities which would make up the private corporation would exchange client information. The State would be expected to contribute information to the network based on the data it collected on State clients. While other states had created similar information networks, they were created by statute, not by incorporation of a private enterprise.

The Commission, by law, must base its advisory opinions on a particular fact situation. 29 *Del. C.* § 5807(c). Here, a particular fact situation did not yet exist as the legal entity of the private corporation had not been created and no State officer had participated in any aspect of the corporation's activities. However, to decide if such a private enterprise model would be used, guidance was needed on whether conflicts could arise from creating such a corporation. As the Commission may "provide assistance to state agencies, employees and officials in administering the provisions of this law," 29 *Del. C.* § 5809(10), this opinion was meant only to provide assistance to the State agencies and State officers involved to aid them in recognizing areas where potential conflicts could arise. It was not meant to prejudge any activities engaged in by such officers, should they have elected to be parties to the private enterprise. Further, it was not within the Commission's authority to suggest how a network, such as one proposed here, should be legally structured, as that was a matter for the Attorney General.

With those limits in mind, having reviewed the bylaws and the purpose of the corporate organization, the Commission had concerns that where State officials join forces with private enterprises under these circumstances, in a corporate activity, as a minimum, it raised issues about the appearance of impropriety. Without detailing all of those concerns, the Commission pointed out two issues. For example, the private corporation would be made up, in part, of companies that the State regulated. It could appear to the public that State officers might, in making regulatory decisions, give preferential treatment to those companies with whom they had joined forces in a private enterprise. See, 29 *Del. C.* § 5805(a)(1) and § 5805(b)(2) (State officers cannot review or dispose of matters in which they have a personal or private interest that tends to impair judgment; State officers cannot represent or assist a private enterprise in matters pending before the State). It also may appear to the public that the State officers were obtaining confidential information in their official capacity and passing that information to private companies. See, 29 *Del. C.* § 5806(f) and (g) (regarding improper disclosure or use of confidential information gained by reason of public position).

If the State held the stock, as opposed to the individual officers, some State official would still have to make voting decisions and perform other functions and responsibilities as a stockholder. That official may have encountered the same appearance problems. Accordingly, the Commission did not see where giving the stock to the State would necessarily eliminate some of the ethical issues that might arise. The Commission had concerns about whether State officials may, within the scope of their employment, enter such arrangement, regardless of any ethical issues. However, that question was for the Attorney General's office, not this Commission.

**96-53 – Personal or Private Interest-- Contract with Company Regulated by Agency:**

Before being appointed to a State agency, an individual had a private contract to provide maintenance for a private enterprise. For a number of years after his appointment, the company was not subject to the agency's regulations. Because of a change in business

operations, the company became subject to the agency's regulatory authority. The individual notified the Commission that he would recuse himself from decisions regarding the company. He asked if he needed to take additional steps to avoid any conflicts of interest.

Because the individual's appointed position resulted in more than \$5,000 a year in compensation, he was considered a "State employee," under the Code of Conduct. See, 29 *Del. C.* § 5804(11)(a)(2). State employees are restricted from participating on behalf of the State in the review or disposition of any matter pending before the State in which they have a personal or private interest. A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in performing duties with respect to that matter. 29 *Del. C.* § 5805(a)(1).

The Code also prohibits accepting outside employment if such acceptance would result in: (1) impairment of independence of judgment; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 *Del. C.* § 5806(b). Additionally, the Code prohibits employees from pursuing a course of conduct which will raise suspicion among the public that they are engaging in acts which violate the public trust and which will reflect unfavorably upon the State. 29 *Del. C.* § 5806(a).

At a minimum, it may appear that participation in regulatory decisions of a company with which the employee did business would raise suspicion among the public that his judgment may be impaired and that he might give preferential treatment to the company. Accordingly, his decision to recuse himself from matters affecting the company was appropriate. The question of whether he should take further action was viewed in light of the other activities regulated by the agency. The agency had specific areas to regulate and decisions by it in areas of regulation outside the area which applied to this company, would not impact the company. Accordingly, the Commission found no violation of the Code as long as he recused himself from decisions pertaining to the company. That would preclude him from reviewing or disposing of matters in which he arguably had a financial interest and would preclude any preferential treatment to the company in making official decisions.

As far as any appearance of impropriety, the Commission emphasized that he had a long-standing contract with the company to perform the maintenance work before the company was ever regulated; he was performing the contract before his appointment; and his company was asked to continue to perform the work to give continuity to the plant maintenance. Thus, it was clear that any financial benefit received through the contract was not the result of his appointment. The Commission concluded he did not need to recuse himself from other regulatory decisions, as those decisions would not impact on the regulatory decisions pertaining to the company.

