

Below are DIAA's written comments concerning the draft recommendations received last Friday:

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### **Recommendation 3: Out-of-Season Coaching**

Please refer to the March 23, 2021 memorandum to the JLOSC analysts regarding out of season coaching.

### **Recommendation 4: Strategic Plan**

DIAA is in the preliminary stages of forming a strategic planning committee that is comprised of Board members and other stakeholders. One issue DIAA is weighing is that there are ten Board members whose terms have expired and who are holding over until their replacements are named. If the current Board establishes a strategic plan, that plan could change when the ten members are replaced.

### **Recommendation 5: Expired Terms**

By statute (14 *Del. C.* § 305(b)), the voting members of the Board are appointed by the Governor with the advice and consent of the Senate. DIAA does not get involved in the appointment process. In DIAA's presentation to the JLOSC, DIAA included the names of current Board members and when their terms expired. DIAA also provided the information to Boards and Commissions with the Governor's Office. On March 22, 2021, Ms. Polk spoke with the Director of Boards and Commissions. The Director told Ms. Polk that she hopes to submit nominees for the vacant Kent County Public Member position and an upcoming vacancy in one of the Sussex County Public Member positions by the end of April. The Director also asked when Boards and Commissions would be allowed to submit nominees for the Board members who are holding over.

### **Recommendation 6: Board Composition**

Regarding the draft recommendation that "[o]f the 6 public members, 1 shall be a current or recent parent of a student athlete from a member school," three out of the five current public members are parents of current or former student athletes. One of the public members is the parent of a current student athlete and of a former student athlete who graduated in 2019. Two of the public members are parents of former student athletes who graduated in 2018 and 2002, respectively.

### **Recommendation 7: Board Meetings**

#### **a. When possible, limit the number of executive sessions to 1 per meeting or schedule a separate executive session meeting.**

Under Delaware's Freedom of Information Act, there are nine different grounds for holding an executive session (29 *Del. C.* §§ 10004(b)(1) - (9)). In accordance with FOIA, the DIAA Board states its intent to hold an executive session and the specific ground or grounds for the executive session on its agenda (29 *Del. C.* § 10002(a)). Between January 2018 and March 2021, the majority of executive sessions were on the ground of discussing documents excluded from the definition of a public record (29 *Del. C.* § 10004(b)(6)), i.e., a pupil file (29 *Del. C.* § 10002(l)(1)). DIAA has individual executive sessions for eligibility waiver requests in order to

comply with privacy laws. If there is more than one eligibility waiver request at a particular meeting, and DIAA is required to limit the executive sessions to one per meeting, the requirement could cause a delay in the Board's decisions on the requests, which would adversely impact students who were seeking eligibility waivers. Other grounds included personnel matters (29 *Del. C.* § 10004(b)(9)) and pending or potential litigation (29 *Del. C.* § 10004(b)(4)).

**b. Establish a standing public comment period that occurs prior to a scheduled executive session.**

DIAA is not required under FOIA to have public comment at any of its meetings. Generally, if a public body does have a public comment period during its meeting, the public comment period is held at the end of a meeting. Similarly, the DIAA Board and its committees have public comment at the end of meetings. In the past, the DIAA Board had public comment at the beginning and the end of meetings. However, there are matters for which DIAA is required to base its decision on a record, such as waiver hearings, regulations, and hearings involving an alleged violation of the regulations. DIAA cannot consider public comment that is outside of a record. As a result, the DIAA Board holds public comment at the end of meetings.

Between January 2018 and March 2021, the DIAA Board had 47 meetings at which there was an opportunity for public comment. At more than half of the meetings, there either was no public comment or only one individual or group made a public comment (i.e., there were 12 meetings at which there was no public comment and 17 meetings at which one individual or group made a public comment).

The current structure does not preclude interested stakeholders from offering their input through other means. DIAA places written correspondence to the Board from stakeholders on its agenda under the Executive Director's report. Also, stakeholders who are not able to attend a Board meeting or who cannot stay for the entire Board meeting are not denied the opportunity to submit comments to the Board. They are encouraged to submit their comments in writing to the Board.

At the previous recommendations meeting, it was mentioned that the State Board of Education is required to "permit public comment on each agenda item before voting on the agenda item and in proximity to the time at which the State Board discusses the agenda item" with the exception of items that have a formal comment period or a process for making a record in an administrative matter that has closed (14 *Del. C.* §§ 105(c)(1) and(2)). The State Board of Education's powers include providing advice to the Secretary of Education on certain matters, deciding certain types of controversies and disputes involving the administration of the public school system, fixing and establishing boundaries of school districts, deciding on controversies involving rules and regulations of school boards, reviewing certain decisions of the Secretary of Education, and approving certain rules and regulations (14 *Del. C.* § 104(b)). DIAA's powers are different from the State Board's powers.

Also, the Governor is required to take into consideration a person's knowledge of athletics in general and interest in high school athletics when deciding whether to appoint the person to the DIAA Board (14 Del. C. § 305(b)). Thus, the DIAA Board is comprised of subject matter experts on interscholastic athletics. There is not a similar requirement for State Board members; the only requirement is that they are citizens of this State when they are appointed (14 Del. C. § 104(a)).

**c. Explore the creation of an Executive Committee, made up of current Board members with appropriate representation, to conduct initial waiver hearings.**

Effective December 11, 2020, DIAA amended its waiver hearing procedures in Regulation 1006. One of the amendments was to create a hearing panel, comprised of three Board members, to conduct the hearing on a waiver request (14 Del. Admin. C. § 1006-9.1.6.1). The composition of the panel can change because, by regulation, Board members are required to recuse if they, their school, or their district may be directly affected by a waiver request (14 Del. Admin. C. § 1006-3.1). After the hearing panel conducts the hearing, it issues a proposed order that includes a brief summary of the evidence and the panel's recommended findings of fact, conclusions of law, and decision (14 Del. Admin. C. Sec. 1006-9.1.6.1.2). The waiver applicant may submit written exceptions, comments, and arguments respecting the proposed order before the Board makes the final decision (14 Del. Admin. C. §§ 1006-9.1.6.1.3 and 9.1.6.1.4). Although hearing panels were conducted four hearings on March 18th, DIAA cannot provide any further information about the hearing panels or the hearings because the waiver requests are still pending.

**Recommendation 8: Standing Committees**

The process for appointing members of DIAA's standing committees is set forth in 14 Del. Admin. C. § 1006-3.2.2. Although the Executive Director and the respective committee's chairperson review applications and make recommendations to the Board for approval and appointment and reappointment, information on all of the applicants who applied is provided to the Board.

DIAA is in the process of revising its website.

**Recommendation 9: DIAA Staff**

Although DIAA believes the development of a new staff position is a great idea, would the position come with a funding line and require OMB's approval or is the funding expected to come from DIAA's special fund which could impact DIAA's \$950,000 spending limit?

**Recommendation 11: Enabling Language Regarding Revenue and Insurance**

DIAA does not request that the General Assembly grant it the statutory authority to purchase insurance coverage for student accidents insofar as such authority would waive DIAA's sovereign immunity and expose DDOE and DIAA to liability they normally would not have. Please see the February 22, 2021 memorandum regarding insurance.

## MEMORANDUM

TO: Mark Brainard and Amanda McAtee, JLOSC Analysts  
FROM: Bradley Layfield, Chairperson, DIAA Board of Directors  
DATE: March 23, 2021  
SUBJECT: Coaching out of Season

The topic of coaching out of season was raised during the Joint Legislative Oversight and Sunset Committee's recommendations meeting on February 16, 2021. In addition, on March 19, 2021, the Delaware Interscholastic Athletic Association ("DIAA") received updated draft recommendations. The purpose of this memorandum is to provide information on the topic of coaching out of season and DIAA's comments on draft Recommendation 3: Out-of-Season Coaching.

The process for changing a regulation is set forth in subchapter II of Delaware's Administrative Procedures Act (29 *Del. C.* Ch. 101). When an agency, including DIAA, proposes to adopt, amend, or repeal a regulation, it is required to submit notice and the proposed regulation to the Registrar of Regulations. 29 *Del. C.* § 10115(a). The Registrar's deadline for submissions to be published in the *Register of Regulations* is on the 15th of each month. After the proposed regulation is published in the *Register of Regulations*, DIAA is required to hold open the opportunity for the public to submit written comments for a minimum of 30 days. 29 *Del. C.* § 10118(a). In addition to the minimum 30-day written comment period, DIAA also has the option of holding public hearings on the proposed regulation. 29 *Del. C.* § 10117. If public hearings are held, DIAA is required to extend the opportunity for written comment for a minimum of 15 days after the final public hearing if more than one hearing was held. 29 *Del. C.* § 10118(a). At the conclusion of all of the public hearings and after the deadline to submit written comments, the DIAA Board determines whether to adopt, amend, or repeal a regulation based on all of the comments received. 29 *Del. C.* § 10118(b). If the DIAA Board makes a substantive change as a result of the public comments, it is required to submit notice and the revised proposal to the Registrar for publication in the *Register of Regulations* and allow the minimum 30-day opportunity for written comments from the public. 29 *Del. C.* § 10118(c).

In addition to the requirements in subchapter II of Delaware's Administrative Procedures Act, there are two additional requirements in Title 14 that impact DIAA's development of regulations. DIAA's governing statute provides that "[n]o motion, resolution or other act of the [DIAA] to adopt or amend . . . rules and regulations may be adopted without agreement of the majority of the voting members of the Board." 14 *Del. C.* § 306. Currently, there are 19 voting members and, as a result, ten affirmative votes are required in order to adopt or amend a regulation. If the Board's composition is changed, and additional voting members are added to the Board, the number of affirmative votes required to adopt or amend a regulation would also increase. Furthermore, interscholastic athletic regulations require the approval the State Board of Education. 14 *Del. C.* § 122(b)(15). When the DIAA Board of Directors votes to adopt or amend a regulation, it then forwards the regulation to the State Board of Education for approval. The State Board of Education meets on the third Thursday of every month, which usually occurs after the deadline for submissions to the Registrar of Regulations thereby impacting when the regulation changes go into effect. In addition, the Governor is required to take into consideration a person's knowledge of

athletics in general and interest in high school athletics when deciding whether to appoint the person to the DIAA Board. 14 *Del. C.* § 305(b). Thus, the DIAA Board is comprised of subject matter experts on interscholastic athletics. The State Board of Education does not have this same requirement. 14 *Del. C.* § 104(a).

There are coaching out of season regulations for the middle school level (subsection 7.6 of 14 *Del. Admin. C.* § 1008) and the high school level (subsection 7.6 of 14 *Del. Admin. C.* § 1009). Over the past few years, DIAA has spent an extensive amount of time researching coaching out of season and soliciting DIAA member schools' input on the matter. In addition to health and safety concerns, such as preventing overuse injuries and discouraging specialization in one sport, youth sports and other athletic programs outside of DIAA are not subject to the same rules and regulations as DIAA member schools. As a result, the programs may have inadequate administrative oversight or coaches may not be trained. Moreover, there are concerns that students who participate in non-school athletics may have an unfair advantage over those who are unable to afford the costs of non-school leagues, camps, and clinics or who do not otherwise participate in non-school athletics. Another concern includes smaller interscholastic athletic programs' reliance on multi-sport athletes and multi-sport coaches.

In 2015, a focus group was formed to address the coaching out of season regulations. The focus group included administrators, coaches, and athletic directors from public and nonpublic schools. When the focus group's ideas for changing the regulations were presented to member schools' athletic directors, the athletic directors did not reach a consensus on changing the regulations. However, effective February 11, 2016, the requirement that prevented high school coaches from coaching an eighth grade student in the coach's designated sport at any time during the student's eighth grade year was repealed.<sup>1</sup>

On May 24, 2017, the DIAA Rules and Regulations Committee, which typically meets only a few times per year, met to discuss changes to the requirements for coaching out of season. Following the meeting, DIAA sent a survey to member schools' athletic directors and coaches about changing the coaching out of season regulation. They also did not reach a consensus on changing the regulation. Although coaching out of season was included on the DIAA Rules and Regulations Committee's agenda when it met again on November 1, 2017, the committee addressed other regulations first and did not discuss the coaching out of season regulations.

On January 17, 2018, the DIAA Rules and Regulations Committee discussed recommending changes to the coaching out of season regulations, including revising the order, adding the terms "all accepted and registered students" to replace references to students, adding that a coaching staff may provide instruction to accepted and registered students with the school's permission, and specifying that contact is not permitted in football and lacrosse. Ultimately, the committee tabled the coaching out of season regulations for further information on insurance and weekly limits. On April 25, 2018, the DIAA Rules and Regulations Committee met and voted to forward a recommendation to the DIAA Board of Directors. At the May 10, 2018 DIAA Board of Directors' meeting, the then-executive director provided an update concerning the committee's recommendations and reported that there was inquiry regarding coaching out of season that was put forth by coaches from one DIAA-recognized sport.

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<sup>1</sup> The Regulatory Implementing Order is available on the Registrar of Regulations' website ([1009](#)).

On June 28, 2018, Senate Concurrent Resolution No. 79 was passed. SCR 79 directed the Delaware Department of Education, with DIAA’s assistance, “to promulgate regulations that permit coaches to coach student athletes out of season, with restrictions that minimize the risk of unethical activity.” SCR 79 further directed DDOE to “publish the proposed regulations developed under this Resolution no later than October 1, 2018.”

On July 30, 2018, the DIAA Rules and Regulations Committee reviewed and considered SCR 79 line-by-line.<sup>2</sup> In addition, the committee considered coaching out of season rules from other states, including Maryland, Pennsylvania, and West Virginia. The committee found that the composition of other states’ associations is markedly different from DIAA, which does not have the oversight capability that other states rely on to implement their coaching out of season requirements. The committee also discussed the January 3, 2003 decision of the Public Integrity Commission (“PIC”) that held that a public school coach does not violate the State Code of Conduct (29 *Del. C.* Ch. 58) for coaching during the off season if the off season coaching is: (1) voluntary (not for pay) and (2) the opportunity to participate is open and equally available to all students.<sup>3</sup> In its decision, the PIC found that even if the coaching is free, thereby eliminating conflicts created by any financial interest, there is still a possibility of conflicts arising from the personal relationship created between the coach and the student and that such conflicts are diminished if the programs are truly open and available to all students. Because PIC’s decision applied to public school coaches only, the coaching out of season regulations included requirements that are consistent with PIC’s decision to be fair to coaches at all DIAA member schools.

On August 9, 2018, the DIAA Board of Directors considered the committee’s recommended changes to the coaching out of season regulations, found that the recommended changes were in accordance with SCR 79, and voted to publish them. The changes were published on September 1, 2018.<sup>4</sup> On October 11, 2018, the DIAA Board of Directors considered written comments concerning the proposed changes, decided not to make further changes as a result of the written comments, and voted to amend the coaching out of season regulations as published. The State Board of Education approved the proposed changes on October 25, 2018. The changes were made effective June 2, 2019 and included permitting coaches of DIAA-recognized sports to have instructional contact with returning student athletes during the summer (the first day after the last spring DIAA state tournament event through August 1) provided that certain conditions were met.<sup>5</sup>

As a result of the written comments that the DIAA Board of Directors received concerning the changes that were made effective June 1, 2019, DIAA conducted a new survey on coaching out of season and the related regulations on open gyms and conditioning programs. On December 13, 2018, the DIAA Board of Directors approved the new survey. The questions were developed by the DIAA Board of Directors with recommendations from the DIAA Rules and Regulations Committee. The survey was administered by WestEd, a non-political, neutral education

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<sup>2</sup> See DIAA Rules and Regulations Committee Meeting Minutes (July 30, 2018).

<sup>3</sup> PIC Advisory Op. 02-60.

<sup>4</sup> The notices and proposed changes are available on the Registrar of Regulation’s website ([1008](#) and [1009](#)).

<sup>5</sup> The regulatory implementing orders are available on the Registrar of Regulation’s website ([1008](#) and [1009](#)).

consulting group that the Delaware Department of Education has partnered with on other surveys. WestEd sent the survey to all DIAA member school superintendents, principals, heads of school, athletic directors, and coaches, collected all responses, aggregated the data, and produced a report for the Board. In addition, information about the survey was sent in the Department's weekly memoranda to superintendents/heads of school and principals. The DIAA Office also sent reminder emails to representatives of the DIAA member schools.

On January 16, 2019, the DIAA Board of Directors held a meeting to review the results of the survey. The Board tabled any action on the survey results until its regular monthly meeting on January 17, 2019. At that meeting, the Board charged the DIAA Rules and Regulations Committee with drafting modifications to the coaching out of season regulations based on the survey data. On February 12, 2019, the DIAA Rules and Regulations Committee made recommended changes to the regulations. The Board considered the recommended changes at its February 14, 2019 meeting and directed the DIAA Rules and Regulations Committee to look at other subsections in Regulations 1008 and 1009 that would be affected by recommended changes to the coaching out of season regulations. On March 12, 2019, the DIAA Rules and Regulations Committee made additional recommended changes to the regulations. On March 14, 2019, the DIAA Board of Directors considered all of the committee's recommended changes to the coaching out of season regulations and voted to publish them.

On April 1, 2019, changes to the coaching out of season regulations were published.<sup>6</sup> During the public comment period for the proposed changes to the coaching out of season regulations, the PIC issued PIC Advisory Opinion 19-14.<sup>7</sup> PIC determined that public school coaches may not work for private sports clubs. PIC found that open and accessible were the two key factors that PIC cited in its prior opinion in 2003 and that it "did not believe that private sports clubs were open and 'accessible' to everyone because lower-income families could not afford to attend such camps or clubs." PIC also found that a financial interest exists whether public school coaches are paid by a student, a parent, or a third party. PIC reasoned that "[c]ompensation creates an interest that may impair a coach's judgment when making official decisions, which is prohibited. As stated in the prior opinion, impaired judgment can lead to favoritism or preferential treatment which can only be mitigated by the lack of a financial interest."

On May 9, 2019, the DIAA Board of Directors considered the written comments it received concerning the proposed changes. The majority of the comments were from athletic trainers or individuals in the medical field who had health and safety concerns, including overuse injuries. The Board tabled the proposed changes for recommendations from the DIAA Sports Medicine Advisory Committee ("SMAC").

On June 3, 2019, the SMAC reviewed draft changes to the coaching out of season regulations and provided a report to the DIAA Board of Directors on June 13, 2019.<sup>8</sup> The report addressed the risks of specializing in a sport too soon or at all, whether sports-enhancement programs lead to success, whether specialization leads to successful performance, how much training is adequate to succeed versus how much is too much, and psychological concerns of

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<sup>6</sup> The notices and proposed changes are available on the Registrar of Regulation's website ([1008](#) and [1009](#)).

<sup>7</sup> Public Integrity Commission Opinion Synopses – Outside Employment 1991-2019 at 5 – 7.

<sup>8</sup> DIAA SMAC Special Meeting Report (June 3, 2019).

intensive training. SMAC also made recommendations based on research and national recommendations, including limiting coaching out of season to rising juniors. Although there are students who participate in the same sport throughout the year, part of DIAA's statutory purpose is to protect the physical well-being of student athletes and to promote healthy adolescent lifestyles. SMAC reported that specialized training in young athletes has risks of injury and burnout and that the degree of specialization is positively correlated with increased serious overuse injury risk. Changes to the coaching out of season regulations require DIAA to balance the needs of multi-sport athletes with those of single-sport athletes in a manner that takes into consideration SMAC's recommendations.

On July 12, 2019, the DIAA Board of Directors withdrew the proposed changes to the coaching out of season regulations.<sup>9</sup> DIAA continues to work on drafting language that would permit coaching out of season during the school year and also address the health and safety and equity concerns that have been raised by stakeholders. On January 15, 2020, March 9, 2020, August 20, 2020, January 12, 2021, and March 1, 2021 the Rules and Regulations Committee met and continued working on revisions to the coaching out of season regulations. The additional concerns that the committee is considering include the availability of coaches and facilities if coaching out of season is permitted during the school year, DIAA member schools' ability for monitoring and oversight, and the advantage fall sports have over winter and spring sports now that coaching out of season is permitted during the summer.

On March 22, 2021, SMAC voted to recommend that coaching out of season be limited to January 1 of sophomore year instead of its previous recommendation of junior year. The Rules and Regulations Committee is scheduled to meet again on March 30, 2021 and will continue working on its recommended changes to present to the DIAA Board of Directors. Regarding Option 1 of draft Recommendation 3, there is no guarantee that changes will be adopted by a specific date. As stated above, DIAA, similar to other agencies, is required to follow the process for changing regulations that is provided in subchapter II of Delaware's Administrative Procedures Act. Regarding Option 2, DIAA recognizes that the JLOSC can sponsor legislation regarding coaching out of season.

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<sup>9</sup> The regulatory implementing orders are available on the Registrar of Regulation's website ([1008](#) and [1009](#)).



Delaware Interscholastic Athletic Association  
Rules and Regulations Committee Meeting  
Monday July 30, 2018– 9:00am  
Collette Education Center – Room A – Dover, DE

## Minutes

1. The Meeting was called to order by Chairman Cimaglia at 9:25 am.
2. Roll Call – In attendance were; Gary Cimaglia, Kevin Fitzgerald, Jack Holloway, Josette McCullough, Mike Hart, Evelyn Edney, Mike Tyndall, Jim Harvey, Mike Wagner and DIAA Executive Director Tommie Neubauer and DAG Laura Makransky. Susan Coffing submitted her resignation from the Committee. Absent; Terre Taylor, Deb Corrado.
3. Jack Holloway motioned and Mike Wagner seconded the approval of the Agenda, passed 10-0.
4. Kevin Fitzgerald motioned and Mike Hart seconded the approval of the minutes from 4/25/18, passed 8-0.

### A) Status of Regulation Changes

- a. Laura Makransky, DAG for DIAA gave an update of the changes to Regulation 1007 that were presented to the state board of education and passed .

### B) Recommended Regulation Changes

1. Coaching Out of Season (1008-7.5 & 1009-7.5) and Senate Concurrent Resolution 79 were reviewed by the Committee. A brief history of how the CR came about. The Committee then focused their review on CR lines 30 to 50 by examining each point line-by-line;  
Line 30 – The period of allowed and non-allowed ‘practicing’ is covered by DIAA Regulations 1008/1009 7.5.1 and 7.5.2. The Committee felt practice period is a better term than ‘no contact’.  
Line 31 – Covered by regulation 1008/1009.7.5.2.  
Line 33 - Covered by regulation 1008/1009.7.5.1.  
Lines 34-36 – Allowed so long as those teams meet the requirements of Regulation 1008/10097.5.2. or 7.5.1.  
Lines 37 – This is allowed as long as regulations 1008/10097.5.1 and 7.5.2. are met.  
Lines 38-39 – Are not restricted by DIAA other than Regulation 1008/1009.7.5.1.  
Lines 40-41 – Is allowed by Regulation 1008/10097.5.2.3.  
Line 42 – Allowed so long as the clinic, lessons or camp meet the requirements of Regulation 1008/10097.5.2. or 7.5.1.  
Lines 43- 48 – Are covered by Regulations 1008/10097.5.1. and 7.5.2.  
Lines 49-50 – Are covered by Regulation 1008/1009.7.5.2.

The Committee discussed the Coaching out of season regulations of MD, WV and PA.

They discussed allowances that could be made upon request for coaches to participate with their school athletes in regional or national events.

They discussed the plan for moving forward and getting member school input on proposed changes.

The Public Integrity Commission ruling of 2003 that does not allow a public school coach to receive compensation for coaching out of season was discussed and what options the Committee could exercise regarding this opinion.

The FAQ for Regulation 1009.7.5.1.3. was created and placed to a vote; motion to approve by Jack Holloway, seconded by Mike Tyndall, passed 10-0.

2. \*Concussion Protocol 1008/1009.3.0. the changes created by Ms. Makransky and Mr. Neubauer were shared with the Committee. Some minor edits were made then motion by Mike Wagner, seconded by Jim Harvey to approve the changes as written passed 9-0.
3. Transfer rule / Passing Work / Years of participation Regulation 1008 – changes were presented by Ms. Makransky, no substantive changes made, primarily clarifying the language and sequencing, motion by Mike Hart, seconded by Evelyn Edney to accept changes as written passed 9-0.
4. Form for requesting Regulation Change any actions was moved to be tabled by Kevin Fitzgerald, seconded by Josette McCullough, passed 9-0.

- C) Committee Discussion items** – There were no additional items discussed.
- D) Next Meeting Date** –To Be Determined depending on actions of DIAA Board and DAAD, Committee to be polled for best date available.
- E) Public Comment** – Mary Pat Kwoka, President of the DE Interscholastic Volleyball Coaches Association spoke regarding the Out of Season Coaching Regulations.
- F) Adjournment** motion to adjourn by Kevin Fitzgerald, seconded by Josette McCullough, passed 9-0 at 11:50am.

## DIAA SMAC Special Meeting Report

The DIAA Sports Medicine Advisory Committee met on 6/3/19 to review the proposed regulation changes to 1008 and 1009. As requested by the DIAA Board of Directors at the May 2019 meeting, the SMAC specifically reviewed literature regarding injury prevention for high school age athletes related to coaching out of season and sports specialization.

### Summary of key literature

- **What are the risks of specializing too soon or at all:**
  - Specialized training in young athletes has risks of injury and burnout, while the degree of specialization is positively correlated with increased serious overuse injury risk.
  - Athletes who met the definition of a highly specialized athlete had 2.25 (range, 1.27-3.99) greater odds of having sustained a serious overuse injury than an unspecialized young athlete, even when accounting for hours per week sports exposure and age. In fact, there was a continuum, with the more specialized an athlete the greater this risk of injury
  - Another study showed that athletes who met the definition of a highly specialized athlete had 2.25 (range, 1.27-3.99) greater odds of having sustained a serious overuse injury than an unspecialized young athlete, even when accounting for hours per week sports exposure and age. In fact, there was a continuum, with the more specialized an athlete the greater this risk of injury
- **Do sports-enhancement programs lead to success:**
  - Scheduled intense competitions that can last 6 hours or longer without adequate rest and recovery have been implicated as a risk factor for potential injury as well. Suggested minimal rest periods between repeated bouts of same-day competition have been proposed, as well as limiting training 48 hours prior to competition to help reduce injury risk. However, more research is needed to understand the risk factors associated with overscheduling competition and to establish formal guidelines to optimize youth sport performance.
  - No studies on sports-enhancement programs in youth that only teach sport technique or “conditioning” have shown a greater chance of success despite their increased time and financial investment.
  - In a study of nearly 1200 young athletes in a variety of sports, the ratio of weekly hours in organized sports to weekly hours in unorganized free play (sports training ratio) approached 2:1. Young athletes who exceed a sports training ratio of 2:1 are more likely to suffer a serious overuse injury. These data seem to indicate that unstructured free play may potentially have a protective effect from serious overuse injury.
- **Does specialization lead to a successful performance and career:**
  - With the exception of a few sports such as gymnastics and figure skating, the odds of excelling to the elite level in sport do not appear to be increased by early sports specialization.

- 3-11% of high school athletes compete at the college level, only 1% receive any form of scholarship
- Jayanthi et al and Cote et al revealed that, for the majority of sports, late specialization with early diversification is most likely to lead to elite status. In addition, athletes who engaged in sport-specific training at a young age had shorter athletic careers.
- Current evidence suggests that delaying sport specialization for the majority of sports until after puberty (late adolescence, ~15 or 16 years of age) will minimize the risks and lead to a higher likelihood of athletic success.
- **How much training is adequate to succeed versus too much:**
  - Exceeding hours per week of training greater than the athletes age or greater than 16 hours per week of total sports participation (for age over 16), regardless of the number of sports, seems to carry the greatest risk of injury
  - High school athletes who did not take at least 1 sport season off during the year (eg, fall, winter, spring, or summer) were more likely to sustain an injury independent of whether the athlete was characterized as a single or multisport athlete
- **Psychological concerns with intensive training:**
  - The psychological risk of burnout, depression, and increased risk of injury may be a reason for withdrawal from sport in young athletes who take part in early specialized training. Talent development research on young athletes demonstrates that professionalized, adult-style practices are likely not optimal for fostering talent development.
  - There is also a valid concern of sports attrition related to early, specialized intense training. In ice hockey, players more prone to dropout began off-ice training at a younger age, while they also invested a larger number of hours in off-ice training at a younger age compared with those who continued participation
  - While many athletes will recover after an injury, injuries that occur during sports or physical activity may deter some athletes from further participation. One year or more after an injury or surgery, only 65% of athletes returned to their previous level of sporting activities, despite functional recovery from the injury. Twenty percent of elite athletes have reported injury as a reason for quitting their sport, and up to 8% of adolescents drop out of sporting activities due to injury or fear of injury. Many athletes within 12 months of an injury report lower levels of physical and mental health, with a significant reduction in their physical activity.
  - Allowing for 1 month off from a sport at least 3 times per year allows for physical and psychological recovery

**Resources for further review:**

Sport Specialization, Part I: Does Early Sports Specialization Increase Negative Outcomes and Reduce the Opportunity for Success in Young Athletes? Sports Health 2015

Sports Specialization, Part II: Alternative Solutions to Early Sport Specialization in Youth Athletes. Sports Health 2015.

### **DIAA DSMAC**

Upon reviewing the current research and National recommendations, the DIAA SMAC recommends the following guidelines be followed when considering out of season coaching:

1. Regulations previously proposed allowing for full calendar year coaching should be limited to rising juniors. The exception to this would be that all pitchers/catchers would be allowed to begin a progressive throwing program beginning six weeks prior to start of normally scheduled start date.
2. For at least 3 months per calendar year, the coach may not coach a student-athlete out -of -season in the same sport he coaches in- season. One of those 3 months must be a 30 day period immediately succeeding that sports last in season day of participation.
  - a. Coaching Outside of the normal school season shall not exceed five (5) days a week and follow regulations 4.2.2.4 and 4.2.2.5 for length of practices.
  - b. Coaching an athlete who is not actively participating in an in- season school sport during the school year shall be limited to 2 hours of practice per school day, five hours on a non school day where there is no more than 3 consecutive hours before a one hour recovery time is conducted (4.2.3.1-3).
  - c. Coaching an out- of- season sport during the school year for an athlete actively participating in an in -season sport must follow regulations 4.2.3.1-3 ( 2 hour practice limit per school day); however, athletes may practice in their out -of- season sport during other days so long as total playing time of both sports do not exceed 2 hours per day on a school day and 5 hours per day on a non school day, have at least 1 hour of rest between sports, do not exceed 3 hours for any one sport on a non school day, and have at least one day where no sport activity whatsoever per calendar week is occurring. During the academic school week, total participation time is not to exceed 15 hours in a 7 day period.
3. All athletes should be encouraged to participate in multiple sports, and not specialize in a single sport.

## **OUTSIDE EMPLOYMENT 1991-2019**

**19-40—Outside Employment:** [Employee] worked for a State [Agency] as an Accountant. Her job duties included: paying [Agency] bills, participating in budget management, etc. [Employee] was not involved with the [Agency]’s oversight of [a specific industry].

[Employee] also worked part-time for a [private employer] that is regulated by the State. The [private employer] was recently sold to a new owner and the new management was requiring their [employees] to work in additional facets of the business]. As a result, a license is now required of all [current employees], regardless of whether they [worked in the specific area that required a license]. To obtain a license, individuals must complete a thorough application process, which includes a review of their criminal history by [a Division within a different Agency]. [The Division] reviewed [Employee]’s application for a license and recommended that the application be approved by the [Employee’s Agency].

[Employee] asked the Commission if her request for an employee license, issued by the [Agency], would create a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. After reviewing the pertinent facts and circumstances, the Commission did not see how [Employee]’s official judgment would be impaired by allowing her to comply with the additional licensing requirement instituted by her part-time employer. However, [Employee]’s supervisor, is responsible for approving or denying licenses following a background check and recommendation by [the other Division]. That meant [Employee]’s outside employment created a situation in which [Employee’s supervisor or co-workers] would be reviewing [Employee]’s license application. Ordinarily, the Commission would not permit a State agency to issue a license to one of its own employees. However, because [Employee]’s background investigation was conducted by employees of [a Division of another Agency] and not the [Employee’s Agency], and [the outside Division] recommended approval of the license application, this Commission decided that there was demonstrable independence of judgment in granting [Employee]’s license application.

The Commission emphasized the fact that their decision was based solely on these facts. It could not be extrapolated to include approval for other [Agency] employees seeking a [similar] license.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency.

Nothing in the facts presented to the Commission indicated that [Employee] would be required to represent her part-time employer before the State. As a result, the Commission had no concerns about preferential treatment to any person.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so she was entitled to a strong presumption of honesty and integrity. Nor were there any facts to indicate that [Employee] would attempt to circumvent official channels. Indeed, the fact that she brought this matter to the Commission's attention was indicative of her desire to work within official channels.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. The Commission treats this provision as an appearance of impropriety standard. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality.

The [Agency's] operations in the State of Delaware are strictly regulated. [Employee] had worked for a [private employer] for almost 30 years. Her application for a license was a requirement forced upon her by [private employer]'s new management, even though [Employee]'s job duties had nothing to do with the [specific area requiring licensure]. In addition, her application was reviewed, and recommended for approval, by [a State agency] that was independent of her [Agency]. As a result, the Commission decided that it was very unlikely that [Employee]'s dual employment would create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. One prohibition considered by the Commission under that provision was that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee]'s part-time employment was in the evenings and on weekends, after her State work hours.

**19-26—Outside Employment:** [Employee works for a State [Agency]. [Employee] was assigned to work in Kent and Sussex Counties. [Employee]'s primary responsibilities included *[job description has been omitted to protect the employee's confidentiality]*. [Employee] worked set shifts that rotated every three to four weeks, depending on staffing levels. For one of those three or four weeks he was on-call.

[Employee] wanted to accept a part-time position with [a local municipality]. His job duties would include [tasks similar to those he performed in his State job]. [Agency] did not have a contractual relationship with [the municipality] but did have regulatory oversight for [some] purposes. As a result, there could be occasions where [Employee] would be required to call upon [municipal employees] for assistance while performing his State job duties. [Employee] stated that the offer for part-time employment was on an 'as-needed' basis meaning

he could select the hours he was available to work based upon his State work schedule. Under no circumstances would he accept part-time work during the week he was on-call.

[Employee] asked the Commission if his part-time work for [the municipality] would create a conflict of interest with his State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It was difficult for the Commission to imagine a scenario which would affect [Employee]'s judgment in his State position. While both positions involved [similar job duties], [Employee]'s State job was [focused on one area and the municipal employment was focused on a different area]. When considering whether it was possible that [Employee] would encounter [municipal co-workers] while working in his State capacity, the Commission surmised that the only way that could happen was if [Agency] was called upon to respond to [a situation in the municipality]. In that instance, [Employee] would be working in a collaborative effort with [the municipality], rather than adversarial, and it was difficult to see how his dual employment would interfere with his ability to perform his official duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [Agency] did not have a contractual relationship with [the municipality]. As a result, the Commission felt that it was unlikely that [Employee]'s colleagues from either job would have contact with each other. Therefore, the likelihood that [Employee]'s part-time work would result in preferential treatment being extended to anyone was very remote.

**(3) official decisions outside official channels:**

Given the different [focus] between the two positions, there did not appear to be any way [Employee] could influence official decisions outside official channels. That was not to say he would do so he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).



There were no obvious conflicts between the two sets of job duties which would be likely to negatively affect the public's confidence in their government. In further mitigation, [Employee]'s outside employment would be with another government entity, rather than a private entity. The public would be less likely to be concerned that [Employee]'s dual employment would create an appearance of impropriety because it would be with another government agency.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated he would work at his part-time job outside of State work hours. The Commission reminded him that the prohibition not only applied to his physical presence, but also related to phone calls and paperwork.

**19-20—Outside Employment:** [Employee] began working for the State on March 4, 2018. She worked for a Division of the Department of Children, Youth and their Families ("DSCYF"). Her job duties included: interviewing clients and family members to gather background information and make referrals for services; assessing progress; collaborating with schools, doctors and other providers to set goals and measure the client's progress.

[Employee] was offered a part-time position by her former employer, [a private entity]. [The private entity] offered various group and individual programs to help children [develop specific skills]. [The private entity] did not contract with the State but they did have some clients that were in the Medicaid program. At the time of the meeting, none of [the private entity]'s clients were active with [the Division]. [Employee was expected to] train new staff members in various skills such as: parent interaction; setting and assessing goals and intake procedures. [Employee] would be able to accomplish her training objectives through the use of cameras. The use of cameras would allow her to reference particular activities or behaviors without having one-on-one contact with [the private entity]'s clients. To further separate her part-time job duties from her State job duties, [Employee] decided that she would not work in any programs that received state funding.

[Employee] discussed the job offer with her State supervisor. [The Supervisor] agreed to allow [Employee] to recuse herself from handling a case in which [Employee] had prior knowledge of the client from her work at [the private entity]. Likewise, the owner of [the private entity] agreed that [Employee] would not be required to perform tasks that would conflict with [Employee]'s State job duties.

[Employee] asked the Commission if her part-time work for [the private entity] created a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It seemed unlikely that [Employee] would encounter any of her State clients while performing

her [private] job duties because she would not be working with individual clients. Conversely, her State supervisor had agreed to allow [Employee] to recuse herself from working with any client that [Employee] had previously encountered at [the private entity]. Those recusal strategies would allow her to perform her [private] job duties without affecting her professional judgment in the performance of her State job duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. It appeared highly unlikely that [Employee] would be required to represent her part-time employer before the State because [the private entity] did not contract with the State. Consequently, it was equally unlikely that she would place her co-workers in a position to make decisions which could result in preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so she was entitled to a strong presumption of honesty and integrity.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation the Commission treats this provision as an appearance of impropriety standard. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality.

