

STATE PUBLIC INTEGRITY COMMISSION

MINUTES

December 20, 2011

1. Call to Order: 10:00 a.m. Present: Chair Barbara Green; Commissioners: Wilma Mishoe, Jeremy Anderson, Mark Dunkle, and Andrew Gonser. Commission Counsel Janet A. Wright; and Administrative Assistant Jeannette Longshore.

2. Minutes: Commissioner Mishoe moved to accept; Commissioner Dunkle 2nd; approved.

3. December 2011 – Admin Items

A. Budget Office Hearing – The Director of the Office of Management and Budget apparently has indicated that there could be a 1% increase in the Department of State’s (DOS) budget request. DOS told PIC to provide a 1% cut, and PIC received no information that anything had changed. PIC will get a better idea of whether there may be a proposed increase after the Governor releases his Budget. Commission Counsel and Commissioner Mishoe attended the hearing. **UPDATE:** The Governor’s Proposed Budget is expected to be released on January 26, 2012. PIC is scheduled to have its budget heard by the Joint Finance Committee on February 9, 2012, 10:00 a.m. in the JFC Hearing Room, Legislative Hall.

(B) DeIDOT Concurrent Employment: The State Auditor issued a report on DeIDOT’s use of consultants. [Auditor’s Report](#). One concern was that current DeIDOT employees are working for its consultants. DeIDOT’s response was that it cannot ask its employees about their outside employment. Commission Counsel sent an e-mail to DeIDOT’s Cabinet Secretary pointing out that if current employees work privately for companies that consult for DeIDOT they are required by law to file a full disclosure with this Commission. [29 Del. C. § 5806\(d\)](#). Counsel offered the Commission’s assistance.

(C) Training:

(a) DOJ Training possibility – The Department of Justice has formed a group of DAGs who are looking at Ethics issues. Commission Counsel was contacted and asked if she wanted to submit anything to them to consider for Ethics Training. A handout covering the law, with case examples, etc., was prepared and forwarded.

(b) Training: Mar 12, 2012 – Smyrna Rest Stop – DHSS
Apr. 3, 2012 - Paradee Bldg. Dover – any agency –

Government employees and officials may register at: <http://delawarepersonnel.com/training>.

Update: The League of Women Voters has asked Commission Counsel to make a 15-minute presentation on pending Lobbyist legislation at its seminar on Campaign Finance and Lobbying Reform. March 21, 2012, Duncan Center, Dover, DE.

(4) Hanson Update: PIC received a letter from Judge Bradley saying he expects oral argument will be in February, given his schedule. His administrative assistant will contact the parties. **UPDATE:** Oral argument is now scheduled for February 7, 2012, Sussex County Superior Court, Georgetown, DE, at 9:30 a.m.

(5) [FOIA – Executive Order 31](#) – Sets time frame to respond to Freedom of Information Act (FOIA) requests; sets amount to charge; provides [FOIA form](#). Impact for PIC--as first 20 pages are free, PIC will not have to bill most applicants, handle deposits, etc. No impact on PIC's budget in not charging as the fees did not go to PIC's budget, but to the General Fund. People are not required to use the form. The Order does necessitate a change to PIC's Rules.

(a) Change to PIC Rules. Some rule changes must be published in the Register of Publications for 30 days to allow time for comments, etc. [29 Del. C. § 10113\(a\)](#). However, the following types of regulations are exempt from that requirement and may be adopted informally: [29 Del. C. § 10113 \(b\)](#).

(1) Descriptions of agency organization, **operations and procedures for obtaining information;**

The following shows the existing PIC Rules and adopted changes:

II. ADMINISTRATIVE MATTERS

(B). **Examination of Commission Files - Records** - Subject to the confidentiality requirements of the Code of Conduct, the files and records of the Commission may be examined by any member of the public in the following manner.

Existing Rule: (1) A request must be made in writing, during regular business hours, to the Administrative Assistant on a form provided for that purpose.

Adopted Rule: (1) A request must be made in writing, to the Administrative Assistant, or the FOIA Coordinator. While a form does not have to be used, requestors may use the: [Statewide FOIA form](#).

Existing Rule (3) Pursuant to 29 Del. C. § 10003, a copying cost of fifty cents (\$.50) per page shall be levied as a charge for copying such records.

Adopted Rule: (3) Fees may be charged pursuant to Executive Order No.31. [Governor's Executive Order No. 31.](#)

Commissioner Mishoe moved that the proposed rules be adopted. Commissioner Gonser 2nd; approved.

5. Executive Session: Commissioner Mishoe moved; Commissioner Dunkle 2nd; approved.

6. 11-55 Complaint - Jurisdiction

A private citizen filed a complaint with the Department of Justice, copying PIC. He alleged a Court employee is interfering with the scheduling of hearings and visitation as it pertains to a relative. It alleges the conduct violates a Court Administrative Order. PIC's jurisdiction is limited to interpretation of "this chapter" 29 Del. C., Chapter 58. [29 Del. C. § 5809\(3\)](#). It does refer to the Code of Conduct, but does not indicate which provision was allegedly violated, as required by PIC rules. [Commission Rules § IV, Hearings and Decisions, p. 4.](#) Also, it is not a sworn complaint as required by law. [29 Del. C. § 5810\(a\)](#). A Court official, contacted by Commission Counsel, said the matter is being investigated. Commissioner Mishoe moved that PIC acknowledge that a copy of the complaint was received; that it has no jurisdiction over Court Orders; and will not investigate at this time to conserve resources and not have multiple agencies investigating, but PIC will request it be advised of the status. If complainant is not satisfied, he can return to the Commission with a complaint that meets the standards in the Rules and statute. Commissioner Dunkle 2nd; approved.

7. 11-54 Post- Employment - Jurisdiction

A former School teacher retired over 2 years ago. She has now taken a job with a tutoring company. It had her file a disclosure of her employment with the Commission. She confirmed with Commission Counsel that she left the State over two years ago, June 2009. The post employment provision applies for 2 years after leaving State employment. [29 Del. C. § 5805\(d\)](#). Counsel drafted a

letter to the effect that she is no longer subject to the law. Commissioner Anderson moved to send the response. Commissioner Gonser 2nd; approved.

8. 11-03/11-19 Personal or Private Interest - Nepotism – Wicks - [29 Del. C. § 5805\(a\)\(1\)](#). As a waiver was granted, these decisions are not confidential.

[29 Del. C. § 5807\(a\)](#). (The opinions are attachments to this pdf).

The Commission rescinded its prior opinion, 11-03, to the Superintendent of Smyrna School District, Deborah Wicks, and issued 11-19, with directives on areas where she was to provide the Commission with additional information. She has responded to the directives, but 184 pages just came to PIC's office shortly before the meeting. Commissioner Dunkle moved that PIC acknowledge receipt of the materials, which will be reviewed. Commissioner Mishoe 2nd; approved.

9. 11-58 Post Employment – [29 Del. C. § 5805\(d\)](#)

A former State employee had previously requested a post-employment opinion on certain matters. He returned with a request on whether he may work for his private employer on 3 of his former agency's contracts. Two contracts were not previously considered by PIC. On one contract, he was not involved in the contractor selection process; or any of the tasks under the agreement. On the 2nd contract, he was not involved in the selection process. It is still in the negotiation stage so no tasks have been assigned. As a former employee, he did not write letters soliciting contractors who were interested; was not on the selection committees; was not involved in any negotiations to execute the contracts. He said that these contracts are work for another section in his agency, and his work was with a distinctively different division. The 3rd agreement was brought to the Commission's attention last time when it dealt with a specific portion on that contract. It did not rule on whether he could work on the rest of it because he did not have the particular details at that time. The Commission bases its decisions on the particular facts of each case. [29 Del. C. § 5807\(c\)](#). He subsequently learned 23 other tasks are in the contract. He wanted to know if he could work on some of those, as he was not in any way involved with those matters from the beginning when his agency sought

interested contractors. He, and a representative from the private company, provided a table of the projects: the completed ones; ones he would not work on; and the 4 tasks he wanted to work on. Commissioner Dunkle moved that he would not be prohibited from working on the first two contracts, as long as he did not work on any tasks under those contracts while employed by the State, and could work on those 4 tasks in the 3rd contract, as he had not been directly and materially responsible for those matters. Commissioner Mishoe 2nd; approved.

10.11-33 – Personal or Private Interest - [29 Del. C. § 5805\(a\)\(1\)](#).

A local government official had issues raised about his participation in two matters and subsequently sought advisory opinions on both issues.

In an unsworn complaint, it was alleged that he had a personal or private interest in the decision because complainant believed he owned properties that are zoned like the ones on which he voted. From that belief, complainant thought he had a conflict of interest in voting on any property so zoned. The statute requires sworn complaints. [29 Del. C. § 5810\(a\)](#). The official said that although the complaint was not sworn he would like to obtain to address the issues and obtain an advisory opinion. He presented documents from the local zoning office showing his property was never zoned like the property in the decision he voted on. They are not only zoned differently, but the size of lots, setbacks, etc., are different depending on that zoning. Also, as a matter of law, the local ordinances showed the zoning laws were different, with the properties treated differently. The County tax records showed his properties were zoned different from the matter considered.

Complainant pointed to a specific decision, he participated in. Again, the allegation was based on the belief that the properties were zoned the same. The tax records showed they were not. Beyond that, he had no financial interest in any properties zoned that way and no financial interest in the owner's company [29 Del. C. § 5805\(a\)\(2\)\(b\)](#). Further, what occurs on that property does not impact on his properties, so he would not experience a financial benefit or detriment because of the decision. [29 Del. C. § 5805\(a\)\(2\)\(a\)](#). The properties are miles apart. Commissioner Anderson moved to dismiss the complaint pertaining to the

allegations that he owns property zoned like the properties in which he participated in the decisions, because as a matter of law, as a matter of law, and fact, they are not the same, and no facts show he had any other personal or private interest. Commissioner Dunkle 2nd; approved.

11. 11-57 Personal or Private Interest - [29 Del. C. § 5805\(a\)\(1\)](#).

A local official sought an advisory opinion after it was publicly suggested he had a conflict. It was assumed he did business with an applicant appearing before him, and received the product at reduced rates. The official says on two separate occasions, once about 20 years ago, and again about 2-3 years ago, he did buy a product from this individual, but he paid the full market value. Moreover, he has no financial interest in the work done by that individual under independent contracts. He said he bought products from that individual because he went through a State agency who gave him that name as a source, on both occasions. He said he is not close personal friends with the individual, e.g., socializing, etc. However, he does call him by his first name because its not uncommon for an older man to call a younger one by their first name, and that they just do not stand on such formalities in the types of businesses that use those particular products.

