

## JURISDICTION & PROCEDURE 1991-2022

**22-24—Code of Conduct applicability:** [Lawyer] contacted the Commission to determine if [a specific provision] could be deleted from [Entity's] bylaws because it prevented [the Entity's] board members, staff, directors and trustees from representing [the Entity] before [a State agency]. In support of removal, he noted that without the bylaw, board members, staff and the trustees] would still be subject to the State Code of Conduct's restrictions on representing another's interest before the State. Under the less strict State law, an employee, trustee, board member or director would only be prohibited from representing [the Entity] before their employing State agency.

### A. Jurisdiction

In the letter request, [Lawyer] summarized the applicability of the State Code of Conduct to various categories of [the Entity's] staff. "[Entity's] employees are considered 'state employees' because [Entity] is a 'state agency'". "[Entity's] Directors are considered 'state employees' because they 'receive compensation as an employee of a state agency'". "Trustees are not 'state employees' and they are specifically not 'state officers'". That is true. However, they *are* considered 'honorary state officials' and are also subject to the State Code of Conduct.

### B. State Law

Restrictions on representing another's interest before the State. — (1) No state employee, state officer or honorary state official may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee, officer or official is associated by employment or appointment.

As pointed out in the Request Letter, the [Entity's] bylaw was more stringent than the State law. State actors are prohibited from representing a private entity before the agency (or board) by which they are employed. [the Entity's] bylaws prohibited an employee, director, board member or trustee from representing [the Entity] (a State agency) before *any* other State agency.

The Commission agreed that the bylaw, although well-intentioned, grossly overstated the State Code of Conduct's conflict of interest provisions. Removal of the bylaw would allow [the Entity's] staff to represent [the Entity's] interests more effectively without diminishing their ethical obligations under the State Code of Conduct.

The removal of the bylaw at issue would have no effect on the State Code of Conduct's applicability to [the Entity]'s employees, directors, board members or trustees.

**19-01—Dual Compensation:** [Employee] ran for and was elected [to public office] in November 2018. He was also a State employee. His State work hours were usually 8:00 a.m. to 4:30 p.m. The hours of [the public office] listed on their website were 8:00 a.m. to 5:00 p.m. [Employee's State Supervisor] questioned how it would be possible for [Employee] to work two government

positions, with the same work hours, without violating the State Dual Compensation policy. 29 *Del. C. § 5822*. The policy prohibited an employee from being paid by two government entities for the same hour of work. The statute also required those employees who were dually employed to keep time records which illustrated the hours worked at their State job(s) so that the State auditors could confirm that there had not been dual payment for any work hour. *Id.*

**29 *Del. C. § 5822*** reads:

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

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

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

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

Absent a conflict of interest, the law recognized that one employee may hold two government positions. However, such a situation required rules of its own. The employee could not be paid for one hour of work by two entities. Therefore, the dually employed person must take vacation, personal or compensatory time from one position or have their salary prorated to reflect the missed time. Because the hours for the [State] position and the [public office] overlapped, [Employee] was required to take vacation, personal or compensatory time from one position while working at the other position. Should [Employee] have neither vacation, personal nor compensatory time available, he must have his pay prorated to reflect a reduced salary for the lost time. 29 *Del. C. § 5822(e)*.

The statute also contained language which controlled how vacation, compensatory, and personal time should be tracked. If the work hours coincided for the first and second jobs, and the employee used vacation or compensatory time so that they could be paid by both entities, the law mandated two requirements: (1) time records be kept and (2) time records be verified by supervisors "at least once every pay period." 29 *Del. C. 5822(b)*.

To comply with the statutes reporting requirements [Employee], [his attorney], [Employee's State Supervisor] and [the agency's Deputy Attorney General] worked together to create a document that required [Employee] to certify his work hours at [his State job] once every pay period. At the meeting [Employee] provided a copy of the document and discussed

the fact that the [State agency] would try to accommodate his requests for vacation or personal time when possible. [Employee] acknowledged his understanding of the fact that [his State agency] would try, but may not be able, to grant all of his requests. [Employee] also demonstrated his knowledge of the statute's requirements and the underlying public policy.

The Commission's oversight powers of the Dual Compensation Policy are to ensure that those employees who have been identified as working two government jobs have appropriate forms and policies in place so that accurate time records can be kept. [Employee] fulfilled that requirement.

**18-51—Referral to the Attorney General's Office; Statute Unconstitutional:** In November 2018, [Complainant] emailed a letter to the State Public Integrity Commission ("PIC or Commission"). A hard copy was sent via U.S. Mail and received in the office on November 30th. In the letter [Complainant] asked the Commission to open an investigation into [a State official]. He/she opined that [Official's personal conduct] reflected unfavorably on the state and its government, a violation of 29 *Del. C.* § 5806(a), often referred to as the appearance of impropriety standard.

Despite the confidentiality requirements related to matters submitted to the Commission, [Complainant]'s letter to the PIC appeared in its entirety in more than one media outlet. In addition, he/she responded to reporter's questions about the letter and the contents therein.

## **APPLICABLE LAWS**

### **A. 29 *Del. C.* § 5808A—Commission Counsel Power and Duties**

(a) There shall be a Commission Counsel who shall be the legal representative of the Commission and have the following powers and duties:

(3) To review information coming to the attention of the Commission relating to potential violations of this chapter.

(4) To investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of this chapter and/or to recommend that possible violations of these, or other state and federal laws, be referred by the Commission to the Attorney General or the United States Attorney for investigation and prosecution. Matters may be so referred to the Attorney General or the United States Attorney only upon a determination by at least a majority of the Commission that there are reasonable grounds to believe that a violation may have occurred.

### **B. 29 *Del. C.* § 5810(h)(1)—Complaints; Hearings; Dispositions**

All proceedings relating to a charged violation of this chapter shall be maintained confidential by the Commission unless:

- a. Public disclosure is requested in writing by the person charged; or
- b. the Commission determines after a hearing that a violation has occurred.

### **C. 29 *Del. C.* § 5805(e)—Unauthorized disclosure of confidential information**

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

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

Commission Counsel was required by law to report to the Commission a suspected violation of the Code of Conduct. Counsel brought the matter to the Commission for a determination of whether there were reasonable grounds to believe that [Complainant] violated the confidentiality provisions of 29 *Del. C.* § 5810(h) and § 5805(e).

After examining the relevant facts and statutes, the Commission decided that [Complainant] knowingly violated the law by discussing his letter with various media outlets in contravention of State law.

## **FIRST AMENDMENT CASE LAW**

In researching case law applicable to the factual scenario, Commission Counsel found case law which indicated that the confidentiality provisions cited above *may be* a violation of the First Amendment's right to free speech. In the interest of fairness to all parties, the applicable case law was forwarded to the Attorney General's Office with the referral.

The Commission voted to forward the matter to the Office of the Attorney General, as mandated by their governing statutes, for consideration of prosecution and/or fines. A copy of the letter was provided to [Official] since it was his/her right to confidentiality that was violated.

## **Update**

*Prior to sending the referral to the Attorney General's office, Commission Counsel found case law that indicated the Code of Conduct's confidentiality requirement may be unconstitutional. Commission Counsel raised that matter with the Commission at the next meeting.*

*The Commission received a letter from the Attorney General's office in January 2019 that stated the confidentiality statute was an unconstitutional restriction on free speech.*

**18-47—Letter Complaint, Jurisdiction:** In November 2018, [Complainant] sent a letter to PIC. A hard copy was sent via U.S. Mail and received in the office on November 30, 2018. [Complainant] asked the Commission to open an investigation into [a State official]. [The Complaint referenced conduct unrelated to the Official's State job duties]. According to [Complainant], [Official] was subject to the Code of Conduct applicable to all State officials. As such, he/she believed that [Official's] personal conduct reflected unfavorably on the state and its government, a violation of 29 *Del. C.* § 5806(a), often referred to as the appearance of impropriety standard.

## **Jurisdiction**

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

29 *Del. C.* § 5806(a) reads in full:

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

[The Commission concluded that they did not have jurisdiction over the Official. Even if jurisdiction existed, there was no legitimate argument that Official's conduct was an exercise of government power]. The same reasoning applied to the invocation of § 5806(a), the appearance of impropriety standard. That provision must be interpreted in the context of the Code of Conduct's purpose. To interpret the standard any other way would allow the provision to apply to behaviors that were not otherwise violations of the Code of Conduct.

Complaint dismissed for lack of personal and subject matter jurisdiction.

**18-44A--Referral to Attorney General's Office:** In October 2018, [a citizen] submitted a Complaint against [a State employee]. [Complainant] alleged that [Employee] was reviewing and disposing of matters involving an acquaintance], creating an appearance of impropriety. The Complainant further asked that the Commission [take a specific action]. The Complaint was first submitted via email and a hard copy followed by U.S. Mail [several days later]. Upon receipt of the email submission, Commission Counsel informed [Complainant] that the matter must remain confidential. On the same day, [Complainant] posted information about the Complaint on [a] website.

One day later, [a media source] published information about the Complaint, its contents, allegations and the name of the [person against whom the Complaint was filed]. [Complainant] was quoted extensively. Over the subsequent weekend, [Complainant] continued to speak to [the media] and also posted information on Facebook. Commission Counsel emailed [Complainant] again explaining that they had violated the confidentiality provisions in the Code of Conduct and that the violation would be presented to the Commission for their review and possible referral to the Attorney General's office for prosecution. [Subsequently, Complainant continued to discuss the Complaint with various media outlets]. Commission Counsel then sent a certified letter to [Complainant] re-stating the law against discussing confidential PIC matters. The return receipt for that letter had not been returned to PIC at the time of the meeting.

## **APPLICABLE LAWS**

### **A. 29 *Del. C.* § 5808A—Commission Counsel Power and Duties**

(a) There shall be a Commission Counsel who shall be the legal representative of the Commission and have the following powers and duties:

(3) To review information coming to the attention of the Commission relating to potential violations of this chapter.

(4) To investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of this chapter and/or to recommend that possible violations of these, or other state and federal laws, be referred by the Commission to the Attorney General or the United States Attorney for investigation and prosecution. Matters may be so referred to the Attorney General or the United States Attorney only upon a determination by at least a majority of the Commission that there are reasonable grounds to believe that a violation may have occurred.

**B. 29 Del. C. § 5810(h)(1)—Complaints; Hearings; Dispositions**

All proceedings relating to a charged violation of this chapter shall be maintained confidential by the Commission unless:

- a. Public disclosure is requested in writing by the person charged; or
- b. the Commission determines after a hearing that a violation has occurred.

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

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

**APPLICATION OF THE FACTS TO THE LAW**

Commission Counsel is required to report to the Commission a suspected violation of the Code of Conduct. Counsel brought the matter to the Commission for a determination of whether there were reasonable grounds to believe that [Complainant] had violated the confidentiality provisions of 29 Del. C. § 5810(h) and § 5805(e).

Counsel suspected that [Complainant] violated the law by discussing their Complaint with [media outlets and publishing the information on Facebook and other websites]. They were obviously familiar with the State Code of Conduct because they cited specific provisions in their Complaint, as well as in discussions with [the media]. Although not required for a prosecution of this type of violation, [Complainant] demonstrated his knowledge of the Code of Conduct's confidentiality provision when [a media source] reported him as saying "those confidentiality rules only apply once there has been a formal charge and related proceedings."

The law required that the statute be interpreted consistent with the General Assembly's manifest intent. 1 Del. C. § 301. If the statute were interpreted as [Complainant] stated, there would be no point in having a confidentiality provision at all. A person could draft a Complaint, publish it and discuss it at length and then submit it to the Commission for further proceedings, all without violating the confidentiality provision.

**ACTION**

The Commission decided that [Complainant] should be referred to the Attorney General's office for prosecution.

**18-44B—Referral to the Attorney General's Office: Breach of 29 Del. C. § 5810(h) and § 5805(e)**

*Prior to sending the referral to the Attorney General's office, Commission Counsel found case law that indicated the Code of Conduct's confidentiality requirement may be unconstitutional. Commission Counsel raised that matter with the Commission at the next meeting.*

A review of relevant case law showed that the Code of Conduct's confidentiality provisions may be a violation of the First Amendment's right to free speech. Of particular concern was a 3<sup>rd</sup> Circuit case, *Stilp v. Contino*. Delaware is part of the 3<sup>rd</sup> Circuit which meant that Delaware courts would be required to follow the circuit's case law unless the facts of the case could be distinguished from the prior opinion in some way. Counsel provided the Commissioners with other relevant case law that was copied and pasted into a document for the Commission's review. Much of the case law contained fact patterns similar to the situation with [Complainant].

*Dilemma--The Commission could not:*

Declare their own statute unconstitutional.

Ask the AG's office for an opinion because they did not have jurisdiction over the Commission's statutes.

Ask the court to decide the constitutionality of the statute because there was no case before them.

The Lawyer's Rules of Professional Conduct prevented Commission Counsel from sending the matter to the AG's Office in the hopes [Complainant] would contest it, thus putting a case before the court. Counsel had an ethical obligation not to pursue legal matters that did not have a reasonable probability of success.

The Commission decided to refer the matter to the AG's Office, thus conferring jurisdiction, and to include language in the referral letter that indicated the statute may be unconstitutional.

## **Update**

*The Commission received a letter from the Attorney General's office in January 2019 that stated the confidentiality statute was an unconstitutional restriction on free speech.*

**16-49—Jurisdiction—Complaint:** On September 19, 2016, PIC received a formal Complaint submitted by [Complainant] against a private sector employee, Ms. X, who was also a member of a State Board associated with a non-executive branch of State government ("Branch"). Her work on the Board required her to have frequent professional contact with the Branch and their employees.] Unlike most boards whose members were appointed by the Governor with the advice and consent of the Senate, this Board's members were appointed by [a different authority].

[Complainant] had a matter pending before the Board. As part of the proceedings, a motion [was filed] with the Board which was to be decided by [Ms. X]. [The Complainant] requested that [Ms. X] voluntarily recuse herself from deciding the matter, which she declined.

The Complaint alleged [Ms. X's] failure to recuse herself was a violation of the State

Code of Conduct's appearance of impropriety standard pursuant to 29 Del. C. § 5806(a). In support of the allegation, [Complainant] alleged that [Ms. X's private employment required her to have frequent contact with a Branch employee who had initiated the matter before the Board. Complainant stated that as a result of the contact Ms. X could not decide the matter pending before the Board because of a conflict of interest].

## **APPLICATION OF THE LAW TO THE FACTS:**

### **I. Procedure**

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

### **II. Jurisdiction**

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

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

The Complaint correctly stated that the Code of Conduct applies to Honorary State Officials, defined as appointees of "any state agency" receiving less than \$5000 in compensation. 29 Del. C. § 5804(6). State agency is defined as "any ...board, commission, committee, court .... 29 Del. C. § 5804(11). The Complaint then alleged that [Ms. X] was subject to the Code of Conduct because she was "affiliated with a 'State agency' under § 5804(11). However, the Complainant failed to consider the remaining portion of § 5804(11) which further defined 'state agency' as an entity "...existing by virtue of an act of the General Assembly or the Constitution of the State.... *Id.* The [Board] did not exist by virtue of an act of the General Assembly or the Constitution of the State. As a result, the Commission decided the [Board] was not a State agency as it was intended to mean under PIC's governing statutes. Since the [Board] was not a state agency, then members of the [Board] were not Honorary State Officials and the State Code of Conduct did not apply to [Ms. X].

There were numerous indicators that the Code of Conduct was not intended to apply to the members of the [Board]. First, [the authorizing entity created the Board to oversee the Branch's responsibilities]. Second, the [Board's] members were appointed by the [authorizing authority], not the Governor with the advice and consent of the Senate, as were members of other boards. Third, the procedures governing the [Board] contained their own provision for recusal. Lastly, the [Branch] has consistently proclaimed its jurisdiction over [this area]. [*Citations omitted*].

[Ms. X] was likewise exempt from the Commission's jurisdiction because she was a member of a board solely under the purview of the [Branch]. The Separation of Powers Doctrine "...is a rule forbidding one branch of government from exercising powers exclusively assigned to another." *Opinion of the Justices*, 380 A.2d 109, 113 (Del. 1977). "...[F]rom the beginning our state government has been divided into three departments, legislative, executive and judicial...[i]t is likewise true that, generally speaking, one department may not encroach on the field of either of the others. *Id.* (*citing New Castle Common v. Gordy*, 93 A.2d 509, 517 (Del. 1952). Under a similar set of circumstances, the Delaware Supreme Court decided that the



Doctrine prohibited the Public Employee Relations Board (“PERB”), an executive branch agency, from exercising jurisdiction over judicial branch employees. *Superior Court v. State Public Employment Relations Board*, 988 A.2d 429, 432-433 (Del. 2010). In reaching that decision, the Court emphasized the fact that the judicial branch had promulgated its own set of rules regarding the contested issue and those Rules pre-empted the executive branch rules. *Id.*

Applying the Court’s analysis to the Complaint, it was clear that the Commission could not exercise jurisdiction over [Ms. X]. The [Branch] evidenced its intent to retain jurisdiction over members of [its Boards when it established a Code of Conduct]. Because [Ms. X’s] alleged conduct was wholly related to her position on a Board created and regulated by [a separate branch of State government] and because the [Branch] had evidenced its intent to retain jurisdiction over Code of Conduct matters related to their employees, the Commission did not have jurisdiction over [Ms. X] for purposes of the Complaint.

