

FINANCIAL DISCLOSURE SYNOPSES

1995-2019

Gifts, Reimbursements and Scholarships

Scholarships—Commission Op. 96-40:

Several State officials attended a national legislative organization's conference. The State of Delaware is a dues paying member of the organization, which fosters communications and cooperation between the States on matters such as policy issues, legislation, etc. It also represents States' positions to the federal government on responsibilities and programs. The national organization has a Board of Directors which raises funds to support the organization's objectives and programs; it sponsors studies, deliberations and publications to provide data on state trends and current developments, etc.

One State official who attended was an officer of the organization's Board of Directors. The organization pays the Board members' costs of travel, hotel, etc., to encourage them to participate in the organization's efforts throughout the year without the State bearing the costs. The payments were made directly to the hotel, travel, etc., vendors on the individual's behalf.

Board members must perform specific duties as detailed in the organizational by-laws, including attending, participating in, and/or presiding over organizational meetings and seminars. They also participate in numerous planning activities. They are expected to perform substantial duties at the meetings, leaving little free time, and are expected to serve as host at social events. They also must be available to talk about issues during sessions and at other times; lobby federal bodies; visit other States to discuss policies, programs and legislation; file amicus briefs; confer with federal government officials, etc. The individual stated that he had, in fact, actively participated in performing these duties.

Other Delaware officials were attendees at the conference and payment of their expenses was reimbursed by the State through the Interstate Cooperation commission.

Reimbursement of Expenses v. Direct Payment

Under the financial disclosure statute, "payments" are part of the definition of both gifts and reimbursements. "Gift" means a "payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received." 29 Del. C. § 5812(o). "Reimbursement for expenditures" means "any payments to a public officer for expenses incurred by that officer. 29 Del. C. § 5812(1). The common and ordinary meaning of "payment" is "the act of paying; something that is paid," and "pay" means "to make a disposal or transfer of money." *Merriam Webster's Collegiate Dictionary*, pp. 853-854 (10th ed. 1994). The organization's policy to cover the expenses of Board members to conduct business falls within the term "payment." However, unlike reimbursements where the "payments" are "to a public officer for expenses incurred by that public officer," the payment for

the Board member was made directly to the vendors for travel, hotel, etc. Thus, the Commission viewed payment of the Board member's expenses as a "gift." Under the "gift" definition, "payments" are not reported if consideration of equal or greater value is given.

"Consideration" generally means that something is given in exchange. *Merriam Webster's Collegiate Dictionary*, p. 245 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); *See also. 17A Am. Jur. 2d Contracts §§ 113 and 114.*

Here, the exchange was that the individual performed substantial duties in his capacity as a Board member and in return the organization paid certain identified expenses related to performing those duties.

The Commission found "consideration," because the payment was made in exchange for performing official duties. Further, in this instance, the Commission found that the actual performance of those duties was consideration equal to or greater than the payment of the expenses. Therefore, the individual need not report the paid expenses under the "gift" section.

For those public officers who were attendees and were reimbursed, the Commission noted that they must report "any reimbursement for expenditures exceeding \$1,000 from a single source." 29 Del. C. § 5813(a)(4)(c).

This Commission has held that the term "any," which the statute does not define, "must be construed according to the common and approved usage of the English language." (*Commission Op. No. 95-06*) (*citing* 1 Del. § 303). It held that "any" includes "every - used to indicate selection without restriction" and "all - used to indicate a maximum or whole." *Id.* (*citing Webster's Seventh New Collegiate Dictionary*, p. 40 (1967)). In that decision the Commission concluded that "the term [any] encompasses reimbursements not only from outside sources but also from State agencies." *Id.* As the language does not restrict "any," by including exemptions the reimbursement is reportable if the amount exceeds \$1,000 from a single source.

This ruling may appear to create an anomaly in that persons who attend the same meeting may end up with different reporting requirements, even though both "gifts" and "reimbursement of expenses" include "payments" within their definitions. Specifically, the direct payment to vendors for the Board member were viewed as a gift, requiring he report the payment if the value were greater than \$250, if there were no consideration. Thus, if the trip were more than \$250 and less than \$1,000, he would report it but the reimbursed attendees would not have to report because the value would not meet the threshold amount for reporting reimbursements. However, in this instance, there was sufficient consideration to remove the payment from being a "gift," and the Board member does not have to report it regardless of value, but the other attendees would have to report reimbursements from the State if the amount exceeded \$1,000. Despite the facial appearance of an anomaly, the different definitions require different results.

Tickets to a Charitable Event--Commission Op. Nos. 96-07 & 96-33:

A public officer was asked, because of his public position, to participate in a charitable athletic event at no cost to him. The value of being able to participate was approximately \$2,000. Some public officers attended an out-of-state conference which was paid for by a number of entities. The primary sponsor was known to the public officers but not all contributors

were known. Although the total cost exceeded \$250, if the costs were split by the entities, none would have paid more than \$250. Are these matters to be reported, and if so, how?

The financial disclosure law requires that persons report: "The source of each of the following items ... Any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of each such gift. For purposes of compliance, the recipient may rely in good faith upon the representation of the source of the gift as to the gift's value. 29 Del. C. § 5813(a)(4)(e) (emphasis added).

The first issue is whether the term "source" is limited to a single entity or encompasses multiple entities. The code does not define source. This Commission has previously followed the Delaware rules of statutory construction which require that "words and phrases shall be read within their context and shall be construed according to the common and approved usage of the English language." 1 Del. C. § 303. The common meaning of "source" is "a generative force: cause"; "a point of origin or procurement: beginning" "one that initiates"; "origin." Merriam Webster's Collegiate Dictionary, p. 1123-24 (10th ed. 1994). While both the language in the statute and the language in the dictionary appear to be phrased in the "singular," the Delaware rules of construction provide that words used in the singular include the plural and the plural includes the singular. 1 Del. C. § 304; See. *State v. Minnick*, 168 A.2d 93 (Del. Super. 1960); *State v. Caruso*, 32 A.2d 771 (Del. Gen. Sess. 1942); *Application of Pepper*, 54 A.2d 173 (Del. Gen. Sess., 1947).

Additionally, in other instances in the financial disclosure law, the legislature has had no problem making it clear when it wishes to refer to "a single source." See, e.g., 29 Del. C. § 5812 (income means "income from a single source"); 29 Del. C. § 5813(a)(4)(a) (income from a "single source"); 29 Del. C. § 5813(a)(4)(b) (capital gain from a "single source"); 29 Del. C. § 5813(a)(4)(c) (reimbursement from a "single source"). Had the General Assembly meant for the "source" of gifts to be limited to a "single source," it could have used such term. See *General Motors v. JAB*, 545 A.2d 1186, 1191 (Del. 1988) (where a provision is expressly included in one section of a statute, but omitted from another, it is reasonable to assume the legislature was aware of the omission and intended it.) Also, the statute requires reporting of the source of gifts received from any "person." Within Chapter 58, "person" means "an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities." See, 29 Del. C. § 5804(6); See also, 1 Del. C. § 302(16) (in construing all statutes, "person" includes individuals, corporations, etc.). Thus, in the context of gifts, it appears clear that "source" and "person" can include more than one entity. The next issue is whether "value" is based on the amount paid by each single entity or based on the aggregate amount. The Code provides that "any gift with a value in excess of \$250" is to be reported. 29 Del. C. § 5813(a)(4)(e). As indicated above, words and phrases are to be read "in their context." 1 Del. C. § 303. Read within its context, it is the value of the "gift" itself, not how it was paid for, that is to be reported because the "gift" has the same value whether it is paid for by one person or many. Such interpretation is consistent with the legislative purpose of disclosure. The legislature, in enacting the financial disclosure law, found that:

"[P]ersons serving in State government hold positions of public trust which require rigorous adherence to the highest standards of honesty, integrity and impartiality. In order to ensure propriety and preserve public trust, a public official or employee should refrain from acting in his official capacity on any matter wherein he has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment, and avoid even the appearance of impropriety. A disclosure of the personal financial interests of public officials will serve to guard

against conduct violative of this public trust and to restore the public's faith and confidence in representatives of its government." 29 Del. C. § 5811.

If a gift were not reported because more than one entity paid for the gift, but the gift had a value that might on the face of it "reasonably be expected to impair objectivity," or if a gift could be accepted and not reported because entities split the costs, the public might well question the point of having a disclosure law because gifts that might appear improper or impact on objectivity could conceivably never be disclosed under such circumstances. It is unlikely that such interpretation would "restore the public's faith and confidence in representatives of its government."

The Commission was asked if the receiver of the gift is required to report gifts when the identity of the givers is not known. For example, in the out-of-state conference situation, one sponsor made it known to the public officers that it, and other unidentified sponsors, paid for the trip. Should the recipient attempt to track down all sponsors who contributed?

As indicated above, the legislative concern was that the government official should not act on matters if there is a direct or indirect personal financial interest. 29 Del. C. § 5811. Obviously, if the individual does not know who gave the gift, any personal interest would not impair judgment and it could not result in a decision in favor of the gift giver. However, assuming the individual did not know the identity of all who participated in the gift, "to avoid even the appearance of impropriety," under 29 Del. C. § 5811, the gift's value should be reported with a notation that the giver is unknown. If less than all entities are known, the entities known should be disclosed and it should be noted if unidentified entities contributed. Thus, in the out of state conference situation, the known sponsor should be identified and it should be noted that there were other unknown entities who contributed. The Commission said it did not believe the recipient must conduct personal investigations to determine the identity of all contributors.

The next issue is another determination of the meaning of "value." The situation given pertains to a charitable athletic event such as the McDonald's Open, where a public official may be invited to appear and play golf. The first question is whether the recipient should base the value on the fair market value of being able to play golf at that time and place or whether the value is the amount raised per participant and donated to charity. The Code states that the individual is entitled to rely in good faith on the representation by the source as to the gift's value. 29 Del. C. § 5813(a)(4)(e). The Code does not define "value."

The rules of statutory construction require that the plain and ordinary meaning of words should be used. 1 Del. C. § 303. "Value" means "a fair return or equivalent in goods, services, or money for something exchanged; the monetary worth of something: marketable price; relative worth, utility or importance." *Merriam Webster's Collegiate Dictionary*, p.1305 (10th ed. 1994). Based on the ordinary meaning, the Commission concludes that "value," under the financial disclosure law, means "marketable price or relative worth." It would be the value paid. Accordingly, the value of the golf event would be what one would have to pay or contribute to participate in the same event. Thus, the full price of a ticket to play in the Pro-Am portion of the McDonald's golf event is its value, not what one would normally pay in green's fees to play at that course.

An item is not a gift if "consideration of equal or greater value is given." 29 Del. C. § 5813(a)(4)(e). The question is whether the public officer's time attending such charity event, is the requisite "consideration." The same question applies to the conference: is attendance by

General Assembly members and Executive Branch officials the requisite consideration?

"Consideration" generally means that something is given in exchange. *17A Am. Jur. 2d Contracts §§ 113 and 114*. It means "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or consideration by the other, as an act of forbearance or the creation, modification, or destruction of a legal relation; or a return promise bargained for and given in exchange for the promise." *17 Am. Jur. 2d Contracts § 85*. Regarding the golfing event, while the Commission appreciates that it is helpful to charities to have political or other "named" personages on hand, it is also an enjoyable, non-governmental activity for the legislator. Without more, there is not "consideration of equal or greater value."

Regarding the conference, the agenda showed that while there were some meetings, they appeared to be incidental compared to the majority of time which was not devoted to business. While attending the short meetings was "some" consideration, it was not equal to or greater than the value of the gift.

Conclusion

In summary, the conference trip's value exceeded \$250. The fact it was paid for by several sources who each contributed less than \$250 does not mean it should not be reported, as it is the value of the gift that is reported. As for reporting the "source," the individual must report known sources and note the lack of identity of other sources. If they become known, their identity should be reported. And as there was insufficient consideration to remove the trip from the definition of gift, the trip should be reported. Regarding the golfing event, assuming the cost to participate in the event would be \$2,000, the value exceeds \$250 and would be reported, as there was no consideration of equal or greater value given.

Payment of Expenses by National Organization--Commission Op. 97-07:

An Executive Branch official traveled out of the country for meetings on national and international policies in his area of expertise. His 48-hour trip was paid for by a national association of which the State is a dues-paying member. He had no decision-making authority over the association.

The purpose of the trip was to share information on different approaches to issues in his field. The trip was held overseas because the issues were on-going, and it was expected that there would be additional meetings, with some occurring overseas and some in the United States, in order to equalize the burden of costs and travel.

The individual was tasked with participating in discussion groups on the Executive Branch's roles in formulating and implementing policy in the area of concern. Additionally, he was asked to give the international group a detailed explanation of the federal/state relationship in the United States with respect to the matters, and subsequently participate in the preparation of a report on the proceedings. The association which paid for his trip made direct payments to the vendors, e.g., hotels, air carriers, etc.

He sought a decision on how the direct payments would be treated under the financial disclosure statute. Additionally, under Executive Orders 5 and 19 [these Executive Orders have been repealed and that portion of the opinion has been removed], the Commission was required

to determine if accepting the payment of expenses raised any ethical issues as the value exceeded \$250.

The financial disclosure statute provides that "gifts" of more than \$250 are to be reported. 29 Del. C. § 5813(a)(4)(e). "Gift" is defined to include "payment." 29 Del. C. § 5812(o). However, a payment is not a gift, and therefore not reported, if "consideration of equal or greater value" is given. 29 Del. C. § 5812(o). "Consideration" generally means that something is given in exchange. *Merriam Webster's Collegiate Dictionary*. p. 245 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); *See also. 17A Am. Jur. 2d Contracts §§ 113 and 114.*

The Commission found that because of his obligation to the association to not only participate in the group discussions, but to give a detailed explanation of the federal/state relationship on the issues, and participate in preparing the report, that his participation during the 48-hour trip (including air time) was at least equal to the value received and therefore not to be reported as a "gift."

The Commission is charged with deciding if acceptance raises any ethical issues. Under the Code of Conduct, restrictions are placed on the receipt of gifts, payment of expenses, etc., if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside of 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).