Commissioner Gonser moved to dismiss the allegations for failure to establish facts sufficient to support a claim that the official has a close personal and/or business relationship with the applicant. Commissioner Anderson 2nd; approved.

12. 11-59 Post Employment - [29 Del. C. § 5805\(d\)](#)

A State employee believes a private company, that contracts with another division in his agency, may have an opening in the near future. If so, he wanted to apply, and if hired, leave State employment to work part-time. The work he will do is not like the work at his State job. However, he said it is possible that in the job, he may encounter some clients from his former agency that he dealt with, but it would be a rare exception because his function was more administrative and not primarily directed toward his division's clients. However, if he had contact with them, he could not recuse because no one else would be there since he would be working at night and/or weekends. He asked for a

waiver, if necessary, to deal with clients from his division that he had worked with. Commissioner Anderson moved there was no conflict, unless one of his Division's clients whose case he made a decision about contacted him on that particular matter, which had a very limited possibility, he was allowed to accept those few calls. Commissioner Mishoe 2nd; approved.

12. Out of Executive Session: Commissioner Mishoe moved; Commissioner Anderson 2nd; approved.

13. Next Meeting: January 17, 2012

14. Adjourned



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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February 24, 2011

Deborah D. Wicks, Superintendent
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82 Monrovia Ave.
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11-03 – Personal or Private Interest – Nepotism

*Hearing and Decision By: Barbara Green, Chair; William Dailey, Vice Chair;
and Commissioners: Mark Dunkle, Bernadette Winston and Lisa Lessner*

Dear Superintendent Wicks:

The Public Integrity Commission reviewed your request for advice on the hiring of your son, George Wicks, as the Supervisor of Facilities Operations for the Smyrna School District. Based on the following, we find an appearance of impropriety because: (1) your presence at the Board's meeting when it approved hiring your son should not have occurred; and (2) you plan to delegate supervision of your son to your Assistant Superintendent. However, we grant a waiver for that delegation, and provide guidance for complying with the law.

I. Facts

Patrik Williams, Assistant Superintendent, is responsible for facilities operations, and the facilities supervisor reports to him. He explained why, and how, the job of Supervisor of Facilities Operations was created. He said the head of facilities retired in June. At that time, only one person supervised all facilities and their operations. At the time he retired, he had been working seven days a week; 12-16 hours daily. He thought the job needed another person. Mr. Williams, as part of his duties related to facilities, considered his input in the context of the District's expansion. Specifically, it has increased the size of Smyrna Middle School by 50%, built Sunnyside Elementary, doubled the size of Smyrna High School, built a central HVAC plant, and is now heavily involved in constructing Clayton Intermediate School. The existing and on-going expansion would continue the increased work load on a single person. He began to look at how other districts that were expanding were meeting their needs regarding supervision of facilities. He learned that districts with similar growth rates had

expanded their team to have at least two "plant" supervisors. He obtained some job descriptions from those districts. He found that Appoquinmink offered two that most closely resembled your District's needs. He modified them to more closely match that need.

You knew he was working on this, and that he was going to the School Board to see if it would approve a change to split the existing "Supervisor of Buildings/Grounds" into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations. Mr. Williams sought your counsel during this time.

On November 17, 2010, Mr. Williams made his presentation to the Board. The plan was to keep the present HVAC Supervisor in the first position, and advertise the second position. You apparently were present as you a member of the School Board and are the Board's Executive Secretary, but you cannot and did not vote. The Board told him to proceed, with a few minor modifications to the proposed posting.

He worked on the posting and discussed it with you. He said you and he sent the revised posting to the individual Board members. They did not have any suggested changes. On November 22, 2010, the new position was posted on the District's web page. You said that around the end of November, you told your son about the job. The job announcement closed on December 7, 2010.

Five people applied. Two applicants were not qualified. Mr. Williams scheduled appointments for applicants to meet the hiring panel. Mr. Williams said he did not know your son, and the first time he ever spoke to him was to set up the appointment. The hiring panel consisted of Mr. Williams; the principals of Smyrna and Clayton Elementary Schools, and Smyrna Middle School; the Chief Custodian of Smyrna Middle School because he would work for the person selected; and Human Resources Specialist Todd Seelhorst. George Wicks was unanimously rated as the top candidate. His name was presented to the Board at its December 13, 2010 meeting, a meeting you attended. The Board approved his selection.

II. Application of Law to Facts – Financial Interest

State officials may not review or dispose of matters if they have a personal or private interest. *29 Del. C. § 5805(a)(1)*. A personal or private interest automatically exists if: "Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons." *29 Del. C. § 5805(a)(2)(a)*.

No facts suggest your son received a financial benefit or detriment that other applicants for the job would not have received.

However, that is not the end of our inquiry.

III. Application of Law to Facts – Personal Relationships

Independent of the automatic conflict if a close relative would receive a benefit or detriment greater than others, the law separately provides that State officials may not review or dispose of matters if they have a personal or private interest. *29 Del. C. § 5805(a)(1)*. This allows consideration of conflicts that do not necessarily entail a financial benefit, but encompass close personal relationships. *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (1967)(alleging official had a conflict because of his personal relationships with applicants; they were not relatives, but Court found the allegation of close relationships sufficient to raise an issue of fact).

Delaware Courts have held that "the decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Prison Health v. State*, C.A. No. 13,010, V.C. Hartnett (June 29, 1993) (citing *Van Itallie v. Borough of Franklin Lakes*, 28 N.J. 258, 146 A.2d 111, 116 (N.J. 1958).

In *Prison Health*, a State employee was not on the selection board that picked a contract applicant, but was at a meeting where the selection board's recommendation was discussed. He asked three questions, but did not vote. His wife was an employee of the company that was recommended and selected. The Court found his participation was indirect and unsubstantial, but said the conduct was improper. However, the Court did not find the conduct sufficient to set aside the decision.

Here, you did not write the job description as it was primarily adopted from existing descriptions of similar jobs in another district. You did not participate in the Board's decision to approve the split positions; or serve or participate at the hiring panel meetings; or participate in the Board's vote to approve hiring your son. However, you did discuss the position and reviewed the job description with Mr. Williams, and you were present when your son's hiring was approved.

Your participation appears to be less than that in *Prison Health*. However, we must still look at whether, at the time you discussed the position and reviewed the job description, you had a personal or private interest. The position description was worked on in November, and was posted November 22, 2010. You said you told your son about the job in late November. You are entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, *J. Terry* (June 30, 1995) *aff'd.*, Del. Supr., No. 304 (January 29, 1996). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. We also note that State employees are not barred from telling people, even a close relative, a

job is open, even if a conflict exists. That is because it would not constitute "reviewing and disposing of a matter" that would "tend to impair judgment." A "matter" is considered "ministerial" when nothing is left to discretion or judgment. Darby v. New Castle Gunning Bedford Education Assoc., Del. Supr., 336 A.2d 209, 211(1975). If a matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. *Id.* It was public knowledge that the Board had decided the jobs could be split; and that posting was to occur after some minor changes the Board requested on November 17, 2010. Telling him of an opening when it was public information is not reviewing or disposing of a matter in an official capacity, misusing confidential information, or giving him any preferential treatment.

Thus, we find no actual violation. However, the law is not limited to just actual violations. It also addresses appearances of impropriety.

IV. Application of Law to Facts - Appearance of Impropriety

State officials shall endeavor to pursue a course of conduct which will not raise suspicion among the public that the official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government. 29 Del. C. § 5806(a). In other words, the conduct is to "instill public confidence in its government." 29 Del. C. § 5802(1).

This is basically an appearance of impropriety standard. The test for appearances of impropriety is if a reasonable person, knowledgeable of all the facts, may still believe the employee could not perform their duties with honesty, integrity, and impartiality. In re Williams, 701 A.2d 825 (Del., 1997).

We have two concerns about the appearances raised in this particular case.

First, even assuming you did not know your son was interested in the job until late November, you did know at the time of the December Board meeting. While you did not participate in the approval vote, you were present. In interpreting a federal ethics provision, it was noted that when the purpose is to instill public confidence in the government, improper conduct may include even "passive action." United States v. Schaltebrand, 11th Cir., 922 F.2d 1565 (1991). The Schaltebrand Court said that "mere presence can possibly influence government colleagues." The statute states that you are not to "review" or "dispose of" matters, which means you are to recuse. It does not specifically state that you are to leave the room. However, had advice been sought from this Commission prior to any action, we would have advised you to leave the room during any discussion and voting. That would help assure the public that your Assistant Superintendent and the Board had the comfort and security of being able to speak freely.

Second, you want to delegate administrative responsibility over your son to Mr. Williams. We understand that the Assistant Superintendent has always handled the facilities aspect, making him the logical candidate for delegation. However, we noted in prior decisions the concerns that may arise when an official has a conflict and the responsibility for the decision is handed down to someone working for the official. Those concerns were that if the employee does not perform as the supervisor desires, there may be retaliation or conversely, there may be preferential treatment with respect to working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto, 549 A.2d 1267, 1274 (N.J. Super., 1988))*.

The public might not understand why Mr. Williams, who works for you, is supervising your son. That is especially true because it might be read as contradicting some of our prior decisions. See, e.g., *Commission Op. No. 02-23 (holding that it would not be a sufficient cure for a conflict for a Cabinet Secretary to delegate her decisions to her Division Directors)*. That case may be factually distinguishable, but we will not attempt to do so at this point. Rather, we rely on a case decision where the Court first found that there was no "financial interest" under 29 Del. C. § 5805(a)(2)(a), just as occurred here. *Harvey v. Zoning Board of Adjustment of Odessa*, C.A. No. 00-04-007CG, J. Goldstein (Del. Super., November 27, 2000) *aff'd.*, 781 A.2d 697 (Del., 2001). The Court went on to find that although there was no financial interest, it would be "prudent" for the officials to recuse because close relatives were involved. Here, you are going to recuse. In *Harvey*, they could not recuse so the Court held that by "rule of necessity," they could participate. Here, only by applying the "rule of necessity," could we allow you to delegate the responsibility to Mr. Williams to supervise your son.

Because of that we discussed at length the School District's "chain of command." The bottom line was that anyone who would oversee your son has a direct connection to your position just like Mr. Williams. Moreover, that would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else selected. On the positive side, you cannot fire Mr. Williams as that must be done by the Board, so that type of retaliation if he did not do as you suggested appears remote. We combined that with the strong legal presumption that you would not engage in such conduct.