**96-51 – Personal or Private Interest-- Subcontracting with Firm which has State Contract:**

A State agency solicited lease proposals for space to house several State agencies. Representatives from each agency which would use the space were on the Site Selection Committee. The committee narrowed the proposals to three candidate firms. One candidate firm intended to subcontract part of the work which would be required to prepare the site. An appointee to one of the State agencies which would be housed in the property owned the firm which would subcontract. Before the Site Selection Committee allowed the three candidates to present their proposals, the Commission was asked if it would violate the Code of Conduct if the appointee's firm subcontracted.

Under the Code of Conduct, "State employee" includes any person "who serves as an appointed member, trustee, director of the like of any State agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year (not including reimbursement of expenses)." 29 *Del. C.* § 5804(11)(a). The individual who owned the subcontracting firm was appointed by the Governor and received a salary of more than \$5,000 per year, for purposes of the Code of Conduct, he was a "State employee."

State employees may not:

**(1) Review or dispose of matters pending before the State where there is a personal or private interest that tends to impair independence of judgment. 29 *Del. C.* § 5805(a)(1). One interest which tends to impair judgment is when action or inaction on the matter would result in a financial benefit or detriment to accrue to the person or private enterprise to a lesser or greater extent than others in the same class or group. 29 *Del. C.* § 5805 (a)(2).**

The matter to be reviewed and disposed of was a leasing contract. The appointee's official duties did not include any aspect of leasing contracts. His duties were to decide regulatory matters. His agency did not regulate either his firm or the candidate firm. Also, he was not on the Site Selection Committee so he would not review or dispose of the lease. While his company might experience a financial benefit if it subcontracted, the financial benefit would not result from any action or inaction by him in his official capacity. Also, he would recuse himself from any discussion with his agency regarding the leasing decision. Thus, the Commission found that if his firm subcontracted as part of the candidate's team, it would not violate 29 *Del. C.* § 5805(a)(1) and (2).

**(2) Represent or otherwise assist any private enterprise with respect to any matter "before the state agency with which the employee . . . is associated by employment or appointment." 29 *Del. C.* § 5805(b)(1).**

Assuming the Site Selection Committee was a "State agency," it was not the State agency to which the employee was appointed. As he was not on the Site Selection Committee; would not discuss the matter with his agency and would not participate in any presentation to the committee by the candidate firm, it would not violate 29 *Del. C.* § 5805(b), if his firm was a subcontractor.

**(3) Enter any State contract for more than \$2,000 (other than employment) unless the contract was made or let after public notice and competitive bidding. 29 *Del. C.* § 5805(c).**

Although the law did not require solicitation for leasing proposals be subject to public notice and competitive bidding, the leasing contract was, in fact, advertised. Thus, there appeared to be no violation of 29 *Del. C.* § 5805(c).

**(4) Engage in conduct that would raise public suspicion that the individual is engaging in acts violating the public trust. 29 *Del. C.* § 5806(a).**

Regarding whether the employee's participation as a subcontractor would raise suspicion among the public that he was engaging in activities violating the public trust, such concern was diminished because: (1) the proposals were subject to public notice and bidding;

(2) the activities raised no technical violations of the statute; (3) he was not on the Site Selection Committee; (4) he would not personally appear or participate in the candidate firm's presentation to the selection committee; and (5) he would not discuss the leasing arrangement with his agency. Also, if his firm subcontracted, the work was only about 5% of the overall project costs. Other than the overall costs proposed, the primary criteria in selecting a candidate focused on site location, not the type of work his firm would subcontract to perform. Thus, it did not appear that the work of the subcontractor would affect the selection, regardless of the contractor. That fact also diminished any appearance that having his firm subcontract as part of one contractor's team would influence the selection of the contractor.

If his firm participated in the contract, it was not anticipated that his State agency would have any special needs from the subcontractor which would require him to discuss those needs with his agency. However, the Site Selection Committee had not decided which candidate would receive the contract. Even assuming that the candidate firm which wished to use his firm as a subcontractor was selected, and assuming his firm was kept as its subcontractor, the need for discussions and decisions between the individual in his private capacity and his agency were remote and speculative. As the Commission must render advisory opinions based only on a "particular fact situation," 29 *Del. C.* § 5807(c), it concluded that it was premature to rule on whether such discussions and decisions, if they needed to occur, would violate the Code of Conduct. The Commission advised the parties that they could seek an opinion should such a situation arise.

**96-44 – Personal or Private Interest--Decisions where Daughter is Involved:** State employees may not review or dispose of State matters if they have a personal or private interest which tends to impair their independent judgment in performing duties with respect to those matters. 29 *Del. C.* § 5805(a)(1). A person's judgment tends to be impaired when any action or inaction on a matter would result in a financial benefit or detriment to a close relative to a greater extent than such benefit or detriment would accrue to other members of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(a). "Close relative" includes children. 29 *Del. C.* § 5804(1).