The fact that [the private entity] did not contract with the State practically eliminated the possibility that [Employee]'s dual employment would create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. One prohibition considered by the Commission under that provision was the State employee could not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee]'s part-time employment would be in the evenings, after her State work hours.

**19-14--Outside Employment:** Commission Counsel spoke to [an interested individual] on March 13, 2019. She asked about the current applicability of *Comm. Op. 02-60* to various scenarios. (Discussed below). She also mentioned proposed regulations to the DIAA portion of the Department of Education's regulatory scheme. The Commission reviewed her request at the March 19, 2019 meeting but was unwilling to issue a formal opinion without reading the proposed regulations and gathering additional information. As a result, the matter was added to the agenda for April 16, 2019, meeting.

## **Prior Opinion**

*Commission Opinion 02-60* decided that public school athletic coaches could participate in sports camps, outside of the school year, as long as the camps were open and available to all students. In addition, the Commission stated that the coaches could not be paid for participating in the sports camps in which their school students participated because it would inject a financial interest into the matter which would then create a conflict of interest.

[The individual] was specifically interested in an interpretation of the following excerpt from *Comm. Op. 02-60*:

If the programs are “open, voluntary and available to all athletes,” and “not tied to a specific school” it is likely some attendees would be from a coach’s own school district. While this again gives the coach more time to develop a close relationship with the team member, who may be in his own district, that concern is diminished if the programs are “truly open, voluntary and available to all athletes.” Thus, assuming the programs can be developed with that accessibility and as long as there is “no financial interest” involved, such activity would be permitted...concerns raised by the possibility that coaches will work with some athletes from their own school district resulting in preferential treatment, are diminished by having programs equally available to all athletes, and the concern of using public office for personal gain, etc., is eliminated. Thus, the literal application of the law is not necessary to serve the public purpose.

[The individual] then asked:

Does this opinion interpret the State Code of Conduct as prohibiting a coach at a publicly funded school from doing any coaching of students from their school or district or can a coach work with athletes from the coach’s school or district if the program is open, voluntary, and available to all athletes and the coach does not have a financial interest involved?

After the March 19, 2019 meeting, the Commission answered this question by affirming [the individual]’s interpretation of the previous opinion. The phrase “open and available to all athletes” was interpreted to mean that any child could try out for a team regardless of economic status. The phrase “financial interest” meant compensation of any kind.

At the April 16, 2019 meeting, the Commission addressed her remaining questions.

## **Questions**

The remaining questions were:

1. Non-school sport clubs are open, and their coaches can, and currently do, coach athletes who otherwise play on competing school teams. Because these clubs are open and accessible and attract students from a variety of schools, are coaches employed by schools in the State of Delaware free to be employed by them? Are they allowed to coach teams which may include one or more students from their school? If the team includes students from their school would guidelines that establish how many students from a coach’s school can be on the

club team with the number specifically developed for each sport, be an appropriate guideline for the coach to use to avoid violating the State Code of Conduct?

2. The other term of importance in the 2003 Commission opinion is “financial interest”. Are we correct in understanding that there is a clear financial interest if the student were to pay the coach directly for his or her professional coaching services? Is the financial interest of the coach diminished to an acceptable level in the case of sport-specific clubs when the club charges a membership tuition fee for all student athletes who join, but the money reaches the coach indirectly, via the coach’s wage or salary? As explained in the prior questions, student-athletes may or may not come from the coach’s school. Does this diminish the possibility of preferential treatment for athletes from the coach’s school or that the coach is using public office for personal gain?

### Answers

1. Public school coaches may not work for private sports clubs. The Commission did not believe that private sports clubs were open and ‘accessible’ to everyone because lower-income families could not afford to attend such camps or clubs. The ‘open’ and ‘accessible’ factors were the two key factors that the prior Commission cited in their opinion. This Commission agreed. As a result, the Commission did not consider the remaining subparts of the question regarding how many students could be on a coach’s club team that were also on the coach’s school team.

2. A financial interest exists whether the coaches are paid by the student, parents or a third party. Compensation creates an interest that may impair a coach’s judgment when making official decisions, which is prohibited. 29 *Del. C.* § 5805(a)(2)(a) and 29 *Del. C.* § 5806(b). As stated in the prior opinion, impaired judgment can lead to favoritism or preferential treatment which can only be mitigated by the lack of a financial interest.

**19-12--Outside Employment:** [Employee] worked for a State [Agency]. [Employee]’s job duties were administrative, not clinical. She did not work directly with her clients, nor did she speak to them on the phone or in person. Her role was limited to documenting treatment services provided to each of her clients by [a State contractor]. When one of her clients completed treatment, she would document their discharge from treatment. All of the information she documented was entered into an [Agency] database which contained information about all of the agency’s clients. [Employee] stated that she could only access information related to her clients; not other clients associated with the agency.

[Employee] was offered a position with [Vendor to provide direct services to clients]. [Vendor] was a privately-owned Medicaid-approved agency and had been providing outpatient services since 2004. [Vendor] supported people with [a particular disability] in the home and in the community. Her duties included: developing treatment plans; coordinating outpatient services; and providing counseling. At the meeting, [Employee] stated that [the Vendor] also had an opening for a clinical supervisor. In that position she would be responsible of reviewing the work of other employees. [Employee] did not work with [Vendor]’s clients as part of her State job duties but her [Agency] did contract with [the Vendor].

[Employee] asked the Commission if her part-time work with [Vendor] would create a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. 5805(1). [Employee] did not have any contact with [Vendor] when performing her State job duties. As a result, it was unlikely that [Employee]'s dual roles would adversely affect her professional judgment.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). It was unlikely that [Employee] would be required to represent [the Vendor] before [her Agency], even though [the Vendor] did contract with the [Agency], because that work would usually be performed by [the Vendor's] supervisor. However, at the meeting she admitted that if she were to work part-time for [the Vendor], her State co-workers could ask her about her part-time work and/or clients if they became aware of her dual employment. Additionally, if hired [to have direct contact with the clients], her State co-workers could be required to review treatment plans she would create for [the Vendor]'s clients. Conversely, if [Employee] were to accept a position as a clinical supervisor, there would be less opportunity for her to show preferential treatment to any person and it would be less likely that her State co-workers would review any of her work. However, that did not end the inquiry. [Employee]'s proposed work as a clinical supervisor is discussed further below.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996). However, she did point out that her co-workers could be interested in her part-time work and the conversation could turn to clients that were being treated by [Vendor] who were also active with [the Agency]. For that reason, she could not accept a position [having direct contact with the Vendor's clients].

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treated this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s employment with [the Vendor], in either position, would likely create an appearance of impropriety amongst the public because [the Vendor] contracted with her State employer. Her employment on both sides of the contractual relationship would likely lead people to believe that she would be unable to perform her State duties without bias. As a result, she could not accept any employment with [the Vendor].

**19-10--Outside Employment:** [Employee] was employed by a State [Agency]. [Agency] provided case management [services for a specific demographic of the population]. [Employee]'s duties included: interviewing clients to gather social and background information; referring clients for appropriate community services; documenting progress; completing case plans and reports; providing counseling to their clients. She was assigned to the Kent County office.

[Employee] also worked at a private business. [The private entity] ran a [housing facility] located in New Castle County. [The private entity] provided many services to families. [Employee]'s duties included answering phone calls; admitting and monitoring clients; and recordkeeping. [Employee] differentiated her two positions by stating that her work [for the private entity was focused on an area not handled by her State Agency]. In the two years she had worked there, she never encountered a family member of a State client.

[Employee] asked the Commission if her part-time work with [the private entity] created a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. §5805(1). [Employee] believed that because the focus of each job was different that there was no crossover between her two positions. In her state job she provided counseling to a [broad demographic of individuals], as well as referring them for community services. All of her State job duties were performed in Kent County. At [the private entity] she worked [with a narrower demographic of individuals] and performed her job duties in New Castle County. The geographic separation between her two job locations made it extremely unlikely that she would encounter a client from one job while performing the duties of her other job, thus practically eliminating the potential to impair her official judgment. However, in the unlikely event that such a circumstance should occur, she was advised to recuse herself from working with the client creating the conflict.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). The Commission decided it was unlikely that [Employee] would be required to represent [the private entity] before [Agency]. [The private entity] did not contract with [Agency] and the clients she worked with at her two jobs were from different [demographic groups]. Nor was it clear how her co-workers and colleagues would be able to show preferential treatment to any person as a consequence of her dual employment.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s two positions were not demographically or geographically related making it less likely that she would encounter clients from one job while performing duties related to the other job. In addition, her agency did not contract with [the private entity], mitigating the impression that [the private entity] could benefit from her part-time employment. As a result, the Commission decided that it was unlikely that her dual employment would create an appearance of impropriety.

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

**19-09—Outside Employment:** [Employee] is an Administrative Assistant II for [a] Division of [a] State agency]. She was assigned to work at [a particular inpatient location]. [Employee] performed general office manager duties, supervised a casual/seasonal employee and prepared contracts between [the Division] and outside vendors; maintained and audited client information in an electronic database. Her work hours were 8:30 a.m. to 4:30 p.m.

[Employee] had been offered a part-time position with [one of her Division's vendors]. [Vendor] did not provide services to the [inpatient location where Employee worked]. [Vendor] provided services to clients [living in the community]. As part of her job duties, [Employee] would assist clients with [various tasks]. She asked for her work hours to be after 5 p.m. and on weekends. The Commission had previously approved [Division] employees to work for [Vendor] in a variety of positions. (*Comm. Ops. 16-46; 16-22; 15-17; 14-31; 14-28*).

[Employee] asked the Commission if her part-time work with [Vendor] created a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employees state] clients did not live in the community. Therefore, it was extremely unlikely that [Employee] would encounter one of [her state] clients while performing her part-time job duties. As a result, there was no concern that her official judgment could be affected by her part-time work. At the meeting, [Employee] mentioned that one of her State job duties was to audit all of [Division]'s client records to assure that they were accurate. This could have involved her auditing one of her [part-time] client's records. However, her audit work was limited to verifying demographic information. Such work is considered ministerial. A matter is "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Commission Op. No. 00-18 (citing Darby v. New Castle Gunning Bedford Education Assoc., 336 A.2d 209, 211(Del., 1975))*. Because her official duties regarding the record database were assigned with certainty, with no room to deviate, a conflict would not arise because her judgment would not be impaired.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Vendor] was a [Division] contractor but they did not work with clients at [the inpatient location where Employee performed her State job duties]. The Commission did not see how [Employee's] work with community-based clients would give her the ability to show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

Because [Employee] would not have contact with [clients from her State job location] while performing her [part-time] job duties, and vice-versa, the Commission decided that her dual roles were unlikely to create an appearance of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e.



computer, fax, phone, etc.) to work on the private business. [Employee] asked [Vendor] for work hours outside of her State work hours.

**19-07—Outside Employment:** [Employee] worked for a [specific Division of a State Agency]. [Employee]’s duties included: referring clients for behavioral health services; documenting progress; completing case plans and reports; requesting residential treatment when necessary.

For the past eight years, [Employee] had also worked part-time for [one of her Agency’s vendors]. [The vendor did not contract with her Division]. [Employee]’s duties included providing counseling and therapy; planning, designing and presenting educational material; documenting records.

[Employee] had a recusal strategy in place [when she was working for the vendor]. If a client was [referred to the vendor by her State Agency, the vendor would not assign her to work with that client]. If she had already been working with the vendor’s client before the client was referred to her State Agency, then [the vendor would] reassign the case to another employee. At the time of her submission, [Employee] was working with a client who [had not been referred to her State Agency] when she first began working with him but was later assigned to [Employee’s] Division. The vendor was unable to assign the client to another employee (as per the recusal protocol) because they were short-staffed and in the process of hiring new employees. At the meeting she reported that she did not see the client again and they were transferred to a new [employee] once the [vendor] had completed the hiring process.

[Employee] asked the Commission if her part-time work with [the vendor] created a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not review and dispose of matters related to [vendor] while performing her State job duties because her Division did not contract with [vendor]. When performing her [vendor] job duties, if one of her clients was [referred to her State Agency] the [vendor] was supposed to transfer the client to another employee. Of course, during the instance she described in her written submission, there were no available employees to whom the client could be assigned. The Commission asked [Employee] how often such a circumstance had occurred. She stated that in the eight years she had worked for the [vendor], this instance was the only occasion.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. Because [vendor] did not contract with [Agency], it was very unlikely that [Employee] would encounter a co-worker or colleague that could benefit in some way from her part-time job duties. As to preferential treatment of her clients, [her State Agency and the vendor served two different types of clients]. In the unlikely event that [Employee] was assigned a client at

[Agency] that she had worked with while at the [vendor], she was advised to recuse herself from that client.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

In [Employee]'s written submission she stated that she does not disclose the fact that she works for [Agency] to her clients or their families. In addition, she had a strong recusal strategy that practically eliminated the crossover between her two positions. Both of those factors mitigated the possibility that the public would perceive her dual employment as an impropriety.

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

**19-03—Outside Employment:** [Employee] was a Supervisor [at a State agency]. She oversaw employees who provided services directly to clients]. In her oversight role, [Employee] was responsible for planning, assigning, reviewing, evaluating, coaching, training and disciplining other [employees]. She also monitored case management plans implemented by her subordinates.

[Employee] also worked part-time for [a municipality as a member of their recreation personnel]. Her work hours were usually 5:30 to 8:30 and did not conflict with her State work hours. She monitored youth and adults who used the gymnasium where she was assigned to play basketball and other recreational activities. She also worked at the scoring table for the youth basketball league. Police officers were also assigned to the recreation locations to handle any issues that could arise. At some of the events [Employee] occasionally saw [clients that were assigned to her subordinates]. While [Employee] may have known the [clients] by sight, they generally did not know her.

[Employee] asked the Commission if her part-time work created a conflict of interest with her State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not have direct oversight over individual clients and was only involved in their matters if one of her subordinates sought her advice. At the meeting, she explained that the [people she encountered as a recreation personnel] were from a different geographic area than the [clients] that were assigned to her subordinates. As a result, it was extremely unlikely that she would encounter a [client] at the recreation facility that she also made decisions about in her State job.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. At her part-time job, [Employee] worked with [a different group of people than those she encountered in her State job]. It was difficult to see how she would encounter a co-worker or colleague who could benefit in some way from her part-time job duties.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

It was unlikely that [Employee]'s dual roles would create an appearance of impropriety amongst the public. She worked in two separate geographic areas and the people that attended the recreation center were unlikely to be [a client of her subordinates].

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision was that the State employee may not use State time or State resources

(i.e. computer, fax, phone, etc.) to work on the private business. [Employee] worked at her part-time job] outside of her State work hours.

**18-50—Outside Employment:** [Employee] is employed part-time by [a State agency]. [The agency] provides services to [clients] diagnosed with [specific disorders]. Individuals diagnosed with [those disorders can receive treatment that addresses all of their needs]. [The agency] operates a facility which provides treatment to [a specific type of client]. [Employee] is the Director [of that facility and works with the clients].

[Employee] also worked part-time [training others in the care of clients at a private facility]. He developed and implemented the curriculum for [those undergoing training]. While [client] treatment was not part of his primary job duties, he occasionally worked some hours [if there was an urgent need].

[Employee] worked a third part-time job at a small private [business], one or two evenings a week. His work at the private [business] afforded him the opportunity to enhance his skills by working with [clients with a different background than that of his State clients]. [Employee] would not work with a client that he had previously contacted at [his State agency] and vice-versa.

Lastly, [Employee] performed some private consulting work in [his area of expertise] but he did not work on cases involving Delaware or its citizens. For all of his part-time roles, [Employee] was careful not to use State time and resources while working on his private endeavors. He asked the Commission to consider whether any of his private part-time work created a conflict of interest with his State position.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not treat clients that he encountered in one job that he had also had contact with in one of his other capacities. He recognized that not only would it be a breach of the Code of Conduct, it also violated [his profession's] ethics rules. Therefore, he was keenly aware of the need to recuse when necessary and the required procedural steps to accomplish such recusal.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [The performance of his job duties] was necessarily a one-on-one endeavor. It was difficult to see how [Employee] could use his multiple roles to gain an advantage or to show preferential treatment to any person.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

[Employee]'s multiple endeavors included [clients] from multiple, and separate, demographics. In his State position, [Employee actually worked with clients]. When working at the [private facility], he was primarily [training co-workers], not clients. If the need arose for [Employee] to actually have contact with a patient it was very unlikely the [client] would be someone from [he knew from his State position]. The same applied to the [clients] he saw in [the private business]. As to his consulting work, [Employee] only worked on cases involving out-of-state individuals, practically eliminating the potential for any crossover.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated in his letter that he was very careful to keep complete time records and did not use his State time or resources for his private endeavors.

**18-17—Outside Employment:** [Prospective employee] worked full-time for [one of the State's vendors] as a Shift Coordinator. [The vendor] provided services to clients of state and county agencies. [Vendor] had two [facilities] in Delaware. [Prospective employee]'s job duties involved direct patient care and included: developing plans, coaching patients; documenting services provided; coordinating plans with the patient's family and other treatment providers; managing the [Vendor's] capacity management plan.

[Prospective employee] applied for a casual/seasonal part-time position within the Department of Health and Social Services. [Prospective employee] would be assigned to [a specific unit] which acted as the "gatekeeper" for [specific] services. Those services included residential treatment programs. Individuals who wanted to enroll in a program had to apply for services through the [unit]. The [unit] evaluated the need for the services [based on a number of criteria]. If the [unit] determined that a person was eligible for services, they would authorize a specific quantity of services and link the eligible person to a community provider. The Vendor was one of those providers. [Prospective employee]'s job duties would not include patient care. She would be responsible for locating [placements] for individuals referred to [the unit] by community providers.

[Prospective employee] asked the Commission if her work with [the Vendor] created a conflict of interest which would prevent her from accepting the position with [the State].

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It was possible that while working for [the State, Prospective employee] would be required to refer patients to [the Vendor], her full-time employer. However, her referral would be based upon an objective, needs-based assessment tool used by [the State] to determine the appropriate long-term placement for patients based upon their circumstances and diagnoses. The assessment tool was a ratings scale to which long-term care providers were assigned a value based upon the services they provided. [The Vendor] was the only provider assigned to their segment of the scale. As a result, if the assessment indicated that the most appropriate placement for the patient was [with the Vendor], [Prospective employee] would relay that information to the community provider. The community provider would then contact [the Vendor] to begin the placement process for their patient. At [the Vendor's location], placement decisions were made by [senior staff] and [Prospective employee] did not have a role in that process. Consequently, the Commission decided that while there was some overlap between the two positions, the overlapping tasks did not require [Prospective employee] to use her independent judgment. As a result, she would not have the opportunity to make decisions based upon impaired judgment while performing her official duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Prospective employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). Her ability to show preferential treatment to anyone was eliminated by [the State's] use of the needs-based assessment tool. The assessment tool controlled the recommendation for placement and [the Vendor] was the only provider assigned to their segment of the scale. As a result, [Prospective employee]'s ability to show preferential treatment to anyone was obviated.

**(3) official decisions outside official channels:**

There did not appear to be an opportunity for [Prospective employee] to influence official decisions outside official channels. That was not to say she would do so she was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is

whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Prospective employee]'s ability to make referrals to her full-time employer while working for [the State] was controlled by an independent assessment tool. Therefore, her dual roles were unlikely to create an appearance of impropriety amongst the public.

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

As long as the referrals [Prospective employee] made while working for [the State] were based upon an independent assessment scale, her dual positions at [the State] and [the Vendor] did not create a conflict of interest.

**18-09—Outside Employment:** [Employee] worked [in the enforcement section of a State agency]. He was assigned to Kent and Sussex Counties. [Employee] had regular contact with other State agencies, Federal and State law enforcement agencies and the general public. The [Agency] required [Employee] to be on call one week of every five-week period.

[Employee] wanted to accept a part-time position with a [Town] to perform similar job duties. [Agency] did not have a contractual relationship with [Town] but did have regulatory oversight over them.

[Employee] asked the Commission if his part-time work for the [Town], or any municipality, would create a conflict of interest with his State job duties.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). It was difficult for the Commission to see how the part-time position would affect [Employee]'s judgment while performing his State job duties. While both positions involved some type of enforcement work, his State job [focused on a specific area] and the [Town] position involved [job duties in a different area]. When asked if it would be possible that he would encounter [Town employees] while working in his State capacity, [Employee] indicated the only possible way that could happen would be if [Agency] was called to [an] emergency in [Town]. In that instance, he would be working in a collaborative effort with the [Town] and the Commission did not see how it would interfere with his ability to perform his official State job duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any

person. [Employee] may not represent or assist a private interest before his own agency. 29 Del. C. § 5805(b)(1). [Agency] did not have a routine regulatory, or contractual relationship, with [Town]. As a result, it was highly unlikely that his colleagues from either job would have contact with each other. Therefore, the likelihood [Employee]’s part-time work would result in preferential treatment being extended to anyone was very remote.

**(3) official decisions outside official channels:**

[Employee]’s State job involved job duties similar, but unrelated to, his Town job duties. Given the different focus between the two positions, there did not appear to be any way he could influence official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). There were no obvious conflicts between the two positions which would be likely to adversely affect the public’s confidence in their government.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision was that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated he would work at his part-time job outside of State work hours. The Commission reminded him that the prohibition not only applied to his physical presence, but also applied to phone calls and paperwork.

[Employee]’s part-time work did not create a conflict of interest with his State job duties.

**18-07—Outside Employment:** [Employee] accepted a position as the Director of [a State Agency]. His job duties were set forth in [*citation omitted*] and included: employing and supervising employees; budget preparation; creating policies and procedures; entering into agreements with user agencies and others. While [Agency]’s enabling statute conferred most of its power on the Director, the [Agency’s] Board was in the process of approving a new regulation which would allow the Director to recuse himself in appropriate circumstances.

Under the existing regulations, matters brought to the attention of the Director that required investigation, were assigned to an investigator. The Director was not the employee tasked with conducting the investigation. When the investigation was complete, the matter was presented to the Board for a hearing and resolution. Because [Employee] was not a member of the Board he did not vote. [Agency] had an existing conflict policy to guide [employees] when an investigation involved family members of an [Agency] employee.



[Employee] also [worked for a municipality over which his agency had jurisdiction]. He wanted to continue to work for the [Town] on a part-time basis in order to maintain [a professional license]. The [Town's] employees were subject to the rules and regulations [promulgated by the Agency].

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

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

The Commission examined [Employee]’s dual roles as the Director of the [Agency] and as a municipal [employee] and found that his work in one capacity was unlikely to affect his professional judgment when performing his job duties in the other capacity. While [Employee] has access to [Agency information] in both positions (one as an administrator and one as a user), he had different log-in credentials which controlled his level of access and would prevent him from performing duties related to his other position. After consideration, the Commission decided that his dual roles, by themselves, did not create a conflict of interest under the State Code of Conduct. However, that did not mean that a conflict of interest would not arise in the future. At the meeting [Employee] was asked how he would handle an [Agency] investigation into [a Town employee]. He stated in that case, he would recuse himself from both sides of the matter. While [the Agency’s] enabling statute did not permit his recusal, the practice had been allowed by the Board on an informal basis.

The Commission then considered whether recusal would be an adequate remedy to any conflict of interest that could arise. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are “routinely cured through abstention or recusal on a specific matter.” *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997) (citing *56 Am. Jur. 2d Municipal Corporations* § 172 (1971); *Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960). However, it also was recognized at common law that some conflicts cannot be cured by recusal when government officials hold dual positions, regardless of sector. *63C Am. Jur. 2d Public Officers and Employees* § 62, et. seq; *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 67. As a result, some courts held that when recusal from participating in decisions was not a sufficient remedy, one of the jobs must be relinquished. *People Ex. Rel. Teros v. Verbeck*, 506 N.E. 2d 464, 466 (Ill. App. 3 Dist. 1987). The courts referred to those situations as having a “clash of duties.” *Id.*; See also, *O’Connor v. Calandrillo*, 285 A.2d 275 (N.J. Super.); *aff’d.*, 296 A.2d 324, cert. denied, 299 A.2d 727, cert. denied, U.S. Sup. Ct. 412 U.S. 940; *Sector Enterprises, Inc. v. DiPalermo*, 779 F. Supp. 236 (ND. NY 1991). That common law rule applied whether the individual held two government posts or a government post and a second job in the private sector. *63C Am. Jur. 2d Public Officers and Employees* § 62. The *Verbeck* Court said banning dual positions under some situations “ensures that there be the appearance as well as the

actuality of impartiality and undivided loyalty.” *Id.* (citing *Rogers*); See also, *O’Connor v. Calandrillo*, *supra*.

In this case, the Commission decided that [Employee]’s recusal would be an adequate remedy to mitigate any conflicts of interest. The [Agency’s] Board had already decided to formalize his ability to recuse himself by creating a new regulation which would allow him to recuse when necessary. He was made aware that under the law, the scope of “recusal” had been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The Commission decided that [Employee]’s ability to recuse himself would adequately address any appearance of impropriety that could be created by a conflict of interest. Furthermore, his recusal would assure the public that he was not engaged in conduct that was contrary to the public trust.

[Employee]’s dual roles as Director of [Agency] and as a [Town employee] did not, by themselves, create a conflict of interest. If a conflict of interest were to arise, he should recuse himself as necessary.

**18-06—Outside Employment:** [Employee] worked for [Agency #1 as an information technology worker]. He described his job duties as building and maintaining systems for State agencies including [Agency #2]. [Employee] also owned a small consulting business. [Agency #2] was considering contracting with [Employee]’s private business to develop a new [process] for their agency. [Employee] asked the Commission if he could contract privately with [Agency #2] without creating a conflict of interest in violation of the Code of Conduct.

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

A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that

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

At the meeting [Employee] admitted that he had worked with [Agency #2] on at least two projects while employed by [Agency #1]. When asked why [Agency #2] could not obtain the same services through [Agency #1], rather than contracting with [Employee], he stated that he did not know.

[Employee] had worked with [Agency #2] as part of his State job duties, developing the same type of product his business would provide. In addition, a contract between his business and [Agency #2] would create a direct financial benefit to [Employee]. As a result, he would have a conflict of interest as a matter of law.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

A private contract between [Employee] and [Agency #2], when the same services could be provided through [Agency #1] was likely to create an appearance of impropriety. The public would likely wonder why a private business owned by a State employee was awarded a contract for services that could easily be provided by a State agency.

A contract between [Employee] and [Agency #2] would create a conflict of interest as a matter of law and create an appearance of impropriety amongst the public.

**17-34--Outside Employment:** [Employee] was a casual/seasonal employee who worked for [a State agency]. She was assigned to work in Wilmington.

[Employee] also worked for [one of her agency's vendors] in Milford. [Employee] stated that she had never referred one of her [State] clients to [the vendor]. In the event that one of her previous [State] clients was later [referred to the vendor, Employee] stated her supervisor had agreed to allow her to recuse herself from that client. The client would be treated by another worker in [a different location].

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

[Employee] filed the required ethics disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee]’s State clients were [dissimilar to the vendor’s clients]. The difference between the two made it unlikely she would have an opportunity to exercise her official judgment in matters related to her private interest. In the unlikely event she was to have contact with a State client while working [for the vendor] she had already implemented an acceptable recusal strategy to mitigate the conflict.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). When working for the private business, [Employee] worked with clients who had been referred to [the vendor] by employees of her own agency. However, those [State workers] were not her immediate co-workers. The Commission did not see how the mere fact that the [vendor’s] clients were referred by employees working for her State agency would cause her to show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is

whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). As long as [Employee] continued to work with [dissimilar client populations], her dual roles were unlikely to create an appearance of impropriety amongst the public because she would not be working with the same clients.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated that she worked for [the vendor] outside of her State work hours. Nonetheless, she must be careful to restrict phone calls and emails related to her private employer to hours that did not coincide with her State work hours.

**17-13--Outside Employment:** [Employee worked for a Division] within the Department of Services for Children, Youth and their Families (“DSCYF”). [Employee] ensured that youth and their families were connected to appropriate services offered by [her Division’s] contracted providers. She did not directly treat patients. [Employee] was unable to attend the meeting due to a previously scheduled [event].

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

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

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

[Employee] completed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). [Employee’s agency] did not work with [the contractor] so it was very unlikely she would make decisions about [the contractor] while performing her State job duties. In the event [one of the contractor’s] clients was referred to [her State agency], there would already have been a

determination that the client's needs exceeded the level of services [the contractor] was able to provide. As a result, she would not be required to provide private mental health counseling to a client that had subsequently been referred to her State agency. However, her ability to withdraw from the treatment of a client while working for her outside employer did not address the issue of reviewing and disposing of matters related to her previous client while performing her State job duties.

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

**(2) preferential treatment to any person:**

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

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

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

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

**17-10—Outside Employment:** [Employee works for a specific State agency with a very specific job description. Employee is a professional in her field].

[Employee] submitted a Secondary Employment Request to [her State agency]. Before she could accept outside employment, she had to obtain an advisory opinion from the Commission. [Employee] asked permission to perform private consulting work related to [her professional field] for approximately 10 hours per month. In her Request for Secondary Employment she stated she would not use her State work hours to perform duties related to her consulting work. [Employee] stated her consulting work would be performed outside the State of Delaware and would not involve any citizens of the State.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Outside employment is considered a private interest. The likelihood that an employee's outside employment may impair their judgment while performing their official duties is greater when the outside employment is within the same jurisdiction as the employing agency, in this case, the State of Delaware. A California court ruled that county employees could not be appointed by a lower court to act as expert advisors for parties adverse to the counties interests without violating conflict of interest laws. The Court said "[w]e would reach this same conclusion even in the absence of a written conflict of interest rule. The appointment of a confidential expert whose employer has an interest contrary to that of the party seeking the appointment is inherently problematic. The conflict it creates between employer and employee is readily apparent and should simply be avoided. *County of Los Angeles Dept. of Regional Planning v. Superior Court*, 208 Cal. App. 4th 1264 (2012).

As long as [Employee]'s consulting work was unrelated to the State, it was difficult to see how her official judgment could be affected by her outside employment.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. She may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). Again, the danger of preferential treatment would be greater if [Employee] accepted private work within the State. However, those concerns were absent because her outside employment did not fall within the jurisdiction of her government agency.

**(3) official decisions outside official channels:**

When a private client hires a consultant with connections to a government agency which may be directly involved in a matter, it may raise the appearance that because of that connection, the employee could circumvent official channels to obtain a benefit for their private client. Particularly troubling is access to confidential information not available to other experts. Again, those concerns do not exist when the private work is performed outside the jurisdiction of the employee's State agency.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

In one case, the Court noted that where State employees hold outside employment in the same field as their State work, it "creates an appearance of impropriety" because of the perception that the State employees have an unfair advantage. The Court specifically noted that State employees had access to the State's computer system, which could be an aid to them in their private business. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Delaware Supreme Court has specifically addressed issues that arose when a licensed professional, as a result of outside employment, represented an opposing interest in a matter involving the State. *In Re Ridgely*, Del. Supr., 106 A. 2d 527 (1954). While *Ridgely*, was a common law decision, the Commission has held that pursuant to the rules of statutory construction, since the General Assembly did not specifically overrule common law, such decisions have precedent in interpreting the statutory provisions. *Commission Op. Nos. 97-24 and 97-30*. In *Ridgely*, the Court held that where the licensed professional (a lawyer) held outside employment that "his private interest (outside employment) must yield to the public one." *Id.* at 4 and 7. The Court held that it was "manifestly improper" for him to accept private employment in State matters and "engage in litigation or the prosecution of claims against a fellow member" of his agency's (Attorney General) staff. *Id.* at 7. The Court also said that when *Ridgely* represented the opposing side against an administrative board which he represented in his State position, "the result was the unseemly appearance in the court of two State's attorneys, one endeavoring to uphold the State's case and the other to overthrow it." *Id.*

Since that common law decision, the General Assembly enacted a provision which requires that: "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." 29 *Del. C.* § 5805(a).

To decide if there was an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78*. Consulting work within the State, using the same skills and expertise [Employee] uses in her State work, could create an impression of impropriety. As stated above, an actual violation is not required, only an impression that the State employee is not acting in the public's interest. However, during the hearing [Employee] made it very clear that her State position was her first priority and she would



not engage in any consulting work in Delaware to ensure there was no appearance of impropriety.

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

**17-05—Outside Employment:** [Employee] worked for [a State agency in a managerial role]. (The Commission had a description of [Employee]’s job duties).

[Employee] had been offered a part-time teaching position at [a local institution of higher learning]. The offer was extended to [Employee] by an instructor at the [institution, Mr. A]. In addition to his work as an instructor, [Mr. A] worked for [Company C], one of [the Agency’s] contractors. While [Employee] would be employed by the [institution], he indicated that his part-time employment may create the appearance that he was working directly for Mr. [A].

As part of his State job duties, [Employee] worked with Mr. [A] and the [institution]. [Employee] was a member of a selection committee through which [the Agency] hired research entities. The [institution] often submitted bids to work on research projects advertised by [the Agency] and was frequently selected as the successful bidder. [Employee] indicated he would be able to step down from his position on the selection committee to avoid any conflicts of interest with the [institution]. However, even though he would no longer be part of the selection process, he would still be required to work with the [institution] on any projects for which they were the successful bidder.

[Employee] asked the Commission to determine if his proposed part-time position as an instructor at the [institution] would create a conflict of interest with his State job.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). In this case, the private interests are Mr. [A] and the [institution]. If [Employee] accepted a position at the [institution], Mr. [A] would be [Employee]’s co-worker. As a result, Employee’s association with [Mr. A] would be that of a co-worker (private interest) who also made official decisions [at his State Agency] about [Mr. A’s employer, Company C] as part of his state job duties. To avoid a conflict of interest he would have to recuse himself from all decisions related to [Company C]. An effective recusal would require him to remove himself from all decisions related to the selection of a contractor if [Company C] had submitted a bid. In addition, [Employee] would be unable to supervise and oversee any projects which involved [Company C]. As the [manager], [Employee] indicated that would not be possible. Consequently, [Employee] would be unable to avoid reviewing and disposing of matters in which he had a private interest.

[Employee] would also have a conflict of interest related to the [institution]. At the hearing, he stated that [the Agency] often hired the [institution] to work on research projects. While it would be possible for [Employee] to step down from serving on any selection committees related to research projects, he could not recuse himself from all involvement with the [institution] because his state job duties required him to collaborate with [the institution]. As a result, he would be reviewing and disposing of matters related to his private employer, the [institution].

It appeared that [Employee] would be making official decisions which would affect both of his private interests in the matter.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. Because his State job duties prevented him from recusing himself from all decisions related to [Company C] and the [institution], [Employee] would essentially be representing his private interests before his own agency every time he made an official decision related to those two entities. In addition, his co-workers or subordinates could feel pressured to make decisions favorable to [Company C] or the [institution] because of their association with [Employee].

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say he would do so he is entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the County duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

In his written submission, [Employee] indicated that he was concerned that his part-time employment would create the appearance that he was working for Mr. [A], rather than the [institution]. That is exactly the type of impression that the statute was designed to prevent. To the public, a high-level [Agency] employee working closely with an employee of an [Agency] contractor could adversely affect the public's confidence in their government. In addition, whether or not the public found his relationship with Mr. [A] questionable, there was still the appearance of impropriety related to the [institution] itself. The [institution] was an [Agency] contractor just like [Company C]. There would be an appearance of impropriety based solely on the fact that [Employee]'s State job duties required him to collaborate with his private employer. The Commission decided that the combination of the two conflicts would most certainly lead to an appearance of impropriety.

**17-04—Outside Employment:** [Employee worked for a Division within the Department of Health and Social Services (DHSS)]. [Employee] worked in [Sussex County] and her clients lived in [a specific type of facility]. [Employee] coordinated care for her clients, made referrals and monitored the services they received.

[Employee] wanted to accept part-time employment with [Company A and Company B]. Both companies contracted with [employee's State agency]. While performing her part-time job duties [Employee] did not have contact with her State clients because her supervisor had arranged her workload so that she was not assigned [to any of Company A's or Company B's clients].

She asked the Commission to determine if either of her part-time positions violated the State Code of Conduct.

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

[Employee]'s comments at the hearing constituted full disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee]'s State clients lived [in a specific type of environment]. Both of her part-time positions required her to work with clients who were similarly situated. When asked by the Commission if there was a possibility one of her State clients could be placed in a facility where she worked part-time, [Employee] indicated that if such a circumstance were to occur her State supervisor would transfer the client to another [employee]. As a result, she would not be placed in a situation where she would be required to review and dispose of matters in which she had a private interest.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). At the hearing [Employee] stated that her part-time work would not require her to have contact with employees from her State agency. Her contact with [Company A's and Company B's] clients was limited to their residential environment and she would not represent them before her State agency. As a result, the Commission decided she could not show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so she is entitled to a strong presumption of

honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996).

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

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

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

**16-53--Outside Employment:** [Employee] worked part-time for [Company C] as a direct care associate. [Company C] operated three local facilities. The facility's provided services to male and female adolescents. Clients usually stayed at the facility for 6-9 months. All of [Company C's] facilities were licensed by the Department of Services for Children, Youth and their Families ("DSCYF"). [Employee] stated that he worked in each of the three facilities on a rotating basis and that [Company C] had several [clients who were involved with a State Agency]. In addition, the [State Agency] regulated and licensed [Company C]. [Employee] was offered a position with [the same Agency]. [As part of his new job duties he would likely be required to have contact with the adolescents located in Company C's facilities]. [Employee] wanted to continue working at [Company C] while also working for the State.