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

The Complaint alleged a violation of 29 Del. C. § 5806(a) which reads: [e]ach state employee...shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee...is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.” This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

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

The Commission decided [Ms. X] was not under the Commission’s jurisdiction and the Complaint alleged an unsubstantiated claim. The Complaint was dismissed.

**16-35A—Jurisdiction—Complaint:** On July 25, 2016, the Commission received a Complaint submitted by [a private citizen] regarding [a State employee who was employed by a different branch of State government]. [The citizen] alleged [Employee] was violating the State Code of Conduct’s Appearance of Impropriety standard pursuant to 29 Del. C. § 5806(a) by not recusing herself from [a formal inquiry related to the citizen]. According to [the citizen], [Employee]’s investigation of [him] had the appearance of impropriety because she “[was] flaunting her

position to carry out the personal vendetta campaign of her fellow [colleague]" and to "advance her [professional] ambitions".

[The citizen] was referred [to Employee's office by a professional in the same field for breaking a professional regulation].

## **I. Procedure**

Properly sworn Complaints must be notarized pursuant to 29 Del. C. §4328(3). [the citizen]'s Complaint was notarized but it was not notarized in the proper format. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). While the Commission could have dismissed the Complaint for failure to be properly notarized, it was decided [the citizen] would likely have the Complaint notarized in the proper format and re-submit it at a later date. As a consequence, the Commission reviewed the Complaint to determine if the Commission had jurisdiction over [Employee] and to determine if the Complaint alleged a violation of the Code of Conduct.

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

### **A. Personal Jurisdiction**

There was no doubt [Employee] was a State employee. However, the Complaint concentrated on duties performed by [Employee as part of her work for this branch of government. This branch of government has sole jurisdiction over its employees when they are acting in their profession's field of expertise].

In sum, the Commission determined that [this] branch of state government was more properly suited to enforce rules governing [Employee's] conduct *as it related to [their field of expertise]*.

The Commission also considered the applicability of the Separation of Powers Doctrine. The Doctrine" is a rule forbidding one branch of government from exercising powers exclusively assigned to another." *Opinion of the Justices*, 380 A.2d 109, 113 (Del. 1977). "...[F]rom the beginning our state government has been divided into three departments, legislative, executive and judicial...[i]t is likewise true that, generally speaking, one department may not encroach on the field of either of the others. *Id.* (*citing New Castle Common v. Gordy*, 93 A.2d 509, 517 (Del. 1952)).

Here, [Employee] was acting in her [official] capacity by investigating a matter which was referred to her office by [a professional in the same field]. That was what she was hired to do. If [the citizen] believed she could not perform her duties impartially because of her [professional] ambitions, [there was] a procedural process by which he could have requested [Employee]'s removal from investigation into his matter. It was unclear to the Commission why [the citizen] did not seek [Employee]'s recusal through [that process] process and instead filed a Complaint with PIC. It appeared the Complainant was trying to draw the Commission, an executive branch agency, into a controversy which was initiated at the request of an [employee of a separate branch of government].

As a result of the above, the Commission decided it did not have jurisdiction over

[Employee] as it related to her [professional conduct]. As a result, the Complaint was dismissed for lack of personal jurisdiction.

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

Even if the Code were to be applied to the facts set forth in the Complaint, the Complaint failed to adequately allege a violation of the Code of Conduct. 29 Del. C. § 5809 (a)(3). The Complaint alleged a violation of 29 Del. C. § 5806(a) which reads: [e]ach state employee...shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee...is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.” This is basically an appearance of impropriety test. *Commission Op. No. 92-11*.

Nowhere in the Code of Conduct is professional ambition listed as a predicate for a violation of the rules. Additionally, no facts were alleged which could substantiate a public perception of impropriety. Clearly, [the citizen] was an interested party and would assume improper intentions on [Employee]’s part, but he did not offer any facts which would have indicated that the public at large was (a) aware of the situation and (b) that [Employee]’s investigation into [the citizen]’s professional conduct was motivated by anything other than fulfilling her professional obligation to her employer. The Commission decided that mere conjecture over someone’s future aspirations was insufficient to substantiate a claim. In cases where the Commission determines that a claim is frivolous or fails to state a claim, the Complaint should be dismissed. 29 Del. C. § 5809(3).

The Commission decided they did not have jurisdiction over [Employee] as it related to her [professional duties]. Furthermore, they also concluded that even if jurisdiction had been established, the Complaint did not substantiate a claim which would constitute a violation of the Code of Conduct.

**16-35B—Jurisdiction--Complaint (Reconsideration):** [The Commission’s] prior opinion was re-examined in light of issues raised when reviewing [Complainant’s] second Complaint filed with the Commission. The Commission reached the same conclusion, PIC did not have jurisdiction over [Subject] and the Complaint failed to properly allege a violation of the Code of Conduct. The Commission reconsidered the reasoning and decided that in addition to a lack of jurisdiction over [Subject] due to the Separation of Powers doctrine, the Commission also found a lack of jurisdiction because [Subject’s Employer] did not meet the Code of Conduct’s definition of a state agency. 29 Del. C. § 5804(11).

The State Code of Conduct applies to ‘state employees’ working for a ‘state agency’. State agency is defined as “any office, department, committee, court...and all public bodies *existing by virtue of an act of the General Assembly or of the Constitution of the State.*” 29 Del. C. § 5804(11) (*emphasis added*). The Commission did not find any evidence that [Employer] was created by an act of the General Assembly, nor was it created by the Delaware Constitution. [Employer]’s authority derived in whole from [a different authority]. The Commission could not conclude that [Subject] was a state employee because her [Employer] did not qualify as a state agency under PIC’s governing statute. Such a finding placed [Subject] outside the jurisdiction of PIC.

Even if the Commission were to consider [Subject] a state employee, the jurisdictional predicate required for application of the Code of Conduct would still fail under the Separation of

Powers doctrine. Under a similar set of circumstances, the Delaware Supreme Court decided that the Doctrine prohibited the Public Employee Relations Board (“PERB”), an executive branch agency, from exercising jurisdiction over judicial branch employees. *Superior Court v. State Public Employment Relations Board*, 988 A.2d 429, 432-433 (Del. 2010). In reaching that decision, the Court emphasized the fact that the judicial branch had promulgated its own set of rules regarding the contested issue and those Rules pre-empted the executive branch rules. *Id.*

Applying the Court’s analysis to the matter, it was clear that the Commission could not exercise jurisdiction over [Subject]. [Subject] was an employee of [a different branch of government]. The [creating authority] had evidenced its intent to retain jurisdiction over [its employees] when it established [its own Code of Conduct].

[Subject]’s alleged conduct was wholly related to her work in [a different] branch of State government and the [authority] had evidenced its intent to retain jurisdiction over Code of Conduct matters related to their employees. The Commission did not have jurisdiction over [Subject] for purposes of [the] Complaint.

**14-17 – Complaint—Procedures Not Followed:** Counsel was contacted via anonymous email on May 9, 2014, asking PIC to open an investigation of [a State official’s handling of a specific matter]. The email was copied to various legislators. The email claimed to be a sworn complaint and listed multiple witnesses to be called at a hearing, presumably by ‘Anonymous’. Counsel responded on May 16, 2014, asking for clarification of the writer’s intent, requesting further direction, and reminding ‘Anonymous’ that all of the Commission’s proceedings are confidential. Counsel asked ‘Anonymous’ to refrain from copying the correspondence to outside parties. ‘Anonymous’ responded by accusing Counsel of having a conflict of interest and asking for Counsel’s recusal. That email was copied to the entire General Assembly. ‘Anonymous’ did not address the procedural issues presented by Counsel in the first email. Counsel has not heard from ‘Anonymous’ since May 18, 2014.

The Commission reviewed the submitted materials and dismissed the ‘complaint’ for failure to comply with the proper procedural requirements, most notably the failure to submit a notarized document as required by *Hanson v. PIC*. C.A. 11A-06-001 (Del. Super. 2012). The Commission instructed Counsel to email ‘Anonymous’ that the complaint was dismissed and to advise that the Commission would no longer communicate with the complainant through email because ‘Anonymous’ continued to forward the emails to members of the General Assembly in violation of the confidentiality requirements of 29 Del. C. § 5807(d)(1).

**12-41 - Complaint—Deviation from Charter School Laws and Jurisdiction:** The original complaint was submitted on October 12, 2012. The complaint was not notarized as required by 29 Del. C. §5810(a). [The complainant] submitted an amended complaint on November 5, 2012. The amended complaint was signed and sealed by a notary but was missing additional language indicating the document was a sworn statement. 29 Del. C. §4328(3). The additional language was identified by the Court in *Hanson v. PIC* as being the accepted notarization for a complaint filed with PIC. 2012 WL 3860732 (Del. Super.). (*aff’d PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). The Commission decided not to dismiss solely on the notary defect as the complaint could be re-submitted with the correct notarization.

Assuming the complaint could be properly notarized, the Commission reviewed the complaint to determine if it was frivolous or failed to state a violation. *PIC Rules*; 29 Del. C.

§5809(3). The Commission may dismiss the complaint on those grounds. *Id.* The allegations are presumed to be true absent further investigation. 29 Del. C. §5808A(a)(4). Charter Schools have been found by the Commission to be subject to the Code of Conduct. *Commission Op. No. 07-63.*

- (a) The Commission first addressed the allegation that [the charter school's] board instituted an admission policy that was contrary to charter school law. The complaint alleged the policy allowed [the] school director, to personally select "preferential students." Nothing in the Code of Conduct addresses school admission policies. The Commission decided that PIC lacks subject matter jurisdiction over charter school admission policies. Dismissed for lack of jurisdiction.
- (b) Next, the complaint alleged [the school director's] employment contract contained a requirement that all of her grandchildren would be admitted to the school. This matter had already been reviewed by the Charter School Accountability Committee in November 2012. Additionally, under the Code of Conduct, only the agency that entered into the contract has the power void the contract. 29 Del. C. §5805(g). PIC lacked jurisdiction over the subject matter and did not have the power to void the contract. Dismissed for lack of jurisdiction.
- (c) The complaint alleged "preferred parents" were asked to join the school board, increasing the size of the Board from five/seven to eleven people. It is further alleged board member's children were automatically admitted, bypassing the school's lottery system. The Code of Conduct does not contain provisions related to either of these issues. The school lottery system and the size of the school board are regulated by the Department of Education. Dismissed for lack of jurisdiction.
- (d) Also alleged were concerns about compensation and the manner in which the budget was organized and presented. Additionally, [complainant] claimed the board voted on matters submitted to them by email with no mention of the contents. The Code of Conduct does not address budgetary issues or employment contracts. As to board votes on email submissions, they may qualify as a FOIA violation, but it does not fall under the purview of the PIC. Dismissed for lack of jurisdiction.

As to all of the above listed allegations, the Commission recommended that the complainant be directed to a website specifically designed to accept complaints about charter schools. The website is:  
[http://www.doe.k12.de.us/infosuites/schools/charterschools/cs\\_complaintprocess.shtml](http://www.doe.k12.de.us/infosuites/schools/charterschools/cs_complaintprocess.shtml).

The Commission turned next to the remaining items in the complaint.

- (a) The board President's wife was an employee of the school. The Code of Conduct does not bar relatives from working with each other. The Code does prohibit one relative "reviewing and disposing" of matters involving the other relative. 29 Del. C. §5805(a)(1). The fact two people worked together, without more, was not enough to determine if there was a violation of the Code of Conduct. The Commission did not have enough information to determine if the board President was reviewing and disposing of matters related to his wife. (For example, did he complete her performance evaluations, supervise her day-to-day work, sign her paycheck?). Dismissed for failure to state a claim.
- (b) A board member overseeing construction for the school was a contractor. Again, without more facts, the Commission could not determine if this was a violation of the Code of Conduct. The Commission would need to know if the board member had a "personal or private interest" in the construction. 29 Del. C. §5805(a)(1). Additional facts relative to a determination of a Code of Conduct violation included whether the

board member owned the construction company, whether the construction company was owned by a friend or family member, the manner in which the contract was awarded, etc. Dismissed for failure to state a claim.

- (c) [Alleged improper real estate dealings]. The Department of Education regulates the use and transfer of real property for all schools. 14 Del. C. §504(3). Additionally, [complainant] alleged [a] family benefitted from the [real estate deal]. However, the complaint did not explain how they benefitted. The Commission would need additional facts to understand how the [family] benefitted in order to render an opinion as to whether the [real estate deal] violated the Code of Conduct. Dismissed for failure to state a claim.
- (d) Finally, the complaint alleged [the school director] was also on [another Board]. Holding dual positions, standing alone, is not prohibited provided that the employee complies with the Dual Compensation rules of the Code of Conduct. 29 Del. C. 5821. The Commission did not have enough facts to determine if [the school director] complied with the statutory requirement. The “other employment” provision of the Code restricts accepting other employment if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) and adverse effect on the public’s confidence in the integrity of its government. 29 Del. C. §5806(a). Not enough facts were provided to determine if this section of the Code is applicable to this situation.

The Commission suggested the complaint could be re-submitted with additional facts to substantiate a claim under the Code of Conduct. Counsel provided [complainant] with a copy of the Code of Conduct. The complaint should also be properly sworn. The allegations over which the Commission did not have jurisdiction may not be re-submitted.

**12-35 – Discrimination Allegations – No Jurisdiction:** A State employee was concerned because his State agency held a training session for women in leadership and did not allow men to attend. The Commission has previously dealt with complaints dealing with alleged discrimination, and concluded it had no jurisdiction, as the laws administered by PIC do not include authority over alleged discrimination in the workplace laws. Its jurisdiction is limited to 29 Del. C., chapter 58. 29 Del. C. § 5809(2) and (3). (PIC’s powers include issuing advisory opinion on “this chapter to any particular fact situation” and to act on alleged violations of “this chapter.”). Those concerns are addressed, usually by the Equal Employment Opportunity Committee (EEOC). Counsel had drafted a letter explaining that, as a matter of law, the Commission does not have jurisdiction, and referring the individual to EEOC.

**11-55 Complaint – Jurisdiction:** A private citizen filed a complaint with the Department of Justice, copying PIC. He alleged a Court employee was interfering with the scheduling of hearings and visitation as it pertained to a relative. It alleged the conduct violated a Court Administrative Order. PIC’s jurisdiction is limited to interpretation of “this chapter” 29 Del. C., Chapter 58. 29 Del. C. § 5809(3). The complaint did refer to the Code of Conduct, but did not indicate which provision was allegedly violated, as required by PIC rules. *Commission Rules § IV, Hearings and Decisions, p. 4*. Also, it was not a sworn complaint as required by law. 29 Del. C. § 5810(a). A Court official, contacted by Commission Counsel, said the matter was being investigated. The Commission decided that PIC would acknowledge that a copy of the complaint was received; that it had no jurisdiction over Court Orders; and would not investigate at the time to conserve resources and not have multiple agencies investigating, but PIC

requested it be advised of the status. If complainant was not satisfied, he could return to the Commission with a complaint that met the standards in the Rules and statute.

**11-43/44 - Anonymous - No Jurisdiction:** Two individuals, independent of each other, sent anonymous letters regarding how a Department is managed. Neither letter identified any person or any facts involving actions allegedly contrary to the Code. Both writers had a return address on their envelopes, so a draft letter was prepared stating that the Commission only has jurisdiction over the provisions in Title 29, Chapter 58, Delaware Code. 29 Del. C. § 5809(3). It was suggested that they may want to send the letter anonymously to the Cabinet Secretary.

**11-42 - No Jurisdiction:** A visitor to the State was given a speeding ticket. The Commission can only act on alleged violations of “this chapter.” 29 Del. C. § 5809(3). Counsel drafted a response stating PIC had no jurisdiction over speeding tickets issued to out-of-state visitors. However, in light of his concern that the speed limit radically dropped from 55 m.p.h. to 25 m.p.h., he was provided with the contact information for DelDOT, which had already said it would look at that area regarding the sudden drop in speed.

**11-37 – No Jurisdiction:** A prisoner, convicted after a bench trial, alleged the Judge did not properly control the courtroom or properly render a decision. He also alleged the two prosecutors used improper evidence. Counsel drafted a letter saying the Commission lacked jurisdiction because: (1) it only has jurisdiction over Judges for purposes of financial disclosure reports. 29 Del. C. § 5812(n)(1)(e-i). The allegation was not related to the Judge’s report; and (2) while State employees, including prosecutors, are subject to the Code, the allegations did not pertain to any Code provision. The Commission can only act on alleged violations of “this chapter.” 29 Del. C. § 5809(3).

**11-29 - Jurisdiction:** The Commission approved Counsel’s draft response to requestor explaining that the Commission lacks jurisdiction over allegations against a General Assembly member because jurisdiction over them is related to their financial disclosure reports. 29 Del. C. Ch. 58, subchapter II. The complaint did not pertain to that issue.

