

STATE PUBLIC INTEGRITY COMMISSION

Synopses of 1991-1995 Opinions

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STATE PUBLIC INTEGRITY COMMISSION

Interpretations of the Code of Conduct

Introduction

The State Public Integrity Commission was originally established in 1991 as the State Ethics Commission. It was responsible for administering and implementing the State Code of Conduct, Title 29, Chapter 58, which governs the ethical conduct of State employees, officers and honorary officials.

In 1994, Title 29, Chapter 58 was amended. The amendment changed the Commission's name, authorized full-time legal counsel and added the additional responsibilities for the Commission to administer and implement the Financial Disclosure statute (effective January 15, 1995) and the Registration of Lobbyists statute (effective January 15, 1996).

As part of the Commission's statutory duties, it is to prepare summaries of its advisory opinions for public distribution. This publication summarizes the Commission's opinions on the State Code of Conduct for the years 1991-1995. Synopses of the Commission's financial disclosure and lobbyists opinions are published separately.

For ease of reading, any reference to the Commission is by its present name. Also, for the reader's convenience, all citations to the Code of Conduct use the numbering system that presently exists.

Requests for advisory opinions from the Commission may be made by State employees, officers, honorary officials, or any State agency. The Commission may be contacted at the phone number and/or address on the cover of this document.

STATE PUBLIC INTEGRITY COMMISSION

SYNOPSIS OF 1991 OPINIONS

CONTRACTS

Transportation

The Code of Conduct prohibits State employees, officers and private enterprises in which the employee or officer has a legal or equitable ownership of more than 10% from contracting with the State (except employment contracts) unless there is public notice and competitive bidding. The Code, in 1991, permitted two exceptions to public bidding: (1) contracts for not more than \$2,000 per year if there were arms' length negotiations; and (2) contracts with a public school district and/or the State Board of Education for transporting school children for the period of July 1, 1990 through June 30, 1991. *29 Del. C. § 5805(c)*.

The Department of Public Instruction (DPI) and two State employees, sought waivers to permit contracts for transporting school children beyond June 30, 1991 without public bidding. Waivers are permitted if the literal application of the statutory provision in a particular case is not necessary to achieve the public purposes of the ethics law or would result in an undue hardship to any State employee, officer or agency. *29 Del. C. § 5807(a)*.

The Commission granted waivers through June 30, 1992 because: (1) under a separate statute, *29 Del. C. § 6916*, such contacts were allowed and there were no complaints about the system; (2) DPI did not realize there was a restriction after June 1991; (3) the Commission was not operative until July 1991 and could not grant relief prior to that date; and (4) the 1991-1992 school year contracts were waiting approval by DPI and there would be a hardship on the school districts, the public and the students if a waiver were denied. (**Commission Opinions 91-8, 91-8A, 91-8B**).

NOTE: After this 1991 decision, the legislature amended the Code of Conduct to resolve the apparent contradictions in the two statutes, *29 Del. C. § 5805(c)* and *29 Del. C. § 6916*. The Code of Conduct now permits transportation contracts with school districts by employees, their spouse or children as provided for by *29 Del. C. § 6916*. However, the exception does not apply to school district transportation supervisors. *See, 29 Del. C. § 5805(h)*.

Contract with State by Spouse

The Commission was notified by a State employee that the employee's spouse occasionally

contracted to perform repair work on State equipment. The Code requires disclosure of a financial interest in any private enterprise which does business with a State agency. 29 *Del. C.* § 5806(d). Such disclosure is a condition of commencing and continuing employment. *Id.* The employee disclosed that in the previous year, spousal income from State work was less than \$1,000 and during the year of the submission the spouse received no income from State work. The Commission acknowledged the disclosure and advised the employee to make an annual disclosure if the spouse's firm did business with the State. (**Commission Opinion 91-1**).

Professional Services

A State agency requested a waiver of the Code of Conduct which prohibits State employees from contracting with the State without notice and public bidding on contracts exceeding \$2,000 per year. 29 *Del. C.* § 5805(c). The agency, pursuant to Departmental policy, had contracted for professional services on contracts of less than \$5,000 per year, without competitive bids, before learning of the \$2,000 limit in the Code of Conduct, enacted in January 1991. It then publicly solicited bids for these professional services and sought a waiver to permit a State employee to fulfil the contract until April 30, 1991, when the public bidding process would culminate in newly contracted services. The Commission rendered no decision on the matter because the contract was entered before the Commission members were appointed in April 1991. The contract with the State employee expired on April 19, 1991. Thus, the matter was moot by the time the Commission held its first meeting. (**Commission Opinion 91-7**).

Contract Bidding by State Employee

A State employee intended to propose that a certain aspect of work performed by his State agency be placed in the private domain and be subject to the bidding process. The employee anticipated that if the agency placed this work within the private domain, he would want to leave State employment and bid on the work. The Commission heard testimony that the agency was not contemplating placing the work referred to in the private domain.

The Commission may issue advisory opinions as to the applicability of the Code of Conduct based on a "particular fact situation." 29 *Del. C.* § 5807(c). The Commission concluded that as no specific facts could be given to the Commission it could not make any findings of fact or conclusions of law. The employee was advised to seek an opinion once he had a firm proposal, but before resigning his State position. (**Commission Opinion 91-5**).

POST-EMPLOYMENT RESTRICTIONS

Professional Services/Early Retirement Option

Post employment restrictions prohibit State employees from representing or otherwise assisting a private enterprise on matters involving the State for two years after leaving State employment if the employee gave an opinion, conducted an investigation, or otherwise was directly and materially responsible for such matter in the course of official State duties. 29 *Del. C.* § 5805(d).

A State employee, who was retiring, requested determination of whether he could offer professional services to firms which contracted with his State agency. At the time of the request, the legislature had passed a one-time early retirement option (ERO) preventing employees from coming back to work for the State for five years, except that in special cases the ERO Committee could allow an individual to contract back to the State for a period of up to one year. 29 *Del. C.* § 5301(d)(4).

The Commission concluded that if the employee or any entity controlled by him intended to contract with the State to provide personal services, then he should apply to the ERO Committee for a determination of whether such contractual arrangement was permissible.

Apart from such determination by the ERO Committee, the Commission found that the employee's statutorily imposed duties encompassed a broad range of control over the agency's functions, including supervisory duties, contractual duties, and coordination, development and planning responsibilities for agency programs. Accordingly, the Commission held that any dealings with that agency would violate the Code, unless the former employee submitted information on specific projects to rebut the assumption that he was "directly and materially responsible" for that specific matter while employed by the State. **(Commission Opinion 91-10).**

Representing Private Enterprise

A former State employee sought a waiver from the restriction prohibiting State employees from assisting a private enterprise on matters involving the State for two years after leaving State employment, if the individual gave an opinion, conducted an investigation, or otherwise was directly and materially responsible for such matter in the course of official State duties. 29 *Del. C.* § 5805 (d).

While employed by DNREC, an employee received applications submitted to the Air Resources Section. He decided if the applications complied with regulations. His decisions were reviewed by two levels of supervision above him. His employer, after he left State service, was a private enterprise regulated by his agency. He sought a waiver so he could discuss options of emission control equipment with his new employer. He believed it was possible and probable he would represent the private enterprise on matters that he had dealt with while with the agency.

The Commission may grant a waiver to specific prohibitions in the Code of Conduct if the Commission determines the literal application of the prohibition in a particular case is not necessary to achieve the public purpose of the Code or would result in an undue hardship on an employee or agency. 29 *Del. C.* §

5807(a).

The Commission found that: the private enterprise had a strong history of compliance before hiring the State employee; there was no discretion by individual business managers regarding obedience to the law; EPA oversees DNREC's actions in issuing major permits; no confidential information gained from employment at DNREC would be compromised as the regulations and any interpretations are public information; and all cases on which the employee worked had been resolved. This reduced the possibility of the former State employee influencing DNREC to bend regulatory requirements. The Commission also found that DNREC encouraged the use of such expertise in the private sector as it could help assure compliance by the private enterprise with public laws and environmental regulations. The employee testified that an undue hardship would result if the private enterprise placed him in an area where his expertise was not used as both he and the company would be at a disadvantage.

The Commission distinguished this opinion from Opinion 91-10, (above) where a former State employee sought to contract with the State after retiring. The Commission noted that the former DNREC employee's activities, unlike those proposed by the other former State employee, would not result in compensation from the State. **(Commission Opinion 91-11).**

Professional Services

A State employee, who served in a professional capacity, due to personal circumstances moved out of State. The agency requested that it be permitted to contract with the individual for professional services on a part-time basis. The agency anticipated the contract might last from six months to possibly a year.

The Code prohibits employees, officers or honorary State officials from representing or assisting a private enterprise on matters involving the State for 2 years after terminating employment if the person gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of official duties. *29 Del. C. § 5805(d)*.

The Commission heard testimony that the employee had played a central role within the agency. The testimony also indicated the employee would work on a part-time basis; the rates would be well below the hourly contractual rates for such professional services; the employee had established trust with the staff and its clients and continuation on a part-time basis would assure continuity that would benefit the clients; the services could not be readily provided by anyone else in the community as there was a shortage of such professionals; and the agency had pursued recruitment for the position, but without success.

Based on these facts, the Commission concluded the contract would violate the post-employment restrictions; however, it held that the literal application of the Code was not necessary to achieve the public purposes of the statute and would result in an undue hardship to the agency. It therefore granted a waiver

as permitted by 29 *Del. C.* § 5807(a). (**Commission Opinion 91-18**).

CONCURRENT EMPLOYMENT

Representation of Private Enterprise

State officers are prohibited from representing or otherwise assisting any private enterprise with respect to matters before the State. 29 *Del. C.* § 5805(b)(2). A Public Service Commissioner requested a waiver from this restriction so he could represent his full-time employer, an insurance company, in matters before the Delaware Insurance Office.

Waivers can be granted if the literal application of the prohibition in a particular case is not necessary to achieve the public purpose of the Code or would result in undue hardship to any State employee, officer or agency. 29 *Del. C.* § 5807(a).

The Commission granted a waiver because the Public Service Commission (PSC) does not regulate insurance companies; has no relationship with the Delaware Insurance Office; and membership on the PSC could not result in undue influence on the Insurance Office. (**Commission Opinion 91-13**).

NOTE: The law provides that employees, officers or honorary officials may not represent or assist private enterprises with respect to matters pending before the agency with which the employee, officer or official is associated by employment or appointment. 29 *Del. C.* § 5805(b)(1). For officers, the statute goes further and states that officers may not represent or assist private enterprises with respect to any matter before the State. 29 *Del. C.* § 5805 (b)(2). The Code defines “employees” as including persons appointed to a State agency, who receive or expect to receive more than \$5,000 per year in compensation. 29 *Del. C.* § 5804 (11)(a)(2). “Officers” are persons required to file a financial disclosure form, except members of the General Assembly and the Judiciary are not included in the term. 29 *Del. C.* § 5804 (12). The PSC Commissioner is appointed by the Governor and, by law, receives more than \$5,000 per year in compensation. 26 *Del. C.* §§ 103, 105, and 110. Thus, he would be considered a State employee, not an officer, and the Commission could have alternatively ruled that no waiver was required as the PSC Commissioner was not representing a private enterprise before the agency with which he was associated with by appointment.

Financial Disclosure

Regulatory board members filed disclosures with the Commission that they were involved in the operation of a facility regulated by the board on which they served. The board members were honorary State officials and as such are required by law to disclose financial interests in private enterprises which are subject to the regulatory jurisdiction of, or does business with, the agency on which they serve as an

appointee. *29 Del. C. § 5806(d)*. Such filings are confidential except as may be necessary to enforce the Code of Conduct. *Id.* The filing is a condition of commencing and continuing appointed status with the State. *Id.* (**Filing Nos. 91-3, 91-4, 91-6**).

Consulting Work

Prior to establishment of the Commission in 1991, a State employee was part owner of a consulting firm which engaged in work that included some matters reviewed by the employee's State agency. The employee did not participate in the review, but the State employee sitting next to him conducted the review.

After the Commission was created, the employee did not engage in outside work that was reviewed by his office. He sought a decision on whether the outside consulting work would violate the requirement that 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 or appointment. *29 Del. C. § 5805 (b)(1)*. His agency expressed concern that even with the employee recusing himself from review, there could be an appearance of conflict because of the small size of the office. The agency stated that the small office size also created problems in making assignments to avoid a conflict. It also noted that private enterprises, over the years, had complained of unfair competition when a State employee engaged in this technical work and that from time to time there was a perception that the State employee might receive preferential treatment during the review process by a co-worker. The Code prohibits conduct that raises an appearance of impropriety. *29 Del. C. § 5806(a) and (b)(4)*.

The Commission held that the employee could not participate in the outside consulting business. (**Commission Opinion 91-12**).

Expert Witness

A State employee wished to pursue outside employment as an expert witness in an area related to his State employment and his professional training.

The Code prohibits State employees, officers or honorary officials from accepting other employment or compensation under circumstances where such acceptance may result in: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give preferential treatment to any person; (3) making governmental decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State. *29 Del. C. § 5806(b)*.

Testimony revealed that if the employee became an outside expert, his courtroom appearance could result

in testimony on his own work for the State or the work of the agency. The employee stated he agreed with the agency “a hundred percent” that there would be a conflict if he testified as a private consultant on jobs he worked on for the State. He said he would refrain from testifying in such instances. He suggested he could provide the expertise to similar agencies in States surrounding Delaware, rather than in Delaware. However, the agency said it had joint projects with

those States and that to have a high level manager from the Delaware agency providing comments and guidance to another state’s agency for a fee could “prove difficult” in terms of working relationships with those States.

The employee said the reason he wanted to become an expert was so he could get experience before he retired and could then pursue that career after retirement. The agency said it could provide the employee with some experience by having him as a witness for the State on certain matters, which would provide him with experience without going to the private sector.

The Commission concluded that if the employee testified in a private capacity, while employed by the State, his State position would be brought out. It was the Commission’s opinion that this would reflect unfavorably on the employee’s position of holding the public trust, and therefore would violate the Code. **(Commission Opinion 91-19).**

JURISDICTION

School Board Member who also is State Employee

Two individuals were alleged to have violated the Code of Conduct. One was an elected school board member and was concurrently an employee of a State school of higher education. He applied for a State job with the same school district in which he held a board position. He was cut from consideration before his application reached review by the School Board. The other individual charged was a State employee whose position was supervised by the School Board. Petitioner, who applied for the same position but was not selected, alleged that: (1) he was not selected because of racial discrimination; (2) it was a conflict of interest for the Board member to apply for the position; (3) it was a conflict of interest for the other employee to be “deeply involved” in the hiring process; and (4) there was questionable use of school funds.

The Commission determined that the alleged racial discrimination and alleged questionable use of school funds were not issues within its jurisdiction. It recommended the alleged discrimination matter be referred to the Equal Employment Opportunity Commission and the alleged misuse of funds matter be referred to the Educational Finance Overview Committee.