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

[Employee] did not need to complete the Ethics Disclosure worksheet because he had not formally accepted the [new] position. His comments at the hearing and his written submissions constituted full disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). [Employee]'s stated that several children in [Company C's] programs [were also involved with

the State Agency]. As a result, there was a strong possibility he could be assigned to work with the same client(s) by both employers. In addition to the fact that [the Agency was involved with some of Company C's clients, the Agency] was responsible for [oversight of Company C and was also responsible for licensing their facilities]. As a result, if an incident occurred while [Employee] was working at [Company C], he could be subject to investigation by his State Agency. Or, he could be assigned by [the Agency] to investigate his co-workers employed by Company C]. While recusal could remove the conflict between the two positions, [the Agency's] employees were often on-call during nights and weekends. In those situations, he admitted he would not have the option of recusing himself because it would be impossible to anticipate the need to do so and recusal would place an undue burden on [the Agency] and his co-workers.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 *Del. C. § 5805(b)(1)*. The presence of [his Agency's] clients at [Company C's] facilities would require [Employee] to represent his private employer before his own Agency. [The Agency] required [Company C] to provide updates, treatment information, etc. for their clients who were placed at one of [Company C's] facilities. As a result, [Employee] would be reviewing treatment information he documented for a [Company C] client while performing his State job duties and vice-versa. In so doing, he would be representing his private interest before the State. Furthermore, while working at [Company C], [Employee] would be reviewing information submitted by his [State] co-workers. Although unlikely, the Commission believed he could be unintentionally influenced by his personal attitude towards his State co-workers when interacting with their clients at [Company C].

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say he would do so he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). However, under this specific set of circumstances, the opportunity to make official decisions outside of official channels was particularly high.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C. § 5802*, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). The duties related to each employer overlapped substantially. There were overlapping clients and contact with overlapping personnel. In addition, [the Agency] was the regulating agency which oversaw [Company C's] facilities and license. As a consequence, [Employee's] dual employment would likely create an impression of impropriety among the public.

[Employee's] employment with [Company C] would create a conflict of interest with [his position in the State Agency].

**16-51--Outside Employment:** [Employee] was employed by a Division of the Department of Services for Children, Youth and their Families as a [licensed professional]. He performed evaluations for children referred to [the Division], identified any behavioral or cognitive issues and recommended treatment options to address those issues.

[Employee] wanted to accept a part-time position with [Company B] conducting [a specific test] on State employees. [Company B] was bidding in response to an RFP issued by [a different department] seeking contractors to [perform the test on prospective State employees and current State employees in specific fields]. [Employee] anticipated he would most often be [working with adults]. To avoid any possible conflicts of interest, [Employee] stated he would recuse himself from working with anyone involved with any of his Department's agencies and would make his ability to recuse himself a part of his contract with [Company B].

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

[Employee] completed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Outside employment is a private interest. In his State position [Employee] works with children. If he were to work for [Company B] he would be working with adults. As a result, there was very little likelihood he would have contact with any of his State clients while performing his part-time work. There was a small possibility that he could encounter a parent or other adult relative of one of his State clients while performing his part-time work duties. However, he had already identified an effective recusal strategy by informing [Company B] that he could not [work with] anyone involved with any of his Department's four Divisions. He was also granted permission to recuse himself as necessary when performing his State job duties. With such a broad recusal strategy, the Commission could not see how his official judgment could be affected by his part-time employment with [Company B].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] cannot represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). Again, as long as [Employee] recused himself as appropriate, it would be difficult for him to show preferential treatment to anyone.

**(3) official decisions outside official channels:**

The demographic differences between the populations he would serve in both positions would make it very unlikely [Employee] would have an opportunity to make official decisions outside official channels. That was not to say [Employee] would do so, he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

First, 29 *Del. C.* § 5806(b) only requires a showing that a course of conduct "may result in" a violation of the Code provisions. *Commission Op. Nos. 92-11; 99-34*. Second, the restriction prohibiting conduct that may result in "any adverse effect on the public's confidence in the integrity of its government," is basically an "appearance of impropriety" test, as is the restriction, found in 29 *Del. C.* § 5806(a), against engaging in any conduct that may "raise suspicion" that the public trust is being violated. *Commission Op. Nos. 98-11; 98-23; 98-31*. Thus, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14*. The law only requires that a violation "may result in an adverse effect on the public's confidence" or that it may "raise suspicion that the dual employment holder is acting in violation of the public trust." *Id*; *See also*, 29 *Del. C.* § 5811(2) (public officers and employees should avoid even the appearance of impropriety where they have a financial interest); *See also*, *Commission Op. No. 99-35 (citing 63C Am. Jur. 2d Public Officers and Employees § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict))*.

To decide if there was an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78*. [Employee's] willingness to recuse himself from [working with anyone] receiving services from his Department greatly diminished the appearance of a conflict of interest. The Commission did not identify any factors weighing in favor of an appearance of a conflict of interest.

[Employee's] proposed contract work with [Company B] would not create a conflict of interest with his State position as long as he recused as necessary.

**16-48--Outside Employment:** [Employee works for a Division] of the Department of Health and Social Services (DHSS). [Employee] works at [a] location in New Castle County. [Employee]'s job duties include interviewing applicants and their families to determine if they are eligible for services, keeping records of case histories and coordinating client services provided by other agencies and contracted providers. At the meeting [Employee] stated that none of her State clients received services from [Company A], one of her agency's contracted service providers. Additionally, she stated that she was not involved in the State's contracting process.

[Employee] accepted a part-time position with [Company A] as an Aide. As an Aide, [Employee] worked with one client as a caregiver. Her duties included assisting the client with [various tasks]. [Employee] stated she was not the client's Case Manager and all interactions with the client's Case Manager would be handled by [Company A]'s Program Manager.

Both the State and [Company A] agreed to allow her to recuse herself as necessary by reassigning conflicting clients to other co-workers.

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

[Employee] filed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee]’s State clients did not receive services from [Company A] nor did she interact with her private client’s Case Manager. As a result, it was difficult to see how her professional judgment could be affected by her part-time employment with [Company A].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). Because she had already established workable boundaries to separate her state clients and [her private] client it was unlikely she would have an opportunity to show preferential treatment to anyone. In addition, because she was not involved in the contracting process between the State and [Company A] it was unlikely she would have occasion to represent [Company A] before the State.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]’s dual employment did not appear likely to affect her ability to perform her State job with impartiality and integrity as long as [Company A] permitted her to recuse as necessary and she did not act as a Case Manager for any of [Company A]’s clients



when performing her State job duties. The fact that she would work with only one [private] client also diminished the potential for conflicts of interest and, thus, the appearance of impropriety.

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

[Employee]’s outside employment with [Company A] did not create a conflict of interest with her State position.

**16-46—Outside Employment:** [Employee] worked for [a Division] of the Department of Health and Social Services (“DHSS”). [Employee] worked at [a specific Facility]. The Facility provided care [a specific type of care to clients who] were dropped off and picked up from the Facility on a daily basis. [Employee] had five clients [with whom he worked]. [Employee]’s State work hours were 8 a.m. to 4 p.m.

[Employee] also worked part-time for [Company A]. [Company A] was one of the agency’s contracted providers. [Company A] provided services to [adults in their homes]. [Employee] worked 6 p.m. to 6 a.m. at a residential home in Millsboro. [Employee] stated his [private clients had different requirements than his State clients].

[Employee] did not encounter his State clients while working at his part-time job. Nor did he encounter his [Company A] clients while working at his State job. He was not involved in the contracting process for either entity.

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

[Employee] filed the required Ethics Disclosure and that, along with his comments to Commission Counsel via telephone, constituted the required disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee]’s State clients received comprehensive care at the Facility. The clients he worked with in his part-time position were living independently. Therefore, it was unlikely [Employee] would encounter clients from either job while performing duties related to the other position. In addition, [Employee] did not have any involvement in the contracting process between the State and [Company A]. As a result, it was difficult to see how his official judgment could be impaired by his dual employment.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 *Del. C.* § 5805(b)(1). [Employee] did not represent his part-time employer before [the Division]. While [Employee] worked with adults in both of his positions, the two groups had different needs and [Employee] provided services specific to each group of clients. There were no facts to indicate [Employee] would, or could, show preferential treatment to any person.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s dual employment did not appear likely to affect his ability to perform his State job with impartiality and integrity because it was highly unlikely he would encounter a client who was receiving services from [Company A] as well as the Facility.

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

[Employee]'s part-time employment with [Company A] did not create a conflict of interest with his State position as long as he worked for [Company A] outside of his State work hours.

**16-45—Outside Employment:** [Employee] was employed by [a Division] within the Department of Health and Social Services (DHSS). [Employee] worked at [one specific location]. His [duties included general oversight of specific clients].

[Employee] accepted a part-time position with [Company A] providing clinical services to [a specific segment of the population]. [Employee] would be conducting individual [clinical tasks related to the treatment of his clients]. [Employee] would work primarily with other [Division] employees. In his Ethics Disclosure [Employee] stated that [Company A] did not assign him clients who received services from the State.

[Employee] previously appeared before the Commission in August 2015, when he requested an advisory opinion regarding his part-time employment with another company contracting with [Division], [Company B].

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

[Employee] filed an updated Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Company A] did not assign clients to [Employee] that were also his State clients. However, his position at [Company A] would require [Employee] to work with [other Division employees]. When asked about the potential for conflict, he stated that [decisions about which treatment providers to select were] made by the client and their family. He further explained that when clients were choosing a provider, the [Division’s] involvement was limited to providing the client with a list of qualified providers. Per [Division] policy, [employees] were not permitted to advocate for one provider over another.

As a State employee, [Employee] was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). After weighing the potential for conflict against the presumption of honesty and integrity, the Commission decided to accept his explanation of the [Division employee’s] role as a resource and facilitator, rather than that of an interested party. However, because his part-time employer was one of his agency’s providers, he had to be extremely careful to maintain independent judgment while performing his State duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). As he did not have any duties related to the bidding and contracting process in either of his positions, [Employee] would not have an opportunity to represent [Company A] before [the Division] for that purpose. However, he would be required to represent [Company A] during some discussions with the client’s [Division representative]. The potential for favorable treatment in such an instance case was mitigated by the fact that the client made the decision as to which provider was selected. As a result, it was unlikely [Employee] could show preferential treatment to anyone, either as a [State employee] or as a [Company A] employee.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Id.*

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]’s dual employment did not appear likely to affect his ability to perform his State job with impartiality and integrity as long as [Company A] permitted him to recuse as necessary. However, because he worked with a small segment of the population, and there were a limited number of providers from which [the Division’s] clients could choose, it was likely that members of the public would notice his multiple roles. As a result, he should always guard against creating an appearance of impropriety when performing his job duties. If he became aware that members of the public were questioning his multiple roles, he was instructed to contact the Commission for further advice.

When deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. This was especially important in [Employee]’s case because of the fact that he worked full-time for the State and also worked two part-time jobs. At the hearing he stated that he worked at his part-time jobs outside of his State work hours. While the Commission believed that was his intention, given the number of demands on his time, he should be particularly careful not to use his State work hours for duties related to his part-time employment.

The Commission decided that [Employee]’s part-time employment with [Company A] did not create a conflict of interest with his State job as long as he continued to recuse himself from involvement with his State clients. Should the facts contained in the opinion change, he should contact the Commission for further advice.

**16-41—Outside Employment:** [Employee] worked for [one of the State’s counties] in an appointed position. He also serves as a member of [a State board]. [*The job descriptions have been omitted to preserve the confidentiality of the applicant.*]

During the most recent election season, [Employee] provided political commentary for two local radio stations. To date, [Employee] had not received compensation for his services but anticipated he would be paid \$250.00 monthly. [Employee] had spoken to his County supervisors and was given permission to appear on the local radio shows. However, the County asked [Employee] to seek an advisory opinion from the Commission to determine if his outside employment would create a conflict of interest under the State Code of Conduct.

**A. Jurisdiction**

The State code applies to all counties and municipalities that have not adopted their own Code of Ethics. “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 act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. 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 have not enacted such legislation by January 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29.” 29 Del. C. § 5802(4) (emphasis added).

The County had not adopted its own Code of Conduct. Therefore, County employees fall under the jurisdiction of the State Code of Conduct.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, county employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not make decisions in any of his three positions related to contracts or advertising. As a result, it was difficult to see how his official judgment could be impaired by working part-time as a political commentator for two radio stations.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before the State or the County. 29 Del. C. § 5805(b)(1). As long as [Employee] did not encourage other State or County employees to advertise with the two radio stations, it was difficult to see how he could show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say he would do so; he is entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the County duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). In deciding if the conduct would raise the appearance of impropriety,

the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). If [Employee] were to mention his State and County positions in connection with his part-time work as a political commentator, the public could perceive the reference as an attempt to boost his credibility as a guest commentator. As a result, neither he, nor personnel from the radio station, could reference his government positions in connection with his appearances as a political commentator. As long as he abided by that restriction, it was unlikely his appearances as a political commentator would have an adverse effect on the public's confidence in their government.

Another prohibition considered by the Commission under this provision is that a County or State official may not use government time or resources (i.e. computer, fax, phone, etc.) to work on the private interest. In his written submission, [Employee] stated he would not use County time when making appearances on the radio shows. The prohibition also applied to his duties as a member of the State board.

The Commission decided [Employee]'s part-time employment did not create a conflict of interest with his County or State positions as long as he did not refer to his government positions while working as a political commentator and he did not use County or State time or resources to perform his part-time duties.

**16-40—Outside Employment:** [Employee worked for a specific Division within] the Department of Health and Social Services. The Division operated [a] facility in [the State] which provided [a specific type of treatment for adults]. [Employee was a manager at that facility].

[Employee] wanted to work as a consultant for a [private entity] representing a defendant in a Delaware criminal case. The [entity] asked [Employee] to offer a professional opinion in his area of expertise. [Employee] did not provide any additional information about the [entity] or the client. However, given [Employee]'s area of expertise, it was likely the [entity] wanted an expert opinion in the same field as the work he performed for the State].

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Outside employment is a private interest. The likelihood that [Employee]'s outside employment could impair his judgment while performing his official duties was greater [because] the outside employment was within the same jurisdiction as the employing agency, in this case, the State of Delaware. A California court previously ruled that county employees could not be appointed by a lower court to act as expert advisors for parties adverse to the counties interests without violating conflict of interest laws. The Court said “[w]e would reach this same conclusion even in the absence of a written conflict of interest rule. The appointment of a confidential expert whose employer has an interest contrary to that of the party seeking the appointment is inherently problematic. The conflict it creates between employer and employee is readily apparent and should simply be avoided.” *County of Los Angeles Dept. of Regional Planning v. Superior Court*, 208 Cal. App. 4th 1264 (2012).

The State is the prosecuting party in all criminal matters. 29 Del. C. § 2504(6). [Employee]’s employment as an [consultant] could put him in a situation where his professional opinion would be averse to that of the State (his employer), and perhaps adverse to an opinion previously offered by one of his own colleagues. Additionally, the fact the [private entity was] seeking to retain [Employee] indicated the defendant has/had [an issue related to Employee’s State position]. If that was indeed true, it was possible the defendant previously [had contact with Employee’s Division or] one of [Employee]’s own colleagues.

Another important factor considered by the Commission was that a conflict may only become apparent after [Employee] had already provided the [entity with his] opinion. Without advance knowledge of the names of the other individuals involved in both sides of the matter it would be almost impossible for the Commission to determine whether [Employee]’s proposed outside employment may impair his ability to perform his official duties.

Additionally, [Employee]’s involvement on behalf of a private interest would prevent the State from seeking [Employee]’s opinion and could create a conflict of interest which would deprive the State of its ability to refer this defendant to [the entire Division, if needed]. As a result of the above, [Employee]’s private interest may or may not be likely to affect his official judgment but would certainly deprive the State of his official judgment, and perhaps that of his colleagues, completely.

It was noted that the statute only required that [Employee]’s outside employment *may* have an effect on his ability to perform his official duties. Given the facts that: (1) his outside employment would put him on the opposite side of a matter than that of his employer; (2) it would be impossible to know all of the possible conflicts in advance of rendering his opinion; and (3) his outside employment could deprive the State the ability to consult with its own employee, as well as the services of his co-workers, the Commission decided that [Employee]’s proposed outside employment would violate the Code of Conduct’s conflict of interest rules. While that analysis alone was sufficient to support the Commission’s decision, the Commission completed the conflict of interest analysis so that [Employee] could refer to it when considering other outside employment.

## **(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). While it was unlikely [Employee] would have occasion to represent this matter before his own agency, he would be representing his private interest before the State [entity responsible for such matters]. As part of his State employment, [Employee] had access to information not usually available to other [similarly situated parties]. That could raise the specter that [Employee] would use his status as a high-level, professional, State employee to obtain preferential treatment for the [the private entity].

## **(3) official decisions outside official channels:**

When an [entity] hires a consultant with connections to a government agency, especially an agency which may have had previous contact the client, it could foster a temptation to use the government connection to circumvent official channels to obtain a benefit for the [entity]. Particularly troubling was access to confidential information not available to other [entities]. That was not to say [Employee] would do so, he was entitled to a strong presumption of honesty

and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

First, 29 *Del. C.* § 5806(b) only requires a showing that a course of conduct "may result in" a violation of the Code provisions. *Commission Op. Nos. 92-11; 99-34*. Second, the restriction prohibiting conduct that may result in "any adverse effect on the public's confidence in the integrity of its government," is basically an "appearance of impropriety" test, as is the restriction, found in 29 *Del. C.* § 5806(a), against engaging in any conduct that may "raise suspicion" that the public trust is being violated. *Commission Op. Nos. 98-11; 98-23; 98-31*. Thus, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14*. The law only requires that a violation "may result in an adverse effect on the public's confidence" or that it may "raise suspicion that the dual employment holder is acting in violation of the public trust." *Id.*; *See also*, 29 *Del. C.* § 5811(2) (public officers and employees should avoid even the appearance of impropriety where they have a financial interest); *See also*, *Commission Op. No. 99-35* (citing 63C *Am. Jur. 2d Public Officers and Employees* § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict)).

One court noted that where a state employee holds outside employment in the same field as their state work, it "creates an appearance of impropriety" because of the perception that the state employee has an unfair advantage. The court specifically noted that state employees had access to the state's computer system, which could aid them in their private business. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Delaware Supreme Court has specifically addressed issues that arose when a licensed professional, as a result of outside employment, represented an opposing interest in a matter involving the State. *In Re Ridgely*, Del. Supr., 106 A. 2d 527 (1954). While *Ridgely*, was a common law decision, the Commission has held that pursuant to the rules of statutory construction, since the General Assembly did not specifically overrule common law, such decisions have precedent in interpreting the statutory provisions. *Commission Op. Nos. 97-24 and 97-30*. In *Ridgely*, the Court held that where the licensed professional (a lawyer) held outside employment that "his private interest [outside employment] must yield to the public one." *Id.* at 4 and 7. The Court held that it was "manifestly improper" for him to accept private employment in State matters and "engage in litigation or the prosecution of claims against a fellow member" of his agency's (Attorney General) staff. *Id.* at 7. The Court also said that when *Ridgely* represented the opposing side against an administrative board which he represented in his State position, "the result was the unseemly appearance in the court of two State's attorneys, one endeavoring to uphold the State's case and the other to overthrow it." *Id.*

To decide if there was an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78*. A State employee working for a private entity in the same State, using the same expertise and skills applied in their State job, was likely to create the appearance of impropriety. That would be true even if the employee did not interact with personnel from their own agency. First, the public would likely wonder if State time or resources were used to complete the private work. As stated above, an actual violation was not required, only an impression that the State employee was not acting in the public's interest. Second, if [Employee]'s opinion were to be adverse to the State's interests, it could put the State in a position where it would have to attempt to undermine the



experience, opinion, methodologies, etc. on which [Employee]’s opinion was based. Having a State employee on one side of an issue and the State on another would almost certainly cause the public to lose confidence in their government.

## **B. Substantial Conflict with Performance of Official Duties**

The statute also requires employees to refrain from engaging in activities in “substantial conflict with their official duties”. 29 *Del. C.* § 5806(b). An important consideration when evaluating an employee’s outside work is the time commitment required to perform duties related to the outside employment. A New York court addressed the concerns raised when State employees have a private business which offers the same type of services privately, as they do on their State job. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Court said that “multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture.” First, it noted that: “the exigencies of [working for a private entity] ... require communication and sometimes actual [attention], with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official library, telephone and other facilities to accommodate the temporal and other necessities of [the private entity].” The Court added that there was an “inevitable conflict created by the limited time and resources for the employee to perform two jobs.” *Id.* at 246. Likewise, this Commission had considered the time constraints inherent in dual employment when considering if a private interest created a “substantial conflict” with performing their official duties, which is prohibited by 29 *Del. C.* § 5806(b). See, e.g., *Commission Op. No. 98-14*.

[Employee] was a State employee. As such, his first loyalty had to be to his State job. If [Employee] were to work as an [consultant for a private entity] that was inherently opposite to that of the State, he was likely to create substantial conflict with his State duties. As discussed above, he could damage his credibility in future proceedings and his involvement could preclude the State from using the services of other State [employees who work in the same Division as Employee]. The loss of those resources was especially important in light of the fact that the Commission had previously granted hardship waivers to allow former [Division employees] to contract with their former agency because of a lack of resources in Delaware. *Commission Ops. 15-06 and 15-09*. As a result, the State would be faced with finding [a professional] qualified to work on a matter and would have to pay additional monies over those allocated in [the Division’s] budget.

[Employee]’s proposed outside employment as [a consultant] in a Delaware criminal case would violate the State’s Code of Conduct by creating a conflict of interest with his State position.

**16-38—Outside Employment:** [Employee] worked for a [Division of] within the Department of Health and Social Services (“DHSS”). [*the job description is omitted to avoid identifying the applicant*].

[Employee] also worked part-time for [one of her Division’s contracted providers]. She worked for [the provider] outside of her State work hours, in the evenings and on weekends. [Employee] told the Commission that her supervisor at [her part-time job] had agreed to allow her to recuse herself from [matters involving her State job].

She asked the Commission to determine if her part-time employment created a conflict of interest with her State job.

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

[Employee] filed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] told the Commission that none of her State clients received services from [provider]. In addition, her supervisors for both [provider] and the State had agreed to allow her to recuse herself from [matters if it involved her] other place of employment. Given her recusal ability, the Commission did not see how her official judgment could be impaired. In similar matters, the Commission approved the dual employment of other [Division] employees who also worked part-time for [provider]. *Commission Ops. 15-23; 15-18; 15-22*. [Employee] further informed the Commission that she had provided training events for [the Division's] employees and [provider]. She stated the training was the same for everyone and she did not single out [provider]'s employees for favorable attention. The Commission concluded she may continue conducting the trainings as long as she continued to provide them in an objective manner.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). Because [Employee] did not oversee State clients receiving services from [provider], the Commission did not see how she could show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest [Employee] would make official decisions outside official channels. That is not to say she would do so; she is entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the

State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). The Commission determined that as long as [Employee] did not [work with provider]’s clients while performing her State job duties, it was unlikely her dual employment would affect her ability to perform her State job with impartiality and integrity.

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

The Commission determined [Employee]’s part-time work with [provider] did not create a conflict of interest with her State position as long as she recused as necessary.

**16-33—Outside Employment:** [Employee] worked for [a State agency at one of their [facilities]. [The facility served a specific segment of the population]. [Employee]’s duties included administering tests; collecting and reporting information to other State personnel. She did not make referrals for outside services.

[Employee] also worked part-time for [Company A, in a field related to her State position]. All of [Employee]’s part-time work was performed in Pennsylvania. [Company A] did contract with the State of Delaware [but they provided services to a different segment of the population].

[Employee] also worked part-time for [Company B doing the same job she performed for Company A]. She was accompanied to the meeting by [one of Company B’s] employees who would be her supervisor. [Employee’s job description included] the following services: participate in supervision, team meetings, trainings, and professional development conferences/seminars as scheduled; complete client documentation and all state required forms and assessments.

[Employee] asked the Commission to determine if her part-time employment created a conflict of interest with her State position.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). [Employee]’s work for the State was limited to [one State facility] and was limited to [a specific specialty]. The work for her part-time employers [was community based]. Her State clients [remained at the State facility] so it was unlikely she would encounter them in the community. There was a remote possibility a client from [her State facility], could seek services from one of the two companies [Employee] worked for part-time. Should such a circumstance occur, she stated she would notify her supervisor and ask for the client to be assigned to a different employee. Given her recusal strategy, it was difficult to see how [Employee]’s professional judgment could be impaired while performing her State job duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. She may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Her State agency] contracted with [both Company A and Company B] but they did not service the [State facility]. As a result, it was highly unlikely that [Employee]’s colleagues from either job would have contact with each other. Therefore, the likelihood [Employee]’s part-time employment would result in preferential treatment being extended to anyone was very remote.

**(3) official decisions outside official channels:**

[Employee]’s part-time employment was in a different field than that of her State job. Additionally, her State clients received services on-site [by State employees]. Given the difference between her State job and the two part-time positions, there did not appear to be any way she could influence official decisions outside official channels. That is not to say she would do so; she is entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). There were no facts to support the conclusion that [Employee]’s part-time employment would be likely to adversely affect the public’s confidence in their government.

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

Neither part-time position created a conflict of interest with her State job as long as she recused as necessary and did not use her State time to perform duties related to her private employers.

**16-19 Outside Employment:** [State Employee] was a teacher, and was also interning as an Assistant Principal, at an elementary school in [a public-school district]. [Employee] also worked summers, nights and weekends as a consultant for a [private business]. The [private business] produced a program [to help teachers improve their classroom skills]. The [private business] contracted with the elementary school and other schools in the same district but [Employee]

was not involved in the negotiation of the contract between the [private business] and the District. [Employee]'s part-time compensation was based upon the number of hours she worked as a consultant, rather than a commission based on the number of contracts sold.

While performing her duties at the school, [Employee] did not vote on, or discuss, [the private business] with those who made contractual decisions about [the private business]. She did, however, implement [the private business]'s principals in the performance of her teaching duties and answered her co-worker's general questions about [the private business], when asked.

[Employee] asked the Commission to determine if her outside employment created a conflict of interest with her State position.

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

[Employee] submitted the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not have any duties related to [the private business]' contract with the District. Therefore, it was unlikely she would encounter a situation in which she would have an opportunity to review or dispose of matters related to [the private business].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. She may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Employee] had taken affirmative steps to ensure that she was not involved with decisions related to [the private business]' contract with the District. However, a situation could arise where she would be required to provide training to teachers or administrators from other schools in her District. The Commission believed it would be a conflict of interest for her to do so. As a fellow teacher and co-worker, it would be difficult for her colleagues to separate her dual roles if she were to serve as a consultant for [the private business] in her District. As long as she did not work on [the private business]' behalf in her District she would not be able to show preferential treatment to any person. She was permitted to continue to answer her co-worker's questions as long as they did not intrude on her ability to perform her state job duties.

**(3) official decisions outside official channels:**

Given the separation [Employee] placed between the two positions, along with the fact that she was not paid on a commission basis, there did not appear to be any way [Employee]

could influence official decisions outside official channels. That is not to say she would do so; she is entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). There were no facts to indicate [Employee]'s dual employment would be likely to adversely affect the public's confidence in their government as long as she did not work for [the private business] in her District.

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

As long as [Employee] did not act as a consultant for [the private business] in her school district, her outside employment did not create a conflict of interest with her State position.

**16-17—Outside Employment:** [Employee] worked for [a State agency]. He was assigned to work in Kent and Sussex Counties. [Employee]'s primary responsibilities [*are very job specific and so a description is not included here*].

[Employee] wanted to accept a part-time position with a [municipal entity in a related field]. His duties would include [*description omitted to maintain anonymity*]. [Employee] stated the [City] was willing to work around his State work hours. When asked about any possible overlap between the two positions he indicated that occasionally, while performing his State duties, he may need to request assistance from [the City]. In that case, he would need to [make contact with his part-time employer]. In addition, when working for [the City], he may receive a call from a State co-worker for [City] assistance. When asked if it was possible for the [City] to come under [his State jurisdiction], he indicated that it was possible. However, since [Employee] was responsible for [assigning job duties] he could assign any[thing] related to the [City] to one of his co-workers. When asked if he had supervisory oversight of his co-workers, [Employee] indicated he did not.

[Employee] asked the Commission to determine if his part-time employment would create a conflict of interest with his State position.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It was difficult to imagine a scenario which would affect [Employee]’s official judgment. He indicated that should the [City] become [involved with his State agency], he would recuse himself and assign the matter to another employee, one that was not under his supervisory purview. As a result, there were no facts that indicated his part-time job would impair his official judgment while performing his State duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. He may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [The Agency] does have a regulatory relationship with the [City]. However, [Employee] would not be involved in any[thing] related to his part-time employer. As a result, the likelihood his part-time employment would result in preferential treatment being extended to anyone was very remote.

**(3) official decisions outside official channels:**

[Employee]’s State job involved [a specific set of duties not described here]. His part-time job would involve [a set of unrelated duties]. Given the difference between the two positions, there did not appear to be any way [Employee] could influence official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). As long as he recuses as necessary, there were no facts which would indicate [Employee]’s dual employment would be likely to adversely affect the public’s confidence in their government.

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

The Commission decided [Employee]’s part-time employment would not create a conflict of interest with his State position as long as he recuses as necessary.

**16-16—Outside Employment:** [Employee] worked for [a State agency] as a Project Manager. [Employee]’s job duties included: coordination and oversight of projects to ensure compliance with state statutes, as well as department and division policies and procedures; providing technical assistance in “determining the feasibility of projects; developed project budgets and approved expenditures; provided technical input into the development of project specifications; oversaw contract bidding to ensure compliance with contractual requirements and state bidding laws; selected and recommended approval of professional services; reviewed, approved and coordinated payment of services and change orders; conducted site inspections to determine contractual compliance and to ensure safety and conformance to project plans.”

[Employee] wanted to accept part-time employment with [a private company] as a cost estimator. According to [Employee], [the private company] did not contract with the State or any local government. [Employee]’s supervisors at [the State agency] opposed his request for outside employment because while [the private company] did not contract with State or local governments, it was likely their suppliers and competitors did. [The State agency] believed [Employee]’s contact with those private entities would create an appearance of impropriety which could affect the public’s confidence in their government. [An agency supervisor] attended the hearing on behalf of [the Agency].

[Employee] asked the Commission to determine if his part-time employment would create a conflict of interest with his State position.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). As a Project Manager, [Employee] had extensive contact with outside companies and suppliers. In fact, one of his primary job duties was to manage the contract bidding process. [Employee]’s supervisors were concerned that some of [the private company’s] competitors would bid on State projects, even though [the company] did not. In that case, he would be faced with making official decisions about companies competing with his part-time employer for projects in the private sector. However, in discussing his proposed employment it became clear that [Employee]’s prospective job would not require his presence at various sites, thus limiting his interaction with other subcontractors. At the hearing, [Employee] stated he would be able to base his [professional opinion on information contained in documents related to the project], with the exception that he may occasionally need to contact suppliers to obtain pricing information. Consequently, any concerns raised by face-to-face interactions with [the private company’s] competitors and suppliers were virtually eliminated. Any remaining concerns were allayed by [Employee]’s willingness to limit his work for [the company] to projects outside the State of Delaware. As a result, there were no facts to support a belief that his part-time job would impair his judgment when performing official duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [The private company] did not contract with the State. As a result, it was



highly unlikely that [Employee]’s colleagues from either job would have contact with each other, eliminating the possibility that anyone would receive preferential treatment.

**(3) official decisions outside official channels:**

[Employee] made executive-level decisions about his assigned State projects. Given his level of authority, the Commission considered whether it was possible for [Employee] to make official decisions outside official channels. That is not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). The fact that [the private company] did not contract with the State reduced the likelihood [Employee] would make official decisions outside official channels. However, if [the company] decided to contract with the State in the future, he should contact the Commission for further advice.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). The appearance of impropriety was [the Agency’s] primary objection to [Employee]’s request for outside employment. However, the isolated nature of the work [Employee] would perform for [the private company], as well as the fact he would not work on any projects in the State of Delaware, mitigated any negative effect his part-time employment would have on the public’s confidence in their government.

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

[Employee]’s part-time employment with did not appear to create a conflict of interest with his State position so long as he did not work on any projects in the State of Delaware.

**16-05—Outside Employment:** [Employee] worked for [a State agency in New Castle County]. [He held a position which required him to work with members of the public and to perform various administrative duties as well as administer a particular proficiency test]. [Employee notified] his supervisors about his plan to seek outside employment.

[Employee] had been offered a part-time job [as a teacher of a skill for which his agency administered proficiency tests]. [The part-time employer] was located in the same geographic area as his State position. After completion of [Employee’s] proposed course, each student was required to complete a [proficiency test administered by Employee’s State agency]. The lists of applicants scheduled for the [agency’s test] were made available to [agency] employees 24 hours prior to the actual test. [Employee] asked his supervisors if it would be possible for him to

identify applicants from the list who were also his students so that he would not be assigned to administer their [proficiency] test. His supervisors were amenable to that arrangement.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). As part of his State job duties [Employee] could be called upon to administer [the proficiency] test. Given the fact [the part-time employer] was located in the same geographic area as his State job it was extremely likely he would encounter his students while performing his State job duties. At the meeting, [Employee] made it clear that he would not administer a test to one of his students and his supervisors were willing to accommodate his request for those students to be assigned to another [agency] employee. As a result, it was unlikely his part-time employment would impair [Employee]'s judgment while performing his official State duties. However, the analysis did not end there.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. State employees may not represent or assist their private interest before their own agency. 29 Del. C. § 5805(b)(1). Assuming [Employee] could recuse himself from administering [agency] tests to his students, his co-workers would be required to serve those customers. While that arrangement may have relieved the possibility that [Employee] would show preferential treatment to his students, it did not ameliorate the possibility that his co-workers would show, or may show, those students preferential treatment. The statute did not require that his co-workers *actually* showed his students preferential treatment. All that was required under the analysis was that [Employee]'s co-workers could show his students preferential treatment. While he was not aware of it, some of his co-workers could have assumed that a student who received instruction from [Employee] would require less scrutiny during the testing process because of [Employee]'s knowledge of [the agency's] testing procedures.

Another concern was that students of [similar businesses] could suspect that [Employee]'s students were shown preferential treatment during the test even if the test was administered by a different [agency] employee. They could assume that [Employee]'s students passed the test because they were subjected to a lesser degree of scrutiny. Furthermore, if a student from a different [company in the same business] did not pass the [agency] test they may assume it was because of a bias towards [Employee's part-time employer]. Even though that may not have been true, his association with [the part-time employer] may have created an appearance of impropriety which is discussed below.

**(3) official decisions outside official channels:**

There were no facts to suggest [Employee] would make official decisions outside official channels. That was not to say he would do so; he was entitled to a strong presumption of

honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s dual employment may have caused the public to question whether his students would be subjected to the same degree of scrutiny as those applicants who were not associated with [Employee's part-time employer]. In addition, it could have called into question any legitimate failing grade on an [agency] test for an applicant who received instruction from a [different business]. Even though [Employee] would be able to recuse himself from administering [agency] tests to his students, the public may have suspected that his association with [the part-time employer] would affect his ability to be impartial when administering a test to a student from one of [their] competitors. Again, that was not to say he would do so. However, an actual violation was not required. The statute simply required that a justifiable impression of a violation be created. Weighing all the facts and circumstances, the Commission decided that [Employee's] association with [the part-time employer] would create an appearance of impropriety under the Code of Conduct.

The Commission decided that [Employee]'s proposed part-time employment would create an appearance of impropriety in violation of the Code of Conduct.

**15-23 – Outside Employment:** [Employee] was employed by [a Division] within the Department of Health and Social Services (DHSS). [Employee] was responsible for planning, assigning, evaluating and reviewing the work of her staff. She also made hiring recommendations and provided technical assistance with complex cases.

[Employee] also worked part-time [for a private company], a [Division] contractor. [The private company] provided services to [a specific segment of the general population]. [Employee] provided [services related to the tasks of daily living] up to 15 hours per week. [Employee] did not have any job duties related to contracts in either of her positions.

[Employee] was prompted by her State agency to contact the Commission and seek advice as to whether her outside employment created a conflict of interest under the State Code of Conduct.

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

[Employee] filed the required Ethics Disclosure Worksheet which, coupled with her comments at the hearing, constituted the required disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate [Employee]'s private employment would affect her judgment while performing her State duties. Given the fact [Employee] did not [work with clients] in her State position it was very unlikely she would encounter her private client(s) while working in her State capacity. As a result, she would not have a personal interest likely to impair her judgment while performing her official duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Employee]'s position [at the private company] did not require her to interact with her State agency. Therefore, it was difficult to see how she could show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest [Employee] would make official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

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

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

The Commission decided [Employee]'s outside employment did not create a conflict of interest with her State job.

**15-22 – Outside Employment:** [Employee] was a casual/seasonal worker with [a Division] within the Department of Health and Social Services (DHSS). [Employee] provided assistance to [other staff members who served a specific segment of the general population]. She assisted clients with [various tasks related to daily living]. [Employee] tracked [various data and hours worked] into a time-tracking system which allowed the State to bill their services to Medicaid. She also assisted [the Division]’s office staff with general clerical work and phone coverage when needed.

[Employee] simultaneously worked two part-time jobs for [a private company], [a Division] contractor. [The private company] provided services to [the same segment of the population served by the Division]. In her first position [Employee] provided [specific services to a client related to daily living] for approximately 15 hours per week. [Employee]’s second position [with the private company involved providing clinical services] to individuals. At the time, [the private company] provided the service to seven individuals. Her job duties included accompanying clients to [various medical appointments and meetings with other providers]. When necessary she sought guidance from [Division] employees including [those she worked alongside in her day job]. [The Division] was in the process of transferring all of their clients who required [specific] services from those provided by [the Division] to those provided by private companies.

