

**PUBLIC INTEGRITY COMMISSION
MINUTES
September 17, 2019**

1. Call to Order: 11:15 a.m. Present: William F. Tobin, Jr. (Vice-Chair; Acting Chair), Michele Whetzel (Vice-Chair); Commissioners: Andrew Manus, Gary Simpson, Rourke Moore. Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for July 16, 2019: Commissioner Moore asked that the minutes be changed to reflect the title of “The Honorable” before his name. Motion to accept the minutes with the requested change. Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 5-0, approved.

3. Administrative Items

A. COGEL trip

B. Budget for FY 2021—Requested an additional \$15K for investigative and prosecutorial expenses.

4. Motion to go into Executive Sessionⁱ and Hear Requests for Advisory Opinions and Waivers; review Complaints. Moved—Commissioner Manus, seconded—Commissioner Moore. Vote 5-0, approved.

5. Request for Investigation

The Commission discussed whether to open an investigation into [a particular Division Head] for alleged nepotism in his Division. The request for the investigation came from one of [the Division Director’s] former employees who had emailed Commission Counsel with various allegations of family relationships in the Division. The Commission decided to advise the former employee to submit a formal Complaint so that the Commission would have the legal impetus for an investigation.

6. 19-29 Ronald Tello--Private Interest (*when a waiver is granted the entire opinion is published*).



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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VIA EMAIL

Oct. 3, 2019

19-29--Private Interest (Waiver GRANTED)

Hearing and Decision By: *William F. Tobin, Jr., (Vice-Chair, Acting Chair); Michele Whetzel, (Vice-Chair); Commissioners: Andrew Manus; Roarke Moore; F. Gary Simpson*

Dear Dr. Tello,

Thank you for attending the Sept. 17, 2019, Commission meeting to which you were accompanied by Harvey Doppelt, the Director of Specialized Services at DPBHS and Chief Investigator of the CORE program. After consideration of all the relevant facts and circumstances, the Commission decided that it would be a conflict of interest for your private business to contract with a vendor benefiting from Federal grant monies that pass through your employing agency. However, the Commission granted you a waiver until June of 2020, the grant's expiration date. The Commission's reasoning is set forth below.

I. FACTS

You are a Family Crisis Therapist ("FCS") for the Division of Prevention and Behavioral Health Services ("DPBHS"), within the Department of Services for Children Youth and their Families ("DSCYF"). You are assigned to the Wm. C. Lewis Elementary School ("school") in the Red Clay School District. The school provides a dual language immersion setting. You work with children and their parents from kindergarten through 5th grade to provide case management, referral and counseling services to the children and their families. You also act as an advocate for the parents within the school.

You also have a private business, Hispanic Personal Development. You want your business to provide services under the umbrella of Delaware CORE (Community Outreach,

Referral and Early intervention) by contracting with one of CORE's vendors, Horizon House. CORE is funded by the Federal government by means of a pass-through grant and is administered by DPBHS, your state employer. CORE serves young adults ages 16-25 who have symptoms of early psychosis. CORE believes that with early intervention people diagnosed with psychosis can lead rewarding and productive lives. To that end, CORE educates the public about psychosis while also guiding and supporting youth and families that are affected.¹ Your business would assign a 'cultural broker' to Hispanic speaking families to help them navigate the bureaucracy of the state and the healthcare system. The request for a cultural broker would likely come from a Horizon House employee. Your business is the only one of its kind in Delaware.

You asked the Commission if it would be a conflict of interest for your business to contract with a vendor in the Delaware CORE program. Furthermore, if the Commission decided that such a contract would be a violation of the Code of Conduct, you asked for a waiver.

II. APPLICATION OF THE FACTS TO THE LAW

A. 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.²

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.³ 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.⁴ A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest."⁵ 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.⁶ When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.⁷

Your state job duties are unrelated to the work you would perform for CORE. In your State position, you work with children in kindergarten through 5th grade. The age demographic for the CORE program is ages 16-25. Because of the differing age demographics between the two positions, the Commission decided that it was very unlikely that you would encounter one of your State clients while performing duties related to your private business and vice versa. As a consequence, the potential for a conflict of interest is greatly reduced. At the meeting you did acknowledge that there is a remote possibility that you could work with a State client in the school setting and discover that one of their older family members would benefit from CORE's services, but that it had never happened before. In order to avoid a conflict that may arise from such a situation, you would ask the school counselor if they could work with the student's family so that you would not have a conflict of interest. As a result, you have identified an acceptable

¹ delawarecore.com

² 29 Del. C. § 5805(a)(1).

³ 29 Del. C. § 5805(a)(1).