**11-22 – Jurisdiction:** A private citizen had bad experiences with long term care facilities in New Jersey. Counsel drafted a letter to him that the Commission had no jurisdiction over those matters. Its jurisdiction is limited to overseeing State of Delaware employees and Officials and nothing indicated they were involved. 29 Del. C. § 5804(6), (11), (12) and (13). Even if Delaware employees and officials were involved, the condition of nursing homes is not within the Commission’s subject matter of jurisdiction as it only has jurisdiction over allegations in “this chapter.” 29 Del. C. § 5809(3) and § 5810. Laws on long-term care facilities in Delaware are at least in part, in 16 Del. Ch. 11. The letter provided him contact information for the N.J. Ombudsman Office that investigates New Jersey’s long-term care facilities.

**11-20 – Complaint:** A citizen sent an e-mail to several State offices complaining about a local government. PIC was copied. Some allegations pertained to election matters. That is not within the Commission’s jurisdiction. See, 15 Del. C., Election Laws. The other allegation pertained to nepotism. The statute provides that officials may not review or dispose of matters where they

have a personal or private interest. 29 Del. C. § 5805(a)(1). However, complainant gave no facts on whether the related individuals had oversight over each other. The Commission Rules require complainant to identify the section allegedly violated, and give the facts pertaining to that allegation. *Commission Rules § IV. HEARINGS AND DECISIONS ¶ (C)*. Also, the e-mail was not a sworn complaint as required by law. 29 Del. C. § 5810(a). The Commission dismissed the complaint and provided information on the proper rules for filing a complaint.

**11-13 -- Standing to Request an Advisory Opinion:** A State employee requested an “emergency opinion” by fax and wanted an answer in less than 2 days. Counsel informed him the Commission is bound by the Freedom of Information Act (FOIA) regarding its meetings, e.g., agenda must be posted seven days before a meeting, and that FOIA does not provide an exception for “emergency ethics situations.” 29 Del. C., Ch. 100. It deals with emergencies pertaining to health and safety. *Id.* He then asked that it be heard at this meeting. Although he was a State employee, the request had nothing to do with his State job. Rather, he wanted an opinion on whether several local officials could participate in a local matter. The Code and case law permit government employees to seek an opinion about the conduct of another government employee. 29 Del. C. § 5807(c); *Post v. Public Integrity Commission*. However, for the Commission to render an opinion, there must be “full disclosure,” so that the official concerned is entitled to rely on that opinion. 29 Del. C. § 5807(c). Here, the State employee clearly was not in a position to provide “full disclosure,” because among other things, his request was based on double-hearsay; not from his personal knowledge. Additionally, he was not in a position to know: (1) information the officials may have discussed in Executive Session on the local issue; (2) if the officials would be entitled to a legal defense, even assuming they violated the Code of Conduct; or (3) if the officials have facts that might justify a waiver, assuming it were a violation. Further, the Town Attorney sent a letter indicating not only that he told the local officials they could seek an opinion, but also identified information in the State employee’s request which the officials disputed. The Commission decided it could not offer an advisory opinion because the request did not include full disclosure as required by the statute.

**11-13 - Standing:** Last month a State employee requested an opinion regarding the conduct of certain local officials. State employees can seek advice on the conduct of others if they have sufficient information for “full disclosure.” 29 Del. C. § 5807(c). The Commission concluded the requestor was not knowledgeable about the information because it had nothing to do with his State job and the information it needed would have to come from the local officials. The requestor did not like the fact that the Commission included in its opinion that he is a State employee. He wanted the Commission to rewrite the letter and take out any reference to him as a State employee because he was asking as a private citizen. However, when his request was initially received, Commission Counsel sent him an e-mail asking if he was requesting as a State employee or private citizen because the Commission cannot issue advisory opinions to private citizens. The requestor said he wanted his request heard. The only legal authority for the Commission to issue him an opinion is that he was a State employee. 29 Del. C. § 5807(c).

Beyond that, the opinion was marked confidential, pursuant to 29 Del. C. § 5807(d). However, he shared it with employees in his State agency. The Commission decided the opinion would not be changed and that he should be reminded that the decision was confidential and should not be discussed with others.



**11-02 – Jurisdiction:** The Commission was copied on a letter from a citizen to an agency expressing concern about a local government’s decision to not renew an official’s contract. Commission Counsel drafted a response stating that it had no jurisdiction over the issues raised.

**10-37 – Jurisdiction:** A citizen filed a complaint with a local Ethics Commission. It was dismissed for lack of jurisdiction. He alleged a Town Council member violated a provision of the Town Charter. He asked PIC to clarify who would have jurisdiction in the matter. PIC has no jurisdiction over the officials in that Town because they have adopted their own approved Code of Conduct. 29 Del. C. § 5802(4). However, to give him a better understanding of the law, the Commission drafted a letter that explained subject matter jurisdiction only applies to the Code of Conduct provisions, and provisions of local Charters are not part of that law.

**10-30 – Jurisdiction--Judge:** A private citizen filed a complaint against a Superior Court Judge alleging his decision regarding a case before him was improper. The Commission has jurisdiction over Judges only for purposes of the financial disclosure law; and does not have jurisdiction over Judges for purposes of the Judicial Code of Conduct.

**10-14 - Jurisdiction:** Use of State Vehicle, State contract, Campaign Contributors’ State Contract. A non-sworn letter was filed with PIC which alleged an official violated the Code of Conduct by: (1) improper use of a State vehicle; (2) improperly awarded a contract to a vendor; and (3) awarded an independent contract to an individual who worked on, and contributed to, the official’s campaign. While the law requires a sworn complaint, it also may act on its own initiative. To promptly resolve the issue, it contacted the official who did not oppose resolving the matter without a sworn complaint. The official filed a motion to dismiss on the merits. The Commission dismissed the allegations in (1) and (2) as PIC lacks jurisdiction over laws and rules cited regarding the use of State vehicles and the issuance of contracts, as they are under the procurement law. The Commission dismissed the 3rd allegation for failure to state a claim.

**10-12 – Jurisdiction -- Local Election Issue:** An unsworn statement was sent to the Commission which alleged, among other things, improper conduct of a local official at the election polls. The writer was notified that the Commission did not have jurisdiction over conduct at the polls as the Election Board has such jurisdiction. The writer also was advised that PIC had no jurisdiction over the Freedom of Information Act allegations, or over any false arrest allegations. At the writer’s request, all of the documents sent to PIC were sent to a Deputy Attorney General. After being advised of these actions the Commission decided it did not have jurisdiction over the matter.

**10-06 – Jurisdiction--Prisoner:** A prisoner filed a sworn complaint alleging such things as an unfair trial, etc., because of the alleged actions of Judges, prosecutors, witnesses, etc. He has appealed these same issues to the Court. PIC does not have jurisdiction over judicial officers.

**09-52 – Jurisdiction—Municipal Agency:** PIC was asked if it had jurisdiction over the Newark Housing Authority. PIC has jurisdiction over “State agencies” and local governments that do not adopt their own Codes of Conduct. “State agency” is defined as an entity created by the

General Assembly. The General Assembly specifically created the Wilmington Housing Authority but did not create the Newark Housing Authority. Rather, it gave the Delaware State Housing Authority the legal ability to create any other local Housing authority if needed. DSHA created the NHA. The City of Newark had its own PIC approved Code of Conduct. The Commission decided NHA is not a “State agency,” so PIC had no jurisdiction of it as such; and it had no jurisdiction over it as a local government entity because the City of Newark had its own Ethics Code.

**09-15 – Jurisdiction--General Assembly Members/Campaign Contributions:** An anonymous person wrote that a State Representative improperly accepted campaign contributions. The letter was copied to a number of State officials. The Commission prepared a letter to those officials who were copied, saying: (1) PIC was sending them its position as they were copied, which was: it had no jurisdiction over: (a) Legislators as they have their own conflict laws (29 Del. C., Ch. 10); and (b) campaign laws are administered by the Elections Board. 15 Del. C. Ch. 80, et al.

**08-40 – Jurisdiction—Acts of a Private Organization:** A private citizen wrote that a landowners’ association would not adopt by-laws language that local officials could not be part of their organization. She gave no facts saying the local officials were reviewing or disposing of matters related to the organizations; nor representing or otherwise assisting them before their own agency. 29 Del. C. § 5805(a) or 29 Del. C. § 5805(b)(1). The Commission has no jurisdiction to tell any private organization to bar public officials from their organization. Its jurisdiction is limited only to acts of government employees, officials, or honorary officials if there is a connection to the Code of Conduct. 29 Del. C. § 5802(4) (jurisdiction over local officials). The Commission copied the Town’s attorney and advised that if their officials wanted an advisory opinion, they could seek one.

**08-39, 08-34, and 08-33 – Jurisdiction—Interest in a Private Organization:** The Commission was asked if a Council member had to resign from a private organization when the Town Council provided some funding to the organization. Both the Council member, and the Council independent of him, made the requests. The Council had passed a resolution pertaining to the matter. Private citizens also requested advice.

(1) Who May Seek Advisory Opinions from PIC? One issue was whether a Council member could seek an advisory opinion, when the local Council had decided it would seek an opinion about his conduct. The statute allows employees, officers, officials, and agencies to seek opinions. 29 Del. C. § 5807(c). Thus, both he and the agency (Council) were free to seek advice on the same issue. However, several private citizens also sought advice on the Council member’s conduct. Unlike complaints, which can be filed by “any person”, 29 Del. C. § 5810(a), advisory opinions can only be sought by government employees, officers, officials and agencies. However, to the extent the private filings provided facts relative to the alleged conflict of interest issue, where relevant and material, they would be considered.

(2) Jurisdiction Over Council Resolutions: A question was raised about the validity of Council’s resolution, saying that Councilman must resign from the organization. PIC’S duty to local governments is only to administer and implement the State Code of Conduct. 29 Del. C. §5802(4). It cannot decide the validity of a Town resolution for Council members to resign from private organizations.

(3) Jurisdiction Over Other Conflict Laws: One request cited 29 Del. C., Ch. 10, Legislative Conflicts of Interest, as the applicable law. That statute clearly says the House and Senate Ethics Committees, not PIC, interpret that law. 29 Del. C. § 1003. It does not apply to local officials. The Code of Conduct, administered by PIC, applies. 29 Del. C., Ch. 58, Subchapter I, § 5802(4).

(4) Jurisdiction Over Constitutional Issues: As to a possible Separation of Powers violation, one requestor noted that PIC may not have jurisdiction over this. He was correct. Administrative agencies usually have only the jurisdiction given by statute. 2 Am. Jur., 2d Administrative Law § 275 (1994). PIC's jurisdiction is limited as noted above. 29 Del. C. § 5802(4). It has no jurisdiction over Constitutional issues. Courts have held that those issues are within the court's expertise; not an administrative agency's. See, e.g., *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir., 1974); *Matters v. City of Ames*, 219 N. E. 2d 718 (Iowa Supr., 1974); *Hayes v. Cape Henlopen School District*, 341F. Supp. 823, 833 (D. Del., 1972).

(5) Jurisdiction over private enterprises and campaign activities and finance laws. An issue was raised alleging the private organization was engaging in campaign activities. Campaign and/or election laws are not in the State Code of Conduct. See, Title 15 Delaware Code. Also, to the extent the concern was about the acts of any non-government entity and/or private citizens, the Code only applies to government employees and officials. See, e.g., 29 Del. C. § 5802(4).

(6) Jurisdiction over local government policies and laws not covered by the Code of Conduct. Issues were raised regarding the local government's "take home car" policy, and procurement rules. PIC's jurisdiction over local officials is limited to the code of Conduct. *Id.* Thus, it had no jurisdiction over Council's policies on taking home government vehicles, absent a link to the Code of Conduct. As to the concern that a Council member, two years ago, procured items not funded in the budget, without following Town procurement rules, or getting approval, such matters are not in PIC's jurisdiction, absent a link to a provision in the Code of Conduct. The official was apparently censured by Council. Even assuming PIC had jurisdiction, the only administrative penalty that it can impose on elected officials, would have been the same - a letter reprimand or censure. 29 Del. § 5810(d)(1).

(7) Conflict of Interest: PIC does have jurisdiction over whether a Council member has a conflict of interest because of serving on the Board of a private organization if he reviews or disposed of matters related to that organization, 29 Del. C. § 5805(a)(1), or if he represents or otherwise assists that private enterprise before his own agency. 29 Del. C. § 5805(b)(1). However, its opinions must be based on the particular facts of each case. 29 Del. C. § 5807(c). Here, there are insufficient facts to render a decision, e.g., in his official position did he participate in decisions about the organization or recuse? In his private position, did he represent the organization before Council, or assist them in preparing a request for funding, etc.?

(8) Confidentiality: 29 Del. C. § 5806(f) and (g). The Council's letter alleged the Council member gave confidential information to the media. That allegation was factually incorrect, as the Council's own official minutes showed Council discussed the particular matter in public twice. The allegation was dismissed for failure to State a claim.

**08-38 – Jurisdiction:** An attorney for a citizen whose profession was regulated by a State

agency wrote to the regulatory agency about a complaint filed against her client. The complaint alleged that the individual, and her employer, were not following the rules for her profession. PIC was copied on the letter, as were others. The only reference in the letter to the Code of Conduct was that a Board member must recuse on the complaint because of a business relationship with the complainant. The agency provided information that the Board has not considered the complaint. It was still under investigation. After the investigation, the report went to a State agency under which the Board did not fall. That agency could recommend dismissal. If dismissed, it would never go to the Board. If not dismissed, the procedure was for those with conflicts to recuse, and the Board member could recuse. The Commission ruled that it had no jurisdiction over substance of the complaint against her client. It also ruled that the Board member had not violated the Code as he had not reviewed or disposed of any part of the complaint. 29 Del. C. § 5805(a)(1).

**08-36 – Job Qualifications** - PIC was copied on an anonymous letter sent to an agency's personnel office saying that an applicant was not qualified for the position sought. If the complaint were filed with PIC, it would require a sworn complaint. 29 Del. C. § 5810(a). Further, the information did not allege any connection to any Code of Conduct provision as required by PIC's Rules, III Investigations. PIC has no jurisdiction over the qualifications of any individual hire by the State. That is generally a personnel issue. The agency to which the anonymous letter was sent was so notified.

**08-07 – Jurisdiction—Private Citizen and Private Company:** A private citizen filed a complaint against his private housing developer and the development's Board. The Commission has no jurisdiction over private entities or persons. Under the Code of Conduct, it has authority over Executive Branch "State employees," "State officers," and "Honorary State Officials." 29 Del. C. § 5804(6), (12) and (13). It also has authority over local government employees and officials if they have not adopted their own Code of Conduct which must be approved by this Commission as being as stringent as State law. 29 Del. C. § 5802(4). As the complaint did not encompass such persons, it was dismissed for lack of jurisdiction.

**07-63 – Jurisdiction—Application of Code of Conduct to Charter Schools: Opinion was released by the Department of Education.**

December 31, 2007

Valerie A. Woodruff, Secretary of Education  
Townsend Bldg.  
401 Federal St., Suite 2  
Dover, DE 19901  
D370B

**07-63 – Jurisdiction - Application of Code of Conduct to Charter Schools**  
**Hearing and Decision By:** *Chairman Terry Massie, Vice Chair Barbara Green; Commissioners Dennis Schrader, William Dailey and Wayne Stultz, Jr.*

Dear Secretary Woodruff:

The Public Integrity Commission (PIC) reviewed the Department of Education's (DOE) request for an opinion on whether:

- (1) Charter Schools are "State Agencies" or "private enterprises" under the Code of Conduct; and
- (2) Charter School Board members and employees are subject to the Code.

Based on the following, PIC finds that Charter Schools are "State agencies," and the Board members and employees are subject to the Code of Conduct.

**I. Code of Conduct Law**

"State agencies" and "private enterprises" are distinct and separate entities:

(A) "State agency:" any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of *an act of the General Assembly* ....29 Del. C. § 5804(10) (emphasis added).

(B) "Private enterprises:" any activity by any person, for profit or not for profit.... *Private enterprise does not include any activity of the State...political subdivision...agency, authority or instrumentality thereof.* 29 Del. C. §5804(9) (emphasis added).

**II. Application of Charter School Law and the Code of Conduct:**

(A) Charter Schools fall within the definition of "State agency" because:

They are *an act of the General Assembly*. 14 Del. C. § 503 & § 504(c) & (d); they are “public schools” and “Reorganized School Districts.” *Id.* “School districts” and “Boards of Education” are “State agencies” in the Code. 29 Del. C. § 5804(10).

(B) They are not “private enterprises” because:

“Private enterprise” excludes activities of the State and authorities thereof. 29 Del. C. § 5804(9). Charter School Board members are “*public agents*,” *authorized by a public-school district or the Department* [Department of Education] to control the Charter School.” 14 Del. C. § 504(b) (emphasis added). See also, 14 Del. C. § 511 (local schools boards and DOE approve Charter Schools and denials cannot be reviewed). The Charter School laws repeatedly refer to the activities of the State by local school districts and DOE as they relate to Charter Schools, and many provisions treat Charter Schools in a manner different from “private enterprises.”<sup>2</sup> Other State activities are: the State Auditor’s mandate to audit the Charter Schools, 14 Del. C. § 513(c); and the required approval by the State’s Charter School approving authority, Budget Director, Controller General, and Secretary of Finance for Charter Schools to opt out of the State’s accounting, payroll, purchasing, compensation, pension and/or benefits systems. 14 Del. C. § 512(9).