[Employee] did not have any job duties related to contracts in either of her three positions. [Employee] was prompted by her State agency to contact the Commission and seek advice as to whether her outside employment created a conflict of interest under the State Code of Conduct.

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

[Employee] filed the required Ethics Disclosure Worksheet. That coupled with her comments at the hearing constituted the required disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate [Employee]’s private employment would affect her judgment while performing her State duties. [Because of the circumstances] It was very unlikely she would encounter her private client(s) while working in her State capacity. As a consequence, there would be no opportunity for her judgment to be impaired.

When [Employee] was working in her [clinical] position she regularly interacted with her co-workers at [the Division]. She explained at the hearing that the State was in the process of outsourcing [those] services. Because the State had traditionally been the sole source of [that] service they were the only provider qualified to train employees of vendor companies during the transition phase. Therefore, the Commission decided her contact with her State co-workers was a temporary necessity to benefit the clients and ensure a smooth transition from State-

provided services to those provided by vendor companies. The Commission did not see any way the contact with her State co-workers could affect her judgment while performing her State duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 *Del. C. § 5805(b)(1)*. [Employee]'s [first] position [with the private company] did not require her to interact with her State agency. Therefore, it was difficult to see how she could show preferential treatment to anyone. Her [clinical] position was more problematic because it required her to interact with her State co-workers. However, the Commission decided her contact with her co-workers, during the transition of services from the State to private providers, was a necessity. Over time, as the private providers took over [those] services, her contact with other State employees would diminish. Any concerns the Commission had about [Employee] receiving preferential treatment from her co-workers and colleagues was outweighed by the temporary nature of the on-going contact and the fact that the State was the only entity qualified to provide her with adequate training.

**(3) official decisions outside official channels:**

There were no facts to indicate [Employee]'s [first] position would lead to official decisions outside official channels. However, the fact she was required to consult with her State co-workers while working [in her clinical position] may have provided opportunities for her to shortcut established procedures which could lead to official decisions outside official channels. [Employee] was advised to be careful to abide by her agency's policies and procedures even if her goal was to save time or increase efficiency. That is not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). While [Employee] may have good intentions, circumventing the ordinary channels would be a violation of the Code of Conduct.

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

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

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

The Commission found [Employee]’s outside employment did not create a conflict of interest with her State job.

**15-21—Outside Employment:** [Employee] worked for [a State agency doing a specific job which, if described, would lead to the identity of the Employee]. In addition to his State employment, [Employee] had a part-time job [in a related field]. He asked the Commission to determine if his outside employment created a conflict of interest.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate that [Employee]’s official judgment would be affected by his part-time position. [Employee did not have an opportunity to promote his part-time employer’s business].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. He may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [Employee would not be representing his part-time employer before his State agency]. Consequently, the Commission could not see how he, or his co-workers, could show preferential treatment to his part-time employer.

**(3) official decisions outside official channels:**

[Employee] did not appear to have significant decision-making ability at either his State job or at his part-time position. Therefore, no facts suggested he would be able to make official decisions outside official channels. That is not to say he would do so; he was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). The Commission did not believe that [Employee]’s part-time work would affect the public’s confidence in the integrity of their government.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public

office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated he would perform his part-time work outside of his State work hours.

**15-18 – Outside Employment:** [Employee] was employed by [a Division] within the Department of Health and Social Services (DHSS). [Employee] worked at [a specific location]. Her caseload included clients [within a specific segment of the general population]. [In her State position] she interviewed clients, families, and professionals to determine a client's need for various social services.

[Employee] also worked part-time for [a private company in a related, but different, capacity]. [The private company] contracted with [Employee]'s State agency. [The private company] provided services to [a specific segment of the general population]. In her written submission, [Employee] stated that she did not encounter her State clients when she was working at her part-time job.

[Employee] was prompted by her State agency to contact the Commission and seek advice as to whether her outside employment created a conflict of interest under the State Code of Conduct.

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

[Employee] filed the required Ethics Disclosure Worksheet which was supplemented by her email communications and comments at the hearing.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate [Employee]'s private employment would affect her judgment while performing her State duties. [The private company] was aware of her State job duties and the potential for conflicts of interest. To avoid those conflicts [the private company] ensured that her State clients were not assigned to the [location] where she worked part-time. As a result, she did not encounter her State clients while working in her part-time position and vice-versa. Since her clients did not overlap between her employers it was not likely she would be required to review matters in which she had a personal or private interest. Additionally, [Employee] was not involved in the contracting or bidding process for either employer, further reducing the likelihood her judgment could be impaired.



**(2) preferential treatment to any person:**

The next concern addressed by the statute was to ensure co-workers and colleagues were not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 *Del. C.* § 5805(b)(1). [Employee] did not represent her part-time employer before [the Division]. Furthermore, she did not have any job responsibilities related to the hiring or oversight of contractors. Therefore, it was difficult to see how she could show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest [Employee] would make official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]’s dual employment did not appear likely to affect her ability to perform her State job with impartiality and integrity. Again, she did not make decisions about contracts or vendors for either employer.

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

The Commission decided [Employee]’s outside employment did not create a conflict of interest with her State job.

**15-17—Outside Employment:** [Employee] was employed by [a State agency]. [Employee] worked at [a specific location]. His work [related to a specific segment of the population].

[Employee] also worked part-time for [a Vendor that contracted with his State agency]. He [provided services similar to those he provided in his State job, although he did not interact with the same people]. [Vendor] was aware of the potential conflicts of interest [Employee] may face because of his dual employment. As a result, they did not assign any of [Employee]’s State clients to the [location] where [Employee worked for the Vendor].

**A. State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure as a condition of commencing**

**and continuing employment with the State. 29 Del. C. § 5806(d). “Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).**

[Employee] filed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate [Employee]’s private employment would affect his judgment while performing his State duties. The Commission decided that [Employee] was unlikely to encounter clients from either job while performing duties related to the other position. [Employee]’s private employer did not assign any of his State clients to the [location] where he worked. Providing further separation between the two positions was the fact that [Employee] was not involved in the contracting process for either employer.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [Employee] does not represent his part-time employer before [his agency]. Additionally, [Employee] does not have any job responsibilities related to the hiring or oversight of contractors. Therefore, it was difficult to see how he could show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say he would do so; he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]’s dual employment did not appear likely to affect his ability to perform his State job with impartiality and integrity. He made his private employer aware of his State job responsibilities so that [Vendor] could support his desire, and duty, to keep his State clients separate from the [Vendor] clients.

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

The Commission decided [Employee]’s outside employment did not create a conflict of interest with his State position.

**15-07--Outside Employment:** [Employee] worked as a [professional] in the Division of Services for Youth, Children and Families (DSCYF). As part of her job, she [provided a specific service to] children and their families in New Castle County]. Her clients were children between 1 and 18 years of age. She also worked with quality management [to monitor the agency’s contractors]. Prior to her position with [her current agency] she was employed by [another division within the Department of Health and Social Services (DHSS)] from September 2013 through October 2014. In that position she worked with adults with [specific needs] who required [a high level of service]. She also provided [services] to clients under the age of 10.

[Employee] wanted to accept a part-time position with a private [employer] located in Dover. The [employer] did not have a contractual relationship with the State. However, one employee at the private company occasionally performed [a service for the State]. [At the private company Employee] would work as an independent contractor, providing services to clients aged 1 to 18. She would also provide consulting services which would include training for parents and schools. To avoid any conflicts of interest, she voluntarily decided to recuse herself from working with any Medicaid clients because of the possibility they could receive services from her State agency.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). There were no facts to indicate [Employee]’s judgment would be affected by her part-time position with [the private employer]. In her State position she worked with [a specific segment of the population]. At [the private company] she would be [working with a different segment of the community]. In the unlikely event she encountered a client in her part-time position she had worked with in her State position, she would recuse herself.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 *Del. C.* § 5805(b)(1). [Employee] would not represent her part-time employer before DSCYF. DSCYF does not contract with the private [employer] and as a result there would be no opportunity for [Employee] to show preferential treatment to anyone.

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

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

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

After the hearing, the Commission discussed [Employee]'s voluntary recusal of all Medicaid patients while performing her part-time job. It was agreed that she had chosen to recuse herself from more matters that the Code of Conduct requires. The Commission decided to advise that her recusal need not be so broad. The likelihood of a conflict of interest would arise in relation to a particular patient rather than in relation to an identifiable segment of the population. The mere fact that clients may share a [a common characteristic] did not, by itself, create a conflict of interest.

As long as [Employee] recused herself from [clients] at her part-time job that she had worked with in her State position, her outside employment would not create a conflict of interest.

**15-03 – Outside Employment:** [Employee] was employed by [a State agency]. One of his duties was to [conduct inspections relevant to the agency's mission]. [Employee] worked in New Castle County and conducted inspections for two [companies in a specific industry].

[Employee] wanted to accept part-time [employment with [a company who was subject to inspections by the State agency] in Dover. While [the local company] was subject to inspection [by the State agency], they were not inspected by [Employee]. They were inspected by a [State] employee in Kent County. [Employee] would work outside of his State work hours, on nights and weekends.

**A. State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure as a condition of commencing and continuing**

**employment with the State. 29 Del. C. § 5806(d). “Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).**

[Employee] filed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate [Employee]’s official judgment would be affected by his part-time work at [the local company]. [Employee] did not conduct inspections [related to the private company] and did not work directly with the [State] employee responsible for those inspections.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [Employee] would not represent his part-time employer before [his agency]. In addition, it was unlikely [Employee] would place his co-workers in a position to show preferential treatment to anyone because he did not work in the same county as the Inspector responsible for regulation of [the private company].

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say he would do so; he was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]’s dual employment did not appear likely to affect his ability to perform his State job with impartiality and integrity. He was responsible for inspections in a different county and related to different companies. Other than the fact that [Employee] would be working for a company [inspected by his State agency], there didn’t appear to be any link between his State job and his part-time employment.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e.

computer, fax, phone, etc.) to work on the private business. According to [Employee] he would work for his part-time employer outside of State work hours.

The Commission decided [Employee]'s proposed part-time employment did not create a conflict of interest as long as he performed his part-time duties outside of State work hours.

**15-01 – Outside Employment:** In January 2015, Commission Counsel received an inquiry regarding the propriety of [a State employee's] outside employment with a company that [had regulatory control over the agency]. In addition to concerns about a conflict of interest, [there were questions about whether the employee was using their vacation time to perform work related to the outside company or if they were using State time].

Commission Counsel contacted [Employee] to see if she wanted to seek an advisory opinion from the Commission. Counsel made clear that she was not required to seek an opinion but that she would need to complete the Ethics Disclosure Form on our website because she was working for a company that “does business with the State.” 29 Del. C. § 5806(d).

[Employee] was responsible for the overall operation of [a portion of the State agency including issues related to the regulatory body overseeing the agency]. As part of the [regulatory] process, the [agency's] operations were periodically assessed, including site visits, to confirm that they were [operating appropriately]. At the [conclusion of the regulatory review], a report was provided which detailed areas for improvement. When necessary, follow-up action was monitored by the [regulatory] body so the facility could be confident that it had taken the appropriate corrective action.

[Employee] did not participate in the review, nor was she involved in decisions regarding [the regulatory body's] contract with [the agency]. According to documents provided by [a department head], last year [the agency] paid [the regulatory body] approximately \$17,500 for dues and fees.

[Employee] was a contract [employee for the regulatory body] and had worked for them (or their predecessor) since 2003. [Employee] was one of 12 [employees in a leadership position]. As part of her duties she travelled to various [agencies] around the country and performed [regulatory] reviews. When she was absent from her State job, she used vacation or compensatory time. [Employee] did not perform any [regulatory] activities related to [her agency]. However, personnel conducting [the agency's regulatory review] were people [Employee] worked with [in her part-time job].

She asked the Commission to decide if her outside employment created a conflict of interest.

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

[Employee] filed the required Ethics Disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate that [Employee]’s official judgment would be affected by her work with [her part-time employer]. At [her agency], she did not make decisions about [her part-time employer’s] contract. Those decisions were made by the agency’s Director and she did not participate in the process.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. She may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Employee] did not represent [her private employer] before her own agency. Additionally, she had no role in the selection of [her part-time employer as the regulatory body]. When [the regulatory body conducted reviews, other State agency personnel worked with the reviewers, not Employee].

**(3) official decisions outside official channels:**

There were no facts to suggest that [Employee] made official decisions outside official channels. That is not to say she would do so; she was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the Code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]’s dual employment did not appear to affect her ability to perform her State job with impartiality and integrity. In fact, according to [Employee], her skills [related to her part-time job] directly benefitted [her agency] because she could manage [her responsibilities] with an eye towards the appropriate standards and procedures.

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

The Commission decided [Employee]’s outside employment did not create a conflict of interest with her State position. She should continue to use her vacation and compensatory time when she was performing duties related to her part-time job.

**14-46 -- Outside Employment:** [Employee] worked [for a Division of] the Department of Health and Social Services (DHSS). [Employee] worked with [a specific segment of the population who were eligible for a specific benefit]. [Employee] met with clients, assessed their needs and designed a comprehensive plan for their care. The plan was shared with family members, doctors, case managers and caretakers to provide continuity of care between all involved parties. [Employee] only worked with clients in Kent County.

[Employee] wanted to work part-time [for one of DHSS’ vendors in New Castle County]. At [her part-time job Employee] would assist [another employee] with their job duties and perform many of the same duties she did at her State job. [Employee] would work with other [State] employees while working [with her part-time employer]. She stated her outside employment would not require her to have contact with any of her co-workers in Kent County.

She asked the Commission to decide if her outside employment would create a conflict of interest.

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

[Employee]’s disclosure form and her comments at the hearing constituted the full disclosure required by the statute.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Under the law barring her from reviewing and disposing of matters in which she has a personal or private interest that may tend to impair judgment in performing her State duties, Delaware Courts have ruled that when such interests exist, officials should recuse “from the outset” and not make even “neutral” or “unbiased” statements on the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), aff’d., No. 304 (Del., January 29, 1996).

Because [Employee] would be working for [the part-time employer], she had a personal interest in that business. 29 Del. C. § 5805(a)(2)(b). At the hearing she stated she did not anticipate having contact with her Kent County [clients] when she was working part-time in New Castle County. First, there was geographic separation. Secondly, she would be working different hours and as a result, she anticipated she would work with different providers and clients. However, if such a situation presented itself, she would need to recuse herself. She stated she could avoid the conflict by asking [the part-time employer] to re-assign the client to



avoid having to make decisions about that client. Likewise, if she encountered one of her New Castle County clients while performing her State duties in Kent County, she would ask her supervisor to assign the client to another [employee].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 *Del. C. § 5805(b)(1)*. The employees of [the private employer] do interact with the employees of [her division]. However, because [the private employer] was a provider only in New Castle County, it was unlikely [Employee] would have contact with her co-workers in Kent County. Therefore, there was a reduced likelihood she would be able to show preferential treatment to anyone.

**(3) official decisions outside official channels:**

According to [Employee]'s disclosure form and her comments at the hearing she did not make official decisions about [the private employer] in her State position. Therefore, she would not be able to make official decisions outside official channels.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C. § 5802*, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Employee]'s dual employment had the potential to create an appearance of impropriety. Therefore, it was important for her to avoid interacting with clients she knew from one job while working at the other job. The fact she would be working in a different county reduced the likelihood her dual employment would adversely affect the public's confidence in their government.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C. § 5806(e)*. One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated she would perform her part-time work outside of State work hours. The Commission reminded her that the prohibition against using State resources applied to her physical presence as well as phone calls and paperwork.

[Employee]'s outside employment did not create a conflict of interest so long as she recused as necessary and did not perform duties related to her part-time job while on State time.

**14-45 – Outside Employment:** [Employee] was the [the head of a Division in a State agency]. His overall responsibilities were to manage [the job description has been removed to preserve the confidentiality of the request].

Prior to his [State] employment, [Employee] [held a similar position in another state]. While employed in [the other state], [Employee] was permitted to work part-time as a private consultant and he would like to continue his private work while employed by the State. His consultations were primarily in [his area of expertise]. [Employee] would not privately consult on any [matters related to] Delaware. In addition, [Employee] would perform all of his consultation work outside of his State work hours and he would not use any State time or resources. "My employment with [the State agency] will have no association or affiliation with my outside employment and vice versa. There currently exists no overlap since the scope of my services will not involve any agency in Delaware."

[Employee] asked the Commission to determine if his outside employment as a [private consultant] would constitute a conflict of interest under the Code of Conduct.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). The likelihood that an employee's outside employment may impair their judgment while performing their official duties is greater when the outside employment is within the same jurisdiction as the employing agency, in this case, the State of Delaware. A California court ruled that county employees could not be appointed by a lower court to act as expert advisors for parties adverse to the counties interests without violating conflict of interest laws. The Court said "[w]e would reach this same conclusion even in the absence of a written conflict of interest rule. The appointment of a confidential expert whose employer has an interest contrary to that of the party seeking the appointment is inherently problematic. The conflict it creates between employer and employee is readily apparent and should simply be avoided. *County of Los Angeles Dept. of Regional Planning v. Superior Court*, 208 Cal. App. 4th 1264 (2012).

There were no facts to indicate that [Employee]'s official judgment would be affected by his outside employment. The fact that [Employee] would not consult on any [matters related to the] State dramatically reduced the likelihood that there would be any crossover between his State job and his consulting job.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private business before his own agency to ensure that his connection to the agency would not result in the use of undue influence, preferential treatment, and the like. *Commission Op. No. 98-23*. Concerns about preferential treatment are absent when the outside employment is removed from the jurisdiction of the employee's government agency. Therefore, [Employee]' private employment outside the State of Delaware was much less likely to create a conflict of interest.

**(3) official decisions outside official channels:**

When a private client hires a consultant with connections to a government agency which may be directly involved in a matter, it may raise the appearance that because of that connection, the employee could circumvent official channels to obtain a benefit for their private client. Particularly troubling is access to confidential information not available to other experts. Again, those concerns do not exist in private work outside the jurisdiction of the employee's agency. No other facts suggested [Employee] would be able to make official decisions outside official channels. That is not to say he would do so; he was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. It only requires that it "may result in an adverse effect on the public's confidence" or that it may "raise suspicion "that the dual employment holder is acting in violation of the public trust. *Id*; *See also*, 29 *Del. C.* § 5811(2) (public officers and employees should avoid even the appearance of impropriety where they have a financial interest); *See also*, *Commission Op. No. 99-35* (citing 63C Am. Jur. 2d *Public Officers and Employees* § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict)).

In one case, the Court noted that where State employees hold outside employment in the same field as their State work, it "creates an appearance of impropriety" because of the perception that the State employees have an unfair advantage. The Court specifically noted that the State employees had access to the State's computer system, which could be an aid to them in their private business. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Delaware Supreme Court has specifically addressed issues that arose when a licensed professional, as a result of outside employment, represented an opposing interest in a matter involving the State. *In Re Ridgely*, Del. Supr., 106 A. 2d 527 (1954). While *Ridgely*, was a common law decision, the Commission has held that pursuant to the rules of statutory construction, since the General Assembly did not specifically overrule common law, such decisions have precedent in interpreting the statutory provisions. *Commission Op. Nos. 97-24 and 97-30*. Since that common law decision, the General Assembly enacted a provision which requires that: "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." 29 *Del. C.* § 5805(a).

To decide if there is an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78*. The Commission decided the fact that [Employee]' consulting work would be outside the jurisdiction of his government job weighed heavily in diminishing the appearance of a conflict and was unlikely to influence the public's confidence in their government.

**B. Substantial Conflict with Performance of Official Duties**

The Code of Conduct also requires employees to refrain from engaging in activities in "substantial conflict with their official duties". 29 Del. C. § 5806(b). An important consideration when evaluating an employee's outside work is the time commitment required to perform duties related to the outside employment. A New York court addressed the concerns raised when State employees have a private business which offers the same type of services privately, as they do on their State job. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Court said that "multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture." First, it noted that: "the exigencies of private practice and the convenience of private clients require communication and sometimes actual representation, with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official library, telephone and other facilities to accommodate the temporal and other necessities of private practices." The Court added that there was an "inevitable conflict created by the limited time and resources for the employee to perform two jobs." *Id.* at 246. Likewise, this Commission has considered the time involved to hold a second job and considered when the employee will perform the private activities in deciding if the other employment creates an interest which is in "substantial conflict" with performing official duties, which is prohibited by 29 Del. C. § 5806(b). See, e.g., *Commission Op. No. 98-14*.

No known facts indicated [Employee] would engage in such conduct. [Employee] was reminded he may not use State time and resources to perform duties related to his consulting work.

The Commission decided [Employee]' consulting work would not create a conflict of interest with his State position as long as he did not perform consulting work in the State of Delaware and did not use State time and resources for his private work.

**14-41 - Outside Employment: Note: Details of the Employee's employment (both State and private) could not be described without identifying the agency and the individual. As a result, most facts have been omitted to maintain confidentiality.**

[Employee] worked for [a State agency performing a job with a very specific job description].

According to [Employee], [his private employer did not contract with his State agency]. However, all Delaware [businesses in this line of work] must be licensed by [Employee's State agency to perform a specific task]. The licensing process was the responsibility of [Employee's supervisors]. [Employee] was not involved in the licensing process at [his State agency] or [his private employer]. He asked the Commission to determine if his outside employment created a conflict of interest. [Employee] was accompanied to the meeting by [the Division Director].

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). There were no facts to indicate that [Employee]'s official judgment would be affected by his part-

time position. At the time [he performed his State job duties, the name of the private business selected to follow-up] was not yet known. Even if [Employee] knew in advance that [his private employer] was going to [become involved], it would not appear to have an effect on how [Employee] performed his State job. [Employee] disclosed that [he was occasionally asked to make referrals to private businesses]. He stated he refers them to the phone book to make a selection and he does not recommend [his private employer].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. He may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). Since [Employee] was not involved in the licensing process, the Commission decided it would not be possible for [Employee] to show preferential treatment to his part-time employer.

**(3) official decisions outside official channels:**

[Employee] did not have any decision-making ability at either his State job or his part-time position. The State did contract with [a similar business] but it was not the business [where Employee worked]. Therefore, no facts suggested he would be able to make official decisions outside official channels. That is not to say he would do so; he was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). The Commission decided the likelihood [Employee]'s dual employment would create an appearance of impropriety was very small.

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

[Employee] also indicated he was an elected official for [a town] and was a member of [a volunteer fire company]. There were no facts to indicate either of those community activities created a conflict of interest with his State job.

The Commission decided [Employee]'s secondary employment did not create a conflict of interest with his State job.

**14-23 - Outside Employment:** [Employee] worked as a supervisor for [a State agency]. Her unit determined the eligibility for, and accuracy of, the benefits received by clients for [certain State benefits]. It also provided feedback to staff [in another Division within the agency] regarding identified errors and assisted in developing solutions to the identified problems. [The other Division] contracted with [a vendor]. [Employee] did not have any direct influence over the vendor's contract. All contract negotiations and renewals went through [the other Division]. Her involvement with [the vendor] was triggered when her division reviewed [benefit] determinations, made by [the other Division], and discovered errors. She forwarded the identified errors to the vendor for review. [The vendor] reviewed the errors for [the other Division] so their staff did not have to spend time reviewing them. For each specific error, [Employee] discussed concerns, policy issues, and training needs with the vendor. The vendor provided [Employee] and [the staff of the other Division] with strategies to avoid or reduce errors. The way the work was set up would make it difficult for her to recuse herself from having contact with [the vendor]. [Benefit determinations] were a part of her staff's workload and she was responsible for contacting the vendor when one of her staff found an error. [Employee] did not want to burden other supervisors by passing that responsibility to others. She also oversaw [work in another area of State benefits]. In that area she hired a different contractor after a bidding process. They only worked on [one type of benefit].

[The vendor for the other Division] had a contract [to reduce benefit determination errors]. Within that contract, the vendor worked with [Employee's Division], including [Employee], on specific errors and error reduction strategies. [The other Division] renewed the contract yearly and [Employee's Division] did not play a part in contract negotiations or renewal. However, [Employee] did know the person at [the other Division] responsible for the renewal of [the vendor's] contract and she would contact them if she had any concerns.

[Employee] had been approached to assist the contractor with [work in a different area than the service they provide to the State]. [The vendor] was looking for assistance to help with expanding their consulting work into [a different] arena. The owner of [the vendor company] did not have a lot of knowledge [in the specific area] and reached out to [Employee] because she [had experience in the new area through her State job]. The work would be completed outside of state hours. The work would be easy for her to accomplish because of the time difference between Delaware and [the geographic location of the new work area]. [The vendor] was not bidding on [work in the same area] in Delaware. The [vendor's] staff that [the employee] currently worked with in [her State job] would be the same staff that would be [working in the new area].

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

[Employee]'s disclosure form and her comments at the hearing constituted the full disclosure required by the statute.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] would not be reviewing and disposing of [work in the same area as she did in her State job]. While she did work with [some of the same] issues in her State position, that work involved a different vendor. No other facts indicated that working with [the vendor] as a part-time employee would impair her judgment.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to [Employee] or to [the vendor]. She may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Employee] would not be representing [the vendor] before her agency during contract negotiations because the contract was handled directly by [a different Division]. No facts presented to the Commission indicated that [Employee], or her co-workers, would show preferential treatment to anyone because of her part-time employment with [the vendor].

**(3) official decisions outside official channels:**

No facts indicated she would be in a position to make official decisions regarding [the vendor], much less any decisions outside official channels. Additionally, [Employee] is entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

The Commission decided her part-time work with [the vendor] would create an appearance of impropriety amongst the public and her co-workers. [The vendor] knew [Employee], and offered her the position, because of her State job. It could appear to others she was leveraging her State position for personal gain. 29 Del. C. § 5806(e). While that may not accurately reflect the circumstances, all the statute requires is a "justifiable impression of a violation." 29 Del. C. § 5802. Additionally, at the hearing [Employee] stated she was acquainted with the person at [the other division] responsible for renewing [the vendor]'s contract. She said she would contact that person if she felt [the vendor] was either falling short of their contractual obligations or if they were exceeding their contractual expectations. Therefore, while she did not have direct decision-making ability over the [the vendor] contract, she did have the ability to influence [the other division's] willingness to renew their contract. It may appear to the public that [Employee] would be less likely to report [the vendor]'s shortcomings if she were privately employed by them. Again, that is not to say she would do so. She is entitled to a presumption of honesty and integrity. *Beebe*. The appearance of

impropriety was especially concerning because she would be unable to recuse herself from working with [the vendor] in her State position.

**C. Waivers may be granted upon a determination of hardship or because enforcement of the Code of Conduct was not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

Nothing presented at the hearing, or in [Employee]'s written submissions, led the Commission to believe she qualified for a waiver due to hardship or that enforcement of the code was not necessary to serve the public purpose.

The Commission concluded that [Employee]'s proposed part-time employment with [the vendor], a contractor she worked with in her State position, would create an appearance of impropriety in violation of the Code of Conduct.

**14-22 - Outside Employment:** [Employee] worked [in an enforcement role for a State agency]. He was assigned to Kent and New Castle Counties. [Employee]'s primary responsibilities included [performing tasks related to his enforcement role].

[Employee] wanted to accept a part-time position with [a private entity with an enforcement role]. His duties would include enforcement [in an area unrelated to his State position]. [His agency] did not have a contractual or regulatory relationship with [the private entity]. [Employee] stated [the private entity] was willing to work around his State work hours.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). While both positions involved some type of enforcement action, his State job was in [one specific area] and the job [for the private entity] involved [enforcement in an unrelated area]. When asked how he would handle a hypothetical situation where [a high ranking official of the private entity] was accused of a violation [related to his State position], he responded that he would not allow the [official's] influence over his part-time job to influence his judgment as he performed his State job. As to [employee's State agency] regulatory authority over [businesses] near [the private entity], [Employee] indicated that they are not within the [private entities purview] and fall under the [purview of a different State agency]. The Commission pointed out that many employees of the [businesses] likely live in the immediate area, perhaps within the [purview] of the [private entity], thus raising the potential for a conflict of interest. [Employee] responded that when [his State agency] was involved in an enforcement action against a [business], he typically dealt with CEO's and managers, not the rank and file employees he would be likely to encounter during his part-time job. It did not appear to the Commission that his duties in his part-time job would influence his judgment related to his State job.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any



person. [Employee] may not represent or assist his private interest before his own agency. 29 *Del. C. § 5805(b)(1)*. [The State agency] did not have a regulatory or contractual relationship with [the private entity]. As a result, it was highly unlikely that his colleagues from either job would have contact with each other. Therefore, the likelihood his part-time work for [the private entity] would result in preferential treatment being extended to anyone was very remote.

**(3) official decisions outside official channels:**

[Employee]'s State job involved [enforcement in a specific area]. His part-time job would involve [enforcement of a separate area]. Given the different focus between the two positions, there did not appear to be any way he could influence official decisions outside official channels.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C. § 5802*, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). There were no obvious conflicts between the two positions which would be likely to adversely affect the public's confidence in their government.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C. § 5806(e)*. One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. One concern was [Employee]'s use of a State car to travel to and from his part-time job. He stated he would drive home in his State car, pick up his personal vehicle, and then proceed to work. As to work hours, [Employee] stated he would work his part-time job outside of State work hours.

The Commission was concerned that while he may be able to arrange some aspects of his part-time job to coordinate with his State schedule, [he may encounter some difficulty with a particular aspect]. However, the Commission decided, as long as he did not use State work hours to perform work related to his part-time job, he would not be in violation of the Code of Conduct.

**13-50 - Outside Employment:** [Employee] worked for [a division under the] Delaware Department of Transportation. He had worked [for the division] for two years. He worked with the public helping customers resolve issues [related to his position]. As part of [employee]'s job, he had access to the "MVALS" system which stored all Drivers' License records. Misuse of the system was cause for immediate dismissal. He was recently informed that [everyone in his position] would be trained to access DELJIS, which is a database used by police agencies and [Employee's agency] to search information pertaining to "wanted" individuals. It also provided a wide range of other information such as driving records, addresses, criminal records, and vehicle registration information. Any misuse of DELJIS access would result in [Employee]'s immediate dismissal. Access to MVAL and DELJIS were closely monitored and every keystroke could be traced back to specific users. Because of the upcoming training for DELJIS, it came to

[Employee]’s supervisor’s attention that he owned a private business. His supervisor asked him to contact the Public Integrity Commission (PIC) to determine if there was a conflict of interest between his [State] position and his private business. Of particular concern was [Employee]’s use of the DELJIS system and its ability to provide him information [helpful] to his private business.

As to the private business, [Employee] was the proprietor of a [private] business he had owned since August 2008. He was the sole [employee]. He had never contracted with any State of Delaware agency, including [his agency], nor had he provided services to any coworker or any member of the public he came into contact with at [his State job]. [Employee] contracted with two private companies to provide him with [information relative to his business]. [Employee] did not use the computer systems available at [his agency] to help him with his private business. In his disclosure he said he would not accept any clients that he had worked with at [his State agency].

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

His written submissions qualified as the required disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). The above provision is meant to ensure that in making State decisions [employee] would not show preferential treatment to clients from his private business. However, the law also bars him from representing or otherwise assisting his private clients before the agency by which he is associated by employment. 29 Del. C. § 5805(b)(1). That is to ensure that his co-workers and colleagues are not affected in their judgment because of his affiliation with his private enterprise’s client.

Many of those concerns were allayed because [employee]’s private business did not contract with the State, nor did his State agency have contact with his private business. However, he was made aware that in his State position, he would be prohibited from assisting a past or present client of his private company. Conversely, he would not be able to accept any clients in his private business that he had previously assisted at [his State agency]. This was to avoid a situation in which he would be reviewing or disposing of matters in which he had a personal or private interest. Should either situation present itself, he was advised to recuse from that matter. Under the law, the scope of “recusal” has been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

[Employee] was advised to discuss with his supervisor his ability to recuse at [his State agency]. In his current position it would simply mean that he could not assist the customer related to the conflict. His ability to recuse from a matter in his private business was easy, he could simply refuse to accept as private clients anyone he had assisted [in his State position].

As to the use of the DELJIS database, [Employee] was required to follow the same rules as any other [agency] employee. The Commission did not ascribe to him conduct which he had not committed. Fears that he may misuse the database for his private business did not, by themselves, create a conflict of interest under the Code of Conduct. The Commission must rely on concrete facts, rather than speculation, when making a determination of the existence of a conflict. 29 *Del. C.* § 5809(2). To date, that had not happened.

**(2) preferential treatment to any person:**

The next concern addressed by the Code of Conduct is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist his private interest before his own agency. 29 *Del. C.* § 5805(b)(1). In his State position, as long as he recused himself from all matters involving clients of his private business, he would not have the opportunity to show preferential treatment to anyone.

**(3) official decisions outside official channels:**

In his State position, recusal from any matter involving clients of his private business removed the possibility of official decisions being made outside official channels.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

Recusing himself from any matter in his private business that involved someone he had previously assisted as part of his State position assured there would not be an impression of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). A prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. In [Employee]'s case, what seemed to be of particular concern to his supervisor was his possible use of DELJIS to benefit his private business. He stated he did not, and would not, use his access to State computer programs to benefit his private business. The Delaware Code provides ample consequences for misuse of the DELJIS system. The consequences included criminal prosecution ranging from a Class A misdemeanor to a Class E felony, depending on the nature of the breach, and immediate termination of employment. 11 *Del. C.* § 8514(c), § 8523(c).

The Commission decided there was not a conflict of interest between [Employee]’s State position and his private business as long as he recused himself as described above. Additionally, there was not a blanket conflict of interest which would prevent him from using the DELJIS database because he owned a private business which might benefit from misuse of the system.

**13-49 -- Outside Employment:** [Employee] worked for [a State agency]. As part of his duties, he referred clients and their families for counseling. [Employee] did not choose the provider. He provided the family with a list of counseling programs in their geographic area, which sometimes included [his part-time employer]. At his part-time job, [Employee] taught a class for divorcing parents. To the best of his knowledge, he had not had [relatives] of his [State clients] in his class.

[His agency] recently polled their employees to determine if any of them held dual employment. [Employee] disclosed that he worked for [his part-time employer] and was directed to contact PIC so it could be determined whether his outside employment created a conflict of interest under the Code of Conduct.

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

[The part-time employer] contracted with the [Employee’s agency]. Once notified of the potential conflict by his State employer, [Employee] filed the required disclosure.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Employment constitutes a private interest. By way of his ethics disclosure, [Employee] indicated he had not had students in his class that were related to his State [clients]. The fact that [Employee] taught [a specific population] in his part-time job and worked with [a different population] in his State job, reduced the likelihood of a conflict. However, it would be possible for a student in his class to be related to one of his [clients]. Should that occur, [Employee] would need to recuse from either teaching the [private student] or from [working with the State client].

Under the law barring him from reviewing and disposing of matters when he has a personal or private interest that may tend to impair judgment in performing his State duties, Delaware Courts have ruled that when such interests exist, officials should recuse “from the outset” and not make even “neutral” or “unbiased” statements on the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996). Barring statements from the person who recuses is to ensure they do not unduly influence their colleagues. Further, Courts have held that “mere presence” of the person with the conflict may influence their colleagues. The issue of undue influence would be cured by the ability to recuse himself at either place of employment.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to [Employee] or his private interest. He may not represent or assist his private interest before his own agency. 29 Del. C. § 5805(b)(1). [Employee] stated in his disclosure that [his part-time employer] may be listed as a provider on a list of available counseling options for his [State clients] and their families. The Commission stressed that [Employee] should not recommend [his part-time employer] to his [clients or their] families.

**(3) official decisions outside official channels:**

As long as [Employee] followed the Commission's recommendations for recusal and he did not involve himself in the selection of a counseling provider, the ability to make official decisions outside official channels would be greatly reduced.

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). As long as [Employee] recused appropriately, no facts suggested there would be an appearance of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] may not use State time and resources to complete work for his part-time position.

The Commission decided that if [Employee] abided by the recusal requirements and did not use State time and resources for his part-time job, there would be no conflict of interest under the Code of Conduct.

**13-46(A) - Outside Employment:** This matter was discussed at the November 2013 meeting. [Employee] was unable to attend at that time. The Commission determined they would need [Employee] to appear at the next hearing so the issue could be more fully explored. (The January meeting was canceled due to weather). [Employee] attended this meeting accompanied by [a co-worker]. [Employee] was employed by the State and was appointed by the Governor. She served [a specific segment of the population]. [Employee] made decisions regarding [individuals]. [Employee]'s office handled approximately 225 cases per year of the 4000 cases in the [State].

[Employee] recently completed a training course that would allow her to act as [in another professional capacity]. She wanted to use the new ability to [participate in proceedings which

were not assigned to her State office]. She proposed acting in her role as [a State employee] without actually having her office involved in the process. [Employee] believed the experience of [working on] those types of disputes would expose her to a different set of issues than those she typically dealt with. She confirmed with [the agency overseeing the work] that there was a need for [additional personnel in the particular area]. At the time, there were only 5 [participants] on the list from which the parties could choose. [Employee] would be unable to charge a fee if she was acting [in her official capacity]. However, she would recommend a donation be made to her office if asked by the parties. [The agency] already had procedures in place to accept donations. [Employee] was primarily interested in gaining new experience and using that experience to benefit her public office.