We also weighed the public concern against the Code's other purpose. It says: "It is both necessary and desirable that all citizens should be encouraged to assume public office and employment, and that, therefore, the activities of officers and employees of the State should not be unduly circumscribed. " 29 Del. C. § 5802(3).

To achieve that purpose, the law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related

to them. 29 Del. C. § 5805(a)(1). Here, you can recuse, but the delegation to your Assistant may still raise public suspicion that the conduct appears improper. As it would appear improper, we then considered whether to grant a waiver.

V. Application of Law to Facts - Waiver

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

Here, nothing suggests any hardship on you. However, for the School District, the public purpose of encouraging individuals to seek employment with the government, in this particular case, would be nullified, if no waiver were granted. That is an extreme consequence when the actual conflict can be cured by recusal, and the only obstacle is in delegating because you are the person at the top of the chain of command. If a waiver were not granted, it could appear that this Commission is trying to graft onto the statute an exception that does not exist. The law requires recusal. 29 Del. C. § 5805(a)(1). It has no exception saying relatives of those at the top cannot seek State employment in an agency where their relative works. Where the legislature is silent, additional language will not be grafted onto the statute because such action would, in effect, be creating law. *Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing State v. Rose, 132 A. 864, 876 (Del. Super., 1926))*. Creating law is not within our purview. The General Assembly would have to make that decision.

As a result, we decided the responsibility can be delegated to Mr. Williams. However, any issue he, or others in the District, may have with your son cannot go through you for any purpose. You must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. If a matter comes to your attention, you are to refer it to Mr. Williams without comment. If at a Board meeting, staff meeting, etc., any issue arises regarding your son, you are advised not only to recuse but to leave the room to avoid even "passive action." *Schaltebrand, supra*.

Mr. Williams is to address the matters without involving you in any way. He is to go directly to the Board, minus you, on any appropriate matters pertaining to Mr. Wicks.

Additionally, you are to insure that not only Mr. Williams, but also your staff and the Board are aware of these restrictions. This insures that Mr. Williams, or any other District employee, or any Board member, have the comfort and protection to speak freely.

Further, as a waiver is granted, this opinion becomes a matter of public record. 29 Del. C. § 5807(b)(4). This is an additional measure toward instilling the public's confidence. It gives further assurance of compliance as the public will know of the restrictions.

Finally, we note that this opinion is limited to the particular facts of this case. 29 Del. C. § 5807(a). It is not authority for an open season on waivers for senior level officials to hire and/or supervise relatives.

VI. Conclusion

We find that your peripheral involvement of being present when the Board decided to approve your son's hiring created an appearance of impropriety that could have been avoided. We also find that delegating administration of your son's position to Mr. Williams would raise an appearance of impropriety because Mr. Williams reports to you. However, to serve the purpose of encouraging citizens to take government employment, the "rule of necessity" is applied, and we grant a waiver, allowing you to delegate to Mr. Williams the responsibility over your son, George Wicks, under the restrictions and procedures identified in this opinion.

Sincerely,


Barbara Green, Chair
Public Integrity Commission

cc: Patrik D. Williams,
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BEFORE THE STATE PUBLIC INTEGRITY COMMISSION

IN AND FOR THE STATE OF DELAWARE

IN RE: DEBORAH WICKS

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Advisory Op. No. 11-19
Supersedes No. 11-03

*Decision by: Barbara H. Green, Chair; William Dailey, Vice Chair;
Commissioners Mark Dunkle, Esq., Lisa Lessner, Wilma Mishoe, Jeremy
Anderson, Esq. and Andrew Gonser, Esq.*

I. PROCEDURAL HISTORY AND BACKGROUND

On or about January 13, 2011, a private citizen called the Public Integrity Commission (PIC). The concern was that hiring George Wicks in the Smyrna School District may have violated the Code of Conduct as his mother, Deborah Wicks, is the District's Superintendent. The caller was advised that a sworn complaint could be filed. *29 Del. C. § 5810(a)(any person may file a sworn complaint)*. Alternatively, PIC's Attorney would contact the District's Attorney to see if Ms. Wicks wanted to seek an advisory opinion, as that could resolve the matter faster. The complainant was more interested in having the matter resolved, and agreed to wait to see if Ms. Wicks would seek advice before filing a complaint. The District's Attorney was provided the information that day. Tab 1. Later that day, he advised PIC that Ms. Wicks would seek an advisory opinion. Her request, with information from Assistant Superintendent, Patrik Williams, was dated the next day. Tab 2 (Wicks' Request); Tab 3 (Williams Ltr). It was received January 20, 2011.

Ms. Wicks' request said her son "would be supervised by Pat Williams. I will have no role in evaluating the performance of George Wicks. I will not participate in any discussions, or decisions, involving George Wicks' compensation, continued employment, or the terms or conditions of his employment by the District." Tab 2.

On February 15, 2011, Ms. Wicks and Mr. Williams met with PIC. As background to the hiring, they said the District has a lot of construction on its schedule, both expanding existing schools and building new ones, and building a central HVAC plant, and it has had to rely on one supervisor of Buildings and Grounds to oversee every project. Tab 3, ¶ 1; Tab 4, lines 23-38. Mr. Williams said the Buildings and Grounds Supervisor, Clint Lasana, retired in May, 2010,

and had said the job was too much for one person: *Id.* Scott Holmes was hired to take his place. (cite). Mr. Williams was hired by the District in the summer of 2010. *Tab 4, lines 291-293.* He said he learned of Mr. Lasana's concern, and began looking at splitting the job into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations. *Tab 3.* Mr. Holmes would be the HVAC supervisor, and they would post a new announcement for the operations supervisor. *Tab 3; Tab 4.* Mr. Williams said Ms. Wicks gave him the flexibility to look at a second supervisory role. *Tab 4, lines 52-53.* He shared the job descriptions with her, and she gave input. *Tab 4, lines 34-36, and Tab 3 ¶ 3.* He said it was incumbent on him to make recommendations to Ms. Wicks, as the Executive Secretary of the Board of Education, and incumbent upon him to keep her apprised. *Tab 4.* He said Ms. Wicks gave him the flexibility to look at a second supervisory role, early in the fall. *Tab 4, lines 47-56.* He also made a presentation to the full Board about splitting the jobs. *Tab 4, lines 53-66.* They gave him authority to proceed with putting together a job description. *Id.* He solicited Ms. Wicks' input. *Tab 3.* Ms. Wicks said she would not normally have input to job descriptions, but certainly would be when someone like Mr. Lasana says he could not his job anymore. *Tab 4, lines 189-198.* He and Ms. Wicks' jointly shared the job description with the individual Board members. *Tab 3.* Ms. Wicks said she was present when the Board—in a workshop—"discussed having an overlap in the two jobs, so if one person was not there, the other person could carry on—while they were two different jobs—one is HVAC and the other is buildings and grounds." *Tab 4, lines 100-105.* The job description was posted on November 22, 2010, and closed after 15 days. *Tab 4, lines 173-177.* Five people applied. *Tab 4, lines 175-180.* Two were not qualified. *Id.* The three remaining applicants, including Mr. Wicks, were interviewed by a panel. *Tab 4, lines 206-215.* Ms. Wicks was not on the panel. *Tab 4, lines 204-206.* As a panel member, Mr. Williams knew it was her son. *Tab 4, lines 224-225.* The panel unanimously recommended Mr. Wicks. *Tab 3, p.2. ¶ 5.* Based on the panel's recommendation, the Board of Education approved the hiring of Mr. Wicks on December 13, 2010. *Tab 3, p. 2 ¶ 6.* The Board knew it was Ms. Wicks' son. *Tab 4, lines 271-271.* She is on the Board, and is its Recording Secretary. *Tab 4, lines 235-246.* She does not vote, but she did not recuse. *Id.*

To determine if Ms. Wicks reviewed and disposed of a matter when she had a personal or private interest, she was asked if she told her son of the job, or how he found out about it, and when did that occur. *Tab 4, lines 301-307.* She said: "I told him of the posting—it was posted at the end of November, so I told him after the posting came out." *Id.*

To preclude violations, PIC discussed how matters pertaining to her son could be handled, since she could not review or dispose of such matters. *29 Del. C. § 5805(a)(1).* She wanted Mr. Williams to supervise her son. *Tab 2.* She and Mr. Williams stated that the Assistant Superintendent had always supervised that position. *Tab 4, lines 128-131 (Wicks) and lines 282-285 (Williams).*

PIC previously ruled it would be improper for an official with a conflict to delegate that duty to a subordinate. *Commission Op. No. 02-23*. It is to strive for consistency in its opinion. *29 Del. C. § 5809(3)*. Thus, it discussed at length the structure of the School District. *Tab 4, lines 128-163, lines 294-300; lines 308-348*.

When it issued its opinion, PIC said:

"[W]e must still look at whether, at the time you discussed the position, and reviewed the job description, you had a personal or private interest. The position description was worked on in November and posted on November 22, 2010. You said you told your son about the job in late November. You are entitled to a strong presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff'd., Del. Supr., No. 304 (January 29, 1996)*. Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. *Tab 5, Commission Op. No. 11-03, p. 3*. "Thus, we find no actual violation." *Id. at p. 4*.

It did find she had violated the restriction on engaging in conduct that may raise suspicion among the public that she acted contrary to the public trust, *29 Del. C. § 5806(a)*, by not recusing when the Board approved the hiring. *Tab 5, p.4*.

Similarly, it found that it would appear improper to allow Mr. Williams to supervise Mr. Wicks. *Tab 5, p. 6*. However, based on the statements of Ms. Wicks and Mr. Williams, PIC also said: "We understand that the Assistant Superintendent has always handled the facilities aspect, making him the logical person for delegation." *Tab 5, p. 5*. It also noted that if Mr. Williams did not supervise Mr. Wicks, "that would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else. *Id.* It noted that the public may not understand why Mr. Williams, who reports to her, was supervising her son, which might appear contrary to prior rulings, but also noted that the opinion would be made public as an additional measure toward instilling public confidence, and further assuring compliance. *Tab 5, p. 5 ¶ 4, and p. 7 ¶ 2*. Based on all of that, and other statements, the Commission granted a waiver to allow Mr. Williams to supervise Mr. Wicks. *Tab 5, p. 6*.