Regarding the remaining issue concerning a conflict, the Commission determined it has personal jurisdiction over State employees, State officers and honorary State officials. *See, e.g. 29 Del. C. §§ 5805-06.* A “State employee” is defined as one who receives compensation from a State agency. *29 Del. C. § 5804(11)(a)(1).* An honorary State official is “appointed.” *29 Del. C. § 5804(13).* Board members do not receive compensation from a State agency and are elected, not appointed. Thus, the Commission concluded the Board member was not a “State employee” or an “honorary State official.” A “State officer” is a person required to file a financial disclosure statement. *29 Del. C. §§ 5804(12) and 5812.* The Code excludes, “elected and appointed officials of . . . public school

districts” from the definition of State officers. *29 Del. C. § 5812(a).* Thus, the Commission concluded that an elected school board member also was not a “State officer.” As his status as a Board member did not place him within the category of persons to whom the Code applied, the Commission concluded it lacked jurisdiction over him in that capacity.

Regarding his concurrent position as a State employee, the Commission had personal jurisdiction over him, but it found that the alleged conflict did not arise within or have a nexus with the Board member’s concurrent State employment.

The other individual was found to be a State employee, giving the Commission jurisdiction. However, after hearings on the matter, the Commission found there was no evidence presented to support a conclusion that there was a conflict of interest, as any accrual of financial benefit, required by *29 Del. C. § 5805(a)(2)(a)*, which prohibits reviewing or disposing of matters where there is a financial interest, was speculative and remote. It further found, after a hearing, that the fundamental facts as developed showed nothing to support a conclusion of an appearance of impropriety under *29 Del. C. § 5806(a).* **(Commission Opinion 91-16).**

Non-Government Activities

Complainant alleged that a State employee, who was concurrently associated with a non-profit organization had improperly used funds of the organization for his personal benefit. A criminal investigation, conducted by the Attorney General’s office, found no criminal violation. An investigation also was conducted by the State Auditor’s Office which concluded that the non-profit’s books were inadequate to determine if State funds were improperly used. The Commission held its investigation in abeyance while those investigations were conducted. Upon conclusion of those investigations, complainant requested the Commission to dismiss the complaint. By law, the Commission may initiate its own investigation based on facts brought to its attention. *29 Del. C. § 5810(a).* The Commission found that as a factual matter, the alleged action was related to his association with the non-profit organization, rather than his public employment. It concluded that the language in the statute seemed to express a clear legislative intent that violations must be related to the public duties of the individual as the statute repeatedly refers to the “public trust,” “public interest,” “official duties,” “governmental decisions,” “official capacity,” etc. The only

statutory references to matters “beyond the scope of public positions,” dealt with the release of confidential government information. 29 *Del. C.* § 5806 (f) and (g). Even those provisions “beyond the scope” are limited to situations where confidential information is obtained as a result of the public position. The Commission concluded that by limiting the Code to matters related only to public office, the Commission had no jurisdiction over the alleged actions which related to his non-government connected activities. (Commission Opinion 91-20); See also, *Howell v. State, Del. Supr.*, 421 A.2d 892 (1988)(in interpreting misconduct in office statute, Court noted that it referred to “official functions,” except for one provision).

ACCEPTING THINGS OF MONETARY VALUE

Client Names Employee in Will

Respondent, as part of her public employment, dealt with an individual who was of below-normal intelligence. During many years of interacting, the State employee was required to assist the individual with, among other things, financial matters. A strong relationship developed between the two. Respondent and another State employee, as a result of their employment, were designated as signatories on the individual’s bank account. Respondent received and disbursed the individual’s paycheck. All monies were accounted for. When the individual wanted to name Respondent as a beneficiary in his will, Respondent told him it would put her in a bad spot. Respondent and another State employee chose an attorney for him from the yellow pages and Respondent drove him to the appointment. The attorney testified that he met privately with the individual; interviewed him extensively; and was of the view that the individual understood what he was doing. The attorney also sought the opinion of a treating doctor, who responded that the individual was competent to make a will. The attorney also testified that he met with the individual four or five other times, and although Respondent accompanied the individual on each trip, the attorney never had the impression Respondent was exerting undue influence over the individual. Respondent was named as a beneficiary in the will and as a beneficiary to the individual’s insurance policy. Respondent was later removed as a beneficiary to the will after telling the individual that a proposed stipulation provided that any money Respondent received would be given to charity. The individual said he did not want his hard earned money to go to charity and that if she could not have it, he would change everything. Respondent also was removed as a beneficiary to the life insurance policy. Without Respondent’s knowledge, the individual, at his attorney’s suggestion, prepared a durable power of attorney naming Respondent and another State employee as attorneys in fact. When Respondent learned of the action, she immediately notified her supervisor and others at the agency.

A complaint was filed alleging Respondent was: (1) pursuing a course of conduct which could raise suspicion among the public that she was engaging in acts which violate the public trust, reflecting unfavorably on the State and its government, 29 *Del. C.* § 5806(a); (2) accepting compensation, gifts or other things of monetary value under circumstances in which acceptance may result in impairment of independence of judgment in the exercise of official duties and may result in an adverse effect on the

confidence of the public in the integrity of the government, 29 *Del. C.* § 5806 (b)(1) and (4); and (3) using public employment to secure unwarranted private advancement or gain, 29 *Del. C.* § 5806 (e).

The Commission found that Respondent had not violated any of these provisions. It specifically found: Respondent endeavored to follow the proper course of action by pleading with the individual not to name her as a beneficiary; the individual removed her as a beneficiary; on learning she was named in the power of attorney, she informed her supervisor and others at the agency; and she did not accept any compensation, gifts or things of monetary value during the course of employment.

Although not finding a violation, the Commission recommended Respondent be dropped from the power of attorney and the checking account. It also recommended that the agency develop

guidelines for its employees so they would know what action to take if they learned they were named in wills, insurance policies, or powers of attorney by a client. **(Commission Opinion 91-15).**

Lodging, Food and Travel

The Commission was asked to grant a waiver to the Director of Company Regulation, Department of Insurance, to permit her to accept an invitation from an insurer regulated by the Department to travel out of the country to help establish a regulatory operation for insurance in former Soviet Union countries. The regulated insurer was selected as the exclusive reinsurer in the Russian Republic and was pursuing similar exclusive contracts with the Baltic Republics. The contracts with a Delaware company made it foreseeable that when Russia established an insurance industry its entry into the American market would probably be through Delaware. The director was invited because of her ten years of experience in insurance regulation and assistance to Latvians in drafting their insurance code.

The Commission was advised that the Insurance Department travels regularly at the expense of the insurance industry to examine regulated companies. Costs paid by the regulated insurers covers travel, board, food, and an hourly fee. The employees accept no honoraria. The procedure eliminates costs to the State and is standard procedure in all States and is within federal guidelines. The Commission heard testimony that there are very specific guidelines for regulating insurance companies and there is no area of “judgment calls” which could be slanted toward playing favorites with the paying insurer.

For this trip, the Commission was advised that the State would benefit from not paying the costs and from having the opportunity to assist in insuring uniformity of regulation in the insurance industry from this market. It was told the trip would be Spartan and the schedule “backbreaking.”

Waivers may be granted where the literal application of a prohibition in a particular case is not necessary to achieve the public purpose of the Code or would result in an undue hardship on any employee, officer, official or State agency. 29 *Del. C.* § 5807 (a). Specific prohibitions considered by the Commission

were: (1) pursuing a course of conduct which will raise suspicion among the public that the individual is engaging in conduct in violation of the public trust and will not reflect favorably on the State and its government, 29 Del. C. § 5806 (a); (2) incurring obligations in substantial conflict with the proper performance of official duties, 29 Del. C. § 5806 (b); and (3) accepting any compensation, gift, payment of expenses or anything of monetary value under circumstances that would impair judgment, 29 Del. C. § 5806 (b) (1) - (4).

Based on the specific facts of this specific trip, the Commission granted a waiver. (**Commission Opinion 91-14**).

STATE PUBLIC INTEGRITY COMMISSION

SYNOPSIS OF 1992 OPINIONS

JURISDICTION

Honorary Officials

A State agency asked whether members of a Council, established to advise a Departmental Secretary on certain matters, were subject to the State Code of Conduct. Council members were, pursuant to law, appointed by the Governor. They received no compensation but could be reimbursed for actual and necessary expenses incurred in performing official duties.

An “honorary State official” is “a person who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses).” 29 *Del. C.* § 5804 (13).

The Commission concluded that the statute reflected legislative intent to include within the Code’s coverage all Honorary State officials. The Commission viewed the important consideration as the authority and responsibility of the office, not just compensation. (**Commission Opinion 92-1**).

Elected Officials

Complainant alleged that an elected official engaged in improper conduct. Some of the alleged conduct occurred prior to January 23, 1991, the effective date of the State Ethics Code. Those allegations were dismissed on the basis that the alleged improper conduct occurred well before enactment of the Code of Conduct and the individual would not have been on notice of the standards to which they were to be held. *Bowie v. City of Columbia*, 378 U.S. 347, 350-51 (1964)(all are entitled to be informed as to what the State commands or forbids).

The Respondent also argued the Commission did not have personal jurisdiction because Respondent was no longer an elected official. The Commission concluded that nothing in the Code suggested that by leaving State employment or office an individual was insulated from responsibility for having violated the Code while in office. It noted that the “post employment restrictions” show a legislative intent to retain jurisdiction over former employees and officers for conduct occurring during their tenure with the State. *See*, 29 *Del. C.* § 5805(d). The Commission also found that as a policy matter, the consequences of violating the Code of Conduct should not be avoided merely by leaving office. The Commission noted that

it was not saying former employees and officers should worry indefinitely that charges under the Code might be brought against them long after leaving State service. The Commission noted that the charges were known to the individual before leaving public office and that a preliminary hearing, including discussion of issues raised in the complaint, occurred while Respondent was still in office.

After several pretrial conferences, rulings, stipulations, receipt of documentary evidence, and the taking of testimony, the Commission concluded that the remaining count should be dismissed for lack of “clear and convincing evidence,” the standard of proof required to find a violation. (**Commission Opinion 92-09**).

Running for Elective Office

A State employee requested a determination of whether there would be a conflict of interest if he ran for an elected State office while employed by the State. The Commission found nothing in the Code of Ethics specifically prohibiting such activity. However, it noted that should the employee be elected, he should be aware that the Code would apply in toto. (**Commission Opinion 92-2**). (*Merit Employees, See, 29 Del. C. § 5954 and Att’y Gen. Op. No. 78-016 (Oct. 5, 1978)*).

NOTE: The Commission’s advisory opinions must be based on a particular factual situation. *29 Del. C. § 5807(c)*. Certain persons covered by the Code of Conduct could be prohibited from maintaining a State position and elective office by other laws, e.g., State Election Commissioner cannot hold or be a candidate for office, *15 Del. C. § 301*; Public Integrity Commission members, formerly State Ethics Commission, cannot hold elected or appointed U.S. or State office, or be a candidate for such office, *29 Del. C. § 5808(b)*. Readers should be alert to other statutes or decisions restricting such actions, e.g., *29 Del. C. § 5954* regarding political activities by State employees; *In Re: Request of the Governor for an Advisory Opinion, Del. Supr., 722 A. 2d 307 (1998)*(*State trooper cannot hold dual positions as trooper and State Representative*).

CONCURRENT EMPLOYMENT

A State employee asked whether his part-time business conflicted with his State duties. The emphasis of his part-time business was to provide certain testing, counseling, consultation and analyses to clients. The clients were not clients of his State agency; they were not State employees; and they were not pursuing litigation against the State in matters on which he tested, counseled, consulted or analyzed. His State duties did not include any involvement with the private sector in similar matters.

The Code prohibits employees from accepting employment where it might result in: (1) impairment of judgment in official duties; (2) preferential treatment to any persons; (3) decisions outside official channels; and (4) any adverse effect on the public’s confidence in the integrity of the government. *29 Del. C. § 5806(b)*.

Based on the employee's representation, testimony from a representative from his agency, and his agreement not to perform his part-time job during regular State working hours, and with the condition that if a conflict arose in the future he would come back to the Commission, no violation was found. **(Commission Opinion 92-3).**

A State employee wished to engage in part-time employment as a consultant with a firm and anticipated it would have clients from Delaware, New Jersey, Maryland and Pennsylvania. The firm would offer services similar to services performed by the employee in his State position. The employee stated that he realized a potential conflict of interest would arise with Delaware clients. He stated that his activities would be restricted to clients from the other States.

The Commission found that, even if the employee were not a party to the actual work, the concurrent employment with a firm that does business in Delaware, would give rise to a perception of a conflict of interest under *29 Del. C. § 5806(a)*, which prohibits conduct that would raise suspicion that the public trust was being violated. It also would violate *29 Del. C. § 5806(b)(4)*, which prohibits accepting other employment under circumstances in which such acceptance may result in any adverse effect on the confidence of the public in the integrity of the government. **(Commission Opinion 92-7).**

An employee's State position was as a Senior Counselor. He wished to take a part-time job with a company owned and operated by his brother to eliminate some of the inconvenient and late hours for his brother. The part-time position could place the employee in the position of giving counseling services as a State employee to some of the persons he would have as clients in his brother's business. Also, as a counselor, he would learn confidential information about the State client that could be useful to his brother's business if the confidential information were disclosed. He also could be in the position of identifying for the State client the companies that offered the type of service provided by his brother's firm.

The Commission found that the significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." *29 Del. C. § 5806(a)*. Actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" that the conduct reflects unfavorably.

While the Commission had no doubt that the employee was honorable and wished to accept part-time employment to help his brother, it concluded that the employee's daily responsibilities could likely be perceived as pursuing a course of conduct subject to suspicion by the public and that his brother's competitors, whether justified or not, could perceive the employee as being in a favored position by virtue of his State employment to steer business to his brother. It also concluded that although a mechanism was in place to provide an alternate counselor, it could be perceived by the public that the employee might be influencing the disposition of the matter through his status as Senior Counselor. The Commission noted that

the employee's attorney acknowledged that: "It is difficult to argue down the perception."

Finally, the Commission concluded that no waiver could be granted as there was no evidence to show that, "The literal application of such prohibition . . . is not necessary to achieve the public purposes" of [the Act] or "would result in an undue hardship on any employee, officer, official or State agency." 29 *Del. C.* § 5807(a). If any hardship existed, it fell on the employee's brother, who was not a State employee, officer or official. (Commission Opinion 92-11).

APPEARANCE OF IMPROPRIETY

Financial Interest of Spouse

A State employee, who was a computer specialist, was tasked with requesting bids by phone or fax, when small items were needed in an emergency. The sealed bids or telephone responses were to be handled by other office personnel and then a committee of three decided who would be awarded the job. The employee's spouse owned a computer firm.

The agency asked if purchase of services from the spouse's company would implicate any provisions of the Code of Conduct.

The Commission concluded that any involvement of the employee in purchases from the spouse's company would violate 29 *Del. C.* § 5806(a), which prohibits conduct that would raise suspicion by the public that the public trust was violated. (Commission Opinion 92-4).

Connection with Civic Association

Two individuals were members of a regulatory agency which reviewed the licensure status of businesses. The individuals were both members of a civic association which was active in matters pertaining to certain types of businesses which were regulated by the agency. A request was made for a determination of whether it would be a conflict of interest for these two individuals to participate in the review of the licensure status of those particular businesses.