The Commission discussed the fact that the statute which authorized the powers of the [the office] was broad in nature and also charged the [office] with educating the public. Therefore, the statute itself did not seem to prohibit [Employee] from working [in this capacity]. [Employee] did acknowledge that it would be a conflict of interest for her to [work in this capacity], if she received private compensation. In that case, the Commission was concerned that she would be leveraging her position to recruit private business. The Commission was also concerned about [Employee] having to divulge confidential information if she [worked on a matter] which was subsequently assigned to [her State office]. [Employee] stated she could avoid such a conflict by advising the parties of such a possibility.

[Employee] was also the Chair of [a] Commission. She had not asked her Commission for their position about her proposal. The PIC recommended that she obtain a position from each member of her Commission and forward that information to PIC within the next 30 days. Once PIC reviewed the position of the members of [her] Commission, PIC would issue an opinion. As a final matter, [Employee] wanted the Commission to consider whether there would be a conflict of interest if she participated in [matters] not related to [issues handled by her office]. For those matters, she would be receiving payment as a private [employee].

**13-46(B) – Outside Employment:** Note: This matter was discussed at the November 2013 and February 2014 meeting. The Commission determined they would like to have the input of [a specific] committee (of which [employee] was the Chair) before deciding the matter. [Employee] sent additional documents which showed her committee had recommended a change to [their governing body] which would give [employee] authority to conduct private [business], have the money collected by the [governing body], and paid to the [employee's agency]. [Employee] would still like the PIC's opinion on whether the [proposed change to employee's duties] created a conflict of interest under the Code of Conduct.

[Employee] was employed by the State full-time. [Employee] was appointed by the Governor. [Employee's duties were statutorily mandated]. [Employee's office handled approximately 225 matters per year of the 4000 [handled in the State].

[Employee] completed a training course [that would allow her to act as a [private professional]. She wanted to use the new ability to conduct [private business] not assigned to [her office] while still acting in her State role. [Employee] believed the experience of [handling private matters not assigned to her office] would expose her to a different set of issues than those she typically dealt with. She confirmed with [the agency's governing body] there was a frequent need for [the type of private business she wanted to provide]. [Employee] was willing to have [any] payments [for her private work] to be made to [her agency] rather than to herself

personally. She was primarily interested in gaining new experience and using that experience to benefit her public office.

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

[Employee]’s email request and comments made during her appearance at the February 18, 2014, meeting constituted the full disclosure required by the statute.

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

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] stated she had discussed the issue with [her governing body] and they were willing to allow her to recuse herself from any matter which had the potential to become a matter for [her agency]. [Employee] understood the possible conflicts that could arise and would be able to avoid [handling] a matter in which her agency may later become involved. Therefore, there was a reduced likelihood her judgment would be impaired while fulfilling the duties of [her State position].

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to ensure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. She may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). Because [employee] understood the need for recusal, she would not represent the interests of a private matter before her own agency. For matters in which [Employee] was [involved as a State employee], it was possible that other [private professionals] would show preferential treatment to her because of her status as a fellow [professional]. However, even if [someone] was inclined to show preferential treatment to [Employee], it was doubtful the [other professional] would be able to exert any real influence over the other party(ies). The openness of the process itself would reduce the chance of preferential treatment being extended or abused.

**(3) official decisions outside official channels:**

The process [in question] required the involvement of multiple parties. As the [private professional], [Employee] would be working with those parties towards a resolution. It would be difficult for [Employee] to make official decisions outside official channels because she would not have sole decision-making power over the process. Additionally, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

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

The purpose of the code is to ensure that there is not only no actual violation, but also not even a “justifiable impression” of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

[Employee] had the laudable goal of enriching her work experience. She was mandated by statute to “act as an informational resource for the public.” [Citation omitted]. [Employee] believed that by expanding her knowledge base she would be fulfilling her statutory mandate because she would be able to offer a richer insight into [her field of expertise]. However, private [citizens] may question her ability to [decide] matters free of any bias based upon her day-to-day perspective [in her State position]. That concern was mitigated by the [proposed client’s] ability to select a [professional] from a list provided by [the governing body] and the fact that the compensation would be paid to her office, not to [Employee] personally. The Commission did not believe conducting private [business] in the manner set forth above would have an adverse effect on the public’s confidence in the integrity of its government.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. In this instance, the money she would be paid for [her] services would go directly to her office and she would still be acting [in her State capacity], she would just be fulfilling a different role. Therefore, the traditional concerns about using State time and resources did not exist.

The Commission decided would not violate the Code of Conduct for [Employee] to conduct private [business in her State role] which did not involve [her State agency]. She was cautioned that the opinion was limited to the applicability of Title 29 Chapter 58 of the Delaware Code. We did not make any decisions regarding other provisions of the Code. If a situation should arise which she did not anticipate, she should return to the Commission for further advice.

**13-31 - Outside Employment:** [State Officer] began practicing law with a new firm of approximately 300 attorneys, most of whom practiced in [another state]. One of the attorneys specialized in the area of abandoned property. The attorney represented companies attempting to retain property state finance departments had decided to claim as abandoned. Usually, the companies were contacted by private auditing firms that represented the state; it was not uncommon for a company to receive a notice that numerous states were simultaneously seeking to claim abandoned property. Because Delaware is a state of incorporation for many companies, it is common for Delaware to be one of the companies involved in the multi-state audits. As a result, the attorney at [State Officer]’s new firm had contact with private companies that were representing the State of Delaware, and he occasionally had direct contact with employees of [a State agency]. Most of the abandoned property cases were resolved informally but some of the cases resulted in litigation.



The [State agency] did not identify any companies with whom it was negotiating over abandoned property. That information was considered confidential taxpayer information. [The State Officer] was also screened from any knowledge of his law firm's clients that had any connection with Delaware state agencies. Therefore, if there were to be any abandoned property issue involving the [State agency] and a client of his new law firm, he would not know about it from either end – short of litigation, the matter would begin and end without [State Officer] ever knowing that a matter existed.

[The State Officer] requested the Commission consider whether he would have a conflict of interest if he worked for a law firm that was negotiating abandoned property settlements with the State of Delaware as long as he did not have any information about either of the parties, nor participate in any way. He also asked the Commission to consider whether the opinion would be different if the case were to proceed to the litigation stage, where [State Officer]'s law firm would be publicly averse to the State.

The Delaware Lawyers' Rules of Professional Responsibility (DLRPR) and the State Code of Conduct restrict, but do not completely bar holding concurrent private and public employment. Rule 1.11; 29 *Del. C.* § 5806(b). PIC does not interpret the DLRPR, only the Delaware Supreme Court regulates the practice of law. To avoid impaired judgment, in his State capacity, [State Officer] may not review or dispose of matters if he has a personal or private interest that may tend to impair judgment in performing official duties. 29 *Del. C.* § 5806(b). Outside employment creates a personal or private interest. 29 *Del. C.* § 5805(a)(2). Under 29 *Del. C.* § 5806(b), State employees may not accept other employment if acceptance may result in: (a) impaired judgment in performing official duties; (b) preferential treatment to any person; (c) official decisions outside official channels (d) any adverse effect on the public's confidence in the integrity of its government.

[The State Officer] stated in his written request, and at the hearing, he would not have any knowledge a matter was pending between his law firm and the State unless it became the subject of public litigation. His law firm was willing to screen him from information related to abandoned property matters. [The State Officer] also stated that the [State agency] did not identify the parties involved in abandoned property issues. To that extent, he would not be reviewing and disposing of matters in which he had a private interest. He did have peripheral involvement in abandoned property issues in the general context of budget discussions. The Commission decided the limited budget discussions did not create a conflict in which [State Officer]'s judgment would be impaired. Assuming [State Officer] was not aware of any pending negotiations between the State and his private employer, he would not be in a position to show preferential treatment to anyone. His lack of knowledge would also prevent [State Officer] from making official decisions outside official channels. Further, [State Officer] stated his law firm would be willing to limit their representation of clients to those matters that can be resolved without litigation.

The Commission decided that under the facts presented, [State Officer] did not have a conflict of interest. However, the finding was conditioned on the fact [State Officer]'s law firm would not participate in litigation against the State.

**13-29 - Outside Employment:** [An employee of DMV] processed [documents] for car dealers and the general public. She also supervised other DMV employees. When asked if she had any discretion in the performance of her job duties, [the State employee] indicated her job required that she exercise her own judgment.

[The State employee] had been offered two part-time positions with two [private companies]. [One company] wanted to hire [the State employee] to run an auto auction and to complete [other paper] work. [The second company] wanted to hire [the State employee] to process their [paper] work. Subsequently, the [paper] work would be brought to DMV for processing by the [companies]. [The State employee] indicated she would not process any paperwork for her part-time employers while working at DMV. If she was presented with a situation in which her part-time employer was the next customer in line, she would skip over their [documents] and work on the next application in line. Work for her private employers would be processed by other DMV employees. [The State employee] acknowledged she supervises some of the employees who would be tasked with processing the work submitted by her private employer.

Under 29 *Del. C.* § 5806(b), State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; (4) any adverse effect on the public's confidence in the integrity of its government.

At her State job, [the State employee] stated she would not be processing [paper] work for her private employers. She claimed those duties would be assumed by other employees at DMV. However, some of those employees were actually supervised by [the State employee]. It would be difficult to determine if the employees' decisions related to the [paper] work were a result of their independent judgment or if they were motivated by external factors. (i.e. fear of retribution from their supervisor; their personal attitude towards [the State employee]). The remaining employees were [the State employee]'s colleagues and co-workers. As a professional courtesy, her co-workers could extend preferential treatment to the [private companies] that employed [the State employee] or subject their submissions to lesser scrutiny. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C.* §5806(e). [The State employee] stated she would not use State time or resources to complete her part-time work. However, the inquiry was more involved. It was assumed other [businesses in the industry] would become aware of the working relationship between [the State employee] and her private employers. Any legitimate rejection of submitted documents by other [private companies] would raise the warranted specter of favoritism.

After a conflict of interest was identified, the Commission considered whether [the State employee] served a ministerial function. A "matter" is considered "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc.*, 336 A.2d 209, 211 (Del.1975). Thus, if the matter was merely "ministerial" the presence or absence of a conflict of interest was immaterial. [The State employee] revealed she often used her own judgment to determine if work complied with DMV regulations. Because she used her own judgment, her job status could not be categorized as ministerial.

The Commission decided that [the State employee]'s employment by private enterprises that contracted with her State agency would be a conflict of interest that could not be cured by recusal or by a determination that her job duties included merely ministerial functions.

**13-28 - Outside Employment:** [A State employee who worked for a division] within the Delaware Economic Development Office placed media advertisements, responded to media requests, and proactively sought media coverage. [The State employee] coordinated with magazines and other publications regarding graphics, placement, and timing of the ads. Billing for each ad went directly to an administrative person in his department. The cost of each ad was generally \$250 per placement. The final decision regarding placement of an advertisement was made by [the State employee's] supervisor. Approximately once a quarter, an ad was placed in [a publication]. [The publication] also reached out to [the State employee] to solicit advertisements.

[The State employee] had been asked to write articles for [the publication]. The topics he expected to cover included profiles of "local personalities and businesses". He believed he would have some control over the topics he would write about. When the Commission asked if he would be able to recuse himself from dealing with [the publication] in his State position, he said he could pass those duties to another employee. [The State employee] said he discussed the position with [the publication] with [his supervisor]. He didn't anticipate any problems with his State employer allowing [the State employee] to recuse from any issue related to [the publication]. He also asked for advice about the information he should include in his byline.

Under 29 *Del. C.* § 5806(b), State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; (4) any adverse effect on the public's confidence in the integrity of its government.

[The State employee] stated he would communicate with the editor at [the publication] in reference to his articles. The advertising department employed different staff reducing the likelihood a conflict of interest would affect [the State employee's] judgment. His ability to recuse himself at his State job from any matter related to [the publication] ensured that official decisions would not be made outside official channels. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the position would be contrary to the restrictions on misuse of public office. 29 *Del. C.* §5806(e). [The employee] said he would not use State time or resources while working for [the publication].

The Commission found there would not be a conflict of interest if [the State employee] recused himself from any matter dealing with [the publication] in his State position. Additionally, [the State employee] could not use his State title in his byline.

**13-26 - Outside Employment:** [A State employee] worked for the Department of Health and Social Services (DHSS). In his position, [the employee] was responsible for [some processes related to] a Request for Proposal (RFP). He was not responsible for awarding contracts. Recently, [the employee] started his own small business consulting firm. As part of the marketing effort for his new firm, he asked if it would be allowable for him to use his State title in the marketing material. The Commission advised that it would be inappropriate for him to use his State title on any marketing materials, including presentations or material requiring biographical content. [The employee] was concerned about how to answer a direct question regarding his position with DHSS. The Commission advised If he was asked directly [about his position with DHSS], he should answer honestly.

[The employee] stated his firm would not do business with DHSS. If he was questioned about the appropriate procedure for completing an RFP for DHSS, he would refer the vendor to a website designed to explain the bidding process. [The employee] did want to offer guidance to his private clients about completing RFPs for other agencies. His work would be focused on [a different process from the one] he monitored in his State job. Additionally, [the employee] stated his guidance would not require him to interact with other State agencies on his client's behalf. His work would be limited to helping his clients [with] the RFP. When asked how he would avoid unanticipated interactions with clients contracting with DHSS, [the employee] said he would have his prospective clients fill out a disclosure form.

Under 29 *Del. C.* § 5806(b), State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; (4) any adverse effect on the public's confidence in the integrity of its government.

Because [the employee] would not contract with, nor accept clients that contracted with, DHSS, there was little concern about impaired judgment, preferential treatment, or official decisions outside official channels. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the Code would be contrary to the restrictions on misuse of public office. 29 *Del. C.* §5806(e). [The employee] stated he would not use State time or resources to work with his private clients.

The Commission decided it would not be a conflict of interest for [the employee] to consult with private clients regarding the RFP process for agencies other than DHSS. [The employee] should also refrain from using his State title on any material related to his private enterprise.

**13-25 - Outside Employment:** [A State employee] worked for the Department of Natural Resources and Environmental Control (DNREC). He supervised employees at DNREC. [The employee] was offered a part-time job working for [an organization]. [The organization] was a non-government agency which advocated to the federal government on behalf of [state] agencies in all 50 states. Delaware was a member of [the organization]. However, [the organization] did not comment on State regulations or statutes. According to [the employee], the only professional contact between his agency and [the organization] was participation in [the organizations] meetings to share and gather information about matters of interest to DNREC. [The employee] had attended those meetings in the past.

[The employee] would develop, review, and manage contract proposals (Request for Proposals (RFPs)) submitted to [the organization] for development of on-line training courses. The training courses were geared towards employees of natural resource agencies. In addition to managing the contracts, he would also be teaching some of the online courses. [The employee] would be paid a flat fee for teaching the course, his salary was not dependent on the number of students enrolled.

Pursuant to 29 *Del. C.* § 5806(b), State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; (4) any adverse effect on the public's confidence in the integrity of its government.

[The employee] indicated that because [the organization] did not represent or contract with DNREC there would be no effect on his judgment in performing his State job, there would be no preferential treatment to any person, and his private work would not result in official decisions outside official channels. When asked if he would use his influence to get his employees to enroll in the online courses, [the employee] said he would not be responsible for making that decision. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* §5806(e). One concern raised in this regard was the use of [the employee's] State title. [The employee] agreed his State title would not be used for any work he did for [the organization]. He also stated he would not use State time or resources to perform his part-time job.

The Commission decided [the employee's] acceptance of the part-time position would not be a conflict of interest and there would be no appearance of impropriety as long as [the employee] did not use his influence over his DNREC employees to encourage enrollment in the online courses. Also, [the employee] must not expend State time or resources for his part-time position.

**13-23 - Outside Employment:** Applicant worked part-time for the Division of Public Health (DPH) within the Department of Health and Social Services. She maintained a database which collected health-related data and she reported that data to a federal agency. Applicant also evaluated a health-related prevention program. Her agency contracted with Brandywine Counseling and Community Services, Inc. (BCCS) to provide various services. BCCS was required to report statistics using the database that applicant managed. She had also trained BCCS employees on the use of the database. Applicant was also co-owner of a consulting business. The business recently entered into a contract with BCCS to provide BCCS with data support services. In that instance, BCCS was contracting with the Department of Corrections (DOC). Applicant would be working directly with BCCS staff.

In their State capacity, State employees may not review or dispose of matters if they have a personal or private interest which tends to impair independent judgment in performing official duties. 29 *Del. C.* § 5805(a)(1). Applicant interacted with BCCS employees frequently. She trained them to use the State's database and when the information in the database was not in compliance with federal standards, she was required to contact them and bring them into compliance. At the meeting she described the standards she had to enforce as a matter over which she had no discretion, a ministerial duty. A "matter" is considered "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc.*, Del. Supr., 336 A.2d 209, 211 (1975). Thus, if the matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. In their private capacity, State employees may not represent or otherwise assist a private enterprise before the State agency with which they are associated with by employment. 29 *Del. C.* §5805(b)(1). In her written disclosure, applicant indicated that she would not represent or assist BCCS in obtaining a contract with DHS. At the meeting, she also indicated she had made her supervisor at DPH aware of her private contract.

State employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 *Del. C.* §5806(a). In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the conduct would be contrary to the restrictions on misuse of public office. 29 *Del. C.*

§5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. Applicant is entitled to a strong legal presumption that she would not engage in a violation. *Beebe Medical Center*. Applicant stated in her disclosure form that she would not use State resources. The Commission decided there was no conflict due to the ministerial nature of her position with the State.

**13-21 - Outside Employment:** Applicant was not present due to a death in his family. However, the Commission may provide advice based on a written statement. 29 *Del. C.* § 5807(a). An employee of the Department of Corrections (DOC) filed the required disclosure of his plan to work a part-time job with New Behavioral Network (NBN), as it contracted with the Department of Services for Children, Youth and Their Families. 29 *Del. C.* § 5806(d). NBN was considering the employee for employment as a Behavioral Interventionist or a Bilingual Parent Aide. In his DOC job, he was not assigned juvenile clients. He was not involved in any matters related to NBN. Thus, he would not review or dispose of matters where he had a financial interest as a result of the part-time employment. 29 *Del. C.* § 5805(a)(1). At NBN, as a Behavioral Interventionist he would be working with children. If he was selected as a Bilingual Parent Aide, he would translate parenting skill information for parents of the NBN child clients. The employee stated that if there were any overlap between his assigned clients and his NBN clients, he would recuse as needed. He would not have any NBN duties that would require him to represent them before the DOC. 29 *Del. C.* § 5805(b)(1). The Commission decided that there was no actual conflict as long as he recused as necessary and reminded the employee of his obligation not to use State working hours or State resources to do work for his private employer. 29 *Del. C.* § 5806(a) and (e).

**13-20 - Outside Employment:** The State employee worked for the Department of Corrections (DOC). She filed a disclosure of her intention to work part-time for New Behavioral Network (NBN), because it contracted with the Department of Services for Children, Youth and Their Families (DSCYF). 29 *Del. C.* § 5806(d). The employee stated her employment with the State consisted of supervising construction workers on the grounds of a correctional facility. Occasionally, she worked inside the building with adult inmates. Her duties did not include any review or disposal of matters related to NBN. 29 *Del. C.* § 5805(a)(1). Her job at NBN would require her to work with adults as a Parent Aide. Logically, if the employee was working with an adult at NBN, they would not be an inmate that she would be supervising at the correctional facility. However, she stated it is possible that she may be assigned to work with an adult who had a relative that was incarcerated. Should that situation arise, she would be unable to recuse herself from her State position, but she would be able to recuse at NBN. Efforts would be made by NBN to determine if the client she would be assigned to work with had an incarcerated family member so that the issue could be addressed prior to case assignment. The Commission found no conflict as long as she recused as appropriate.

**13-08 - Outside Employment:** After an ethics training class to a State Board, a member who was also a director and president of a private enterprise, concluded he would recuse from any hearings the private enterprise brought before the Board. That is consistent with 29 *Del. C.* § 5805(a) (1) and (a) (2). Although he planned to recuse as a Board member, he wanted advice on proper recusal. He noted that, at the training, it was stated that if there was a conflict the official should recuse from the outset. *Beebe Medical Center*. It was stated that PIC usually recommends that the individual leave the room because some Courts have held that even

“mere presence” could influence other decision makers. *United States v. Schaltebrand*, 11<sup>th</sup> Cir., 922 F.2d 1565 (1991). He said that his observation had been that Board members participated when they had a conflict but recuse from the vote. That is what occurred in the *Beebe* case and the Court said it was improper not to recuse from the outset. The Board Member said he did not even plan to attend the meetings. The other reason he wanted a formal opinion from PIC was because at the training it was stated that if the advice was followed that the individual would be protected from a complaint or disciplinary action. 29 *Del. C.* § 5807(c). The private enterprise’s attorney was at that meeting and encouraged the Board Member to get a formal opinion because of the protection it offered, especially as there was a gentleman who was suing the Board over a similar circumstance.

However, it became clear he had another conflict. The Code barred him, in his private capacity, from representing or otherwise assisting the private enterprise in the matter before the Board on which he is associated by appointment. 29 *Del. C.* § 5805(b)(1). He said he had been involved in the project for more than 4 years, and because of his position as President, Board member, and investor, he would find it difficult to totally recuse. He said as other matters related to the private enterprise were being discussed, it was possible that the subject matter of the Board application may be raised or that someone may bring it up for other purposes. The Board Member was appointed about six months prior, and the application was recently submitted. There had not been a ruling on the application. It would go to a subcommittee then to the full Board. He said he did review the application after it was submitted to the Board. He also said he is familiar with the Board’s procedures because he had gone through the application process twice with other entities related to his private enterprise.

The Board Member said his board position was voluntary and he could resign but did not want to because he considered it an honor to sit on the Board. He explained why his private enterprise’s application would garner extra scrutiny: Before he became a Board member, a competitor filed an application to put a similar facility in New Castle County. The Board did a study on whether it was needed. They do it county by county. The board initially determined that there was not a need for this type of enterprise in New Castle County. But there was a need, according to the Board, at that time in Sussex County and Kent County. The application was initially voted down. The competitor was unhappy with the Board’s decision. Subsequently, there was some change in Board members and then it apparently got voted in the positive. According to the Board Member, a case was currently pending the court system. The Board had not acted on an application since that time. The Board Member then spent some time differentiating his proposed facility from his competitor’s facility. He also discussed the fact that the Board felt that the facility proposed by this Board member’s private enterprise was more appropriately considered for approval. However, a question remained about why the Board changed their vote for the New Castle County project after the Board members were changed. He said: “I don’t think it’s possible for me not to participate at [his private enterprise]. First of all, I’m an investor. I’m already an investor. Not a large amount of money. It’s a very small amount of money so far in this little center. .... It’s not a big investment; it’s just some founder shares to try and get it started. For me to sit here and tell you I’m not going to have anything to do with--I mean I’m President of [the private enterprise]. I’m going to have to help negotiate. You know.... [the private enterprise] going to have to pay rent on the place, on the property or are we going to have to sell it out right. So, I’m going to be involved in one shape or form. I will try not to be involved as far as participation with the... Board. That I’ve been trying to stay away after I heard you talk.”

The Commission decided that while recusal from the Board’s action would cure that conflict, he still had a conflict because he said he could not totally recuse from assisting the

private enterprise on the matter in his private capacity because of his job, his fiduciary duties as a board member, and the inability to always know when an issue would come up, coupled with the appearance issues that may be raised because he knew he had an application coming before the Board before accepting the position, and it could be seen as putting himself in an advantageous position. As the conflict could not be cured, and no facts indicated a waiver could be granted, then the advice was that he should leave the Board.

**13-04 - Outside Employment – Gavin Bethell – Waiver Request- Granted (As a waiver was granted, the proceedings are not confidential. 29 Del. C. § 5807(b)(4).) (Footnotes have been omitted for ease of publication).**

April 1, 2013

XXXXXXXXXXXXX.  
Wilmington, DE 19805

#### **13-04 – Outside Employment**

***Hearing and Decision by:*** Wilma Mishoe, Chair; Andrew Gonser, Esq., and William Tobin, Vice Chairs; William Dailey, Lisa Lessner, and Jeremy Anderson, Esq.

Dear Mr. Bethel:

The Public Integrity Commission PIC reviewed your request for a waiver to accept a part-time position with Crossroads, which contracts with your State office. Based on the following law and facts, we grant a limited waiver.

#### **Applicable Law and Facts**

State employees who have a financial interest in a private enterprise that does business with, or is regulated by, a State agency, must file a full disclosure with PIC. 29 Del. C. § 5806(d). It is a condition of commencing and continuing employment with the State. Id. “Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).

You work for the Division of Prevention and Behavioral Health (DPBH), Department of Services for Children, Youth, and their Families. Crossroads contracts with your Division. Your written statements, and your statements at PIC’s meeting, constitute the disclosure.

State employees may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).



Your State job involves working with children ranging from 8-16 years of age. They are referred to your agency by their parents who say something is wrong. The agency then diagnoses their problems. You said the parent explains the child's previous history to you; you also review any prior diagnoses, and the opinion of the Psychologist who meets with them as part of the intake procedure, which gives you a well-rounded version of all the issues they have. From that review, it may be determined that the child needs drug and alcohol counseling. You said that in making such referrals, you "go off of past history," "anything the child speaks about in therapy," or if, at some point, they "have a dirty urine test." You said you also "make contact with all the providers." That includes Crossroads and Aquila, who are the only drug and alcohol counseling providers under contract with your Division. Thus, your normal duties include reviewing the child's case, and, if necessary, referring them to Crossroads or Aquila. At present, your team has only one child who is actually involved in drug and alcohol counseling. Once the child has been referred, the State duties include following up on that treatment. In other words, you could have occasion to review your State client's case and decide if they should be referred to Crossroads—your private employer.

A personal or private interest includes private employment. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, a State official served on a State Board reviewing hospital applications to assess health care resources and the need for such resources. *Id.* at p. 1. From that review, the Board made a recommendation to the State Bureau under which the Board operated. *Id.* Persons at the Bureau level made the final decision. *Id.* The State official, Mr. Davis, was also privately employed by a hospital. *Id.* at p.6. Beebe Hospital (BMC) alleged he violated the above provision because he participated in the review of a Nanticoke Hospital application when his private employer was involved in a business dealing with Nanticoke. *Id.* at p. 6. The Court reviewed the record and found that during the Executive Session he made comments, and asked questions on some procedures. It found the "minutes of the executive session established that his participation in the discussion was extremely limited and neutral." *Id.* at p. 7. It also found that he did not vote, and the vote was "only a recommendation." *Id.* The Court said: "I find that nothing Mr. Davis did prejudiced the BMC application." However, it still held that "he should have recused himself from participation in this matter at the outset." *Id.*

In another case, a State employee, Henry Risley, was not on the evaluation committee to consider awarding a State contract for health care to State prisoners, but he attended a meeting about the contract and asked some questions. *Prison Health Services, Inc. v. State*, C.A. No. 13,010, VC Hartlett, III (Del. Ch. July 2, 1993). Later, a bidder alleged Risley should not have participated because his spouse worked for one of the bidders. *Id.* at p. 1. The Court found his activities were limited to: (1) providing a list of Bureau of Prisons employees from which a Bureau representative could be selected to serve on the evaluation committee, and (2) attending and asking three questions (but not voting) at a meeting of the Department's Executive Committee when a recommendation was given to the Bureau Chief. *Id.* at 2. The Court found "no evidence that any of the members of the Evaluation Committee or the Executive Committee were not disinterested or not fully informed." *Id.* However, it went on to say: "Undoubtedly Risley's conduct was inappropriate and he should have abstained from even this limited role in the procurement process because his wife is an employee (albeit a fairly low-level employee) of one of the bidders. *Id.*

You said your Supervisor could make the final decision regarding a referral of your State clients to Crossroads or Aquila. As noted in the cases above, even if others make the final decision, it still is inappropriate for the person with the conflict to participate, and recusal is to be from the outset.

In order for your Supervisor to make the referral, realistically, you would first review the client's case to determine their issues and diagnosis and in doing so would know if they need the type of health services provided by Crossroads under the State contract before your referred the matter to your Supervisor. Thus, as in Beebe and Prison Health, you would be reviewing matters where you have a personal or private interest because of your private employment. In fact, you have a more direct interest than those officials because you would be reviewing a matter that could be directly referred to your private employer.

The reason for barring such participation is to ensure no favoritism, preferential treatment, undue influence, or bias is shown by you in your decision making because of your private employment. Bias could be suspected either way. It could be suspected that, even inadvertently, you influenced your Supervisor to refer to Crossroads so that it gets a steady stream of clients, or that you may over respond because of that concern and in order to avoid such appearance inadvertently hesitate to refer which could hurt your State clients.

This is not to say you would actually engage in such conduct, but as noted in Beebe and Prison Health, even if that does not actually occur, your participation would still be "undoubtedly inappropriate", and therefore, the law dictates you should recuse "from the outset." However, for the reasons discussed below, we grant a waiver so you can handle your State cases up until the point where a referral must occur, and then turn the case over to your Supervisor for that recommendation, with the Supervisor determining who, other than you or someone you supervise, will follow-up with Crossroads on the client's progress, if the Supervisor selects that provider.

**A. State employees may not represent or otherwise assist a private enterprise on matters before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1).**

The purpose of this rule is to ensure colleagues and coworkers in your agency do not have their judgment impaired when they review Crossroads' work by you because of your status as a State employee.

You indicated that you presently have 8 clients at Crossroads who are not State clients but came to Crossroads through private insurance. As they are not State clients, you would have no occasion to represent or otherwise assist Crossroads before your own State agency on matters pertaining to those clients. We also understand that you will not take any of your Division's clients as your private clients.

However, you indicated you also wanted to work with children from the Division of Youth Rehabilitative Services (YRS) in your private job. That creates another conflict because "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. 29 Del. C. § 5804(11) (emphasis added). YRS, like DPBH, is a Division of the Department of Services for Children, Youth, and their Families.

Even before this restriction was passed by the General Assembly, Delaware Courts upheld a State agency's decision not to do business with a private company when one of its employees also held a position in the State agency with which the company sought to do business. *W. Paynter Sharp & Son v. Heller*, 280 A.2d 748 (Del. Ch. 1971). The agency believed that would "avoid any allegation or suggestion of undue influence" in the agency's decision. The Court noted that at that time the State had no conflict of interests laws, but upheld the agency's decision, saying that government contracts "have been suspect because of alleged favoritism, undue influence, conflicts and the like. In my view it is vital that a public agency have the confidence of the people it serves and, for this reason, it must avoid not only evil but the appearance of evil as well." Three years later, the General Assembly passed the conflicts of interest law barring private dealings between agencies and persons from their own agency, with the General Assembly making it one of the "vital" standards that carries a criminal penalty. 29 Del. C. § 5805(f).

For the reasons below, we do not grant a waiver of this provision.

**B. Waivers may be granted if there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a).**

Waivers are always the exception, not the rule. That is particularly true of the above Code of Conduct provisions because they are criminal provisions. 29 Del. C. § 5805(f). The General Assembly, in passing the law, said: some standards "are so vital to government that violation thereof should subject the violator to criminal penalties." 29 Del. C. § 5802(2). Thus, when we consider a waiver it must be as limited as possible.

You asked for a waiver because of your current financial situation, which we do not detail herein because when a waiver is granted the opinion becomes a matter of public record. 29 Del. C. § 5807(a). You said that you need to work part-time to meet certain critical financial obligations, and you have tried over an extended period of time to find part-time work in your professional field without success. You also are presently pursuing a further education that may subsequently lead to a better paying job.

Because realistically you may not know in advance that your State clients need referral for drug and alcohol counseling, a waiver is needed so you can review the case. From the review, or if subsequently on a urine test, it is determined your State client needs a referral, then you should refer the matter to your supervisor, and let your Supervisor decide which provider will be used, and decide who will make the subsequent follow up with any client that is referred to Crossroads. When that was mentioned at the Commission meeting, you said: "I understand that there's a conflict."

We note that it does not appear that there would be a flood of cases that you would have to refer to your Supervisor, because you said your team only has one child with a drug and alcohol assessment. The majority of the State clients you are involved with are there for mental health needs.

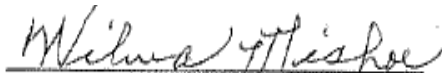
This will allow you to perform your State duties, and at the same time accept employment with Crossroads and assist you in overcoming your financial hardship.

However, we do not grant a waiver so that you may accept YRS clients, or other clients from the Department by which you are employed. That is because Crossroads has other clients with whom you can work without having to violate the provision that bars you from dealing with your own agency. As you can accept the employment, and have that source of income, with the waiver of only one provision, we will not waive another criminal provision when it is not necessary.

## Conclusion

Based on the above law and facts, we grant a waiver to the restriction that would bar you from reviewing your State cases in order to determine if they need to be turned over to your Supervisor for referral for drug and alcohol counseling.

FOR THE PUBLIC INTEGRITY COMMISSION

  
Wilma Mishoe, Chair

*The Commission decided it would be a conflict to review cases, then hand them off to his supervisor once he [Mr. Bethell] had decided they needed referral to Crossroads or Aquila because the Code bars "review" of matters where there is a personal or private interest. 29 Del. C. § 5805(a)(1). At a minimum, it could appear his review would influence the Supervisor's decision, but an undue hardship waiver should be granted for that provision so he could find work before his financial hardship worsened. The waiver was limited to 29 Del. C. § 5805(a)(1) so he cannot represent or assist Crossroads in his private capacity before his own agency.*

**13-04 – Outside Employment--Reconsideration of Denial of Waiver:** A State employee asked for reconsideration of the Commission's denial of his waiver request to work with clients referred to Crossroads by Youth Rehabilitative Services (YRS). Previously, the employee had asked for a financial hardship waiver to allow him to work for Crossroads. Crossroads contracted with the Department of Services for Children, Youth and Their Families (DSCYF), and the applicant worked for a different Division within the Department. His State duties included making referrals to Crossroads. A limited waiver was granted to the provision that provides that he may not review or dispose of matters where he has a personal or private interest. 29 Del. C. § 5805(a)(1). The waiver recognized that it would be impossible for him to know upon intake of a client in his Division if it would require that the child be referred to Crossroads or another provider. He would have to review the case to make that decision. The employee recognized that if a referral was required, he was to then recuse and have his Supervisor make the decision. At that time, he also asked about taking YRS clients. YRS is a Division of his State agency, DSCYF. The law bars State employees from representing or otherwise assisting a private enterprise before the "State agency" by which they are employed. 29 Del. C. § 5805(b)(1). "State agency" means "Department." 29 Del. C. § 5804(11).

He sought reconsideration of that denial so that he could accept YRS clients. According to the Deputy Director of his Division, in his State job, he worked with YRS employees on cases assigned to both Divisions. At Crossroads, if a YRS client's private insurance did not cover the cost of the Crossroads treatment, the applicant would have to refer the client to his own Division. Thus, he would be representing or otherwise assisting the private enterprise not only before another Division in his Department, but before his own Division. He stated that in an instance where YRS may refer a client to him in his position at his State job, he would refer that case to his supervisor. However, under the first decision, his cases were already subject to referral, and this would just add to more recusal from his State duties. The Commission denied his request for reconsideration because there was too much overlap between his State job and his private position.

**13-02 – Outside employment:** State employee wanted to work part-time with a private company that contracted with her State agency. She filed a disclosure as required. *29 Del. C. § 5806(d)*. In her State job, she would not be involved in issues pertaining to the company's contract, nor would she have any of its clients referred to her in her State job. Thus, she would not review or dispose of matters pertaining to the company. Further, she would not refer any clients to that company. *29 Del. C. § 5805(a)(1)*. In the private job, she would not be performing the same work as in her State job. She specifically sought work that would be different. Thus, there would be no occasion when she would represent or assist the private enterprise before the agency by which she was employed. *29 Del. C. § 5805(b)(1)*. The private job was performed during non-State hours, and she would not use State resources or State time to perform her private work. Thus, she would not be using her State position for her personal benefit. *29 Del. C. § 5806(e)*. The Commission decided there was no conflict.

**12-46 - Outside Employment:** A State employee wanted to start a part-time, non-profit business to assist single parents and young adults in buying/financing a car. She would conduct research on dealerships, costs, etc., and go to the dealership with them. In her State job, she may not review or dispose of matters pertaining to her private business. *29 Del. C. § 5805(a)(1)*. Her State job did not involve such research. She said if any issue arose pertaining to her private work, she could tell her Supervisor, and the matter could be handled by someone else in her agency that she does not supervise. She was not going to charge fees but will accept donations. She wanted to help people not get "ripped off". She said she would perform the work after her State hours and on weekends and use her own resources, e.g., laptop, cell phone, etc., rather than State resources. Thus, she would not be using her State position for personal gain or benefit. *29 Del. C. § 5806(e)*. She would hand out flyers to attract clients.

She also may not represent or otherwise assist her private clients before her own agency. *29 Del. C. § 5805(b)(1)*. No facts suggested she would be appearing before her agency on behalf of the parties involved in the transaction. The Commission decided that as long as in her State job she did not handle the parties involved in the sale and did not represent or assist them on her own agency's matters, it would not violate the Code.