As the individual had no decision-making authority over the source of the payment he would have no occasion to render any kind of judgment or make official decisions regarding them, thus he would not be in a position to have his judgment impaired or give them preferential treatment. Additionally, most of his time was spent either in flight or in the meetings; and the meetings related to performing his State position. Accordingly, the Commission found no ethical issues were raised.

Payment by Non-Profit Organization--Commission Op. 97-01:

A non-profit organization which received State and federal funding, and some private funding, paid the expenses for a trip out of the country for public officers. The organization was subsequently reimbursed, in part, by a foreign entity's fund. No State or federal funds were used for payment of the trip. Public officers on the trip had some decision-making authority over the State funding of the organization. One of the attendees sought a decision on how the payment should be reported.

The request raised issues not previously addressed by this Commission, such as how a non-profit corporation which receives some State and federal funds is viewed under the statute and how "source" and "value" are determined and reported when a non-profit entity makes direct payments to vendors, and is later reimbursed by a foreign grant program. Accordingly, the Commission addressed those issues at length, and concluded that the payments were to be reported as a "gift" for the reasons given below.

Public officers are to annually report "payments" if they are a "reimbursement of expenditures" or a "gift." 29 Del. C. § 5813(a)(4)(c) and (e). Both "reimbursements" and "gift"

include "payment" in their definitions. 29 Del. C. § 5812(1) and (o). This Commission has previously noted that including "payment" in both definitions can create anomalies. See, *Commission Op. No. 96-40*. Here, a non-profit entity made direct payments to vendors then was partially reimbursed through a grant. Thus, the Commission first addressed whether the payments were a "reimbursement."

"Reimbursement of expenditures" means "any payments to a public officer for expenses incurred by that public officer." 29 Del. C. § 5812(7). Generally, words and phrases which have a meaning in law are to be construed and understood according to such meaning. 1 Del. C. § 303. Such definitions are usually binding. See, *1A Sutherland Stat. Constr. § 20.08* (5th ed. 1992) ("when the legislature provides a definition for a term, it is that definition to which a person should conform his conduct"; "when a legislature defines the language it uses, its definition is binding.") The General Assembly defined reimbursement as "payments to a public officer for expenses incurred by that public officer." To give meaning to that phrase, as distinct and separate from the meaning of payments under "gift," the Commission interpreted "reimbursement payments" to literally require re-payment to the public officer." This is as opposed to "payments" under "gift" which would encompass direct payments to vendors, etc.

Here, the non-profit corporation paid the expenses for airfare, lodging, etc., directly to the vendors. The public officer did not make payments and seek reimbursement. Rather, the non-profit sought partial reimbursement from a foreign entity through a grant. As the non-profit, rather than the public officer, received the reimbursement, the manner in which the non-profit paid the costs on the officer's behalf would not be a "reimbursement."

Definition of 'Person'

The Commission next considered whether the non-profit payment is to be reported as a "gift." Public officers must report "any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of such gift." 29 Del. C. § 5813(a)(4)(e). A "gift" is "a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received." 29 Del. C. § 5812(o).

The disclosure statute does not define "person." However, the Delaware rules of statutory construction define "person" as including "corporation, companies, associations, firms, funds, partnerships, societies and joint-stock companies, as well as individuals." 1 Del. C. § 302(16). There is no distinction or exemption for non-profit or other private corporations funded in part by a government entity. Those rules also provide that in construing all statutes of this State, the definitions given therein are to be given the meanings provided unless the context requires a different meaning. 1 Del. C. § 302. In construing statutes using the word "person," it must be assumed that the General Assembly was aware of the definition in the rules of construction. *State ex rel. Milby v. Gibson*, 140 A.2d 774 (Del. Super., 1958).

With that assumption in mind, the Commission examines the disclosure statute to see if the legislature intended a different meaning for "person." To determine intent, the Commission looked first to the statutory language. See, *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991) (in deciding legislative intent, Courts look first to the statutory language). The disclosure statute, just like the Delaware Rules of Statutory Construction, 1 Del. C. § 302(16), has no distinction or exception for a non-profit or any private corporation funded in part by any government entity. Where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law.

Goldstein (citing State v. Rose, Del. Super., 132 A. 864, 876 (1926)). The Commission found nothing in the statute suggesting that "person" had a meaning other than the meaning in 1 Del. C. § 302(16). Accordingly, based on the law cited above, the Commission may not graft a distinction onto the statute, and it must conclude that the non-profit corporation is a "person" under the disclosure statute. As the non-profit corporation made the payments, the Commission did not decide if the foreign entity, which partially reimbursed the non-profit company, was a "person" under the statute.

Is the Payment a Gift?

We note first that the common meaning of "gift" is to receive something of value as a present or payment from another person which is absolute, subject to no condition, and which the receiver may do with as he or she pleases. Since the payment by the non-profit corporation of these expenses was subject to conditions, i.e., making the overseas trip for certain expressed purposes and not a thing the public officer could do with as he/she pleased, such payment would not constitute a "gift" as that term is generally understood to mean.

The statutory meaning of "gift" modifies the term "gift" as a "payment" by providing that receipt of such "payment" need not be reported even if consideration of equal or greater value is received" by the person making the payment. 29 Del. C. § 5812(o). Clearly, therefore, the legislature could not have intended that the word "gift" as used in the act should be given its common and accepted meaning, i.e., "do with as you please," because a "gift" is not a "gift" if the donee gives "consideration of equal or greater value" to the donor. Thus, we concluded that "payment" is the operative word, not "gift" as used in this section of the disclosure statute. Stated another way, receipt of a "payment... or anything of value"... " in excess of \$250" is to be reported "unless consideration of equal or greater value is received." 29 Del. C. § 5812(o) and 29 Del. C. § 5813 (e) (read together).

With this analysis in mind, it was quite clear to us that based on the facts as disclosed at the hearing, the payment of expenses by the non-profit for the overseas trip, which exceeded \$250, should be disclosed unless consideration of equal or greater value was received in return.

"Consideration" Means Giving Something in Exchange

Generally, "consideration" as used in contract law, consists of some bargained for benefit or advantage to the promisor, or some loss or detriment to the promisee. See, *Restatement (Second) of Contracts § 71; C.J.S. Contracts § 74*, p. 426. On the other hand, a mere promise, without more lacks any consideration and is unenforceable. *C.J.S. Contracts § 87*, pp. 434, 435. In more layman-like terms, "consideration" means that something is given in exchange. See, *Merriam Webster's Collegiate Dictionary*, p. 246 (10th ed. 1994). To some extent, there was a form of consideration given by the public officer in making this trip. Certainly, the public officer was under no obligation to go. Also, the daily schedule the public officer was required to keep, attending meetings, seminars and inspecting plants and businesses, left little time to spend on personal activities. In short, this trip was not a vacation junket. Still, the fundamental question which must be answered is whether there was "consideration of equal or greater value" given in return. This has not been an easy question for us to answer. However, after examining all of the facts presented to us, we have concluded that although some consideration was given, the value received by the non-profit corporation flowed to that organization from its participation in the trip through its representatives who attended, just as the public officer personally, and to some extent the State of Delaware, gained value from the trip.

"Motivation" is not "Consideration"

The purpose of the trip was for Delaware business and government leaders to learn about manufacturing extension, manufacturing networks, technology, development, and technical education efforts in Germany and Denmark and to explore with representatives of the various institutes, laboratories, etc., the opportunities for developing and enhancing similar programs in Delaware. This opportunity to learn about such developments and programs was achieved without the State incurring the costs since the trip was paid by the non-profit corporation. The disclosure statute does not exempt "gift" based on the purpose of the trip; nor is a "gift" exempt from disclosure merely because the State obtained some financial savings by not having to pay for the trip's expense. No quantified value can be said to have passed to the non-profit corporation from the public officers and the other attendees as consideration for paying these expenses. On the other hand, the value of the trip is to be found in the programs sponsored by the host countries which, in turn, were of benefit to those attending the programs.

The disclosure provision requires that the source and value of a "gift be reported if the value exceeds \$250." 29 Del. C. § 5813(a)(4)(e). "Value" is the price paid and the gift retains that value regardless of how many sources actually pay. *Commission Op. No. 96-33*. The price paid was approximately \$2,000 per person. The non-profit made the initial payment and was later reimbursed, in part, by the foreign entity's fund, which paid the larger portion of the trip.

The Commission concluded that both sources should be reported to comply with the statutory purpose. The purpose is to help insure, through disclosure, that public officers 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 independence of judgment. 29 Del. C. § 5811. The non-profit corporation does receive some State funding over which the public officer has some decision-making authority, even though there was no decision-making authority over the foreign entity's fund or over what federal funds were granted to the non-profit or how those funds are spent. This is not meant to cast doubt on the propriety of this trip or how it was funded. Indeed, it could have a beneficial effect for the State of Delaware. Rather, what we are dealing with is whether it is to be reported on the financial disclosure statement.

In considering the purposes of financial disclosure laws, courts have held that although the disclosure requirements are broad, they see no possibility of devising an objective scheme of relevant and irrelevant interests. *In re Kading*, 235 N W 2d 409, *reh'g denied*, 238 N W 2d 63 (1975). Rather, courts have held that whatever over-breadth may exist should be cured through case-by-case analysis. *County of Nevada v. MacMillen*, Cal., 522 P.2d 1345 (1974). Limiting disclosure to interests relating only to the government activities where an officer's particular duties lay would not guarantee the absence of conflicts and tailoring requirements for each officer would be an insurmountable task. *Snider v. Shapp*, Pa., 405 A.2d 602 (1979); *Fritz v. Gorton*, Wash., 517 P. 2d 911, *app. dismissed*, 417 U. S. 902, 41 L. Ed. 2d 208, 94 S. Ct. 2596 (1974) (tailoring the act to the many offices affected would be impractical). Uniform disclosure of matters reasonably relevant to the public officer's duties, in general, are proper. *Goldtrap v. Askew*, Fla., 334 So. 2d 20 (1976).

Case analysis here revealed that what was reasonably relevant to the duties of the office held by this individual was that the non-profit received some State funding, even though such funds were not used. Accordingly, reporting that source would appear to fall within the statutory scheme, but reporting only that source could result in the appearance that the entire sum was

paid by the non-profit, when the major portion of the costs were paid by a grant over which the public officer had no decision-making authority.

Conclusion

For the foregoing reasons, the Commission concluded that the payment was not to be reported as a "reimbursement." It was to be reported as a "gift" because the source was a "person" under the statute and there was not consideration of equal or greater value to remove the payment from the definition of "gift." The value that was to be reported was the estimated \$2,000 and the source to be reported would be both entities that made payments.

Guidelines for Public Officers, January 21, 1997

I. Background to Ruling

(A) Direct Payments by the State:

At the Financial Disclosure training sessions given in preparation for the 1997 financial disclosure filings, several persons ask how direct payments by the State or by private employers of individuals who concurrently hold a position as a public officer would be treated under the financial disclosure statute. Based on the legal authority and reasons detailed below, the Commission issued the following general guidelines on January 21, 1997.

(B) Direct Payments by Private Employers:

Where the State expends State funds on public officers to participate in officially sanctioned activities, direct payments by the State under those circumstances are not items subject to the financial disclosure reporting laws under the definition of "gift." Where a private employer pays for its employee to conduct legitimate business activities which the employer has determined are related to that private employer/private employee relationship, such payments are not items subject to reporting as a "gift" under the financial disclosure statute.

The Commission's authority to issue advisory opinions is restricted to "particular fact situations." 29 Del. C. § 5807(c) and § 5809(2). To date, no fact situations involving such direct payments have been brought to the Commission for consideration and determination. However, the Commission understood that Public Officers wanted guidance in these areas before filing financial reports in mid-February 1997. While the Commission cannot issue a ruling on a particular fact situation as it has no such situation before it, the Commission has authority to prepare and publish guides explaining the duties of individuals covered by this chapter; and give instructions and materials to facilitate compliance with the statute. 29 Del. C. § 5809(9).

Thus, to facilitate the mid-February filing of the financial disclosure report, the Commission issued the above general guidelines and instructions based on the following:

II. Applicable Law

A. Direct Payments by the State

The financial disclosure statute, requires reporting of "gifts" that are valued at more than \$250 received from any "person." 29 Del. C. § 5813(4)(e). The statute defines "gift" as

including "payment." 29 Del. C. § 5812(o). However, an item is not a "gift" if consideration of equal or greater value is given. 29 Del. C. § 5812(o).

"Person" is not defined in the financial disclosure subchapter subsection. However, "person" is defined under the Code of Conduct as "an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities." 29 Del. C. § 5804(7). It separately defines "State" and "State agency." See, 29 Del. C. § 5804(9) and (10). Further, the Delaware rules of statutory construction define "person" and "State" separately. 1 Del. C. § 302(16) and (18). Those rules require that in construing all statutes of this State, the definitions given therein are to be given the meanings provided unless the context requires a different meaning. 1 Del. C. § 302. Courts have held that in construing statutes using the word "person," it must be assumed that the General Assembly was cognizant of the definition provided in the rules of construction. *State ex. rel. Milby v. Gibson*, Del. Super., 140A.2d 774 (1958).

With that assumption in mind, the Commission examined the context of the financial disclosure statute to see if the legislature in using the word "person" intended it to have a meaning different than that word as defined in the rules of statutory construction, such that it would include "State."

Words and phrases are to be read in their context and should reflect the General Assembly's manifest intent. 1 Del. C. § 301 and 303. The intent of the General Assembly, expressed in its findings, is that disclosing personal financial interests will serve to guard against public officials 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 independence of judgment and avoid the appearance of impropriety. 29 Del. C. § 5811. Obviously, if individuals are employed and paid by the State, they have a financial interest. Payment of expenses related to that employment also add to that financial interest.

The Commission must assume that payments by the State for travel, etc., are in the legitimate conduct of State business. Courts have recognized that when the government reimburses its employees for participating in official functions that there is a presumption that the employees are then under the "watchful eye" of the agency. *Sanjour v. Environmental Protection Agency*, D.C. App. Ct., 984 F.2d 434,445 (1993) (interpreting the federal ethics provision restricting payment of expenses when performing official duties). In any event, the Commission does not have the authority to review those expenditures and they are a matter of public record.