The Commission concluded it would violate 29 *Del. C.* § 5805(a), which prohibits the review or disposition of matters pending before the State where there is a personal or private interest that tends to impair independence of judgment in performing duties with respect to that matter. It also concluded that their involvement in the review would violate 29 *Del. C.* § 5806, which prohibits conduct that would have an adverse effect on the public's confidence in the government.

The Commission noted that its holding was without prejudice to the possible applicability of 29 *Del. C.* §

5805(a)(3), which provides that where a person has a statutory responsibility where he has a personal or private interest and the matter cannot be delegated, that the person may exercise responsibility with respect to that matter if they promptly notify the Commission and fully disclose the personal or private interest and explain why the responsibility cannot be delegated. **(Commission Opinion 92-5).**

ACCEPTANCE OF THINGS OF MONETARY VALUE

A State agency was charged with implementing a new federal law which pertained to the licensing of a certain profession. The members of the profession, who were required to be licensed by the State agency, were members of three associations related to the profession. The associations wanted to privately fund a barbeque for the agency's employees. The agency stated that the licensing program was a continuing one with new applicants applying on a regular basis. It requested a determination of whether the privately funded barbeque for the employees by the private associations would violate the Code of Conduct.

The Commission found that the activity would be contrary to 29 *Del. C.* § 5806(b)(2), which prohibits acceptance of other employment, any compensation, gift, payment of expenses or any other thing of monetary value where such acceptance may result in an undertaking to give preferential treatment to any person. It also found that the activity would violate 29 *Del. C.* § 5806(b)(4), which prohibits accepting anything of monetary value where such acceptance may result in any adverse effect on the public's confidence in the integrity of the government. **(Commission Opinion 92-6).**

STATE PUBLIC INTEGRITY COMMISSION

SYNOPSES OF 1993 OPINIONS

CONCURRENT EMPLOYMENT

An individual was elected to public office. He also held a part-time job as an auctioneer. He was hired as an auctioneer by the sheriff of the county where the sales occurred. He requested a decision on whether his concurrent employment violated the State Code of Conduct. The Commission was advised that the sales as an auctioneer were “completely divorced” from his public office. The Commission held that such outside employment did not create a conflict of interest. **(Commission Opinion 93-1).**

CONCURRENT POSITIONS

An individual served as an honorary State official on a State Board. “Honorary State officials” are persons who serve as appointed members, trustees, directors or the like of any State agency and receive not more than \$5,000 per calendar year in compensation. *29 Del. C. § 5804(13)*. The official was subsequently hired as the director of a State agency. He requested a determination of whether holding these concurrent positions created a conflict of interest. None of his decisions as an Honorary State official would have any effect on the State agency for which he worked. None of his activities for the State agency had any effect on the commission to which he was appointed. He advised the State Ethics Commission that he would decline any payment of expenses or the \$75 stipend he would normally receive from the position to which he was appointed. The Commission found no violation of the Code of Conduct. **(Commission Opinion 93-5).**

NOTE: The Code prohibits persons employed by the State who also serve in an elected or paid appointed position from accepting payment from more than one tax-funded source for duties performed during coincident hours of the workday. *29 Del. C. § 5822*.

A division director in a regulatory agency also served on a board which consisted of appointees from local and State government and other persons who were elected to the board. The board was responsible for overseeing facilities’ management of a public facility. Vendors for the facility were licensed and regulated by the division director’s State agency, but had no dealings with the board on which he served. He requested a determination of whether serving on the board created a conflict of interest. The Commission held that the director could serve in the dual capacity as long as he recused himself from any action with his agency whenever an application was made by a licensee in connection with the facility which the board managed. **(Commission Opinion 93-16).**

A State officer was asked to represent the State on a consortium of health care providers. The consortium was funded in part by a State commission to which the officer was appointed. He sought a decision of whether serving on the consortium conflicted with either his State position or his State appointment. He stated he would abstain from voting on consortium contracts that dealt with his agency or the commission on which he served. The Commission found no violation as long as he recused himself from matters that could create a conflict of interest or that could create a perception of such conflict. He was advised to bring any specific matters that arose to the Commission for an advisory opinion. **(Commission Opinion 93-19).**

POST-EMPLOYMENT

A State employee, who retired under the Early Retirement Option, asked if he could contract as an individual or as a consultant with his State agency. Employees cannot represent a private enterprise on matters before the State where they gave an opinion, conducted an investigation or were directly and materially responsible during State employment for two years after they leave State employment. 29 *Del. C. § 5805(d)*. At the time of this request, the General Assembly had passed legislation providing that persons who retired under the Early Retirement Option could not work for the State for five (5) years, except that in special cases the Early Retirement Committee could allow the individual to contract back to the State for a period of up to one year. 29 *Del. C. § 5301(d)(4)*. The Commission held that the employee's situation fell under the ERO Act and should be pursued with the Early Retirement Option Committee. **(Commission Opinion 93-2).**

A State employee submitted an application for a research grant to a national agency. It was prepared on his own time, including a week of annual leave. He subsequently left State employment to work in another State. The grant was later approved and once awarded would be performed by a company which contracted with the State agency for which he had worked. The research would involve a study of clients which the contractor obtained through its contract with the State. The former employee would be a principal investigator for the grant. The agency where he had worked would not receive funds from the proposed grant, but had entered an agreement endorsing the grant application and agreeing to work with the contractor on certain aspects of the research, such as providing a point of contact for information sharing, attending research team meetings, insuring the research did not affect another contract the agency already had with the contractor, referring eligible consumers to the research program, etc.

The Commission found that the employee's participation in the research program would not violate the post-employment restriction which prohibits former employees from representing a private enterprise on matters pending before the State for 2 years after terminating employment if the individual gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for the matter in the course of official duties while employed by the State. 29 *Del. C. § 5805(d)*. **(Commission Opinion**

PERSONAL OR PRIVATE INTERESTS

A State officer notified the Commission that in his official position he reviewed and approved contracts for services for his Department. A private enterprise which contracted with his Department employed his spouse. He noted that her employment represented a financial interest on his part and his review of such contract might appear improper. *See, 29 Del. C. § 5806(a)*. He delegated his authority to review such contracts to another individual in the agency.

The Code prohibits officers from reviewing or disposing of matters where there is a personal or private interest that tends to impair judgment. *29 Del. C. § 5805(a)*. The Code specifically identifies as an interest which “tends to impair judgment,” one where the individual reviews or disposes of matters where action or inaction would result in a financial benefit to the person or close relative to a greater extent than would occur for others who are in the same class or group. *29 Del. C. § 5805(a)(2)(a)*. A “close relative” means “a person’s parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.” *29 Del. C. § 5804 (1)*. Where there is such an interest, the person can delegate such authority. However, if the responsibility cannot be delegated, the individual must fully disclose to the Commission why the matter cannot be delegated. *29 Del. C. § 5805(a)(3)*.

The Commission found the delegation to be appropriate. **(Commission Opinion 93-3)**.

An individual seeking State employment was requested by the agency for which he intended to work, to seek a determination of whether his spouse’s operation of a private enterprise created a conflict of interest. The individual would be working in an area dealing with transportation and his spouse owned and operated a company that provided certain transportation services. While the spouse had to obtain a business license and the necessary permits for her company from the State, the company was not otherwise regulated by the State and did not contract with the department to which he had applied for a job or with any State agency. The individual seeking State employment did not have any direct involvement in the company’s operation, decision making or direction; did not own stock in the corporation; and was not an officer or director of the corporation. If he were hired by the State, he would not be involved in any decisions in his official capacity regarding his spouse’s business interest.

The Code prohibits employees from reviewing or disposing of matters before the State where there is a personal or private interest. *29 Del. C. § 5805(a)*. It also prohibits employees from acquiring a financial interest in a private enterprise where he has reason to believe it may be directly involved in decisions to be made by him in his official capacity. *29 Del. C. § 5806(c)*.

The Commission found no violation of the Code of Conduct under these circumstances.

(Commission Opinion 93-6).

Note: No State employee, officer or honorary official shall acquire a financial interest in any private enterprise which he has reason to believe may be directly involved in decisions to be made by him in an official capacity on behalf of the State. 29 *Del. C.* § 5806(c). Any State employer or officer who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency (and any honorary State official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee) shall file with the Commission a written statement fully disclosing the same. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the State. 29 *Del. C.* § 5806(d).

Complainant alleged that municipal officials improperly voted on a matter where they had a financial interest. Effective January 23, 1993, the Code of Conduct applied to local governments if they had not adopted a code at least as stringent as the State Code. 68 *Del. Laws* § 1, c. 433. The Code prohibits officials from participating in the review or disposition of matters where there is a personal or private interest which tends to impair a person's independence of judgment in the performance of duties. 29 *Del. C.* § 5805(a)(1). A person has an interest which tends to impair judgment if action or inaction would result in a financial benefit to the person to a greater extent than such benefit would accrue to others of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(b).

The "action" was a vote to impose a moratorium on a certain matter due to weather related reasons so that there could be a discussion at the next public meeting. There were no facts alleged showing that the vote resulted in any financial benefit to the town officials charged, and no prejudice accrued to any party. Accordingly, the complaint was dismissed. **(Commission Opinion No. 93-8).**

Complainant alleged that a local government official, in a legislative capacity, prepared a revised ordinance and submitted it to the town's Board of Commissioners. Complainant alleged that the official violated the Code of Conduct by reviewing and disposing of matters where there was a personal and private interest which tended to impair judgment in official decisions. 29 *Del. C.* § 5805(a). Complainant also alleged that the official had worked, not only with the town's attorney, but with unidentified citizens in preparing the revised ordinance. Upon request for identification of these individuals at a public meeting, the official refused to identify such persons, which complainant believed violated the Freedom of Information Act. *See, 29 Del. C. § 10001, et. seq.*

The Commission found no allegation that there was an attempt to pass the proposed revision without proper notice and an opportunity for opponents to be heard. The draft legislation had been made public. The Commission noted that officials are entitled to draft proposed legislation and can be assisted by a government attorney and other employees hired by the legislative body. It found that legislators are not prohibited from being assisted by unidentified private citizens in drafting proposed legislation under the

Code of Conduct provisions. There were no facts to support the allegation that the official had any personal or private interest in the matter. To the extent the activities violated the Freedom of Information Act (FOIA), that was not a matter for the Commission, as its jurisdiction is limited to the Code of Conduct. Enforcement of FOIA is within the Attorney General's jurisdiction. 29 *Del. C.* § 10005. (**Commission Opinion 93-10**).

An individual was appointed to serve on a regulatory agency but did not wish to execute the appointment until there was a determination that his financial holdings did not create a conflict of interest. In accepting the appointment, the individual would receive more than \$5,000 compensation per year. The Code of Conduct defines such persons as "State employees." *See*, 29 *Del. C.* § 5804(11)(a)(2). The Code requires State employees with a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency to file a disclosure statement. 29 *Del. C.* § 5806(d). The disclosure from this employee revealed that he was the president and majority stock holder in two corporations. Neither corporation was subject to the regulatory jurisdiction of, nor did they do business with, any State agency. However, the corporations had contracts with a company which was regulated by the agency to which the individual was appointed. The individual disclosed that the corporations would not, in the future seek contract work with any company regulated by the agency to which he was appointed. However, the corporations, to avoid default on the existing contracts, needed to complete the projects with the company regulated by the agency. The work was not a significant part of the corporations' business and the work was in its final phase.

The Code also prohibits employees from acquiring financial interests in a private enterprise directly affected by decisions to be made by them. 29 *Del. C.* § 5806(c). It also prohibits employees from having an interest in any private enterprise which is in substantial conflict with the proper performance of public duties. 29 *Del. C.* § 5806(b). The Commission found that neither of these provisions was implicated because the corporations were not affected by the regulatory agency; did not directly or indirectly benefit from any decisions made by the regulatory agency; and had insignificant business with a regulated company.

The Commission also found that performing responsibilities for the regulatory agency would not create an appearance of impropriety, which is addressed by 29 *Del. C.* § 5806(a), § 5806(b)(4) and § 5811(2). It found that not only were the businesses not regulated by his agency; that the contracts were inconsequential to agency action; that the contracts were almost completed and no further contracts would be pursued, but that the individual had initiated the request for an opinion and filed a disclosure statement on his own and had initiated discussion and disclosed these facts during Senate confirmation hearings. (**Commission Opinion 93-12**).

JURISDICTION

Complainant alleged that State officers contracted with a private enterprise for services which

complainant alleged resulted in unnecessary expenditure of State funds and could have led to unjust enrichment of the non-State persons entering the contract because they were paid more than complainant believed should have been paid.

The Commission found that to the extent the complaint alleged unjust enrichment by the private contractor, it had no jurisdiction, as the Commission's jurisdiction is limited to State employees, officers and officials, not private individuals or enterprises. *See, e.g., 29 Del. C. § 5805, § 5806.*

To the extent the complaint alleged the conduct of the State officers in entering the contract was improper, the Commission held that its jurisdiction extended only to conflicts of interest identified in the Code and that no facts indicated that the officers' actions fell within the statutory provisions. The Commission noted that it does not have the unrestricted, roving authority to review the wisdom or propriety of contracts entered by State agencies and officers or to review administrative efficiency of State government where no violation of the Code of Conduct is involved. The Commission recommended that complainant contact the State Auditor or other appropriate authority. **(Commission Opinion 93-7).**

Complainant alleged that he and other employees were directed by medical professionals to perform certain actions complainant believed to be illegal. The Commission declined jurisdiction because it is not empowered to review every alleged violation of laws and regulations that are not within the acts over which the Commission has authority. The individual was advised that under the specific facts, the alleged charges might more appropriately be referred to the State Board of Medical Practice. **(Commission Opinion 93-7).**

Complainant alleged that certain elected municipal officials engaged in activities prohibited by the Code of Conduct. Some of the alleged activities occurred before January 23, 1993. The General Assembly had provided that, "It is the desire of the General Assembly that all counties, municipalities and towns adopt code of conduct legislation at least as stringent as this [Code of Conduct] act to apply to their employees and elected and appointed officials." *67 Del. Laws c. 417 §2.* "Subchapter I, Chapter 58 of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993." *68 Del. Laws c. 433 § 1.* The Commission found that as the municipality had not adopted a Code of Conduct, it became subject to the law on January 23, 1993. However, the Commission held that it would be an anomaly to hold the Code violated by acts occurring well before the Code applied to municipalities because at the very least public servants should have notice of the specific standards to which they are held. *Bowie v. City of Columbia, 378 U.S. 347, 350-51(1964).* It therefore dismissed the charges that occurred prior to January 23, 1993. **(Commission Opinion 93-8).**

Complainant alleged that a State regulatory agency failed to: (1) hold a licensing hearing for him;