**12-45 – Outside Employment:** A Division Director asked if he could accept part-time employment with a company that previously had a contract with a different State agency, than the one he works for, but has fulfilled that contract and is not expected to seek further work in Delaware. Thus, he would have no occasion to review or dispose of matters pertaining to the

company. 29 Del. C. § 5805(a)(1). That also would mean he would not have an occasion to represent or otherwise assist the private enterprise before his own agency. 29 Del. C. § 5805(b)(1). The work he would perform would be related to regulatory matters in a totally different State. His State job deals with the same type of regulatory matters, and the company had asked if he would be interested in working on such matters. The company had previously dealt with him when he worked for a different State before coming to Delaware. He would perform the work during non-State hours, and without using State resources, e.g., fax, phone, computer. While the work would pertain to another State, he does not expect it to involve much travel, but could work from home. Those facts did not suggest that he had used, or would use, his Delaware position to obtain the job, or perform the work. 29 Del. C. § 5806(e). The Commission recommended that his request be approved as long as he returned to the Commission if the company sought to do business with the State of Delaware, 29 Del. C. § 5806(d), and did not improperly use or disclose any confidential information gained from his State job. 29 Del. C. § 5806(f) and (g).

**12- 34 - Outside Employment – Writing a Book:** A State employee worked for the media before accepting a State job. During that time, he wrote about an event in Delaware that occurred several years ago. He wanted to write a book about the event in his spare time. The Code bars State employees from reviewing or disposing of matters where they have personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). The employee’s official duties were in no way related to the subject matter he wished to write about, so he would not have the opportunity to review or dispose of matters related to his personal interest. State employees also may not represent or otherwise assist a private enterprise on State matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). Although writing the book could involve interviews with some people who worked for the State, he would not be dealing with any people in his own agency. State employees may not use their State office for personal benefit or gain. 29 Del. C. § 5806(e). No facts suggested that he would be obtaining and using confidential information for his personal benefit. Also, he would not use State time or resources to work on his book. He would primarily work evenings and weekends, but would take annual leave on occasion if, for example, the person he wanted to interview was only available during the day. However, he would advise his supervisor, and other senior level officials at the Department of his plan to write the book before that would occur, to ensure they did not have a problem with him writing the book for any reason, since his public duties were to “command precedence” over his outside employment. *In re Ridgley*, 106 A.2d 527 (Del. 1954). State employees may not engage in conduct that may raise public suspicion that they are violating the public trust or have any adverse effect in the public’s confidence in its government. 29 Del. C. § 5806(a) and § 5806(b)(4). He expressed concern that because there had been litigation about the event, and some government officials had spoken on the issue, that their comments could have an adverse effect. What he described depicted the usual tensions related to litigation in a high-profile case. However, the concern dealt with here was whether his conduct would raise such issues. The Commission decided there was no violation of the Code of Conduct.

**12-32 - Private Job with Agency Vendor – Waiver Granted.** *When waivers are granted, the opinion becomes a public record. 29 Del. C. § 5807(a). (Footnotes have been omitted for ease of publication).*

## 12-32 Concurrent Employment

**Hearing and Decision By:** Barbara Green, Chair; William Dailey and Wilma Mishoe, Vice Chairs; Lisa Lessner and Andrew Gonser, Commissioners

Dear Ms. [Christine] Montgomery:

The Public Integrity Commission reviewed your disclosure on your planned employment with New Behavioral Network (NBN), which contracts with your Department, Children, Youth and Their Families (DSCYF), but not the Division of Family Services (DFS), where you work. Based on the following law and facts, we find one conflict but grant a waiver of that provision.

### I. Applicable Law and Facts:

**A. State employees must file a full disclosure if they have a financial interest in a private firm that does business with the State. 29 Del. C. § 5806(d). Financial interest includes private employment. 29 Del. C. § 5804(5)(c)).**

You filed the required disclosure, so a waiver of this law is not required.

### B. State employees may not:

**(1) review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing State duties. 29 Del. C. § 5805(a)(1).**

Private employment can create a personal or private interest. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). You are a Family Service Assistant, in DFS. Your duties involve assisting social workers in the adoption unit. You deal with adoption recruitment, paper and computer work related to adoptions; transportation of the children (e.g., to meet with prospective families) and do not have a caseload. That work does not require you to review or make decisions about NBN's contract. A separate Division, Prevention and Behavioral Health Services (DPBHS), develops, awards, and oversees that contract. In your private job, you will work with clients that are not processed for adoption through your Division. Thus, you would have no occasion to make decisions about your private clients in your State job. Your conduct does not violate this provision, so no waiver is required.

**(2) represent or otherwise assist a private enterprise before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). State agency means a Department. 29 Del. C. § 5804(11).**

Your work for NBN will involve working with clients who receive treatment and assistance in behavioral health. Specifically, you expect to do such things as take the clients to functions or activities and observe their behavior in social settings. You will report your observations to the NBN therapist who is assigned to the child. Your observations will assist her in assessing the child's needs.

If your clients are not State clients from your Department, this provision would not apply. However, if your NBN client is from your agency, the therapist is required to meet with DPBHS on a regular basis to discuss the clients. The effect is that your observations, reported to the therapist, are being used by NBN to show how it is fulfilling its contractual obligations of providing services to the Department's clients. We have held that such involvement constitutes assisting the private enterprise before the agency by which the State employee is associated. *Commission Op. No. 06-38*. Ideally, NBN should not assign you clients from your State agency to avoid a violation. We discuss below, the waiver granted so you can continue to deal with the one client who is assigned to you.

**C. Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(c).**

One purpose for not representing or assisting a firm before one's agency is to ensure your colleagues and co-workers do not base their decisions on the fact that you are involved with the private enterprise. The other reason is to ensure that State employees do not use their public office to secure unwarranted privileges for themselves or the private enterprise. Here, nothing suggests these purposes could not be served. Regarding decisions by your immediate colleagues and co-workers, no decisions are made by anyone in your Division. Thus, the possibility of loyalty or favoritism toward you is more remote. Moreover, the decisions made by DPBHS employees are not direct decisions about your work. Rather, your interactions and observations pertaining to the child are evaluated by a professional therapist at NBN so that the therapist can decide on the approach to, and success of, therapy. How, and whether, that approach or its effectiveness fits into NBN's contractual obligations—not whether your reported observations are correct or incorrect—is what DPBHS determines.

Regarding using your public office to obtain special benefits for NBN that is not likely to occur as you do not draft, write, approve, manage, etc., the contract, nor does anyone in your Division. Also, you said that in performing these same functions for your prior employer, you never had occasion to deal with DPBHS. Finally, at present, you only have one client. You explained that during approximately 2 years with this client, the client has been relocated with different family members several times; has had several different therapists; and as a result, you have been the only stable feature in the client's life. We weigh that against the remote possibility that your input on a single client to the NBN therapist will influence the decisions of State employees in another Division, and the even more remote possibility that you could use your public office on behalf of NBN to influence DPBHS decisions, and conclude that a literal application is not necessary under the particular facts of this case.

**D. State employees may not misuse public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).**



We noted above the remoteness of you misusing your public office to give NBN an advantage. Additionally, under this restriction, you are precluded from using State time and/or State resources (e.g., phone, fax, computer, e-mail, etc.) to perform any of your private work.

## II. Conclusion

We find compliance with most of the rules and waive one provision because of the remoteness of possible misconduct. This waiver is limited solely to these particular facts. Should your situation change, you should contact the Commission.

### FOR THE PUBLIC INTEGRITY COMMISSION



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Barbara Green, Chair

**12-32 - Outside Employment: A waiver was granted, so the opinion is a public record. 29 Del. C. § 5807(a).** (*Background: Last month the Commission granted a waiver for Ms. Montgomery to accept outside employment with the New Behavioral Network (NBN). Commission Op. No. 12-32.*) She provided NBN with a copy of the Commission's decision. It noted that the opinion cited Ms. Montgomery as saying NBN had a contract with a Division in her Department, but not with her Division, Family Services. NBN contacted Counsel to advise that it does have a contract with her Division. Ms. Montgomery had no involvement with that contract. No facts indicated misrepresentation on Ms. Montgomery's part, because she previously was honest with the Commission in telling them she had had outside employment with another State vendor but did not know she had to file a full disclosure with PIC until NBN told her. Moreover, she gave a copy of the Commission's decision to her prospective employer with the statement that NBN did not contract with her division, which would be inconsistent with any deliberate misrepresentation. After a review of this new fact, the Commission decided that the new fact did not change the outcome of the original decision, but that the opinion should be reissued with the corrected information.

**August 21, 2012**

Ms. Christine Montgomery  
309 Odessa Ave.  
Wilmington, DE 19809

**12-32 Concurrent Employment – Revised Opinion**

**Hearing and Decision By:** *Vice Chairs William Dailey and Wilma Mishoe; Commissioners Mark Dunkle, Esq., and Andrew Gonser, Esq., Commissioners*

Dear Ms. Montgomery:

The Public Integrity Commission previously reviewed your disclosure on your planned employment with New Behavioral Network (NBN). At that time, you knew NBN contracted with the Department of Services for, Children, Youth and Their Families (DSCYF), Division of Prevention and Behavioral Health Services (DPBHS). You did not know it also contracted with the Division of Family Services (DFS), where you work. NBN alerted us to that change in fact, which has now been considered. Based on the following law and facts, we still find one conflict, but still grant a waiver of that provision.

**I. Applicable Law and Facts:**

**A. State employees must file a full disclosure if they have a financial interest in a private firm that does business with the State. 29 Del. C. § 5806(d). Financial interest includes private employment. 29 Del. C. § 5804(5)(c)).**

You filed the required disclosure, so a waiver of this law is not required.

**B. State employees may not:**

**(1) review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing State duties. 29 Del. C. § 5805(a)(1).**

Private employment can create a personal or private interest. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). You are a Family Service Assistant, in DFS. Your duties involve assisting social workers in the adoption unit. You deal with adoption recruitment, paper and computer work related to adoptions; transportation of the children (e.g., to meet with prospective families) and do not have a caseload. That work does not require you to review or make decisions about NBN's contract with DFS. Also, DPBHS develops, awards, and oversees another contract. Again, you have no involvement in that contract. In your private job, you will work with clients that are not processed for adoption through your Division. Thus, you would have no occasion to make decisions about your private clients in your State job. Your conduct does not violate this provision, so no waiver is required.

**(2) represent or otherwise assist a private enterprise before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). State agency means a Department. 29 Del. C. § 5804(11).**

Your work for NBN will involve working with clients who receive treatment and assistance in behavioral health. NBN has said it will not assign clients from DFS to you. Specifically, you expect to do such things as take the clients to functions or activities and observe their behavior in social settings. You will report your observations to the NBN therapist who is assigned to the child. Your observations will assist her in assessing the child's needs.

If your clients are not from your Department, this provision would not apply. However, because your NBN client is from DPBHS, the therapist is required to meet with DPBHS on a regular basis to discuss the clients. The effect is that your observations, reported to the therapist, are being used by NBN to show how it is fulfilling its contractual obligations of providing services to the Department's clients. We have held that such involvement constitutes assisting the private enterprise before the agency by which the State employee is associated. *Commission Op. No. 06-38*. Ideally, NBN should not assign you clients from your State agency to avoid a violation. We discuss below, the waiver granted so you can continue to deal with the one client who is assigned to you.

**C. Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(c).**

One purpose for not representing or assisting a firm before one's agency is to ensure your colleagues and co-workers do not base their decisions on the fact that you are involved with the private enterprise. The other reason is to ensure that State employees do not use their public office to secure unwarranted privileges for themselves or the private enterprise. Here, nothing suggests these purposes could not be served. Regarding decisions by your immediate colleagues and co-workers, no decisions are made about your NBN client(s) because NBN will not assign you clients from your Division. Thus, the possibility of loyalty or favoritism toward you is more remote. As far as decisions made by DPBHS employees, they do not make direct decisions about your work. Rather, your interactions and observations pertaining to the child are evaluated by a professional therapist at NBN so that the therapist can decide on the approach to, and success of, therapy. How, and whether, that approach or its effectiveness fits into NBN's contractual obligations—not whether your reported observations are correct or incorrect—is what DPBHS determines.

Regarding using your public office to obtain special benefits for NBN that is not likely to occur as you do not draft, write, approve, manage, etc., the DPBHS contract, nor does anyone in your Division. Also, you said that in performing these same functions for your prior employer, you never had occasion to deal with DPBHS. Finally, at present, you only have one client. You explained that during approximately 2 years with this client, the client has been relocated with different family members several times; has had several different therapists; and, as a result, you have been the only stable feature in the client's life. At its meeting with NBN Director Brenda L. Farside, ICSW, and Case Manager Raychel Bouchat, they confirmed the need for such stability in a client's life, whenever possible. We weigh that against the remote possibility that your input on a single client to the NBN therapist will influence the decisions of State employees in another Division, and the even more remote possibility that you could use your public office on behalf of NBN to influence DPBHS decisions, and conclude that a literal application is not necessary under the particular facts of this case.

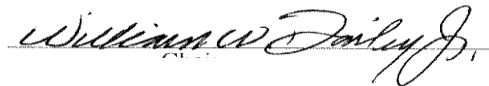
**D. State employees may not misuse public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).**

We noted above the remoteness of misusing your public office to give NBN an advantage. Also, under this restriction, you may not use State time and/or State resources (e.g., phone, fax, computer, e-mail, etc.) to perform your private work.

## II. Conclusion

We find compliance with most of the rules and waive one provision because of the remoteness of possible misconduct. This waiver is limited solely to these particular facts. Should your situation change, contact the Commission.

FOR THE PUBLIC INTEGRITY COMMISSION



William Dailey, Vice Chair

**12-22 – Outside Employment:** A private citizen wanted to serve on a State Board. He asked if his private business would create a conflict if he served on the Board under the restrictions on outside employment. A conflict may arise if the other employment may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

His company focused on State employees who would be under the Board's purview. Most of his companies advertising would not reflect his name and would give an out-of-State address for the company. However, he wanted to use bulletin board space and put materials out on tables in the State facilities under the Board's jurisdiction. He also offered classes on certain retirement aspects, and those materials would identify him as the specialist offering the program and would be in State facilities. He said that if one of his clients appeared before him at a Board meeting, he could recuse, so that he would not be reviewing or disposing of matters where he had a personal financial interest. 29 *Del. C.* § 5805(a)(1). However, the agency was filled with people that he would be targeting as potential clients, so he had a very specific personal interest in everyone under the Board. It was particularly so since he just started his business within the past 2 years and was trying to grow the business. The effect could be that he may have to constantly recuse. The Commission has previously held that if the person must constantly recuse because of a conflict, then they are not performing their public duty. The law requires that public duties command precedence over personal or private interests. *In re Ridgely*, 106 A.2d 527 (Del., 1954) (outside employment was personal or private interest; State officer obtained private client through his State office). The Commission found there was a conflict because of his personal and private interest in all of the employees under the Board's purview, and his use of its facilities for his private business could be seen by the public, and by competitors, as using public office for personal benefit or gain. 29 *Del. C.* § 5806(e).

**12-20 – Concurrent Employment:** A State employee had a part-time job with a private company that did business with her State agency. As the private company contracted with her Department, she filed a disclosure. 29 *Del. C.* § 5806(d). In her State job, she had no duties

requiring her to review or dispose of matters pertaining to the private company, e.g., contracts, referral of clients, etc., which would be prohibited. 29 Del. C. § 5805(a)(1). Further, no facts suggested that in her State job she dealt with any of the company's clients. Thus, she would not review or dispose of matters in her State job pertaining to the company or its clients. *Id.* Also, no facts suggested that in her private job she dealt with any of her agency's clients. Thus, she would not be representing or otherwise assisting the private enterprise before her own agency. 29 Del. C. § 5805(b)(1). The Commission found there was no conflict as long as there was no overlap in private and State clients in the two jobs. If so, she would have to recuse from those matters.

**12-17 – Outside Employment:** A State employee wanted to work part-time for a contractor that did business with his State agency. Thus, he filed the required disclosure. 29 Del. C. § 5806(d). His State duties did not entail reviewing or disposing of matters pertaining to the contractor. Thus, he did not review or dispose of the contract matter. 29 Del. C. § 5805(a)(1). As far as taking care of clients from the private company in his State job, he would refer them to another employee. He also said he would not represent or assist the private company on any matter before his own agency, 29 Del. C. § 5805(b)(1), e.g., assisting them with contract renewal, etc. Nor would he accept any clients at the private company from his State agency. Under those circumstances, the Commission decided there was no conflict.

**12-14 - Outside Employment -** A State employee worked for a State educational institution and worked part time for a vendor who contracted with a totally separate Department. The law mandates a full disclosure under those circumstances. 29 Del. C. § 5806(d). In her State job, she worked with adults who attended the education institution. She had no involvement in the contract awarded to the vendor, as it is handled by a totally separate agency. Thus, she did not review or dispose of the contract matters. 29 Del. C. § 5805(a)(1). Also, because any work done by her in her private capacity would not be reviewed by her agency, she was not representing or otherwise assisting that private enterprise before her own agency. 29 Del. C. § 5805(b)(1). It was very unlikely, but possible, that an adult she worked with in her State job, could have children involved in the program where she worked in her private capacity. The Commission found there was no violation as long as she recused from accepting a client in her private capacity if she was dealing with the parents in her State capacity, and vice versa, and she should not use State time or resources to perform the private work.

**12-13 – Outside Employment –** A State employee worked for an education institution and had a part time job with a vendor who contracted with a totally different Department. She filed a disclosure. 29 Del. C. § 5806(d). In her State job, she had no decision-making authority regarding her private employer. Thus, she did not review or dispose of that matter. 29 Del. C. § 5805(a)(1). As far as her private work, if it were reviewed by a State agency, it would not be her own agency, but the contracting agency. Thus, she was not representing or otherwise assisting a private enterprise before her own agency. 29 Del. C. § 5805(b)(1). Again, there is a very unlikely possibility that families in her State job, might also receive services from that private vendor, and vice versa. The Commission decided that as long as she did not use State time or resources for her private work and recused from matters if there was an overlap in clients, it was not a conflict.

**11-51 - Outside Employment:** A State employee worked for an organization that was regulated by a different State agency than where he worked. As it was regulated by the State, the law requires a full disclosure of the financial interest (employment) with the company as a condition of commencing and continuing State employment. 29 Del. C. § 5806(d). He filed a disclosure as required.

State employees may not accept other employment if acceptance may result in: Impaired judgment in performing official duties: His official duties were as a direct support professional. He did not make any decisions about the private organization, nor did it have any dealings with his State agency. Thus, he would not be reviewing or disposing of matters in which he had a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

Preferential treatment to any person: As the organization had no dealings with him or his State agency, he was not in a position to show preferential treatment or to influence co-workers or colleagues to show preferential treatment because he would not be representing or assisting the organization before his agency. 29 Del. C. § 5805(b)(1).

Official decisions outside official channels: No facts suggested this would occur because the organization was not seeking any official decision from him, or his State agency.

State employees may not use public office for personal gain or benefit: 29 Del. C. § 5806(e). The employee stated he would not use State time or resources for his private work. He worked on evenings and weekends assisting clients of the organization.

**11-50 - Outside Employment – Limited Waiver Request – Granted**

*NOTE: When a waiver is granted, the decision becomes a matter of public record. 29 Del. C. § 5807(b)(4). The Commission's full opinion granting a limited waiver request follows.*



STATE OF DELAWARE  
**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

MARGARET O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 3  
DOVER, DELAWARE 19901

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**October 27, 2011**

Dr. Craig A. Porterfield  
109 N Main ST  
Camden, DE 19934

**11-50 – Outside Employment**

**Hearing and Decision By:** *Barbara Green, Chair, Vice Chair William Dailey;*  
*Commissioners: Mark Dunkle, Lisa Lessner, Jeremy Anderson, Wilma Mishoe*  
*and Andrew Gonser*

Dear Dr. Porterfield:

The Public Integrity Commission reviewed your request to maintain a small private practice as a Psychologist with clients including children and adolescents. As discussed below, we grant a waiver so that you may have such clients.

**I. Applicable Law and Facts**

You recently accepted employment with the State as a Psychologist Supervisor. You work for the Department of Services for Children, Youth and Their Families, Division of Prevention and Behavioral Health Services. It provides behavioral health services to children up to the age of 18 and their families. Part of your credentials related to that job were that you have a long established private practice in dealing with children and adolescents. You wish to keep a small private practice and have children and adolescents as clients.

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

**(1) impaired independence of judgment in performing official duties.** To insure this does not occur, the law precludes you from reviewing or disposing of matters where you have a personal or private interest that may tend

to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). Your State duties would not include making decisions about your own private practice or its clients. For example, your private practice will not be contracting with your agency, so you would have no occasion to draft, review, or oversee a contract with your own business. Also, in your State job you would not be referring clients to your private practice. Further, you do not have any clients from your State agency, so you would not be reviewing your own private treatment of the clients in your State job.

**(2) preferential treatment to any person.** The rule above is meant to preclude you, personally, from showing preferential treatment to your own private interest in your State job. Additionally, the law precludes you from representing or otherwise assisting your private enterprise before your own State agency. 29 Del. C. § 5805(b)(1). That rule is meant to preclude your State colleagues or co-workers from making preferential decisions pertaining to you in your private practice. Your private practice does not accept Medicaid. Your Division's clients, among other things, must have Medicaid, according to its criteria. [http://kids.delaware.gov/pdfs/pol\\_pbh\\_cs001\\_ServiceEligibility.pdf](http://kids.delaware.gov/pdfs/pol_pbh_cs001_ServiceEligibility.pdf). Thus, your clients would not be connected to your Division.

However, if you have children and adolescents in your private practice, it is possible you may have to report a case of child abuse. If that situation arose, you must report it to the Division of Family Services, in your Department. Thus, you would not deal directly with your immediate co-workers and colleagues, and persons you supervise.

The problem of having any dealings with your Department could be eliminated if you had only adult clients. You do have some. However, we discussed the fact that you believe that continuing work with children and adolescents would make you a better regional supervisor of children's mental health services. You also said it has been about 5 years since you had to report a case of child abuse. Thus, only rarely, would you have to deal with another Division in your State agency. We discuss below the waiver granted so that you may continue your private practice with children and adolescents.

**(3) official decisions outside official channels.** No facts suggested this would occur since your private practice is not seeking decisions from your agency pertaining to the practice.

**(4) any adverse effect on the public's confidence in the integrity of its government.** This is basically an appearance of impropriety test. *Commission Op. No. 97-23*. The test is whether a reasonable person, knowledgeable of all relevant facts, would still believe a State employee could not perform their State duties with honesty, integrity, and impartiality. *In re Williams, 701 A.2d 825 (Del., 1997)*.



In addition to the facts above, we also consider if your outside employment would substantially conflict with performing your State duties. 29 Del. C. § 5806(b). You said that as far as scheduling your clients, and other administrative duties, your spouse would handle those matters. Also, you are reducing your client base so the number of clients is limited, meaning fewer hours at that practice. You anticipate performing the work during non-State hours. This ties into the provision that precludes you from using public office for private benefit or gain, 29 Del. C. § 5806(e)—in other words, using State time or resources for your private work.

We are aware that an emergency could arise with a private client during your State work hours. Because of the limited number of clients, and the type of clients you have, we do not expect you would receive so many emergency calls that it would substantially conflict with performing your State duties. Further, we presume that like other doctors, if you cannot be reached, you have a means of letting them know what to do in your absence, e.g., call 911, alternative doctor to contact, etc.

Also, your practice with children and adolescents deals primarily with ADHD clients. You do not work with children who have serious psychological problems, which could entail more emergencies. As you just started with the State on October 8, 2011, we remind you that if emergency calls occur, you are required to take approved leave when you perform private work. Also, because you are just beginning with the State, we point out that if the emergencies are of a greater number than expected, or if for some other reason your private practice limits your ability to perform your State job, Courts have ruled that as between outside employment and State duties, the State duties must command precedence. *In re: Ridgely*, 106 A.2d 527 (Del., 1954).

## II. Waiver

Waivers may be granted if there is an undue hardship on the State employee or the agency, or if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(c).

In this case, the provision that needs to be waived is the provision restricting you from "representing or otherwise assisting a private enterprise before your State agency." 29 Del. C. § 5805(b)(1). "State agency" includes "Department." 29 Del. C. § 5804(11). If you had to report child abuse, you would be acting as a representative of your private practice, dealing with a Division in your Department. Thus, a literal reading would preclude that activity even though you would be required by law to make such reports, and even though it would be an extremely rare possibility.

While that problem could be eliminated if you only accepted adults, we acknowledge that continuing to work with children lends additional credibility to

your State job. Moreover, the Code says: "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." *29 Del. C. § 5802(3)*.

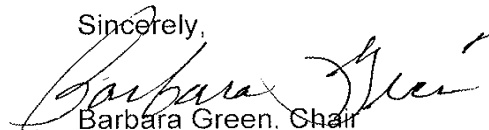
Beyond that, as noted, the purpose of the restriction against dealing with one's own agency is to preclude preferential treatment by colleagues and co-workers. Aside from dealing with persons in a different division, by law, they are to make decisions about child abuse "in the best interest and safety of the child" and "are to provide a prompt assessment of the child and the child's family and the circumstances of the reported incident." *16 Del. C. § 901*. Thus, their focus is not on making decisions about a trained professional required by law to report alleged abuse. This differs from situations where they would make a decision about you, e.g., awarding a contract to you, etc., where you would obtain some type of advantage over competitors, or a financial benefit, etc., as a result of preferential treatment.

As your dealings with another Division would be extremely rare, and as those dealings are not of the type where employees in that Division would render preferential treatment to you, we waive a literal reading of the statute.

### III. Conclusion

Based on the above facts and law, we grant a waiver so your private practice can include children and adolescents as clients.

Sincerely,



Barbara Green, Chair  
Public Integrity Commission

**11-48 - Outside Employment:** A State employee asked if she could work part-time for a private company that contracted with her agency. State employees with a financial interest in a private enterprise that does business with, or is regulated by the State, must file a full disclosure as a condition of commencing and continuing employment with the State. *29 Del. C. § 5806(d)*. The individual filed the required disclosure.

State employees may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. *29 Del. C. § 5805(a)(1)*. Her State work did not involve any connection to the company's contract with her agency; she made no decisions about it; and did not refer State clients to the organization.

State employees may not represent or otherwise assist a private enterprise before the agency with which they are associated with employment. *29 Del. C. § 5805(b)(1)*. In her private job, she had no State clients, so would have no occasion to deal with her own agency.

State employees may not use public office for personal gain or benefit. 29 Del. C. § 5806(e). The employee stated she would not use State time or resources for her private work.

The Commission found no conflict of interest as long as she did not use State time and resources for her private work.

**11-47 - Concurrent and Post-Employment:** A State employee, and an out-of-State partner, started a corporation and wanted to be able to write books, prepare media releases, screen plays and speeches; work with clients to set up strategies for their projects; and develop strategies for the corporation's projects. Their firm may also be involved in political consulting and investor relations. He noted a statute that applied only to employees in his agency where there were some specific restrictions. This Commission's jurisdiction is limited to interpreting only 29 Del. C., chapter 58. 29 Del. C. §5809(2) and (3).

He also asked the Commission if some of the work would violate the concurrent employment law, and if some would violate the post-employment law. State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

In his State job, the employee was largely responsible for media relations, communications, writing op-ed pieces and grants, drafting and researching op-ed pieces, speeches, and anything related to mass media. He asked if, while employed by the State, he could work on a book for a potential client who lived out of State. In dealing with her, he learned she has a problem with a private company regulated in her State, of the same type regulated by his State office. He said she had not been able to get a response from that State's regulatory agency. He said that in his official capacity he normally acted as a "proxy" for persons over whom his office had no jurisdiction, to help them with calls similar to this situation. He planned to go to a national conference and wanted to approach the head of that State's regulatory body to discuss his potential client's problem and let that State office take it from there. He normally attended those conferences in his official capacity. He said he could contact the head of that State's regulatory body to discuss his potential client's problem in his official capacity, or in leave status.

The Commission found that it would not violate the Code if the employee wrote a book that was not in any manner related to his State job, as long as it was not during State hours, or using State resources, but it would violate the Code for him to intervene on behalf of his potential client with the head of another State's regulatory agency, whether he attended the conference in an official capacity, or was on leave status. In his official capacity, it may raise the appearance he was using his public office to obtain preferential treatment for a potential client, which could result in a financial benefit to him in the form of a contract. 29 Del. C. § 5806(e). In his private capacity, it may appear he only switched to that capacity to avoid a violation if he acted in his official status, and it would be difficult for the public to discern the difference in his roles.

**11-41 - Outside Employment:** A State employee worked part-time for a private enterprise. The private enterprise contracted with a State agency. Employee filed the required disclosure of her financial interest in the private company. 29 Del. C. § 5806(d). She did not

deal with, and was not involved in the contract, the company. Thus, in her State job, she did not review or dispose of matters related to that company. 29 *Del. C.* § 5805(a)(1). In her private job, she did not get involved with, nor did she have, any clients from her own agency. The contract was with a different Department. Thus, she was not representing or assisting the private company before her own agency. 29 *Del. C.* § 5805(b)(1). She was not using State resources or State time to perform her private work which is barred by the provision against using public office for personal benefit or gain. 29 *Del. C.* § 5806(e). The Commission found there was no conflict at present, but if anything changed, she should contact the Commission.

**11-40 – Outside Employment:** A State employee was an investigator for a State agency that contracted with his part-time private employer. He filed the disclosure required by law. 29 *Del. C.* § 5806(d). He was told by his agency that he could no longer work for the private company, so he asked the Commission if a conflict existed. The State contract for services from his private employer was not related to his State job. He was not, and is not, involved in putting together or overseeing the contract. Thus, he is not reviewing or disposing of those matters. 29 *Del. C.* § 5805(a)(1).

The employee worked for the State agency for about 3 years and worked at the private company for more than 2. In that time, he never dealt with his own division, or any other division in his agency. He, and representatives from the private company, said he was not assigned any State clients. He only had one client, who did not receive services from his State agency. Thus, he did not represent or assist the private company before his own agency. 29 *Del. C.* § 5805(b)(1). The private work was performed during non-State hours. He, and representatives from the company, said that while his hours conducting State investigations can vary from normal work hours because of the nature of his work, they were able to schedule his private work around those hours because he only has one client, and usually worked 8 hours in a week. If he needed to contact the company during his normal workdays, he used his 15-minute break or his lunch break, and his own phone. Thus, he was not using State time or resources for his private work. 29 *Del. C.* § 5806(e). The Commission decided there was no conflict of interest under these particular facts, and the employee should notify the Commission of any changes.

**11-39 - Outside Employment:** A State employee worked part-time in sales for a private enterprise. He filed a disclosure of his outside employment but was not mandated to do so. It is only required if the private enterprise does business with, or is regulated by, the State. 29 *Del. C.* § 5806(d). No facts suggested the company did business with any State agency. Specifically, it did not do business with his agency. Thus, he would not review or dispose of matters related to the company, nor represent or assist it before his agency. 29 *Del. C.* § 5805(a)(1) and (b)(1). He did not use State time or resources to perform the private work. 29 *Del. C.* § 5806(e). There was no conflict as the company has no relationship with the employee's agency, and he was not required to file.

**11-34 - Concurrent Employment:** A State employee recently accepted a new job with a State agency. Before that, she worked for a different agency. Her old agency asked if she would privately contract to work part-time training her replacement. The Code of Conduct places certain restrictions on other employment. 29 *Del. C.* § 5806(b). Accepting the work cannot result in:

**(1) impaired independence of judgment in performing official State duties.**

Her part-time work would not have anything to do with her work in her current agency. However, the former employer did have dealings with her current State office. State employees may not review or dispose of matters where they have a personal or private interest that may tend to impair judgment. 29 *Del. C.* § 5805(a)(1). The part-time work had nothing to do with the State agency where she was now employed, so she would have no occasion to review or dispose of matters pertaining to her private work. Her former employer did have dealings with her current agency. However, she said that she expected there would seldom be contact, and if a matter arose, she could recuse.

**(2) preferential treatment to any person.**

As she would recuse from matters pertaining to her former employer, she would not be able to show them preferential treatment. To avoid preferential treatment to State employees who contract with the State, the law requires that if the contract is for less than \$2,000, there must be arms' length negotiations. 29 *Del. C.* § 5805(c). Arms' length negotiations means there must be distance between the contracting parties, and that the amount paid is a fair market value. *Commission Op. No. 98-23*. Distance is established by the restriction against reviewing or disposing of matters related to her part-time employer. 29 *Del. C.* § 5805(a)(1). The employee expected she may make as much as \$400 depending on the number of hours it took to train her replacement. She would be paid somewhere between \$15-20 an hour—about the same amount she was paid while in the job. As that is the market for that skill, it comported with the law. Also, she was not hired out of preferential treatment. Rather, no one else at the agency had the same knowledge because it had a very small staff, and each had dedicated tasks, and her specialty was in the particular area where she would train. That means she was the only one with complete knowledge of the particular system. She did prepare a notebook for her replacement, but two events, with specific deadlines, would require that her replacement have the training to ensure they could meet the deadlines.

**(3) official decisions outside official channels:**

No facts suggested this could occur.

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

This is basically an appearance of impropriety test. The test is whether a reasonable person, knowledgeable of all relevant circumstances would still believe that she could not perform her duties with impartiality, honesty and integrity. *In re Williams*, 701 A. 2d 825 (*Del. Super.*, 1997). Beyond the fact that the above Code provisions are being complied with, she also would not use her public office for personal benefit or gain, which is barred by 29 *Del. C.* § 5806(e). She would not use State time and resources to perform her private work. She gave the training at night and on weekends. She did not expect the training to run past December 2011, and probably not even that long. It would more likely be during August and September, depending on the availability of the person she needed to train. She said that while she was working part-time for her former employer, she would recuse from handling anything related to them in her current State job. She also pointed out that the two jobs are "like apples and oranges." The persons needing the services from each entity were not collocated; the services offered by each entity were totally different; the clientele for each agency was totally different. Recusal would not be difficult because she would rarely have to deal with her former employer,

as it would be one of just many things she does. Thus, she would not be constantly recusing for a significant portion of her State job. She said that if it was necessary to avoid a conflict, she would do it on a voluntary basis so that their program would not suffer. She asked if she could not work for them in a paid capacity, she would like confirmation that she could do it as a volunteer. The Commission found that it would not be a conflict, whether paid or not, for her to accept the short-term employment, as long as she recused herself from matters pertaining to the former employer while holding the part-time job.

**11-25 - Outside Employment:** State employees must file full disclosures if they have a financial interest in a private enterprise that does business with the State. 29 Del. C. § 5806(d). “Financial interest” includes employment. 29 Del. C. § 5804(5). A State employee held outside employment with a company that contracted with his Department. He filed a disclosure as required.

State employees may not review or dispose of matters if they have a personal or private interest in the matter which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). In his State job, he did not draft, write, oversee, etc., the company’s State contract. The company contracted with a totally separate division. He said if the company’s clients came to his State office, he would not get involved. Also, he did not refer State clients to the company because those needing providers for the services offered are given a list of providers and the clients make the choice.

State employees may not represent or otherwise assist a private enterprise before the agency by which they are associated with employment. 29 Del. C. § 5805(b)(1). The employee did not have any of his State clients as private clients. He did have private clients that were State clients of his coworkers and colleagues in his State office. As a result, if his coworkers needed to review the records of their clients, he would be assisting the private enterprise before his own agency. He is asked the company to re-assign any client that he had that was active with his agency. The company complied with that request and clients were reassigned.

State employees may not engage in conduct that would raise public suspicion that they are acting in violation of the Code. 29 Del. C. § 5805(b)(1). This is basically an appearance of impropriety test. The test is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code is being violated. *In re Williams*, 701 A.2d 825 (Del., 1997). To decide if the conduct would create an appearance of impropriety, the Commission looks to the totality of the circumstances. *Commission Op. No. 96-78*. Here, the only actual conflict is that the employee had State clients from his own agency as private clients. However, that was rectified.

The Commission also considers the following provision: A State employee may not use public office for personal benefit or gain. 29 Del. C. § 5806(e). That can occur if the State employee uses State time or resources, such as phone, fax, computer, etc. The employee indicated he was not engaging in such conduct. He is entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff’d*, Del. Supr., No. 304 (January 29, 1996).

With the reassignment of clients, the Commission decided there was no conflict of interest.

**11-24 – Outside Employment:** State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with the State. 29 *Del. C.* § 5806(d). “Financial interest” includes employment. 29 *Del. C.* § 5804(5). A State employee filed a written statement because she wanted to work for a private enterprise that contracted with her State agency. State employees may not review or dispose of matters if they have a personal or private interest in the matter which may tend to impair judgment in performing official duties. 29 *Del. C.* § 5805(a)(1). The State employee’s job entailed reviewing and disposing of matters dealing with the private enterprise, in terms of recommendations, etc. She had referred State clients to the private enterprise in the past.

If she accepted the job, it would create a financial interest in the private company. 29 *Del. C.* § 5804(5). In her State job, if there were an option for referral of clients to the private company, she would have input into the final decision. If she recused from such referral, the client could be denied an opportunity or option of being placed with that company. The facts differed from cases where State employees worked with a different clientele in their State job than in their private job. Aside from reviewing or disposing of such matters, her State position placed her in a potentially adversarial role where her recommendations could differ from the client’s desires. If she did not recuse, it could appear that she was making her recommendations based upon her financial interest. If she did recuse, then she would not be performing an on-going and vital function of her State duties. Thus, recusal would not cure the problem because her State duties were to “command precedence” over her personal or private interest. *In re Ridgely*, 106 A.2d 527 (Del., 1954) (holding that State employee’s private interest in other employment must yield to his public duties).

State employees may not represent or otherwise assist a private enterprise before the agency by which they are associated with employment. 29 *Del. C.* § 5805(b)(1). Even if the above conflict could be cured, a conflict arises from the fact that other employees from her State agency refer their clients to the same private company. In her private job, she would be handling those clients in a representative capacity for the company. Her colleagues and co-workers who refer clients to that company may need to confer with her on the client’s progress. As a result, they would be reviewing and evaluating her private performance. The reason for this rule is to ensure that colleagues and co-workers do not have impaired judgment in making decisions over a co-worker in their private capacity and are not unduly influenced by that relationship. Again, there is no cure for the conflict because the company does not have other clients she could work with.