Beyond that, the Commission advised Ms. Wicks how to comply with the Code. In granting the waiver, it said:

"However, any issue he [Mr. Williams], or others in the District, may have with your son cannot go through you for any purpose. You must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. If a matter comes to your attention, you are to refer it to Mr. Williams without

comment. If at a Board meeting, staff meeting, etc., any issue arises regarding your son, you are advised not only to recuse but to leave the room to avoid even 'passive action.'" (citation omitted). *Tab 5, p. 4.*

It also cited the law verbatim: "State officials may not review or dispose of matters if they have a personal or private interest." *Id. at p. 4.* It later said: "The law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related to them." *Id. at p. 5-6.* "The statute states that you are not to "review" or "dispose of" matters, which means you are to recuse." *Id. at p. 6.*

It further directed that Ms. Wicks was "to insure that not only Mr. Williams, but also your staff and the Board are aware of these restrictions." *Tab 5, p. 6.*

II. CURRENT FACTS

On or about April 11, 2011, a different individual contacted PIC. The concern was that Ms. Wicks had not complied with informing the staff and Board about her restrictions; that Mr. Wicks had earlier that year applied for essentially the same job; and Ms. Wicks was participating in matters related to her son's duties. In support of the claims, the two job descriptions were provided. *Tab 6 (A) and (B).* Also, e-mails between Ms. Wicks and her son were attached. *Tab 7.*

Because of the public concern, the Commission wrote and asked that Ms. Wicks provide documented evidence that she informed the Board and her staff; and that she fully disclose the information regarding her son's earlier application for essentially the same position. *Tab 8.*

Ms. Wicks and Mr. Williams responded on or about June 20, 2011. *Tab 9 & 10.* After reviewing their responses, PIC notified Ms. Wicks that: (1) the Board had not verified that it received the entire opinion, although she said she instructed her secretary to send it; as the Board only verified receiving "the results"; (2) the information on her restrictions given to the staff and Board to post did not comply with PIC's ruling; and (3) she had not explained why she did not tell PIC about her son's earlier application for essentially the same job. It noted that Mr. William's explanation about the earlier hiring was not derived from personal knowledge because he had not been hired until after that job was announced; interviews conducted; and Mr. Holmes was hired. *Tab 11.* It advised Ms. Wicks that it would meet on September 20, 2011 to decide if the waiver should be revoked or other action taken. *Id.* Ms. Wicks was asked to attend. *Id.* She, Mr. Williams, and the District's attorney appeared. Additionally, the Board submitted a letter asking that Ms. Wicks be allowed to have "operational contact" with her son.

These are the Commission's additional findings of law and facts after those events.

(A) **Applicable Law:** Upon the written application of any State employee, the Commission may issue an advisory opinion as to the applicability of this chapter [title 29, chapter 58]. Any person who acts in good faith reliance upon any such advisory opinion shall not be subject to discipline or other sanction hereunder with respect to the matters covered by the advisory opinion provided there was a full disclosure to the Commission of all material facts necessary for the advisory opinion. 29 Del. C. § 5807(c).

(1) Good Faith and Disclosure

In terms of disclosure, “good faith” means honesty of purpose and full and complete disclosure. *Black’s Law Dictionary*, (6th ed), p. 693. It “implies honesty, fair dealing and full revelation.” *Id.* “Full disclosure” means that one who participates in a transaction for his own benefit is required to fully reveal the details of such. *Id.* at p. 672. It carries an “obligation to reveal all details.” *Id.* Disclosure means sufficient information so that decision makers can make an intelligent evaluation; it is deemed basic to an intelligent assessment. *Id.* at p. 464. Where “good faith” is not exercised, Delaware Courts have excluded the tainted information. *Jones v. State*, Cr. A. Nos. 16, 2010, 17, 2010 (Del., September 5, 2011). Specific behavior that Delaware Courts have found sufficient to constitute bad faith includes misleading the court, altering testimony, or changing positions on an issue. *Beck v. Atl. Coast PLC*, 868 A.2d 840 (Del. Ch., 2005).

In the context of nepotism, Courts have held that where officials failed to disclose information regarding relatives, they lose the “good faith” defense. *State ex rel. Summer v. Denton*, 382 S. 2d 461 (Miss., 1989); 1980 Miss. LEXIS 1926; *Nepotism in Public Service*, 11 ALR 4th 813.

In *Denton*, the statute, like Delaware’s, provided for a good faith defense after full disclosure, in seeking an advisory opinion. It said:

“When any officer, board, commission, department, or person authorized by this section to require such written opinion of the attorney general shall have done so and shall have stated all the facts to govern such opinion, and the attorney general has prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, department or person who, in good faith, follows the direction of such opinion and acts in accordance therewith....” *Id.* at 467.

In *Denton*, by law, it was improper for an official to knowingly vote to let any contract to, or for the employment by contract, or otherwise, of any relative of any member of the board of supervisors, or any relative of a road commissioner, related by blood or marriage within the third degree of consanguinity. *Id.* at 463.

The request to the AG for an advisory opinion said that a Board Member, Mr. Mathias, and the contractor, Mr. Jones, were married to sisters from another family. The AG concluded: the fact that two men had married sisters does not create any relationship between those two men prohibited by the statute. Mrs. Jones is Mr. Mathis' sister-in-law but that does not make Mr. Jones Mr. Mathis' brother-in-law so it did not establish a relationship between them 'by blood or marriage within the third degree,' as computed by the civil law. *Id.* at 467.

Subsequently, the State learned that the Board member's nephews-in-law were paid under that contract. *Id.* at 467. The AG and Auditor sued the Board members to recover those funds. *Id.* at 462. They sought penal damages against all of the Board members for paying funds in violation of the statute, as they all knew of the relationship. *Id.* at 462 and 463.

The AG testified that the advisory opinion did not refer to the children of Mr. Jones because the request for an opinion did not state that his two sons were also the sons of Mr. Jones' present wife—the Board member's sister-in-law. *Id.* at 467. The AG observed that "they could have been sons by a previous marriage so, not having any of that information, the question was answered solely with respect to Johnny Jones." *Id.* at 468. The Court concluded: "the opinion does not support a good faith defense because it does not refer to the relationship which existed between the Jones brothers and Supervisor Mathis" *Id.* Accordingly, the Court reversed and remanded so penal damages could be assessed against all defendants. *Id.*

Here, as in *Denton*, it was not until after the opinion was issued that PIC learned that certain information was not disclosed.

(a) Prior Application by Mr. Wicks for an Almost Identical Position

At no point in her written request, Mr. Williams' supplement to her request, or in either of their statements at PIC's meeting was it ever disclosed that Ms. Wicks' son previously applied for essentially the same job earlier that year, but was not selected. After the opinion was made public, a private citizen notified PIC of that information. PIC followed up in a letter, stating that Ms. Wicks did not disclose his earlier application for essentially the same job, and that "full disclosure" is required in order for an official to rely on the advisory opinion. It directed that she was to "fully disclose" the information regarding her son's application, and the "full details" of her "role in the review" of the applications, interviews, and selection. *Tab 8*. Her response was: "In an attached memo, Mr. Williams will address the 2010 job position that George Wicks was not hired for, as I was once again not part of that process." *Tab 9*. Mr. Williams stated: "Superintendent Deborah Wicks played no role in the selection of Mr. Holmes, nor did she play any role in the hiring or interviewing process." *Tab 10*.

That written response poses two problems:

(1) Mr. Williams also was “not part of the process.” Mr. Williams was hired in the summer of 2010. *Tab 4*. This job was announced in February 2010; interviews were conducted in March; and Mr. Scott Holmes was selected and subsequently took Mr. Lasana’s job on May 1, 2010. *Tab 10*. It is unclear why Ms. Wicks choose not to respond because she “was not part of the process,” yet had someone whom she clearly knew was “not part of the process,” respond. That is, at best, disingenuous.

(2) The documents Mr. Williams submitted are not sufficient to fully answer PIC’s question. While the documents reveal some information, such as the fact Ms. Wicks was not on the selection panel, those documents give no indication of whether she was “reviewing” or “disposing” of the matter. For example, if only documented records--such as provided here--were reviewed on the 2nd hiring, nothing would suggest that she gave input on the job description; attended workshops where the duties were discussed, did not recuse from School Board meetings when it was discussed, etc.¹

At its second meeting, PIC asked why she did not disclose the information. Ms. Wicks said she did not think PIC would be interested in the fact that he was not selected for that job. *Tab 12, lines 304-317*.

“Full disclosure” means that one who participates in a transaction for his own benefit is required to fully reveal the details of such. *Black’s, supra at p. 672*. It carries an “obligation to reveal all details.” *Id.*

The benefit Ms. Wicks would have been entitled to receive would be protection against a disciplinary action or complaint, but she did not fully disclose that information. She knew the details, and she had the obligation to reveal those details. Then, after full disclosure, the Commission decides which details are “material facts necessary for the advisory opinion.” *29 Del. C. § 5807(a) and (c)*. Generally, in legal matters a statement is “material” when “it could have affected the course or outcome the proceedings.” *11 Del. C. § 1235(a)*. In fact, if it were a sworn statement, it might fall within that perjury definition.

PIC relied on her statement and gave her the “strong legal presumption of honesty and integrity” regarding her disclosure. It said:

“[W]e must still look at whether, at the time you discussed the position, and reviewed the job description, you had a personal or private interest. The position description was worked on in November and posted on November 22, 2010. You said you told your son about the job in late November. You are

¹ Similarly, the letter from Former Assistant Superintendent, Clarence Lloyd, also does not address those kinds of issues. *Tab 14*. Also, the Commission asked that she answer because it is possible that she may have taken action without Mr. Lloyd’s knowledge.

entitled to a strong presumption of honesty and integrity. Beebe Medical Center, Inc. v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff'd., Del. Supr., No. 304 (January 29, 1996). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. Tab 5, Commission Op. No. 11-03, p. 3. "Thus, we find no actual violation." Id. at p. 4.

It relied on her statement again when it addressed the concerns about appearances of impropriety. PIC said: "First, even assuming you did not know your son was interested in the job until late November, you did know at the December Board meeting." Id. at p.4.

The fact that her son sought essentially the same job earlier in the year reveals that she knew of his interest in the job much earlier than late November 2010. It was not a question of whether or not he got the job, it was a question of when she knew about his interest in the job.

Just like the AG in Denton, without having that information, the opinion could only address what would be a conflict based on what was disclosed. It could not be based on what was not disclosed.