(2) properly interpret the law during a hearing; (3) ascertain the actual ownership of property during a hearing; (4) publish an opinion in a timely manner, allegedly affecting complainant's appeal rights; (5) hear certain evidence; (6) prevent an agency member from speaking during a hearing because complainant believed the speech constituted testimony on behalf of an applicant; (7) obtain evidence of an applicant's debts; and (8) announce meetings as required by the Freedom of Information Act. The Commission's jurisdiction is limited to the Code of Conduct. It does not have the unrestricted, roving authority to review administrative actions where there is no alleged specific violation of the Code of Conduct. The Commission recommended the individual file an appeal or take proper court action concerning the agency's procedures and decisions. The Freedom of Information Act concern would be within the Attorney General's jurisdiction. *29 Del. C. § 10005. (Commission Opinion 93-17).*

PROCEDURE

An individual sent a letter to the Commission alleging improper activities by certain local government officials. He also asked if the State Code of Ethics applied to the specific municipality. The Commission responded that the Code of Conduct applies to municipalities that did not adopt their own code of conduct by January 23, 1993. *See, 68 Del. Laws c. 433 § 1.* The Commission advised it had jurisdiction over the specific municipality referred to in the letter and advised the writer that if he wished to initiate an investigation into possible violations of the Code of Conduct, a sworn, detailed complaint must be filed. *See, 29 Del. C. § 5810(a). (Commission Opinion 93-9).*

An individual wrote the Commission regarding an investigation by a State officer. The officer's authority to investigate was not questioned, but his motives were. The Commission advised that the Code of Conduct and the Commission Rules and Regulations require complaints to be in the form of a sworn statement with specific facts, and upon receipt the Commission would consider the complaint. *See, 29 Del. C. § 5810(a). (Commission Opinion 93-15).*

CONFLICT OF INTEREST

A State officer asked whether it would be an ethical violation for him to rent an apartment to a State employee. The employee was not assigned to his agency and did not report to the officer or anyone in his agency. She performed reception work for a suite of offices that the State officer used about three days a week. The offices were occupied full time by the individual to whom the employee reported. The employee served as the receptionist to all users of the suite and was available to do secretarial work for all persons in the office. The employee was looking for a temporary rental while she purchased a home. The officer had a condominium for rent. The Commission found no violation as he was not incurring any obligation "in substantial conflict" with performing his official duties. *29 Del. C. § 5806(b). (Commission Opinion 93-14).*

STATE PUBLIC INTEGRITY COMMISSION

SYNOPSES OF 1994 OPINIONS

JURISDICTION

Complainant, who was a prisoner, alleged that a State attorney was negligent in handling a case. It was alleged that the attorney had not pursued matters and had not zealously represented his client. Complainant alleged that the attorney had violated numerous Delaware Lawyers' Rules of Professional Conduct. The Commission's jurisdiction is limited to interpreting and enforcing the provisions of Title 29, Chapter 58. *See, e.g., 29 Del. C. § 5809.* Complainant did not allege any violation of any provision in Chapter 58. The Commission held that interpretation and enforcement of the Lawyers' Rules of Professional Conduct was not within the Commission's jurisdiction and referred complainant to the Office of Disciplinary Counsel. (**Commission Opinion 94-01**).

NOTE: The comments to the Delaware Lawyers' Rules of Professional Conduct provide that "A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct . . . and to statutes and government regulations regarding conflict of interest." *See, Rules of Professional Conduct, R. 1.11, comment.*

Complainant, who was a prisoner, alleged that a State attorney provided ineffective assistance of counsel because the attorney refused to file a motion relating to the case. Complaint alleged the attorney was violating numerous rules of the Delaware Lawyers' Rules of Professional Conduct. It was not alleged that the attorney violated any provisions of Title 29, Chapter 58. The Commission held that it had no jurisdiction over the Rules of Professional Conduct and referred complainant to the Office of Disciplinary Counsel. (**Commission Opinion 94-02**). (See also, **Commission Opinion 94-01**).

Complainant, who was a prisoner, alleged that a State attorney violated numerous rules of the Delaware Lawyers' Rules of Professional Conduct because the attorney allegedly failed to check crucial facts and failed to file a motion to dismiss. Complainant did not allege violations of any provisions of Title 29, Chapter 58. The Commission held it had no jurisdiction to interpret and enforce the Rules of Professional Conduct and referred complainant to the Office of Disciplinary Counsel. (**Commission Opinion 94-03**). (See also, **Commission Opinion 94-01 and 94-02**).

Complainant alleged that the prison facility in which he was housed was overcrowded; that the prison tried to conceal that information; and that he and other inmates were denied access to the courts.

He did not allege any violation of Title 29, Chapter 58. The Commission found it did not have jurisdiction and suggested complainant address his complaint through the prison grievance process or possibly through the court system. **(Commission Opinion 94-04).**

Complainant, who was convicted of a crime, filed a complaint with an agency alleging improper conduct by a number of attorneys employed by a State agency. Complainant asserted that the prosecuting attorney had solicited misleading statements from a witness at trial and that the defense attorney had not used the right strategy and tactics in defending the case. The agency's attorney issued an opinion finding there was no violation of the Rules of Professional Responsibility, and that most of his concerns would be more properly addressed in the courts. Complainant then filed a complaint with the Public Integrity Commission alleging the decision was "erroneous" and that the attorney had "sherked [sic] his ethical responsibility." He identified no violation of Title 29, Chapter 58. The Commission found it had no jurisdiction and advised complainant to submit the matter to either the Board on Professional Responsibility or the Delaware Supreme Court. **(Commission Opinion 94-08).**

Complainant filed a complaint against a member of the Delaware General Assembly. The Commission ruled that members of the General Assembly were excluded from the definitions of State employee, State officer, and Honorary State official found in 29 *Del. C.* § 5804. As the Code of Conduct applies to State employees, officers and honorary officials, and members of the General Assembly are not within those definitions, the Commission held it had no jurisdiction over the complaint. Complainant argued that because the General Assembly member had previously filed a complaint against complainant, the member of the General Assembly had subjected himself to the Commission's jurisdiction. The Commission held that the argument was without merit. The Commission referred the matter to the Attorney General and the appropriate Ethics Committee of the General Assembly. **(Commission Opinion 94-14).**

POST-EMPLOYMENT

A State agency requested an advisory opinion on the post-employment restriction. Advisory opinions may be issued on the written request of a State employee, officer, honorary official or a State agency. 29 *Del. C.* § 5807(c). The restriction provides that former employees cannot represent or assist a private enterprise on any matter involving the State, for a period of two years after termination of employment or appointed status with the State, if they gave an opinion, conducted an investigation or otherwise were directly and materially responsible for such matter in the course of official duties. 29 *Del. C.* § 5805(d). In this instance, while employed by the State, the employee was responsible for conducting a technical evaluation that was part of the selection process which led to the award of a contract. Less than a year after the evaluation, the employee left State employment and after working in private employment in other areas, accepted a position with the private enterprise that was selected to perform the State contract. The Commission found that the employee gave an opinion when he conducted the technical

evaluation, and therefore was prohibited from working on that specific contract for the private enterprise for a period of two years after his State employment terminated. **(Commission Opinion 94-05).**

A waiver of post-employment restrictions was granted to a Department of Health and Social Services (DHSS) employee, who was the lead person with the Delaware Health Care Commission in developing policy for the managed care program, and was assigned the lead responsibility within DHSS to oversee implementing the program. She subsequently retired and the Department sought a waiver to the post-employment restriction, which prohibits former employees from representing or assisting private enterprises in matters before the State for two-years after leaving employment, in order to award her a contract to continue carrying out the assignment. *29 Del. C. § 5805(d)*.

“Private enterprise” means any activity conducted by any person, whether conducted for profit or not for profit. *29 Del. C. § 5804(8)*. The Commission found that the broad definition of "private enterprise" encompassed such contract and that her actions, while an employee, made her "materially responsible" for the matters upon which she would continue to work.

It granted a waiver to the post-employment prohibitions because if she were not permitted to continue the work after retirement, it would cause an undue hardship upon the Department in carrying out its mandated time limitations in implementing the program. *See, 29 Del. C. § 5807(a)*(waivers may be granted if a literal application of the prohibition in a particular case is not necessary to achieve the public purposes or would result in an undue hardship on any employee, officer, honorary official or State agency). The Commission also noted that the post-employment contract would not be an increase in her hourly rate and she would not be working full-time. **(Commission Opinion 94-10).**

A private enterprise, which had a contract with a State agency, wished to employ one of the agency's former employees. The Commission found that the employee, in the course of State duties, had not given an opinion, conducted an investigation and was not directly responsible for “such matter” [the contract]. The Commission based its conclusions on the fact that the employee had no input to or control over the subject matter of the contract. **(Commission Opinion 94-11).**

PROCEDURE

The Code of Conduct provides that the Commission may act “upon the sworn complaint of any person.” *29 Del. C. § 5810(a)*. It also provides that the Commission is to follow the procedural rules in § 5810 and can establish such other procedural rules as shall not be inconsistent with the rules prescribed in the Code. *29 Del. C. §5809 (6)*. The procedural rules require that a complaint: (1) be sworn; (2) contain particular facts, and (3) identify the section of the Code believed to be violated. Complainant submitted two unsworn complaints; did not detail facts sufficiently for the Commission to determine jurisdiction; and did not identify the Code sections believed to be violated. Complainant was notified to

submit sworn complaints with more facts and with Code sections identified. Copies of the Code and Commission's rules were provided. (**Commission Opinion 94-09 and 94-12**).

The Commission issues advisory opinions based on a "particular fact situation." 29 *Del. C.* § 5807(c). A State employee asked if contact with a private firm where the employee's spouse worked created a conflict. The issue became moot because the spouse left the firm. Thus, there was no longer a "particular fact situation" on which the Commission could act. (**Commission Opinion 94-07**).

The Commission was asked if a State officer's appointment to a nonprofit organization created a conflict. The requesting agency submitted the legislation creating the organization, but provided no details allowing a decision based on "a particular fact situation," as required by 29 *Del. C.* § 5807(c). The Commission requested additional facts. (**Commission Opinion 94-15**).

CONCURRENT EMPLOYMENT

Some State employees asked if a conflict would exist if they started a private enterprise, while employed by a State agency. No State employee, officer or honorary official shall have any interest in any private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No employee, officer, or honorary official shall accept other employment, any compensation where such acceptance may result in: (1) impairment of independence of judgment in the exercise of official duties; (2) giving preferential treatment to any person; (3) making government decisions outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 *Del. C.* § 5806(b). The Commission concluded the proposed endeavor would conflict with their agency duties because the proposal entailed technical assistance to private enterprises in areas evaluated by the employees in their State jobs. No facts were presented to justify a waiver under 29 *Del. C.* § 5807(a). (**Commission Opinion 94-13**).

The Commission granted a limited waiver to an appointee on the Criminal Justice Council, to complete a grant application for SODAT-Delaware, Inc., for which she was contracted. Prior to being appointed to the Criminal Justice Council, the appointee had contracted to complete four applications. She had completed three and was working on the fourth at the time of her appointment. The waiver was limited to the completion of the fourth application. The waiver was granted because it would be an undue hardship on the appointee if she were required to break the contract and it would be an undue hardship on the organization to find a new contractor at that stage. (**Commission Opinion 94-16**).

STATE PUBLIC INTEGRITY COMMISSION

SYNOPSES OF 1995 OPINIONS

APPEARANCE OF IMPROPRIETY

A State employee managed certain State housing facilities. The employee hired a tenant from one facility for child care. The Commission held that the arrangement violated the prohibition on engaging in acts in violation of the public trust and which would not reflect favorably on the State. 29 *Del. C.* § 5806 (a) and (b). The Commission's concern was that, as a minimum, it might appear that the tenant would receive preferential treatment from the State employee.

The Commission may grant a waiver if it determines the literal application of such prohibition in a particular case is not necessary to achieve the public purpose of the statute or would result in undue hardship on any employee, officer, honorary official or State agency. 29 *Del. C.* § 5807(a). The employee testified that she had no relatives to care for the children, the costs of child care with other sources were prohibitive, and she could not find feasible alternative care, among other things. Agency testimony was that the employee's responsibilities involving the exercise of discretion regarding this tenant could be given to the employee's supervisor or another agency official. With that restriction, the Commission granted a waiver. **(Commission Opinion 95-16).**

A State regulatory commission asked whether its members would be in violation of the Code of Conduct if they contracted with a private firm to provide legal counsel when that firm also would represent private clients before the same regulatory agency.

"State employee" includes "an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such services in a calendar year." 29 *Del. C.* §5804(11)(a)(2). Members of this agency are appointed and each receives more than \$5,000 annually. Thus, they are subject to the Code of Conduct.

The applicable provisions in this situation are:

! Pursuing a course of conduct which would raise suspicion among the public that he is engaging in acts in violation of the public trust and which will not reflect favorably on the State and its government. 29 *Del. C.* §5806(a); and

! Disclosing confidential information. 29 *Del. C.* §5806 (f) and (g).

In determining the applicability of these provisions, the Commission noted that State employees, officers or honorary officials cannot represent or otherwise assist private enterprises in matters before the State

agency with which they are associated by employment or appointment. 29 *Del. C.* §5805 (b)(1). Contracts violating the Code of Conduct may be voidable. 29 *Del. C.* §5805(g). Here, the contractor may not be subject to the Code of Conduct, but the effect would be that the agency could achieve by contract that which otherwise is not permitted. Specifically, the contractor, while working for the State, could also represent or assist their private enterprise in matters before the same agency. The risk exists that the power or discretion vested in public authority might be used to benefit a private client or that an unfair advantage could accrue to the private client by access to confidential government information about the client's adversary. See, *Midboe v. Com'n. on Ethics for Pub. Employees*, *La. Supr.*, 646 So.2d 351 (1994); *Howard v. Florida Com'n. on Ethics*, *Fla. App.*, 421 So.2d 37 (1982); *Delaware Lawyers' Rules of Professional Conduct, Rule 1.11 Comment* (lawyer representing government, whether employed or specially retained, is subject to Rules of Professional Conduct and to statutes and government regulations on conflicts of interest).

While it is presumed the attorney would not improperly use or disclose such information, there is a question of whether such access would appear improper. As a factual matter, it was not feasible to make a complete and isolated separation of the private clients from the agency representation. For example, while representing the agency, the attorney/firm could perhaps establish precedent applicable to all regulated entities appearing before the agency--including the private clients.

The Commission also considered the statutory purpose of the agency. That statute identified a very public purpose for the agency. In light of its statutory duties to the public, the public could well look with suspicion on an agency hiring an attorney to "work both sides of the street."

The Commission concluded that for the agency and/or its members to agree to a contract with such results would, as a minimum, create an appearance of impropriety. **(Commission Opinion 95-20).**

The head of a State agency was asked to appear in a video prepared by a private enterprise. In the past it had contracted with the agency, and was expected to seek future contracts. The contracts were in a highly competitive area. In reviewing the video script, the Commission found that it was a promotional/marketing tool for the firm, and statements to be made by the agency head served little, if any, public purpose. The Commission found that appearance in the video might be seen by competitors and/or the public as an endorsement of that firm. While the agency said it was willing to appear in videos for all competitors, the Commission found that was not a viable solution because some firms might not have the capacity to engage in such marketing efforts. Further, because the individual participated in reviewing the contract applications, there could be a perception that the individual's judgment was impaired or that preferential treatment could result. The Commission held that the individual could not appear in the video. **(Commission Opinion 95-36).**

Complainant alleged that a State agency conducted an investigation and did not inform complainant until the investigation was completed and referred to another agency for determination of whether any administrative, civil or criminal action, might be taken against complainant as a result of the investigatory findings. Complainant alleged that failing to inform her of the investigation violated the prohibitions against: (1) engaging in conduct that would raise suspicion among the public that the employee/officer was engaging in acts in violation of the public trust, 29 *Del. C.* § 5806(a); (2) using public office to secure unwarranted privileges, private advancement or gain, 29 *Del. C.* § 5806(e); and disclosing confidential information beyond the scope of the employee/officer’s public position, 29 *Del. C.* § 5806(g).