State employees may not engage in conduct that would raise public suspicion that they are acting in violation of the Code. 29 *Del. C.* § 5805(b)(1). This is basically an appearance of impropriety test. The test is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code is being violated. *In re Williams*, 701 A.2d 825 (Del., 1997). To decide if the conduct would create an appearance of impropriety, the Commission looked to the totality of the circumstances. *Commission Op. No. 96-78*. Here, actual conflicts were identified, and recusal would not resolve the conflicts, or the negative effects that the employment could have on the process of handling these clients.

A State employee may not use public office for personal benefit or gain. 29 *Del. C.* § 5806(e). Aside from the actual conflicts, it could appear that she could use her State position to refer State clients to the facility because the more clients it had, the more it stabilized employment for her. Added to that appearance is the fact that the facility was paid more under the contract for each client that was accepted.

The Commission found the private employment was a conflict that would have a direct effect on her job performance and it would not instill public confidence in her conduct because of the appearance issues.

**11-21- Outside Employment:** A State employee contracted with a State agency, but not his own agency. Thus, he was not representing or otherwise assisting a private enterprise before his own agency, which is barred. 29 *Del. C.* § 5805(b)(1). The contracting decision was made by an agency which he was not associated with by employment. Thus, he did not review or dispose of the contracting matter in his State job. 29 *Del. C.* § 5805(a)(1). The contract was performed during non-State hours. 29 *Del. C.* § 5806(e). The contract was for \$1,900 so the law did not require public notice and bidding. 29 *Del. C.* § 5805(c). However, he did not realize he must file a disclosure with the Commission because he had a financial interest in a private enterprise that did business with the State. 29 *Del. C.* § 5806(d). His supervisors alerted him and he immediately filed the disclosure. He said he knew “ignorance of the law is no excuse” and apologized. The Commission found there was no conflict of interest, and that he complied with the disclosure requirement.

**11-16 – Outside Employment:** Applicant could not appear due to illness. By law, the Commission may render a decision on a written statement if there is sufficient information. 29 *Del. C.* § 5807(c). The State employee was employed by one State agency and wanted to work part-time for a private company that contracted with a different State agency. By law, she must file a disclosure. 29 *Del. C.* § 5805(d). Regarding the other elements of the law that applied, State employees cannot seek State contracts for more than \$2,000 unless they are publicly noticed and bid. 29 *Del. C.* § 5805(c). She was not seeking the State contract but wanted to work for the company that was awarded the contract which was publicly noticed and bid. State employees cannot review or dispose of matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). Outside employment is a financial interest. 29 *Del. C.* § 5804(5). In her State job, she made no decisions about the private company. In her State job she dealt with certain State clients. In her statement she said if one of her private clients came to her State office for assistance, someone else would take care of that person. Similarly, if one of her State clients was referred to her in her private job, they would be referred to someone else at the private company. Her statement also said she would not use State time or resources for her private work. The Commission decided that under those circumstances, there was no conflict of interest.

**11-15 - Outside Employment:** A State employee also had a private business. On behalf of her company, she wrote the response to her own agency’s publicly noticed request for proposals. She also went to the pre-bid meeting to represent the company and bid on the contract.

State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure. 29 *Del. C.* § 5806(d). She filed a written disclosure and appeared before the Commission. State employees may not review or dispose of State matters if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). She was not involved in any manner in preparing the State contract, nor would she have compliance oversight. State employees may not represent or otherwise assist a private enterprise before their own agency. 29 *Del. C.* § 5805(b)(1). She had already represented her private company before her own agency by preparing the response to the request for proposals and attending the pre-bid



meeting. If awarded the contract, she would be continuing to represent or assist her private company before her own agency.

She said several years ago the Commission let her contract with her own agency as long as her employees did not work at the State facility where she worked. She, nor the Commission's staff, could find that opinion. The Commission assumed she was permitted to do so in the past. She said when her company was allowed to contract with her agency, she had a business partner. She no longer does. She did not seek the contract in the intervening years after the Commission's opinion because she did not know she had to attend mandatory pre-bid meetings. Failing to attend meant no contract. The Commission must base its opinion on the particular facts of each case. 29 *Del. C.* § 5807(c). The Commission found it violated the Code of Conduct for her to contract with her own agency, and no facts substantiated a waiver.

**11-15 Reconsideration – Contracting with own Agency:** The Commission previously found a State employee violated the Code by representing or assisting her private enterprise before her own agency by preparing the response to proposals and attending a pre-bid meeting with her agency, and it would be a continuing violation for possibly 3 years if she were permitted to contract with her own agency. 29 *Del. C.* § 5805(b)(1). It denied a waiver because she had other options of obtaining income without contracting with her own agency, and the hardship imposed on her—not contracting with her own agency—was not an undue hardship because it is the same hardship imposed on all State employees and officials. 29 *Del. C.* § 5807(a). She requested reconsideration and submitted some additional facts. Among them, she said her private business had lost money because she could not contract with her own agency. She could not pinpoint any exact amount. However, she said again she had found other jobs. Moreover, she previously told the Commission she had kept her private company running for 3 years without a State contract. She also said she had not gotten a pay raise with the State in years, and in fact had a pay cut. However, that was the same hardship suffered by all State employees. The Commission did not change its original decision because contracting with her own agency is a conflict, and the facts still did not support a waiver when she had other options for obtaining additional income, and was doing so, in the private sector.

**11-12 - Outside Employment:** A State employee asked if her outside employment would violate the Code of Conduct. She was required to file a disclosure about her private and State employment, because the private company contracted with another State agency. 29 *Del. C.* § 5806(d). In her State job, she did not make any decisions about her private company's State contract as that was handled by a totally different agency. Thus, she did not review or dispose of those matters. 29 *Del. C.* § 5805(a)(1). Regarding the substance of her work, in her State job, she dealt primarily with adults. In her private job, she dealt primarily with youth. However, there were a few occasions where it might be possible that one of her private clients would come to her agency on certain matters. As she cannot, in her State capacity review or dispose of matters where she has a personal or private interest, 29 *Del. C.* § 5805(a)(1), she said if that occurred, she would recuse.

Her private job only dealt with the Child Mental Health Division of the Kids' Dept., not the State agency. Thus, she was not representing or assisting the private enterprise before the agency by which she was associated by employment. 29 *Del. C.* § 5805(b)(1). She performed the work during non-state hours and would not use State time or resources for the work, to avoid using public office for personal gain. 29 *Del. C.* § 5806(e).

The Commission decided that based on these facts, there was no conflict of interest, as long as she recused as discussed.

**11-07 - Outside Employment:** A State officer asked if his private employment, in a regulated field, complied with the Code. He said he was able to perform his private work during non-State hours; and did not use State resources or time for that work. That is consistent with the law that provides that State officers may not use public office for personal gain or benefit. *29 Del. C. § 5806(e)*.

He said 95% of the private work was reviewing written material and research, etc., in preparation of contracts which could be done during non-State time. All of this work pertained to private entities, not any State agency. Aside from that work, there was a small percentage dealing with small private matters that did not involve any State regulatory authority. In the unlikely event it would involve any State regulatory authority, he would not be involved, as the private entity would handle those matters. The work in that area had been reduced because some of it was time sensitive; but the change meant he did not have to respond immediately on that work. The company had a third area of work, which normally would require filings with a State office. However, he is not involved with that work. Other persons in the company handle it. Moreover, a third-party company handled any filings. Therefore, he was not representing or otherwise assisting his private enterprise before his own, or any other State agency on those matters. *29 Del. C. § 5805(b)(1) and (2)*. He did not expect to deal with any State agencies in his private work except that, as a licensed professional, his annual filings were made with the State agency that regulated his profession. The filings were primarily, ministerial, e.g., name, address, identification number, etc. Some information had to be reported about the firm's accounts, which could be audited. To the extent the filing was purely ministerial, Delaware Courts have held that participating in such matters is not a conflict because ministerial matters do not require any judgment. (cite omitted). However, in the event that information was audited, and questions were raised, he should recuse if possible, and if he could not, he should file a full disclosure with the Commission explaining the conflict and why it could not be delegated. *29 Del. C. § 5805(3)*.

As far as reviewing or disposing of matters pertaining to his private employment in his State job, which is barred by *29 Del. C. § 5805(a)(1)*, he said neither his company nor the customers they served dealt with his State office. Thus, he would not be reviewing or disposing of those matters. He said it was possible, in the future, that one of his creditors might seek to do business with his State office. However, he said he would not get involved. While the Commission would need the particular facts to render a decision on that issue, *29 Del. C. § 5807(c)*, it discussed with him several methods of resolving a conflict if one did arise: (1) the agency had a DAG assigned who did not report to him; (2) sometimes committees with people who do not work for him could render a decision; and (3) it was possible other State officials would be able to render a decision, if the law did not bar such activity. Because the only potential conflict was that a creditor may sometime in the future want to do business with his office, nothing suggested he would have to constantly recuse. Again, the Commission explained that if he could not delegate, the law requires him to file a full disclosure of the conflict and explain why he could not recuse.

The Commission also discussed with him that his career field has its own set of regulations, and PIC is not authorized to interpret those. However, it suggested a couple of

areas where he may want some clarification on those regulations. He said he already had those plans, but meeting with the Commission was his first step in the process.

The Commission found there was no conflict as long as he performed the work during non-State hours; did not use State resources, e.g., phone, fax, e-mail for private work; recused as required or filed a full disclosure where required if a conflict did arise; and may come back to the Commission if his circumstances changed. Further, that he may file the regulatory filings with the State agency regulating his profession, but if any questions arose, he should either have someone else at the company address those concerns or file a full disclosure with the Commission about the conflict and why he could not delegate.

**11-06 – Outside Employment:** A State employee filed a disclosure that she was seeking outside employment with a vendor contracting with her own agency. In performing the private work, she would have to deal with another Division in her agency, e.g., reporting to it about her private clients; meeting with members of that Division to review cases, etc. The Code bars State employees from representing or otherwise assisting a private enterprise before their own agency. The Commission dealt with a prior case where another employee from this same Department also had private employment with this same vendor and the Commission found it violated the Code. The Commission is required to strive for consistency in its opinions. The Commission decided that it would violate the Code of Conduct for this employee to accept outside employment with this vendor.

**10-40 - Outside Employment:** A State employee investigated certain claims of fraud in her Division, and also held a license as a medical professional. A second State agency wanted to contract with her part-time to use her medical skills. Before her present State job, she had contracted with that agency for such work. Full Disclosure: State employees with a financial interest in a private enterprise that does business with any State agency must file a full disclosure. 29 *Del. C.* § 5806(d). Her private contract constitutes a private enterprise. 29 *Del. C.* § 5804(f). She filed a disclosure. Contracts with State: If for more than \$2,000 must be publicly noticed and bid. 29 *Del. C.* § 5805(c). While the agency's contract could go as high as \$10,000, the particular projects she would work on would be for less than \$2,000. Contracts for less than \$2,000 must show "arm's length negotiations." *Id.* That means distance between the parties, and fair market value. She cannot accept if accepting may result in: (1) impaired judgment: she cannot review or dispose of matters where she has a personal or private interest. 29 *Del. C.* § 5805(a)(1). She has no occasion to review the 2<sup>nd</sup> agency's matters in her State job. (2) preferential treatment: As she has no State involvement with the 2<sup>nd</sup> agency, she could not give it preferential treatment. No facts suggested that agency gave her preferential treatment in offering her the job, e.g., to obtain some type of benefit or because she is a State employee. Rather, contracted for this type of work with the 2<sup>nd</sup> agency before being hired by her present agency; (3) official decisions outside official channels: as no overlap exists between her private and State activities, no facts suggest this could occur; and (4) any adverse effect on the public's confidence. No facts suggested an appearance of impropriety, but consistent with the Commission's prior rulings, she was reminded that she cannot use State time or resources to perform her private work. She was also advised, consistent with the law, that if the 2<sup>nd</sup> agency offered to expand her work on the particular projects she would be assigned under the contract, and it would exceed \$2,000, she cannot proceed with that work as the contract was not publicly noticed and bid.

**10-35 - Outside Employment:** A State employee wanted to accept private employment as a sales representative for a private company. The company did not do business with his agency. However, he would be selling to professional organizations of which his bosses were members, and they could be involved in decisions about purchasing. This could result in State time being used to discuss private business. Also, as part of his official duties, he had responsibilities to contact those professional organizations about State matters. That also could lead to work time discussions about his private work. He said he could envision a scenario where he is at his State job and making calls to the organization about State business, and he would be speaking to someone to whom he was trying to make a sale. The sale would be for a product that would result in a *very* significant commission. He asked if he could not sell to the Delaware organizations that the Commission consider if it would be a conflict to work in Maryland. The Commission found that he could take the job in Maryland, but it would be too much of an overlap for him to concurrently work in Delaware because of the potential contracts with his own bosses; official decisions regarding organizations where he might be trying to make a sale; etc. Also, he could not use State time for his private job.

**10-28 - Motion for Reconsideration – Outside Employment:** A State employee asked the Commission to reconsider its opinion which concluded that it would be contrary to the Code of Conduct for him to a business when, in his State job, he would be in a position to review or dispose of matters related to that type of business; in his private capacity, he would be in a position where he may have to represent or otherwise assist his private enterprise before his own agency; and, at a minimum, it could appear he used his public office for personal benefit. In the motion to reconsider, he asked if he limited his business to just a certain aspect would it be contrary to the Code; if he recused from any work on his State job related the matter, whether that would solve the conflicts; he disagreed with how portions of the opinion were phrased; and believed the Commission was overly concerned about appearances of impropriety. He did agree that the aspect he now suggested pursuing was regulated by his agency, meaning he would still be representing or assisting his private enterprise before his own agency, so even if he recused in his State job on all yard waste matters, he would still have a conflict. The Commission affirmed, without changing, its prior opinion; that the business is regulated by his agency; that recusal on everything related to the matter would not cure the conflict of dealing with his own agency or the appearance issues.

**10-23 - Outside Employment:** A State officer privately contracted with a private enterprise. While the company contracted with the State, it does not contract with his agency. Full disclosure is mandated. 29 *Del. C.* § 5806(d). He does not use State time or resources to perform the private work but works weekends or evenings. He has no State clients. He is updating his 2004 disclosure when he worked part-time for three private companies that contracted with the other State agency. The Commission approved the outside employment on the condition he would advise the Commission of any changes. It was also reinforced that he could not complete his private work using State time and resources.

**10-18- Outside Employment:** A State employee worked for a regulatory agency that handled documents that must be filed to comply with the regulations. She had a part-time job with a company that is regulated by her agency and files documents with it. State employees may not review or dispose of matters where they have a financial interest. 29 *Del. C.* § 5805(a)(1). She recused herself from working on any paperwork from her private employer in her State job. State employees may not represent or otherwise assist a private enterprise on matters before

their own agency. 29 Del. C. § 5805(b)(1). In her private job, she was not involved in putting together the paperwork that goes to her agency. She did, on occasion, sign the checks that went with the paperwork when her boss was absent. However, she spoke with him, and he said he or someone else could sign the checks. She also provided notary service for clients of her private employer. However, that is only for purposes of identifying the individual and does not in any way validate the information in the paperwork that goes to her agency. The Commission decided that she could continue working at the private company, as long as she recused herself from working on its documents in her State job, and did not prepare any documents for her private employer to be sent to her agency, or sign checks that go with the documents. She may notarize signatures of clients, as long as she is not certifying the validity or accuracy of the papers.

**10-16 - Outside Employment:** A State employee worked for a company that contracted with a Department other than the one where she works. State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with, or is regulated by, the State. 29 Del. C. § 5806(d). The employee properly filed the disclosure so that the Commission could decide if any overlap between her State job and the company was sufficient to create a conflict. State employees may not review or dispose of matters in which they have a personal or private financial interest. 29 Del. C. § 5805(a)(1). In her State job, she had no reason to make decisions about the company. The awarding of the contract was done by a completely different agency. State employees may not represent or otherwise assist a private enterprise before their own agency. 29 Del. C. § 5805(b)(1). As far as her private work, she said there was a possibility for a potential client overlap between her State clients and the private clients. However, if one of her State clients came in, she would refer them to another counselor. The Commission found there was no violation as long as she did not accept clients from her own agency.

**10-10 - Outside Employment:** A State agency publicly noticed and bid a contract and once the contractor was selected, it wanted to privately contract with a State employee from a different agency to work part-time. As the company did business with a State agency, the employee must file a written disclosure. She and representatives from the contracting agency and the vendor appeared before PIC. In her State job, she had no official duties that required her to review or dispose of matters related to the contracting agency or the vendor. As the job is with a different agency, she would not be representing or assisting the private company before her own agency. She would not have any client overlap because her State clients are adults and her private clients are children. She would work in the private job during non-State duty hours. She would not perform any work related to her private clients during State duty hours or use State resources, e.g., working on her case notes, etc. The Commission found there was no conflict.

**09-53 - Outside Employment:** A State employee worked on web sites for a State agency. Part of her duties was to take photos and maintain the site. As a private activity, the employee also took photos and wanted to offer them for free to the agency for its web site. A personal camera was used in both instances, and it had a copyright embedded into all the photos. The employee wanted to expand the private photography business for outside employment. The employee asked if it would be a conflict to take official photos, and to offer free photos to the agency for its web site. The employee was contacted while on State duty and was asked for reprints of photos taken as part of the State job. The employee's opinion was that the agency should not

give reprints. She also would like to sell those private photos to others. The law precludes State employees from reviewing or disposing of matters if they have a personal or private interest that may tend to impair judgment, and/or representing or otherwise assisting a private enterprise before their own agency, whether paid or not. The Commission moved it could, at a minimum, appear improper if the employee gave private photos to the agency to use for its web site. First, she was the one responsible for taking the photos as part of her State job, and if she maintained the web site with her own private photos, it could appear that she was using her State job for personal benefit. Second, whether her agency paid her or not, she cannot represent or otherwise assist a private enterprise before her own agency. As she is expanding her business into photography, if she offers those photos to her own agency to use on the same web site she maintains, it could appear that she is representing or otherwise assisting her private business before her own agency. Even without pay, she would privately benefit from the exposure of having her personal work on the website. Further, she would be in the position to decide which photos would go on the web site—her official photos or ones taken privately, and it may appear she would get a leg up on other photographers who might be interested in having their work displayed. There was such a significant overlap between the State work and the proposed private work, (even though not paid), that the public may not be able to make the distinction and suspect she was using State time for private work, and/or that she may personally benefit from her public position by the exposure for her personal photographs on the website and then sell them, etc.

**09-33 – Outside Employment – Employer Contracts with Employee’s Agency:** A State employee disclosed that she wanted to privately work for a firm that contracted with her State agency. 29 Del. C. § 5806(d). However, it was not within her section, and she had no responsibility for the State contract, nor did she make referrals to the private firm. Thus, she did not review or dispose of matters related to the company as part of her official duties. 29 Del. C. § 5805(a). Also, she would not accept any State clients as part of her private work. Thus, she would not have occasion to represent or assist the private enterprise/its clients before her own agency. 29 Del. C. § 5805(b)(1). Further, she performed a different function in her State job. While not expected to occur, she said if a matter was referred to her in her State job by the private firm, she would recuse, and vice versa. She was on a four-day work week with the State and would work for the firm on her day off and in the evening. Thus, she would not be using State time to perform her private work. 29 Del. C. § 5806(e). She also said she would not use State resources for her private job. *Id.* The Commission found no conflict.

**09-29 – Outside Employment - Private Work with State Supervisor:** Two State employees who worked in the same office wanted to start a private business doing the same work for private enterprises as they did in their State office. One of the State employees supervised the other. The Code bars accepting other employment if it may result in, or appear to result in:

**(1) Impaired Judgment in Performing Official Duties.**

Courts have noted that where the official had supervisory control, and then had a personal relationship with an employee, it could raise concerns that the supervisor may be favorably biased in official decisions related to that employee, e.g., evaluations, working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto, 549 A.2d 1267, 1274 (N.J. Super., 1988))*. Conversely, the supervisor may “bend over backwards” to avoid showing favorable bias, and as a result, the judgment would still be impaired. 29 Del. C. § 5806(b)(1) and (2). The doctrine

arises out of the public policy that an officeholder's performance not be influenced by divided loyalties. *63C Am. Jur. 2d Public Officers and Employees* § 62. Here, as the supervisor and employee had the same "personal or private interest," the supervisor may be divided between that interest and the supervisory duties to fairly evaluate the employee's State work. Even if the supervisor recused from supervising the State employee who would be a private business partner, it would not cure other issues discussed below.

## **(2) preferential treatment to any person:**

Preferential treatment can come from several directions. By law, State employees may not "represent or otherwise assist" a private firm before your own agency. *29 Del. C. § 5805(b)(1)*. "Agency" includes "Department." *29 Del. C. § 5804(11)*. This helps avoid impaired judgment of colleagues and co-workers who may tend to give preferential treatment to the State employees' firm. Here, the private work would not only go to the State employees' Department, it would go to their own Division. That is literally contrary to this law. To avoid formally representing their firm before their agency, they said they would not go to the facility in their County. Rather, a relative of one of them would take the paperwork to a different facility. However, that did not cure the "otherwise assisting" aspect. The State's employees would prepare the documents reviewed by co-workers and colleagues. Again, this would directly violate this law.

Appearances Issues: Aside from these direct violations, the State employee who worked privately for his State supervisor would have his own "personal or private interest" in insuring job security in his State job. Preferential treatment could arise in that it could appear that an employee might give preferential treatment to a supervisor's wants and needs because the supervisor could hire, fire or promote the employee. *See, e.g., People Ex. Rel. Teros v. Verbeck, III. App. 3 Dist., 506 N.E. 2<sup>nd</sup> 464 (1987)*.

Another preferential treatment concern is that the supervisor, in an official capacity, routinely dealt with the State employee who would handle the transaction from the private company. They were "always back and forth on the phone," and if the supervisor needed immediate answers to questions, that is who she called. As a result of that relationship, it could raise public suspicion that the State employee who would handle the transaction, herself, or by and through her employees, might show preferential treatment to their firm.

Competing firms may also have concerns of preferential treatment. They may suspect that the State employees' firm would get preferential treatment because of the supervisor's relationship with the State employee who would handle the transactions, or because the two firm members were both State employees, even if a relative brought in the paperwork.

## **(3) official decisions outside official channels:**

This precludes employees from "back-dooring" when they cannot use the "front door," e.g., recusing, and then trying to get favorable decisions from another official.

Appearance Issues: Even if both State employees recused from officially reviewing or disposing of matters related to their firm, it could appear they would unofficially influence the State employee making the official decisions, because of the strong working relationship discussed above. Another potential conflict was that even if the supervisor recused from supervising the other employee, it may appear that the supervisor would be in a position to unofficially influence the official who would make the decisions to give the State employee, who

works for the private firm, favorable evaluations.

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

As noted above, there need not be an actual conflict, nor does it require that the public servant succumb to the temptation; rather it is if there is a potential for conflict. *63C Am. Jur. 2d Public Officers and Employees ' 252*. In the paragraphs above, we identified some appearance concerns. However, other relevant facts and law showed other potential conflicts.

**Appearance Issues:** Courts have held that even if an employee recused in a State job, a ban on accepting the private job “ensures that there be the appearance as well as the actuality of impartiality and undivided loyalty.” *People Ex. Rel. Teros v. Verbeck*, Ill. App. 3 Dist., 506 N.E. 2<sup>nd</sup> 464 (1987); *See also, O'Connor v. Calandrillo*, N.J. Super., 285 A.2d 275, *aff'd.*, 296 A.2d 325, *cert. denied.*, 299 A.2d 727, *cert. denied.*, U.S. Supr. Ct., 412 U.S. 940. *Sector Enterprises, Inc. v. DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). In *Sector*, the Court said multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture if their private business offers the same services as they do for the State. One concern was:

the exigencies of private practice and the convenience of private clients require communication and sometimes actual representation, with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official library, telephone and other facilities to accommodate the temporal and other necessities of private practices.

Likewise, the Commission considered the time involved for the private job. Both said they would not work on their private business during State duty hours. A runner would take the documents to the facility. However, one relevant fact was that the State facility where the documents must be reviewed operated during the same hours that they performed their official duties. If the runner was at the facility, and had questions for either of them, the runner would want to call while they were on State time. As the questions would arise during work hours, the public, which would include employees within the agency, could well suspect the use of State hours to work on their personal business because of those overlapping hours to perform their State duties and the private job.

Both said the private firm's work would be sent to the supervisor at another facility. However, she likely had the same work hours. She had an official duty to answer her employees' questions on their paperwork and, if necessary, she or her employees may need to contact one of them directly to answer questions on their private work. As the employees at the other facility would perform the official tasks of resolving questions during the same hours as the 2 employees worked at their State job, again, it may result in the public, including agency employees, suspecting use of State time and resources for their private work.

When a government employee accepts something of monetary value, which under Delaware's statute includes money from other employment, Courts have said that it may raise the specter that government employees are “selling” their labor twice--once to the government and once to the private sector, thus creating at least an appearance that the employee is using public office for private gain. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 3d 85, 94 (1995). As in the federal case, the Delaware Code bars State employees from using public office to secure unwarranted privileges, private advancement or gain. *29 Del. C. § 5806(e)*.



**Conclusion:** As noted, the Commission found potential violations of the Code if the supervisor reviewed or disposed of matters relating to the supervision of the State employee who would be part of the private business, and on the “representing or otherwise assisting” their private enterprise before their own agency. However, even if no direct violation were considered, with the multiple potential conflicts, the public may suspect that the Code would be violated if they undertook this private employment.

**09-28 – Outside Employment—Consulting with Private Clients:** A State employee asked if he could create his own consulting firm to aid private clients in matters for which he was not responsible as a State employee. He said that if any of his clients came to his agency, he would not participate in the matter. 29 Del. C. § 5805(a). Also, he would not privately seek grants, or other services, for himself or his clients. Thus, he would not represent or otherwise assist his firm/clients before his own agency. 29 Del. C. § 5805(b)(1). The Commission found no conflict, but he must recuse if matters arise where his private clients seek such things as grants, or other services, from his office.

**09-27 – Outside Employment—No Dealings with Own Agency:** A State employee asked if she could take a part-time job in the private sector. The firm had no contracts with her agency. It was unlikely, but if the firm came to her agency, she would recuse in her official capacity, and would not represent or assist it before her agency. 29 Del. C. § 5805(a). She would not take State clients from her agency as her private clients. That meant she would not be representing or otherwise assisting the private enterprise/its clients before her own agency. 29 Del. C. § 5805(b)(1). The Commission found no conflict as long as she recused if required.

**09-14 – Outside Employment - Private Consulting on Duties Connected to State Job:** A former contractor with an agency was later hired as a full-time State employee. Her private consulting business dealt with the same issues as her full-time State job. She asked if she could continue to privately consult with local governments, private entities, or other private clients if they did not come before her agency. Some of those entities had approached her after she has given classes—an official duty--and asked if she could consult with them. They are not Delaware entities. She said she did not develop a long client list because she established it with no reason to think the agency would hire her. If she consulted, she would not seek or advertise for clients. She said it was not unusual for her to use her State work as part of the training, and afterwards she had been approached to consult. In the prior two years, she spoke at national conferences. At the first conference she was not asked if she would consult. This year, two entities approached her. She had not yet pursued them as clients. She had been asked to speak in other States and did so. She was occasionally paid but had also provided services pro bono. She used her agency’s “best practices” in handling her private clients. She said her agency supported her on that. Her supervisor said she was the only one on a National Board related to her State work from the Mid-Atlantic area, and some other States.

He said she was asked to speak at its conferences because of her expertise and wide understanding of regional and national needs. He said Delaware's program model was to share good ideas as seeds for the program, but implementing the ideas and process were the vital part for her private clients. He said the “best practices” she provided for them was part of her State duties. Opportunities for non-Delaware clients were outside the scope of her State duties. He said she was empowered by the agency to work with non-Delaware clients, even though it

was not within her State job. However, she would consult in her private status. Her agency would approve what she would share with them, and it would have to be distinctly different from her State work. The Commission found that it would be a conflict as the two jobs were so intertwined that it would be difficult to distinguish whether her role was in her official or private capacity, and it may appear she would be using public office to obtain private clients.

**09-14 - Reconsideration for Outside Employment:** The Public Integrity Commission (PIC) reviewed a request to reconsider its advisory opinion on out-of-State private consulting on the same matters as a State employee's official duties.

### **I. Standard for Reconsideration**

Superior Court Rule 59 is the standard. Rule 59 motions are to give an opportunity to correct errors. It is not a device for raising new arguments. It will be denied unless a controlling precedent or legal principle was overlooked, or the law or facts that would change the outcome were misunderstood. *Beatty v. Smedley*, C.A. No. 00C-06-060 JRS, J. Slight III (Del. Super., March 12, 2003).

**ARGUMENT 1:** PIC ignored the presumption of honesty principle and assumed the private clients may contact the State employee at work, and that the State employee would not refer potential clients to other resources.

**RESPONSE:** The State employee's honesty was specifically presumed: "This is not to say you would actually violate this or other provisions." *Op. p. 3, ¶ 1.* It then cited the law that says "However, actual violations are not required; only the appearance thereof." *Id.*

**USE OF STATE TIME/RESOURCES:** Case law holds that using official time and resources is an "inherent" conflict when the jobs are the same. *Op. p. 3 ¶ 3.* "Inherent" means it is, by nature, part of the "essential character." It is not an issue of honesty; it identifies the "nature of the beast."

**REFERRALS:** PIC considered two ways referrals could occur to see if one or the other would solve the appearance issue: (1) including the State employee's business or (2) not including it. They were factual possibilities. Regardless of the employee's honesty, both would put the State employee in a no-win situation. *Op. p. 4 ¶.*

Regarding the State employee's statement that they would be honest, Delaware Courts, in a decision on State duty and private practice before an independent Commission, said if the result was to cast upon the official the burden of determining the limits which must be circumscribed for a private practice, it was easy to say that in a doubtful case the official should decide against their own interest. It went on to say that while that is true, officials are subject to human weakness, and the inevitable result is that in some cases considerations of self-interest may entice the holder of the office away from the performance of their duty. *In re Ridgely*, 106 A.2d 527 (Del., 1954).

The legal principle of honesty was not overlooked.

**ARGUMENT 2:** The State agency was not "vetting" the employee's private business. It was "vetting" PIC's process. With due diligence, the agency appropriately advised the employee to seek PIC's advice, which should mitigate "public suspicion."

**RESPONSE:** The Legislators passed the law vetting PIC's process. 29 *Del. C.*, Ch. 58. An agency's vetting is not required. We did not suggest the agency's advice to seek PIC's advice was inappropriate in law or fact. We also address "mitigation" herein. p.2 and Argument 5. Moreover, State officials must comply with the law, whether they seek an opinion or not. 29 *Del. C.* § 5802.

Moreover, the record shows the State agency used the term "vet." The State employee even used the term "vet" in this request, e.g., the State employee would refer potential clients to the agency to "vet the opportunity." p. 2, *last ¶*; p. 4 ¶ 2. That is not "vetting" PIC's process; it is "vetting" the State employee's private work, by co-workers on State hours—an "inherent" conflict.

Approval by colleagues or co-workers did not mitigate public suspicion. That duty was specifically removed from State agencies and employees when this independent Commission was created to serve as the "public's eye" to instill the public's confidence. 29 *Del. C.* § 5802 and § 5806 (a). The very reason for the public's concern when State employees decide if a conflict exists for another employee was the suspicion that they might "do each other a favor."

The outcome does not change. This argument is contrary to the law and its purpose. Having an agency "vet" PIC's process is not required by law, nor does it as a factual matter, determine if a conflict or the appearance thereof exists. Also, the underlying opinion pointed out the problems when the agency "vets" its employee's work. *Op. p. 2 last ¶ through 3.*

**ARGUMENT 3:** If the agency did not support the request or recommend going to PIC, PIC would not have supported it, nor would it have been presented.

**RESPONSE:** PIC's duties are not to rubber stamp an agency's position. It is to independently apply the law and facts. 29 *Del. C.* § 5807(c). A State employee has the legal right to seek advice even if the agency did not approve. *Id.*

This argument did not change the outcome. It was contrary to the law, and the facts did not determine if a conflict, or the appearance thereof, existed.

**ARGUMENT 4:** There is substantial precedent for, and value of, counterparts in other states acting in the same capacity as those being requested herein because of their expertise.

Comments of persons from other States are not legal precedence or legal principles. They do not interpret Delaware law; which PIC must apply. *Id.* Factually, they give the same reason as the employee and the agency--the "unique perspective and qualifications." That expertise directly resulted from the State job, which the State employee would then offer to private clients. That is the heart of the problem. pp. 2 ¶ 3; p. 3, *IV*, ¶ 5; p. 4, ¶ 4. We further note that Courts have said that when a government employee is compensated by a private entity for performing what would be their official duties, one ethical concern is that it may raise the appearance to the public that they are selling their official work twice—once to the government and then to the private sector. *Sanjour v. EPA*, D.C. App. Ct., 984 F.2d 434,445 (1993).

This argument did not change the outcome. As a matter of law, the letters saying other States allow it is not legal precedence. The fact that they consult outside of their States was the very fact the State employee wanted PIC to consider. It did so. In applying Delaware law, it

concluded that even limiting the work to out-of-State clients would not resolve the public concerns.

**ARGUMENT 5:** PIC should consider the following suggestions that the State employee believed would eliminate or minimize the appearance of impropriety.

A. If asked to provide revitalization consulting, or training for out-of- state public or private entities, as a result of the agency's sponsored activity, the State employee would immediately tell the inquirer to contact a designated agency representative to vet the opportunity. Also, the State employee would disclose to the agency representative all opportunities for outside employment that may arise beyond the agency sponsored activity.

The opinion addressed "vetting." *p. 4, ¶2, and fn. 5*, as does this reconsideration. This proposal does not change those facts and/or the law.

B. For out of state requests, if the agency declines funding or time to support the request, only then would the State employee be allowed to pursue those opportunities independently and then without encumbering the State or the State employee's availability to perform core official responsibilities in anyway, that determination ultimately to be assessed by the direct supervisor.

This raised "vetting" again, but now adds to the appearance of using public office for personal gain and/or official endorsement. If the agency declined a request, "only then would I be allowed to pursue those opportunities....", which to the public may create the appearance that the agency would be identifying projects, on State time, for the State employee's private business.

This did not change the outcome. Rather, it reinforced the result.

C. PIC or the agency could cap the number of requests that the agency would review for outside employment to not more than five per year.

PIC considered the fact that the State employee had two clients pending. *Op., p. fn. 5*. If two clients could raise all the concerns expressed, increasing the number could result in even more public suspicion. Moreover, the private pay would be based on the number of hours spent for each client, not how many clients the State employee had. The Commission dealt with the issue of "the money trail" and how the public may not be able to discern where one job began and the other ended. *Op. p. 5, 1<sup>st</sup> full ¶*.

This argument did not change the outcome.

D. Stipulate that no one could promote, reveal, imply, or suggest the existence of a personal business at agency related or agency sponsored activities.

Those facts were considered in reaching the outcome. *pp. 4 ¶, fn. 5*.

E. Stipulate no use of presentations and/or materials developed for the State for outside employment activities.

These facts were considered in reaching the outcome. *p. 2, fn. 3*.

## CONCLUSION:

Reconsideration was denied. Neither controlling precedents nor legal principles were overlooked, nor was the law or facts misunderstood.

**09-04 - Outside Employment and Lobbying:** A State employee asked if she could lobby on behalf of a non-profit organization, where she was the Director and Board President. The organization submitted its budget to the Department where she was a State employee. The Commission found it would be a conflict because she would be representing or otherwise assisting the private enterprise before her own agency. 29 Del. C. § 5805(b)(1). It found that a waiver should not be granted because there were many other Board members, and a registered lobbyist for the organization, who could act on the areas where she was not to participate, so there was no undue hardship, and literal application of the law was necessary to serve the public purpose. 29 Del. C. § 5807(a). In such situations, the public purpose was to ensure that State employees did not use their public position within their own agency to benefit their private interest, and that they did not use their public position to unduly influence their coworkers and colleagues. 29 Del. C. § 5806(e).

**09-03 – Outside Employment - Licensed Professional Needs Job for Certification:**  
*A waiver was granted so the opinion is a matter of public record. 29 Del. C. § 5807(b)(4).*

### 09-03 – Outside Employment

**Hearing and Decision by:** Chairman Terry Massie, Vice Chair Bernadette Winston;  
Commissioners William Dailey, and Dennis Schrader

Dear Ms. Scott:

The Public Integrity Commission reviewed your request for advice on accepting outside employment to obtain your Licensed Professional Counselor of Mental Health certification. Based on the following, we grant a waiver, with some restrictions.

#### I. Background

You work for the Division of Child Mental Health Services (CMH), Department of Services for Children, Youth and Their Families. CMH provides a statewide continuum of mental health and substance abuse (behavioral health) treatment programs for children and youth. The services have graduated levels of intensity and restrictiveness.

In this situation, clients come to CMS by two routes: (1) the majority are those in treatment with providers for mental health or substance abuse issues, but have no insurance, so may qualify for State services; or (2) those who go through the drug court, are found to need treatment for substance abuse, and CMH evaluates them for referral

to a treatment center. Your State job is to work with providers, and the clients regardless of the route by which they arrive, to ensure proper services to the State clients.

