

PUBLIC INTEGRITY COMMISSION
MINUTES
June 20, 2017
10:00 A.M.

1. **Call to Order:** 10:00 a.m. Present: William F. Tobin, Jr. (Chair); Bonnie Smith (Vice Chair), Michele Whetzel (Vice Chair); Commissioners: Dr. Wilma Mishoe, Jeremy Anderson, Esq., Andrew Gonser, Esq.; Commission Counsel: Deborah J. Moreau, Esq.
2. **Approval of Minutes of May 16, 2017:** One grammatical error to be fixed. Moved—Commissioner Whetzel; seconded—Commissioner Mishoe. Vote 5-0, approved. (Commissioner Anderson not present).

3. Administrative Items

Legislation Pending: Status remains unchanged from May 2017.

4. **Executive Session¹ to Hear Requests for Advisory Opinions, Waivers and Referrals:** Moved—Commissioner Mishoe; seconded Commissioner Gonser. Vote 5-0, approved. (Commissioner Anderson not present).

Update 17-01: Commission Counsel subpoenaed [agency] records containing [Employee's] comments about [a particular subject]. The investigator concluded her investigation with no new additional information. Counsel hoped to have the item on the July calendar for a decision on whether to proceed with the Complaint.

5. 17-15—Post Employment Violation

The matter was referred to the Commission via a letter from the State Auditor's Office. While performing an audit, the Auditor's Office discovered information which they believed was a violation the Code of Conduct's post-employment restriction.

[Employee] was previously employed by [a school district]. He retired on July 1, 2015. [Employee] subsequently accepted employment with one of the District's contractors. The Auditor's office confirmed that [Employee] was working for [the contractor] in May 2016, but they believed he could have started working for [them] in August 2015.

While employed by the District, [Employee] had oversight of several projects and contracts, including one awarded to [his new employer]. The original contract was dated November 30, 2012. To avoid State procurement rules, the District added several other projects to the original contract through a "piggy-back" provision in 29 Del. C. § 6981(b). The first addendum to the original contract, dated October 16, 2013, added [other] renovation services to the contract. The second addendum, also dated October 2013, added [a second set of] renovations. Prior to making the addendum's to the original contract, [Employee] sought legal advice from the District's attorney who determined that the addendums were allowable under the original RFP and contract. The circumstances surrounding the modifications to the original contract were provided as background information because the Commission did not have jurisdiction over State procurement rules. However, the dates of the addendums were important in determining the applicability of the Code of Conduct's post-employment restriction.

The Auditor did not file a formal Complaint. As a result, the Commission considered whether [Employee]'s conduct appeared to violate 29 Del. C. § 5805(d) and, if so, decide upon a course of action. The issue had generated a lot of media coverage.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there is substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. [Employee] signed a contract with [the contractor] on behalf of the District and then left the District to work for [the company], on at least one project he was materially responsible for while employed by the State. His presence at the District’s Pre-Construction meeting on behalf of [the contractor] in May 2016, only 11 months after leaving State employment was strong evidence that [Employee] violated the post-employment restriction.

The question then considered was what course of action the Commission should pursue? [Employee] was no longer a State employee. As a result, an administrative penalty was not a suitable remedy for his actions. Violations of 29 Del. C. § 5805(d) are subject to a criminal penalty of “not more than one year in prison and by a fine not to exceed \$10,000.” 29 Del. C. § 5805(f)(1). The Commission is authorized to refer matters to the Attorney General’s office when there is substantial evidence of a criminal violation. 29 Del. C. § 5809(4). Referral was not contingent on whether the information was reviewed by the Commission in the context of an advisory opinion or a formal Complaint. *Id.* In a similar circumstance the Commission issued an advisory opinion to the Auditor’s office and forwarded the opinion to the Attorney General’s office for further investigation and prosecution (*Commission Op. 07-04*).

The Commission decided that based on the information provided, [Employee] had violated the post-employment restriction in the Code of Conduct and forwarded the matter to the Attorney General’s Office, Office of Civil Rights and Public Trust for investigation and possible prosecution. The Auditor’s office was copied on the referral letter.

Moved—Commissioner Gonser; seconded—Commissioner Anderson. Vote 6-0, approved.

6. 17-18—Post Employment

[Employee] worked [for a Division] in the Department of Health and Social Services (“DHSS”). She was assigned to work in New Castle County. [Agency’s] mission is to serve [a specific population of citizens]. Her job duties included: oversight of [other Agency employees who worked directly with clients]. [Agency] recently issued an RFP seeking bidders to provide [a service] for their clients. The successful bidder to the RFP was [a private company]. [Employee] was considering leaving State employment to accept a position with [the private company].