The Commission found federal and State laws recognizing that investigations may be kept confidential (citations omitted), and that, by law, it does not violate the 4th or 6th amendment for investigators not to inform an individual he is under investigation. *Chrisco v. Shafran*, *D. Del.*, 507 *F. Supp.* 1312, 1316 (1981). The reason for confidential investigations is to shield the information gathering process from premature discovery; protect the identity of informants, investigative techniques, the investigator, and the investigated. *Annotation, What Constitutes Files Exempt from Disclosure under Freedom of Information Act*, 17 *ALR Fed.* 522 § 7 (1973). Because the law permits confidential investigations, the Commission held that not disclosing the investigation to complainant would not raise suspicion that the public trust was violated. It found no evidence to support the claim that Respondents disclosed confidential information during the investigation. In fact, complainant’s factual allegations were that they kept the investigation confidential. The Commission found no evidence to support the claim that Respondents obtained any personal gain or benefit by conducting a confidential investigation. (**Commission Opinion 95-5**).

JURISDICTION - PERSONAL JURISDICTION

School Board Members

A school board member asked for an advisory opinion. The Commission may issue advisory opinions on the request of any “State employee,” “State officer,” or “honorary State official.” 29 *Del. C.* § 5807(c). The Commission concluded that school board members are not within those terms. A “State employee” is an individual who receives compensation as an employee of a State agency. 29 *Del. C.* § 5804 (11). School board members receive no compensation. 14 *Del. C.* § 1046. “Honorary State officials” are persons appointed to their positions. 29 *Del. C.* § 5804 (13). Generally, school board members are elected, not appointed. 14 *Del. C.* § 1050. “State officers” are individuals required by law to file financial disclosure statements, and the Code specifically exempts elected and appointed officials of public school districts from that group. 29 *Del. C.* § 5812. (**Commission Opinion 95-4**; See also, **Commission Opinion 91-16, pp. 7-8, supra**).

“Non-State Employees”

An agency advised the Commission that it employed two categories of personnel. One category was hired under the State Merit system and paid through the agency's State budget. Other employees were not subject to the Merit system and were paid by appropriated special funds and non-appropriated special funds. The agency, for lack of a better term, referred to the latter group as "non-State employees." The agency asked whether the "non-State employees" were subject to the Commission's jurisdiction for purposes of implementing and administering the Code of Conduct.

The Code of Conduct governs the conduct of officers and employees of the "State." 29 *Del. C.* § 5802(1). "State" includes any "State agency." 29 *Del. C.* § 5804(8). "State agency" includes "all public bodies existing by virtue of an act of the General Assembly . . ." 29 *Del. C.* § 5804 (9). The Commission found that this agency was created by statute and was referred to as an agency of the State government in that statute. The Commission concluded that the "non-State employees" were under the direction and control of the "State agency," even though funding for the employees was primarily from federal funds. It heard testimony that the employees were not independent contractors and that personnel matters, such as hiring and termination were decided by the State agency, not any federal agency. Based on these facts, the Commission determined that such employees were subject to the Commission's jurisdiction. **(Commission Opinion 95-15).**

National Guard

The Commission was asked if Delaware National Guard members were subject to the State Code of Conduct. The Code applies to "State employees." 29 *Del. C.* § 5805. "State employees" are defined as "any person who receives compensation from a State agency." 29 *Del. C.* § 5804(11)(a). "State agency" includes departments existing by virtue of an act of the General Assembly. 29 *Del. C.* § 5804(10). The General Assembly, by statute, designated the Department of Military Affairs as a "Department of the Executive Branch of government in a like manner of all other such departments," and determined that the Delaware National Guard, "when not in the service of the United States," is governed pursuant to the laws of the State. 20 *Del. C.* § 121. State law directs when Guard members are to be paid from State appropriations. *See*, 20 *Del. C.* §§ 123(8), 127, 181, 182, 184. Accordingly, the Commission held that Delaware National Guard members are subject to the Code of Conduct when not in the service of the United States.

The Commission noted that the National Guard must conform to federal statutes and regulations governing the Armed Forces of the United States insofar as applicable and not inconsistent with the Constitution of Delaware or Title 20 of the Delaware Code. 20 *Del. C.* § 103. Thus, federal statutes or regulations pertaining to ethical conduct for National Guard members also could be applicable. The Commission declined to address whether federal statutes or regulations could preempt the Delaware State Code of Conduct absent a particular factual situation. **(Commission Opinion 95-19).**

Attorneys Under Contract with the Government

A State agency posited that attorneys contracting with the State are not “State employees” and, thus not subject to the Code of Conduct. The Commission declined to rule on whether contractual attorneys are “State employees” as such determination was not required for the Commission to reach a decision. (*See, Commission Opinion 95-20, pp.27-28, supra*). However, it noted that there is law indicating that attorneys who contract with the State may be subject to the Code. *See, Delaware Lawyers’ Rules of Professional Conduct, Rule 1.11, comment* (lawyer representing government, whether employed or specially retained by the government, is subject to Rules of Professional Conduct . . . and to statutes and government regulations regarding conflicts of interest); *29 Del. C. §5805 (g)* (contracts violating Code of Conduct are voidable by court action); *Midboe v. Com’n. on Ethics for Pub. Employees, La. Supr., 646 So.2d 351 (1994)* (attorney who previously worked for State could not represent private clients in transactions with that agency for 2 years); *Howard v. Florida Com’n. on Ethics, Fla. App., 421 So.2d. 37 (1982)* (State Ethics Code applied to attorney who contracted with State school board as its attorney; conflict existed as he was also a partner in the firm providing legal services to the board.) (**Commission Opinion 95-20**).

Members of the Judiciary

Complainant alleged that there are husband and wife judges in the Judiciary. To the extent complainant was alleging that hiring relatives violates the restriction on reviewing or disposing of matters where there is a personal or private interest which tends to impair judgment, and that by law, an interest that tends to impair judgment exists if action/inaction would result in a financial benefit or detriment to a “close relative,” which is defined to include a spouse, *29 Del. C. § 5805(a) and (b) and § 5804(1)*, the Commission dismissed the allegation. It noted that: (1) no facts supported an allegation that a husband or wife in the Judiciary appointed their spouse; (2) the Delaware Constitution, art. IV §3, establishes the method of judicial appointments and requires appointment by the Governor, with the Senate’s consent; and (3) even assuming such hiring decisions were made by a member of the Judiciary, such members are governed by the Judicial Code of Conduct, not the State Code of Conduct. *See, 29 Del. C. § 5804(12)*.

Accordingly, such action, even if assumed true, would not be within the Commission’s jurisdiction. (**Commission Opinion 95-5**).

JURISDICTION - SUBJECT MATTER

Temporary Restraining Orders/Preliminary Injunctions

Complainant filed a motion with the Commission for a temporary restraining order and preliminary injunction prohibiting a State agency from proceeding with certain administrative actions against the individual in another forum. The Code specifically defines the Commission’s powers and duties. *29 Del.*

C. § 5809 and § 5810. There is no reference to the authority to issue restraining orders/preliminary injunctions. Where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. Goldstein v. Municipal Court, Del. Super., C.A. 89A-AP-13, J. Gebelein (January 7, 1991); State v. Rose, Del. Super., 132 A. 864, 867 (1926). To graft the authority to issue restraining orders/injunctions onto the Code would create jurisdiction not given by the General Assembly. **(Commission Opinion 95-5)**.

Constitutional Issues

Complainant alleged that various State employees/officers deprived complainant of certain rights in another agency's proceeding, such as the right to a fair hearing, the right to be advised of a criminal investigation conducted by the agency, and unequal treatment under the law. The Commission concluded that to the extent the allegations raised constitutional issues, it had no jurisdiction. Generally, administrative agencies have only such adjudicatory jurisdiction as is conferred by statute. 2 Am. Jur. 2d Administrative Law § 275 (1994). The Commission's jurisdiction is limited to administering and implementing the Code of Conduct. 29 Del. C. §§ 5805(a), 5809(3) and 5810(a). The Code mentions no jurisdiction over constitutional issues. Further, Courts have recognized that constitutional issues are within the courts' expertise, not the expertise of administrative agencies. See, e.g., Plano v. Baker, 2d Cir., 504 F.2d 595, 599 (1974); Matters v. City of Ames, Iowa Supr., 219 N.W.2d 718 (1974); Hayes v. Cape Henlopen School District, D. Del., 341 F. Supp. 823, 833 (1972). **(Commission Opinion 95-5)**.

Personal Injury Actions/Contract Rights

Complainant alleged that certain State employees, in a separate administrative hearing, improperly conducted the hearing. To the extent that the manner of conducting the hearing was governed by the individual's employment contract, the Commission held it had no jurisdiction to interpret contractual and statutory provisions governing employment contracts. The contract and certain statutory provisions established the rights related to the employment matters, while the Commission's jurisdiction was limited to administering and implementing the Code of Conduct. 29 Del. C. §§ 5805(a), 5809(3) and 5810(a). Complainant also raised issues of invasion of privacy and libel and/or defamation. The Commission held that to the extent these were personal injury claims, its limited jurisdiction did not encompass such claims. **(Commission Opinion 95-5)**.

Rules of Professional Responsibility for Attorneys

An agency asked if it could contract with a law firm/attorneys for legal services to the agency while the same firm/attorneys also represented private clients before the agency. The agency posited that the

Delaware Lawyers' Rules of Professional Conduct do not prohibit such dual representation.

Generally, administrative agencies have only such jurisdiction as is conferred by statute. 2 *Am.Jur. 2d Administrative Law* § 275 (1994). The Commission's jurisdiction is limited to administering and implementing the Code of Conduct. *See, 29 Del. C. §§ 5808(a), 5809(3) and 5810(a)*. In addition to the fact that the statutory language does not give the Commission jurisdiction to interpret the Rules of Professional Conduct, the Delaware Supreme Court has held that a non-client litigant and its lawyers do not have standing to enforce the Delaware Lawyers' Rules of Professional Conduct in a non-disciplinary proceeding. *In re Infotechnology, Inc., Del. Supr., 582 A.2d 215 (1990)*. To ask the Commission to interpret the Rules of Professional Conduct would, in effect, be an attempt to enforce those rules, a responsibility of the Delaware Supreme Court. *See, 10 Del. C. §1906*. While the Commission may find interpretations of the Rules of Professional Conduct persuasive in interpreting its own statute, to the extent the Rules and the Code of Conduct are in *pari materia*, it does not have the authority to interpret the Rules. *See, Sutherland Stat. Constr. §45.15, Vol. 2A (5th ed. 1992)* (decision on statutory construction has relevance as precedent if language of one statute is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other). (**Commission Opinion 95-20**).

Open Meeting Laws

Complainant alleged that an agency conducted an executive session in violation of the Freedom of Information Act (FOIA). The Commission noted that Delaware law permits executive sessions under certain conditions, *29 Del. C. § 10004(b)*, but found that decisions on whether FOIA has been violated are specifically within the Attorney General's jurisdiction, *29 Del. C. § 10005(e)*, and therefore the Commission had no jurisdiction over the issue. (**Commission Opinion 95-5**).

Release of School District Record Information

Complainant alleged that certain confidential information on students was released by a State employee and given to a candidate for the School Board as an aid to election. Complainant believed the release was improper under: (1) the Family Education Rights and Privacy Act of 1974 (FERPA); (2) the School District's policy implementing FERPA; and (3) Delaware laws governing school board elections. Complainant alleged that violation of those provisions constituted a violation of the Code of Conduct, which prohibits disclosure of confidential information obtained through government positions. *29 Del. C. § 5806(f) and (g)*.

The Federal law, FERPA, provides that the Secretary of Education or an administrative head of an education agency is to deal with FERPA violations. *20 U.S.C. § 1232(g)(a)(5)(B)*. The doctrine of

preemption holds that where federal law so occupies the field, States are prevented from asserting jurisdiction and may not pass a law inconsistent with the federal law. *Black's Law Dictionary*, p. 1060 (5th ed. 1979). For the Commission to assume jurisdiction over an alleged improper release of school records information when federal law establishes the manner for pursuing such alleged violations would be inconsistent with federal law.

Regarding the allegation that the State employee failed to follow the School District's policy in releasing information, under Delaware law, "the school board of each reorganized school district shall decide on all controversies involving the rules and regulations of the schoolboard." 14 *Del. C.* § 1058. Usually, specific provisions govern over general provisions. As the legislature specifically gave jurisdiction to the school board to interpret its rules and regulations, the general provisions of the Code of Conduct would not apply.

To the extent the complaint alleged a violation of school board election laws, the Commission found no election statute which appeared to be violated. Even assuming a violation that would permit a challenge to the school board election, such challenge would more properly be addressed to School Board Election officials. **(Commission Opinion 95-3).**

POST-EMPLOYMENT

The Delaware Superior Court addressed the issue of post-employment in *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super.*, C.A. No. 94A-01-004, *Terry, J.* (June 30, 1995). The Court determined that there was no violation of the post employment restriction provision, 29 *Del. C.* §5805 (d), where a former member of the Health Resources Management Council appeared on behalf of Nanticoke Memorial Hospital for a certificate of need. The Council reviewed applications for certificates of need and made recommendations to the Bureau of Health Planning and Resources Management. The Bureau approved the application for Nanticoke and denied an application submitted by Beebe Medical Center. The Medical Center appealed the decision to deny its application alleging, among other things, lack of an impartial hearing because of impermissible conflicts of interest. The Court found that the record showed that while on the Council, the member did review Certificate of Needs requests, but did not participate in reviewing the applications that were the subject matter of the proceeding, and therefore, the member had no direct or material responsibility for the matter. The Court held that the Council member did not violate the statute by appearing on behalf of Nanticoke.

A State agency asked if contracting with a private enterprise, which employed an individual formerly employed by the agency, would violate the post-employment provision. That provision prohibits State employees, officers or honorary officials from representing a private enterprise on matters involving the State, for 2 years after terminating State employment, if the individual gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of official duties while with the State. 29 *Del. C.* § 5805(d). It also prohibits disclosure of confidential information

gained by reason of public position and otherwise using such information for personal gain or benefit. *Id.*

As a State employee, part of the individual's duties included administrative assistance to a task force which developed findings/recommendations in a particular subject area. About six years before the task force was formed, the individual worked in that area for the State. However, the work for the task force required no special knowledge of the subject as the responsibilities were purely administrative, such as locating filed materials, providing them to the task force, editing the task force's report, etc. The report covered the findings/recommendations voted on by the task force. The substance could not be altered from that vote. The employee was not asked for any personal or professional opinion on the subject. The employee also assisted in preparing a presentation of the report to the Governor, but the presentation was given by the agency director, who did not deviate from the findings and facts voted on and adopted by the task force.