⁴ 29 Del. C. § 5805(a)(2)(a) and (b).

⁵ 29 Del. C. § 5805(a)(2).

⁶ See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

⁷ *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).

recusal strategy for this portion of the Code of Conduct that would mitigate any conflict of interest issues between your two roles.

B. No state employee may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee is associated by employment.⁸

You work for the agency that administers the CORE program. While it is true that your State job duties are not related to grants or contractors, your private business would receive monies from one or more of CORE's vendors that are paid out of Federal grant monies administered by DPBHS. In addition, like any agency administering a grant, your State agency is responsible for overseeing the funds to assure they are spent in ways that are compatible with the grants purpose. Mr. Doppelt is DPBHS' Chief Investigator for the CORE program. Although his purpose in attending the meeting with you was to confirm the program's need for services provided by your private business, his presence also illustrates the crossover between your State job and your private business. Furthermore, even though your business would receive payments from Horizon House or another CORE vendor, it does not change the fact that the monies originated from your State agency. Under the aforementioned circumstances, you would be assisting a private enterprise (your private business) in a matter before DPBHS, your State employer. That is a conflict of interest and a violation of the State Code of Conduct.

C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust.⁹

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.¹⁰ The Commission treats that as an appearance of impropriety standard.¹¹ 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.¹² Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances.¹³ 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.¹⁴

You found out about the need for 'cultural brokers' through a combination of contacts that arose out of your State job and your private contacts in the community. However, having already established a conflict of interest, the Commission turned to your request for a waiver.

D. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose.¹⁵

⁸ 29 Del. C. § 5805(b)(1).

⁹ 29 Del. C. § 5806(a).

¹⁰ 29 Del. C. § 5802.

¹¹ *Commission Op. No. 07-35.*

¹² *In re Williams*, 701 A.2d 825 (Del. 1997).

¹³ *See, e.g., Commission Op. No. 97-23 and 97-42.*

¹⁴ 29 Del. C. §§ 5802(1) and 5802(3).

¹⁵ 29 Del. C. § 5807(a).

(a) Undue Hardship

A waiver may be granted if there is an “undue hardship” on the applicant or the agency.¹⁶ “Undue” means “more than required” or is “excessive.”¹⁷ CORE is not a State agency. Ordinarily, a private entity does not qualify for a waiver. However, because CORE is funded through a grant administered by DPBHS, the Commission took into consideration Mr. Doppelt’s comments regarding the need for your private business’ services. According to Mr. Doppelt, the Hispanic community is generally reluctant to avail themselves of services available from the State and/or the medical community, thus categorizing them as an underserved community. Mr. Doppelt stated that the aid of a cultural broker would benefit members of the Hispanic community by acting as a guide to help them navigate language barriers, as well as the procedures and paperwork necessary to avail themselves of available resources. As a result, your private business shares a common goal with CORE and would also advance your agency’s goals. Lastly, Mr. Doppelt stated that the services provided by your private business are not usually available outside of urban areas, your business being the sole exception in Delaware. After weighing the relevant factors, the Commission decided to grant you a waiver until the end of June 2020.

(b) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public’s confidence in its government.¹⁸ The statute was designed to protect against self-dealing and its enforcement is generally the best way to serve the public purpose.

The CORE grant is set to end in June 2020. A waiver of limited length assures the public that the waiver exists for a specific purpose, thus reducing the public’s concerns about self-dealing while also promoting the public’s confidence in their government.

III. CONCLUSION

The Commission decided to grant you a waiver until the end of June 2020 to allow your business, Hispanic Personal Development, to contract with one or more of CORE’s vendors to provide the services of a cultural broker when requested. This entire opinion will be published so that the public may know that the conduct prohibited by the State Code of Conduct has been reviewed and approved by the Commission.

Sincerely,

/s/ William F. Tobin, Jr.

William F. Tobin, Jr.
Acting Chair

Motion consistent with the written opinion. Moved—Commissioner Manus; seconded—Commissioner Simpson. Vote 5-0, approved.

¹⁶ *Id.*

¹⁷ *Commission Op. No. 97-18 (citing Merriam Webster’s Collegiate Dictionary, p. 1290) (10th ed. 1992).*

¹⁸ *29 Del. C. § 5802(1) and (2).*

7. 19-31—Private Interest

[Employee] is a member of a [Board]. The Board has the legal authority to administer and supervise [an entity] and is the chief decision-making body of the [entity]. The Board generally meets once a month, in the evenings.