A State employee was asked to review an existing agency contract for expansion. The contract dealt with scheduling and testing. The agency's senior management decided to expand the contract because legislative changes dictated that the work be assumed by the existing contractor to free up agency staff. Persons at a higher level than the employee approved the negotiations. After the contract was re-negotiated, the contractor announced plans to hire additional workers. The announcement reflected the specific hiring criteria and the particular background needed. The employee's daughter, among other applicants, had the particular background and applied for a job.

The Commission found no violation of 29 *Del. C.* § 5805(a) as the State employee had no foreknowledge that her daughter would be considered for a position when the negotiations were occurring. Therefore, her judgment would not have been impaired because of her lack of knowledge. Also, no evidence suggested that her contract negotiations benefitted her daughter more than other members of the same class or group of persons. The contractor established the hiring criteria and hired other similarly qualified applicants. No facts suggested that the daughter received any greater benefit than that offered to other applicants. The daughter would not work for the contractor in the same area as her mother and her mother had no responsibilities in the area of the subject matter (scheduling/testing) of the contract.

**96-42 – Personal or Private Interest--Agency Contracts with Brother-in-Law:** A State employee was the lead point of contact for his agency's procurement activities. On occasion, requests for locksmiths went through his office. As part of his duties, he obtained quotes from vendors, and where appropriate sought public bids. His brother-in-law was a managing partner for a locksmith company. As such, quotes from that firm could be solicited and/or that company would submit bids when public notice and bidding were required. The agency, believing a conflict might exist, had the individual's supervisor solicit quotes or handle bids on locksmith needs. The agency asked if such action was sufficient to avoid a conflict.

The Code restricts State employees from:

**(1) reviewing or disposing of matters if a personal or private interest tends to impair independent judgment in performing official duties; 29 Del. C. § 5805(a); and**

**(2) engaging in conduct that would raise suspicion among the public that an employee is acting in violation of the public trust. 29 Del. C. § 5806(a).**

The Commission concluded that the agency had properly removed the employee from participating in the procurement activity because if he called and obtained quotes, his familial relationship might, as a minimum, tend to impair judgment. Even if it did not, the public could suspect that he would give his brother-in-law preferential treatment by: (1) calling him for a quote and not calling others; and/or (2) passing quotes of other contractors to his brother-in-law.

The Commission found that the procedures set up by the agency sufficiently removed any suspicion that he was engaged in activities violating the public trust because very few such requests came through his office; his supervisor decided if the bid complied with State procurement rules; and an individual from another section reviewed the contracts and judged the supervisor's recommendation on the bases of costs, competence, past track record, etc., of the contractor.

**96-16 – Personal or Private Interest—Regulating Activities Where Spouse Has Interest:**

The Code of Conduct requires honorary State officials who have a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee, to file with the Commission a written statement fully disclosing the same. 29 Del. C. § 5806(d). An honorary State official notified the Commission that he served in a regulatory agency which regulated activities in which his spouse planned to engage. He said he would recuse himself from decisions concerning his spouse.

Honorary State officials are restricted from reviewing and disposing of matters before the State where they have a personal and private interest which would tend to impair independence of judgment. 29 Del. C. § 5805(a)(1). One interest which, as a matter of law, tends to impair independence of judgment is one where a close relative would receive a greater benefit or detriment than members of the same class or group. 29 Del. C. § 5805(a)(2). "Close relative" is defined to include a spouse. 29 Del. C. § 5804(1). The Code also prohibits such persons from engaging in conduct that would raise suspicion among the public that he is engaging in acts violating the public trust and that would not reflect favorably upon the State. 29 Del. C. § 5806(a).

Without deciding if the spouse would receive a benefit or detriment greater than that received by others in the same class or group, the Commission held that if the honorary State official decided matters concerning his spouse, it could appear to the public that his judgment would be impaired, and therefore, it was appropriate that he recuse himself on such matters. The Commission noted that a separate statute governing the particular regulatory body had specific provisions dealing with appointees having a direct or indirect pecuniary interest in the regulated activity. As the Commission had no jurisdiction to interpret that statute, it suggested the individual discuss compliance with that statute with the appropriate authority. The individual later notified the Commission that his spouse would not engage in the regulated activity as long as he served on the regulating agency.

**95-36 – Personal or Private Interest – Endorsement:** The head of a State agency was asked to appear in a video prepared by a private enterprise. In the past the enterprise had contracted with the agency and was expected to seek future contracts. The contracts were in a highly competitive area. In reviewing the video script, the Commission found that it was a promotional/marketing tool for the firm, and statements to be made by the agency head served little, if any, public purpose. The Commission found that appearance in the video might be seen by competitors and/or the public as an endorsement of that firm. While the agency said it was willing to appear in videos for all competitors, the Commission found that was not a viable solution because some firms might not have the capacity to engage in such marketing efforts. Further, because the individual participated in reviewing the contract applications, there could be a perception that the individual's judgment was impaired or that preferential treatment would result. The Commission held that the individual could not appear in the video.