These are “activities of the State” and excluded from “private enterprises.”

### **C. Statutory Rules of Construction:**

**(1) Clear Language:** Where the legislative intent is clearly reflected by unambiguous language, the language itself controls.” *Cede & Co. and Cinerama, Inc., v. Technicolor, Inc.*, 758 A.2d 485 (Del., 2000); *Coastal Barge Corp. v. Coastal Zone Indus. Control Board*, 492 A.2d 1242, 1246 (Del., 1985).

The words of both laws are clear. Charter Schools are “public schools” and “reorganized school districts,” under the Charter Law, and “school districts” are “State agencies,” under the Code of Conduct.

**(2) Legislative History:** Statutes are to be interpreted consistent with the General Assembly’s manifest intent. 1 Del. § 301. Aside from the plain language of intent, there are well-established constructional aids, to search for legislative intent. *Spielberg v. State*, 558 A.2d 291, 293 (Del., 1989). It is helpful at the outset to trace the legislative history of the statutory scheme. *Id.*

Charter Schools were created in 1997. 71 Del. Laws, c. 180, July 16, 1997. “School districts” were added to the Code of Conduct in 2001. By law, it must be assumed that the General Assembly knew of existing laws. *State ex rel. Milby v. Gibson*, 140 A.2d 774 (Del., 1958).

After Charter Schools were created, the “school districts” wanted a separate Code of Conduct. Initially, proposed legislation created a separate Code. H.B. 634. PIC has authority to recommend rules of conduct for public employees and officials. 29 Del. C. § 5809(1). It explained to the House and Senate Education Committees its concerns about H.B. 634. *PIC Ltr., Senator Sokola*, June 21, 2000. The proposed legislation was amended to make school districts subject to the Code. *H.B. 634, S.A. 1*, June 30, 2000. The next year, a law was signed

making them subject to the same Code as other officials, employees, Board and Commission appointees, other State agencies, and local governments. *H.B. 54*, signed 4/10/01; 29 Del. C. §§ 5802(4); 5804(6); 5804(12)(a); 5804(13).

**(3) Legislative Intent:** Like the plain words, the history shows the General Assembly's intent to include all school districts under the Code, when pre-existing law said Charter Schools are public schools and reorganized school districts. Had it wanted to exempt them from "school districts" under the Code it could have. For PIC to exempt Charter Schools is against the rule of construction that where the legislature is silent, additional language will not be grafted onto the statute. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing *State v. Rose*, 132 A. 864,876 (Del. Super., 1926)).

**(4) Public Purpose:** Statutes with a public purpose are broadly construed to achieve that purpose. *3A Sands, Sutherland Stat. Constr.*, Chapter 71 (5th ed. 1992). The Code's purpose is to instill the public's confidence in its government; give standards for employees and officials to follow; and "guarantee a uniform maintenance of these standards." 29 Del. C. § 5802(1) and (2). Excluding Charter Schools would be a narrow construction; would not guarantee uniform maintenance of the standards between other public schools and Charter Schools and would not serve the public purpose.

**(5) Undesirable Results:** If a statutory interpretation "would lead to an absurd and undesirable result," the terms should agree with legislative intent. *Law v. Developmental Child Care, Inc.*, 523 A.2d 557, 560 (Del. Super., 1987); *Helfand v. Gambee*, 136 A.2d 558, 561 (Del. Ch., 1957); 2A *Sutherland Stat. Constr.* § 46.07 (5th ed. 1992). The undesirable result--excluding Charter Schools--does not agree with the legislative intent or public purpose.

Concluding that Charter Schools are "State agencies," under the Code, is consistent with the rules of construction, legislative history and intent, and the purpose.

### **III. Application of the Code of Conduct to Board members**

Charter School Board members are appointed public agents. The Code applies to: "State employees," including any person: "*who is an elected or appointed school board member.*" 29 Del. C. § 5804(12)(a)(3).

Again, we find the language is clear, and excluding Charter School Board members would be contrary to the language, intent, and public purpose, as discussed above.

### **IV. Application of the Code to Charter School Employees**

The remaining administrative, professionals, teaching staff, etc., fall within another definition of "State employee" "any person who receives compensation as an employee of a State agency." 29 Del. C. § 5804 (12)(a)(1).

As noted, Charter Schools use the State's systems of accounting, payroll, compensation, pensions, etc., unless various State agencies approve opting out. 14 Del. C. § 512(9). We understand from Deputy Secretary Nancy Wilson, and Deputy Attorney General Mary Cooke, that Charter School employees are paid by the State through the State system.

Further, the Charter Law acknowledges the equivalency of Charter School employees to local school district employees, e.g., (1) same immunities as employees, directors and officers

of public school districts and other public schools; 14 Del. C. § 504(d); (2) same rights to organize and bargain collectively as employees of other public schools; 14 Del. C. § 507 (c)(3); having State certified teachers unless exceptions are made on the same basis available to public schools. *Id.* The “same basis” creates like standards between these employees and other public schools. Making them subject to the same Code of Conduct also creates a uniform standard.

Based on the Code’s definition of “State employees,” and the facts that Charter School employees work for a public school, and have indicia of equivalent treatment, we find they are subject to the Code. Again, to find otherwise would be contrary to the language, history and purpose.

#### **IV. Conclusion**

Based on the above law and facts, we find that the Code of Conduct applies to Charter Schools, their Board members, and their employees.

Sincerely,

Terry Massie  
Public Integrity Commission

**07-46 – Jurisdiction—Local Election Qualifications:** The Code provides that the Commission can give advisory opinions, grant waivers, or act on complaints as it pertains to “this chapter.” See, e.g., 29 Del. C. § 5809(2) & (3); § 5807 (a); § 5807(c); and § 5810(a). “This chapter” contains no election qualification provisions, so PIC has jurisdiction over election laws.

**07-45 – Jurisdiction—Violations of Local Law:** A local official, represented by Counsel, appeared regarding a filing by a local citizen. It was not a sworn complaint as required by the Code. 29 Del. C. § 5810(a). The filing referred to violations of local laws, not the State Code. The Commission only has jurisdiction over matters in “this chapter”—Title 29, Del. C. Ch. 58. See, e.g., 29 Del. C. § 5809(2) & (3); § 5807 (a); § 5807(c); and § 5810(a). The official argued there was no jurisdiction. She said she did not want an advisory opinion but wanted to assist the Commission in any preliminary questions about this filing. The Commission made it clear that this was no formal proceeding or anything to that effect. After a discussion on jurisdiction issues, the Commission held it had no jurisdiction over the local government’s Code provisions cited by the filer, only the Code of Conduct. Even assuming it alleged a Code of Conduct violation, it was not a sworn complaint, as required. 29 Del. C. § 5810(a).

**07-37 – Jurisdiction—General Assembly Member/Private Employment:** A citizen filed a complaint against a State official alleging a violation of the Code of Conduct. However, the alleged acts were done as a General Assembly member. The Commission has no jurisdiction over the conflict of interest law for Legislators in their official capacities. 29 Del. C. Ch. 10. The Legislator’s second job was not as a State employee. The Commission has no jurisdiction under the Code of Conduct of non-State employees. Even assuming jurisdiction, the Commission found that the complaint failed to state a claim because the individual did not



review or dispose of the matter which allegedly created a conflict. 29 Del. C. § 5805(a). Even the complaint said that the Legislator had not even commented on the particular matter. The complaint was dismissed for lack of jurisdiction, and even assuming jurisdiction, failure to state a claim. 29 Del. C. § 5809(3).

**07-36 – Jurisdiction—Dual Compensation:** A complaint was filed against a State official alleging the official was receiving two government paychecks and had not properly tracked an overlap in the hours reported at each job. 29 Del. C. § 5822(a)&(b). However, the official is paid with private funds; not State funds so the Dual Compensation Law does not apply, as funding from each job must be from State or local governments to fall within the provisions. *Id.* It also was alleged that the official, in the State job had violated the Code of Conduct. The Commission had no jurisdiction over the official in the State job which is specifically excluded from the Code of Conduct.

**06-55 – Jurisdiction—Complaint Against Local Officials: The Commission reviewed a private citizen’s letter alleging that local Officials and their attorney violated the Code of Conduct. The Town Attorney and one of the officials authorized release of the opinion as it pertained to them. Because not all of the persons against whom the allegations were made have authorized release, the identity of the complainant and those persons, along with some identify facts are not provided to limit the possibility of identifying the persons charged.**

#### **Advisory Op. No. 06-55 - Complaint Against Local Government**

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

Dear XXXX:

The Public Integrity Commission (PIC) received your letter alleging misconduct of several Ocean View officials/employees and the Town Solicitor. Your letter was not a sworn complaint as required by law. 29 Del. C. § 5810(a). However, the Commission reviewed it. Based on the following law and facts, PIC dismissed the allegations for failure to state a violation of the State Code of Conduct. 29 Del. C. § 5809(3).

#### **I. Standard of Review:**

In deciding if allegations create a reasonable belief of a Code of Conduct violation, PIC assumes all facts as true. 29 Del. C. § 5808(A)(a)(3).

#### **II. Personal and Subject Matter Jurisdiction**

You allege violations by Council member Leroy Thomas, Town Solicitor Dennis Schrader, and other Town officials and employees, in acting in a personnel related issue matter. Your correspondence alleges:

**A. Town officials and the Solicitor are subject to the State Code of Conduct.** The Town has an independent contract with the Solicitor, and/or his law firm. The Code does not include independent contractors as persons subject to the law. 29 Del. C. § 5804(6),

(12), (13) and 5812(n)(2). However, we will assume there is jurisdiction.

Your letter alleges that these persons violated the Code by:

**B. Denying the individual in the personnel related matter State and/or Federal rights of due process and equal protection.** Assuming a third party could assert the Constitutional rights of another, we have no jurisdiction over Constitutional issues. *Commission Op. No. 95-05* (attached).

**C. Denying the individual an adversarial process and requiring him to speak immediately after the decision was made.** You thought he was entitled to:

1. the process used in criminal proceedings--the Town first presenting its case, e.g., witnesses, etc., and the "defendant" then having rights to cross-examine, present witnesses, etc. Nothing suggests this was a criminal proceeding, nor do we have jurisdiction to so decide, we only administer proceedings in 29 Del. C., Chapter 58.

2. the process due to those charged with violating the Code of Conduct. 29 Del C. § 5810. The individual was not charged with violating the Code of Conduct, so would not be entitled to that process.

**D. Failing to seek a Commission opinion.** It is optional, not mandatory, for officials to seek advisory opinions. 29 Del. C. § 5807(c). If you are alleging the individual was denied his "rights" and "process" under the advisory opinion provision, because they did not seek an opinion, his "right" to that "process" was not denied. Any official may seek an opinion. 29 Del. C. § 5807(c).

**E. Using a process that was not identified and was improper.** The Town Solicitor identified the process and procedures under the Town's revised Rules of Procedure, Rule 14.1 and Mason's Manual of Legislative Process. *Town Minutes*. If you are alleging that he misadvised his client, we have no jurisdiction over an attorney's advice to a client, or over the Delaware Lawyers' Rules of Professional Conduct (DLRPC), even assuming it applies. *Commission Op. No. 98-25*. We also cannot interpret a Town's Rules of Procedure or the Legislative Process Manual. Our jurisdiction, 29 Del. C., Chapter 58, does not include those rules or processes.

**F. Not pursuing this Commission's venue to hear the substance of the matter.** The matter did not arise under the State Code of Conduct provisions. The charges are identified, e.g., improper procurement practices, "verbal threats," "cover-ups," etc. Again, we cannot interpret Town ordinances, rules or practices. We also have no authority to prosecute or issue advice on claims of "verbal threats," "cover-ups," etc. Thus, this Commission is not a proper venue for the Motion.

**G. Violating 29 Del. C. § 5806(a).** This is the only State Code of Conduct provision allegedly violated. It prohibits conduct violating the public trust. *Id.* Delaware Courts interpreted an identical provision in Wilmington's Code of Conduct. *City of Wilmington v. AFSCME, Council 81, Local 1102*, Del.Ch., C.A. No. 19561-NC, VC Noble (March 21, 2003). The City disciplined a City employee by removing him from his job. It alleged, among other things, "public trust" violations by using racial remarks, fighting with a citizen, etc. The Court held "public trust" allegations are insufficient to state a claim because it is a "general public policy provision." It said there must be "explicit," "well-

defined,” and “dominant grounds” rather than allegations of violating a general public policy.

This Commission has held that the restriction on violating the public trust is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The Delaware Supreme Court has held that allegations of “an appearance of impropriety,” must be supported by “articulated facts”—essentially the same language as the *AFSCME* decision. *Seth v. State of Delaware*, 592 A.2d 436 (Del., 1991)).

*Seth* alleged that an attorney, who was a part-time State prosecutor, violated the “appearance of impropriety” in the DLRPC because of a dual relationship between his State job and private job. The Court said: absent an actual conflict, it would not remove him as a prosecutor based on an unarticulated concern for the “appearance of impropriety.” It said appearances of impropriety claims have been criticized as too imprecise, leading to ad hoc results. Further, unsubstantiated claims were sometimes used as a tactical weapon against an official, when, in fact, there was no conflict.

This Commission does not interpret the DLRPC, but under the rules of statutory construction, a case decision is relevant if the language of one statute is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other. *Commission Op. No. 99- 51 (citing Sutherland Stat. Constr. '45.15, Vol. 2A (5<sup>th</sup> ed. 1992)*. Here, the decision addressed the same issue: did the conduct of a State official “appear improper”?

Finally, we have held that evil motives cannot be ascribed to public officials based on suspicion and innuendo, not hard facts. *Commission Op. No. 00-18*. Officials are entitled to a “strong legal presumption of honesty and integrity.” *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff’d*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996). Here, without any “hard facts,” it is alleged that the conduct appeared improper. Allegations using only the “public trust” claim as a “hook” into government officials without a connection to an explicit conflict of interest do not overcome that strong legal presumption, nor do they state a claim under the State Code of Conduct.

**H. Hearsay and Confidential information were improperly given to the press.** The Town’s official minutes show that Councilman Magill said he gave the information to the press. No facts suggest it was from Councilman Thomas.

1. Allegations of hearsay articles. Hearsay is a legal term used in evidentiary matters in a Court based on the Rules of Evidence. It is basically, an out of court statement, (oral or written) not made under oath. That means most information in the media is “hearsay.” Hearsay allegations do not establish a Code of Conduct violation.
2. Allegations of confidentiality: You pointed to such things as a letter by a Town employee allegedly concerning a statement made by the individual. Neither your correspondence nor the Town minutes establish that the letter was confidential. The Town employee who wrote it made no such claim at the meeting. The individual who made the statement never claimed it was confidential, only that the phrasing of his statement was incorrect, and he was just joking. Absent a scintilla of evidence of confidentiality, the allegation fails to state a claim.

### III. Conclusion

Even assuming all facts as true, the allegations fail to State a violation of the Code of Conduct because the allegations are not within the jurisdiction of this Commission, and/or fail to provide facts sufficient to establish a reasonable belief of a violation of the Code.

**Original Signed by Chair Terry Massie**

**06-51 – Jurisdiction--Non-State Employee Disclosure of Contract with State:** The Code of Conduct applies to State employees, officers, and honorary officials. 29 Del. C. § 5804(6), (12) and (13). A non-State employee filed a disclosure of his contract with a State agency. The individual was notified that the Commission has no jurisdiction over non-State employees.

**06-41 – Jurisdiction--Entitlement to Records:** A citizen filed a complaint alleging that she had not been given documents relative to her lawsuit against a State financial institution. The documents and the persons allegedly involved were in no way connected to State employees, officers, or officials, which are the persons to whom the Code applies. See, 29 Del. C. § 5804(6), (12) and (13). Even if the persons were under the Commission's jurisdiction, it can only apply the provisions of Title 29, Chapter 58. 29 Del. C § 5809(2) and (3). The allegations did not pertain to any of those provisions. The complaint was dismissed for lack of jurisdiction.

**06-24 – Jurisdiction—Attorneys:** An attorney filed a complaint against another attorney alleging she may have violated the Code of Conduct because she filed a petition against him regarding suspension of his law license. The Commission found it had no personal jurisdiction over her. Further, even assuming such jurisdiction, it had no subject matter jurisdiction. Accordingly, it dismissed the complaint. The statute requires a sworn statement for complaints. 29 Del. C. § 5810(a). The statement was not sworn; however, as the Commission lacked jurisdiction, it did not require a re-filing solely for that reason.

#### A. FACTS:

At the time of her alleged acts, the complainant was representing a plaintiff in an action against a corporation's directors and officers. Her husband was not a director or officer but was a corporate employee. Her petition, if approved, would allegedly bar the attorney from representing his client. Allegedly, at a conference on the matter, the attorney raised his concerns to the Court that she had a conflict under the Code of Conduct, and the Court removed her from participating in the petition based on that law. However, he said the conference proceedings were confidential and he cannot provide information to confirm the allegations, her response, actions taken by the Court, the law under which the Court acted, etc. Her petition was not granted, but he said he was later removed from the case.