Further, the public is on notice of the source of that "financial interest" in a number of ways. First, the financial disclosure statute requires public officers to identify the position they hold in the State. 29 Del. C. § 5813(a)(l). Further, by defining "public officer" positions that must report information, the decision-making level of such persons is addressed by the statute. Additionally, "the source of any income" and "the source ... of any reimbursement" is identified in the financial disclosure report if the threshold amount of more than \$1,000 is met. 29 Del. C. § 5813(a)(4)(a) and (e). Thus, the "State" as a source of a "financial interest" is disclosed. Aside from the financial disclosure report, which is publicly available, the public has access to additional information on the State as a source of a "financial interest." For example, the public may obtain exact salaries, learn of public expenditures, etc., through other publicly available sources. Therefore, the Commission believed the purpose of insuring that the public is aware of the State as a source of the public officer's financial interest is served through those means. The Commission therefore provided the following general guideline: where the State expends State funds on public officers to participate in officially sanctioned activities, direct payments by

the State under those circumstances are not items subject to the financial disclosure reporting laws under the definition of gift.

B. Direct Payment by Private Employers

The Commission again noted the obvious: if the individual is employed by a private enterprise it gives rise to a financial interest. If the private enterprise also undertakes to pay the expenses for legitimate business purposes related to the employee's position with the private enterprise, and not as a public officer, that conceivably adds to the financial interest. "Person," as defined under Delaware law, would include such private enterprises. However, again the Commission notes that the source of income from partnerships, managerial positions in a business enterprise, professional organizations such as the practice of medicine, law, accounting, engineering or other profession, must be reported if the value or income is greater than \$5,000 per year. 29 Del. C. § 5813(a)(2) and (3). Also, the source of income derived for services rendered which includes the source of salary, wages, consulting fees and professional services is disclosed on the financial reporting form if the income exceeds \$1,000 from that source. 29 Del. C. § 5813(a)(4)(a). Thus, the public is informed of the source of the public officer's financial interest which results from employment with a private enterprise. Further, whether there is consideration of equal or greater value given to a private employer when the private employer pays for its private employee (who as a coincidence happens to also be a public officer) to attend functions related to that private employment is not a decision within the purview of this Commission. Accordingly, as a general guideline, where a private employer pays for its employee to conduct legitimate business activities which it has determined are legitimately related to that private employer/private employee relationship, such payments are not items subject to reporting as a "gift" under the financial disclosure statute.

Direct Payments by the State and by Private Employers—Commission Op. 97-05:

The State contracted with a private company for a leadership course which public officers attended. The State paid the course costs either by reimbursement or a direct payment. Does the public officer report the payment of expenses?

Cabinet Secretaries, agency heads, Division Directors, program managers, and other top executives attend the program. Some of these are "public officers" under the financial disclosure law; this opinion applies to those persons. See, 29 Del. C. § 5812(a). If attendees want to know if they are "public officers," they may review 29 Del. C. § 5812, and if needed, request an advisory opinion from the Commission. "Payments" are reported if they are "reimbursements" or "gifts." See, 29 Del. C. § 5812(1) & (o); § 5813(a)(4)(c) & (e).

Most attendees have the payment for the program, hotel, meals, costs of training, course materials, etc., paid by Interagency Voucher. Those payments are direct payments, not reimbursements. Thus, they are "direct payments by the State," and consistent with the Commission's guidelines issued January 21, 1997, such payments are not reported as "gifts." See, *Guidelines for Public Officers*, "Direct Payments by the State," (January 21, 1997). Transportation costs are paid by the individual, who may seek reimbursement. As the financial disclosure law requires reporting of reimbursements from "any source," State reimbursements are included. See, *Commission Op. No. 95-06*. Accordingly, if public officers are reimbursed more than \$1,000 by the State in a calendar year, the State of Delaware is listed as the "reimbursement" source.

The statutory language appears to create an anomaly as State officers report State

"reimbursements," but not direct payments by the State as "gifts." However, the different statutory definitions require different results. *Commission Op. No. 96-40*. "Reimbursements" from "any source" are reported; "gifts" from "any person" are reported. "Person" has a legal meaning that does not include the State. See, *Guidelines for Public Officers*, "Direct Payments by the State," (January 21, 1997).

Jurisdiction of Financial Disclosure—Commission Op. No. 97-24:

A local government had adopted its own Code of Conduct, which was reviewed and approved by the Commission to be at least as stringent as the State Code of Conduct. 68 Del. Laws. c. 433 § 2. Subsequently, it adopted a Financial Disclosure ordinance. It asked if the Financial Disclosure ordinance needed to be reviewed by the Commission.

The Commission held that, the Act requiring that local governments have their codes reviewed by this Commission clearly and specifically refers only to "Code of Conduct" legislation, which Commission of local government codes would be limited to that government's Code of Conduct provisions. While local government Codes of Conduct would include provisions relating to financial disclosure similar to those in the State Code of Conduct, e.g., 29 Del. C. § 5806(d), in order to be as stringent as the State Code, it would be those provisions--not the annual reporting provisions--which this Commission would review and approve.

Payment of Foreign Travel Expenses--Commission Op. 97-42:

A State officer, and persons from other States in similar positions, traveled to a foreign country to participate in meetings to enhance understanding with the foreign government on cultural, economic and political affairs, with a specific emphasis on government issues handled by his agency and similar agencies in the other States. The foreign government paid the travel expenses.

The financial disclosure law defines "gift" to include "payments." 29 Del. C. § 5812(o). Payments are reported if the value exceeds \$250, but only if there is no consideration of equal or greater value. 29 Del. C. § 5812(o) and § 5813(a)(4)(e). He spent approximately six days overseas. While there, he actively engaged in meetings with foreign government officials. He was expected not only to attend the meetings, but required to give information and a presentation on Delaware laws enforced by his agency. His agenda and comments at the Commission meeting showed he was actively engaged in government related duties during the visit. Accordingly, his participation, with little or no recreational or sight-seeing activities, constituted consideration of equal or greater value. Thus, the payment was not a "gift."

The Code of Conduct restricts State employees and officers from accepting payment or anything of monetary value 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) an appearance of impropriety. 29 Del. C. § 5806(b).

As he had no decision-making authority over the foreign government in his official capacity, his judgment would not be impaired nor would he be in a position to give that government, or members thereof, any preferential treatment. Further, the purpose of the trip and his active participation in performing duties related to his official functions did not raise an appearance of impropriety.

Reimbursement Paid by Another State--Commission Op. No. 97-43:

A member of the Executive Branch was asked to go to another State to serve as a judge in a competition which it was hosting. The other State reimbursed her expenses.

The threshold amount for disclosing reimbursements is if the value exceeds \$1,000 from a single source in a calendar year. 29 Del. C. § 5813(a)(4)(c). As the other state's agency reimbursed her for an amount of less than \$1,000, the reimbursement did not meet the threshold amount for reporting.

The Commission is required to decide if acceptance raised any ethical issues, the Commission applied the Code of Conduct, which restricts State officers from accepting a payment or 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 its government. 29 Del. C. § 5806(b).

Here, she had no decision-making authority over the other state's agency that reimbursed her, or over any companies that competed for the award. Also, neither the other state's agency, nor the companies she was judging, had any business dealings with her agency. Thus, it did not appear that she would be in a position to have her judgment impaired, nor to give either the agency or the competitors any preferential treatment. The other state's agency invited her to be a judge in the competition principally because of her official position and expertise in the particular area. In those circumstances, such action did not raise any appearance of impropriety.

Winning a Raffle--Commission Op. 97-33:

A State officer put her business card in a hat at a social function. When the drawing was held, her card was selected and she won two tickets from an airline company for a trip overseas.

The financial disclosure statute requires Public Officers to report the source and value of any gift received which is worth more than \$250 on their annual financial disclosure report. See 29 Del. C. § 5813(a)(4)(e). The airline tickets were a "gift" as defined by the financial disclosure law because "gift" includes accepting "anything of value" unless "consideration of equal or greater value is received." Here, she merely put her business card in the hat for the drawing; she gave nothing in exchange for the tickets. As the value of the tickets was more than \$250, the source and value would be reported under the financial disclosure statute.

To decide if accepting a gift raises an ethical issue, the standard applied to officers in the Executive Branch is whether acceptance may result in: (1) impaired 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 government of the State. 29 Del. C. § 5806(b).

The State officer had no decision-making authority, or in fact, any dealings with the airline in her official capacity. Moreover, her business card was selected at random from all

business cards that were put in the hat. Accordingly, the Commission found no ethical issue raised by accepting the tickets.

Accepting a Token Gift—Commission Op. 97-33:

A Senior Executive Branch official received two items of jewelry from visitors from a foreign government. The visitors were part of an exchange program with the foreign government. They presented the items at a public presentation as a token of appreciation to the State officer for hosting them during their visit.

The financial disclosure statute requires reporting the source and value of gifts worth more than \$250 on the annual report. 29 Del. C. § 5813(a)(4)(e). The jewelry was a "gift" as defined by the financial disclosure law because "gift" includes accepting "anything of value" unless "consideration of equal or greater value is received." 29 Del. C. § 5812(o). Here, she received the items from the foreign visitors who were here as part of an exchange program and she gave nothing in exchange for the items. Rather, they were a complimentary gesture, given in a public presentation, as an expression of appreciation for performing her State duty of hosting the visitors. Performing that duty was not contingent on receiving a gift. While the Commission found that the jewelry was a "gift," after seeing the two items, it concluded that the value was *de minimis*--less than \$5.00 each. Therefore, the value did not reach the reporting threshold amount of \$250.

As she was an Executive Branch officer, the State Code of Code provision regarding accepting gifts was applied to decide if any ethical issue was raised by acceptance. The Code restricts acceptance if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment of any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

Here, her agency was involved in the exchange program with the foreign government. Thus, she may have some decision-making authority regarding the program and persons from the foreign government who participate. However, as previously noted, the value of the jewelry was *de minimis* and, factoring in the circumstances under which it was given, the Commission found that acceptance would not result in impaired judgment, preferential treatment, official decisions outside official channels or adversely affect the public's confidence. Thus, no ethical issue was raised by accepting the jewelry.

Tickets to an Athletic Event--Commission Ops. 97-38 and 97-39:

State officers notified the Commission they had accepted an invitation to an athletic event from a private enterprise. They attached a per-person break down of the value of attending and participating in the event, and pointed out that they did not receive all items listed, such as the breakfast and a plaque. They believed the "value" of the gift was appropriately reduced by the amount of the items not received. The Commission has previously ruled that: "value" means "a fair return or equivalent in goods, services or money for something; marketable price; relative worth, utility or importance." *Commission Op. No. 96-33*. In that opinion, the Commission held that the "value" received when participating in an athletic event is what one would have to pay or contribute to participate in the event. Thus, to the extent that the costs to participate would include the costs for such items as plaques, breakfasts, etc., it appears that the "value" would not be reduced just because the individual did not personally partake of

those items.

Forbearance as a Gift--Commission Op. 98-13:

A State official asked the Commission if she needed to report the value of attending a seminar where a private company asked her to serve as a panelist at one session of the seminar. If she served as a panelist, she would not be required to pay the registration fee. The private company also paid the travel and accommodation expenses.

The financial disclosure statute requires that "gifts" valued at more than \$250 must be reported. 29 Del. C. § 5813(a)(4)(e). "Gift" is defined to include "payment" and "forbearance." 29 Del. C. § 5812(o). Obviously, the airfare and hotel are "payments." "Forbearance" means "refraining from the enforcement of something (as a debt, right or obligation) that is due." *Merriam Webster's Collegiate Dictionary*, p. 455 (10th ed. 1994). As the company refrained from enforcing payment of the registration fee, it would constitute "forbearance." Accordingly, the total value received from the company for the travel, accommodations, and registration fee, would be reported, unless there was consideration of equal or greater value given.

The term "gift" specifically excludes the need to report if "consideration of equal or greater value" is given. 29 Del. C. § 5812(o). As there was not enough information available for the Commission to decide if sufficient consideration was given to remove it from the term "gift," the Commission advised her that she could provide the facts and receive an advisory opinion on whether there was consideration of equal or greater value.

Honoraria—Commission Op. 98-24:

A candidate for State office asked if a payment for writing an article should be reported as "income for services rendered" or "honoraria."

Both types of payments result from services rendered. However, there is a legal distinction between the two. "Honoraria" is payment in consideration of services which admit of no compensation in money," but are "voluntary payments for which no remuneration could be collected at law." *Black's Law Dictionary*, p. 663 (5th ed. 1989). On the other hand, salary and wages can be collected at law, and the payment under such circumstances arises generally from what normally constitutes an employer-employee relationship with the distinction between them being that "salary" is paid for a fixed period such as a year, month, etc., while "wages" are normally based on an hourly rate. *Id.* at 1200.

Here, the payment was more in line with "honoraria." First, the fee was received for a "written article." The definition of "honoraria" specifically includes such items. 29 Del. C. § 5812(m). Second, the relationship between the payee and payor was basically voluntary in nature. That is, individuals could volunteer to serve on an advisory board and to apparently encourage volunteers to write articles, the payor would pay \$50.00 for an article. However, there appeared to be no requirement for the payment and no means of enforcing payment.

Because the payment fit within the clear terms of the definition of "honoraria" and because the payment arose from a voluntary relationship, the Commission concluded that it should be reported as "*honoraria*."

Corporate Aircraft Travel—Commission Op. No.98-29:

A State officer and members of his staff used a corporate aircraft to travel to a conference. The Commission held that it was a "gift," as defined by the financial disclosure statute, as no facts indicated any consideration of equal or greater value. See, 29 Del. C. § 5812(o).

As the Public Officer was a member of the Executive Branch, the Commission reviewed the Code of Conduct to decide if any ethical issues were raised by acceptance. The Code of Conduct restricts state employees, officers or honorary state officials from accepting 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 persons; (3) the making of governmental decisions 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. § 5806(b).