**95-27 – Personal or Private Interest – Contracting w/Relative's Firm:** A State employee asked whether it would violate the Code of Conduct if his agency contracted with a private enterprise which employed his son. Documentation and testimony revealed that the private enterprise was awarded the contract after public notice, competitive response, objective evaluation, and interviews conducted by a team composed of members from the State employee's agency and another agency. The employee was not involved in any of those matters, did not select the team, was not a member of the team, and was not part of the selection process. Further, the son worked in a department of the private enterprise that would not be involved in the State project. The State employee would not review or sign any contracts, invoices, change orders, etc., on the project involving the private enterprise. Such decisions would be made by persons not directly supervised by the employee. With those limitations on the State employee's actions, the Commission found it would not violate the Code for the agency to contract with the private enterprise.

**95-24 – Personal or Private Interest—Board Membership:** State duties required an employee to review responses to Requests for Proposals (RFPs). A private enterprise, on which the employee served on the Board of Director's submitted a response for review. The private enterprise had not told the employee it intended to submit such response and the employee had not, as a Board member, been asked for information about how to prepare the response, nor as a Board member had the employee reviewed the response before it was sent to the State. The individual alerted a supervisor and declined to review the response before seeking a decision from the Commission on what action, if any, should be taken relative to the matter.

The Code prohibits employees from participating in the review or disposition of matters

before the State where there is a personal or private interest that tends to impair independence of judgment. 29 Del. C. § 5805(a). One interest which tends to impair judgment is where the person has a financial interest in a private enterprise which could be affected by action or inaction on matters before the State. 29 Del. C. § 5805(a)(2). While the employee received no compensation from the private enterprise and no determination had been made by the private enterprise regarding any ownership interest by the employee, the private enterprise would benefit financially if selected to fulfill the contract. The Commission held that the employee's review of the response could violate the prohibition against reviewing such matters or, at a minimum, could create an appearance of impropriety which is prohibited by 29 Del. C. § 5806(a).

**95-20 – Personal or Private Interest – Retaining an Attorney:** A State regulatory commission asked whether its members would be in violation of the Code of Conduct if they contracted with a private firm to provide legal counsel when that firm also would represent private clients before the same regulatory agency. "State employee" includes "an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such services in a calendar year." 29 Del. C. § 5804(11)(a)(2). Members of the agency were appointed, and each received more than \$5,000 annually. Thus, they were subject to the Code of Conduct.

The applicable provisions in the situation were: (1) Pursuing a course of conduct which would raise suspicion among the public that he was engaging in acts in violation of the public trust and which would not reflect favorably on the State and its government. 29 Del. C. § 5806(a); and (2) Disclosing confidential information. 29 Del. C. § 5806 (f) and (g).

In determining the applicability of those provisions, the Commission noted that State employees, officers or honorary officials could not represent or otherwise assist private enterprises in matters before the State agency with which they were associated by employment or appointment. 29 Del. C. § 5805 (b)(1). Contracts violating the Code of Conduct may be voidable. 29 Del. C. § 5805(g). Here, the contractor was not be subject to the Code of Conduct, but the effect would be that the agency could achieve by contract that which otherwise was not permitted. Specifically, the contractor, while working for the State, could also represent or assist their private enterprise in matters before the same agency. The risk existed that the power or discretion vested in public authority might be used to benefit a private client or that an unfair advantage could accrue to the private client by access to confidential government information about the client's adversary. *See, Midboe v. Com'n. on Ethics for Pub. Employees, La. Supr.*, 646 So.2d 351 (1994); *Howard v. Florida Com'n. on Ethics, Fla. App.*, 421 So.2d 37 (1982); *Delaware Lawyers' Rules of Professional Conduct, Rule 1.11 Comment* (lawyer representing government, whether employed or specially retained, is subject to Rules of Professional Conduct and to statutes and government regulations on conflicts of interest).

While it was presumed the attorney would not improperly use or disclose such information, there was a question of whether such access would appear improper. As a factual matter, it was not feasible to make a complete and isolated separation of the private clients from the agency representation. For example, while representing the agency, the attorney/firm could possibly establish precedent applicable to all regulated entities appearing before the agency--including the private clients. The Commission also considered the statutory purpose of the agency. The statute identified a very public purpose for the agency. In light of its statutory duties to the public, the public could well look with suspicion on an agency hiring an attorney to "work both sides of the street." The Commission concluded that for the agency and/or its

members to agree to a contract with such results would, at a minimum, create an appearance of impropriety.

**95-16 – Personal or Private Interest – Appearance of Impropriety:** A State employee managed certain State housing facilities. The employee hired a tenant from one facility for childcare. The Commission held that the arrangement violated the prohibition on engaging in acts in violation of the public trust and would not reflect favorably on the State. 29 *Del. C.* § 5806 (a) and (b). The Commission’s concern was that, at a minimum, it might appear that the tenant would receive preferential treatment from the State employee.