Once the task force's recommendations were adopted, it was determined that contracts would be issued after public notice and bidding. An outside vendor was selected to develop the Request for Proposals (RFPs). The employee had no input in selecting the vendor and gave no input to the vendor in developing the RFP. The vendor established extensive and detailed guidelines for responding to the RFP, which were provided to all bidders.

The Commission found that the employee gave no opinion on the work of the task force or the vendor, and had no input to either the findings/recommendations of the task force or the development of the RFP. It concluded she was not directly and materially responsible for the subject matter of the contract while employed by the State, and therefore, found no violation of the post-employment restriction.

However, after leaving State employment, the individual worked with several non-profit agencies in drafting her new employer's response. The Commission found that such action raised a close question as to whether such involvement created an improper appearance, as one purpose of the Code of Conduct is to avoid any improper public perception. 29 *Del. C.* § 5802 and 5806(a).

To determine if such action created an improper appearance, the Commission noted that it had already found that the employee's duties as they related to the task force did not violate the post-employment restrictions. It also found that: (1) the employee had a background in the subject of the contract in terms of education and work experience prior to working for the State which would give her familiarity with and knowledge of the substance to be addressed in the RFP response; (2) the response was not the sole work of the former State employee as other employees of the private enterprise and four non-profit agencies provided input; and (3) the development of the response was overseen by the private enterprise through its grant and research office. The Commission found that these actions, to a certain degree, limited her control over the response. Further, as she had no control of the findings/recommendations of the task force or the vendor, again, her control over what would be in the response was limited. The Commission also found that while the employee was present at task force meetings, sworn statements from the employee and persons within the State agency were that she gained no superior knowledge as a result of her

administrative work. The Commission also noted that the detailed guidelines and specific, objective scoring criteria, rated by a multi-agency committee, tended to place all bidders on an even field, and that the private enterprise for which the former State employee worked was found, by the multi-agency committee, to have a “clearly superior” response. The Commission also noted that another bidder had an executive director who was a voting member on the task force. As there were only three bidders, if the former employee’s private enterprise and the private enterprise which had a voting member on the task force were not permitted to bid, then the agency would have only one bid, which was determined to be inferior. The Commission also found that if that bidder were selected, the agency would have to devote time and resources to that bidder, putting a strain on the agency.

The Commission’s final conclusion was that: there was no technical violation of the post-employment restriction; the findings eliminated any possible improper public perception, although it was a close call; and that even if there were an improper public perception, the Commission would grant a waiver because if the agency could not offer the contract to the selected company, it would create an undue hardship as the agency would not be able to offer the contract to the superior bidder and would have to devote time and resources to any other bidder. **(Commission Opinion 95-2).**

An individual who was leaving State employment asked whether accepting a position with a private enterprise would violate the post-employment restriction. The Commission found that accepting the position would not violate the post-employment restriction because: (1) the nature of the two positions was dissimilar as the State position was primarily administrative and the private position was operational; (2) the employee’s State responsibilities did not involve preparing Requests for Proposals (RFPs) in the specific area in which the employee worked; (3) the State’s contractual process in that area was administered by a person not within the supervision of the person leaving State government; and (4) the State responsibilities did not encompass review of responses to RFPs submitted by the private enterprise for which he wished to work.

While not finding a technical violation, the Commission found that because the private enterprise was seeking or might seek a State contract with the agency, any direct participation in writing or presenting RFPs to the agency on such matters might appear improper, and directed the individual not to be involved in writing or presenting RFP responses from the private enterprise for 2 years after termination. **(Commission Opinion 95-6).**

A State agency wanted to contract with a medical professional after he retired from the State. The individual would perform some of the functions he was responsible for during his State employment. The Commission found that because he would perform the same functions as while employed by the State, the contract would violate the 2-year post-employment restriction against employees representing or assisting a private enterprise on matters they were directly and materially responsible for during State employment. 29 *Del. C.* § 5805(d). (The Commission, in a previous decision, ruled that a private personal contract with

the State constituted a “private enterprise,” making former State employees with such contracts subject to the post-employment restrictions. *Commission Opinion No. 94-10, p.25, supra*). The Commission advised that the 2-year prohibition was a measure to assure the public that former State employees cannot use information acquired during their employment or their former position as a means to “get a leg up” on other private enterprises that have dealings with the State. The Commission noted that despite these restrictions, the Legislature recognized that a total ban against a former State employee working for a private enterprise was not realistic and thus limited the prohibition to instances where the individual was directly and materially responsible for the matter during State employment. Further, it granted the Commission authority to grant a waiver where “the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would result in an undue hardship on any employee, officer, official or State agency.” 29 *Del. C. § 5807(a)*.

Testimony was that the agency would incur a hardship if it could not contract with the individual as his services were “unique” because of his extensive professional background in the area where he would be working; he had established a rapport with Delaware hospitals and doctors that was needed to ensure success of the agency’s programs; his particular medical training and experience were not easily found; despite a search no one qualified to assume the duties was available at this time; his skills were needed to complete programs already implemented; and he was familiar with the data system being used on programs that were “pretty well on their way” to conclusion.

The Commission granted a five-month waiver to the post-employment restriction with the opportunity for the agency to seek an extension of the period with supporting evidence showing good cause. **(Commission Opinion 95-11)**.

A former State employee sought a decision on whether employment as a counselor, which was part of her responsibility as a State employee, violated the post-employment provision. The Commission concluded there was no violation of the Code of Conduct because although the private enterprise had a contract with the State, the employee was not involved in the decision resulting in that contract. Further, while her former State clients might elect to receive treatment from the private enterprise because of the contract with the State, the contract was the result of a federal law requiring that clients be given a choice of provider, and it was the clients’ choice, not a decision that could be made by the former employee. The Commission also was advised that the individual was not using the list of her clients from the State to encourage them to switch to the program offered by the private enterprise. **(Commission Opinion 95-17)**.

A State employee developed a technical proposal for a federal grant program which was later approved by his agency and by a federal agency. Contractual arrangements were made and various private enterprises were selected to start the project. As part of official duties, the State employee worked with one of the companies selected. When he left State employment he began a consulting firm and was offered a consulting opportunity with a subsidiary of that company. The subsidiary’s project was unrelated to the

agency project; the subsidiary was not involved with the agency project in any manner; nor was it seeking any State assistance or contract relative to the program he was to consult on; the consulting work was in the marketing area, not the technical area in which he worked for the State; no proprietary or confidential information from the agency was to be used in developing the marketing program; and the client base was not the same. Based on these facts, the Commission found no violation of the post employment provision. (**Commission Opinion 95-18**).

A State employee asked if it was proper to accept employment with a nursing home after leaving State employment. The employee's State duties did not include referring clients to nursing homes, nor did the employee, or any person supervised by the employee, determine the facility to which clients were admitted as that decision was made by the individual or their family. The employee had no direct dealings with any of the agency's clients. The employee supervised persons who evaluated clients for certain benefits. The employee reviewed the evaluations for determination of benefits to ascertain if proper procedure was followed. The State agency had no contract with the nursing home which wanted to hire the employee.

The duties with the nursing home would require little, if any, contact with the State agency, as the nursing home clients were primarily clients that would not seek the type of benefits offered by the agency. The only anticipated contact with the agency was that it might inquire about the number of beds available in the facility and/or seek confirmation of admissions or discharges. Such information would be purely objective in nature, with no relationship to eligibility for State benefits. The skills required at the nursing home related more to the employee's professional educational training than to the specific skills used at the agency. The Commission found no conflict of interest based on these facts and directed that any confidential information learned as a State employee could not be used in employment with the nursing home. (**Commission Opinion 95-32**).

PROCEDURE

Respondents sought to amend their answer to a complaint by striking one sentence of part of a response to an allegation as unresponsive and to add a specific legal defense. The Code of Conduct provides that the procedural rules specified in the Code are to be followed and that the Commission is to establish such other procedural rules as shall not be inconsistent with the rules prescribed in the Code of Conduct. *29 Del. C. § 5809 (6)*. The Code of Conduct and the Commission's Rules and Regulations do not address the standard for motions to amend. The Code does provide however, that if a violation is found, the person charged may appeal to the Delaware Superior Court. *29 Del. C. § 5810A*. Because of that Court's jurisdiction over appeals, the Commission found the Superior Court Civil Rules of Procedure persuasive authority as the standard for motions to amend. *See, Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992)*. Those Rules provide that after responsive pleadings are filed, a party may

amend pleadings only by leave of court or written consent of the adverse party and leave shall be freely given when justice so requires. *Del. Super. Ct. Civ. R. Pro. 15(a)*. The adverse party could not be contacted and no written response was filed. The Commission held that amendments will be granted if “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” *Del. Super. Ct. R. Civ. Pro. 15(c)(2)*. The determining factor is whether the opposing party should have been on notice from the original pleadings that the new claim or defense might be asserted. *Bissell v. Papastravros’ Assoc. Medical Imaging, Del. Supr.*, 626 A.2d 856 (1993). The Commission found that the adverse party was on notice of the defense because the specific legal defense Respondents sought to raise was consistent with continuous denials of the factual allegations and the already asserted defense that complainant failed to state a claim. Respondents were only identifying why, as a matter of law, there was a failure to state a claim. Regarding the motion to strike, the Commission found that the sentence was unresponsive as it referred to a document not mentioned in the particular allegation, and granted the motion. **(Commission Opinion 95-5)**.

CONFIDENTIAL INFORMATION

Complainant alleged that comments to the news media by State officers disclosed information that allegedly was confidential because it related to personnel matters pending before a State adjudicative body. The Code of Conduct prohibits improper release of confidential information. 29 *Del. C.* § 5806(g). It does not specifically address the conduct imposed on individuals regarding public communication prior to adjudicative proceedings. The Commission found it persuasive to look at ethical standards governing extra-judicial statements by attorneys and employees and investigators in the prosecutor’s office, in this particular case, because the matters were referred for possible criminal prosecution and/or other administrative actions. *See, Sutherland Stat. Constr.* § 45-15, Vol. 2A (5th ed. 1992)(decision on statutory construction has relevance as precedent if both statutes are such closely related subjects that consideration of one naturally brings to mind the other). The Commission specifically held that this standard would not necessarily apply in other cases.

The Delaware Rules of Professional Conduct place limits on the types of extra-judicial statements made by attorneys and employees or other persons assisting or associated with a prosecutor. *Rules of Professional Conduct 3.6 and 3.8*. The rules identify the types of statements that may be made, without elaboration by a lawyer involved in an investigation or litigation. *Rule 3.6(c)*. In this case, statements to the effect that “we are doing an investigation of . . . ; “after we became aware of some alleged irregularities”; the investigation was “based on information they obtained elsewhere”; and “we have deferred and cooperated with [agency].” The Commission found these statements permissible as the Rules allow statements that an investigation is in progress, including the general scope of the investigation, the identity of the investigating agency and the length of the investigation. *Rule 3.6(c)(3) and (7)(iv)*. The statements did not include prohibited remarks such as comments on character, credibility, reputation, criminal record

of a party, a suspect or witness, the identity of a witness or the expected testimony of a party or witness. *Rule 3.6 (b)*. The media reported that two respondents declined comment, one stating that it was a confidential matter. The Commission held that refusing to disclose information as to a pending action was not considered “release of information.” *See, Annotation, Release of Information Concerning Forthcoming or Pending Trial as Grounds for Contempt Proceedings or other Disciplinary Measures Against Member of the Bar, 11 ALR 3d 1104 §1 {A}*. (Commission Opinion 95-5).

NEPOTISM

Complainant alleged that a State employee directly hired close relatives to work in the same agency in both a Merit position and a temporary position. Upon investigation of the allegation of hiring into the Merit position, the Commission found the hiring was conducted pursuant to competitive hiring requirements governing the hiring of Merit employees. *See, 29 Del. C. § 5901, et. seq.* The position was publicly announced. Applicants were tested and ranked by test scores by agencies other than the hiring agency. *See, 29 Del. C. § 5917 and § 5919*. The list of eligible candidates was forwarded to the hiring agency for interviews. Appointment of persons on the list was of persons “standing among the highest 5 or highest 15%, whichever is the greater number.” *29 Del. C. § 5921*. The top six candidates were contacted for interviews, but had either accepted other jobs or did not respond to calls to schedule interviews. The next four top ranking people included the State employee’s close relative. All four were interviewed by individuals other than the person charged with violating the Code. The agency was not required to interview more than one person on the list. *29 Del. C. § 5921*. The documentary evidence also showed that of the remaining candidates, two were interviewed (one was selected for another position in the agency), two did not respond to calls for interviews, and the last three on the list were not contacted. The reason for non-selection was documented, even though by law, the employing agency cannot be required to give a reason for non-selection unless all applicants are rejected. *29 Del. C. § 5921*.

The individual charged did not have any decision making authority in the announcement of the position, the testing of candidates, the selection of candidates to be interviewed, and the actual interviews. Also, the person charged was not physically located in the same office, could not observe the relative’s work habits and skills limiting any input on the relative’s evaluation, did not supervise the relative, and was precluded by the agency from participating in matters relating to the relative’s evaluation or any grievances regarding the relative’s employment if they arose.

Regarding the hiring of a close relative in a casual/seasonal position, the agency’s procedure was for its personnel staff to rank persons to ensure they were qualified prior to being hired. The individual charged was not involved in the ranking and the ranking was conducted by a separate division within the agency. The individual did not make the hiring selection.

The Commission found no violation because the individual did not participate in the “review or disposition” of the hiring of close relatives and would not “review or dispose” of their evaluations, grievances, etc. **(Commission Opinion 95-12).**

Complainant alleged that a State employee obtained a position for a close relative with a firm which contracted with the agency where the employee worked. Upon investigation, it was found that: the contract between the private enterprise and the State agency was made before the close relative went to work for the private enterprise; the contract was awarded after notice and public bidding; and the State employee was not solely responsible for developing the Request for Proposal and was not totally responsible for determining who obtained the contract. The Commission also heard evidence that the private enterprise hired the close relative after completion of a college degree in a field that qualified the close relative for a job with the private enterprise. The close relative was not involved in any actions or interactions the private enterprise had with the State agency. Based on these facts, the Commission found no violation. **(Commission Opinion 95-12).**

A State employee asked whether it would violate the Code of Conduct if his agency contracted with a private enterprise which employed his son. Documentation and testimony revealed that the private enterprise was awarded the contract after public notice, competitive response, objective evaluation, and interviews conducted by a team composed of members from the State employee’s agency and another agency. The employee was not involved in any of these matters, did not select the team, was not a member of the team, and was not part of the selection process. Further, the son worked in a department of the private enterprise that would not be involved in the State project. The State employee would not review or sign any contracts, invoices, change orders, etc., on the project involving the private enterprise. Such decisions would be made by persons not directly supervised by the employee. With these limitations on the State employee’s actions, the Commission found it would not violate the Code for the agency to contract with the private enterprise. **(Commission Opinion 95-27).**

ACCEPTANCE OF ANYTHING OF MONETARY VALUE

Gifts

Prior to working for the State, an individual provided professional services to a non-profit organization. The services were primarily pro bono. The non-profit group derives a significant portion of its budget from State contracts. The individual’s State position might require him to review the non-profit group’s contracts. On accepting the State position, the individual advised the agency that he would recuse himself from reviewing the group’s contracts. Shortly after accepting the State position, the non-profit group sent the individual an unsolicited gift to express appreciation for the professional services given as a private citizen. The State employee asked if accepting the gift would violate the gift provision. The Code

prohibits State employees from accepting gifts under circumstances in which such acceptance may result in: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any person; (3) the making of a government decision outside official channels; or (4) any adverse effect on the public's confidence in the integrity of State government. 29 *Del. C.* § 5806(b). Because the group had a pending State contract, the Commission found that acceptance might appear improper. However, because the gift was for services rendered, primarily *pro bono*, as a private citizen, not as a State employee, and the individual had recused himself from reviewing matters before the agency concerning the group, the Commission granted a waiver for him to accept the gift with the condition that he continue to recuse himself from matters involving the organization. (**Commission Opinion 95-7**).