This is the second of two opinions regarding state officials using transportation provided at no cost by private companies. See, *Commission Op. No. 96-26*. The Commission found that it was reasonable for the public officer to rely on Opinion No. 96-26 in determining that use of the corporate jet would not violate the Code of Conduct. Both uses were similar in that the trips were for public purposes which benefitted the State of Delaware; the use of the private jet satisfied a justifiable expedited transportation need and the use of the corporate jet saved the state money. However, the Commission cautioned that the trips did differ. For example, each company had different relationships with the State; the trips were scheduled differently (in *No. 96-26*, the company was making the trip because one of its directors was participating in the conference); and the more recent flight was catered. The reason for pointing out the differences in the two cases was to emphasize that the Commission's conclusions must be based on the specific facts of each matter before the Commission.

It advised the officer not to construe the opinions as blanket approval for any other use of corporate aircraft. The fact that use of a private jet saves taxpayers money is but one factor considered. Any future use of corporate aircraft could, depending on the specific facts and the cumulative effect, result in a different conclusion by the Commission if the public perception could be that a government official may become beholden to the private interest supplying the jet or that a government official may be using public office for private gain, which is prohibited by 29 Del. C. § 5806(e).

Award from Professional Organization--Commission Op. No. 98-27:

A state officer was nominated and selected for an award from a professional organization. The basis for selection was to recognize, among other things, his career dedication to public service. He received a statuette and a complimentary registration to attend the organization's meeting. As statuette and registration were valued at more than \$250, they were to be reported as gifts under the financial disclosure statute, as no facts indicated that he had given the organization consideration of equal or greater value.

To decide if accepting a gift raises any ethical issue for members of the Executive Branch, the Commission applies the Code of Conduct standard which restricts State officers

from accepting gifts or anything of monetary value if it may result in: (1) impaired 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 its government. 29 Del. C. § 5806(b).

The officer was a member of the association and was nominated for the award to recognize his career dedication to government service; sustained outstanding contributions; exemplary public management; professionalism; excellence and positive awareness of public administration. The nomination was by another association member who also worked for a Delaware agency.

In his State position, the officer had no decision-making authority over the association. Thus, it did not appear that his judgment would be impaired or that he was in a position to give the organization preferential treatment or make official decisions outside official channels which would benefit the organization.

There was an official relationship between the agency where the nominator worked and the State officer. The officer chaired a State committee which had awarded a contract to the nominator's agency. The contract was managed by the recipient's department. It was awarded before the officer was nominated for the award. The nominator was one of the principal persons responsible for the contract, and his contribution as part of the "in kind" resources in the contract. A student, whom he supervised, was paid out of the contract. None of these facts constituted a violation of 29 Del. C. § 5806(b).

Tickets to Sports Events—Commission Op. 98-26:

A State officer received tickets to two sporting events from a company which was regulated by the State. As the tickets were valued at more than \$250, the source and value of the tickets was to be reported, as no facts indicated that the officer had given any consideration in return for the tickets.

State officers are restricted from accepting gifts or anything of monetary value if acceptance 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 its government. 29 Del. C. § 5806(b).

His official duties did not involve any decisions regarding the regulation of the private enterprise. His official duties did require him to develop and execute strategies as part of the State's interests in insuring jobs in the public sector in companies of this type. In essence, his official duties required him to "court" the industry to protect jobs and recruit jobs from the industry for the State. While the company, like other similar companies, would have an interest in the strategies he was required to develop and execute, he had not worked on any development project for this company within the last 12 months, nor were there any projects pending. Thus, it did not appear that the gifts would affect his judgment on any official decision or result in any type of preferential treatment for the company.

The Commission emphasized that his State position was unique from most State positions because of the need to "court" private enterprises. Thus, issues regarding appearances of impropriety when a State employee accepts gifts from private enterprises are different because of the unique operations of his office, which were mandated by statute.

Accordingly, the Commission found no violation of the Code of Conduct.

Tickets from State Agency—Commission Op. 98-28:

The statute requires that gifts from any "person" valued at more than \$250 must be reported unless consideration of equal or greater value is received. 29 Del. C. § 5813(a)(4)(a). The Commission has ruled that when a State agency provides payment for State officers, that such items are not matters to be reported as a "gift" because the financial disclosure statute requires that "gifts" from any "person" must be reported. See, *Guidelines for Public Officers*, "Direct Payments by the State," January 21, 1998. The Commission reached that conclusion because "person" has a specific statutory definition, which does not include "State agency;" "State agency" is clearly and separately defined; and had the General Assembly wished to include "State agency" within the definition of "person" it could have done so. *Id.* "State agency" is defined to include *public bodies existing by virtue of an act of the General Assembly...* 29 Del. C. § 5804(10) (*emphasis added*).

Here, the tickets were received from the Riverfront Development Corporation (RDC). The RDC resulted from legislation in a Bond Bill passed in June 1995 (*S.B. No. 260*). In that legislation, the General Assembly authorized the Governor to incorporate along with the New Castle County Executive and the Mayor of Wilmington a Riverfront Development Corporation. Read literally, the RDC resulted from an act of the General Assembly. Moreover, in the legislation, the General Assembly stated that the RDC *"is to assist and cooperate in capital development and public works programs funded in conjunction with other governmental agencies."* The implication of that language is that the RDC may be considered a governmental agency for certain purposes. Thus, we conclude that the RDC is a "State agency" as defined by the State Code of Conduct.

We are aware that the Attorney General's office concluded that the RDC is not a "State agency" for purposes of applying prevailing wages provision of the procurement law. However, the procurement law has its own distinct definition for "agency." We further note that it is possible for an entity to be a "State agency" for some purposes but not others. See, e.g., *Skomorucha v. Wilmington Housing Authority*, 504 F. Supp. 831 (D. Del. 1980); *Wilmington Housing Authority v. Williamson*, 228 A.2d 782 (Del. 1967); See also, *Atty. Gen. Informal Op. No. 93-1018* (July 21, 1993); *Atty. Gen. Op. No. 79-F013* (November 30, 1979).

Accordingly, since the RDC falls within the Code of Conduct's definition of "State agency" the tickets need not be reported. Moreover, the Commission has no authority to review expenditures by State agencies. See, *Guidelines to Public Officers*. Therefore, any question regarding whether an ethical issue is raised is not within the Commission's jurisdiction.

Value of Tickets to Grand Gala--Commission Op. No. 99-09:

The State Public Integrity Commission received notice that a State officer in the Executive Branch accepted tickets to the Grand Gala and dinner from a private enterprise. In his correspondence, he noted that the "real value" was \$50 with a "face value" of \$450. Also, he received tickets to the Nicholas and Alexandra Exhibit, from Broughton International, which he listed according to "face value" and "real value."

As a point of clarification, the financial disclosure statute requires public officers to report

"any gift with a value in excess of \$250." 29 Del. C. § 5813(a)(4). The term "value" must be given its plain and ordinary meaning which means "marketable price." *Commission Op. Nos. 96-07 & 96-33*. Thus, for reporting under the financial disclosure law, the value is what one would have to pay or contribute to participate in that particular event. *Id.*

To decide if ethical issues are raised, the Commission applies the Code of Conduct provision on accepting gifts. Gifts may be accepted unless acceptance may result in: (1) impaired 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 its government. 29 Del. C. § 5806(b).

As no details were given concerning any decision-making authority the public officer may have over the gift givers; whether he would be in a position to give preferential treatment to them, etc., the Commission notified him that it could not render the decision on whether any ethical issues were raised.

More Grand Gala Tickets—Commission Op. 99-05

Another public officer notified the Commission he had received two tickets valued at \$225 each to attend the Grand Gala from a private corporation. As the total value of the two tickets was more than \$250, the source and value would be reported on the financial disclosure report. 29 Del. C. § 5813 (a)(4)(e); *See, Commission Op. No. 99-09*. Based on the following law and facts, we concluded that no ethical issue is raised by acceptance.

In deciding if any ethical issue is raised, the Commission applies the Code provision which restricts State employees and officials from accepting gifts 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 its government. 29 Del. C. § 5806(b).

The officer indicated that in his official duties, he had no issues or matters with the company, nor did he expect any future matters before him involving the company. As he would not be making decisions regarding the company, it did not appear that his judgment would be impaired in performing official duties. No facts are given that would indicate that he would show preferential treatment to the company or make official decisions outside official channels on its behalf.

The question of whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government is essentially an "appearance of impropriety" standard. We have noted that when a private source pays the expenses of a public official, it may evoke at least two ethical issues in the minds of the public:

(1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA. US. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*.

(2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.*

Here, the company was a registered lobbying organization. Thus, it has clearly expressed an interest in the decisions to be made on legislative and administrative actions in the State of Delaware. Certainly, some members of the public may view a Senior level official's acceptance of tickets to a rather lavish event from an organization which has expressed interest in legislative or administrative decisions to be made by the State as creating "an appearance of impropriety" because it could be seen as an attempt to curry favor. However, we must base our opinions on a "particular fact situation." 29 Del. C. § 5807(c). Moreover, those particular facts must be placed within the framework of the law. First, we note that the General Assembly chose not to place a total ban on gift acceptance; rather, it requires that we evaluate, on a case-by-case basis, the acceptance of gifts. Second, the law requires that the Code be interpreted giving a legal presumption of "honesty and integrity" to State officials. *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, while the company had expressed an interest in government decisions, the official presently had no decisions pending regarding the company; nor had he made decisions about it prior to accepting the tickets. Because the company dealt in certain matters where the State had recently been involved in legislation, the Commission asked about the involvement of the official's office on those matters. He explained that persons in his office were involved in the legislation. However, the particular company was not affected by the legislation because it applies only to companies which supplied Delaware customers, and this company did not supply Delaware customers.

While the legislation would permit new suppliers to offer such services to Delaware customers, and as a consequence the company could, at some point, decide to enter the market, such activity was purely speculative at the time, and the Commission cannot base decisions on speculative facts. *Commission Op. No. 97-11*. Accordingly, based on the particular facts, it did not appear that the tickets were offered to curry favor in decision making since he had not been, and was not presently, making decisions regarding the company.

Regarding whether acceptance may create the appearance that he was using public office for private advantage or gain, we have previously noted that when a private source pays for State officials to attend events, the public may suspect that the officials are using their public position for social advantage or private gain. *See, Commission Op. No. 97-33*. We also noted that the differences in appearance of impropriety can vary depending on whether the evening's event consisted of a reception of juice and cookies as compared to cocktails, dinner, etc. *Id.* We noted that this was an evening of rather lavish entertainment from a lobbying organization to a person who holds a key position in the administration. Even some of the Commission members struggled with this. However, we must place that fact within the total factual circumstances. Here, as noted, the company was not seeking official action by his office; did not do business with or seek to do business with his office; was not regulated by his office; and had no interests pending that may be substantially affected by the performance or nonperformance of the official's duties. Moreover, by law, he was entitled to the presumption of honesty and integrity. No facts indicated that such presumption was overcome. Accordingly, based on the particular facts, no violation was found.

Corporate Aircraft Travel--Commission Op. No. 99-17:

The Public Integrity Commission received notice that a Public Officer in the Executive Branch was asked to be the guest speaker at the annual meeting of a research and

manufacturing association in Florida. He was asked to speak not only because of his State position but because he also chaired a national organization, which dealt with legislative and policy issues of interest to the research/manufacturing group. The private association paid his travel expenses which were estimated at \$2,424.46. The issues raised were whether: (1) his participation constituted "consideration of equal or greater value" such that the payment would not be a "gift" under the financial disclosure law; and (2) acceptance of payment of expenses by the private enterprise raised any ethical issues under the State Code of Conduct. For the following reasons, the Commission concluded that his participation in the meeting constituted sufficient consideration so that the payment would not be a "gift" and that, based on the facts below, acceptance did not raise an ethical issue.

(A) "Consideration of equal or greater value"

Under the financial disclosure statute, "gifts" valued at more than \$250 are to be reported unless there was consideration of equal or greater value given. 29 Del. C. §5812(o). Here, the public officer agreed to speak at the association's annual meeting, covering particular legislative and policy issues, not only as they related to Delaware, but also on a national level from his perspective as chair of a national organization. His speech lasted about 45 minutes. He did not attend any meals, golf outings or other such events. Immediately after speaking, he returned to Delaware. Based on these facts, the Commission concluded that there was "consideration of equal or greater value." Therefore, the payment would not be a "gift" under the financial disclosure law.

(B) Were any ethical issues raised by acceptance?

The Code of Conduct restricts acceptance of payment of expenses 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;
- (4) any adverse effect on the public's confidence in the integrity of its government.

29 Del. C. § 5806(b).

In his State capacity he had no direct or immediate decision-making authority over the private association. No facts were given indicating that in his State capacity he had any significant, indirect or anticipated future decision-making authority relative to the association. Based on those facts, it did not appear that his judgment would be impaired in performing official duties for the State. The correspondence indicated that he spoke on certain legislative and policy issues, emerging trends in Delaware, and possible changes in federal and State programs. The association was registered as a lobbying organization in Delaware, and therefore would have an interest in Delaware laws and administrative actions in areas which may impact on its membership, but no facts indicated any issues affecting the association were supported by his office, or that the association was seeking to have any legislation or administrative action introduced or drafted by his office. Based on those facts, it did not appear that in his State position he would give the association preferential treatment or would make official decisions outside official channels.

Whether acceptance would have any adverse effect on the public's confidence in the integrity of its government is based on the totality of the circumstances. *Commission Op. Nos. 96-78 and 97-23*. We have noted that courts have held that when a government official accepts travel expenses from a private party it may evoke at least two ethical concerns:

(1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*.

(2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.*

Here, the association was registered as a lobbying organization in Delaware. Thus, it clearly had expressed an active interest in Delaware's legislative and administrative actions which could impact on its membership. Thus, the public could view the payment of expenses as an attempt to curry favor with an official who could be in a position to help them on either legislative issues or administrative actions. However, against that concern, we must balance the remaining facts. Specifically, as noted above, based on the facts provided, no legislative or administrative actions were presently pending which diminishes the possibility that his judgment would be impaired; that he would give preferential treatment; or would make official decisions outside official channels. Moreover, the time spent at the conference was basically limited to the time during which he was speaking, leaving little, if any, possibility for the members of the association to "lobby" him on their views. Additionally, he received no personal benefit, such as honoraria, nor did he engage in activities such as golfing, etc. Thus, no facts indicated that he used his public position for private gain. The Commission also noted that the reason for accepting the corporate aircraft was because of a long-standing commitment to participate in a program back in Delaware. Because of that commitment, he could only accept the speaking engagement if arrangements could be made for him to return to Delaware in time to meet his prior commitment. Moreover, he was invited not just because of his State position, but also because of the broader perspective he could bring to the proceedings as chair of the national organization. This also aids in diminishing the possibility that he was sought as a speaker just as a means of currying favor with him because of his State position.