The Commission may grant a waiver if it determines the literal application of such prohibition in a particular case is not necessary to achieve the public purpose of the statute or would result in undue hardship on any employee, officer, honorary official or State agency. 29 *Del. C.* § 5807(a). The employee testified that she had no relatives to care for the children, the costs of childcare with other sources were prohibitive, and she could not find feasible alternative care, among other things. Agency testimony was that the employee’s responsibilities involving the exercise of discretion regarding this tenant could be given to the employee’s supervisor or another agency official. With that restriction, the Commission granted a waiver.

**95-12 - Personal or Private Interest—Nepotism:** Complainant alleged that a State employee directly hired close relatives to work in the same agency in both a Merit position and a temporary position. Upon investigation of the allegation of hiring into the Merit position, the Commission found the hiring was conducted pursuant to competitive hiring requirements governing the hiring of Merit employees. See, 29 *Del. C.* § 5901, et. seq. The position was publicly announced. Applicants were tested and ranked by test scores by agencies other than the hiring agency. See, 29 *Del. C.* §§ 5917 and 5919. The list of eligible candidates was forwarded to the hiring agency for interviews. Appointment of persons on the list was of persons “standing among the highest 5 or highest 15%, whichever is the greater number.” 29 *Del. C.* § 5921. The top six candidates were contacted for interviews but had either accepted other jobs or did not respond to calls to schedule interviews. The next four top ranking people included the State employee’s close relative. All four were interviewed by individuals other than the person charged with violating the Code. The agency was not required to interview more than one person on the list. 29 *Del. C.* § 5921. The documentary evidence also showed that of the remaining candidates, two were interviewed (one was selected for another position in the agency), two did not respond to calls for interviews, and the last three on the list were not contacted. The reason for non-selection was documented, even though by law, the employing agency cannot be required to give a reason for non-selection unless all applicants are rejected. 29 *Del. C.* § 5921.

The individual charged did not have any decision-making authority in the announcement of the position, the testing of candidates, the selection of candidates to be interviewed, and the actual interviews. Also, the person charged was not physically located in the same office, could not observe the relative’s work habits and skills limiting any input on the relative’s evaluation, did not supervise the relative, and was precluded by the agency from participating in matters relating to the relative’s evaluation or any grievances regarding the relative’s employment if they arose.

Regarding the hiring of a close relative in a casual/seasonal position, the agency’s procedure was for its personnel staff to rank persons to ensure they were qualified prior to being

hired. The individual charged was not involved in the ranking and the ranking was conducted by a separate division within the agency. The individual did not make the hiring selection. The Commission found no violation because the individual did not participate in the “review or disposition” of the hiring of close relatives and would not “review or dispose” of their evaluations, grievances, etc.

**94-16 – Personal or Private Interest – Grants:** The Commission granted a limited waiver to an appointee on the Criminal Justice Council, to complete a grant application for SODAT-Delaware, Inc., for which she was contracted. Prior to being appointed to the Criminal Justice Council, the appointee had contracted to complete four applications. She had completed three and was working on the fourth at the time of her appointment. The waiver was limited to the completion of the fourth application. The waiver was granted because it would be an undue hardship on the appointee if she were required to break the contract and it would be an undue hardship on the organization to find a new contractor at that stage.

**94-13 – Personal or Private Interest – Starting a Business:** State employees asked if a conflict would exist if they started a private enterprise, while employed by a State agency. No State employee, officer or honorary official shall have any interest in any private enterprise, nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No employee, officer, or honorary official shall accept other employment, any compensation where such acceptance may result in: (1) impairment of independence of judgment in the exercise of official duties; (2) giving preferential treatment to any person; (3) making government decisions outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 *Del. C.* § 5806(b). The Commission concluded the proposed endeavor would conflict with their agency duties because the proposal entailed technical assistance to private enterprises in areas evaluated by the employees in their State jobs. No facts were presented to justify a waiver under 29 *Del. C.* § 5807(a).

**93-19 – Personal or Private Interest – Dual Positions:** A State officer was asked to represent the State on a consortium of health care providers. The consortium was funded in part by a State commission to which the officer was appointed. He sought a decision of whether serving on the consortium conflicted with either his State position or his State appointment. He stated he would abstain from voting on consortium contracts that dealt with his agency or the commission on which he served. The Commission found no violation as long as he recused himself from matters that could create a conflict of interest or that could create a perception of such conflict. He was advised to bring any specific matters that arose to the Commission for an advisory opinion.

**93-16 - Personal or Private Interest – Dual Positions:** A division director in a regulatory agency also served on a board which consisted of appointees from local and State government and other persons who were elected to the board. The board was responsible for overseeing facilities’ management of a public facility. Vendors for the facility were licensed and regulated by the division director’s State agency but had no dealings with the board on which he served. He requested a determination of whether serving on the board created a conflict of interest. The Commission held that the director could serve in the dual capacity as long as he recused himself from any action with his agency whenever an application was made by a licensee in

connection with the facility which the board managed.

