

**PUBLIC INTEGRITY COMMISSION
MINUTES
August 15, 2017**

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

2. Approval of Minutes of July 18, 2017: Moved—Commissioner Anderson; seconded—Commissioner Smith. Vote 5-0, approved.

3. Administrative Items:

Good-bye to Dr. Mishoe.

Commission Counsel will be a guest speaker at the October 2, 2017 meeting of the Delaware Coalition for Open Government.

4. Executive Session¹ to Hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Gonser, seconded—Commissioner Whetzel. Vote 5-0, approved.

5. 17-22—Complaint (*Commissioner Tobin recusing*)

On July 5, 2017, PIC received a Complaint (“Complaint #1”) alleging multiple violations of the Code of Conduct. Complaint #1 was signed by multiple affiants. The Complaint asked the Commission to [provide an interim remedy while the Complaint was being reviewed]. On the same day, PIC received another Complaint (Complaint #2) filed and an un-notarized letter also alleging violations of the Code of Conduct. On July 10, 2017, PIC received two additional un-notarized letters describing [an employee’s] behavior while acting in his professional capacity. Finally, on July 12, 2017, PIC received another un-notarized letter alleging unprofessional conduct.

Complaint #1 was published in various media outlets including delmarvanow.com, wboc.com and The News Journal. Commission Counsel emailed [Complainants] on July 5, 2017, and advised that proceedings before the Commission were confidential and they should refrain from divulging any further information to the media.

On July 11, 2017, Commission Counsel sent a Preservation Letter to the [Employer] advising them to preserve any and all information related to the allegations pending before the Commission.

Complaint #1 alleged violations of 29 *Del. C.* § 5806(a)(e) and (h) which read as follows:

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

(e) No state employee, state officer or honorary state official shall use such

public office to secure unwarranted privileges, private advancement or gain.

(h) No state employee, state officer or honorary state official, in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency.

Complaint #2 alleged violations of subsections (e) and (h).

Procedure

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). Complaint #1 was notarized by multiple affiants. The Commission decided it was unlikely that every affiant could attest to the existence of all of the allegations in the Complaint. It was more likely that each affiant could only attest to the facts related to their [situation]. As a result, there was a procedural defect in Complaint #1 which would likely fail examination by a reviewing court. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). If the Commission determined that Complaint #1 properly alleged one or more violations of the Code of Conduct, the affiants would be asked to re-submit their Complaints separately so that it would be clear from the reading of the Complaint which affiant alleged a particular violation of the Code of Conduct. Complaint #2 was submitted by [one person] and was properly notarized.

Jurisdiction

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

A. Personal Jurisdiction

The [employer] previously sought the Commission's approval for their own Code of Conduct pursuant to 29 *Del. C.* § 5802(4). The provision states "[i]t is the desire of the General Assembly that all ...municipalities...adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials." *Id.* The Commission approved the Code of Conduct in September 2013 and it was subsequently adopted. However, there was no follow-through and no Ethics Commission was created. While there was an effort to adopt their own Code of Conduct, it could not be the intent of the legislature to allow adoption of a Code of Conduct and then permit a failure to administer the applicable provisions. The Delaware Supreme Court has held "[t]he goal of statutory construction is to determine and give effect to legislative intent." *LeVan v. Independence Mall*, 940 A.2d 929, 932 (Del. 2007). As a result, [Employee] remained under the PIC's jurisdiction.

B. Subject Matter Jurisdiction:

As stated above, the Complaints alleged violations of 29 *Del. C.* § 5806 (a)(e)(h). Complaint #1 did not match specific facts with applicable violations of the Code of Conduct. Commission Counsel distilled the allegations down to the following list:

- Sexual Harassment
- Racial Discrimination
- Abusive Conduct
- Violation of 1st Amendment rights

- Improper Interference with [other departments]
- Misuse of property
- Harassing and demeaning behavior
- Violations of [other regulations]
- Pressuring to employees to disclose confidential information
- Misappropriation of funds
- Use of authority to obtain [extra benefits].

Complaint #2 alleged sexual harassment as a violation of 29 *Del. C.* § 5806(e)(h).

The Commission agreed that [Employee] acted in an unprofessional, offensive and deplorable manner. It was also clear that nothing was done over the past seven years to correct his behavior or hold him accountable. However, the Commission's jurisdiction is limited to administering the laws in Title 29, Chapter 58. *Commission Op. No. 95-05*. The Commission has previously decided that it has “no jurisdiction over personnel laws” (*Commission Op. No. 97-28*) or “allegations of sexual harassment such as ‘leering,’ making sexual comments, etc., [which] are governed by laws and regulations administered by such entities as the Equal Employment Opportunity/Affirmative Action (EEO/AA) section under State Personnel, or the Department of Labor, or certain federal offices. Similarly, allegations of racism are governed by laws and regulations administered by such entities.” *Commission Op. Nos. 91-16, 98-42, 00-22*.