#### B. APPLICATION OF THE LAW TO THE FACTS:

He alleged she may have violated provisions barring State employees from: (1) reviewing and disposing of a State matter if a close relative has a financial interest in a private

enterprise, which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 Del. C. § 5805(a)(2)(b). “Matter” includes “petition”; “close relative” includes “spouse”; and “financial interest” includes employment if the income is more than \$5,000. 29 Del. C. § 5804(7); § 5804(1); and § 5804(5)(b); (2) engaging in conduct that may raise suspicion among the public that the public officer is acting in violation of their public trust or creates a justifiable impression among the public that such trust is being violated, 29 Del. C. § 5806(a). This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. It can only be applied to provisions of 29 Del. C., Ch. 58.

**(1) Jurisdiction:** This Commission’s jurisdiction is limited to interpreting Title 29, Del. C., Ch. 58. *See, e.g.*, 29 Del. C. § 5808(a) and § 5809(2) and (3). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint’s substance. Legal and factual reasons preclude the Commission’s jurisdiction over the attorney or the facts in the complaint.

### **(a) Personal Jurisdiction Attorney Discipline**

The Delaware Supreme Court has the “inherent power and authority over the regulation of the legal profession, “the Court shall maintain appropriate standards of professional conduct for all lawyers subject to its jurisdiction, dispose of individual cases of lawyer discipline and disability, and administer the lawyer disciplinary system.” *Delaware Lawyers’ Rules of Professional Responsibility, I. Structure and Scope, Rule 1; See also, DLRPC Rule 5.7, comment [11]* (When the full protections of the DLRPC do not apply, principles of law external to the Rules govern). The ODC is an arm of the Court and assists the Court in regulating the practice of law. It is to evaluate, investigate, and, if warranted, prosecute lawyer misconduct.

Here, the attorney was acting as an attorney in drafting and filing a petition in which it is alleged that she had a “personal interest” because of her spouse’s employment. The DLRPC specifically addresses situations where a lawyer has a “personal interest” because a spouse is involved in a matter. *See, Rules 1.7 comment [1]; and 1.8*. The specific rules, with exceptions, govern a lawyer’s acts when there is a “personal interest,” and when a lawyer should withdraw. The jurisdiction to discipline a lawyer is with the Supreme Court. Not only is that true under the DLRPC, but the Delaware Supreme Court has long recognized that under the rules of statutory construction, a more specific statute or rule applies over a more general statute or rule. “Where there is an irreconcilable conflict, a general clause must always give way to one that is specific; the general being treated as including only that which is not specifically given.” *Culver v. Elliott*, 40 Del. 578 (1940) (*citing In Re Conner’s Estate*, 302 Pa. 534, 153 A. 730, 731).

### **(b) Court Procedures**

Also, DLRPC, Rule 5(d) provides: “These Rules shall not be construed to deny to any court the powers necessary to maintain control over its proceedings.” Under a Court’s Procedural Rules, motions alleging conflicts and seeking withdrawal of an attorney may be filed. This allows the Court to rule on whether an attorney should withdraw. By bringing the alleged conflict to the Court’s attention, by formal motion or not, the complainant in this action effectively moved that she withdraw, and allegedly the Court so directed. Actions under Court Rules of Procedure are not in this Commission’s jurisdiction.

### **(c) Connection between the DLRPC and Code of Conduct**

DLRPC Rule 1.11 specifically addresses the conduct of government attorneys. It defines “matter” as “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation...or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency. *Rule 1.11, (e)(1) and (2)*. Here, the “matter” was a judicial conference, where the complainant in this action requested a ruling or other determination on whether she should withdraw. Moreover, the comment to *Rule 1.11* provides that: “[a] lawyer who is a public officer is personally subject to the Rules of Professional Conduct.... In addition, such a lawyer may be subject to the statutes and government regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under these rules.” *Rule 1.11, comment [1]*. Before the Supreme Court adopted the rewrite of the DLRPC, the comments to Rule 1.11 said a lawyer is subject to the government’s ethics rules. *See, DLRPC compared with changes, comment [1]*). The new comments provide that a lawyer may be subject to the government statutes and regulations. *Id.* The permissive jurisdiction appears consistent with DLRPC 5.7, which says that if the DLRPC protections are not available, then external law governs. As noted, the DLRPC has specific rules on when an attorney should withdraw, with a number of exceptions. The Code of Conduct has only one exception to withdrawal—when a government official has a statutory duty that cannot be delegated. 29 Del. C. § 5805(a)(3). If the Commission limited a government attorney to only that situation, it would be contrary to the DLRPC which is not as limited as the Code of Conduct, and specifically addresses the issue for lawyers. In other words, the Commission would, in effect, deny the attorney the exceptions in the DLRPC.

#### **(2) Subject Matter Jurisdiction:**

##### **(a) Insufficient Facts**

Even if the Code were applied, and assuming all facts as true, the Commission must base its opinions on the particular facts of each case. 29 Del. C. § 5809 (2) and (3) and § 5810(a). Complainant in this action said he cannot provide the transcript of Court proceedings on this matter. As a result, the Commission did not have all the facts. Delaware Courts have held that mere allegations, without articulating facts, are insufficient to establish a conflict. *Seth v. State*, 592 A.2d 436 (Del., 1991). Also, Delaware Courts have ruled that mere allegations of a conflict just because a State officer and her spouse in his private employment were involved in the same matter (investigation on physician’s conduct and whether his license should be revoked), does not, without more, create a conflict. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995).

##### **(b) Meaning of “Matter”**

Again, assuming all allegations were true, it did not necessarily follow that the attorney violated the Code of Conduct. For there to be a conflict, the close relative must have a financial interest in the “matter.” No facts suggested that her husband had a financial interest in the petition. The complainant identified the “matter” as the petition and said its approval would result in his removal from the corporate case. However, no facts suggested she was seeking to remove him from that particular case. Rather, if granted, he would be removed from all cases. In interpreting the Code of Conduct, Courts have held that public officials are entitled to a “strong legal presumption of honesty and integrity.” *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff’d.*, Del.

Supr., No. 304 (January 29, 1996). No facts were given suggesting that the petition was the result of a particular bias as it related to the corporate case or other litigation. Thus, the legal presumption had not been overcome by the facts. Delaware Courts have interpreted the term “matter” in the Code of Conduct as pertaining to a particular matter pending before the State. See, *Beebe, supra* (application to State Board was not the same “matter” the former State official was directly and materially responsible as he had not worked on that particular application while on the State Board who considered applications); See also, *Commission Op. No. 96-75* (interpreting the meaning of “matter”). The case was not the particular “matter”; the particular matter was the “petition.” Aside from the fact that her spouse did not have a financial interest in the particular matter, his financial interest in the suit against the corporation appeared to be remote. He was not a party to the suit; he was not an officer of the corporation holding a fiduciary interest in the company. He was a company employee. No facts showed he would benefit to a lesser or greater extent than any similarly situated person (company employee) by the outcome of the petition or litigation.

The Code of Conduct’s specific language says the State officer may not review or dispose of a matter if their action “would result in a financial benefit or detriment than such benefit or detriment would accrue to others who are members of the same class or group of persons,” and/or if “the close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interest in the same enterprise.” 29 Del. C. § 5805(a)(2)(a) and (b). No facts were given to show that her husband or the company would benefit to a lesser or greater degree because she reviewed or disposed of the petition.

The complainant also said the Code provides if there is a statutory duty that cannot be delegated, that a full disclosure is to be filed with this Commission, 29 Del. C. § 5805(3). He said the attorney did not file such disclosure. Again, assuming the facts as true, the law gives Courts the means to deal with an alleged conflict. If she fully disclosed the petition information which was allegedly confidential, she may have acted in violation of the Court’s confidentiality order and/or the statutory provisions governing her State duties which include confidentiality restrictions. In *Camas, supra*, the Court noted that the State officer was under a statutory obligation not to improperly use or disclose confidential information, and the mere fact that the State officer and her spouse allegedly may have shared confidential information, was insufficient to state a claim because she was under a statutory obligation not to improperly use or disclose confidential information, and not facts suggested that she had.

### **(C) CONCLUSION**

Based on the above facts and law, the Commission finds that it has neither personal nor subject matter jurisdiction. Moreover, even assuming all facts as true, the allegations are insufficient to establish a claim. Accordingly, the complaint is dismissed pursuant to 29 Del. C. § 5808A(a)(4) and 29 Del. C. § 5809(3).

**01-10 – Jurisdiction—Improper Use of Government Resources:** An anonymous complaint was filed with the Commission alleging that a State employee had used her department’s equipment and funds, for her personal use, and that she was violating certain agency regulations. The Commission’s statute requires that all complaints be sworn. 29 Del. C. § 5810(a). Although this was not a sworn complaint, the Commission reviewed the matter to decide if it had jurisdiction.

As to the allegation of using government funds to pay for personal matters, the Commission has held that it has no authority to review expenditures of State funds. See, e.g., *Commission Op. No. 97-23*. Regarding the alleged violation of State regulations, the Commission can only interpret Title 29, Chapter 58. It has no authority to interpret other State laws, rules, or regulations. See, e.g., *Commission Op. No. 97-28*. However, the Commission can refer to the appropriate State authority any substantial evidence of a violation of any criminal law. 29 Del. C. § 5809(4). Assuming, but not deciding, if there was misuse of government funds, the matter was referred to the Attorney General's office.

**00-33 – Jurisdiction-- Allegations of False Arrest, Perjury:** It was alleged that local government officials were engaging in conduct such as false arrest, perjury, discrimination, etc. Complainant wanted the Commission to represent him in legal actions against the officials. The complaint was not a sworn statement as required by 29 Del. C. § 5810(a). Even if that legal formality were met, the Commission has no jurisdiction over the types of charges alleged. See, *Commission Op. Nos. 95-5; 96-38; 96-10; and 98-25*. Also, the Commission has no authority to represent private citizens in any legal action.

**00-28 – Jurisdiction-- Conduct of Legislator:** Correspondence sent to the Commission alleged that a General Assembly member had a conflict of interest. First, to the extent the letter was meant as a complaint, the statute requires that complaints be sworn. 29 Del. C. § 5810(a). Second, even if it were sworn, the Commission has no jurisdiction over General Assembly members regarding conflicts of interest. *Commission Op. No. 97-14*. The General Assembly has a separate statute on conflicts of interest and has House and Senate Ethics Committees to administer that law. 29 Del. C., Chapter 10. Thus, the matter was dismissed for failure to state a claim. 29 Del. C. § 5809(3).

**00-23 – Jurisdiction-- Elected School Board Members:** Complainant alleged that: (1) four elected School Board members may have violated a Board Policy; and (2) while the Board was negotiating with several school teachers, two Board members allegedly made “not-so-veiled threats” to a teacher. The Commission has no jurisdiction over local, elected School Board members. *Commission Op. No. 91-16*. As the complaint failed to state a claim, it was dismissed pursuant to 29 Del. C. § 5809(3).

**00-22 – Jurisdiction-- Alleged Violations of Federal & State Criminal Laws:** Complainant alleged irregular procedures and violations of federal and State criminal laws by several State officials. There were allegations of misuse of government funds; bribery; failure to pay child support; constitutional violations; inadequate qualifications for a job; sexual harassment, etc. The Commission's jurisdiction is limited to interpreting Title 29, Chapter 58. *Commission Op. No. 95-05*. Allegations of misuse of government funds, constitutional violations, sexual harassment, and personnel issues (e.g., job qualifications) are not within its jurisdiction. *Commission Op. No. 97-28*. Nor does it have jurisdiction over Title 11 criminal provisions (e.g., bribery, etc.). *Commission Op. No. 96-10*. Thus, the complaint was dismissed for failure to state a claim, pursuant to 29 Del. C. § 5809(3).



**00-14 – Jurisdiction-- Campaign Finance:** A candidate for a State office which regulated certain industries asked if those industries could make campaign contributions to candidates for that office. The Commission has jurisdiction over candidates for State office only under the financial disclosure law. See, 29 Del. C. § 5812(a)(3). Campaign contributions and expenditures are governed by 15 Del. C., Chapter 80.

**99-35 – Jurisdiction—General Assembly Members:** A situation arose where the issue was whether a General Assembly member had a "personal or private interest" which tended to impair independent judgment. 29 Del. C. § 5805(a)(1). The Commission's jurisdiction is limited to interpreting Title 29, Chapter 58; not other statutes or the constitution. *Commission Op. No. 95-05*. We have no jurisdiction over conflict of interest issues of General Assembly members. *Commission Op. No. 94-14; 96-11; 97-14*. Thus, we could not interpret the Legislative Conflicts of Interest Law or the State Constitutional provision which restrict legislators from participating in matters if they have a "personal or private interest." See, 29 Del. C. § 1002(a) and Del. Const. Art II § 20.

**98-25 – Jurisdiction—Constitution, Federal Laws, State Criminal Laws:** A complaint was filed against police officers and former police officers of a local government, current and former attorneys' and deputy attorneys' general, public defenders, and judges. The Commission held that it had no jurisdiction over: (1) certain persons named in the complaint; and (2) the subject matter of the complaint. As the Commission lacked jurisdiction, it dismissed the complaint pursuant to 29 Del. C. § 5809(3).

## I. FACTS

The complaint arose from circumstances before, during, and after complainant's plea agreement to felony charges for which he had been incarcerated for more than 10 years. He had challenged those legal proceedings in the Delaware Superior and Supreme Courts, the United States District Court, Court of Appeals, and the United States Supreme Court. Those challenges alleged: insufficient evidence to convict; perjury; coerced confession; ineffective assistance of counsel for failing to file a motion, refusing to put DNA evidence into evidence, refusing to call certain witnesses; conspiracy by the Judge, defense attorney, prosecutor and an unnamed lab technician to manufacture evidence; and denial of the right to a speedy trial. In a separate proceeding, he alleged ineffective assistance of counsel for failing to present motions to suppress a confession and failing to present certain evidence.

In the complaint filed with the Commission, he alleged that: (1) all defendants violated his Constitutional rights under the 4th, 5th, 6th, and 14th amendments; (2) all defendants violated specific chapters of federal law; (3) all defendants violated specific State criminal laws; (4) all defendant attorneys violated certain identified rules of the Lawyers' Rules of Professional Conduct; and (5) all defendant judges violated specific canons of the Judges' Code of Conduct.

Essentially, he alleged: improper arrest; illegal search and seizure; perjury; ineffective assistance of counsel; coercion to enter plea agreement; tampering with and/or creating false evidence; racial profiling and discrimination; improper denial of motions; invasion of attorney-client relationship; violation of Criminal Court rules; prosecutorial misconduct; lack of probable cause; failure to hold evidentiary hearings; conspiracy, etc.

The complaint did not allege any violation of any State Code of Conduct provisions.

## **II. LEGAL ISSUES**

Generally, administrative agencies have only such jurisdiction as is conferred by statute. *Commission Op. No. 95-20*. Thus, the Commission's jurisdiction is limited to administering and implementing only the provisions of title 29, Chapter 58. *Id.*

### **(a) Personal Jurisdiction**

Members of the judiciary are specifically exempted from the State Code of Conduct, as their conduct is governed by the Judicial Code of Conduct. *Commission Op. No. 96-38*. Thus, the Commission had no jurisdiction over such persons. *Id.* The State Code of Conduct also does not apply to local governments which adopt their own Code of Conduct. *68 Del. Laws c. 433 § 1*. As the local government which employed the police had adopted its own Code of Conduct, the Commission had no personal jurisdiction over its employees. *Commission Op. Nos. 96-11 & 96-45*.

### **(b) Subject Matter Jurisdiction**

The complaint alleged violations of: (1) the Constitution; (2) federal laws; (3) title 11, Delaware Code; (4) the Lawyers' Rules of Professional Conduct; (5) the Judges' Code of Conduct; and (5) Criminal Rules of Procedure. The Commission has held that it lacks jurisdiction over the same types of subject matter alleged in this complaint. *Commission Op. No. 91-16* (no jurisdiction over alleged racial discrimination); *Commission Op. No. 94-01* (no jurisdiction where it was alleged that a State attorney had not pursued criminal case matters; had not zealously represented a defendant; and had violated many Delaware Lawyers' Rules of Professional Conduct); *Commission Op. No. 94-02* (no jurisdiction over State attorney who allegedly provided ineffective assistance of counsel by refusing to file a motion related to case); *Commission Op. No. 94-03* (no jurisdiction where it was alleged that State attorney violated numerous Rules of Professional Conduct; failed to check crucial facts of case; and failed to file a motion to dismiss); *Commission Op. No. 94-08* (no jurisdiction where it was alleged that State prosecutor solicited misleading statements from witness at trial and State defense attorney did not use the right strategy and tactics); *Commission Op. No. 95-20* (no jurisdiction to interpret Rules of Professional Conduct); *Commission Op. No. 95-5* (no jurisdiction where it was alleged that complainant was deprived of Constitutional rights of due process and equal treatment under the law); *Commission Op. No. 96-10* (no jurisdiction over title 11 criminal code provisions); *Commission Op. Nos. 96-09 & 97-06* (no jurisdiction over Federal laws); *Commission Op. No. 96-38* (no jurisdiction over judges, prosecutors and local government where it was alleged that: witnesses perjured themselves; prosecutors improperly filed a motion to exclude certain evidence and had other evidence admitted which was allegedly altered; illegal search; judge refused to hold suppression hearing; no jurisdiction over procedural and evidentiary matters in prosecution for murder).