**93-14 – Personal or Private Interest – Renting to Employee:** A State officer asked whether it would be an ethical violation for him to rent an apartment to a State employee. The employee was not assigned to his agency and did not report to the officer or anyone in his agency. She performed reception work for a suite of offices that the State officer used about three days a week. The offices were occupied full time by the individual to whom the employee reported. The employee served as the receptionist to all users of the suite and was available to do secretarial work for all persons in the office. The employee was looking for a temporary rental while she purchased a home. The officer had a condominium for rent. The Commission found no violation as he was not incurring any obligation “in substantial conflict” with performing his official duties. 29 *Del. C.* § 5806(b).

**93-12 – Personal or Private Interest – Appointment:** An individual was appointed to serve on a regulatory agency but did not wish to execute the appointment until there was a determination that his financial holdings did not create a conflict of interest. In accepting the appointment, the individual would receive more than \$5,000 compensation per year. The Code of Conduct defines such persons as “State employees.” *See*, 29 *Del. C.* § 5804(11)(a)(2). The Code 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 a disclosure statement. 29 *Del. C.* § 5806(d). The disclosure from the employee revealed that he was the president and majority stockholder in two corporations. Neither corporation was subject to the regulatory jurisdiction of, nor did they do business with, any State agency. However, the corporations had contracts with a company which was regulated by the agency to which the individual was appointed. The individual disclosed that the corporations would not, in the future seek contract work with any company regulated by the agency to which he was appointed. However, the corporations, to avoid defaulting on the existing contracts, needed to complete the projects with the company regulated by the agency. The work was not a significant part of the corporations’ business and the work was in its final phase.

The Code also prohibits employees from acquiring financial interests in a private enterprise directly affected by decisions to be made by them. 29 *Del. C.* § 5806(c). It also prohibits employees from having an interest in any private enterprise which is in substantial conflict with the proper performance of public duties. 29 *Del. C.* § 5806(b). The Commission found that neither of these provisions was implicated because the corporations were not affected by the regulatory agency; did not directly or indirectly benefit from any decisions made by the regulatory agency; and had insignificant business with a regulated company.

The Commission also found that performing responsibilities for the regulatory agency would not create an appearance of impropriety, which is addressed by 29 *Del. C.* § 5806(a), § 5806(b)(4) and § 5811(2). It found that not only were the businesses not regulated by his agency; that the contracts were inconsequential to agency action; that the contracts were almost completed and no further contracts would be pursued, but that the individual had initiated the request for an opinion and filed a disclosure statement on his own and had initiated discussion and disclosed these facts during Senate confirmation hearings.

**93-10 – Personal or Private Interest – Local Government:** Complainant alleged that a local government official, in a legislative capacity, prepared a revised ordinance and submitted it to

the town's Board of Commissioners. Complainant alleged that the official violated the Code of Conduct by reviewing and disposing of matters where there was a personal and private interest which tended to impair judgment in official decisions. 29 *Del. C.* § 5805(a). Complainant also alleged that the official had worked, not only with the town's attorney, but with unidentified citizens in preparing the revised ordinance. Upon request for identification of these individuals at a public meeting, the official refused to identify such persons, which complainant believed violated the Freedom of Information Act. See, 29 *Del. C.* § 10001, et. seq.

The Commission found no substantiation of the allegation that there was an attempt to pass the proposed revision without proper notice and an opportunity for opponents to be heard. The draft legislation had been made public. The Commission noted that officials are entitled to draft proposed legislation and can be assisted by a government attorney and other employees hired by the legislative body. It found that legislators are not prohibited from being assisted by unidentified private citizens in drafting proposed legislation under the Code of Conduct provisions. There were no facts to support the allegation that the official had any personal or private interest in the matter. To the extent the activities violated the Freedom of Information Act (FOIA), that was not a matter for the Commission, as its jurisdiction is limited to the Code of Conduct. Enforcement of FOIA is within the Attorney General's jurisdiction. 29 *Del. C.* § 10005.

**93-08 – Personal or Private Interest – Municipal Officials:** Complainant alleged that municipal officials improperly voted on a matter where they had a financial interest. Effective January 23, 1993, the Code of Conduct applied to local governments if they had not adopted a code at least as stringent as the State Code. 68 *Del. Laws* § 1, c. 433. The Code prohibits officials from participating in the review or disposition of matters where there is a personal or private interest which tends to impair a person's independence of judgment in the performance of duties. 29 *Del. C.* § 5805(a)(1). A person has an interest which tends to impair judgment if action or inaction would result in a financial benefit to the person to a greater extent than such benefit would accrue to others of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(b).

The "action" was a vote to impose a moratorium on a certain matter due to weather related reasons so that there could be a discussion at the next public meeting. There were no facts alleged showing that the vote resulted in any financial benefit to the town officials charged, and no prejudice accrued to any party. Accordingly, the complaint was dismissed.