[Employee] applied, and interviewed for, a position with [a State vendor] as a [Coordinator]. His/her duties would include: identifying and recruiting potential stakeholders and community members; gathering information about needs and available resources through meetings, interviews, and focus groups; facilitating public meetings and focus groups, leading [subcommittees]; making findings and recommendations; working collaboratively with other groups to coordinate projects, activities, etc.; collecting and coordinating data for reports to demonstrate contract goals and deliverables. [Employee] stated that [his/her] Board is one of the stakeholders that would be involved in [the] initiative.

[Employee] asked the Commission if his employment [with the State vendor] would create a conflict of interest with his position on the Board.

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.¹⁹

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.²⁰ 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.²¹ A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest."²² 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.²³ When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited.²⁴

At the meeting, [Employee] was unclear about how much involvement the Coordinator would have with the Board's [staff and/or constituents]. As a result, the Commission offered the following advice to avoid any potential conflicts. In general, if the Coordinator's contact with [the Board's staff and constituents] takes place outside the confines of the working environment, the fact they [share a similar interest] was incidental to the contact, [Employee]'s work would be less likely to conflict with his/her Board duties. However, if the Coordinator is required to go to [the Board's location] and work with [constituents] on the premises, the potential for a conflict would be much higher.

Whatever the cause, it is possible to cure conflicts of interest through recusal. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in

¹⁹ 29 Del. C. § 5805(a)(1).

²⁰ 29 Del. C. § 5805(a)(1).

²¹ 29 Del. C. § 5805(a)(2)(a) and (b).

²² 29 Del. C. § 5805(a)(2).

²³ See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

²⁴ *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).

the public sector and one in the private sector could result in conflicts that are “routinely cured through abstention or recusal on a specific matter.”²⁵ For example, if [Employee]’s position required him to work with an individual who subsequently had a matter pending before the [Board], he/she would need to recuse him/herself from consideration of that matter. Similarly, if the Coordinator were to ask the [Board] for permission to go to one of the [Board’s] locations and set up a program, that request would likely go through the Board. In that case, [Employee] should not be the person making the request [of the Board] nor should he/she consider the request as a Board member.

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.²⁶

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.²⁷ The Commission treats that as an appearance of impropriety standard.²⁸ 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.²⁹ Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances.³⁰ 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.³¹

The public’s perception is likely to be related to how much direct contact the Coordinator would have with the [Board and their constituents]. If the Coordinator does not work in [any of the Board’s satellite locations, Employee]’s dual roles would be less likely to raise suspicion that he/she was engaging in conduct that would be contrary to the public trust. If the Coordinator is required to engage in activities that involve the [Board’s staff or constituents], [Employee] should recuse him/herself from consideration of those matters whether the matter arose under his/her role as Coordinator, Board member or both. [Employee]’s recusal will assure the public that he/she is not engaged in conduct that is contrary to the public trust.

Motion—[Employee]’s proposed employment as Coordinator would not conflict with his [Board] duties as long as he/she recuses himself as necessary. Moved—Commissioner Simpson; seconded—Commissioner Moore. Vote 5-0, approved.

8. 19-27—Complaint-Personal Interest

The matter was resolved to the mutual satisfaction of the parties and the Complainant without a hearing, or finding of fault. Additional training will be provided by Commission Counsel to the entire group. [Board member] was not required to admit any wrongdoing because he/she had sought, and acted under, the advice of counsel.³²

Motion—acceptance of the resolution proposed by the parties. Moved—Commissioner Tobin; seconded—Commissioner Manus. Vote 5-0, approved.

²⁵ *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997) (citing *56 Am. Jur. 2d Municipal Corporations* § 172 (1971); *Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960).

²⁶ 29 *Del. C.* § 5806(a).

²⁷ 29 *Del. C.* § 5802.

²⁸ *Commission Op. No. 07-35*.

²⁹ *In re Williams*, 701 A.2d 825 (Del. 1997).

³⁰ See, e.g., *Commission Op. No. 97-23* and *97-42*.

³¹ 29 *Del. C.* §§ 5802(1) and 5802(3).

³² 29 *Del. C.* § 5809.

9. 19-28—Complaint

The Commission discussed the matter with the attorney hired to prosecute the matter before the Commission. [He/she] wanted to reveal a potential conflict between him/herself and [the subject of the Complaint]. Ten years ago the [subject of the Complaint] was the lawyer's high school] teacher. He/she does not socialize with [the subject of the Complaint] and has not spoken to him/her in the intervening time period.

The Commission decided that there was no conflict of interest and did not require [the lawyer's] recusal.

10. Motion to go out of Executive Session: Moved—Commissioner Whetzel; seconded—Commissioner Simpson. Vote 5-0, approved.

11. 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.*