(C) Conclusion

Based on the above facts, the Commission found that: (1) consideration of equal or greater value was given and therefore the payment of his expenses by a private enterprise need not be reported as a gift under the financial disclosure law; and (2) based on the particular facts, no ethical issues were raised by acceptance of the payment of expenses.

Corporate Aircraft--Commission Op. No.99-39:

A Senior Executive Branch official notified the Commission that he accepted travel on a corporate aircraft under circumstances essentially identical to those addressed in a 1996 Commission Opinion. *Commission Op. No. 96-26*. The Commission must strive for consistency in its opinions. 29 Del. C. § 5809(5). Accordingly, as there were no distinctive factual differences between the 1996 situation and this situation, the Commission concluded, for the reasons expressed in its earlier opinion that: (1) as the value-\$460-exceeded \$250, it should be disclosed in the official's annual financial disclosure statement; and (2) no ethical issues were raised by acceptance.

Exhibition Tickets--Commission Op. No. 99-20:

A Division Director accepted two tickets valued at \$200 each from a private enterprise to attend an exhibition. The official could use the second ticket to bring a guest. Aside from viewing the exhibition, presentations were made by public officials, a meal was served, and there was entertainment. The issues were whether: (1) the tickets were to be reported under the financial disclosure statute; and (2) any ethical issue was raised by acceptance.

Under the financial disclosure statute, the issue is whether to report the ticket value as a "gift" or whether the official's attendance constituted "consideration of equal or greater value," which would remove it from the reporting requirement. 29 Del. C. § 5813 (a)(4)(e).

The Commission is to be consistent in its opinions. 29 Del. C. § 5809(5). We have held that "consideration" generally means that something is given in exchange to the gift giver. *Commission Op. No. 99-26 (citing Merriam Webster's Collegiate Dictionary, p. 246 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); and 17A Am. Jur. 2d Contracts §§ 113 and 114.)*

In a prior opinion to this same official, addressing similar circumstances, we held that the value of the ticket for a guest was to be reported. *Commission Op. No. 97-33*. Regarding the official's own ticket, several reasons were given for the offer of the tickets. However, the "motive" behind an offer and acceptance is distinct and different from "consideration." *See, e.g., Commission Op. Nos. 96-26 & 97-01 (citing 17A Am. Jur. 2d Contracts § 115)* (where sponsor gave tickets to an official to attend because of his status as a public official, consideration was not of equal or greater value). While public officials spoke at the event, it was not suggested that this particular official gave a presentation. As consideration "means that "something is given in exchange," *Commission Op. No. 97-01*, and the facts did not indicate an exchange between the official and the private company for a presentation, there was no "consideration" on that basis.

In later correspondence, the official said a Senior Level Executive Branch official, who was involved in matters related to decisions concerning State funds for the organization, specifically asked her to observe and assist the company to ensure the success of its projects as the State had invested substantially. Where the benefit accrues to the public officer personally and to some extent to the State, with the gift giver receiving little or no benefit, then the consideration is not "equal to or greater than" as required by the statute. *Commission Op. No. 97-01*. Here, the benefit passed personally to the official and the guest, who attended an evening's entertainment. The benefit obtained by the State was that it might gain some insight as to the success of the program. As the State may have benefitted from the official's attendance, any "consideration" was to the State, not to the gift giver. Therefore, the ticket value would be reported under the Financial Disclosure Statute.

As the official was in the Executive Branch, the Commission reviewed the facts to decide if any ethical issue was raised under the Code of Conduct.

Again, we must be consistent in our opinions. In prior opinions, we said that when private sources confer benefits on public employees to perform agency related functions, it may raise, at least, an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56 F.3d 85, 94 (1995) (interpreting federal ethics restrictions on accepting payment from private sources for performing official duties)*. Two ethical concerns noted in *Sanjour* are:

(1) when a public employee accepts benefits from a private party, it may appear to the

public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Id.*

(2) even if there is no reason to suspect that the private party is trying to curry favor with the employee, the acceptance of benefits from a private source may raise the appearance that government employees are using public office for private gain. *Id.*

In that prior opinion, we noted that by statute, officials from this particular office were entitled to reimbursement for expenses incident to official duties. *Id.* Thus, to the extent senior level Executive Branch official asked her to attend, attendance may have been incident to official duties for which the State could have paid the official's expenses (but not necessarily those of her guest). *Id.* When the State pays, the ethical concerns raised when payments are made by private enterprises do not arise because it is presumed that: (1) such payments are in the legitimate conduct of State business and (2) the employees are then under the "watchful eye" of the agency. *Commission Ltr to Public Officers*, January 21, 1997. At least one Commissioner believed that payment might have been obtained from the State in this situation.

We have urged officials to "exercise great caution" if tickets are accepted from a private enterprise if the official makes decisions about the private enterprise, because it could appear that the offer is to curry favor or influence decisions. *Commission Op. No. 97-33*. We noted that offering additional tickets may also raise the appearance that the offer was to curry favor or influence the decision maker. *Id.* Moreover, accepting the additional tickets may raise suspicion that the official is using public office to obtain "private perks." *Id.* We noted that the concerns increase if the event is rather lavish. *Id.*

Here, the official attended because she was asked to observe and assist the company to ensure the success of its projects. Logically, if asked to "observe and assist the company," it should be anticipated that the official would develop and express an opinion on the success of the project. As the State "has invested substantially in this project," the official's opinion could impact on future decisions regarding State funding to the company. Thus, it could appear that the offer was to "curry favor" because of the official's significant, indirect decision-making authority. We also note that the tickets to this event were \$200 each, while the tickets made available to the general public are \$13. This indicates that the event the official attended was likely more lavish than what the public receives.

However, to decide if acceptance may have an adverse effect on the public's confidence in its government, we first note that there is a legal presumption of honesty and integrity in the conduct of government officials. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996). We also must place the concerns about currying favor in decision making and using public office to obtain unwarranted privileges, private advancement or gain within the totality of the circumstances. *Commission Op. No. 96-78*. While the event apparently was more lavish than what was available to the general public and while she had significant, indirect decision-making authority which could affect the company's State funding, the official said that the Governor asked her to participate; and the evening was not solely directed at entertaining as official presentations were made. Thus, we distinguish this situation from one where we found it improper for a government official to accept tickets to a musical concert where there were no official activities, and he had decision making authority over the gift giver. *Commission Op. No. 98-35*. Moreover, the nature of this particular official's position was that the matters over which she had decision making authority were ones connected to the particular type of exhibition. Additionally, no facts indicated that any matter concerning the company's funding was under review when she attended, as it was in *No. 98-35*. *Compare also*,

Commission Op. No. 97-11 (members of a State agency which routinely made decisions regarding private company should not attend company's "gala" when the sponsor had matters pending before the Commission).

Accordingly, while we still encourage "great caution" in accepting payment of expenses from an organization over which an official has even an indirect, but significant, decision making authority, we found no violation in this particular instance.

Panelist at a Conference--Commission Op. No. 99-38:

A senior Executive Branch official attended an out of state conference for government officials and business organizations. He was selected as a panelist for an evening business session and also participated in a morning business session to present the Executive Branch's perspective as part of the discussions. After the morning business session, he participated in a round of golf and then returned to Delaware. A private enterprise, which was registered as a lobbying organization, paid the expenses for his overnight lodging, meals and round of golf. Although the conference lasted for 3 days, he went late on Friday and returned on Saturday. Payment of his expenses for one night's lodging, one dinner, one lunch, one breakfast, and a round of golf were valued at approximately \$530.

His dealings with the private enterprise in his official capacity consisted of: regularly participating in meetings and forums sponsored the private enterprise to discuss public policy issues; working with the private organization on a study on public policies; and meeting with this private enterprise, and other businesses and civic groups to present information on certain policy issues.

Two issues were raised: (1) whether payment of his expenses should be reported under the financial disclosure law; and (2) whether accepting the payment raised any ethical issue under the State Code of Conduct.

(1) Reporting Requirement

State officers must report gifts of more than \$250. 29 Del. C. § 5813(a)(4)(e). "Gift" includes payment or anything of value unless "consideration of equal or greater value" is given in return. 29 Del. C. § 5812(o). If it is a "gift" then it is to be reported; if sufficient consideration is given, it is not a "gift" and need not be reported.

Based on the particular facts, there was "consideration of equal or greater value" given where in return for payment of his expenses, he participated in both an evening and morning business session, and although he received the additional benefit of participating in a round of golf, this activity was not the primary focus of the time you spent at the retreat. As there was consideration of equal or greater value, he was not required to report the payment as a "gift" under the financial disclosure statute. *Compare, Commission Op. Nos. 96-07 & 96-37* (No consideration of equal or greater value where business meetings were incidental as compared to the majority of the conference time which was not directed at business).

(2) Ethical Issues

The Code restricts acceptance of payment of expenses if it may result in: (1) impaired independence of judgment in performing official duties; or (2) official decisions outside official

channels; or (3) preferential treatment to any person; or (4) have any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). The concerns addressed by the Code of Conduct restrictions are that when private sources confer benefits on public officials and those officials are responsible for agency related functions, it may, at least, raise an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, US. Court of Appeals (D.C.), 56 F.3d. 85, 94 (1995)).* Two ethical issues noted by the *Sanjour* court were:

(1) when a public official accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Id.*

(2) even if there is no reason to suspect that the private party is trying to curry favor with the official, the official's acceptance of benefits from a private source may raise the appearance that government employees are using public office for private gain. *Id.*

In prior opinions, we noted that lobbying organizations, through their registration, have indicated a clearly expressed interest in the State's legislative and administrative activities. *Commission Op. Nos. 99-05 & 99-17.* Accordingly, we urged that caution be used in accepting benefits from such entities. *Id.* However, the question is whether that clear interest in State decisions, based on the particular facts, may raise the appearance that the recipient is beholden to or prone to provide favors to the private enterprise. Here, it did not appear that the official had any decision-making authority over the private enterprise. It had no contracts with his agency, and he advised this entity and other private enterprises of various State fiscal issues, it did not appear that the interactions he described could result in any official decisions about the private enterprise in which his judgment would be impaired or that he was in a position to give it preferential treatment or make official decisions outside official channels.

The question of whether an official's acceptance of benefits from a private source may raise the appearance that such officials are using public office for private gain also must be considered based on the particular facts. While an overnight trip out of State and the accouterments (lodging, golf, and meals) valued at \$530 might be considered fairly lavish by some, the Commission also notes that he left Delaware late on Friday to participate as a panelist that evening. He did not seek the benefit of staying all three days; or the benefit of payment of expenses for his spouse although apparently the private enterprise apparently would have paid those costs. On Saturday morning, he also participated in official meetings. At the conclusion of those meetings, he played a round of golf before returning to Delaware that same day. Based on the particular facts, we found no violation of 29 Del. C. § 5806(b).

Recognition as an Alumnus—Commission Op. 99-46:

A private foundation paid the expenses for a Public Officer to return to his alma mater as a special guest speaker when he was honored as an alumnus. Based on the following facts and law, the value need not be reported as a "gift" under the financial disclosure law and acceptance did not raise any ethical issue under the Code of Conduct.

The Foundation paid the public officer's expenses for travel, lodging, parking and dinner when he was honored as an alumnus and was the event's special guest speaker. The total value was \$866.69. Under the financial disclosure law "gift" includes "payment" or "anything of value." 29 Del. C. § 5812(o). However, an item is not a "gift" if consideration of equal or greater

value is given. 29 Del. C. § 5812(o). "Consideration" generally means that something is given in exchange. See, *Merriam Webster's Collegiate Dictionary*, p. 246 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); See also, *17A Am. Jur. 2d Contracts* §§ 113 and 114.

In return for the Foundation paying his expenses, he attended the function and was a speaker. Where individuals serve as speakers such activity constitutes "some consideration" See, e.g. *Commission Op. No. 99-17*. Whether it is consideration of "equal or greater value" depends on the particular facts, e.g., length of the event, portion of event spent engaging in official activities versus portion of event not engaged in official activities. *Id.* Here, he left for the out-of-state event late in the afternoon, for an early evening reception. The ceremony at which he was introduced and spoke started an hour later. He stayed overnight and caught a 7:30 a.m. flight. Based on those facts, there was consideration of equal or greater value. Thus, the payment need not be reported as a "gift" on his financial disclosure report.

When a senior level Executive Branch officer accepts a payment of more than \$250, the Commission must decide if any ethical issue is raised by acceptance. State officials may not accept gifts, payments of expenses, or anything of monetary value, 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 the integrity of its government. 29 Del. C. § 5806(b).

In his official capacity, he had no decision-making authority over the Foundation and no dealings with it other than using the opportunity as its guest speaker. Where a government official has no decision-making authority over an organization which gives them something of value, it is unlikely that their independent judgment will be impaired or that the person will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. Thus, the remaining issue is if acceptance created any appearance of impropriety. To decide if acceptance raises an appearance of impropriety, we look at the totality of the circumstances. *Commission Op. No. 97-23*. Here, based on the reason for attending, the limited time spent as the organization's guest, the activities engaged in, the fact that he had no decision-making authority over the organization, etc., acceptance did not raise any appearance of impropriety.

Briefcase and Painting--Commission Op. No. 99-50:

A State officer accepted two gifts valued at more than \$250 each: (1) a painting by a local artist; and (2) a briefcase from a national association. Based on the following law and facts, we find: (a) the source and value of the painting should be reported as a gift on his annual financial disclosure report; (b) the source and value of the briefcase need not be reported as a gift on that report; and (c) no ethical issues are raised by the acceptance of either item.