**93-06 – Personal or Private Interest – Spouse's Business:** An individual seeking State employment was requested by the agency for which he intended to work, to seek a determination of whether his spouse's operation of a private enterprise created a conflict of interest. The individual would be working in an area dealing with transportation and his spouse owned and operated a company that provided certain transportation services. While the spouse had to obtain a business license and the necessary permits for her company from the State, the company was not otherwise regulated by the State and did not contract with the department to which he had applied for a job or with any State agency. The individual seeking State employment did not have any direct involvement in the company's operation, decision making or direction; did not own stock in the corporation; and was not an officer or director of the corporation. If he were hired by the State, he would not be involved in any decisions in his official capacity regarding his spouse's business interest.

The Code prohibits employees from reviewing or disposing of matters before the State where there is a personal or private interest. 29 *Del. C.* § 5805(a). It also prohibits employees from acquiring a financial interest in a private enterprise where he has reason to believe it may be directly involved in decisions to be made by him in his official capacity. 29 *Del. C.* § 5806(c).

The Commission found no violation of the Code of Conduct under these circumstances.

**Note:** No State employee, officer or honorary official shall acquire a financial interest in any private enterprise which he has reason to believe may be directly involved in decisions to be made by him in an official capacity on behalf of the State. 29 *Del. C.* § 5806(c). Any State employer or officer who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency (and any honorary State official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee) shall file with the Commission a written statement fully disclosing the same. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the State. 29 *Del. C.* § 5806(d).

**93-05 – Personal or Private Interest – Honorary Official:** An individual served as an honorary State official on a State Board. “Honorary State officials” are persons who serve as appointed members, trustees, directors or the like of any State agency and receive not more than \$5,000 per calendar year in compensation. 29 *Del. C.* § 5804(13). The official was subsequently hired as the director of a State agency. He requested a determination of whether holding these concurrent positions created a conflict of interest. None of his decisions as an Honorary State official would have any effect on the State agency for which he worked. None of his activities for the State agency had any effect on the commission to which he was appointed. He advised the State Ethics Commission that he would decline any payment of expenses or the \$75 stipend he would normally receive from the position to which he was appointed. The Commission found no violation of the Code of Conduct.

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

**93-03 – Personal or Private Interest – Spouse Employment:** A State officer notified the Commission that in his official position he reviewed and approved contracts for services for his Department. A private enterprise which contracted with his Department employed his spouse. He noted that her employment represented a financial interest on his part and his review of such contract might appear improper. See, 29 *Del. C.* § 5806(a). He delegated his authority to review such contracts to another individual in the agency.

The Code prohibits officers from reviewing or disposing of matters where there is a personal or private interest that tends to impair judgment. 29 *Del. C.* § 5805(a). The Code specifically identifies as an interest which “tends to impair judgment,” one where the individual reviews or disposes of matters where action or inaction would result in a financial benefit to the person or close relative to a greater extent than would occur for others who are in the same class or group. 29 *Del. C.* § 5805(a)(2)(a). A “close relative” means “a person’s parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.” 29 *Del. C.* §

5804 (1). Where there is such an interest, the person can delegate such authority. However, if the responsibility cannot be delegated, the individual must fully disclose to the Commission why the matter cannot be delegated. 29 *Del. C.* § 5805(a)(3). The Commission found the delegation to be appropriate.

**92-05 – Personal or Private Interest - Connection with Civic Association:** Two individuals were members of a regulatory agency which reviewed the licensure status of businesses. The individuals were both members of a civic association which was active in matters pertaining to certain types of businesses which were regulated by the agency. A request was made for a determination of whether it would be a conflict of interest for the two individuals to participate in the review of the licensure status of those particular businesses. The Commission concluded it would violate 29 *Del. C.* § 5805(a), which prohibits the review or disposition of matters pending before the State where there is a personal or private interest that tends to impair independence of judgment in performing duties with respect to that matter. It also concluded that their involvement in the review would violate 29 *Del. C.* § 5806, which prohibits conduct that would have an adverse effect on the public's confidence in the government.

The Commission noted that its holding was without prejudice to the possible applicability of 29 *Del. C.* § 5805(a)(3), which provides that where a person has a statutory responsibility where he has a personal or private interest and the matter cannot be delegated, that the person may exercise responsibility with respect to that matter if they promptly notify the Commission and fully disclose the personal or private interest and explain why the responsibility cannot be delegated.

**92-04 – Personal or Private Interest - Financial Interest of Spouse:** A State employee, who was a computer specialist, was tasked with requesting bids by phone or fax, when small items were needed in an emergency. The sealed bids or telephone responses were to be handled by other office personnel and then a committee of three decided who would be awarded the job. The State employee's spouse owned a computer firm. The agency asked if purchase of services from the spouse's company would implicate any provisions of the Code of Conduct. The Commission concluded that any involvement of the employee in purchases from the spouse's company would violate 29 *Del. C.* § 5806(a), which prohibits conduct that would raise suspicion by the public that the public trust was violated.