While the Code of Conduct does have a provision regarding sexual harassment (§ 5806(h)) the Commission has interpreted it as applying to interactions between government actors and third parties (*Commission Op. Nos. 98-42, 00-22*), such as vendors and contractors. The reason for that interpretation is the underlying purpose of the Code of Conduct. When creating the Code of Conduct, the legislature declared legislative findings and statement of policy. 29 *Del. C.* § 5802(1)-(4). Subsection (2) states “[t]o ensure propriety and to preserve public confidence, officers and employees...must have the benefit of specific standards to guide their conduct... .” The inclusion of § 5805(e) must be read in the context of the Code of Conduct (i.e. personal and private interest, conflicts of interest). The purpose of the statute was never intended to be a substitute for state and federal discrimination law. If the statute were to be interpreted otherwise, any sexual harassment claim between two state employees would fall within the Commission’s jurisdiction. Nothing in the legislature’s findings indicated that they intended to abrogate state sexual harassment laws. As a result, the sexual harassment claims were only considered as they related to [Employee] and third parties. In this case, Complaint #2 alleged such sexual harassment.

The same reasoning applied to § 5806(a), the appearance of impropriety standard. It too must be interpreted in the context of the Code of Conduct’s purpose. To interpret the standard otherwise would allow the provision to apply to behaviors that were not otherwise violations of the Code of Conduct. As a result, most of [Employee’s] disturbing behavior was not a violation of the Code of Conduct’s appearance of impropriety standard.

The one exception to the appearance of impropriety allegations would be those [that alleged Employee allowed his personal associations to interfere with his business decisions]. According to Complaint #1, [Employee] would intervene in citizen’s matters, substituting his judgment for that of [another employee] based on whether he did, or did not, like the particular citizen. Therefore, the appearance of impropriety alleged in Complaint #1 was grounded in a violation of 29 *Del. C.* § 5805(a), because it was alleged [Employee] allowed his professional judgment to be affected by personal interests.

29 *Del. C.* § 5806(e) prohibits the use of government property for private advancement or gain. The Complaint alleged that [Employee had used Employer’s resources for his own

gain]. Therefore, the allegation in Complaint #1 regarding the issue appeared to set forth adequate facts upon which the Commission could determine if [Employee] violated the Code of Conduct.

Commissioner Smith pointed out that although some of the allegations may have been addressed with other agencies, [Employee] could have continued to violate those policies and procedures. The Commission decided there was no way to determine exactly which allegations in the Complaints were accurate without first investigating the matter. The Commission then discussed the possibility of hiring an investigator. Commission Counsel agreed to look into the possibility.

Motion—Open an investigation on [Employee] and the allegations contained in the Complaints. Moved—Commissioner Whetzel, seconded—Commissioner Gonser. Vote 4-0, approved.

6. 17-25—Post Employment

[Employee] previously worked for the [State]. She retired on January 1, 2017. [Employee]’s prior duties were to [work directly with clients and to serve as a training instructor for other employees].

[Employee] was asked to return to [the location of her previous State employment to run a new program]. [Employee] expected to contract with [her former agency] to provide the services for four hours per week.

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*.

In this matter, [Employee] worked at [the same location] when employed by the State and also worked for the same supervisor. However, the *Beebe* court ruled that subject matter overlap was not enough to trigger application of the post-employment restriction. Instead, the court looked at the specific facts and parties involved in each matter to determine if the employee had previously given an opinion about, or been materially responsible for, the same matter while employed by the government entity. *Beebe, supra*. As a contractor [Employee] would be running a new program in which she had no previous involvement. When asked by the Commission about the possibility that she would be required to treat the same clients she treated while she was a State employee, [Employee] responded that it would be very unlikely that such a circumstance would occur because [her former clients had likely progressed through the system past the point where she would be involved]. As a result, she did not believe she would encounter a situation in which she would be required to treat a previous client.

Motion—No violation of the post-employment restriction in the Code of Conduct. Moved—Commissioner Anderson, seconded—Commissioner Whetzel. Vote 5-0, approved.

7. 17-24—Outside Interest

[Employee] left a message and sent an email that she had a crisis at work and could not attend the meeting. Commission Counsel would contact her to reschedule.

8. Motion to Go Out of Executive Session—Moved—Commissioner Whetzel; seconded—Commissioner Smith. Vote 5-0, approved.

9. Adjournment

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.