"Under the financial disclosure law, the source and value of "gifts" greater than \$250 valued at more than \$250 must be reported. 29 Del. C. § 5813(a)(4)(e). "Gift" includes "anything of value." 29 Del. C. § 5812(o). Here, the estimated values are: \$700 for the painting; and \$310 for the briefcase. However, an item is not a "gift" if consideration of equal or greater value is given. 29 Del. C. § 5812(o).

I. Is it a Reportable Gift?

(A) The Painting

Traditionally, the local artist gave certain senior level officials an original painting before they leave office. The State officer planned to take the painting and other personal belongings when his term ended. No facts suggested that he gave anything in return for the painting. As he gave no consideration, the item, its source, and its value should be reported.

(B) The Briefcase

The national association gave the briefcase to him as a token of its appreciation for his work as its Chair. As Chair, he managed the organization's activities, such as forums on education reform, tobacco litigation settlement, served as host when the organization met in Delaware, led its efforts to inform Congress on certain issues, etc. Many hours were spent on these functions. This Commission has held that where a State official was an officer of a national organization and was expected to participate in planning organizational activities, preside over meetings, attend and participate in the organization's activities, etc., that the actual performance of those duties was "consideration of equal or greater value" where the "thing of value" received was the costs of his travel, hotel, etc. *Commission Op. No. 96-40*.

Here, the "thing of value" is a briefcase, but the exchange-performing the required organizational functions in return for something of value-is the same. To be consistent with our prior ruling, we find that his participation is equal to or greater than the value of the briefcase.

II. Is an Ethical Issue Raised?

When senior level Executive Branch officials receive gifts valued at more than \$250, in addition to complying with the financial disclosure law, they must obtain a ruling on whether acceptance raises any ethical issues under the Code of Conduct. State officials are restricted from accepting "gifts" or "any other thing of monetary value" 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 the integrity of its government. 29 Del. C. § 5806(b). As both items were "things of monetary value," the statutory provisions were applied as follows.

(A) The Painting

In his official capacity, he had no direct or immediate decision-making authority over the artist. Where a State official has no decision-making authority over the entity which gives them a thing of value, it is unlikely their independent judgment will be impaired or that the entity will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. The remaining issue is if acceptance may create an appearance of impropriety, e.g., would it appear that he was using public office for unwarranted privileges or private gain, which 29 Del. C. § 5806(e) prohibits. Obviously, the painting was given because of the public office he held. By accepting, he privately gained the painting and its value. However, this is a gift traditionally given to the occupant of this senior level position before the official leaves office, diminishing any perception that he used public office for unwarranted privileges or private gain.

(B) The Briefcase

Again, in his official capacity, he had no direct or immediate decision-making authority over the association. Thus, it was unlikely his judgment would be impaired or that the association will receive preferential treatment in his official decisions. *See, Commission Op. No.*

97-43. Again, the issue is whether acceptance may result in any appearance of impropriety. Based on the particular circumstances under which the "thing of value "was given--in return for performing duties as Chair of the association; and the fact that he had no decision making authority over the association--it did not appear that the item was given or accepted as a result of any special or unwarranted privileges or personal gain.

Point-to-Point Tickets--Commission Op. No.99-52:

A company gave two tickets to Point-to-Point at Winterthur to a State officer who was involved in regulating the industry of which the company was a part. The Commission concluded that the tickets should be reported under the financial disclosure reporting law, and that acceptance raises ethical issues for the reasons detailed below.

Motive "is not "Consideration"

Under the financial disclosure law, gifts valued at more than \$250 are to be reported unless consideration of equal or greater value is given. 29 Del. C. §§ 5812(o) & 5813(a)(4)(e). The two tickets were valued at \$681.50. He attended the event because he was encouraged to develop good relations with the regulated industry, due to its importance to the State's economy and such events were attended by persons who previously held his position. The motive prompting one to enter an agreement is distinct and different from "consideration." *Commission Op. No. 96-26 (citing 17A Am. Jur. 2d Contracts§ 115)*. As "motive" is not "consideration," and no facts indicate that anything was given in return, then the item is a "gift" and reportable under the financial disclosure statute. *Id.* Here, no facts indicated that he gave anything in return. Accordingly, the source and value would be reported as a gift in his annual financial disclosure report.

Is an Ethical Issue Raised?

When gifts are reported we decide if any ethical issues are raised by acceptance. To decide if accepting a gift raises ethical issues, we apply the Code of Conduct. State officers may not accept any compensation, gift, payment of expenses or any other thing of monetary value under circumstances where acceptance may result in:

- (1) Impaired independence of judgment in exercising 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 impact on the confidence of the public in the integrity of the government of the State. 29 Del. C. § 5806(b).

The Code also prohibits State officers from using public office to secure unwarranted privileges, private advantage or gain. 29 Del. C. § 5806(e). By law, his official duties included responsibility for regulating the industry of this company. (Citation omitted). The statute also gave him authority to visit and examine each of the industry's institutions as frequently as deemed necessary or expedient. (Citation omitted). Thus, normally his official duties entailed exercising judgment on such matters as examinations over those institutions. However, the particular company was based out-of-state and its own State was its primary state regulator. While his office would normally have concurrent jurisdiction, it entered an agreement with other State regulators in this industry if they had branches in more than one state. Basically, the agreement was that the "home State" will be the primary regulator. Thus, his office did not

examine the company. However, despite the agreement, the Commission noted that: it was a highly regulated industry; his authority as a senior level Executive Branch official could have a significant impact on how, and by whom, such companies would be regulated; and the company had identified its interest in Delaware's legislative and administrative actions by registering as a lobbying organization. Clearly, it, like other institutions in the industry, would be interested in administrative actions taken by his office.

For example, his office regulated another company in Delaware, which was a small affiliate of the company giving the tickets. Also, by law, he collected certain fees from the company giving the tickets and its small affiliate in Delaware. (Citation omitted). The rate was set by State statute, and based on a percentage of the company's net income. (Citation omitted). In reviewing the payments, he had some latitude in deciding if the entity had submitted the proper amount. Specifically, by law, the assessment was to be reviewed and corrected by him upon application by any party involved. (Citation omitted). Thus, he reviewed the entity's statements and determined if the report complied with the statute. If a regulated entity challenged its assessment, by statute, he was charged with deciding if the assessment would be corrected. He had no recollection of the company or its Delaware affiliate submitting any application for an assessment correction. The assessments are reviewed at least on a quarterly basis. (Citation omitted). The Point-to-Point was on May 2, 1999. It was not clear if any quarterly assessments by the company or its Delaware affiliate were pending review when the tickets were offered. Obviously, the timing of the gift can impact on deciding if independent judgment would be impaired. However, even without that information, the Code restricts acceptance if it may result in any adverse effect on the public's confidence in the integrity of its government. We have held that this is basically an appearance of impropriety test. *Commission Op. No. 96-78*.

In interpreting federal regulations similar to Delaware's Code of Conduct, which addresses private parties paying for activities of government employees, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns about appearances:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favours" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 56 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect the private payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the specter that the employee is using public office for private gain. *Id.*

He agreed that attending an event hosted by an entity over which he had decision making authority creates a different appearance than if he attended an event hosted by an entity over which he had no decision-making authority. That difference is indicated by the terms which require that we look at "whether acceptance would result in impaired independent judgment in performing official duties." We have held that where there is no official duty to make a decision over the gift giver, then judgment cannot be impaired. *See. e.g., Commission Op. No. 97-43*. However, while the question of whether his judgment would be impaired can be easily resolved when no judgments are to be made, the statute is not limited to just that criteria. For example, whether acceptance may have an adverse effect on the public's confidence in the integrity of its government is basically an appearance of impropriety test and is decided based on the "totality of the circumstances." *Commission Op. No. 96-78*.

Here, the gift was given by an entity regulated by him. Moreover, the assessment decision alone was an on-going issue before him. Beyond that, when the gift is to a lavish event, it also raises the concern in the mind of the public that the official may be using public office to obtain unwarranted privileges, private advancement or gain. *Sanjour* at 95-96 (noting the difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch *en route*, as compared with a lobster dinner and a Lear jet to a far-off resort area). This event was rather lavish with food, drinks, etc., set up in a special tent for the company to entertain its invited guests. These were not tickets available to the general public. Thus, it could appear that the gift giver was trying to curry favor, or that the public officer was receiving a "private perk" from a company with substantial interests in decisions made by him. Based on the facts, we conclude that acceptance was improper because it raises an appearance of impropriety.

Improper acceptance can result in administrative penalties; however, he was not required to repay the company because he was not aware of the value of the tickets when he accepted them; officials who previously held his position attended such events which affected his decision to accept the tickets; he was encouraged by higher level officials to develop good relations with the industry because of its importance to Delaware's economy; and upon learning of the value of the tickets and reviewing our opinions which raised some concerns in his mind, he immediately came to the Commission for a ruling.

A Word of Caution

*We caution that: (1) as the financial disclosure law provides that public officer's may rely on the gift givers' value, 29 Del. C. § 5813(a)(4)(e), they should always be alert to ascertaining the value when offered anything of monetary value; (2) participation in events by officials who previously held the same job does not negate the fact that the Code of Conduct places the responsibility on each individual State employee or officer to comply with the law; and (3) while he may have been encouraged by superiors to develop good relations with the industry, when an entity that is regulated by his office pays for him to socialize with its officials and representatives at a rather lavish event, that is apparently by invitation only, it can take on appearances beyond developing good relations for the reasons stated herein. The fact that a superior does not detect a conflict, does not excuse a violation of the Code. See, *Refine Construction Company Inc. v. United States*, U.S.CL Ct. 12 CL Ct. 56, 62 (1987) (interpreting federal restriction prohibiting conduct having any adverse effect on the public's confidence in its government, the Court noted that it had repeatedly held that a government employee cannot claim exemption from a conflict of interest simply because his superiors did not discern the conflict.*

Trip to a Foreign Country—Commission Op. 00-03:

A public officer's expenses for a trip overseas were paid by an Institute. The Institute, in cooperation with the Council of State Governments Eastern Regional Conference (CSG-ERC) put the seminar together for government officials from a number of States. The State of Delaware is a dues paying member of CSG-ERC, which is a multi-state organization that assists states with multi-state and regional solutions on legislative, economic, and other matters. As part of CSG's activities, it puts together international programs which consist of seminars, technical assistance programs and citizens' exchanges. The international programs are

coordinated through the standing international committee, which supports the expanding role of states in international trade, economic development and other global activities.

The schedule reflected that most of the officer's time during the days and some evenings entailed participating in various events, e.g., briefings, tours of various locations, home hospitality with foreign counterparts, etc. There was some free time, but much of it was in the early evening before other scheduled events, such as when the officer had free time from 5 p.m. to 7 p.m., followed by a scheduled dinner and discussion for the participants and the foreign hosts, starting at 7 p.m.; and, again on another day when the officer had free time from 5 p.m. to 8 p.m., followed by a scheduled dinner meeting with senior officials from the foreign country at 8 p.m. In addition to the official schedule, the officer was asked by another Delaware official to add a specific activity, if time permitted, such as visiting a hospital in the foreign country. The officer was able to add that to the schedule.

Was There "Consideration?"

The financial disclosure statute defines "gift" to include "payment," and requires that "gifts" valued at more than \$250 be reported unless there is consideration of equal or greater value. 29 Del. C. § 5812(o) and § 5813(a)(4)(e). Items are not a "gift," and therefore not reported, if there is "consideration" of equal value given to the gift giver. 29 Del. C. § 5812(o). Thus, the financial disclosure issue is whether the official's participation constituted "consideration" to the Institute which paid for the travel.

The Commission must be consistent in its opinions. 29 Del. C. § 5809(5). In a prior opinion, where a private enterprise paid for a State official to visit a foreign country so that she could learn about international aspects of such matters as manufacturing, etc., the Commission held that any benefit received passed to the official or the State, not to the private enterprise. Accordingly, it held that there was not consideration of equal or greater value as the official did not have to give anything to the gift giver in return. *Commission Op. No. 97-01*.

Here, it also appears that the trip provided the officer with an international understanding of international trade, economic development, etc., which was the purpose of the trip. No facts indicated that the Institute received any benefit or return because of the officer's attendance. Accordingly, payment of expenses would be reported in the officer's annual financial disclosure statement.

Were any Ethical Issues Raised?

The Commission must decide if any ethical issues are raised by acceptance of things of value valued at more than \$250 by a senior level Executive Officer. The standard applied is whether acceptance 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).

No facts indicated that the officer had any decision-making authority over the Institute or could give it preferential treatment or make official decisions outside official channels. Thus, the question is whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b)(4). This is basically a question of whether there is an appearance of impropriety. *Commission Op. No. 97-42*.

Delaware courts have held that 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). While *Williams* interpreted the Code of Judicial Conduct, such interpretations may be used as guidance in interpreting the State Code of Conduct because the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. See, *Commission Op. No. 95-5 (citing Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992))* (decisions on statutory construction have relevance if both statutes are such closely related subjects that consideration of one naturally brings to mind the other).

In deciding the appearance of impropriety issue, the Commission looks at the totality of the circumstances, such as the reason for attending, the activities engaged in while attending, etc. See, *Commission Op. No. 97-23 and 97-42*. Because the officer had no decision making authority over the Institute; the purpose of the trip was educational in nature which served to benefit, not the gift giver, but the State; and the agenda reflects a trip primarily focused on official activities, with little free time, we concluded that no ethical issue was raised by acceptance.

Gift to Stay at Hotel Returned to Giver—Commission Op. 00-07:

The Commission reviewed a notification from a senior level Executive Branch official of a gift certificate for services at a hotel. The certificate showed that it was from the hotel's staff, but the officer indicated that the manager gave it to him as a holiday gift. The manager served on an Advisory Board, which worked with this public officer's office on certain matters. The public officer was the head of the agency, and had concerns about the possible appearance of impropriety that acceptance may raise, and wanted a ruling from the Commission to clarify the issue. If acceptance appeared improper, the public officer intended to return the certificate. Based on the following law and facts, the Commission concluded that acceptance may, at a minimum, raise an appearance of impropriety.