## **III. CONCLUSION**

Pursuant to its authority to dismiss for failing to state a claim, the Commission dismissed the claims against the local police and the judges for lack of personal jurisdiction; and dismissed all claims for lack of subject matter jurisdiction.

**99-07 – Jurisdiction—Overcrowding and Lack of Medical Care in Correctional Facility:** A prisoner alleged that a State correctional facility was overcrowded; he had not received proper medical treatment; and the facility had not responded to his grievances. The Commission's jurisdiction is limited to Title 29, Chapter 58: "It does not have the unrestricted, roving authority to review administrative actions where there is no alleged specific violation of the Code of Conduct." *Commission Op. No. 93-17*. As the allegations did not constitute a violation of the Code of Conduct, the complaint was dismissed for failure to state a violation, pursuant to 29 Del. C. § 5809(3).

**99-19 – Jurisdiction—Exposure to Toxic Fumes:** A prisoner alleged that he was exposed to toxic fumes at a State correctional facility. He alleged that he experienced dizziness, headaches, memory loss, etc., due to the exposure. He said he was consulting with his attorney; was bringing an action against the State; and that an environmental specialist had documented the matter.

The Commission has no jurisdiction over alleged medical complaints that arise in a correctional facility. *Commission Op. No. 99-07*. As none of the allegations constituted a violation of the Code of Conduct, the complaint was dismissed for failure to state a violation, pursuant to 29 Del. C. § 5809(3).

**98-42 – Jurisdiction—Allegations of Improper Hiring Procedures, Sexism, Racism:** Complainant alleged that a State officer violated the Code of Conduct by: "creating" jobs; "doctoring resumes" of persons not qualified for jobs; violating Merit policies in interviewing and hiring; pre-selection of job applicants; having employees work out of their job classifications; racism, poor management; failing to accommodate sick or injured employees when medical documents were provided; carrying a handgun on the job; "leering" at female employees; making sexual comments; infatuation with a female employee allegedly resulting in favoritism; misuse of state vehicles; misrepresentation in accounting reports; prohibiting "Christmas" luncheons but instead having a "Holiday" party; computer misuse; and suborning perjury.

The Commission held that it had no jurisdiction over the allegations, and dismissed them pursuant to 29 Del. C. § 5809(3) based on the following:

The Commission's jurisdiction is limited to administering the laws in Title 29, Chapter 58. *Commission Op. No. 95-05*. It has no jurisdiction over personnel laws or regulations governing the hiring, management and compliance with Merit policies. *Commission Op. No. 97-28*. Title 29, Chapter 59 and other personnel laws govern those matters. Laws and regulations regarding allegations of sexual harassment such as "leering," making sexual comments, etc., are governed by laws and regulations administered by such entities as the Equal Employment Opportunity/Affirmative Action (EEO/AA) section under State Personnel, or the Department of Labor, or certain federal offices. Similarly, allegations of racism are governed by laws and regulations administered by such entities. *Commission Op. No. 91-16*. Alleged misuse of government vehicles and penalties for misuse are governed by Title 29, Chapter 71. Thus, such allegations might more properly be within the jurisdiction of the Department of Administrative Services. Misrepresentation in accounting reports is not in the Commission's jurisdiction. The authority to audit is given by statute to the State Auditor. See, 29 Del. C. § 2906.

The allegations of computer misuse were that programs were installed on the agency's computer without authority to do so. The Commission has no authority to decide which computer programs are proper for an agency to install or whether the installation may violate any licensing agreement with the software vendor. Whether the allegations raise issues of any criminal laws, such as theft of services, would be a matter for the Attorney General. Whether the allegations raise issues under any licensing agreement with the software vendor would be a matter for the vendor to decide if it could pursue.

The allegation that the individual will not permit "Christmas" luncheons, but instead has a "Holiday" luncheon, is not within the Commission's jurisdiction. To the extent that complainant was trying to allege some type of religious discrimination, such matters again might more properly be addressed to EEO/AA. Generally, laws against religious discrimination restrict showing a preference or bias for one religion over the other. However, it was unclear what the basis might be because "Christmas," the term which the State officer would not use, is not observed by all religions.

It also was alleged that the individual carried a personal handgun on the job. The Commission has no authority to decide if any State employee or official may carry a handgun or under what circumstances such action would be permitted. To the extent the allegations raised issues of whether he had legal authority to carry a handgun, the Commission has no authority to license or revoke the license of any person carrying a handgun; or decide if carrying the handgun raises an on-the-job safety issue.

Regarding the allegation of having State employees make false statements under oath, to the extent the allegation was that the individual was suborning perjury, the Commission has no authority to determine if perjury has occurred. The crimes related to perjury are in Title 11, Chapter 5. To the extent those laws are alleged to have been violated, the Commission has held that it lacks jurisdiction over Title 11, criminal code provisions. See, *Commission Op. No. 96-10*.

**97-37 – Jurisdiction—Local Government Code of Conduct:** A City government submitted a Code of Conduct for its employees and officials for the Commission to review and determine if the local code was as stringent as the State Code. See, *68 Del. Laws, c. 433 § 1*. The Commission approved the City's Code, except for three minor areas, which were more procedural than substantive, which needed to be more stringent. For example, the City needed to provide a time frame in which appeals could be filed.

**97-30 (also 97-24) – Jurisdiction—Scope of Code of Conduct:** The Commission was asked if the Code of Conduct was limited to only pecuniary or financial interests. Holding that the Code of Conduct was not limited to only financial interests, the Commission first noted specific examples of Code provisions that did not, by their language, apply only to financial interests. For example, the State Code restrictions on confidential information not only prohibit the use of such information for financial gain, but any personal gain or benefit and they also prohibit improper disclosure. See, 29 Del. C. § 5806(f) and (g); See *also*, 29 Del. C. § 5806(e) (prohibiting the use of public office to secure unwarranted privileges, private advancement or gain). Thus, the plain language of those statutory provisions demonstrated that the restrictions are broader than pecuniary interests.

Further, where the General Assembly evidenced intent for the prohibition to refer only to financial interest, it specifically used that term, which has a very precise statutory definition. *See, e.g.*, 29 Del. C. § 5806(c) (no State employee, officer or honorary official shall acquire a “financial interest...”); *See*, 29 Del. C. § 5804(5) (definition of “financial interest”). In other instances, it makes no reference to financial interests. *See, e.g.*, 29 Del. C. § 5806(b) (no State employee, officer or honorary official shall have any interest in any private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest) (emphasis added). If the General Assembly had meant for all of the restrictions to be limited to financial interests, it clearly could have done so. Moreover, to read the Code as limited to pecuniary or financial interests would ignore the broader statutory language, making broader terms such as “any interest” have no meaning. The rules of statutory construction require that all words and phrases be given meaning. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991).

Also, it is clear under the Delaware common law that conflicts of interests for public officials may arise as a result of more than just pecuniary interests. *See, e.g.*, *Shellburne, Inc. v. Roberts*, Del. Super., 238 A.2d 331 (1967) (complaint alleged “personal interest,” “conflict of interest,” and “use of public office in the furtherance of such personal interest or conflict of interest,” because public official allegedly based his decision on other than the merits because he was motivated by: (1) his desire to assist his coreligionists; (2) the close attorney-client and business relationship between the official and the attorney for the civic association which wanted rezoning; and (3) his colleague whose wife was a member of the Church). The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from “reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment.” *See*, 29 Del. C. § 5805(a)(1). The Courts’ concern is that decisions be based on a “fair and unadulterated examination of the merits” and that “any conduct giving the appearance that impropriety is involved therein should be studiously avoided.” *See, Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (expressing the court’s concern for any deviation from the administrative process as provided by law or participation in *ex parte* communications between one party and those charged with reviewing the merits for the State agency). Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253* (1997). Thus, the State Code is basically a codification of the common law restrictions which Delaware Courts have recognized as encompassing more than pecuniary interests.

**97-28 – Jurisdiction—Activities Outside the Scope of the Statute:** A complaint was filed alleging that several State employees improperly engaged in activities during State work hours for which they should not have received State pay. It was further alleged that those individuals should not have worn a State uniform during the activities. The Commission held that it did not have jurisdiction to decide pay issues or uniform issues, as those issues were essentially personnel matters because personnel laws and rules established the circumstances under which uniforms may be worn and under which State employees are paid. It was suggested that the complainant may wish to pursue this matter with the agency’s personnel section or with the State Personnel Office.

**97-24(A) – Jurisdiction—Local Government Financial Disclosure Ordinances:** When a local government adopts a Code of Conduct, the Commission must review the local

government's code to decide if it is at least as stringent as the State Code. 68 Del. Laws, c. 433 § 1. The Commission was asked if it also must review local ordinances similar to the Financial Disclosure subchapter.

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 is Subchapter I of Chapter 58, Title 29. See, 68 Del. Laws c. 433 §1. There is no reference to the subchapter on financial disclosure. Thus, any review by the 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."

**97-24(B) – Jurisdiction—Local Government Code of Conduct:** A local government sought to amend its Code of Conduct which it adopted in 1991. The Commission must review amendments to local government codes of conduct to insure they are at least as stringent as the State Code of Conduct. 68 Del. Laws, c. 433 § 1. On reviewing the amendment, the Commission found it was not as stringent as the State Code because it did not apply to all employees, only to persons with duties that involved the exercise of discretion, while the State Code applies to all State employees.

Because local government codes need not be word-for-word the same as the State Code in order to be as stringent, the Commission then considered if the scope of the persons to whom the local government's code applied had such legal significance that the absence of including all employees would make the local code less stringent than the State Code. While most State Code provisions factor in the decision-making capability of the individual, there also are provisions that restrict certain conduct, regardless of whether the individual is acting in a ministerial or non-ministerial capacity. For example, the State Code restricts the disclosure and/or use of confidential information for personal gain or benefit. See, 29 Del. C. § 5806(f) and (g). Even non-decision makers have access to confidential information, such as a clerk typist who types the information. Therefore, the Commission found that the scope of the persons to whom the Code applies has legal significance and, thus, concluded that the local code, by limiting its applicability to only those in non-ministerial positions, was not as stringent as the State Code.

It also noted that the local code lacked a post-employment provision and a restriction on improperly disclosing confidential information. The Commission noted that the local code should be amended to include such provisions.

**97-14 – Jurisdiction—Members of the General Assembly:** A complaint was filed alleging that a General Assembly member had acted on matters where there was a conflict of interest. The Commission has no jurisdiction over General Assembly members as they are specifically excluded from the definitions of "State employee" and "State officer." See, 29 Del. C. § 5804(11)(b) and (12). They also do not fall within the definition of "Honorary State Officials," who are appointed and who receive less than \$5,000 per year in compensation. See, 29 Del. C. § 5804(13). Thus, they do not fall within the definitions of those persons to whom the Code of Conduct applies. Rather, such officials are subject to the Legislative Conflicts of Interest statute. See, 29 Del. C. § 1001 *et. seq.* Under that statute, the General Assembly has its own

House and Senate Ethics Committees to deal with alleged ethical violations.

**96-45 – Jurisdiction—Employees of Local Government:** Complaints were filed against individuals who were employed by local governments. The State Code of Conduct applies to local governments who have not adopted their own Codes of Conduct. 68 Del. Laws c. 433 § 1. Four local governments have adopted their own codes--Lewes, New Castle County, Newark and Wilmington. As the individuals were employed by local governments which had adopted their own code, the Commission had no jurisdiction and referred complainants to the local governments.

**96-42 – Procedure—Confidential Information:** A State employee was the lead point of contact for his agency's procurement activities. His brother-in-law's private firm periodically bid on locksmith contracts with the agency. The procurement law prohibited disclosure, during negotiations, of the contents of proposals to prohibit availability to competing offerors. 29 Del. C. § 6922. The agency delegated responsibilities concerning the locksmith contracts to the individual's supervisor. The Code of Conduct prohibits engaging in activities that might reasonably be expected to require or induce one to disclose confidential information acquired by public position. 29 Del. C. § 5806(f). It also prohibits disclosing or otherwise using confidential information for personal gain or benefit. 29 Del. C. § 5806 (g). As the agency had delegated the review and disposal of the contracts to the individual's supervisor, he did not participate in negotiations or otherwise have access to information, such as quotes from competitors, etc. Therefore, the Commission found no violation of the confidentiality provisions.

**96-39 – Jurisdiction—State Regulatory Body:** An Association was created by statute to regulate a profession. The Governor appointed some members of its "governing board" and the professional membership elected others. It asked if the Association was a "State agency" and if the Board members were subject to the State Code of Conduct.

The Code applies to State employees, officers and honorary officials. See, e.g., 29 Del. C. §§ 5805 and 5806. Appointees to a "State agency" are either "State employees" or "Honorary State officials." "State employee" means "any person (1) who receives compensation as an employee of a State agency; or (2) who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year" (excluding, among others, Honorary State officials). 29 Del. C. § 5804(11)(a). "Honorary State official" means "a person who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year." 29 Del. C. § 5805(13). "State agency" means "any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly . . ." 29 Del. C. § 5804(10).

The regulatory body existed by an act of the General Assembly. It was deemed a "public body" under the Freedom of Information Act (FOIA). It was called a State agency in the Administrative Procedures Act (APA). By statute, the appointees constituted a "board." Although self-regulating, it performed the same regulatory functions performed by State boards and commissions that regulate other professions under Title 24. Like other State regulated

professions, it was subject to “regulation in the public interest.”

The Code of Conduct was created to ensure conduct that does not violate the public trust or create a justifiable impression among the public that the public trust is being violated. 29 Del. C. § 5802. Because the regulatory body was statutorily created by the General Assembly; was deemed a “public body”; was referred to as a State agency; functions as similar State boards and commissions; and was charged with a public trust; the Commission found that it was a “State agency” for purposes of the Code of Conduct.

By statute, the appointees were part of the “governing board.” As such, they were “directors or the like,” under the Code of Conduct, because the statute gave them authority for the overall direction of the organization through the establishment of bylaws related to the administrative and domestic duties of the organization. The appointees of the board had a statutory right to accept remuneration, but they had elected not to do so. This Commission previously held that where appointed members of a Council established by statute was not entitled to compensation that they were still covered by the Code of Conduct because the “important consideration in the determination of whether an Honorary State Official is covered is the authority and responsibility of that office, not just the compensation.” *Commission Op. No. 92-01, A-1*. Thus, the fact that the appointed members were not accepting compensation was not a determinative factor. The Commission found that they were: (1) appointed; (2) “directors or the like” of a State agency; and (3) could reasonably expect to receive less than \$5,000 per calendar year. Accordingly, they were “Honorary State Officials” and subject to the Code of Conduct.

The membership elected the remaining board members. Under a literal reading of the statute, they would not be considered: (1) “Honorary State Officials,” as they are not appointed; (2) “State officers” because they are not required to file a financial disclosure statement; and (3) “State employees” because they were not accepting compensation from the State as they had elected not to establish bylaws concerning remuneration.

The rules of statutory construction require that statutes be construed consistent with the manifest intent of the General Assembly. See, 1 Del. C. §§ 301 and 303. The General Assembly found that the conduct of State government officials must hold the respect and confidence of the people and that to ensure propriety and to preserve public confidence, such persons “must have the benefit of specific standards to guide their conduct.” 29 Del. C. § 5802. It stated that the code “shall be construed to promote high standards of ethical conduct in state government.” 29 Del. C. § 5803. Generally, statutes enacted for a public purpose are broadly construed to serve that public purpose. See *generally, 3A Sands, Sutherland Stat. Constr. Chapter 71*, (5th ed. 1992).

The elected members, with the appointed members, are the “governing board” of a State agency. The agency was subject to public scrutiny under FOIA. The purpose of FOIA is to let citizens observe the performance of public officials and to monitor their decisions and is broadly construed to serve that purpose. 29 Del. C. § 10001. Such legislation has the effect of instilling the respect and confidence in its public officials, just like the Code of Conduct. See, *e.g., Levy v. Board of Cape Henlopen School District*, Del. Ch. C.A. No. 1447, V.C. Chandler (October 1, 1990 at 20) (FOIA is designed to ensure government accountability and is the method by which government officials earn the public trust). The regulatory agency was charged with regulating the practice of a licensed profession in Delaware “in the public interest.” Under the rules of statutory construction, interpretation of one statute may be influenced by the language of other statutes where they apply to similar persons, things or relationships to aid in a more harmonious



and uniform system of law and may supply evidence that legislative action is standardized. *2B Sands, Sutherland Stat. Constr.* § 53.02 (5th ed. 1992); *Id.* at § 53.05 (the general course of legislative policy in other statutes may be used to show intent or convey meaning of another statute).

