

**PUBLIC INTEGRITY COMMISSION
MINUTES
April 18, 2017**

1. Call to Order: 10:00 a.m. Present: William F. Tobin, Jr. (Chair); Bonnie Smith (Vice-Chair); Michele Whetzel (Vice-Chair); Commissioners: Andrew Gonser, Esq, Lisa Lessner; Commission Counsel: Deborah J. Moreau, Esq.

2. Acceptance of Minutes of March 21, 2017: Moved--Commissioner Gonser; seconded—Commissioner Lessner. Vote 5-0, approved.

3. Administrative Items

A. State budget—The Director of OMB has been given the power to reduce an agency's GF budget forcing the agency to rely on their ASF funds for annual expenses. We still do not know what our operating budget for next year will be.

B. SB29--Senator Townsend introduced legislation which would give PIC jurisdiction over members of the General Assembly for purposes of the entire Code of Conduct. I contacted Senator Townsend to express my concerns that the statute, as written, violates the Delaware Constitution. He indicated he would be willing to rephrase the language in the Bill to allow PIC to have jurisdiction over GA members for purposes of misuse of State property but would continue to vest jurisdiction for conflict of interest matters with the Senate and House Ethics Committees.

4. Motion to go into Executive Session: Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote 5-0, approved.

Update on 17-07: [Employee] retained [an] attorney in the matter. [Employee's] hearing date was moved to May 16, 2017 at noon at his attorney's request. [A Deputy Attorney General] will prosecute the case before the Commission. [The DAG] works for the Office of Civil Rights and Public Trust. Commission Counsel had already sent her all of the documents related to the matter.

5. 17-12—Personal Interest

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

[Employee] wanted to start a part-time business to provide services [related to the management of a different environmental problem] for private entities such as homeowner's associations, the general public and property management companies. In his email request, [Employee] stated that he would focus his services [on a different, but related, environmental problem]. [Employee] acknowledged the fact that [he could be presented with an opportunity to perform work related to the same duties he performed for the State] but did not anticipate it would be the primary focus of his business.

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

A. Applicable Law

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

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

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

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an

official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

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

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

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

Motion—[Employee]’s proposed business would create a conflict of interest with his State job duties, despite his clear display of integrity. However, his obvious honesty did not overcome the Commission’s responsibility to protect the public from the appearance of impropriety. The Commission wanted to stress that he was not banned from owning all businesses, only the business that he disclosed for the purpose of obtaining an advisory opinion. Moved—Commissioner Gonser; seconded Commissioner Whetzel. Vote, 5-0, approved.

6. 17-13--Outside Employment

[Employee worked for a Division] within the Department of Services for Children, Youth and their Families (“DSCYF”). [Employee] ensured that youth and their families were connected to appropriate services offered by [her Division’s] contracted providers. She did not directly treat patients. [Employee] was unable to attend the meeting due to a previously scheduled [event].

[Employee] had been offered part-time employment with [a State contractor to provide services to their private clients]. [The contractor] provided services to both adults and children, usually through Medicaid, which is a Division within the Department of Health and Social Services (“DHSS”). [The contractor was] also in the process of becoming a provider for [a different Division] of DHSS. [Employee] did not anticipate that [her agency] would refer clients to [the contractor] but it was possible that she would [encounter the contractor’s] clients who had been referred to her agency for additional services. In that event, she had notified [the contractor] that she would need to immediately withdraw from treatment of that patient.

[Employee] asked the Commission to determine if her part-time position with [the contractor] would violate the State Code of Conduct.

(A) State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d). “Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).

[Employee] completed the required Ethics Disclosure.

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

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee’s agency] did not work with [the contractor] so it was very unlikely she would make decisions about [the contractor] while performing her State job duties. In the event [one of the contractor’s] clients was referred to [her State agency], there would already have been a determination that the client’s needs exceeded the level of services [the contractor] was able to provide. As a result, she would not be required to provide private mental health counseling to a client that had subsequently been referred to her State agency. However, her ability to withdraw from the treatment of a client while working for her outside employer did not address the issue of reviewing and disposing of matters related to her previous client while performing her State job duties.

As a condition of her outside employment the Commission required [Employee] to recuse herself from working on any matters that involved clients (or immediate family members of clients) she previously treated [on behalf of the contractor] when performing her State job duties. The Commission stressed that under the law, the scope of “recusal” has been broadly interpreted. When there is a personal or private interest, an official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). This insured that [Employee]’s coworkers would not be influenced by her previous association with the client. She would need to verify her ability to recuse herself from reviewing and disposing of matters related to [one of the contractor’s] clients, who had then been referred to [her State agency], with her supervisor(s).

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). The issue was not whether [Employee] would be representing [the contractor] before her State agency, because she would not. The issue was whether [Employee]’s prior involvement with an [agency] client would influence her State colleagues and co-workers to extend special privileges to those clients. Her ability to recuse herself from [the agency’s] clients whom she had previously treated [on behalf of the contractor] was equally necessary to avoid preferential treatment being shown to anyone.

(3) official decisions outside official channels:

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

Board, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s dual employment did not appear likely to affect her ability to perform her State job duties with impartiality and integrity as long as the State allowed her to recuse herself from managing clients she previously treated [on behalf of the contractor].

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

Motion—As long as [Employee] could recuse from treating specific patients by both the State and [the contractor], her part-time job would not create a conflict of interest with her State position. Moved—Commissioner Gonser; seconded—Commissioner Smith. Vote 5-0, approved.

7. Motion to go out of Executive Session: Moved—Commissioner Lessner; seconded—Commissioner Gonser. Vote 5-0, approved.

8. Adjournment. Next meeting May 16, 2017.