[The private company] had proposed hiring [Employee] to work on their Quality Improvement team. She would work directly with other healthcare providers to “ensure the most current, clinically proven techniques and practices [we]re being put in place”. The position would also allow her to work directly with patients, an aspect of her State job that she missed. [The private company] was proposing that [Employee] work in Sussex County. [Employee] asked the Commission to determine if employment with [the private company] would violate the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

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To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. [Employee]’s new position with [the private company] would require her to work in Sussex County, rather than New Castle County where she performed her State job duties. The geographic separation made it less likely that she would encounter her former State co-workers, or clients, while

performing her new job duties. In addition, [the private company] provided services to clients [in a different setting than those Employee worked with in her State position]. The difference between the client's demographic would provide her with an even greater separation between her new duties and those she performed while working for the State. In sum, the geographic and demographic separation between the two positions made it highly unlikely that she would be asked to work on matters for which she was previously responsible while employed by the State. As a result, the Commission decided that the position [with the private company] would not violate the post-employment restriction in the Code of Conduct.

Moved—Commissioner Gonser; seconded Commissioner Whetzel. Vote 6-0, approved.

7. 17-19—Outside Interest

[Employee worked for a State Agency]. His duties included: “conducting and coordinating research activities, liaising with federal and local stakeholders on projects, and providing technical oversight [of] management activities for [the Agency] and other State agencies.”

[Employee] asked the Commission to consider whether: (1) he could work as a consultant for private companies contracting with the State (generally) or his department or division (specifically); (2) he could provide consultant services to private companies that did not contract with the State, if the duties would not overlap with his State duties; (3) he could work on projects outside the State of Delaware; (4) there was a rule against entering into a business arrangement with a State co-worker; (5) he could start a part-time business providing [a specific type of] inspection for private [companies] as required by a different section of [Employee]’s State Division.

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).

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).

B. Applying the Law to the Questions Raised

1. Could [Employee] work as a consultant for private companies contracting with the State, his department or his division?

The law prohibited [Employee] from reviewing and disposing of matters in which he had a private interest. His State duties were related to [a specific area]. The analysis of whether his work for a private company would violate the law focused on the subject matter of each contract-- rather than the entity that issued the contract. However, it was more likely that a contract between a private company and his Division would involve matters he was responsible for while performing his State duties. In addition, the likelihood that his work for a private company would create an appearance of impropriety would be greater if the contract was with his Division because of the increased potential that there would be overlapping contacts or employees.

2. Could [Employee] provide consultant services to private companies that did not contract with the State if the duties did not overlap with his State duties?

Generally, if the private company did not contract with the State, it was very unlikely that he would review and dispose of matters related to the private employer while performing his State job duties. Nor would his work for such a company be likely to create an appearance of impropriety amongst the public.

3. Could [Employee] work on projects outside the State of Delaware?

The Commission's jurisdiction extended to [Employee]'s work for the State. As long as a project was not connected to Delaware, it was not likely he would be put in a position to violate the applicable provisions of the Code of Conduct. However, in [Employee]'s case, he worked with federal agencies whose jurisdiction extended across state lines. Generally speaking, if he accepted private employment or consultant work out-of-state, he could not interact with any of the same federal personnel he worked with when performing his State job duties. Generally, [Employee] did not provide enough facts upon which the Commission could give him a definitive answer.

4. Are there rules against entering into a business arrangement with a State co-worker?

The answer to the question depended on the position the co-worker held and if [Employee] had job duties related to the co-worker. The Code of Conduct does not have a blanket prohibition against owning a business with a co-worker but the question could not be phrased that broadly. A business relationship with a co-worker is usually permissible as long as neither of them had supervisory responsibility over the other. [Employee] did not elaborate further on his co-worker's status.

5. Could [Employee] start a part-time business conducting inspections for private developers which were regulated by a different section of his Division?

Without knowing the specific type of project, or the extent to which other sections of his Division were involved, the Commission could not answer this question. [Employee] was instructed to return to the Commission when he had more specific information upon which the Commission could base its opinion.

No motion, send [Employee] a general letter of advice and recommend that he return to the Commission at that time.

8. Motion To Go Out of Executive Session: Moved—Commissioner Mishoe; seconded Commissioner Gonser. Vote 6-0, approved.

9. Adjournment: Next meeting July 18, 2017. Commissioner Gonser will be on vacation.

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.