**91-19 – Personal or Private Interest - Expert Witness:** A State employee wished to pursue outside employment as an expert witness in an area related to his State employment and his professional training. The Code prohibits State employees, officers or honorary officials from accepting other employment or compensation under circumstances where such acceptance may result in: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give preferential treatment to any person; (3) making governmental decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State. 29 *Del. C.* § 5806(b).

Witness testimony revealed that if the employee became an outside expert, his courtroom appearance could result in testimony on his own work for the State or the work of the agency. The employee stated he agreed with the agency "a hundred percent" that there would be a conflict if he testified as a private consultant on jobs he worked on for the State. He said he would refrain from testifying in such instances. He suggested he could provide the expertise

to similar agencies in States surrounding Delaware, rather than in Delaware. However, the agency said it had joint projects with those States and that to have a high-level manager from the Delaware agency providing comments and guidance to another state's agency for a fee could "prove difficult" in terms of working relationships with those States. The employee said the reason he wanted to become an expert was so he could get experience before he retired and could then pursue that career after retirement. The agency said it could provide the employee with some experience by having him as a witness for the State on certain matters, which would provide him with experience without going to the private sector.

The Commission concluded that if the employee testified in a private capacity, while employed by the State, his State position would be a topic of testimony. It was the Commission's opinion that this would reflect unfavorably on the employee's position of holding the public trust, and therefore would violate the Code.

**91-13 – Personal or Private Interest - Representation of Private Enterprise:** State officers are prohibited from representing or otherwise assisting any private enterprise with respect to matters before the State. 29 *Del. C.* § 5805(b)(2). A Public Service Commissioner requested a waiver from this restriction so he could represent his full-time employer, an insurance company, in matters before the Delaware Insurance Office. Waivers can be granted if the literal application of the prohibition in a particular case is not necessary to achieve the public purpose of the Code or would result in undue hardship to any State employee, officer or agency. 29 *Del. C.* § 5807(a). The Commission granted a waiver because the Public Service Commission (PSC) did not regulate insurance companies; had no relationship with the Delaware Insurance Office; and membership on the PSC could not result in undue influence on the Insurance Office.

**NOTE:** The law provides that employees, officers or honorary officials may not represent or assist private enterprises with respect to matters pending before the agency with which the employee, officer or official is associated by employment or appointment. 29 *Del. C.* § 5805(b)(1). For officers, the statute goes further and states that officers may not represent or assist private enterprises with respect to any matter before the State. 29 *Del. C.* § 5805 (b)(2). The Code defines "employees" as including persons appointed to a State agency, who receive or expect to receive more than \$5,000 per year in compensation. 29 *Del. C.* § 5804 (11)(a)(2). "Officers" are persons required to file a financial disclosure form, except members of the General Assembly and the Judiciary are not included in the term. 29 *Del. C.* § 5804 (12). The PSC Commissioner was appointed by the Governor and, by law, received more than \$5,000 per year in compensation. 26 *Del. C.* §§ 103, 105, and 110. Thus, he would be considered a State employee, not an officer, and the Commission could have alternatively ruled that no waiver was required as the PSC Commissioner was not representing a private enterprise before the agency with which he was associated with by appointment.

**91-12 – Personal or Private Interest - Consulting Work:** Prior to establishment of the Commission in 1991, a State employee was part owner of a consulting firm which engaged in work that included some matters reviewed by the employee's State agency. The employee did not participate in the review, but the State employee sitting next to him conducted the review. After the Commission was created, the employee did not engage in outside work that was reviewed by his office. He sought a decision on whether the outside consulting work would violate the requirement that no State employee may represent or otherwise assist any private enterprise with respect to any matter before the State agency with which the employee is

associated by employment or appointment. 29 Del. C. § 5805 (b)(1). His agency expressed concern that even if the employee recused himself from the review, there would be an appearance of conflict because of the small size of the office. The agency stated that the small office size also created problems in making assignments to avoid a conflict. It also noted that private enterprises, over the years, had complained of unfair competition when a State employee engaged in this technical work and that from time to time there was a perception that the State employee might receive preferential treatment during the review process by a co-worker. The Code prohibits conduct that raises an appearance of impropriety. 29 Del. C. § 5806(a) and (b)(4). The Commission held that the employee could not participate in the outside consulting business.

**91-03, 91-04, 91-06 – Personal or Private Interest - Financial Disclosure:** Regulatory board members filed disclosures with the Commission that they were involved in the operation of a facility regulated by the board on which they served. The board members were honorary State officials and as such were required by law to disclose financial interests in private enterprises which are subject to the regulatory jurisdiction of, or did business with, the agency on which they served as an appointee. 29 Del. C. § 5806(d). Such filings are confidential except as may be necessary to enforce the Code of Conduct. *Id.* The filing is a condition of commencing and continuing appointed status with the State. *Id.*