Even if the importance of that fact were not clear to Ms. Wicks when she was asked by PIC about the time frame of when she knew of her son's interest, the opinion referenced that fact more than once. It was from that fact that it concluded she did not violate the Code when she worked on the job description and attended the workshops where the duties were discussed, because based on her statements it concluded she did not know of his interest when those events occurred. Id. at 4. In deciding the appearance of impropriety issue, it said: "Assuming you did not know of your son's interest until November, you knew when the Board decided to hire him. It then concluded that was conduct that appeared improper." Yet, she felt no obligation to notify the Commission, and disclose that she knew about his interest much earlier.

Beyond that, although she said she did not see why PIC would be interested in a job her son did not get, the importance of that information was intuitively obvious to the citizen who notified the Commission about the earlier job.

(2) The Status of Clint Lasana

It also was not disclosed that Clint Lasana, after retiring, was rehired as a construction consultant. PIC relied on the information from Ms. Wicks and Mr. Williams regarding the critical need for creating and filling that second job. PIC was told that Mr. Lasana had said the job was too much for one person. PIC was given detailed information about the increased construction in the District. It was told: "We have continued to rely on just one supervisor of "buildings and grounds" to oversee every project. This supervisor has been working seven days

a week, 12-15 hours daily, just to keep up, and, of course, attend to our other existing schools/operating outside the 'construction zone.' *Tab 3*. It was also told that the existing and on-going expansion would continue the increased work load on a single person. *Id.*

PIC relied on those statements. It noted all of those difficulties. *Tab 5, p. 1*. At no point did Ms. Wicks or Mr. Williams indicate anyone was available who could help with the "increased work load of a single person." Had they indicated some of the load was being decreased by having a contractor, it may not have created what seemed to be a greater sense of urgency² or "undue hardship." PIC specifically noted the "undue hardship" on the District if it could not hire someone—and in this case, that someone had already been hired—Ms. Wicks' son. *Tab 5, p. 6*. To accommodate that hiring after the fact, PIC combined that hardship with the purpose of encouraging people to seek State employment to justify granting a waiver. *Id.* Had it known about the alternative, it could have made a more informed decision.

The importance of information on alternatives to hiring relatives was demonstrated in a Court action, where the Court found that an official hired his relatives when there was sufficient labor available without doing so. *White v Gainer*, 164 S.E. 247 (W. Va., 1932). The Court found his conduct constituted "misconduct in office"³ and affirmed a judgment of removal from office. *Id.* In Delaware, monetary remedial actions were taken against the agency after an alternative to hiring a relative was not fairly considered because of a conflict of interest. *Brice v. Dep't of Corrections*, 704 A.2d 1176 (Del., 1998).

In *Brice*, a State employee's nephew applied for a job, and the uncle was on the selection committee. Another applicant learned the nephew was unanimously selected. He filed a grievance with the Merit Employee Relations Board (MERB) alleging discrimination due to nepotism. He also sought reimbursement for the costs associated with filing the grievance. MERB upheld his grievance and concluded the nephew was shown preferential treatment because of the manner in which alternatives to the nephew were treated. However, it held it could not make the agency cover his costs. *MERB Op. Docket No. 95-06-41*. The Superior Court found that it was a "blatant" case of nepotism, even though the panel members testified that they were not influenced by the uncle in their decision. However, it, too, held that MERB could not require the Department of Corrections to pay for his attorney and grievance costs. He appealed to the Supreme Court. *Brice v. Department of Correction*, 1997 Del. Super. LEXIS 329 (Del. Super. Ct. June 23, 1997). It held that the agency could

² We note, but do not decide if the rehiring of Clint Lasana was contrary to the Code of Conduct. The Code bars former employees from contracting on matters where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible for the matter. 29 Del. C. § 5805(d).

³ Delaware also has a "Misconduct in Office" provision. 11 Del. C. § 1211. PIC has no jurisdiction over that provision, so does not rule on whether it applies.

be responsible for the costs associated with the initial filing, the Superior Court action, the Supreme Court action, and costs associated with the remand to the Board to implement the payment to him. *Brice v. Department of Correction*, 704 A.2d 1176, 1998 Del. LEXIS 35 (Del. 1998)

Thus, Courts do not take lightly the issue of nepotism when it results in less than fair consideration of the alternatives to hiring a relative.

When asked about Mr. Lasana's hiring at the second meeting, at one point Ms. Wicks said he is still works for the District "off and on." *Tab 12, lines 104-110*. At another point she said he "does not work there now." *Id. at lines 330-331*, Ms. Wicks said they tried it for a while, and he "was charging us a huge amount." *Id. at lines 339-344*. PIC still does not know his true status. That is not "full disclosure."

Now, PIC has been told that the only responsibility the Supervisors of Buildings and Grounds are responsible for is whether the construction is on time. *Tab 12, lines 97-102*. This is in stark contrast to Ms. Wicks' and Mr. Williams' previous disclosure of the weekends, long days, etc., that a single person had to perform because of the heavy construction.

(3) Supervisory Responsibilities

In a Delaware Supreme Court case dealing with a personal or private interest, where an official did not disclose truthful information, one line in that opinion was: "There is another feature of this case that has a most unpleasant aspect." *In re Ridgely*, 106 A.2d 527, 532 (Del., 1954). That adequately assesses the following information.

Ms. Wicks requested that Mr. Williams be allowed to supervise her son. She and Mr. Williams said supervisory control of the Buildings and Grounds Supervisor had "always" been the Assistant Superintendent's responsibility. Again, the Commission relied on their statements. PIC said that "since it had always been handled by the assistant superintendent, it made Mr. Williams the logical candidate for delegation." *Tab 5, p. 4 ¶ 1*. PIC also noted that if the duty were given to someone else, it "would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else selected." *Tab 5, p.5 ¶ 3*.

After the Commission learned of the earlier job that Mr. Wicks applied for, it was given the two job announcements. The first job announcement, for which Mr. Wicks applied, but was not selected, said the individual would report to the Superintendent. *Tab 6(A)*. The second job announcement said the individual would report to the Superintendent and the Assistant Superintendent. *Tab 6(B)*. This demonstrates more than a lack of candor in disclosing information.

(4) Findings Regarding Good Faith and Disclosure:

We find that the failure to disclose: (1) her son's previous consideration for essentially the same job; (2) the District had in place an alternative to handle the construction; and (3) that it had not "always" been the Assistant Superintendent's responsibility to supervise the Buildings and Grounds Supervisors resulted in a skewed decision, rather than an "intelligent assessment," that would have come with full disclosure. There was not "full disclosure" as mandated by law. Thus, Ms. Wicks is not entitled to rely on the initial opinion as protection against disciplinary action or a complaint.

Moreover, in *Ridgely*, the Delaware Supreme Court explained the legal effect of erroneous statements by a public official. *Ridgely* had a personal or private interest in a matter and the Attorney General directed him to prepare a letter regarding his conduct. *Id.* at 530. Four of his statements were later found to be erroneous. *Id.* The Court held that "an adverse inference must be drawn from the erroneous statements in his letter." *Id.* at 532. It went on to say his statements may have been hastily drawn, "but it is hard to believe that they do not evidence some consciousness of the impropriety of his conduct." *Id.* at 533. It concluded that a reprimand was the appropriate sanction. *Id.*

We, too, must draw an adverse inference from the failure to disclose certain facts, and the erroneous statements made to this Commission. We reprimand the conduct and find that at a minimum, it raises the appearance of impropriety.

III. Reliance on PIC's Advice

For an official to be protected by an advisory opinion or waiver they must evidence "reliance" on the opinion. *29 Del. C. § 5807(a) and (c)*. Generally, "reliance" might be defined as a belief which motivates an act. *Black's, supra*, p. 1291.

(1) Advice on Ms. Wicks' Restrictions:

PIC's opinion advised Ms. Wicks to inform the School Board and the staff of the restrictions on her. *Tab 5, p. 6*.

(a) Timing of Notice of Restrictions

PIC's opinion was issued February 24, 2011. After a citizen alerted PIC to the fact that this may not have occurred,⁴ PIC asked for documented proof that they were informed. Ms. Wicks' written response, unsupported by any attestation or document, said she instructed her secretary to

⁴ The citizen also informed Commission Counsel that because of the concern, that citizen had personally sent the entire opinion to the Board.

send the entire opinion to the Board on March 1, 2011. *Tab 9, p. 1 ¶ 1*. She did attach a document signed by the Board members, attesting that they received “the results” at the March 16, Board meeting. *Id. at p. 3*. In PIC’s follow up letter, it noted that the Board did not certify that it received the entire opinion from Ms. Wicks’ office. *Tab 11, p. 1 ¶ 1*. It still does not know if a copy were sent from her office to the Board members. However, it seems logical that the Board received the same “results” that eventually were given to the staff.

Notice to the staff did not occur until June 12, 2011. *Tab 9, p. 2*. That was almost 4 months after the opinion was issued.

At PIC’s meeting, Ms. Wicks said they were not notified sooner because her husband has been sick. She said she had been “back and forth to Baltimore with her husband...” *Tab 12, lines 21-26*.

Quite frankly, that does not explain a delay of almost 4 months. Even then notice to the staff did not occur until PIC asked for documented evidence. Had PIC not been alerted by a citizen, it seems likely the notice would have been delayed even longer, or may not ever have occurred.

Ms. Wicks found time to notify the Board of “the results” on March 16. *Tab 9, p. 1 ¶ 1 and p. 3*. The following day the Monthly Administrators meeting, and Monthly Chief Custodian’s meetings were held. The custodial employees work for Mr. Wicks.⁵ *Tab 6(B)*. Ms. Wicks and the Assistant Superintendent knew of the restrictions. Even if we presume she was frequently absent due to her spouse’s illness, she never asked Mr. Williams to notify the staff. Further, again presuming she was frequently absent, since Mr. Williams presumptively acts in her absence, he did not act to inform any employees. Had PIC’s advice been followed, perhaps Ms. Wicks would not have been contacted by a School employee saying her husband had applied for a job, but had never been contacted by Mr. Wicks’ office. That employee might have known to go to Mr. Williams with “any issue” pertaining to Mr. Wicks.⁶

Ms. Wicks also said: “I didn’t realize there was a time line for that information to get out.” *Tab 12, lines 23-24*. While it is true that PIC did not put a deadline in its opinion as to when she was to notify the staff, PIC tries not to micromanage officials. It anticipated Ms. Wicks would act within a reasonable period of time.

⁵ PIC was asked if it meant to say that Mr. Wicks could not attend meetings. That is a possible solution in some situations. However, as it pertains to the custodian’s meetings, where it is important that those who are supervised by Mr. Wicks, and he also can feel free to participate, in candid discussions about the work load, the events occurring on the job, etc., then the solution is that rather than Ms. Wicks and Mr. Williams both attending those meetings, as is apparently the custom, as previously directly, Ms. Wicks can recuse and stay out of the room.