This regulatory agency was unique from other governing bodies of professional regulatory agencies established by Title 24 in that some members were appointed, and some were elected, while the governing bodies of all other Title 24 professional regulatory agencies are comprised only of appointees. See, e.g., Title 24, “Professionals and Occupations.” However, it was charged with essentially the same duties as other professional regulatory agencies, except the regulated profession was different. As the appointed members and the members of the governing bodies of all other professional regulatory agencies appeared to be subject to the State Code of Conduct, the Commission did not believe the legislature intended to exclude the elected members of this governing board merely because of uniqueness in structure when the functions are essentially the same and there is a public purpose to be served. Accordingly, the Commission found that the elected members of the governing board also were subject to the Code of Conduct.

**96-38 – Jurisdiction—Judges, Prosecutors, and Local Government Police:** After being charged with murder, complainant filed a complaint against a judge, prosecutors, local police officers and detectives, and an expert witness hired by the local government. He alleged that witnesses perjured themselves; the prosecutors filed a motion to exclude evidence; an expert hired by the prosecution altered evidence; complainant’s home was searched without a warrant; and the judge refused to hold a suppression hearing. To the extent complainant was alleging the State Code of Conduct was violated, the Commission held:

The Code of Conduct applies to State employees, officers and honorary officials. The Commission has no jurisdiction over the judiciary as they are specifically excluded from the definitions of State employee and officer. See, 29 Del. C. § 5804(11)(b) and (12)(a). They are not honorary officials because although appointed, they receive more than \$5,000 per year. See, 29 Del. C. § 5804(13). Further, their conduct is governed by the Judicial Code of Conduct. The Commission also had no jurisdiction over the local police and detectives because their conduct was governed by a Code of Conduct adopted by their local government. See, 68 Del. Laws c. 433 § 1. No facts suggested that the hired expert was a State employee, officer or official, or that he was a local government employee or official who was subject to the State Code of Conduct. Accordingly, the Commission concluded it had no jurisdiction over him.

Regarding the prosecutors, the Commission held that while they are State employees, this Commission has limited jurisdiction only over the subject matter addressed by its statute. There is no provision governing the types of procedural and evidentiary matters of which the individual complained. Rather, the appropriate criminal laws and rules of procedure govern such matters and those laws and rules are not within the Commission’s jurisdiction.

**96-11 – Jurisdiction—Members of the General Assembly:** A complaint was filed against a General Assembly member. The Commission previously held that the Code of Conduct does not apply to such persons. *Commission Op. No. 94-14*. It applies to State employees, officers and honorary officials. General Assembly members are specifically excluded from the definitions of State employees and officers. See, 29 Del. C. § 5804 (11)(b)(1) and (12)(a). They do not fall within the definition of honorary officials as those persons are appointed and General

Assembly members are elected. See, 29 Del. C. § 5804(13). Further, conflicts of interest for General Assembly members are governed by 29 Del. C. § 1001, *et. seq.* That law is enforced by the House Ethics Committee for Representatives and the Senate Ethics Committee for Senators. 29 Del. C. § 1003. As the Commission had no jurisdiction, it referred complainant to the appropriate Ethics Committee.

**96-10 – Jurisdiction—Criminal Law Complaint:** Complainant alleged that the Attorney General’s office had improperly concluded, after an investigation, that the acts of a State employee did not constitute violations of criminal laws such as: issuing a false certificate; tampering with public records; and official misconduct. Because the AG’s office did not find a violation of those laws, complainant alleged that something “illegal and unethical” was “going on” in the AG’s office. As complainant did not identify the criminal laws, he believed the AG’s office had violated, the Commission assumed that his allegation was all encompassing.

First, the Commission held that to the extent he was alleging violations of any crime outside the scope of the State Code of Conduct, it had no jurisdiction over such laws. It also had no authority to interpret Title 11 criminal code provisions to decide if, in fact, the State employee had engaged in criminal acts, as the Attorney General is charged with the power and duty to investigate, upon information received, possible violations of the criminal code. See, 29 Del. C. § 2504(4) and *In re Eastburn & Son*, Del. Super., 147 A.2d 921(1959).

Second, while the State Code of Conduct has certain provisions that rise to the level of a criminal violation, See, 29 Del. C. § 5805, he had not identified which provisions he believed were violated. See, *Commission Rules and Regulations, IV (C)* (complainant must file a sworn statement; include the known facts; and identify Code sections he believes were violated). Thus, the Commission reviewed each provision within Section 5805 and determined that the facts failed to state a claim under any provision which carried a criminal penalty. The complaint was dismissed. See, 29 Del. C. § 5809(3) (Commission may dismiss any complaint that fails to state a violation).

**95-20 – Jurisdiction—Attorneys Working for the Government:** A State agency posited that attorneys contracting with the State are not “State employees” and, thus not subject to the Code of Conduct. The Commission declined to rule on whether contractual attorneys are “State employees” as such determination was not required for the Commission to reach a decision. However, it noted that there was existing law indicating that attorneys who contract with the State may be subject to the Code. See, *Delaware Lawyers’ Rules of Professional Conduct, Rule 1.11, comment* (lawyer representing government, *whether employed or specially retained by the government*, is subject to Rules of Professional Conduct ... *and to statutes and government regulations regarding conflicts of interest*); 29 Del. C. § 5805(g) (contracts violating Code of Conduct are voidable by court action); *Midboe v. Com’n. on Ethics for Pub. Employees*, La. Supr., 646 So.2d 351 (1994) (attorney who previously worked for State could not represent private clients in transactions with that agency for 2 years); *Howard v. Florida Com’n. on Ethics*, Fla. App., 421 So.2d. 37 (1982) (State Ethics Code applied to attorney who contracted with State school board as its attorney; conflict existed as he was also a partner in the firm providing legal services to the board.)

**95-19 – Jurisdiction – National Guard:** The Commission was asked if Delaware National Guard members were subject to the State Code of Conduct. The Code applies to “State

employees.” 29 Del. C. § 5805. “State employees” are defined as “any person who receives compensation from a State agency.” 29 Del. C. § 5804(11)(a). “State agency” includes departments existing by virtue of an act of the General Assembly. 29 Del. C. § 5804(10). The General Assembly, by statute, designated the Department of Military Affairs as a “[d]epartment of the Executive Branch of government in a like manner of all other such departments,” and determined that the Delaware National Guard, “when not in the service of the United States,” is governed pursuant to the laws of the State. 20 Del. C. § 121. State law directs when Guard members are to be paid from State appropriations. See, 20 Del. C. §§ 123(8), 127, 181, 182, 184. Accordingly, the Commission held that Delaware National Guard members are subject to the Code of Conduct when not in the service of the United States.

The Commission noted that the National Guard must conform to federal statutes and regulations governing the Armed Forces of the United States insofar as applicable and not inconsistent with the Constitution of Delaware or Title 20 of the Delaware Code. 20 Del. C. § 103. Thus, federal statutes or regulations pertaining to ethical conduct for National Guard members also could be applicable. The Commission declined to address whether federal statutes or regulations could preempt the Delaware State Code of Conduct absent a particular factual situation.

**95-15 – Jurisdiction – Casual/Seasonal Employees:** An agency advised the Commission that it employed two categories of personnel. One category was hired under the State Merit system and paid through the agency’s State budget. Other employees were not subject to the Merit system and were paid by appropriated special funds and non-appropriated special funds. The agency, for lack of a better term, referred to the latter group as “non-State employees.” The agency asked whether the “non-State employees” were subject to the Commission’s jurisdiction for purposes of implementing and administering the Code of Conduct.

The Code of Conduct governs the conduct of officers and employees of the “State.” 29 Del. C. § 5802(1). “State” includes any “State agency.” 29 Del. C. § 5804(8). “State agency” includes “all public bodies existing by virtue of an act of the General Assembly . . . .” 29 Del. C. § 5804 (9). The Commission found that the agency was created by statute and was referred to as an agency of the State government in that statute. The Commission concluded that the “non-State employees” were under the direction and control of the “State agency,” even though funding for the employees was primarily from federal funds. It heard testimony that the employees were not independent contractors and that personnel matters, such as hiring and termination were decided by the State agency, not any federal agency. Based on those facts, the Commission determined that such employees were subject to the Commission’s jurisdiction.

**95-05 – Jurisdiction—FOIA:** Complainant alleged that an agency conducted an executive session in violation of the Freedom of Information Act (FOIA). The Commission noted that Delaware law permits executive sessions under certain conditions, 29 Del. C. § 10004(b), but found that decisions on whether FOIA has been violated are specifically within the Attorney General’s jurisdiction, 29 Del. C. § 10005(e), and therefore the Commission had no jurisdiction over the issue.

**95-05 – Jurisdiction—Contract Rights:** Complainant alleged that certain State employees, in a separate administrative hearing, improperly conducted the hearing. To the extent that the manner of conducting the hearing was governed by the individual’s employment contract, the

Commission held it had no jurisdiction to interpret contractual and statutory provisions governing employment contracts. The contract and certain statutory provisions established the rights related to the employment matters, while the Commission's jurisdiction was limited to administering and implementing the Code of Conduct. 29 Del. C. §§ 5805(a), 5809(3) and 5810(a). Complainant also raised issues of invasion of privacy and libel and/or defamation. The Commission held that to the extent these were personal injury claims, its limited jurisdiction did not encompass such claims.

**95-05 – Jurisdiction—Constitutional Claims:** Complainant alleged that various State employees/officers deprived complainant of certain rights in another agency's proceeding, such as the right to a fair hearing, the right to be advised of a criminal investigation conducted by the agency, and unequal treatment under the law. The Commission concluded that to the extent the allegations raised constitutional issues, it had no jurisdiction. Generally, administrative agencies have only such adjudicatory jurisdiction as is conferred by statute. *2 Am. Jur. 2d Administrative Law* § 275 (1994). The Commission's jurisdiction is limited to administering and implementing the Code of Conduct. 29 Del. C. §§ 5805(a), 5809(3) and 5810(a). The Code mentions no jurisdiction over constitutional issues. Further, Courts have recognized that constitutional issues are within the courts' expertise, not the expertise of administrative agencies. See, e.g., *Plano v. Baker*, 2d Cir., 504 F.2d 595, 599 (1974); *Matters v. City of Ames*, Iowa Supr., 219 N.W.2d 718 (1974); *Hayes v. Cape Henlopen School District*, D. Del., 341 F. Supp. 823, 833 (1972).

**95-05 – Jurisdiction—Temporary Restraining Order:** Complainant filed a motion with the Commission for a temporary restraining order and preliminary injunction prohibiting a State agency from proceeding with certain administrative actions against the individual in another forum. The Code specifically defines the Commission's powers and duties. 29 Del. C. § 5809 and § 5810. There is no reference to the authority to issue restraining orders/preliminary injunctions. Where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. *Goldstein v. Municipal Court*, Del. Super., C.A. 89A-AP-13, J. Gebelein (January 7, 1991); *State v. Rose*, Del. Super., 132 A. 864, 867 (1926). To graft the authority to issue restraining orders/injunctions onto the Code would create jurisdiction not given by the General Assembly.

**95-05 – Procedure—Confidentiality:** Complainant alleged that comments to the news media by State officers disclosed information that allegedly was confidential because it related to personnel matters pending before a State adjudicative body. The Code of Conduct prohibits improper release of confidential information. 29 Del. C. § 5806(g). It does not specifically address the conduct imposed on individuals regarding public communication prior to adjudicative proceedings. The Commission found it persuasive to look at ethical standards governing extra-judicial statements by attorneys and employees and investigators in the prosecutor's office, in this particular case, because the matters were referred for possible criminal prosecution and/or other administrative actions. See, *Sutherland Stat. Constr.* § 45-15, Vol. 2A (5th ed. 1992) (decision on statutory construction has relevance as precedent if both statutes are such closely related subjects that consideration of one naturally brings to mind the other). The Commission specifically held that the standard would not necessarily apply in other cases.

The Delaware Rules of Professional Conduct place limits on the types of extra-judicial

statements made by attorneys and employees or other persons assisting or associated with a prosecutor. *Rules of Professional Conduct 3.6 and 3.8*. The rules identify the types of statements that may be made, without elaboration by a lawyer involved in an investigation or litigation. *Rule 3.6(c)*. In this case, statements to the effect that “we are doing an investigation of . . . ; “after we became aware of some alleged irregularities”; the investigation was “based on information they obtained elsewhere”; and “we have deferred and cooperated with [agency].” The Commission found these statements permissible as the Rules allow statements that an investigation is in progress, including the general scope of the investigation, the identity of the investigating agency and the length of the investigation. *Rule 3.6(c)(3) and (7)(iv)*. The statements did not include prohibited remarks such as comments on character, credibility, reputation, criminal record of a party, a suspect or witness, the identity of a witness or the expected testimony of a party or witness. *Rule 3.6 (b)*. The media reported that two respondents declined comment, one stating that it was a confidential matter. The Commission held that refusing to disclose information as to a pending action was not considered “release of information.” See, *Annotation, Release of Information Concerning Forthcoming or Pending Trial as Grounds for Contempt Proceedings or other Disciplinary Measures Against Member of the Bar*, 11 ALR 3d 1104 §1 {A}.

**95-05 – Procedure:** Complainant alleged that a State agency conducted an investigation and did not inform complainant until the investigation was completed and referred to another agency for determination of whether any administrative, civil or criminal action, might be taken against complainant as a result of the investigatory findings. Complainant alleged that failing to inform her of the investigation violated the prohibitions against: (1) engaging in conduct that would raise suspicion among the public that the employee/officer was engaging in acts in violation of the public trust, 29 Del. C. § 5806(a); (2) using public office to secure unwarranted privileges, private advancement or gain, 29 Del. C. § 5806(e); and (3) disclosing confidential information beyond the scope of the employee/officer’s public position, 29 Del. C. § 5806(g).

The Commission found federal and State laws recognizing that investigations may be kept confidential (citations omitted), and that, by law, it does not violate the 4th or 6th amendment for investigators not to inform an individual he is under investigation. *Chrisco v. Shafran*, D. Del., 507 F. Supp. 1312, 1316 (1981). The reason for confidential investigations is to shield the information-gathering process from premature discovery; protect the identity of informants, investigative techniques, the investigator, and the investigated. *Annotation, What Constitutes Files Exempt from Disclosure under Freedom of Information Act*, 17 ALR Fed. 522 § 7 (1973). Because the law permits confidential investigations, the Commission held that not disclosing the investigation to complainant would not raise suspicion that the public trust was violated. It found no evidence to support the claim that Respondents disclosed confidential information during the investigation. In fact, complainant’s factual allegations were that they kept the investigation confidential. The Commission found no evidence to support the claim that Respondents obtained any personal gain or benefit by conducting a confidential investigation.

**95-05 – Procedure:** Respondents sought to amend their answer to a complaint by striking one sentence of part of a response to an allegation as unresponsive and to add a specific legal defense. The Code of Conduct provides that the procedural rules specified in the Code are to be followed and that the Commission is to establish such other procedural rules as shall not be inconsistent with the rules prescribed in the Code of Conduct. 29 Del. C. § 5809 (6). The Code of Conduct and the Commission’s Rules and Regulations do not address the standard for motions to amend. The Code does provide however, that if a violation is found, the person

charged may appeal to the Delaware Superior Court. 29 Del. C. § 5810A. Because of that Court's jurisdiction over appeals, the Commission found the Superior Court Civil Rules of Procedure persuasive authority as the standard for motions to amend. See, *Sutherland Stat. Constr. § 45-15, Vol. 2A* (5th ed. 1992). Those Rules provide that after responsive pleadings are filed, a party may amend pleadings only by leave of court or written consent of the adverse party and leave shall be freely given when justice so requires. *Del. Super. Ct. Civ. R. Pro. 15(a)*. The adverse party could not be reached, and no written response was filed. The Commission held that amendments would be granted if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Del. Super. Ct. R. Civ. Pro. 15(c)(2)*. The determining factor was whether the opposing party would have been on notice from the original pleadings that the new claim or defense could be asserted. *Bissell v. Papastravros' Assoc. Medical Imaging*, Del. Supr., 626 A.2d 856 (1993).

The Commission found that the adverse party was on notice of the defense because the specific legal defense Respondent sought to raise was consistent with continuous denials of the factual allegations and the already asserted defense that complainant failed to state a claim. Respondents were only identifying why, as a matter of law, there was a failure to state a claim. Regarding the motion to strike, the Commission found that the sentence was unresponsive as it referred to a document not mentioned in the particular allegation and granted the motion.

**95-04 – Jurisdiction – School Board Members:** A school board member asked for an advisory opinion. The Commission may issue advisory opinions on the request of any "State employee," "State officer," or "honorary State official." 29 Del. C. § 5807(c). The Commission concluded that school board members are not within those terms. A "State employee" is an individual who receives compensation as an employee of a State agency. 29 Del. C. § 5804 (11). School board members receive no compensation. 14 Del. C. § 1046. "Honorary State officials" are persons appointed to their positions. 29 Del. C. § 5804 (13). Generally, school board members are elected, not appointed. 14 Del. C. § 1050. "State officers" are individuals required by law to file financial disclosure statements, and the Code specifically exempts elected and appointed officials of public-school districts from that group. 29 Del. C. § 5812. (See also, *Commission Op. 91-16*).