Under the financial disclosure law, gifts exceeding \$250 are to be reported unless there is consideration of equal or greater value. 29 Del. C. § 5812(o). As no facts suggested that the public officer gave anything in return for the gift certificate, it normally would be reported, and the public officer had done so on his annual financial disclosure report. However, because acceptance would be improper, and therefore he was advised to return it to the gift giver, he was authorized to amend his financial disclosure report.

What were the Ethical Problems?

State officers may not accept gifts if acceptance may result in: (1) impaired 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). The Code also prohibits State officers from using public office to obtain unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).

As the head of the agency, his statutory duties included responsibility for, among other things, certain matters that had a significant impact on the hotel. (Citation Omitted). Also, by statute, appointees to the Advisory Board to which the manager was appointed, serve in an advisory capacity to this Director and their responsibility is to "consider matters relating to..." the

responsibilities of the Director. (*Citation Omitted*). The hotel had a vested interest in those matters. Also, the agency put together seminars and used hotel facilities for those seminars. While the decision of what hotel may be used for a seminar was made by one of his staffers, the hotel also could have an interest in being selected by his office as the site for such seminars. We have noted that when private parties pay the expenses or give gifts to public officials, it can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favours" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 56 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. *Id.*

Here, the hotel had an interest in insuring that its interests were advanced. In fact, the officer noted that this hotel was a "significant player." Because of his statutory duties, his decisions could directly impact the interests of the hotel. Since the hotel's manager was on the advisory board, it may appear to the public that the hotel wanted to curry favor in decisions to be made by him. Also, as his office selected hotels as the location for some of its seminars, other hotels or the public may believe that his acceptance of the more than \$250 gift certificate from the hotel was an endorsement of that hotel, or they may have believed it would receive preferential treatment in decisions made by him and his staff.

Even if the hotel were not trying to curry favor with him, we have noted that the more lavish the gift, the more it may raise the appearance that State employees are using public office for unwarranted privileges, private advancement or gain. Here, he was offered the opportunity for services at what may be considered one of the best hotels not only in Delaware, but in the region.

When we consider whether the facts may result in any adverse effect on the public's confidence in the integrity of its government, we consider the totality of the circumstances. *Commission Op. No. 96-78*. We also must keep in mind that the Code does not require an actual violation, only that the conduct "may raise suspicion" that the public trust is being violated or "may result in" impaired judgment, preferential treatment, etc. Thus, even where the gift giver has no intent of currying favor, we must balance that fact against the other facts, which are that his position gives him the authority to make decisions that could significantly impact the hotel's concerns. Thus, acceptance "may raise suspicion" that: his judgment could be impaired; he could give preferential treatment; or make official decisions outside official channels which could benefit the hotel. Moreover, because of the nature of the gift, it may raise suspicion that he was using public office for unwarranted privileges, private advantage or gain. Accordingly, because acceptance may raise such suspicions, we concluded he should return the gift certificate.

Reporting Payment of Family's Expenses—Commission Op. 00-13:

An Executive Branch public officer notified the Commission of the payment of expenses by a private enterprise for him to attend and speak at its annual meeting. Based on the following law and facts, we concluded that: (1) the value of the payment for lodging for his family should be reported as a "gift;" and (2) accepting the payment does not raise an ethical issue

under the Code of Conduct.

Public Officers must report gifts valued at more than \$250 under the financial disclosure law, and Executive Branch Officers must also report gifts of more than \$100 from a single source. 29 Del. C. § 5813(a)(4)(e). "Gift" includes payment or anything of monetary value, unless consideration of equal or greater value was given. 29 Del. C. § 5812(o). The public officer agreed to speak at the annual meeting to emphasize to the industry the attributes of doing business in Delaware. He also brought his family. He paid for all meals and expenses of the trip, except for two nights lodging, which was paid for by the private organization and valued at \$897.92. It was assumed that the cost of lodging would have been less if he alone had attended.

Based on our prior rulings, his agreement to attend and speak in return for payment of his own expenses constitutes "consideration," which we find to be equal to or greater than the value paid for his trip. *Commission Op. No. 99-17*. However, when a private source pays for an official to attend events to perform official duties, if the private source also pays for a spouse or friend who is not performing an official function, then the value of that part of the payment is a "gift." *Commission Op. No. 97-33*. Thus, under 29 Del. C. § 5813(a)(4)(e), the value of lodging for his family members would be reported in Section 3(E) of the financial disclosure report if it exceeded \$250

His request cited a prior opinion where payment of his air travel of \$2,424.46 in return for speaking at a meeting was found to be adequate consideration, and therefore not treated as a gift. The Commission must base its opinions on the particular facts of each case. 29 Del. C. § 5807(c). Thus, it is not enough to compare other trips based solely on the dollar amount, because the issue of "consideration" is whether something of adequate value is given in return under the specific circumstances of each matter. In the prior opinion and this opinion, we concluded that he gave consideration for his expenses. The difference here is the payment of expenses for his family, not for him, for which we found no consideration.

Were any Ethical Issues Raised?

Senior level Executive Branch officials must also obtain a ruling on whether any ethical issue is raised if they accept a gift valued at more than \$250. The Code of Conduct restricts acceptance of gifts, payment of expenses or anything of monetary value if acceptance may result in:

- (1) impaired independence of judgment in performing official duties;
- (2) preferential treatment of any persons;
- (3) official decisions outside official channels; or
- (4) any adverse effect in the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

The correspondence indicated that he had no direct or immediate decision-making authority over the private organization and no facts were given to indicate the possibility of preferential treatment or official decisions outside official channels. Thus, the issue was whether acceptance may result in any adverse effect in the public's confidence in the integrity of its government. To decide if acceptance adversely affects the public's confidence in the integrity of the government, we look at the totality of the circumstances. *Commission Op. No. 96-78*. This is, in essence, an appearance of impropriety test. *Commission Op. No. 91-12*. In several past opinions, we noted that when private parties pay the expenses or give gifts to

public officials, it can evoke at least two ethical concerns regarding appearances:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 56 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. *Id.*

In this instance, any appearance of impropriety was negated by the following facts: he had no direct or immediate decision making authority over the private organization; it did not appear that the private organization was attempting to curry favor with him as he had no decision making authority over it; he paid for all expenses associated with his family's trip except for lodging; while the conference ran from June 3 to June 6, he and his family were only there on June 5 and 6; part of that time he was fulfilling his speaking agreement; no facts indicated that the two days were spent in purely social activities provided by the private organization; and he would report the value of his family's lodging. Placing those facts within the total circumstances, we found no appearance of impropriety.

Grand Gala Tickets from a Lobbyist—Commission Op. 01-06:

A Public Officer in the Executive Branch asked about reporting gifts and if it were proper to accept tickets to the Grand Gala from a lobbyist who lobbied his agency. Based on the following law and facts, his acceptance raised an ethical issue.

Public officers must report gifts valued at more than \$250.00 on their annual financial disclosure report. 29 Del. C. §5813(a)(4)(e). Here, the public officer complied with the reporting procedure after accepting tickets to the Grand Gala from a lobbyist.

State employees may not accept compensation, gifts, payment of expenses, other employment, or anything of monetary value if it may result in: (1) impaired independence of judgment; (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). Also, they may not use public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).

In interpreting similar federal regulations which address having expenses for government employees paid by private parties, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect a private payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the appearance that the employee is using public office to secure privileges or

private gain. *Id.*

Here, the tickets were given to him by a lobbyist. He and the lobbyist had been personal friends for years. Despite those years of friendship, the lobbyist had never before offered the officer tickets to events such as the Grand Gala. The officer had recently been appointed to a senior level executive branch position. His agency had some decision-making authority over a company the lobbyist represented. Thus, it appeared the officer was offered the tickets, not because of the longstanding friendship, but because of his State position. We point this out because it focuses on the reason for exercising caution when accepting things of value from a lobbyist.

When an organization is registered to lobby, the registration is a clear indicator that the organization has an interest in official decisions. *Commission Op. No. 99-05 & 99-17.* We have urged public officers to exercise "great caution" in accepting gifts or things of value from entities that have an expressed interest in official decisions. *Id.* Here, the organization represented by the lobbyist had identified its interests in official State decisions through its lobbying registration, and there was a clear connection to its interest in decisions by his department.

His department worked with the organization represented by the lobbyist to negotiate certain State matters that impacted on the agency's budget for one of its divisions. The division's staff puts the proposal together, negotiated with the organization, and then sent the budget to the officer for final approval. There was a substantial amount of money involved. Moreover, if the organization did not fund the division's budget at the level at which his agency had committed, then by federal regulation, the organization would have to shut down, which could cost it about a million dollars each day. Thus, there was significant decision-making authority by him relative to the organization, which clearly had a significant interest in his decisions.

Thus, the adverse effect on the public's confidence in its government is that the offer could well have been made to curry favor in his decision making. Accordingly, acceptance, at a minimum, would raise an appearance of impropriety. Because he had just been recently appointed to a State position, had promptly reported the acceptance, and sought guidance, the Commission did not impose a penalty.

Out-of-State Conference--Commission Op. 02-16:

Based on the following law and facts, the Commission concluded that a public officer's trip to an out of State conference, with additional days spent on vacation, with portions of the vacation paid for by a private enterprise, required that the value be reported and that a portion of the value be returned to the private enterprise.

I. Consideration

Public officers must report "gifts" of more than \$250. 29 Del. C. § 5813(a)(4)(e). "Gift" includes payment of expenses. 29 Del. C. § 5812(o). However, payments are not "gifts" if in return the officer gives "consideration of equal or greater value." As shown here, "consideration" by attending courses and/or moderating events, can be consideration of equal or greater value, depending on the circumstances.

In prior opinions, we found "consideration of equal or greater value" where officials

attended a conference and most of their time was in official sessions, with little or no personal activities. See, e.g., *Commission Op. No. 99-31*. Conversely, where the official sessions were limited, and most of the time was for personal activities such as social events and golf, the "consideration" was "not equal to or greater than" the payment. *Commission Op. Nos. 96-07 & 96-37*. Those are basically the two ends of the extreme. This officer's situation was more "in the middle," and we had not addressed that type of situation. Thus, the officer's decision to seek guidance was very appropriate.

The issue is whether the officer gave "consideration of equal or greater value" to the private enterprise for paying expenses of more than \$1,000 for the out of state conference. The officer accepted the offer because the policy issues to be discussed related to the officer's official functions. However, the motive for entering an agreement is distinct and different from "consideration." *Commission Op. No.96-26 (citing 17A Am. Jur. 2d Contracts § 115)*.

"Consideration" is a "recompense; payment; an act, forbearance or promise given by one party for an act or promise of another." *Commission Op. No. 97-07 (citing 17A Am. Jur. 2d Contracts §§ 113 & 114)*. Here, in return for the payment of expenses, the officer agreed to attend a two-day seminar. Merely attending a conference is "some" consideration but not "equal to or greater than" a payment of expenses to attend, depending frequently on the amount of expenses reimbursed. *Commission Op. No. 96-52*. That is because the officer who attends the course and upgrades his knowledge and enhances his skills as a public administrator can receive a greater value than the gift giver. *Id.* Here, in the initial written request, the officer said: "During the conference, I was asked and voluntarily agreed to serve as a moderator for one of the breakfast sessions." An "after the fact" arrangement could not have been an inducement for the officer to accept payment.

Rather, it would be a "gratuitous act;" not "consideration." See, *Black's Law Dictionary*, p. 307 (6th ed., 1998). However, at the Commission meeting, the officer said the agreement to moderate was part of the original offer. Public officers are 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, Terry, J. (Del. Super., June 30, 1995). Thus, with that presumption and under the changed facts, the agreement to moderate may be read as an "act or promise" in return for payment and, therefore, would also be "some" consideration.

Because attending the seminar and moderating a breakfast session were "some consideration," the next issue was whether the consideration was "equal to or greater than" the value received from the private enterprise's payment of expenses. The private enterprise paid expenses of \$1,665.11 for the officer to attend the two-day conference and moderate a breakfast session. The agenda showed the continental breakfast period was 45 minutes. The officer stayed two more days on vacation, with the private enterprise paying lodging costs. Thus, essentially equal time was devoted to business and to pleasure in return for the payment. The officer's decision to stay over for two nights vacation could have given the private enterprise a "cost savings" on the reduced air fare. However, any "costs savings" it could have realized by the officer's extended stay was eliminated because the private enterprise paid those "savings" toward the officer's vacation lodging costs. The private enterprise then added \$109.00 to cover the remaining cost of the officer's vacation lodging. Thus, the officer personally saved the costs of lodging and any travel that would have been incurred if the officer vacationed in this out-of-state location and personally paid the costs.

"Costs Savings" is a "financial benefit" - something of monetary value. Courts have held that a "costs savings" to an official is a financial benefit. See, e.g., *Davidson v. Oregon*

Government Ethics Commission. 712 P. 2d 87 (Ore. Supr., 1985). As the financial disclosure law requires reporting anything of value greater than \$250, "costs savings" of more than \$250 must be reported.

Based on those facts, the greater value accrued to the officer, not the private enterprise. The officer received the value of: (1) the payment of travel to the out of state location and lodging expenses related to the conference; and (2) a further benefit on lodging for personal vacation days. The State of Delaware also received a value in that the conference presumably enhanced the officer's skills as a public administrator. This factor is discussed in the next section of this opinion. In return, the private enterprise received the officer's attendance and service as a moderator at a 45-minute breakfast session. Moreover, it incurred higher costs because the officer stayed for two personal days. As the officer received the greater value, the source and value must be reported as a "gift" on the financial disclosure report.

II. Ethics Considerations

The Code of Conduct restricts acceptance of gifts, payment of expenses or anything of monetary value if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. § 5806(b). It also restricts State officers from using public office for personal gain or benefit. 29 Del. C. § 5806(e).