⁶ The specifics of this situation are discussed later in this opinion.

In determining what is a “reasonable time” for performance, Courts consider such factors as relationships between parties; subject matter; and the time that a person of ordinary diligence and prudence would use under similar circumstances. *Black’s, supra, p. 1266.*

The relationship between Ms. Wicks and PIC was that PIC had offered her the opportunity to avoid a complaint being filed against her for participating in hiring her son by seeking an advisory opinion. She quickly responded to that opportunity. The same day the District’s attorney was advised of the option, Ms. Wicks accepted. Her written request was dated the very next day. *Tab 2.* That was some evidence that gave PIC reason to expect she would timely respond to its advice. Yet, after she received PIC’s advice, she was not “motivated to act” for almost 4 months, and then only after PIC requested proof of notification.

In PIC’s 20 years of existence, advice on conflicts, which deal with honesty and integrity, triggers an actual and immediate response to “rely” on the advice. That is what “reliance” encompasses. The purpose of getting the advice is so the official is protected against a complaint or disciplinary action. Delaware Courts have held that where an official had a personal and private conflict of interest, “unless he was willing to resign from his office, he should have taken that action [delegating to another] as soon as the probability of conflict of interests appeared.” *In re Ridgely at 476.* Thus, as a matter of law, Ms. Wicks should have acted as soon as she received the advice on how to comply.

We find that an almost four month delay in acting is not a reasonable time, and therefore, there was no reliance on the opinion during that period of time.

(b) Content of Notice of Restrictions

The Board said it received the “results” of PIC’s opinion on March 16, 2011. *Tab 9, p. 3.* It did not detail what “the results” were. However, the letter provided to the administrators, and the Board, for posting in their buildings on June 17, 2011, said:

“Per the ruling of the Delaware State Public Integrity Commission, on February 24, 2011, I have been granted a waiver using the ‘rule of necessity’ that encourages citizens to take government employment, allowing me to delegate to Mr. Patrik Williams the responsibility of supervision of my son George Wicks in his role as Supervisor of Buildings and Grounds. I will have no role in evaluating his performance, or any discussions or decisions involving George Wicks’ compensation, continued employment, or the terms of his employment by the Smyrna School District.” *Tab 9, p. 2.*

PIC’s opinion did not limit its opinion to just those 4 areas: evaluation, compensation, continued employment, or the terms of his employment. No where in the opinion does it reflect that break down. As indicated above, it said

"any issues." PIC has previously held that: "The common and ordinary meaning of "any" includes "every - used to indicate selection without restriction" and "all - used to indicate a maximum or whole." *Commission Op. No. 95-006 (citing Webster's Seventh New Collegiate Dictionary, p. 40 (1967))*.

Aside from the plain and ordinary meaning, the fact that PIC meant the restrictions to be "all inclusive," is buttressed by the fact that in Ms. Wicks' request for an opinion, she proposed—verbatim—those very same limits. Her request said: "I will have no role in evaluating his performance, or any discussions or decisions involving George Wicks' compensation, continued employment, or the terms of his employment by the Smyrna School District."

Had PIC intended those to be the limits, it would have said so—instead it said "any issues." Moreover, PIC's conclusion was preceded by repeated references to the clear statutory language that says an official may not review or dispose of a matter where they have a personal or private interest—without any distinctions or exceptions. It said:

"State officials may not review or dispose of matters if they have a personal or private interest." *Tab 5, p. 4*. It later said: "The law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related to them." *Id. at p. 5-6*. "The statute states that you are not to "review" or "dispose of" matters, which means you are to recuse." *Id. at p. 6*.

It also described a case which held that even "indirect" and "unsubstantial" participation is "undoubtedly improper" when a matter pertains even indirectly to a close relative. *Tab 5, p. 4*.

In a situation where an official participated in decisions about a close relative, the Court said "that if the officer was at all in doubt, which he should not have been, he could have sought an opinion from the Attorney General." *State ex. Rel. Roberts v. Buckley, 533 S.W. 2d 551 (Mo., 1976)(official violated nepotism law was required to forfeit job)*. In *Ridgely, supra*, the Court noted the unfortunate consequences for an official when it "is cast upon the occupant of the office the burden of determining for himself the limits" of his conduct. *Id. at 478*. The General Assembly rectified that "unfortunate consequence" by creating an independent agency—PIC—so Ms. Wicks did not have to determine the limits. As the opinion was not couched in the limited terms offered by Ms. Wicks, if "any issue" were not clear to her, she, like the *Buckley* official, could have sought an opinion. *29 Del. C. § 5807(a) and (c)*.

The "unfortunate consequence" here, which could have been avoided, is that in determining her own limits—or lack thereof—Ms. Wicks reviewed and disposed of a matter related to her son's employment

PIC was provided with an e-mail from a School District teacher, who said her husband applied for a part-time substitute custodial job 5 weeks ago, but no one had gotten back to him. She said: "Couldn't someone have at least let him know they weren't interested...? It's embarrassing because I work here." *Tab 7, p. 2.*

Three minutes after receiving that e-mail, Ms. Wicks sent an e-mail to Mr. Wicks saying: "George, Please look into this email for me and see if we can get this good contact working as a sub for us!⁷ Mom." *Id. at p. 1.*

Mr. Wicks responded at length the next day saying: "Mom, Here is info on this situation". *Id.* He went into detail about doing sub interviews, and interviews, for such positions; "we are busy so we group them together to make the best of our time;" and said Mr. Goodlin has been scheduled for an interview. *Id.* He then wrote 3 paragraphs, saying five weeks is not long to wait; a lot of people would like a custodial position; if someone has a question about their application it is their responsibility to call; not the responsibility of the proposed employer to give running updates on job status." *Id.*

He said: "In my opinion, it is also a very bad idea for the wife of a prospective employee to place indirect pressure on the prospective employee's potential supervisors by sending an email like this." *Id.* He then talked about the substitute custodial shortage, saying that according to another employee, it was not the subs that were a problem, but it was the existing custodians just not doing their job. *Id.* He then went back to the School teacher's inquiry and said the decision on whether he should seek employment elsewhere was "the Goodlin's alone and we have no comment on their employment decisions. *Id.* Also as far as her feeling of embarrassment, she is in control of her own feelings and we have no responsibility in whatever feelings she has. *Id.* Scott Holmes and I are simply trying to do our jobs the best we can with the time we have allotted each day. *Id.* There is no great conspiracy here against the Goodlins. *Id.* We are trying to use the right procedures in doing our job and also use the best time management practice we can." *Id.*

Ms. Wicks clearly knew this duty belonged to her son, since she immediately wrote to him. She then received a response from him for her review which dealt with the performance of his duties—the length of time to get interviews; the way he was practicing those duties—giving sub interviews and interviews; how he dealt with "customer" concerns; his evaluation of his own work—that he's doing the best he can; we're busy, etc. Explaining what his responsibilities were not—providing information to applicants because it was their job; or responding to people's feelings, etc. He then brought up the fact that apparently some employees working for him were not performing their jobs.

⁷ We do not address if Ms. Wicks was engaging in "pre-selection," as those are personnel issues.

Those are “issues” pertaining to her son’s employment. She participated in that matter—she reviewed the e-mail from the teacher; she disposed of it by immediately directing him to “see if we can get this good contact working as a sub.” When he responded that an interview was now scheduled, he provided additional information for her to review, not only about his job performance as it related to the hiring of substitute custodians, but also about problems with his employees. That violates the restriction on “reviewing or disposing of matters where there is a personal or private interest that may tend to impair judgment in performing official duties.” 29 Del. C. § 5805(a)(1).

What is ironic is that Mr. Wicks thought it was “a very bad idea” for a family member who worked for the District to use “indirect pressure” to get an answer about their spouse’s application for a job in the District. That is especially true when his “Mom” was telling him to “see if we can get this good contact working as a sub for us! Mom.” His response to “Dear Mom” was that he had scheduled the teacher’s husband for an interview; that he’s working hard, etc.

That is the reason Courts sometimes rail against nepotism. Restricting relatives from working together is meant to allow them to perform their duties at arm’s length rather than under any possible inhibition that might exist because of an intimate relationship. *Rosenstock v. Scaringe*, 357 N.E.2d 347 (N.Y., 1976)(Court affirmed an order declaring invalid the candidacy of the wife of a school Board member for a position on the Board); *Keckeisen v. Independent School Dist.*, 502 F. 2d 1062 (Minn); *cert. denied*, 423 U.S. 833 (School Administrator hiring close relative (spouse) “was bound to have a deleterious effect on the moral of the school’s faculty; and administrator may be swayed by the close relationship). *Brice, supra* (“blatant nepotism” for uncle to sit on hiring panel when nephew sought job). *Barton v. Alexander*, 148 P. 471, (Id., 1915)(Court said nepotism was recognized as “an evil that ought to be eradicated and stamped out”).

Ms. Wicks said she “did not consider that e-mail a complaint against her son.” *Tab 9, p. 1 ¶ 3*. Again, she is selectively self-interpreting the restriction. It does not have to be a “complaint.” It is “any issue.”⁸

At the Commission meeting, it was pointed out that the Commission used the term “issue,” and that might be read as being limited to only certain areas about his employment. *Tab 12, lines 54-63*.

To clarify our meaning, then and now, “issues” means “matters.” *Webster’s Collegiate Dictionary*, p. 622. It means what the statute, as cited throughout the opinion, says: An official “may not review or dispose of matters where they have a personal or private interest that may tend to impair judgment

⁸ Again, we note that it apparently was intuitively obvious to the citizen who notified the Commission of the e-mail that this was “an issue” pertaining to George Wicks. That citizen apparently understood the restriction when she read the opinion.

in performing official duties.” To further clarify, “matter” is statutorily defined. It means “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(7).

Ms. Wicks has a “personal or private interest in her son, George Wicks.”⁹ She may not review or dispose of any (all inclusive) matter (as defined, e.g., business dealing or transaction of any sort) with her son George Wicks, as long as they are both employed by the Smyrna School District.

If that is not clear, Ms. Wicks should seek further advice from this Commission before acting. If it cannot be done, then other options will have to be explored, e.g., one of them leave voluntarily; one of them be removed by the Commission if additional violations occur, 29 Del. C. § 5810(d)(2). See, *Nepotism in Public Service*, 11 ALR 826 (cases of voluntary removal to avoid conflict; cases of forfeiture of job because of conflict violation)..

