

## **LOCAL CODES OF CONDUCT 1991-2022**

**22-37 City of Wilmington Code of Conduct:** The Commission reviewed proposed changes to the City of Wilmington's City Ethics Requirements. After reviewing the proposed changes, the Commission decided that the amendments did not make substantive changes to the City's Ethics Requirements which would make it less stringent than the State's Code of Conduct. Therefore, the proposed changes to the City Ethics Requirements were approved.

**22-10 City of Lewes—Code of Conduct Review:** The Commission originally reviewed and approved the City of Lewes' ("City") Code of Ethical Conduct in July 1993. In 2018, the City submitted proposed amendments for PIC's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." The amended Code of Ethical Conduct was approved by the Commission at the September 18, 2018, meeting.

The City completed another review of their Code of Ethical Conduct and proposed several changes.

- 9-1—The City adopted the State Code of Conduct's Legislative Findings and Statement of Policy. Addition of this provision did not diminish the strength of the ordinance and helped direct administration of the ethics code.
- 9-2—Removed the definition of "bias". This term does not appear in the State ethics code. Made a grammatical correction in the definition of "matter."
- 9-3—stated that employees and officials of the City could not incorporate bias or discrimination into any of their official decisions. Re-affirmed the impartial judgement standard.
- 9-5—Removed language regarding bias and substituted 'independent judgment' as the appropriate standard for evaluating the need for recusal.
- 9-8—Added to the list of people who could not serve on the Board of Ethics to include individuals appointed to the City's commissions and committees. Prohibited members of the Board of Ethics from deciding any matters while they are a candidate for elective office.
- 9-9—Allowed members of the Board of Ethics to consider the contents of the complaint during a preliminary inquiry. Codification of accepted practices. Allowed the Board of Ethics to determine the witnesses called during a hearing.
- 9-10—Added criminal penalties for violations of the Code of Ethical Conduct. Set forth the applicable statute of limitations for violations of the ethics code. Made the Superior Court the court of appeal to match the State statute. Prohibited violations that were not knowing or willing from being prosecuted criminally but left open the possibility of administrative penalties. The State Code limits criminal penalties to the conflicts of interest provisions. Other violations of the Code of Conduct solely subject to administrative penalties. Consequently, Lewes' Code of Ethical Conduct could be stricter than the State Code, which is permitted.

## RECOMMENDATIONS

After reviewing the proposed changes, the Commission offered the following advice:

- Section 9-9—The Board of Ethics cannot decide on behalf of the litigants which witnesses will be called to present evidence. Under the State Code of Conduct, both parties have the right to call witnesses as they see fit. That did not mean that the members of the Board of Ethics were expected to listen to an excessive number of witnesses whose testimony was duplicative and cumulative. The Commission suggested that the drafters consult with the City Solicitor about revising the proposed language to allow the members of the Board of Ethics to request a proffer from the calling party. The proffer would allow the members of the Board of Ethics to best determine if the witnesses' testimony was likely to be repetitive or cumulative. If the City put a blanket prohibition on parties calling their own witnesses, it was likely that any decisions made by the Board would be overturned by a court on appeal.
- Although not part of Lewes' request, the Commission pointed out that the civil burden of proof in Delaware changed from a preponderance of the evidence to clear and convincing evidence.

The Commission did not approve the amended Code of Ethics.

**22-10B City of Lewes—Code of Conduct:** The Commission originally reviewed and approved the City of Lewes' ("City") Code of Ethical Conduct in July 1993. In 2018, the City submitted proposed amendments for PIC's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." The amended Code of Ethical Conduct was approved by the Commission at the September 18, 2018, meeting. More recently, the Commission met on May 17, 2022, to review proposed amendments to the City of Lewes' Code of Conduct. Those amendments were approved with suggestions for minor changes to Ordinances 9-9(C)(11) and 9-9(C)(17).

After incorporating the Commission's suggestions, the City re-submitted their Code of Ethical Conduct for final approval. At the Commission's June 21, 2022, meeting, the revised Code of Ethical Conduct was approved in its entirety.

**20-07--City of Newark--Code of Conduct (*no appearance*):** The City of Newark ("City") originally adopted their Code of Conduct in April 1993, after review and approval by the Delaware Ethics Commission (PIC's predecessor). The City, through their Director of Legislative Services, Renee Bensley, submitted proposed amendments for the Commission's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." 29 *Del. C.* § 5802(4). Ms. Bensley stated that the City wanted to expand the size of their board and change the manner in which the board members were appointed. The City approved the submission to the PIC at their February 6, 2020 board meeting.