When private sources confer benefits on public officials and those officials are responsible for agency related functions, it may, at least, raise an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56F.3d. 85, 94 (1995))*. Two ethical issues noted by the *Sanjour* court were:

(1) when a public official accepts benefits from a private party, it may appear to the public that he may be beholden to the private interest and prone to provide "favors" in return. *Id.*

(2) even if there is no reason to suspect the private party is trying to curry favor with the official, his acceptance of benefits from a private source may raise the appearance that he is using public office for private gain. *Id.*

Here, the officer had no decision-making authority over the private enterprise, its membership, or the foundation that finances its activities. Thus, no facts suggested that the officer: (1) in making official decisions could have impaired judgment; (2) could give preferential treatment to the private enterprise; or (3) could make official decisions outside official channels for the private enterprise. Thus, the issue of being beholden to the private interest or providing favors in return was not raised.

A. Appearance of Impropriety

The issue then is whether there was any appearance of using public office for private gain. To decide if there was an appearance of impropriety, the Commission looked at the totality of the circumstances. *Commission Op. No. 96-78*. Here, some facts diminish the appearance of impropriety. Specifically, the conference was a means to improve the officer's skills as a public administrator; the officer moderated a 45-minute breakfast session; and the officer attended all sessions during the Tuesday through Thursday conference. The evening

activities involved receptions and dinner for the approximately 200 participants, with the Tuesday reception including opening remarks and Wednesday's reception and dinner including presentations on conference related matters. Also, no facts show acceptance would impair official judgment; result in preferential treatment or official decisions outside official channels.

We weigh those facts against the ones that may "raise suspicion" among the public of any appearance that public office was used to obtain an unwarranted privilege, private advancement or gain, which is prohibited by 29 Del. C. § 5806(e).

The officer advised the private enterprise that if the return flight was on Sunday rather than Friday, it would save \$255 in airline costs. The private enterprise allowed the officer to apply that \$255 to the lodging costs for two vacation nights. As the lodging costs were \$182 per night, the private enterprise had to cover an additional \$109 for lodging on those nights. ($\$182 \times 2 = \$464 - \$255 = \109). Thus, the private enterprise paid more because the officer suggested staying over, than if the officer had left as scheduled. Beyond the fact that the officer's personal vacation made the private enterprise pay more than was originally bargained for, we also considered the fact that the two-day vacation was in a \$182.00-a-night room at a "world-class destination resort on 22 coastal acres", where the room rates went from \$99.00 per night to \$2,500.00 per night. Courts have noted that there is a difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area. See, *Sanjour supra*. That is because the latter may raise the appearance that the public employee was using public office to privately benefit. *Id.*

B. Purpose of the Law

The Code's purpose is to ensure that the public's confidence in its employees and officials is upheld. 29 Del. C. § 5802. Statutes enacted for a public purpose are broadly construed to achieve that purpose. See generally, *3A Sands, Sutherland Stat. Constr. Chap. 71 5th ed. 1992*). Adding that purpose to these facts, accepting the additional \$109 beyond the actual expenses of the conference may "raise suspicion" among the public of the appearance of using public office for unwarranted privileges, private advantage or personal gain, in violation of 29 Del. C. § 5806(e). To resolve the appearance of impropriety, the private enterprise must be reimbursed \$109; the added cost incurred for the personal vacation.

III. Conclusion

Based on the above law and facts, we concluded that the value of the payment of expenses, minus the \$109.00, should be reported as a gift on the financial disclosure report, and that \$109.00 should be repaid to the private enterprise to eliminate any appearance of using public office for personal gain.

Financial Interest in Racing Animal—Commission Op. 03-05:

A public officer asked if he were required to report a partial ownership interest in livestock used in the racing industry, and if so, how it should be reported.

Yes. The source of a financial interest is reported in Section 1 of the form if: (1) there is a legal or equitable ownership interest; (2) the value exceeds \$5,000 in fair market value or in income; and (3) the financial interest constitutes "an instrument of ownership" or a "business

enterprise." Here, the public officer was one of several owners of the livestock, with a legal title of ownership registered in Delaware. While income of more than \$5,000 was not received during the reporting year, the fair market value was estimated as more than \$5,000. As he had an ownership interest valued at more than \$5,000, it met the threshold requirements for reporting.

The next issue was whether the interest was reported as "an instrument of ownership," as defined in 29 Del. C. § 5812(c), or as a "business enterprise," as defined in 29 Del. C. § 5812(n). An "instrument of ownership" includes, "but is not limited to, common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds and debt instruments, if convertible to equity instruments." 29 Del. C. § 5812 (c). A broad reading of the definition could result in the conclusion that the ownership was a "proprietary interest." That term generally defines an interest of a property owner with all rights appurtenant thereto. *Black's Law Dictionary*, p. 1219 (6th ed. 1998). Delaware recognizes certain legal rights of owners of registered racing animals. See, e.g., 3 Del. C. § 10032; 30 Del. C. § 2305; *Belote v. Del. Standardbred Dev. Fund*, Del. Ch., C.A. No. 985, Hartnett III V.C. (November 18, 1982).

As a registered owner, the officer would have the pertinent rights. However, in interpreting the definition "instrument of ownership," the Commission has held that the terms are to be construed to include objects similar to those specifically enumerated. *Commission Op. No. 99-14 (citing Triple C Railcar Service, Inc. v. City of Wilmington, Del. Super., C.A. No. 90C-FE-101, Gebelein, J. (September 17, 1992))*. The enumerated terms in "instrument of ownership" deal with various types of securities that carry conversion privileges. *Id.* "Proprietary interests" in securities generally means the owners have the right to vote shares of stock and to participate in managing. *Black's Law Dictionary*, p. 1219 (6th ed. 1998). No facts indicated the ownership was the type generally enumerated in this particular definition, e.g., stocks, bonds, etc.

"Business enterprise" means "corporation, partnership, sole proprietorship or any other individual or organization carrying on a business or profession." 29 Del. C. § 5812(n). One criterion of "business enterprise" is that the person holds a "position of management." *Id.* Management positions include "officer, director, partner, proprietor or other managerial position." 29 Del. C. § 5812(d).

The public officer and the other owners had not created a "corporation" or "partnership." As there was more than one owner, it was not a "sole proprietorship." However, "business enterprise" includes the broad words: "any other individual carrying on a business or profession," and "position of management" includes "proprietor." Delaware law establishes an occupation tax on certain racing animal owners. See e.g., 30 Del. C. § 2305. It is a form of excise tax imposed on persons for the privilege of carrying on business, trade or occupation. *Black's Law Dictionary*, p. 1079 (6th ed. 1998). Further, a proprietorship means the legal right and title of ownership of a business, usually unincorporated and owned and controlled by a person(s). *Id.* at p.1220.

Interpretation of Similar Federal Law

Aside from fitting within the terms of "business enterprise," the federal financial disclosure law is similar: requiring disclosure of identity and category of any interest in property held during the preceding calendar year in a trade or business or for investment or income with a fair market value of more than \$1,000 as of the close of the preceding calendar year.... 5 U.S.C. App. § 102. That law has been interpreted to include reporting of "livestock owned for

commercial purposes." 5 C.F.R. Part 2634.301(b). Under the rules of statutory construction, interpretation of one statute may assist in interpretation of another statute where they apply to similar persons, things or relationships. 2B Sands, *Sutherland Stat. Constr.* § 53.02 (5th ed. 1992); 2A Sands, *Sutherland Stat. Constr.* § 45.15 (5th ed. 1992) (decision on a point of statutory construction has relevance as precedent if the language of one statute has been incorporated in another or both statutes are such closely related subjects that consideration of one would naturally bring the other to mind).

Conclusion

As the public officer had a financial interest valued at more than \$5,000 fair market price which was apparently taxed for the privilege of carrying on a business, and he held a managerial position as a "proprietor," that interest was to be reported in Section 1 of the financial disclosure report under "business enterprise," indicating the source of the interest and listing the "position of management" as a "proprietor" with others.

Spouse's Student Loans—Commission Op. 04-05:

No. Public officers need not report creditors (debts) that are solely the spouse's. However, if the public officer was also indebted to the creditor (e.g., joint debt), he must report the creditor. *Comm. Ltr. Op. January 27, 1995.*

The Commission has held that in interpreting the statute, it looks first to the language. *Commission Op. No. 95-01 (citing Goldstein v. Muni. Court, Del. Super., C.A. No. 89A-AP-12, J. Gebelein (January 7, 1991)).* The statute only requires the officer to report the spouse's sole financial interests in the asset section "instruments of ownership, business enterprises, and professional organizations."

The asset provision requires public officers to report "constructively controlled" financial interests. 29 Del. C. § 5813(a)(3). "Constructively controlled" includes "any financial interest of the spouse or minor child of a public officer." 29 Del. C. § 5812(b). While the law clearly requires public officers to report sources of a spouse's assets, the debt section refers only to the "public officer's" creditors. The public officer is to report: "Each creditor to whom the public officer was indebted for a period of 90 consecutive days or more during the preceding calendar year in an aggregate amount in excess of \$1,000." 29 Del. C. § 5813(a)(5). Unlike the asset section, the debt section does not refer to creditors that are solely the spouse's. It refers only to the "public officers'" creditors. The definitions of "public officer" do not include spouses. 29 Del. § 5812(n)(1)-(17).

The Commission has held that where the persons and things to which the statute refers are affirmatively or negatively designated, the inference is that all omissions were intended. *Commission Op. No. 95-01 (citing Norman v. Goldman, 173 A.2d 607, 610 (Del. Super., 1961)).* The Commission is to be consistent in its opinions. 29 Del. C. § 5809(5).

The legislative history also shows that "constructively controlled" was intentionally moved to only the assets section. Initially the legislation required public officers to report any "constructively controlled" financial interests "as hereinafter provided." *House Bill 83, § 5862 (1), January 27, 1983, p4, line 31.* The statute then listed the categories as: instruments of ownership; business enterprises; income; capital gains; reimbursements; honoraria and creditors. *H.B. 83, § 5862 (1)(a)-(e), January 27, 1983.* In April, substitute legislation was

introduced. *House Substitute 1 to H.B. 83, April 17, 1983.* The substitute legislation moved the term "constructively controlled" from § 5862 (1), which governed reporting requirements for all categories. It was moved to § 5862 (1)(b) & (c). Those two sections govern reporting of instruments of ownership, business enterprise and professional organizations. *HS. 1 to H.B. 83, April 17, 1983, p. 5, line 25; p. 6, lines 8 & 9.* Later, the General Assembly dealt again with an amendment to "constructively controlled." *House Amendment 1 to HS. 1 to HB 83, June 7, 1983.* That action was a technical amendment, merely dividing the definition of "constructively controlled" into three sub-paragraphs. *HA. 1 to HS. 1 to HB. 83, June 7, 1983, p. 1, lines 17-20 & page 2, lines 1-7.*

The legislative history shows the General Assembly worked extensively with this legislation: 18 House amendments, and at least 2 Senate amendments to the substitute legislation. The history also supports the legal presumption that the General Assembly was aware of the statutory language and specifically limited "constructively controlled" to only the asset section.

Social Security Benefits as "Income"—Commission Op. 04-06:

Yes, Social Security benefits should be reported as a source of income if the amount exceeds \$1,000 in the reporting year. That conclusion is based on the following:

Public officers must report the source of **any** income for services rendered if the amount exceeds \$1,000 from a single source. 29 Del. C. § 5813(4)(a) (emphasis added). The purpose of the financial disclosure law is to instill the public's faith and confidence in the representatives of its government. 29 Del. C. § 5811. The Commission has followed the general rule of law that statutes with a public purpose are liberally construed to achieve that purpose. *Commission Op. No. 95-04 (citing 3A Sands, Sutherland Stat. Constr., Chapter 71 (5th ed.1992))*. Based on that purpose and the plain language of the statute, the Commission has held that the term "any" is all inclusive. *Commission Op. No. 95-06 (common meaning of "any" includes "every - used to indicate selection without restriction." Webster's Seventh New Collegiate Dictionary, p. 40 (1967))*.

In applying the statute's plain language and purpose, the Commission has held that if the payment is based on wages, the source of the payment is to be reported under "income." (*Commission Op. No. 96-68 (workers' compensation is reported as income, as a portion of the payment is derived from "wages.")*). That is because "income derived for services rendered" includes salary, wages, consulting fees and professional services. *Id. (citing 29 Del. C. §§ 5813(a)(4)(a) and 5812(j))*.

Like workers' compensation, Social Security payments are derived, in part, from "wages." In *Op. No. 96-68*, the Commission also factored in that the standard for reporting "income" under the Internal Revenue Code (IRC) includes reporting workers' compensation as "income." *Id.* Likewise, the IRC standard includes Social Security as "income." See, e.g., *IRS Tax Topics, "Topic 423 - Social Security and Equivalent Railroad Retirement Benefits"; IRS Publication 915; Form 1040, "Income" 20a; and Form 1040 Instructions, Lines 20a and 20b.*

Based on the statutory language and purpose, and the Commission's prior interpretation of "income," it concluded that Social Security benefits should be reported as a source of "income" in Section 3(a) of the financial disclosure reporting form.

Campaign Contributions are not reported as "Gifts"—Commission Op. 04-48:

An elected official received notice that lobbyists, on their lobbying expense report, listed political contributions as "gifts" to him. He asked if that information was properly listed by the lobbyists as a "gift." He also asked if he must report the same information as a "gift" under the financial disclosure law.

Under the lobbying law, "gift" "shall not include a political contribution otherwise reported as required by law." 29 Del. C. § 5812(h). Thus, lobbyists should not report campaign contributions as a "gift." Similarly, the financial disclosure report filed by public officers specifically excludes political contributions that are reported pursuant to other laws. 29 Del. C. § 5812(h). Political contributions are reported pursuant to the filing requirements with the Board of Elections. 15 Del. C. Ch. 80. Thus, the public officers do not report campaign contributions as "gifts" under the financial disclosure law, but file pursuant to the Elections law with the Elections Board.

Payments on Jointly Held Property—Commission Op. 09-54:

A public officer asked if the law required reporting a payment by a non-relative, co-owner of property for improvements as a gift, when the public officer also contributed to property improvements. The second issue was if the law required reporting, how it should be reported. The Commission held that $\frac{1}{2}$ the value of the improvements should be reported, as no exemption applied, but the value received would be $\frac{1}{2}$ because of the mutual benefit the co-property owner received when the official paid for improvements.