We find that Ms. Wicks did not correctly inform the Board and staff of her restrictions; did not timely notify her staff that she was restricted in any way; and as a consequence failed to comply with the statute that prohibits her from reviewing or disposing of matters where she has a personal or private interest. The law requires “good faith reliance” on the advice in order to be protected against a compliant and/or disciplinary action. 29 Del. C. § 5807(a) and (c). Ms. Wicks’ acts do not constitute “good faith reliance” on PIC’s opinion.

(B) Waiver

Applicable Law: Waiver may be granted if there is an undue hardship on the State employee, official, or State agency, or if a literal application of the law would not serve the public purpose. 29 Del. C. § 5807(a).

(1) Undue Hardship

PIC previously granted a waiver based on the hardship of the agency regarding the work load as described by Ms. Wicks and Ms. Williams, and based on the Code provision that the law is meant to encourage people to accept public employment. *Tab 5, p. 6*. Based on the information we now have, we find that the hardship alleged for the agency was not supported by facts.

⁹ This is made more than clear by the fact that they exchanged e-mails about a School business transaction (hiring of a custodian), and in that transaction, Ms. Wicks identified herself as “Mom.” George Wicks responded with “Dear Mom.” It is clear that they are not drawing the line between their professional roles and their personal and private roles. Delaware Courts have held that when there is a personal or private interest, the “private interest must yield to the public one.” *In re Ridgely* at 531. That has not occurred.

Now, Ms. Wicks, and the School Board, asked the Commission to grant a waiver so Ms. Wicks can have “operational contact” with her son.

Ms. Wicks said: “In this letter to the Commission we’re asking for an operational contact because it’s very difficult to have one administrator in the School District I can’t speak to. *Tab 12 lines 28-35*. I know that every time you are at a meeting it’s certainly not about him, or anything that he was doing, but at a construction meeting, or at an administrative meeting, that could certainly look like I was not following your directions. *Id.* So, that’s why the Board was asking for operational contact.” *Id.* She later said: “So, we were hoping for that. That would make it easier to continue.” *Id. at line 40. See also, Tab 13, Board’s letter.*

(a) The Construction Meetings

Mr. Williams said:

“Typically when we have a construction meeting regarding the development of a school or a facility. the administrators, the contractor and the architect will be at the table to look at the progress notes, to look at change orders, to discuss possible design alterations. The construction meeting which we’re asking for is part of operational contact, we don’t engage in liability issues, we don’t engage in job performance. It’s strictly about the progress of the site and it’s about proposed design changes that we might want to consider. The two supervisors for our district, Mr. Holmes and Mr. Wicks, their responsibility is the timeliness of the project completion. They don’t bare responsibility for problems that have developed under the contractors’ watchful eye. They simply help keep an eye on those pieces, as we all do, and need to gauge whether or not the contractor has met his obligations to the district.” *Tab 12 lines 91-102.*

PIC was previously told that the Building and Grounds Supervisor was working seven days a week, 12-16 hours per day because of the construction. *Tab 3, p. 1 ¶ 1.* That was the basis of the need for the 2nd job. *Id. and Tab 4 lines 23-38.* Now, PIC has been told that the Supervisors only have responsibility for the timeliness of project completion. *Tab 12, lines 97-99.*

If they are only responsible for the timeliness of project completion, then whether the contractors are on time, or not, is something that could be gauged by the progress notes, or learned from Mr. Holmes, or passed to Mr. Williams prior to the meeting. That indicates a lack of need for Ms. Wicks “operational contact” with her son.

If we assume responsibility means more than whether the construction is on time, that responsibility could relate to Mr. Wicks’ job performance. For example, if he neglected to mention that the project was falling behind schedule, then that relates to his performance—or lack thereof. If he is excessively

overbearing on the contractors to get the work done, and the contractors contest his actions, they would want to resolve it. If Ms. Wicks had “operational contact” with him, he could argue that he was doing what she told him to do. That may not inspire confidence in the contractors that they could get the matter fairly solved because of the closeness of the familial relationship. See, Lew v. Spencer, 468 F.2d 553 (CA5 Tex, 1972)(nepotism policies or laws discourage favoritism; prevent emergence of disciplinary problems, inhibit personal and professional cliques in which the familial relatives side with each other).

(b) The Hurricane Situation

Ms. Wicks also gave a specific example of when she contacted him when Hurricane Irene occurred and the School was being used as a shelter. *Tab 12, at lines 115-121*. “When we had the hurricane and we were open for a shelter, I depended on George [Wicks] and Scott [Holmes] to go get things, and bring in the dumpster. *Id.* Those kinds of contacts would be difficult not to have in a smaller district where you’re all working together. It’s all hands on deck.” *Id.*

When asked why Mr. Williams was not supervising the Supervisors of Buildings and Grounds, he said: “I live down by the Killen’s Pond State Park so I was not in Smyrna on Sunday.” *Id. at lines 127-128*. Apparently, it was not such an emergency that “all hands were on deck” since he was not there. Moreover, Ms. Wicks subsequently said that: “Everyday it’s an all hands on deck because we have so many different issues.” *Id. at lines 141, 142*.

When asked if she could have told Mr. Holmes and let him take it from there, Ms. Wicks said: “But its just the not having the ability to do that would make it very difficult. *Id. at lines 146-148*. So, yes, I could go through Mr. Holmes all the time but it seems so artificial¹⁰ to have one administrator that you can’t talk to.” *Id.* She said: “If I couldn’t have operational contact there would be so many times that I could not get the dumpster, or--you know--all the things you do when you’re running the School District.” *Id. at lines 132-134*.

Ms. Wicks also was given a hypothetical of how Mr. Wicks’ work performance could come into play in the case of a hurricane, if she exercised her “operational contact.” *Id. at lines 155-160*. The scenario was that a hurricane occurs, “and a week later you do a debriefing or a recap of how did everything

¹⁰ It is interesting that Ms. Wicks now finds that having someone else handled matters pertaining to her son is “artificial.” That “artificiality” was never raised as a concern when she asked to have Mr. Williams supervise her son. Additionally, now Mr. Williams also says it is “artificial” for her not to talk to Mr. Wicks. PIC recognized the essence of that artificiality when it said: “Here, you can recuse, but the delegation to your Assistant may still raise public suspicion that the conduct appears improper. As it would appear improper, we then considered whether to grant a waiver.” A waiver was granted to allow conduct that would appear improper to occur based on their statements regarding the long hours, etc. Now, the failure to disclose that Mr. Lasana was being used as a resource, and her son’s prior application, now show she was in actual violation of the Code when that waiver was granted.

go, and everything went terrible: he was late, so he didn't get it done; it didn't happen; a foundation was lost; etc. *Id.* Then what happens with that review and decision making?" *Id.*

Ms. Wicks agreed she should not make that review or decision. *Id.* at 161. Yet, by having "operational contact" it again places her in a position where his performance is at her direction. If it were not properly performed, any inquiry into his lack of performance would have to directly involve her since she gave him directions. Also, if he excelled—or she thought he did—then her appraisal of his performance could affect his evaluation—just, as it would if he did not perform.

(c) The Board's Letter

The Board gave as an example: "the fact that the HVAC system in a building is not functioning properly is an operation contact unless the problem is attributable to something Mr. Wicks did, or failed to do." *Tab 13.*

First, regarding the HVAC system, the job description for Mr. Wicks does not include the requirement for troubleshooting and determining cause of action for maintaining HVAC and electrical systems. *Tab 6-B* That duty is in Mr. Holmes job description. *Tab 6-A* Ms. Wicks and Mr. Williams made sure they distinguished those duties. Ms. Wicks said they were "two very different jobs—one is HVAC and the other is Building and Grounds." *Tab 4, lines 100-105.* Mr. Williams said after he learned about Mr. Lasana's concern about the amount of work, he "began looking at splitting the job into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations." *Tab 3 ¶¶ 1 and 2.* "The current supervisor would be 're-assigned' as the HVAC supervisor, and with some minor revisions we would post for a new Supervisor of Facilities—Operations." *Id.* Mr. Holmes would be the HVAC supervisor, and they would post a new announcement for the operations supervisor. *Id.* at ¶ 2.

As Mr. Holmes is the HVAC supervisor,¹¹ Ms. Wicks does not need "operational contact" with Mr. Wicks on those matters. If Mr. Holmes needs assistance, he can work it out with Mr. Wicks and his custodians.

Moreover, the Board's distinction that it is operational contact "unless the problem is attributable to something Mr. Wicks did, or failed to do, raise the same problems that occur with the construction "timeliness" responsibility and the "hurricane" duties. If Ms. Wicks tells him to make the HVAC system a lower priority, and things go bad because he delayed when he is the one who supposedly has the maintenance knowledge, it reflects on his judgment and performance. Moreover, the "operational contact" itself could result in her reviewing matters pertaining to his job, even unrelated to the issue that caused the "operational contact."

¹¹ The HVAC duties were about the only duties that make the two jobs different. .

That is exactly what occurred regarding the hiring of a substitute custodian. She told him to: "see if we can get this good contact working as a sub." *Tab 7*. That might be called an "operational contact," just like telling him the HVAC is not working properly. The problem was he responded not only that he had scheduled the teacher's husband for an interview, but he launched into other matters that relate to his own performance, e.g., how hard his is working; how little time he has, etc. *Id.* Additionally, he told her that an employee told him that the problem with the custodians, was not the substitutes, but it is the custodians who are not doing their job. *Id.* He is "the immediate Supervisor of all the Building chief custodians..." *Tab 6(B)*. If his employees are not performing, as the Supervisor it falls on him to act. As he is supposed to be supervised by Mr. Williams, he should report problems and progress to him. As Ms. Wicks is now in possession of that information, if she takes no action, it raises issues of preferential treatment because of their personal relationship. *Brice, supra.* (*MERB found the nephew received preferential treatment because his uncle participated in decision*). If she takes action, she is reviewing and disposing of the matter when she has a personal or private interest. That is a "no-win" situation, and is the essence of a conflict—being torn between the official duties and the personal interest.¹²

When PIC granted its previous waiver, it allowed conduct to occur that could appear improper. Now, Ms. Wicks wants to engage in conduct that is improper—reviewing and disposing of matters where she has a personal or private interest because to do so would "make it easier to continue."

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

First, the initial waiver was granted based on statements by Ms. Wicks and Mr. Williams about the hardship on the agency because of the difficulty in obtaining assistance because of all of the construction. *Tab 5, p. 1 and 6*. Now, PIC has been told that the Buildings and Grounds supervisors are only responsible for seeing that the work is done on time. *Tab 12, lines 98-99*. That eliminates that "undue hardship" for the agency.