Concurrent Employment

A State employee asked if forming a consulting firm with a non-State professional associate to supplement his income and prepare for retirement would violate the Code of Conduct, which prohibits accepting outside employment if it would result in: (1) impairment of independence of judgment; (2) preferential treatment; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of State government. 29 *Del. C.* § 5806(b).

The firm would not pursue the Delaware market while the individual was a State employee; the individual would devote weekends and nights to this outside employment so that it did not interfere with State employment; and the employee's primary responsibilities with the consulting firm would be in the marketing area, not in the technical and professional area the employee held with the State agency.

To ensure the outside employment as a principal in the professional consulting firm did not conflict with the employee's State duties, the Commission approved the employment with the above noted restrictions and with the additional restrictions that the employee adhere to the Code provisions, including any compliance required by the post-employment restrictions after leaving State employment; adhere to the Code of Ethics for the professional association to which he belonged as a result of his professional training; did not work as a private consultant for the agency or perform work with the consulting firm that would be approved by the agency while still employed; did not solicit firms employed by the agency to form partnerships or other work relations on agency contracts while employed by the agency. The employee in his outside employment, and/or the consulting firm, were precluded from working directly or indirectly with any firms dealing with the State or Delaware local governments, or with any firms dealing with the State of Delaware, while employed by the State. **(Commission Opinion 95-13).**

A State employee held outside employment as a Realtor. The employee's agency had occasion to deal in real estate transactions. Correspondence and testimony revealed that the employee's official duties as a secretary were primarily typing documents dealing with federal grants and did not include any duties, even typing, related to real estate development. The section to which the employee was assigned did not make any realty decisions for the agency, and any dealings by the section dealt with broader trends in development which, according to an agency representative, were not immediately translatable to Realtors. Also, the employee was not exposed to information considered confidential by the agency in any of its real estate transactions.

Concerning outside employment, the individual dealt in limited residential real estate transactions, not commercial transactions. The realty company had no dealings with the State agency. Also, the employee did not conduct real estate business during agency duty hours. The Commission found no conflict, but directed the individual to be aware of changes to the outside employment and/or agency duties. If the duties began to overlap, the employee was to re-evaluate the situation and return to the Commission if a further opinion were needed. **(Commission Opinion 95-28).**

A State employee, who worked for an agency that engaged in real estate transactions, was concurrently employed by a real estate firm. The employee's official duties required him to review loan applications from developers and determine if the developer's numbers supported the particular development under review for a loan. The employee did not approve the loans. The loans were for development purposes, not acquisition. The employee had no way of knowing in advance the properties a developer would select, as the developer selected a site, then submitted loan applications, which identified the site, to the agency. Any real estate company used by the developer in acquiring the property was selected by the developer before applying to the agency. The real estate firm where the employee worked had no dealings with the agency or any developer with whom the agency was working. The employee's only real estate transactions were listing residential properties at the request of personal friends. The employee had not solicited sales or sold any properties. Also, the employee did not conduct real estate business during State duty hours. The Commission found no violation under these specific facts, but directed the employee to be alert to changes in either the State duties or the real estate transactions and re-evaluate the situation and return to the Commission if a further opinion were needed. (**Commission Opinion 95-30**).

A State employee sought a decision on whether entering into a textbook contract, as one of several authors, violated the Code of Conduct. Compensation was not based on the number of books sold; rather, the individual would be compensated at a flat rate for the section of the book which the individual would author. The Code prohibits acceptance of other employment or any compensation or payment of expenses where such acceptance may result in: (1) impairment of independence of judgment in official duties; (2) an undertaking to give preferential treatment to any person; (3) the making of a government decision outside official channels; or (4) any adverse effect on the public's confidence in the integrity of State government. 29 *Del. C.* § 5806(b).

The individual was selected by the publisher as one of the authors because of professional training received prior to State employment. A self-imposed restriction was that the employee would not conduct marketing activities for the publisher in Delaware.

The Commission found that receipt of compensation would not impair the individual's judgment in official decisions or result in preferential treatment or decisions outside official channels because: the publisher had no contracts with the State; if the publisher contracted with the State for sale of the book, the individual would not be involved in the selection; the employee would not make presentations to any Delaware State agency regarding the textbook; and would not participate in developing guidelines for selecting textbooks. Participation also would not substantially conflict with the individual's official duties because the employee would accomplish any responsibilities to the publisher on the employee's own time. The Commission found no violation under these facts and directed the individual to observe the self-imposed limitation of not presenting any marketing in

Delaware. (Commission Opinion 95-39).

PERSONAL OR PRIVATE INTEREST

The Delaware Superior Court addressed the issue of conflicts of interests in *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995).

The opinion addressed, among other things, whether a member of the Health Resources Management Council (Council) who failed to recuse himself at the beginning of the Council's proceedings, violated 29 Del. C. § 5805(a)(1). That section prohibits State officials from reviewing or disposing of matters where the official has a personal or private interest that tends to impair judgment. The Court "assumed" the council member had an interest in the matter because he is the Milford Hospital administrator and the hospital had entered an alliance with Nanticoke Memorial Hospital, which received the Council's approval to establish a cardiac catheterization laboratory. The Court found that the council member, during the public meeting, declared a possible conflict of interest, but noted he did not participate in the discussions nor did he vote. The Court also found that during the executive session, the Council member's comments favored neither applicant and were essentially neutral. While finding no prejudice resulted from the comments, the Court did find that the member should have recused himself from participating at the outset.

State duties required an employee to review responses to Requests for Proposals (RFPs). A private enterprise, on which the employee served on the Board of Directors submitted a response for review. The private enterprise had not told the employee it intended to submit such response and the employee had not, as a Board member, been asked for information about how to prepare the response, nor as a Board member had the employee reviewed the response before it was sent to the State. The individual alerted a supervisor and declined to review the response before seeking a decision from the Commission on what action, if any, should be taken relative to this matter.

The Code prohibits employees from participating in the review or disposition of matters before the State where there is a personal or private interest that tends to impair independence of judgment. 29 Del. C. § 5805(a). One interest which tends to impair judgment is where the person has a financial interest in a private enterprise which could be affected by action or inaction on matters before the State. 29 Del. C. § 5805(a)(2). While the employee received no compensation from the private enterprise and no determination had been made by the private enterprise regarding any ownership interest by the employee, the private enterprise would benefit financially if selected to fulfill the contract. The Commission held that the employee's review of the response could violate the prohibition against reviewing such matters or, as a minimum, could create an appearance of impropriety which is prohibited by 29 Del. C. § 5806(a). (Commission Opinion 95-24).

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CHAPTER 58. LAWS REGULATING THE CONDUCT OF OFFICERS AND EMPLOYEES OF THE STATE

Subchapter I. State Employees', Officers' and Officials' Code of Conduct

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Subchapter I. State Employees', Officers' and Officials' Code of Conduct

§5801. Short title.

This subchapter shall be known and may be cited as the "State Employees', Officers' and Officials' Code of Conduct." (67 Del. Laws, c. 417, §1.)

§5802. Legislative findings and statement of policy.

The General Assembly finds and declares:

(1) In our democratic form of government, the conduct of officers and employees of the State must hold the respect and confidence of the people. They must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

(2) To ensure propriety and to preserve public confidence, officers and employees of the State must have the benefit of specific standards to guide their conduct and of some disciplinary mechanisms to guarantee uniform maintenance of those standards. Some standards of this type are so vital to government that violation thereof should subject the violator to criminal penalties.

(3) In our democratic form of government, 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. (67 Del. Laws, c. 417, §1.)

§5803. Construction.

This subchapter shall be construed to promote high standards of ethical conduct in state government. (59 Del. Laws, c. 575, §1; 67 Del. Laws, c. 417, §1.)

§5804. Definitions.

For the purposes of this subchapter:

(1) "Close relative" means a person's parents, spouse, children (natural or adopted) and

siblings of the whole and half-blood.

(2) "Commission" means the State Public Integrity Commission established by this chapter.

(3) "Commission Counsel" means the legal counsel appointed by the Commission pursuant to this chapter.

(4) "Compensation" means any money, thing of value or any other economic benefit of any kind or nature whatsoever conferred on or received by any person in return for services rendered or to be rendered by himself or another.

(5) A person has a "financial interest" in a private enterprise if:

a. He has a legal or equitable ownership interest in the enterprise of more than 10% (1% or more in the case of a corporation whose stock is regularly traded on an established securities market);

b. He is associated with the enterprise and received from the enterprise during the last calendar year or might reasonably be expected to receive from the enterprise during the current or the next calendar year income in excess of \$5,000 for services as an employee, officer, director, trustee or independent contractor; or

c. He is a creditor of a private enterprise in an amount equal to 10% or more of the debt of that enterprise (1% or more in the case of a corporation whose securities are regularly traded on an established securities market).

(6) "Matter" means any application, petition, request, business dealing or transaction of any sort.

(7) "Person" means an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.

(8) "Private enterprise" means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the State or of any political subdivision or of any agency, authority or instrumentality thereof.

(9) "State" means the State of Delaware and includes any state agency.

(10) "State agency" means any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly or of the Constitution of the State, excepting only political subdivisions of the State, their agencies and other public agencies not specifically included in this definition which exist by virtue of state law, and whose jurisdiction:

a. Is limited to a political subdivision of the State or to a portion thereof; or

b. Extends beyond the boundaries of the State.

(11) a. "State employee" means any person:

1. Who receives compensation as an employee of a state agency; or
2. Who serves as an appointed member, trustee, director or the like of any state agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses).

b. "State employee" does not include:

1. Members of the General Assembly;
2. The Chief Justice and Associate Justices of the Supreme Court;
3. The Chancellor and Vice-Chancellors of the Court of Chancery;
4. The President Judge and Associate Judges of Superior Court
5. The Chief Judge and Associate Judges of Family Court;
6. The Chief Judge and Resident Judges of the Court of Common Pleas;
7. The Chief Judge and Associate Judges of Municipal Court;
8. The Chief Magistrate and Justices of the Peace;
9. State officers; or
10. Honorary state officials.

(12) "State officer" means any person who is required by subchapter II of this chapter to file a financial disclosure statement but does not include:

- a. Members of the General Assembly;
- b. The Chief Justice and Associate Justices of the Supreme Court;
- c. The Chancellor and Vice-Chancellors of the Court of Chancery;
- d. The President Judge and Associate Judges of Superior Court;
- e. The Chief Judge and Associate Judges of Family Court;
- f. The Chief Judge and Resident Judges of the Court of Common Pleas
- g. The Chief Judge and Associate Judges of Municipal Court; or
- h. The Chief Magistrate and Justices of the Peace.

(13) "Honorary state official" means a person who serves as an appointed member, trustee, director or the like of any state agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses). (59 Del. Laws, c. 575, §1; 1 Del. Laws, c. 132, §23; 62 Del. Laws, c. 48, §1; 67 Del. Laws, c. 417, §1; 69 Del. Laws, c. 467, §§2, 3.)

§ 5805. Prohibitions relating to conflicts of interest.

(a) *Restrictions on exercise of official authority.*

(1) No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which he has

a personal or private interest, provided, that upon request from any person with official responsibility with respect to the matter, any such person who has such a personal or private interest may nevertheless respond to questions concerning any such matter. 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 his duties with respect to that matter.

(2) A person has an interest which tends to impair his independence of judgment in the performance of his duties with respect to any matter when:

a. 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; or

b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.

(3) In any case where a person has a statutory responsibility with respect to action or nonaction on any matter where he has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person may exercise responsibility with respect to such matter, provided, that promptly after becoming aware of such conflict of interest, he files a written statement with the Commission fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person.

(b) Restrictions on representing another's interest before the state.

(1) No state employee, state officer or honorary state official may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee, officer or official is associated by employment or appointment.

(2) No state officer may represent or otherwise assist any private enterprise with respect to any matter before the State.

(3) This subsection shall not preclude any state employee, state officer or honorary state official from appearing before the State or otherwise assisting any private enterprise with respect to any matter in the exercise of his official duties.

(c) Restrictions on contracting with the state. -- No state employee, no state officer and no private enterprise in which a state employee or state officer has a legal or equitable ownership of more than 10% (more than 1% in the case of a corporation whose stock is regularly traded on an established securities market) shall enter into any contract with the State (other than an employment contract) unless such contract was made or let after public notice and competitive bidding. Such notice and bidding requirements shall not apply to contracts not involving more than \$2,000 per year if the terms of such contract reflect arms' length negotiations. For the period of July 1, 1990 through June 30, 1991, nothing in this subsection shall prohibit a state employee, a state officer, or a private enterprise in which a state employee or a state officer has a legal or equitable ownership of more than 10% (more

than 1% in the case of a corporation whose stock is regularly traded on an established securities market) from contracting with a public school district and/or the State Board of Education for the transportation of school children without public notice and competitive bidding as is permitted under §6916 of this title.

(d) *Post-employment restrictions.* -- No person who has served as a state employee, state officer or honorary state official shall represent or otherwise assist any private enterprise on any matter involving the State, for a period of 2 years after termination of his employment or appointed status with the State, if he gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of his official duties as a state employee, officer or official. Nor shall any former state employee, state officer or honorary state official disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit.

(e) *Unauthorized disclosure of confidential information.* -- No person shall disclose any information required to be maintained confidential by the Commission under §5806(d), §5807(b) or (d), or §5810(h) of this title.

(f) *Criminal sanctions.*

(1) Any person who knowingly or willfully violates any provision of this section shall be guilty of a misdemeanor, punishable for each such violation by imprisonment of not more than one year and by a fine not to exceed \$10,000.

(2) A prosecution for a violation of this section shall be subject to the time limitations of §205 of Title 11.

(3) The Superior Court shall have exclusive jurisdiction over prosecution for all criminal violations of this section.