At the time of the meeting, members of the ethics board were appointed by the Mayor. The City requested permission to change the appointment process to allow each city council

member to appoint one member from their district. An at-large member would continue to be appointed by the Mayor. In addition, the City wanted to increase the size of the board from five to seven members (which also increased the number required for a quorum from three to four) and create staggered appointment terms so that the City would be able to retain institutional knowledge.

The requested changes were reviewed by the Commission on February 18, 2020. The Commission decided that the amendments did not make substantive changes to the City's Code of Conduct. Therefore, the proposed changes to the City's Code of Conduct were approved.

**18-32 - Wilmington Code of Conduct:** The City of Wilmington ("City") originally adopted their Code of Conduct in March 1993, after review and approval by the Delaware Ethics Commission (PIC's predecessor). The City, through their attorney William B. Larson, submitted proposed amendments for PIC's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." 29 Del. C. § 5802(4). Mr. Larson stated that the City decided to review, reorganize, and re-name their Code of Conduct to make it easier to read and understand.

The City planned to change the name of its Code of Conduct to City Ethics Requirements. Their ordinance included both ethics provisions and financial disclosure requirements. The State code did not permit the Commission to review the City's financial disclosure rules. In the State code the financial disclosure rules are set forth in Subchapter II. Financial Disclosure. Because the Commission only has the power to review ordinances related to *this* subchapter, the Commission did not review or consider those provisions. 29 Del. C. § 5802(4) (Subchapter I. State Employees', Officers' and Officials' Code of Conduct).

After reviewing the City's proposed changes, the Commission decided that the amendments did not make substantive changes to the City's Ethics Requirements and found that it was at least as stringent as the State's Code of Conduct.

**18-30A Lewes Code of Conduct:** The Commission originally reviewed and approved the City of Lewes' ("City") Code of Conduct in July 1993. The City, through their attorney, Glenn Mandalas, submitted proposed amendments for PIC's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." 29 Del. C. § 5802(4).

In comparing the current Code of Conduct to the proposed Code of Conduct, the City made several notable changes.

#### Additions/Changes of Consequence

- § 9-2(F) - Changes the definition of financial interest to vague (maybe unenforceable) terms. While there is an attempt to further clarify the meaning in section H, the definitions leave a lot of room for interpretation.
- § 9-3(A) - States that officials and employees should pursue the City's interests *before* their own. When officials and employees are acting in their official capacity, their personal interests should not be considered at all.

- § 9-3(B) – Again, the language of the code implies that employees and officials may pursue their own interests as long as they pursue the City’s interests first.

#### Omitted Provisions

- No provision prohibiting the use of their City position for special privileges, advancement or gain.
- No prohibition against disclosing confidential information.
- No prohibition against accepting gifts or other things of monetary value.

After evaluation, the Commission decided the proposed code was less stringent than the State code, which was impermissible. *Id.*

The Commission did not approve the City of Lewes’ proposed changes to its Code of Conduct.

**18-30B--City of Lewes Code of Conduct:** The Commission originally reviewed and approved the City of Lewes’ (“City”) Code of Conduct in July 1993. The City, through their attorney, Glenn Mandalas, submitted proposed amendments for PIC’s review and approval as required by statute. “Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter.” 29 *Del. C.* § 5802(4).

The first revision was considered and rejected by the Commission at the September 18, 2018, meeting. At that meeting the Commission decided that the revision lacked several important components and that the revised Code of Conduct was less stringent than the State Code, which is impermissible. *Id.* Mr. Mandalas submitted a new revision on October 3, 2018, for the Commission’s consideration. After reviewing the changes, the Commission decided that the revised City of Lewes Code of Conduct was at least as strict as the State Code of Conduct. Therefore, the revised Code of Conduct was approved.