**95-03 - Jurisdiction-- Release of School District Record Information:** Complainant alleged that certain confidential information on students was released by a State employee and given to a candidate for the School Board as an aid to election. Complainant believed the release was improper under: (1) the Family Education Rights and Privacy Act of 1974 (FERPA); (2) the School District's policy implementing FERPA; and (3) Delaware laws governing school board elections. Complainant alleged that violation of those provisions constituted a violation of the Code of Conduct, which prohibits disclosure of confidential information obtained through government positions. 29 Del. C. § 5806(f) and (g).

The Federal law, FERPA, provides that the Secretary of Education or an administrative head of an education agency is to deal with FERPA violations. 20 U.S.C. § 232(g)(a)(5)(B). The doctrine of preemption holds that where federal law so occupies the field, States are prevented from asserting jurisdiction and may not pass a law inconsistent with the federal law. *Black's Law Dictionary, p. 1060* (5th ed. 1979). For the Commission to assume jurisdiction over an alleged improper release of school records information when federal law establishes the manner for pursuing such alleged violations would be inconsistent with federal law.

Regarding the allegation that the State employee failed to follow the School District's policy in releasing information, under Delaware law, "the school board of each reorganized school district shall decide on all controversies involving the rules and regulations of the school board." 14 Del. C. § 1058. Usually, specific provisions govern over general provisions. As the legislature specifically gave jurisdiction to the school board to interpret its rules and regulations, the general provisions of the Code of Conduct would not apply. To the extent the complaint alleged a violation of school board election laws, the Commission found no election statute which appeared to be violated. Even assuming a violation that would permit a challenge to the school board election, such challenge would more properly be addressed to School Board Election officials.

**94-15 – Jurisdiction:** The Commission was asked if a State officer's appointment to a nonprofit organization created a conflict. The requesting agency submitted the legislation creating the organization, but provided no details allowing a decision based on "a particular fact situation," as required by 29 Del. C. § 5807(c). The Commission requested additional facts.

**94-14 – Jurisdiction—General Assembly:** Complainant filed a complaint against a member of the Delaware General Assembly. The Commission ruled that members of the General Assembly were excluded from the definitions of State employee, State officer, and Honorary State official found in 29 Del. C. § 5804. As the Code of Conduct applies to State employees, officers and honorary officials, and members of the General Assembly are not within those definitions, the Commission held it had no jurisdiction over the complaint. Complainant argued that because the General Assembly member had previously filed a complaint against complainant, the member of the General Assembly had subjected himself to the Commission's jurisdiction. The Commission held that the argument was without merit. The Commission referred the matter to the Attorney General and the appropriate Ethics Committee of the General Assembly.

**94-09; 94-12 – Procedure:** The Code of Conduct provides that the Commission may act "upon the sworn complaint of any person." 29 Del. C. § 5810(a). It also provides that the Commission is to follow the procedural rules in § 5810 and can establish such other procedural rules as shall not be inconsistent with the rules prescribed in the Code. 29 Del. C. §5809 (6). The procedural rules require that a complaint: (1) be sworn; (2) contain particular facts, and (3) identify the section of the Code believed to be violated. Complainant submitted two unsworn complaints; did not detail facts sufficiently for the Commission to determine jurisdiction; and did not identify the Code sections believed to be violated. Complainant was notified to submit sworn complaints with more facts and with Code sections identified. Copies of the Code and Commission's rules were provided.

**94-08 – Jurisdiction--Prisoner:** Complainant, who was convicted of a crime, filed a complaint with an agency alleging improper conduct by a number of attorneys employed by a State agency. Complainant asserted that the prosecuting attorney had solicited misleading statements from a witness at trial and that the defense attorney had not used the right strategy and tactics in defending the case. The agency's attorney issued an opinion finding there was no violation of the Rules of Professional Responsibility, and that most of his concerns would be more properly addressed in the courts. Complainant then filed a complaint with the Public

Integrity Commission alleging the decision was “erroneous” and that the attorney had “shirked [sic] his ethical responsibility.” He identified no violation of Title 29, Chapter 58. The Commission found it had no jurisdiction and advised complainant to submit the matter to either the Board on Professional Responsibility or the Delaware Supreme Court.

**94-07 – Jurisdiction:** The Commission issues advisory opinions based on a “particular fact situation.” 29 Del. C. § 5807(c). A State employee asked if contact with a private firm where the employee’s spouse worked created a conflict. The issue became moot because the spouse left the firm. Thus, there was no longer a “particular fact situation” on which the Commission could act.

**94-04 – Jurisdiction--Prisoner:** Complainant alleged that the prison facility in which he was housed was overcrowded; that the prison tried to conceal that information; and that he and other inmates were denied access to the courts. He did not allege any violations of Title 29, Chapter 58. The Commission found it did not have jurisdiction and suggested complainant address his complaint through the prison grievance process or possibly through the court system.

**94-03 – Jurisdiction--Prisoner:** Complainant, who was a prisoner, alleged that a State attorney violated numerous rules of the Delaware Lawyers’ Rules of Professional Conduct because the attorney allegedly failed to check crucial facts and failed to file a motion to dismiss. Complainant did not allege violations of any provisions of Title 29, Chapter 58. The Commission held it had no jurisdiction to interpret and enforce the Rules of Professional Conduct and referred complainant to the Office of Disciplinary Counsel. (*See also, Comm. Op. 94-01 and 94-02*).

**94-02 – Jurisdiction--Prisoner:** Complainant, who was a prisoner, alleged that a State attorney provided ineffective assistance of counsel because the attorney refused to file a motion relating to the case. Complaint alleged the attorney was violating numerous rules of the Delaware Lawyers’ Rules of Professional Conduct. It was not alleged that the attorney violated any provisions of Title 29, Chapter 58. The Commission held that it had no jurisdiction over the Rules of Professional Conduct and referred complainant to the Office of Disciplinary Counsel. (*See also, Comm. Op. 94-01*).

**94-01 – Jurisdiction--Prisoner:** Complainant, who was a prisoner, alleged that a State attorney was negligent in handling a case. It was alleged the attorney had not pursued matters and had not zealously represented his client. Complainant alleged that the attorney had violated numerous Delaware Lawyers’ Rules of Professional Conduct. The Commission’s jurisdiction is limited to interpreting and enforcing the provisions of Title 29, Chapter 58. *See, e.g.,* 29 Del. C. § 5809. Complainant did not allege any violation of any provision in Chapter 58. The Commission held that interpretation and enforcement of the Lawyers’ Rules of Professional Conduct was not within the Commission’s jurisdiction and referred complainant to the Office of Disciplinary Counsel.

**NOTE:** The comments to the Delaware Lawyers’ Rules of Professional Conduct provide “[a] lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct . . . and to statutes



and government regulations regarding conflict of interest.” *See, Rules of Professional Conduct, R. 1.11, comment.*

**93-17 – Jurisdiction:** Complainant alleged that State officers contracted with a private enterprise for services which complainant alleged resulted in unnecessary expenditure of State funds and could have led to unjust enrichment of the non-State persons entering the contract because they were paid more than complainant believed should have been paid.

The Commission found that to the extent the complaint alleged unjust enrichment by the private contractor, it had no jurisdiction, as the Commission’s jurisdiction is limited to State employees, officers and officials, not private individuals or enterprises. *See, e.g., 29 Del. C. § 5805, § 5806.*

To the extent the complaint alleged the conduct of the State officers in entering the contract was improper, the Commission held that its jurisdiction extended only to conflicts of interest identified in the Code and that no facts indicated that the officers’ actions fell within the statutory provisions. The Commission noted that it does not have the unrestricted, roving authority to review the wisdom or propriety of contracts entered by State agencies and officers or to review administrative efficiency of State government where no violation of the Code of Conduct is involved. The Commission recommended that complainant contact the State Auditor or other appropriate authority.

**93-15 – Procedure:** An individual wrote the Commission regarding an investigation by a State officer. The officer’s authority to investigate was not questioned, but his motives were. The Commission advised that the Code of Conduct and the Commission Rules and Regulations require complaints to be in the form of a sworn statement with specific facts, and upon receipt the Commission would consider the complaint. *See, 29 Del. C. § 5810(a).*

**93-09 – Jurisdiction:** An individual sent a letter to the Commission alleging improper activities by certain local government officials. He also asked if the State Code of Ethics applied to the specific municipality. The Commission responded that the Code of Conduct applies to municipalities that did not adopt their own code of conduct by January 23, 1993. *See, 68 Del. Laws c. 433 § 1.* The Commission advised it had jurisdiction over the specific municipality referred to in the letter and advised the writer that if he wished to initiate an investigation into possible violations of the Code of Conduct, a sworn, detailed complaint must be filed. *See, 29 Del. C. § 5810(a).*

**93-08 – Jurisdiction:** Complainant alleged that certain elected municipal officials engaged in activities prohibited by the Code of Conduct. Some of the alleged activities occurred before January 23, 1993. The General Assembly had provided that, “It is the desire of the General Assembly that all counties, municipalities and towns adopt code of conduct legislation at least as stringent as this [Code of Conduct] act to apply to their employees and elected and appointed officials.” 67 Del. Laws c. 417 §2. “Subchapter I, Chapter 58 of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993.” 68 Del. Laws c. 433 § 1. The Commission found that as the municipality had not adopted a Code of Conduct, it became subject to the law on January 23, 1993. However, the Commission held that it would be an

anomaly to hold the Code violated by acts occurring well before the Code applied to municipalities because at the very least public servants should have notice of the specific standards to which they are held. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51(1964). It therefore dismissed the charges that occurred prior to January 23, 1993.

**93-07 – Jurisdiction:** Complainant alleged that he and other employees were directed by medical professionals to perform certain actions complainant believed to be illegal. The Commission declined jurisdiction because it is not empowered to review every alleged violation of laws and regulations that are not within the acts over which the Commission has authority. The individual was advised that under the specific facts, the alleged charges might more appropriately be referred to the State Board of Medical Practice.

**92-09 – Jurisdiction - Elected Officials:** Complainant alleged that an elected official engaged in improper conduct. Some of the alleged conduct occurred prior to January 23, 1991, the effective date of the State Ethics Code. Those allegations were dismissed on the basis that the alleged improper conduct occurred well before enactment of the Code of Conduct and the individual would not have been on notice of the standards to which they were to be held. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) (all are entitled to be informed as to what the State commands or forbids).

The Respondent also argued the Commission did not have personal jurisdiction because Respondent was no longer an elected official. The Commission concluded that nothing in the Code suggested that by leaving State employment or office an individual was insulated from responsibility for having violated the Code while in office. It noted that the “post-employment restrictions” show a legislative intent to retain jurisdiction over former employees and officers for conduct occurring during their tenure with the State. *See*, 29 Del. C. § 5805(d). The Commission also found that as a policy matter, the consequences of violating the Code of Conduct should not be avoided merely by leaving office. The Commission noted that it was not saying former employees and officers should worry indefinitely that charges under the Code might be brought against them long after leaving State service. The Commission noted that the charges were known to the individual before leaving public office and that a preliminary hearing, including discussion of issues raised in the complaint, occurred while Respondent was still in office.

After several pretrial conferences, rulings, stipulations, receipt of documentary evidence, and the taking of testimony, the Commission concluded that the remaining count should be dismissed for lack of “clear and convincing evidence,” the standard of proof required to find a violation.

**92-02 – Jurisdiction - Running for Elective Office:** A State employee requested a determination of whether there would be a conflict of interest if he ran for an elected State office while employed by the State. The Commission found nothing in the Code of Ethics specifically prohibiting such activity. However, it noted that should the employee be elected, he should be aware that the Code would apply *in toto*. (Merit Employees, *See* 29 Del. C. § 5954 and *Att’y Gen. Op. No. 78-016* (Oct. 5, 1978)).

**NOTE:** The Commission’s advisory opinions must be based on a particular factual situation. 29

Del. C. § 5807(c). Certain persons covered by the Code of Conduct could be prohibited from maintaining a State position and elective office by other laws, e.g., State Election Commissioner cannot hold or be a candidate for office, 15 Del. C. § 301; Public Integrity Commission members, formerly State Ethics Commission, cannot hold elected or appointed U.S. or State office, or be a candidate for such office, 29 Del. C. § 5808(b). Readers should be alert to other statutes or decisions restricting such actions, e.g., 29 Del. C. § 5954 regarding political activities by State employees; *In Re: Request of the Governor for an Advisory Opinion*, Del. Supr., 722 A.2d 307 (1998) (State trooper cannot hold dual positions as trooper and State Representative).

**92-01- Jurisdiction - Honorary Officials:** A State agency asked whether members of a Council, established to advise a Departmental Secretary on certain matters, were subject to the State Code of Conduct. Council members were, pursuant to law, appointed by the Governor. They received no compensation but could be reimbursed for actual and necessary expenses incurred in performing official duties. An “honorary State official” is “a person who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses).” 29 Del. C. § 5804 (13). The Commission concluded that the statute reflected legislative intent to include within the Code’s coverage all Honorary State officials. The Commission viewed the important consideration as the authority and responsibility of the office, not just compensation.

**91-20 – Jurisdiction - Non-Government Activities:** Complainant alleged that a State employee, who was concurrently associated with a non-profit organization had improperly used funds of the organization for his personal benefit. A criminal investigation, conducted by the Attorney General’s office, found no criminal violation. An investigation also was conducted by the State Auditor’s Office which concluded that the non-profit’s books were inadequate to determine if State funds were improperly used. The Commission held its investigation in abeyance while those investigations were conducted. Upon conclusion of those investigations, complainant requested the Commission to dismiss the complaint. By law, the Commission may initiate its own investigation based on facts brought to its attention. 29 Del. C. § 5810(a). The Commission found that as a factual matter, the alleged action was related to his association with the non-profit organization, rather than his public employment. It concluded that the language in the statute seemed to express a clear legislative intent that violations must be related to the public duties of the individual as the statute repeatedly refers to the “public trust,” “public interest,” “official duties,” “governmental decisions,” “official capacity,” etc. The only statutory references to matters “beyond the scope of public positions,” dealt with the release of confidential government information. 29 Del. C. § 5806 (f) and (g). Even those provisions “beyond the scope” are limited to situations where confidential information is obtained as a result of the public position. The Commission concluded that by limiting the Code to matters related only to public office, the Commission had no jurisdiction over the alleged actions which related to his non-government connected activities. See *Howell v. State*, Del. Supr., 421 A.2d 892 (1988) (in interpreting misconduct in office statute, Court noted that it referred to “official functions,” except for one provision).

**91-16 – Jurisdiction - School Board Member Also State Employee:** Two individuals were alleged to have violated the Code of Conduct. One was an elected school board member and was concurrently an employee of a State school of higher education. He applied for a State job with the same school district in which he held a board position. He was cut from consideration

before his application reached review by the School Board. The other individual charged was a State employee whose position was supervised by the School Board. Petitioner, who applied for the same position but was not selected, alleged that: (1) he was not selected because of racial discrimination; (2) it was a conflict of interest for the Board member to apply for the position; (3) it was a conflict of interest for the other employee to be “deeply involved” in the hiring process; and (4) there was questionable use of school funds.

The Commission determined that the alleged racial discrimination and alleged questionable use of school funds were not issues within its jurisdiction. It recommended the alleged discrimination matter be referred to the Equal Employment Opportunity Commission and the alleged misuse of funds matter be referred to the Educational Finance Overview Committee.

Regarding the remaining issue concerning a conflict, the Commission determined it had personal jurisdiction over State employees, State officers and honorary State officials. See, e.g. 29 Del. C. §§ 5805-06. A “State employee” is defined as one who receives compensation from a State agency. 29 Del. C. § 5804(11)(a)(1). An honorary State official is “appointed.” 29 Del. C. § 5804(13). Board members did not receive compensation from a State agency and were elected, not appointed. Thus, the Commission concluded the Board member was not a “State employee” or an “honorary State official.” A “State officer” is a person required to file a financial disclosure statement. 29 Del. C. §§ 5804(12) and 5812. The Code excluded, “elected and appointed officials of . . . public school districts” from the definition of State officers. 29 Del. C. § 5812(a). Thus, the Commission concluded that an elected school board member also was not a “State officer.” As his status as a Board member did not place him within the category of persons to whom the Code applied, the Commission concluded it lacked jurisdiction over him in that capacity.

Regarding his concurrent position as a State employee, the Commission had personal jurisdiction over him, but it found that the alleged conflict did not arise within or have a nexus with the Board member’s concurrent State employment.

The other individual was found to be a State employee, giving the Commission jurisdiction. However, after hearings on the matter, the Commission found there was no evidence presented to support a conclusion that there was a conflict of interest, as any accrual of financial benefit, required by 29 Del. C. § 5805(a)(2)(a), which prohibits reviewing or disposing of matters where there is a financial interest, was speculative and remote. It further found, after a hearing, that the fundamental facts as developed showed nothing to support a conclusion of an appearance of impropriety under 29 Del. C. § 5806(a).