The Board uses the HVAC situation as an example of the need for the request. As noted above, that is not Mr. Wicks' duty, and we will not base a waiver on a hypothetical that is not even part of his duties.

Ms. Wicks wants to deal directly with her son because "it's very difficult not being able to communicate with one administrator." *Id. at line 30; see also lines 147-148 and 240-241*. That is not an "undue hardship." It is the very hardship

¹² Now that Mr. Wicks has raised the issue about the custodians not performing, his Supervisor, Mr. Williams, is the proper person to look into this matter and work with Mr. Wicks on resolving issues pertaining to such alleged lack of performance.

that the statute imposes—that she may not review or dispose of matters where she has a personal or private interest. Beyond that, Ms. Wicks has been the Superintendent for 13 years. *Tab 13*. During that time, the Supervisor of Buildings and Grounds reported to her. e.g., *Tab 6(A)*. Yet, when she and Mr. Williams asked that he be permitted to assume her duties, relative to Mr. Wicks, not a word was said about any difficulties it would create if she recused. Her statements assured PIC that she could recuse. Even after she received the opinion, she did not come back to the Commission and say it was too difficult to work around her son. It was not until she had already violated the advice, and was notified that PIC knew she was not complying, that she said it was “too difficult.” That may be, at least in part, because she was not trying to work around her son, as show in the above facts. That means she has not yet tried stepping aside, so she cannot say, with authority, that it is “too difficult” to do what the law directs.

She also says it “would be easier to continue.” *Id. at line 40*. Of course it is easier not to recuse. If a waiver were granted every time someone said it would be “easier” not to follow the law, then the Code would have no meaning. The fact that she said easier “to continue,” is also indicative that she was not trying to work around her son.

The Board mentioned that Ms. Wicks is a “hands-on” manager. *Tab 13*. Mr. Williams said that was her management style, but that he is personally aware that other Superintendents handle things differently. *Tab 12, lines 283-287*.

Her management style is not a basis for a waiver. As demonstrated with specific examples above there are ways to address those situations without her having “operational contact” with her son. Any official who is restricted from reviewing and disposing of certain matters has to change how they normally “operate”. Again, that does not make it an “undue hardship” because it is the very hardship the law imposes.

The request for an “operational contact” waiver is denied as there is no “undue hardship.” .

(2) Literal Application of the Law is Necessary to Serve the Public Purpose

Courts have noted the purposes for barring relatives from reviewing or disposing of matters pertaining to their close relatives. *Nepotism in Public Service*, 11 ALR 4th 826 (19??). It is to discourage favoritism; prevent emergence of disciplinary problems, inhibit personal and professional cliques in which the familial relatives side with each other. *Id.* (citing *Lew v. Spencer*, 468 F.2d 553 (CA5 Tex, 1972); conformed to (SD Tex., 369 F. Supp. 1219; *aff'd*. 490 F.2d 93 (CA5 Tex., 1973)(spouses could not teach in same College Department).

It also is to provide a wider cross section of the community served by the School District, and allows for debate of issues at arm's length rather than under any possible inhibition that might exist because of an intimate relationship. *Id.* (citing *Rosenstock v. Scaringe*, 387 NYS 2d 716 (3d Dept., 1976), *aff'd.*, 357 N.E. 2d 347). Such bars, generally, tend to make for better efficiency in public office. *Id.* (citing *Backman v. Bateman*, 263 P.2d 561 (Ut., 1953). Such close relationships are bound to have a deleterious effect on the morale of other employees. *Id.* (citing *Keckeisen v. Independent School Dist.* (CA8 Minn., 1975), *cert. den.*, 423 U.S. 833); see also, *Id.* citing *Espinoza v. Thoma*, 580 F.2d 346 (Neb., 1975)(employment of family relatives by same employer could impede efficiency and cause morale problems).

Ms. Wicks now says it is “too difficult” to try to work around him. She should remember that she told him about the job; the recommendation was from a panel of persons that report to her; and the School Board, of which she is a member, approved the hiring knowing he was her son. That hiring alone was enough for a member of the public to suspect the Code was violated. Subsequently, as Ms. Wicks continued to participate in matters related to him, another citizen came forward, with documents showing non-compliance.¹³

If Ms. Wicks engaged in operational contact with him, it would defeat the public purpose that has already suffered. It is enough that she has a waiver allowing the Assistant Superintendent to have oversight of him—that, by itself, appears improper. We will go no further.

III. Conclusion

(A) Findings:

(1) We find that Ms. Wicks did not exercise good faith reliance on the Commission's opinion issued in February because she did not fully disclose material facts. 29 Del. C. § 5807(a) and (c). As a consequence, she is not only reprimanded, but she is not protected from disciplinary action or complaint regarding any conduct she engaged in from the time of that opinion until the time of this opinion.

¹³ At the 2d meeting with PIC, Mr. Williams stated: “I don't want someone sitting in an office somewhere seeing Mr. Wicks drive up, and say 'hello' to Ms. Wicks as she walks by, and then report her for some impropriety.” *Tab 12, lines 294-298*. That has not happened in the more than 4 months since she was issued the opinion. Rather, the information PIC received was not some frivolous claim, but specific and accurate information about Ms. Wicks dealing with her son; about her not informing the staff of her restrictions, etc. When it initially granted the waiver, it specifically noted that because the opinion would be a matter of public record it would instill the public's confidence because it would know of the restrictions. *Tab 5, p. 7*. The fact that the information has not been frivolous is some indication that the public read and understood the restrictions.

(2) Based on the additional facts learned after the February opinion, we find that Ms. Wicks *did* violate the restriction against reviewing and disposing of matters when she gave input to the job description, participated in workshops where the duties were discussed, etc. That is because contrary to the original opinion, where the Commission held there was no violation because she did not know of his interest in the job, those events occurred after he had applied for, but not been accepted for a nearly identical position.

(3) Based on the additional facts learned after the February opinion, we find that the justification given for creating the position, e.g., long hours, every day, etc., because of the construction, was insufficient to establish an undue hardship on the agency, as there were other means available and being used (Clint Lasana), and the initial description of the duties involved in the construction, long hours, etc., are inconsistent with the subsequent information that the Supervisor is only responsible for timeliness.

(4) Ms. Wicks has never “fully disclosed” the information pertaining to her knowledge of her son’s interest from the time of the first job.

(5) Ms. Wicks has never “fully disclosed” the situation pertaining to the consultant contract with Mr. Lasana.

(6) The facts do not show an undue hardship on the agency that would permit Ms. Wicks to have an “operational control” waiver. It would be absolutely contrary to the public purpose to grant that waiver. Our previous waiver, that Mr. Williams is to supervise Mr. Wicks, remains in effect for the present..

(B) Advice to be followed

(1) In her official capacity, Ms. Wicks may not review or dispose of any matter pertaining to her son, George Wicks. “Any” is all inclusive. “Matter” means “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(7). Any “matter” pertaining to Mr. Wicks in his official capacity should be referred to Mr. Patrik Williams. If he is not available, it should be referred to Mr. Scott Holmes. Those “matters” may not be discussed with Ms. Wicks. If the “matter” cannot be resolved, Mr. Williams is to go to the School Board if necessary. **Ex. Mr. Wicks’ e-mail to Ms. Wicks said some of the custodians are not performing their jobs. Mr. Williams is to work with Mr. Wicks to identify if that is correct, and if so, take any appropriate action, without involving Ms. Wicks.**

(2) Ms. Wicks is to provide the School Board, her staff, and all School District employees with the above restriction, without any self-interpretation. As Ms. Wicks prefers deadlines, they should be informed by e-mail **within 2 days of the date of this opinion**, with Commission Counsel copied so that PIC will know they were notified and know what information was in the notice. Her e-mail

address is: janet.wright@state.de.us Additionally, in that same time frame, she is to forward, by e-mail, to all Board members, the entire opinion because it addresses, among other things, why PIC denied the Board's request for an "operational contact" waiver.

(3) Ms. Wicks must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. Even "indirect" and "unsubstantial" participation is precluded. *Prison Health v. State, C.A. No. 13,010, V.C. Hartnett (June 29, 1993)*. If a matter comes to her attention, she is to refer it to Mr. Williams without comment. If at a Board meeting, staff meeting, etc., any issue arises regarding her son, she is not only to recuse, but to leave the room because courts have held that when the purpose is to instill public confidence in the government, improper conduct may include even "passive action." *United States v. Schaltebrand, 11th Cir., 922 F.2d 1565 (1991)*. The Court said that "mere presence can possibly influence government colleagues." *Tab 5, p. 4*. In the context of nepotism, it is to inhibit personal and professional cliques in which the familial relatives side with each other. **Ex: Monthly Custodian Meetings. We understand that Ms. Wicks and Mr. Williams normally attend. As the activities of the custodians are directly the responsibility of Mr. Wicks, Ms. Wicks should not participate in those meetings.**

(3) Ms. Wicks is to provide **all** details regarding the construction consultant contract with Mr. Lasana, e.g., any written contract, information on when he left State employment and when he received the contract, what matters he has worked on, what is his current status, etc. Ms. Wicks is to provide that information to Commission Counsel **within 10 work days of receiving this opinion.**

(4) Ms. Wicks is to provide **all** details of her knowledge of her son's interest in the first facilities job, including when she knew, and all details pertaining to her involvement in any manner as it relates to that job, e.g., reviewing the job description, writing the job description, discussing the position with the Board, the Assistant Superintendent or others at the time, any records of calls, any e-mails or other documents or recollection of discussions with any person regarding his application for the job; whether the members of that panel knew he was Ms. Wicks' son, whether any member of that panel is a personal friend of Ms. Wicks' or of her son, George Wicks, and the details pertaining to that relationship, and any other details she recalls regarding that position, its applicants, etc. Ms. Wicks is to provide that information **within 20 work days of receiving this opinion.**

(5) Ms. Wicks is to report back to this Commission **within 30 work days of this date of this opinion** on how she has achieved compliance through recusal.

(6) If Ms. Wicks does not understand the restrictions, or any part of this opinion, she is to seek advice from this Commission, and not self-interpret or use other sources. Under a similar statute, Courts have held that if the official seeks advice from sources other than the statutory source authorized by law to issue conflict opinions, they will not be protected against a disciplinary action or complaint. PIC Ethics Bulletin 009, ¶¶ 6, 7, 8.

FOR THE COMMISSION



**Barbara H. Green, Chair
Public Integrity Commission**

Date: November 18, 2011