**13-22 - Dewey Beach Code of Conduct:** Dewey Beach submitted its Code of Conduct for reconsideration by the Commission. Counsel for Dewey Beach, worked with PIC Counsel to finalize the changes. Dewey Beach had complied with all the requests of the Commission to change the Dewey Beach Code of Conduct to conform to the State Code of Conduct. The only remaining change the Commission was asking Dewey Beach to make was to remove the requirement that a complaint be “hand-delivered” in Section 10-8, Line 33. The concern was the public would be less likely to file complaints if they had to show up in person to deliver it to the Dewey Beach Ethics Board. Counsel verbally agreed to make the change. With that change, the Commission concluded that the Dewey Beach Code of Conduct was at least as stringent as the State Code of Conduct as required by 29 *Del. C.* § 5802(4). The Commission accepted the Dewey Beach Code of Conduct with the caution that in addition to the wording change, they must keep their Ethics Board fully staffed. Staffing shortages lead to improper administration of the code and an indifferent attitude toward enforcement.

**12-39 - Delaware City Code of Conduct:** Delaware City submitted a Code of Conduct for PIC to review. For a local government to have its own Code of Conduct, it must be at least as stringent as State law. 29 Del. C. § 5802(4). In comparing the State law to the local Code, it was determined there were several areas where its Code was not as stringent: (1) the provision dealing with representing or otherwise assisting a private enterprise before one's own agency, did not bar such action; it only required that they disclose the conflict; (2) provided that the City's employees and officials adhere to the conflicts of interest standards established by State law. The purpose of adopting their own Code was to remove them from an obligation to comply with State law so that provision could be misleading; (3) there was no right of appeal provision; (4) there was no provision that provided applicants were protected against a complaint or disciplinary action if they followed the City Commission's advice. It was suggested the City may want to stagger the terms of its members so that they do not lose the experience of all members at the same time; and that the City itself be authorized to request an advisory opinion. There was discussion about the "civility" provisions in the City Code, which are not in the State law, which the City wanted to maintain. As a matter of format, it was suggested the paragraphs be numbered so that it would be easier to cite to them. The Commission recommended that those matters be identified for them so they could make the necessary changes and resubmit.

**Update:** The City made the required changes, and it was approved by PIC at the January 22, 2013 meeting.

**10-01 - NCC Code of Conduct Amendments:** (1) would permit persons involved in partisan politics to serve on the Commission. The Commission decided that it was not as stringent as State law which bars those involved from partisan politics. (2) complaint to be submitted "under penalty of perjury." State law requires a "sworn complaint." The Commission decided it was not as stringent as State law; (3) allows telephone conferences; The Commission advised that the State Code has no similar provision as such matters are determined under the Freedom of Information Act and this Commission has no jurisdiction to interpret FOIA, but PIC noted it was unclear why they put provisions from other laws in the Code of Conduct which would put them in the position of having to interpret and respond to challenges based on a law over which the Attorney General's office has jurisdiction. (4) added a 14 day time period for respondent to respond to a summary of the complaint. The Code of Conduct does not provide for a "summary" of a complaint – only a complaint--to go to the respondent. The Commission advised that: (1) giving a summary was less than giving a complaint so it was not as stringent; and (2) the State Code has no set time frame for respondents to answer, and NCC could have made that part of their procedural rules, not the law, but it was not less stringent since the State law does not have a more stringent time frame, but that we note that set time limits can create problems. (5) another time frame set. The Commission decided as in (2) in the previous motion. (6) deletion of certain confidentiality provisions in several sections. The Commission found that deleting the confidentiality provisions was inconsistent with Section 5810(h). (7) would allow respondent to only "admit" or "deny". The Commission advised that the State Code did not place those substantive limits on respondents, so limiting the response, without giving such things as the ability to respond that they are without knowledge or belief, etc., is a right they would be entitled to under State law, and is the manner in which Delaware legally operates in terms of responding to complaints. (8) would allow a union representative to be at hearings. The Commission previously addressed but NCC took no action. The Commission advised as before. (9) permitted letters of reprimand even if no violation was found and discussed removal of elected officials. The Commission advised that the State law provides if a violation is found reprimands may be issued, with no reference to any sanction if a violation is not found, and the penalty of removal does not apply to elected officials, and generally where the law is silent it

expresses the legislative intent. (10) added a prohibition on retaliation—essentially a whistleblower’s statute. The State Code of Conduct has no such provision. The State whistleblower’s law is under the Attorney General’s jurisdiction. PIC has no authority to interpret a whistleblower’s law, and again PIC noted that it was unclear why NCC added substantive law to its Code of Conduct that is under the purview of other agencies.