(g) *Contracts voidable by court action.* -- In addition to any other penalty provided by law, any contract entered into by any state agency in violation of this subchapter shall be voidable by the state agency; provided, that in determining whether any court action should be taken to void such a contract pursuant to this subsection, the state agency shall consider the interests of innocent 3rd parties who may be damaged thereby. Any court action to void any transaction must be initiated within 30 days after the state agency involved has, or should have, knowledge of such violation. (59 Del. Laws, c. 575, §1; 63 Del. Laws, c. 1, §1; 64 Del. Laws, c. 423, §1; 67 Del. Laws, c. 314, §1; 67 Del. Laws, c. 417, §1.)

(h) *Exceptions for transportation contracts with school districts.* -- Except for transportation supervisors for any school district within this State, nothing in this section shall prohibit an employee or his or her spouse or children (natural or adopted) from contracting for the transportation of school children. Such transportation contracts may be entered into by an

employee or his or her spouse or children without public notice and competitive bidding as is provided in §6916 of this title. (59 Del. Laws, c. 575, §1; 63 Del. Laws, c. 1, §1; 64 Del. Laws, c. 423, §1; 67 Del. Laws, c. 314, §1; 67 Del. Laws, c. 417, §1; 68 Del. Laws, c. 198, §1; 69 Del. Laws, c. 467, §§4, 27.)

§5806. Code of conduct.

(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 he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government.

(b) No state employee, state officer or honorary state official shall have any interest in any private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:

- (1) Impairment of independence of judgment in the exercise of official duties;
- (2) An undertaking to give preferential treatment to any person;
- (3) The making of a governmental decision outside official channels; or
- (4) Any adverse effect on the confidence of the public in the integrity of the government of the State.

(c) No state employee, state officer, or honorary state official shall acquire a financial interest in any private enterprise which he has reason to believe may be directly involved in decisions to be made by him in an official capacity on behalf of the State.

(d) Any state employee or state officer who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any state agency (and any honorary state official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the state agency on which he serves as an appointee) shall file with the Commission a written statement fully disclosing the same. Such disclosure shall be confidential and the Commission shall not release such disclosed information, except as may be necessary for the enforcement of this chapter. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the State. (69 Del. Laws, c. 467, §§5, 27.)

(e) No state employee, state officer or honorary state official shall use his public office to secure unwarranted privileges, private advancement or gain.

(f) No state employee, state officer or honorary state official shall engage in any activity

beyond the scope of his public position which might reasonably be expected to require or induce him to disclose confidential information acquired by him by reason of his public position.

(g) No state employee, state officer or honorary state official shall, beyond the scope of his public position, disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit.

(h) No state employee, state officer or honorary state official, in the course of his 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. (59 Del. Laws, c. 575, §1; 63 Del. Laws, c. 1, §2; 65 Del. Laws, c. 349, §1; 67 Del. Laws, c. 417, §1.)

§5807. Waivers of restrictions and advisory opinions.

(a) Notwithstanding the provisions of §§5805 and 5806 of this title, upon the written request of any state agency or of any individual who is or was a state employee, state officer or honorary state official, the Commission may grant a waiver to the specific prohibitions contained therein if the Commission determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would result in an undue hardship on any employee, officer, official or state agency. Any such waiver may be granted only by written decision of the Commission. Any person who acts in good faith reliance upon any such waiver decision shall not be subject to discipline or other sanction hereunder with respect to the matters covered by the waiver decision provided there was a full disclosure to the Commission of all material facts necessary for the waiver decision.

(b) Any application for a waiver, any proceedings and any decision with respect thereto shall be maintained confidential by the Commission provided that:

(1) Public disclosure shall be made by the Commission upon the written request of the applicant;

(2) The Commission may make such public disclosure as it determines is required in connection with the prosecution of any violation of this subchapter;

(3) The Commission shall report to appropriate federal and state authorities substantial evidence of any criminal violation which may come to its attention; and

(4) In the event that a waiver is granted, the waiver decision and the record of all proceedings relating thereto shall be open to public inspection.

(c) Upon the written request of any state employee, state officer, honorary state official or state agency or a public officer as defined in §5812 of this title, the Commission may issue an advisory opinion as to the applicability of this chapter to any particular fact situation. 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.

(d) Any application for an advisory opinion, any proceedings and any decision with respect thereto shall be maintained confidential by the Commission provided that:

(1) Public disclosure shall be made by the Commission upon the written request of the applicant;

(2) The Commission may make such public disclosure as it determines is required in connection with the prosecution of any violation of this chapter;

(3) The Commission shall report to appropriate federal and state authorities substantial evidence of any criminal violation which may come to its attention; and

(4) The Commission shall prepare a summary of its advisory opinions for public distribution without disclosing the identity of the applicants. (59 Del. Laws, c. 575, §1; 67 Del. Laws, c. 417, §1; 69 Del. Laws, c. 467, §§6, 7, 27.)

§5808. State Public Integrity Commission; establishment, membership, offices.

(a) The State Ethics Commission is hereby renamed and reestablished as the State Public Integrity Commission to assume the functions of the State Ethics Commission and to administer and implement this chapter, and to perform such other responsibilities as may be entrusted to it by law.

(b) The Commission shall consist of 7 members appointed by the Governor with the concurrence of the Senate. Not more than 4 members shall be registered with the same political party. No member shall hold any elected or appointed office under the government of the United States or the State or be a candidate for any such office. No member shall hold any political party office or an office in any political campaign. Members of the Commission may be removed by the Governor, with the concurrence of the Senate, for substantial neglect of duty, gross misconduct in office or violation of this chapter.

(c) A member of the Commission shall be appointed for a term of office of 7 years and until his successor has been appointed and has qualified, except that initially the Commission shall consist of the members of the former State Ethics Commission as of July 15, 1994, and said members shall serve the remaining portion of their terms and until their successors have been appointed and have qualified. No member shall serve for more than 1 full 7-year term. When a vacancy occurs in the membership of the Commission, it shall be filled by appointment for the unexpired portion of the term in the same manner as original appointments.

(d) The Commission shall elect a chairperson from among its membership. Four members of the Commission shall constitute a quorum and, if a quorum is present, a vacancy on the Commission shall not impair the right of the remaining members to exercise all the

powers of the Commission. Disciplinary hearings may be conducted and sanctions may be imposed only by the affirmative action of at least 4 members. Otherwise the Commission may delegate authority to the chairperson to act for the Commission between meetings.

(e) Each member of the Commission shall be compensated at the rate of \$100 for each day devoted to the performance of his or her official duties. Each member of the Commission shall be reimbursed for reasonable and necessary expenses incurred in the performance of official duties.

(f) The principal office of the Commission shall be in Dover but it may meet, and exercise its power, at any other place in the State. (67 Del. Laws, c. 417, §1; 69 Del. Laws, c. 467, §8.)

§5808A. Commission Counsel; powers and duties.

(a) There shall be a Commission Counsel who shall be the legal representative of the Commission and have the following powers and duties:

(1) To assist the Commission in preparing and publishing manuals and guides explaining the duties of individuals covered by this chapter and in other activities, such as seminars and workshops, educating individuals covered by this chapter about its requirements and purposes, and giving instructions and public information materials to facilitate compliance with, and enforcement hereof.

(2) To provide legal counsel to the Commission concerning any matter arising in connection with the exercise of its official powers or duties.

(3) To review information coming to the attention of the Commission relating to potential violations of this chapter.

(4) To investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of this chapter and/or to recommend that possible violations of these, or other state and federal laws, be referred by the Commission to the Attorney General or the United States Attorney for investigation and prosecution. Matters may be so referred to the Attorney General or the United States Attorney only upon a determination by at least a majority of the Commission that there are reasonable grounds to believe that a violation may have occurred.

(5) To prosecute disciplinary proceedings, if a determination has been made by at least a majority of the Commission that there are reasonable grounds to believe that a violation may have occurred, before the Commission and to assist the Commission in drafting educational materials, waiver decisions and advisory opinions.

(6) To employ and supervise staff necessary to perform his or her investigatory and prosecutorial functions.

(7) To maintain permanent records of all advisory, waiver, investigatory and prosecutorial matters.

(8) To perform any other tasks requested by the Commission concerning any matter arising in connection with the exercise of its official powers or duties.

(b) The Commission Counsel may recuse from a matter before the Commission when, in the view of Commission Counsel or of the Commission, such recusal is deemed necessary or appropriate. In situations where Commission Counsel recuses, the duties of the Commission Counsel may be exercised by the Attorney General or by outside counsel chosen by the Commission. (69 Del. Laws, c. 467, §9.)

§5808B. Commission Counsel’s appointment contingent upon appropriations.

The Commission Counsel established by §5808A of this title shall not be appointed by the Commission until adequate funds have been appropriated for such purpose. In the absence of such appointment, the Attorney General shall provide legal assistance to the Commission and shall exercise any duties assigned to the Commission Counsel by this chapter. Such duties may also be exercised by outside counsel chosen by the Commission, if adequate funds are appropriated for such purpose. (69 Del. Laws, c. 467, §9.)

§5809. Same -- Powers and duties.

The powers and duties of the Commission shall be as follows:

(1) To recommend to the General Assembly from time to time such rules of conduct for public employees and officials as it shall deem appropriate.

(2) To issue written advisory opinions upon the request of any state employee, state officer, honorary state official or state agency as to the applicability of this chapter to any particular fact situation.

(3) To refer to Commission Counsel to investigate any alleged violation of this chapter and, after notice and hearing, to recommend by resolution, such disciplinary action as it may deem appropriate to such appropriate official or agency as the Commission shall determine or to take such other disciplinary action as is authorized by §5810(d) of this title or other provisions of this Code. The Commission may also dismiss any complaint that it determines is frivolous or fails to state a violation.

(4) To report to the appropriate federal or State authorities any substantial evidence of a violation of any criminal law which may come to its attention in connection with any proceeding whether advisory or disciplinary.

(5) To maintain a file of its proceedings, waiver decisions and advisory opinions with a view toward achieving consistency of opinions and recommendations subject to the confidentiality requirements of §5807(b) and (d), and §5810(h).

(6) To follow the procedural rules specified in §5810 of this title and to establish such other procedural rules as shall not be inconsistent with the rules prescribed therein.

(7) To subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of books, papers, records or other evidence needed for the performance of the Commission's duties or exercise of its powers.

(8) To prescribe forms for reports, statements, notices and other documents required by law.

(9) To prepare and publish manuals and guides explaining the duties of individuals covered by this chapter; and giving instructions and public information materials to facilitate compliance with, and enforcement hereof.

(10) To provide assistance to state agencies, employees and officials in administering the provisions of this law.

(11) To prepare an annual report by March 1st of each year describing its activities for the previous year and to prepare such other reports and studies as may advance the purposes of this chapter.

(12) To appoint a lawyer admitted to practice in the State to serve as Commission Counsel.

(13) To request appropriate state agencies to provide such professional assistance as it may require in the discharge of its duties. (59 Del. Laws, c. 575, §1; 67 Del. Laws, c. 417, §1.)

(14) To contract for any services which cannot satisfactorily be performed by the Commission Counsel or other Commission staff.

(15) Commencing January 15, 1995, to administer and implement the financial disclosure provisions of subchapter II of this chapter and to maintain the records filed pursuant thereto.

(16) Commencing January 15, 1996, to administer and implement the lobbyist registration provisions of this Code and to maintain the records filed pursuant thereto.

(17) To perform such other responsibilities as may be assigned to it by law. (59 Del. Laws, c. 575, §1; 67 Del. Laws, c. 417, §1; 69 Del. Laws, c. 467, §§10-13, 27.)

§5810. Same -- Complaints; hearings; dispositions.

(a) Upon the sworn complaint of any person or on its own initiative, the Commission may

refer to the Commission Counsel for investigation any alleged violations of this chapter. The Commission Counsel shall be the prosecuting attorney in disciplinary proceedings before the Commission. In any such investigation or proceeding, a defendant shall be given an opportunity to be heard after notice, to be advised and assisted by legal counsel, to produce witnesses and offer evidence, and to cross-examine witnesses. A transcript of any such proceeding shall be made and retained, subject to the confidentiality requirements of subsection (h) of this section.

(b) A member of the Commission shall be ineligible to participate, as a member of the Commission, in any commission proceeding relating to his or her conduct. A member of the Commission who has been found by the Commission to have violated this chapter shall be ineligible to serve again as a member of the Commission.

(c) A member of the Commission may disqualify himself from participating in any investigation of the conduct of any person upon submission in writing and under oath of an affidavit of disqualification stating that he cannot render an impartial and unbiased decision in the case in which he seeks to disqualify himself.

(d) With respect to any violation with which a person has been charged and which the Commission has determined as proved, the Commission may take any one or more of the following actions:

(1) Issue a written reprimand or censure of that person's conduct.

(2) With respect to a state employee or state officer, other than an elected official, remove, suspend, demote or take other appropriate disciplinary action with respect to that person, without regard to any limits imposed by Chapter 59 of this title but within the limits of the Constitution and other laws of the State.

(3) With respect to an honorary state official, recommend that appropriate action to be taken to remove the official from office.

(e) In any proceeding before the Commission, upon the request of any person charged with a violation of this chapter, such person shall be permitted to inspect, copy, or photograph books, papers, documents, photographs, or other tangible objects which will be used as evidence against that person in a disciplinary hearing and which are material to the preparation of his defense.

(f) In any proceeding before the Commission, if the Commission Counsel or the Commission at any time receives any exculpatory information respecting an alleged violation against any person, it shall forthwith make such information available to such person.

(g) Any person charged with a violation of this chapter may apply to the Commission for the issuance of subpoenas for the appearance of witnesses and for the production of documents on his behalf. The application shall be granted upon a concise showing by such

person that the proposed testimony or evidence is relevant (or is reasonably calculated to lead to the discovery of relevant evidence) and is not otherwise available. The application shall be denied if not made at a reasonable time or if the testimony or evidence would be merely cumulative.

(h)(1) All proceedings relating to a charged violation of this chapter shall be maintained confidential by the Commission unless (i) public disclosure is requested in writing by the person charged; or (ii) the Commission determines after a hearing that a violation has occurred.

(2) Notwithstanding the confidentiality requirements of paragraph (1) of this subsection, the Commission shall make available for public inspection the record of all proceedings relating to any decision of the Commission which is appealed to Superior Court and the Commission shall report to appropriate federal or state authorities any substantial evidence of a violation of any criminal law which comes to its attention in connection with any proceeding under this chapter.

(3) The chairman of the Commission shall, with the approval of the Commission, establish such procedures as in the chairman's judgment may be necessary to prevent the disclosure of any record of any proceedings or other information received by the Commission or its staff except as permitted by this chapter. (67 Del. Laws, c. 417, §1; 69 Del. Laws, c. 467, §§14-18.)

§5810A. Judicial Review.

In the event that the Commission finds that any person has violated any provision of this chapter, said person shall have a right of appeal to Superior Court of any such finding and of any sanctions imposed with respect thereto by filing a notice of appeal with the Superior Court within 30 days of the final action by the Commission in a particular case. The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the Commission for further proceedings on the record. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the Commission's decision was supported by substantial evidence on the record. The burden of proof in any such appeal shall be on the appellant. (67 Del. Laws, c. 417, §1; 69 Del. Laws, c. 467, §19.)