**08-96 – Lewes Code of Conduct Amendment:** Amendment to include that persons appointed to Boards and Commissions were subject to the Code to bring it into compliance with State law. 29 Del. C. § 5802(4). The Commission approved the amendment contingent on a change to reflect all such appointees; not just those paid more than \$5,000. **UPDATE:** Town Attorney advised that no limit was intended; the wording will be changed to reflect all Board and Commission members are subject to the law.

**08-67- Georgetown Code of Conduct:** Submitted Code identical to Smyrna’s PIC approved Code. It was found to be at least as stringent as the State Code. 29 Del. C. § 5802(4).

**08-31 – New Castle County Code of Conduct Amendment:** Less stringent areas:

(1) Union representative at hearings. Not in State Code. Same comments as above on laypersons.

(2) Commissioner to act as investigator, fact finder, and give a recommendation to the other Commissioners. State law: Those are Legal Counsel’s duties. Aside from usurping Counsel’s statutory duties, separating the duties instills public confidence because co-Commissioners are not reviewing their colleague’s work. The same applied when all members participated, because it meant another “public eye” was deciding on the critical issue of conflicts. It also could provide an odd number for the vote to reduce possible split decisions, etc.

**08-29 - Lewes Code of Conduct Amendment:** The Town submitted an amendment so PIC could decide if it was as stringent as the State Code. 29 Del. C. § 5802(4). Three areas were less stringent:

(1) Would give the Mayor and Council approval of Commission decisions. State law: Ethics Commissions are to be independent, and if they must have approval from other officials, it does not insure that independence.

(2) Page 1, definitions: “Personal or private interests” should be substantive law.

(3) Page 3 – Parties had a right to legal counsel or be assisted by a layperson. Not in State law. Concern: practicing law without a license (occurred when a layperson came before another State Board). As they were not as stringent as State law, these areas of the amendment were not approved.

**08-19 - Dewey Beach Code of Conduct:** Local governments are subject to the State Code of Conduct unless they adopt their own Code which must be approved by this Commission as being as stringent as State law. 29 Del. C. § 5802(4). Dewey Beach rewrote its Code with some changes after the Commission identified areas that were less stringent than State law. *See, 07-55.* This was a review of the rewrite. Areas identified last time as not as stringent were still not included, e.g., post-employment. Again, the Commission found it was still less stringent than the State Code of Conduct.

**07-55 - Dewey Beach Code of Conduct:** The Town of Dewey Beach submitted a Code for the Commission's review and asked if it were as stringent as State law. 29 Del. C. § 5802(4). Its Code lacked some provisions, e.g., post-employment. It also had a provision that read as if Dewey's Ethics Commission would make some decisions interpreting its Code, but leave other decisions to this Commission to interpret under State law, which could not be done. The Commission found it was not as stringent as State law.

**06-58 - Smyrna Code of Conduct:** The Town of Smyrna submitted a draft Code of Conduct to the Commission to decide if its Code was as stringent as the State Code. 29 Del. C. § 5802(4). It was basically identical to the State Code, and was approved as being as stringent.

**06-38 – Local Government Amendments:** A local government submitted two ordinances for the Commission to review to decide if the amendments were at least as stringent as State law. 29 Del. C. § 5802(4). The Commission concluded that one ordinance had confusing language on preliminary hearings and confidentiality, making it appear that the local government would open complaint proceedings after the preliminary hearing. State law requires the proceedings be closed throughout, absent approval by the person charged. 29 Del. C. § 5810(h). If the ordinance is meant to open the proceedings after a preliminary hearing, the ordinance is not as stringent as State law. The other ordinance was to change the local government's gift law, financial disclosure reporting law, and add solicitation as authorized under the ordinance. The Commission found that: (1) as previously ruled, it had no jurisdiction over the financial disclosure law of local Governments; (2) delegation of authority to persons other than the Commission to approve gift acceptance was less stringent than the State law and would leave the local government employees without the statutory protection to which they are entitled; and (3) the authority for local government employees and officers to solicit gifts was found to be not as stringent as the State code, as State law has a rule regarding only acceptance. 29 Del. C. § 5806(b). Moreover, there are criminal provisions against public servants soliciting. See, e.g., 11 Del. C. § 1206 & § 1209(4). The Commission also determined that the local government's Ethics Commission should be advised that its process, which results in ordinances being passed by the local government (with hearings, etc.) before the ordinance is reviewed for stringency by this Commission can confuse employees and officials as to which law is in place at the time, and that a letter to that effect should be sent to the local government officials.