You seek a certificate so you can better serve CHM clients who go through the drug court. Certification requires supervisory hours from a qualified provider. Your agency contracts with two drug and alcohol treatment providers-- Aquila and Crossroads. You searched for a possible source other than those contractors, specifically Catholic Charities. However, they cover a more broad-based area. You wish to focus on the treatment areas related to your drug court clients. At present, the majority of your State clients are at Aquila. Most went through the drug court program. Aquila's focus is primarily alcohol abuse. Crossroads does not screen for alcohol abuse. You would like to work at Crossroads.

## **II. Application of Law and Facts**

**A. As Crossroads does business with your State agency, you are required to file a full disclosure of your financial interest (employment), as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d).**

You filed the required disclosure. Disclosures are reviewed for conflicts. The review of your disclosure shows two areas of concerns, which you should deal with as follows:

**B. In your private job, you may not represent or otherwise assist a private enterprise before the agency which employs you. 29 Del. C. § 5805(b)(1).**

To avoid this conflict, recuse in your private job from any dealings with your agency. For example: do not: (1) take any of your State agency's clients; (2) assist it in any manner in: (a) fulfilling its present contract; (b) requesting a renewal, or (c) responding to a request for a proposal from your agency.

**C. In your State capacity, you may not review or dispose of matters if you have a personal or private interest in a private enterprise that may tend to impair your judgment. 29 Del. C. § 5805(a).**

In your State job, you do not select your agency's contractors. Thus, you do not directly review or dispose of the contract matter. However, as a case manager, you recommend providers for your State clients based on client evaluations, family preference, availability, location and severity of substance use. The Director of Drug and Alcohol service, and the treatment team leader, make the final decisions. However, the law does not require you to be the final decision maker--it includes even "review." The final decision makers would certainly value your input on your clients' needs, and on a broader level, your input on the providers' capabilities.

This is not to, in any way, suggest you would directly or indirectly assist Crossroads in obtaining favorable treatment in terms of client assignments or contract decisions. However, no actual violation is required. Rather, State employees are to avoid conduct that would even "raise suspicion" that their official decisions may be affected by their personal interests. 29 Del. C. § 5806(a) and (b)(4). Thus, we considered if we should grant a waiver.

**D. Waivers may be granted if there is an undue hardship on the State employee or State agency, or if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

First, we note that State employees are entitled to a strong legal presumption of honesty and integrity in performing official duties. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd.*, Del. Supr., No. 304 (January 29, 1996). Here, the presumption is reinforced because you advised your colleagues, your immediate supervisor, your team leader, etc., of your proposed endeavors to obtain your certification, and that you are properly filing with the Commission for advice. They support your academic endeavors.

The hardship could occur effect both you and your agency. First, you are limited in sources where you could receive the certification from an entity that would give you the possibility of working with clients (non-State clients), who have the same areas of counseling needs as the clients you work with who are part of the drug court program. Second, because your sources for working with similarly situated clients are limited, if you could not work with your agency's provider, then your agency could miss the opportunity for you to gather more education and experience in a more closely job-related client environment.

Aside from these hardships, the public purpose is meant to ensure that officials are making decisions based on merits, not bias, favoritism, conflicts and the like, which could impair judgment. Those concerns are diminished in several ways:

- (1) Crossroads does not even screen for alcohol abuse. Thus, it could not generate, through such screening, a list of non-insured clients whom it could refer to you as needing CMH assistance and then have you recommended those clients to Crossroads.
- (2) If a client uses alcohol, they will be sent only to Aquila. Courts have held that when the action is "ministerial"—meaning the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment—then judgment cannot be impaired. *Darby v. New Castle Gunning Bedford Education Assoc.*, Del. Supr., 336 A.2d 209, 211(1975).
- (3) In matters where there is a choice between Aquila and Crossroads, you said that your colleagues, or supervisor, or others could make the decision. 29 Del. C. § 5805(a).
- (4) As noted, your recommendations in your State job are valued. However, your team, the team leader, Dr. Charles Webb, and Martha Gregor, Program Director scrutinize your recommendations. Also, as you must consider the family's desires, they will monitor your referrals for the results.
- (5) The waiver becomes a matter of public record. 29 Del. C. § 5807(b)(4). That way, the public will know why we granted a waiver, and can see the steps taken to avoid even appearances of impropriety.

### **III. Conclusion**

Based on the above, to avoid the potential conflict of representing or assisting the Crossroads before your agency, in your private capacity, you must not work on any matters related to your State clients, your agency, etc. As far as reviewing or disposing

of matters that may tend to impair judgment in your State job, we grant a waiver, under the above conditions.

**Original Signed by Chair Terry Massie**

**08-60 – Private Employment of Elected Official: Confidentiality of the following opinion was waived by the Applicant, who authorized, in writing, release by PIC. 29 Del. C. § 5807(d). (Note: Footnotes have been removed for ease of publication)**

***Advisory Op. No. 08-60 -Private Employment of Public Officer Hearing and Decision by: Chairman Terry Massie; Vice Chair Barbara Green; Commissioners: William Dailey and Wayne Stultz***

Dear Lt. Gov. Elect Denn:

You asked the Public Integrity Commission (PIC) for advice on accepting a private job as a lawyer after you take office as the Lieutenant Governor. If PIC found it contrary to the Code of Conduct, you asked it to consider a waiver. Based on the following law and facts, the proposed conduct is not contrary to the Code as long as the restrictions are followed. Under those conditions, PIC did not have to consider a waiver.

### **I. Background to the Decision**

As Lieutenant Governor, you will continue to be subject to the Code of Conduct and Financial Disclosure laws. 29 Del. C. § 5804(13) and 29 Del. C. § 5812(n)(1).

As a lawyer, you are subject to the Delaware Lawyers' Rules of Professional Responsibility (DLRPR). We do not interpret the DLRPR as the Delaware Supreme Court regulates the practice of law. However, the DLRPR addresses special conflicts for lawyers who are current or former government officers. *Rule 1.11*. It says such attorneys may be subject to government conflict laws. *Rule 1.11(e)(2) and cmt. [1]*. That is to circumscribe the State's consent to the conduct of its officers under its conflict laws. *Id. at cmt. [1]*. The Court chose not to rule on the lawyers' canons, saying when State officers have a "personal interest" in private employment, that as between the State and the private practice, "the public duty commands precedence." That does not mean public officers may never hold outside employment; only that they comply with State conflict laws. Delaware Courts have addressed State ethical concerns:

Both Codes have similar purposes:

- (1) to "instill public confidence" in government, 29 Del. C. § 5802(1) & (2), and in the "rule of law." DLRPR, Preamble [6];
- (2) to ensure public office is not used for unfair advantage or special privileges. 29 Del. C. § 5806(e), (f) & (g) and DLRPR Rule 1.11 *cmts.* [3] & [4];
- (3) be restrictive enough to instill public confidence, but not be so "unduly



circumscribed” as to discourage citizens from assuming public office. 29 Del. C. § 5802(3) and DLRPR Rule 1.11, cmt. [4].

One statute’s interpretations can be used in interpreting another if both include the same language or are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat. Constr.* § 45.15, Vol. 2A (5th ed., 1992). Accordingly, we reference the Code of Conduct and the DLRPR.

## II. Application of Facts and Law

As you said, the State Constitution prescribes the Lieutenant Governor’s duties:

Preside over the State Senate, voting only to break ties; (2) preside over the Board of Pardons, which under its rules normally meets 10 times per year, and pays no compensation; (3) perform other duties as may be provided by law. Del. Const. art. III, § 19 & § 20. Senate Presidents are compensated the same as the House of Representatives’ Speaker—a part-time position. Del. Const. art. III, § 19 & § 20; *The Delaware State Constitution: A Reference Guide*, pp. 118 & 119, Holland, Randy J. (2002). We do not interpret the State Constitution, as that is the Courts’ expertise, not administrative agencies. *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823, 833 (D. De1., 1972); *Plano v. Baker*, 504 F.2d 595, 599 (2d. Cir., 1974); *Matters v. City of Ames*, 219 N.W.2d 718 (Iowa, 1974). However, the plain language gives relevant facts on your official duties in ascertaining how they relate to your proposed private acts. You said the limited Lt. Governor’s duties would give you non-government time to practice law, particularly after the Legislative session ends. Your concern is the salary and its possible impact on your participation in government service. You were aware of the salary before being elected and asked the State Bar Association if any DLRPR rules barred you from a concurrent private practice. You learned that your situation was not unique and provided PIC with Bar Associations’ advice on public officers also having a private practice. The DLRPR and the Code of Conduct restrict, but do not completely bar other employment. Rule 1.11; 29 Del. C. § 5806(b). We address the Code restrictions:

State officers may not accept outside employment if acceptance may result in:

**(1) impaired judgment in performing official duties:** To avoid impaired judgment, in your State capacity, you may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5806(b)(1). Outside employment creates a personal or private interest. 29 Del. C. § 5804(5)(b) and § 5805(a)(2)(a). You expect to pursue legal work with firms that do not do business with any State agency. If you and the firm do no State business, you will have no occasion to “review or dispose” matters involving your private interest.

However, unexpected circumstances may arise. If so, you would recuse and/or seek PIC’s further guidance. We do offer this general advice if that occurs.

**(a) Recuse from the outset.** *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, Terry, J. (Del. Super., June 30, 1995), *aff’d.*, Del. Supr., No. 304 (January 29, 1996).

**(b) Recuse even if you are not the final decision maker.** Participation can

constitute a “review” of the matter. *Beebe, supra*. Even “neutral and unbiased” statements are barred. *Id.*

**(c) File disclosures with PIC where appropriate under the Code of Conduct.**

(1) If your private entity decides to do business with the State, you must file a full disclosure, even if there is no conflict, or recusal can occur if there is one. 29 Del. C. § 5806(d). This ensures PIC conducts an independent review of the particular facts that changed.

(2) If you cannot recuse, you must file a full disclosure with PIC explaining why. *Id.* at § 5805(a)(3). Courts have held that even if the officer, nor his family, have a private interest, some conflict concerns suggest it may still be “prudent” to recuse, except if recusal is impossible. *Harvey v. Zoning Board of Adj. of Odessa*, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000), *aff’d.*, *Zoning Board of Adj., of Odessa v. Harvey*, Del. No. 590, 2000 (May 23, 2001). In essence, exercising “prudence” relates to appearances of impropriety.” 29 Del. C. § 5806(a). *Harvey* essentially applied the judicial standard for these other public officers: “the rule of necessity.” Executive Branch officers, by filing the required disclosure in that situation, again ensures PIC’s independent review of those particular changed facts.

(3) Financial Disclosure Law filings. Regardless of circumstances, you must disclose the source of your outside employment, reimbursements or payment of expenses from that source, etc., in your annual financial disclosure report--a public record. 29 Del. C. § 5813(a)(4)(a).

**(2) preferential treatment to any person:** As noted above, the Code and DLRPR seek to avoid treatment that benefits the officer or his private entity. As long as you, nor the firm, do business with the State, you, nor the firm, would be in a position to receive preferential treatment. You expect you could find practice in the Federal Court system on such cases as bankruptcy and would not practice in State Courts. You did note you were not sure if State Courts are a “State agency” under the Code of Conduct. As the term “State agency” can have different meanings under various Delaware laws, we clarify that for purposes of the Code of Conduct:

“State agency” means any office, department, board, commission, committee, court, school district, board of education, and all public bodies existing by an act of the General Assembly or the State Constitution. 29 Del. C. § 5804(11).

You also will not have your State position on the firm’s letterhead, etc., to avoid concerns about even appearing to use public office to attract clients for yourself or the firm.

Also, you nor your firm will lobby State agencies. DLRPC does not bar the firm from dealing with the State but says to timely screen the member who is a public officer, and bar him from fees from the dealings. Rule 1.11 § (b) & (c). This provision, like the Code of Conduct, is to ensure no misuse of public office for an unfair advantage or preferential treatment, but at the same time “not be so restrictive” as to discourage public service. *Id.* at cmt. [4] & 29 Del. C. § 5802(3). The Code of Conduct, like Rule 1.11, does not bar the firm from so acting. Rather, it bars Executive Branch State officers from

representing or assisting a private enterprise on State matters, whether paid or not. 29 *Del. C.* § 5805(b)(1) & (b)(2). An example of “assisting” which would be preparing legal documents, but having another attorney sign the documents and appear before the Court or a State tribunal. *In re Ridgley*, 106 A.2d 527 (Del., 1954).

Based on the facts, you would comply with the State Code, but also have self-imposed a more stringent rule of not working for a firm that does business with the State.

Again, your circumstances may change. If the firm decides to engage in lobbying, you may seek PIC’s guidance on the Code of Conduct, and the State lobbying law, which it administers. 29 *Del. C.*, c. 58, Subchapter IV. Also, if the firm engages in lobbying, it, like any lobbying organization, can request its own guidance on the law, as authorized. 29 *Del. C.* § 5807(c) & §5809(2).

**(3) official decisions outside official channels:** This rule bars doing “thru the backdoor” that which you cannot do “thru the front door”—in essence, using your State position to influence other State decision makers on matters related to your private practice. The fact that you, nor the firm, will deal with the State eliminates that possibility. Moreover, under the Code, you are entitled to “a strong legal presumption of honesty and integrity” that you will comply. *Beebe, supra*.

**(4) any adverse effect on the public’s confidence in its government’s integrity.** This is basically an appearance of impropriety test. The standard is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code was being violated. *In re Williams*, 702 A.2d 825 (Del., 1997).

Here, we find no improper appearance based on the above relevant facts which basically come down to the following:

- (a) your proposed conduct, at this stage, is not contrary to the above provisions;
- (b) you plan to comport your conduct in a manner more restrictive than required by the Code;
- (c) your proposed conduct is not unique, and is consistent with DSBA opinions you provided, concluding the conduct would not create a violation or an appearance of impropriety.
- (d) you plan to return to PIC if additional advice is necessary;
- (e) you will allocate your private practice time to ensure your State job commands precedence over that work; and
- (f) you will not use State resources for your private practice.

### **III. Confidentiality**

The DLRPR and the Code bar misuse of confidential government information. Rule 1.11; 29 *Del. C.* § 5806(f) and(g). As to advisory opinions, generally, if no Code violation exists, the opinion is confidential. 29 *Del. C.* 5807(c). You plan to provide the opinion to firms where you seek employment. As the confidentiality belongs to you, you

are free to release it to anyone. However, if you desire that PIC provide the opinion, you must authorize us in writing. 29 *Del. C.* § 5807(d)(1).

#### **IV. Conclusion**

Based on the above facts, law, and restrictions, we find no violation of the Code.

#### **Original Signed by Chairman Terry Massie**

**08-43 – Private Employment with Agency Contractor:** A State employee asked if she could accept a private job which did business with her State agency. 29 *Del. C.* § 5806(d). She would not deal with her own agency; or its clients 29 *Del. C.* § 5805(b)(1). She would have no occasion to make decisions about the private firm in her official capacity. 29 *Del. C.* § 5805(a). She would recuse if her private clients came to her for State services and refer them to another employee. In her private capacity, if her State clients came to the firm, the matter could be given to another of the firm's employees. The Commission found no conflict if she did not deal with her State clients in her private capacity, and vice versa.

**08-42 – Outside Employment with State Agency Certified Company:** A State employee asked if outside employment with a private firm, complied with the Code, when the firm had been State certified to provide certain services. 29 *Del. C.* § 5806(d). It was not certified by her agency. In her private capacity, she had no State clients as she dealt primarily with grants. The private company had no grants from her agency. She would not deal with her own agency. 29 *Del. C.* § 5805(b)(1). Her State section did not deal with the type of services offered by the private firm, or decide if the firm should be certified. Thus, she had no occasion to review or dispose of matters related to the company. 29 *Del. C.* § 5805(a). The Commission found no conflict.

**08-41 – Outside Employment—Company Did Business with the State in the Past:** A State employee asked if he could accept a private job with a firm that several years ago did business with his agency. He would not represent or assist the firm on any State matters but would work on matters outside the State of Delaware. The Commission approved a prior request from him on outside employment. In that case, as in this one, he said he would not deal with *any* State agency, even though the law only required he not represent or assist a private enterprise before his own agency. 29 *Del. C.* § 5805(b)(1). He ended up not accepting that job but wanted to know if the fact that this firm had previously done business with his agency would change PIC's guidance. The Commission noted that he was self-imposing a greater restriction than required by law. The only difference here is this firm previously did business with his agency but was no longer. The Commission found no conflict as long as he followed the prior advice.

**08-37 – Outside Employment of Licensed Professional:** A State employee, who was a licensed professional, asked if her outside practice would create a conflict as some of her clients may later qualify for some benefits administered by her agency. There was a very remote

possibility that persons approved for the State benefits, might come to her private practice, as they select their own provider. Such State clients had not come to her in, at least, a 7-year period. In her State job, she dealt with children. Her State job focused on children who were State clients. Her outside clients were not clients of her Department, Division or Section. Thus, she did not review or dispose of matters pertaining to her private clients in her State job. 29 *Del. C.* § 5805(a). Nor did she represent or otherwise assist her private enterprise before her own agency. 29 *Del. C.* § 5805(b)(1). She also was not referred clients by the State Courts. Although it was a very remote possibility, if her private clients came to her State job, she would recuse. 29 *Del. C.* § 5805(a). In her outside job, she would not accept agency clients. 29 *Del. C.* § 5805(b)(1). The Commission found no conflict at the time. It held that a waiver may be granted if such clients came to her and for some reason she could not recuse, but she would need to file a disclosure of her inability to delegate. 29 *Del. C.* § 5805(3).

**08-18 – Outside Employment – Tutoring:** A State teacher wanted to contract with a private firm to tutor students. She did not participate in any State decision regarding any contracts with the firm; would not be tutoring her own students, or students in her school, etc. PIC previously ruled on a very similar situation and found no conflict as long as those teachers complied with certain restrictions (e.g., no tutoring of own students or students in her school). PIC is to strive for consistency in its opinions. Accordingly, it found she would have no conflict if she complied with those same restrictions, which are detailed in the redacted 07-30 opinion below.

**08-03 and 08-16 – Outside Employment - Two Tutors:** Two teachers sought outside jobs as tutors with a private enterprise which contracted with the State. They filed disclosures as required. They would not tutor their own students or students from their educational facility; they did not make decisions on the State’s tutoring contract; and would not represent themselves or the company before their own agency. As several such opinions have been issued, the language of the prior opinions was adopted as the circumstances were the same, and the Commission is to strive for consistency in its opinion. 29 *Del. C.* § 5809(5). The sample language without identifying information is below in *Commission Op. No. 07-30*.

**07-68 - Outside Employment Disclosure - Waiver Denied:** The requester wanted a part-time job with a company that is regulated by the State Office in which she worked. By law, she disclosed that relationship to the Commission as a condition of commencing and continuing State employment. 29 *Del. C.* § 5806(d). Her State duties involved responsibilities for licensing, certification and surveying such facilities, including the private employer. Her public and private duties differed to some extent. Her interest in the part-time job was because she suffered a significant loss in State over-time pay when she left her last State job to accept this State position. She and her supervisor said she would be screened from any State involvement in decisions about that company, re: licensing, etc. Thus, she would not review or dispose of matters pertaining to her private employer. 29 *Del. C.* § 5805(a). She said that in her private capacity she would not represent or otherwise assist the company on State matters before her own Office. 29 *Del. C.* § 5805(b)(1). As far as confidential information, she said she believed surveys, licensing, etc., of such facilities were public records. She and her agency said that if she did have access to confidential information about such facilities she would be blocked by screening and would not use it to assist the facility. 29 *Del. C.* § 5806(f) and (g).

Her supervisor expressed the economic need for her to work part time. Her opportunities were limited as most part-time jobs would be at facilities regulated by her Office.

However, the supervisor said her Office did not regulate some facilities that could use her professional services. The Commission found there was a conflict, or at least the appearance thereof, due to the overlap between her State duties and the private job. She would be in a position to assist the facility, and unable to ignore non-compliance with her State Office's regulations, etc. 29 Del. C. § 5806(b)(1)(2) and (4) (impaired judgment; preferential treatment, or the appearance thereof). Other regulated facilities and the public could suspect she was violating the Code.

**07-61 – Outside Employment – Subcontractor on Federal Rule Proposal:** A State employee asked if he could accept an outside consulting subcontract on a Federal rule proposal. As a contractor he would serve as a communications consultant, working with web platforms and other communications tools, e.g., media, etc., to publicize the opportunity for people to comment on the rule. None of the work is within the purview of his State job. Thus, he would not review or dispose of the matter in his State job. 29 Del. C. § 5805(a)(1). His name would not appear on the web site, but if people ended up contacting him through such things as a “contact us” link, he would not deal with any Delaware organizations or persons who did business with, or were regulated by, his agency. Someone in his agency might choose to comment on the rule, but he would not be involved in that activity. 29 Del. C. § 5805(a)(1). The Commission found no conflict as long as the facts did not change and if he followed the same restrictions identified in *Opinion No. 07-58*.

**07-60 – Outside Employment - Newly Hired Disclosure:** A newly hired State employee filed an ethics disclosure because as a condition of commencing employment she must file a full disclosure because she has a financial interest (employment) in a private business that did business with the State. 29 Del. C. § 5806(d). She worked in a completely different Department and would have no occasion to make decisions about the private enterprise, nor did she have oversight of them or the contract. Thus, she did not review or dispose of matters pertaining to the company. 29 Del. C. § 5805(a). She would also have no occasion to go before her own agency and personally help the private enterprise in terms of getting contracts. 29 Del. C. § 5805(b)(1). The contracts that the company had with the other Department were publicly noticed and bid. The employee discussed information about the State contract and a description of her duties within her Department. Those duties did not involve the same State clients. In fact, they were not even in the same zip code as any of her clients. There also was no other overlap with the company. Her supervisors were both aware of their employee's private obligations and both they, and the filer, knew she could not and would not use State time or resources for her private job, 29 Del. C. § 5806(e), or misuse any confidential information about clients. 29 Del. C. § 5806(f) and (g). The Division Director checked to make sure that there were no contracts with her Department. The Commission found no conflicts.

**07-58 – Outside Employment—Private Consulting with Out-of-State Clients:** A State employee asked if he could accept an outside consulting contract for out-of-State clients, both public and private. He had no State duties related to the prospective clients. The Commission found there was no conflict as long as he complied with the following restrictions; (1) if any of his clients should ever do business with his agency, whether directly or indirectly, he must recuse, 29 Del. C. § 5805(a)(1); (2) if any of his private clients do business with, or are regulated by any State agency, he must file a full disclosure with PIC as a condition of continuing State employment, 29 Del. C. § 5806(d); (3) he may not use any State resources or time for his private business (he will be consulting by phone after his normal work day, and will not use

State resources or time), 29 Del. C. § 5806(e); (4) he may not use his State position in any way connected to his private job: e.g., not advertised to or discussed with clients, or used on stationery or other communications such as e-mail, business cards, etc.; *Id.* (5) he must follow any agency policy if it is more stringent; (6) he may not represent or in any way assist any of the private clients before his agency, if they ever have any dealings with it, 29 Del. C. § 5805(b)(1); (7) he may not improperly use or disclose State confidential information to his clients, e.g., proprietary technical information, etc., 29 Del. C. § 5806(f) & (g); and (8) he must screen for conflicts in his State job and private work. He is entitled to the strong legal presumption that he will follow these limitations. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996).

**07-51 – Outside Employment with Company Doing Business with the State:** A State employee wanted to accept a part-time job with a private employer which had been awarded a State contract. The contract was not with his State agency. He filed a full disclosure as required. 29 Del. C. § 5806(d). The employee's State clients were not the same as the ones he would have in the part-time job. Thus, he would not review or dispose of matters in his State job where he had a personal or private interest. 29 Del. C. § 5805(a)(1). He would not perform the private work during State hours or using State resources. 29 Del. C. § 5806(e). PIC found no violation, but if the employee's situation changed, he was to notify PIC.

**07-41 – Outside Employment in Regulated Practice:** A State employee filed a disclosure for 2 reasons; (1) he was a licensed professional with a private practice that was regulated by a State agency; and (2) he had a financial interest (employment) in a private enterprise that did business with the State. 29 Del. C. § 5806(d). Regarding the first reason for filing--a professional practice regulated by the State--in his State capacity, he made no decisions, nor had any other involvement in the regulatory board. 29 Del. C. § 5805(a)(1). Regarding his private employment, while he worked with others in his profession, his State job did not require him to make decisions on any of the professionals he would work for, or with, in his private job. Also, he had no involvement in his Department's contracts for licensed professionals in his field. *Id.* His State job was primarily working with adults. His private job would deal with adolescents. Thus, he would have no occasion to represent or otherwise assist the private enterprise on matters related to his adolescent clients. 29 Del. C. § 5805(b)(1). If his State clients came to his private job, he could recuse and let other professionals take them as clients. However, there was a very remote chance that he might not be able to refer such clients to another professional if there was an emergency. As he was only working very limited hours in the private job, the possibility he would deal with an emergency situation was also remote. The Commission found no conflict at this time, and he could return to the Commission if his circumstances changed.

**07-35 - Outside Employment - Waiver Granted; opinion becomes public record.** 29 Del. C. § 5807(b)(4).

#### **Advisory Op. No. 07-35- Outside Employment**

***Hearing and decision by:*** Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners Dennis Schrader and William Dailey

Dear Mr. [Ivan] Edmunds:

The Public Integrity Commission reviewed your disclosure on your private job with People's Place. Based on the law and facts below, we grant a waiver for you to engage in the outside employment.

## I. Law and Facts:

**(A) Disclosure:** State employees must file a disclosure if they have a financial interest in a private firm that does business with any State agency. 29 Del. C. § 5806(d). People's Place contracts with the Department of Services for Children, Youth, and Their Families (DSCYF), Division of Family Services (DFS), where you work.

**(B) State Job:** In your State job, you may not review or dispose of matters where you have a financial interest, including a private job. 29 Del. C. § 5805(b). You are a DFS Family Crisis Therapist. You are not in any way involved with the contract.

**(C) Private Job:** State employees may not represent or assist a private firm before their agency. 29 Del. C. § 5805(b)(1). People's Place contracts for Juvenile services. Your job is not to work on DFS' contract, but to counsel battered and abused adults. No facts suggest you represent or assist People's Place before your agency.

**(D) Appearance Test:** State employees may not accept private jobs, if it may affect the public's confidence in its government. 29 Del. C. § 5806(b)(4). This is to avoid even an appearance of impropriety. *Commission Op. No. 92-11*. On the face of it, working for a firm that contracts with your Division may appear improper. However, the test is: if a reasonable person, knowing *all* the relevant facts that a reasonable inquiry would disclose, believes the official's ability to carry out State duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997).

Here, other relevant facts are: (1) you are technically complying with the law; (2) your private work is screened so you do not get State clients; (3) you are entitled to a strong legal presumption of honesty and integrity; (4) to further instill public confidence in its government, waivers are made public so the public will know *all* the relevant facts for the waiver; and (5) the public purposes of the restrictions are to prevent preferential treatment for the private firm by you in your State job, or from your colleagues if you represented or assisted the firm before your agency; those purposes are served here.

## II. Conclusion:

Based on the specific facts and law above, we grant a waiver, limited to these particular facts, for you to work for People's Place. If the facts change, you may need to file an updated disclosure.

**Original Signed by Chair Terry Massie**

**07-30 – Outside Employment - Private Tutoring with Company that Does Business with the State:** A teacher filed a disclosure of her outside employment as a private tutor with a private firm that contracted with the State, as a condition of commencing and continuing employment with the State. 29 Del C. § 5806 (b). The private vendor contracted with various school districts, but not her district. She made no official decisions about the State contracts with the firm by which she is employed. 29 Del C. § 5805(a)(1). The State contract was publicly noticed and bid. 29 Del C. §5805 (c). The contract value, as it related solely to this teacher,



was less than \$2,000. She tutored during non-State work hours. Counsel provided a prior Commission opinion from a similar situation, where the facts were essentially the same and no violation was found. Commission Op. No. 02-02. The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5). The Commission found no violation.

**RE: Advisory Op. No. 07-30 - Disclosure- Outside Employment (Tutor)**

**Hearing and Decision by:** Vice Chairs Barbara Green and Bernadette Winston,  
Commissioners William Dailey, Dennis Schrader and Wayne Stultz

Dear \_\_\_\_\_

The State Public Integrity Commission reviewed your full disclosure regarding your part-time job as a tutor with XXX, which contracts with State School Districts to tutor students. Based on the following facts, and law, we concluded that your part-time employment does not create a conflict.

As you are privately employed by a company that does business with the State, you must file a “full disclosure” with the Commission. 29 Del. C. § 5806(d). We reviewed your worksheet and understand that you do not tutor any students from the school where you teach or even in your School District.

We previously addressed, at length, the restrictions on tutoring. *Commission Op. No. 02-02*. In that opinion, we noted that conflicts can arise if the teacher tutored students from their own school. You are not engaged in such conduct. Further, your worksheet reflects that in your official capacity, you have no authority to determine what company gets a tutoring contract. 29 Del. C. § 5805(a)(1); you do not represent or otherwise assist the private company before your own District, 29 Del. C. § 5805(b)(1); etc., are not performing the private work during State hours or with State equipment, etc. 29 Del. C. § 5806(e).

Based on these facts, we find no violation. However, if there is a substantial change in your circumstances, you should review our opinion, the full disclosure requirements, etc., and, if necessary, submit the new information. For example, if your phone number changes, you need not file an update. However, any substantial change, e.g., in your official capacity you become involved in issuing contracts to private companies to tutor, should be filed so that we can determine if your changed status may result in a conflict.

**07-27 – Outside Employment—Contractor of State Agency:** A State employee expected to end a part-time job due to a promotion in a State job. However, an opinion was sought, for the time, at the private firm. A disclosure was filed, as required by law, if a State employee has a financial interest in a private firm doing business with, or regulated by, a State agency. 29 Del. C. § 5806(d). The private firm had a contract with a State agency, but not the agency where the employee worked. Thus, the employee would not review or dispose of matters pertaining to the company. 29 Del. C. § 5805(a). The employee had no reason to represent or assist the private firm before her own agency. 29 Del. C. § 5805(b)(1). Totally different agencies refer clients to the private firm. The client had a choice of which private firm to go to. This firm was one provider. One job was with adult clients and the other was with adolescent clients. If any of the

State clients were referred to the private firm, she would recuse. The Commission found no violation.

The employee was also is a licensed professional in a totally different field from her State job and her private job. She asked if she needed to file a disclosure of that part-time job or if the Commission would consider it at this meeting. As the Commission had no prior facts on that job, by consensus, it advised her to file a disclosure on that particular matter.

**06-86 – Outside Employment – Vendor for Different Division; Different Clients**  
***As a waiver was granted, the opinion is a matter of public record. 29 Del. C. § 5807(b)(4).***

### **Advisory Op. No. 06-86 - Contracting with State Vendor**

***Hearing and Decision by: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston, Commissioners William Dailey, and Dennis Schrader***

Dear Ms. Gregor:

The Public Integrity Commission reviewed your disclosure of your private job with Kent/Sussex Counseling, which contracts with the Department of Services for Children, Youth and their Families. You are employed by the Department. If a conflict exists, you seek a waiver. Based on your written disclosure and comments at our meeting, to the extent your conduct would violate the Code, a waiver is granted based on the following law and facts.

State employees must file disclosures if they have a financial interest in a private firm that does business with, or is regulated by, the State. 29 Del. C. § 5806(d). Your financial interest is your private job with Kent/Sussex Counseling. It contracts with your Department, so you filed the required disclosure.

The contract is not with your Division--Children's Mental Health—where you are the Director of Drug and Alcohol Services. The private firm contracts with a separate Division--Alcohol Services and Mental Health. While the general work is the same--counseling clients with substance abuse problems--the clients are not the same in your two jobs. Your State job deals with children and substance abuse. Your private job deals with adults and substance abuse. You have no involvement with the private firm's contract, nor any occasion to make other decisions about the firm in your State capacity.

Based on those facts, you are not violating the provision on reviewing or disposing of State matters if you have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

By law, you may not represent or assist a private enterprise on matters before your agency. 29 Del. C. § 5805(b)(1). In your private job, you do not have the same clients. Also, the Counseling firm screens incoming cases to ensure you do not have clients from your own Division, but clients from any other Division. As you have no Departmental clients, you would not formally represent the firm before your Department.

However, to the extent your private job might literally be seen as “otherwise assisting” the firm, you sought a waiver.

Waivers may be granted if literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a). State employees may not represent or assist private firms before their agency to ensure: (1) a private firm does not get a “leg up” on competitors because of your State connection; and (2) co-workers and colleagues are not biased in decisions about the firm because of your affiliation.

Here, any connection between your two jobs is very remote, as seen in the facts. Also, the contract was publicly noticed and bid, giving competitors a chance to contract. No facts suggest it was awarded to the firm because of you. All the facts help ensure the public concerns are achieved. Accordingly, we grant a waiver. However, if the above facts change, you are free to return to the Commission for advice.

**Original signed by Chair Terry Massie**

**06-84 – Outside Employment - Job with Contractor of Different Agency; Different Clients: A waiver was granted so the opinion is a matter of public record. 29 Del. C. § 5807(b)(4).**

**Advisory Op. No. 06-84 - Contracting with State Vendor**

***Hearing and Decision by: Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, and Dennis Schrader***

Dear Ms. Harris:

The Public Integrity Commission reviewed your disclosure of your private job with Kent/Sussex Counseling, which contracts with the Department of Services for Children, Youth and their Families. You are employed by the Department. If a conflict exists, you seek a waiver. Based on your written disclosure and comments at our meeting, to the extent your conduct would violate the Code, a waiver is granted based on the following law and facts.

State employees must disclose their financial interest in a private firm that does business with, or is regulated by, the State. 29 Del. C. § 5806(d). Your financial interest is your private job with Kent/Sussex Counseling. It contracts with your Department, so you filed the required disclosure.

The contract is not with your Division—Developmental Disabilities--where you are a Social Services Specialist. The private firm contracts with the Division of Alcohol Services and Mental Health. You have no involvement with the private firm’s contract, nor any reason to make decisions about the firm in your State job.

Based on those facts, you are not violating the provision on reviewing or disposing of State matters if you have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

By law, you may not represent or assist a private enterprise on matters before your agency. 29 Del. C. § 5805(b)(1). In your private job, you do not have the same clients. Also, the private firm screens incoming cases to ensure you have no clients from your own Division or any other Division. As you have no Departmental clients, you would have no reason to formally represent the firm before your Department.

However, to the extent your private job might literally be seen as “otherwise assisting” the firm, you sought a waiver.

Waivers may be granted if literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a). State employees may not represent or assist private firms before their agency to ensure: (1) a private firm does not get a “leg up” on competitors because of your State connection; and (2) co-workers and colleagues are not biased in decisions about the firm because of your affiliation.

Here, any connection between your two jobs is very remote, as seen in the facts. Also, the contract was publicly notice and bid giving competitors a chance to contract. No facts suggest it was awarded to the firm because of you. All the facts help ensure the public concerns are achieved.

Further, waivers may be granted if an employee has an undue hardship. 29 Del. C. § 5807(a). You accepted the job so you could get the required credits to be certified in this field. As your Department contracts with most of the firms who provide this service, you are limited in places to go to advance your certification.

Accordingly, we grant a waiver. However, if the above facts change, you are free to return to the Commission for advice.

**Original signed by Chair Terry Massie**

**06-76- Outside Employment - Employer Contracts with Different Division. Waiver Granted. Opinion is a matter of public record. 29 Del. C. § 5807(b)(4).**

**Advisory Op. No. 06-76 - Employment with State Vendor**

**Hearing and Decision by:** *Chairman Terry Massie, Vice Chairs; Barbara Green and Bernadette Winston, Commissioners; William Dailey and Dennis Schrader*

Dear Ms. McCormick:

The Public Integrity Commission reviewed your disclosure filing of your employment with Resources for Human Development (RHD). RHD contracts with your agency, the Department of Health and Social Services. You asked if employment with RHD created a conflict, and, if so, asked for a waiver. Based on the following law and facts, to the extent there may be a conflict, or the appearance thereof, we grant a waiver.

The law requires that State employees file a disclosure if they have a financial interest in a private company that does business with or is regulated by the State. 29

*Del. C. § 5806(d)*. As your financial interest is private employment with RHD, and it contracts with your agency, you filed the required disclosure.

You are employed in the Departments Division of Developmental Disabilities Services. RHD contracts with a different division, Substance Abuse and Mental Health. In your State job, you may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. *29 Del. C. § 5805(a)(2)*. You are in no manner involved in making decisions about RHD in your State job. As long as there is no change in those facts, there is no violation of this restriction.

In your private job, you may not represent or otherwise assist a private enterprise on matters before your agency. *29 Del. C. § 5805(b)(1)*. In your private job, you issue medications and complete shift program notes. In that job, you have no dealings with either your Division or the Division which contracts with RHD. You perform the private work during non-State hours. To the extent your activities in your private job might literally be read as meaning that you are otherwise assisting RHD before your own agency, you sought a waiver.

Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. *29 Del. C. § 5807(a)*. The public purpose of restricting State employees from representing or assisting private entities before their own agency is to ensure that the private entity does not get a leg up on its competitors because of your State connection. Further, it ensures that your co-workers and colleagues are not engaging in biased decisions in such matters as awarding a contract, etc., because of your private employment connection.

Here, the public purposes are achieved because the connections between your State and private employment are very remote. You are not involved in any of the contract actions; the contract is not even with your own Division; the contract was awarded before you were even hired; your clients are not the same in the two jobs; in your private capacity you do not report to, nor are you evaluated by anyone in your Division, or by anyone in the Department. Those facts indicate that the public concerns identified above are achieved because of that remoteness.

Accordingly, we grant a waiver. However, if your circumstances change, you are free to return to the Commission for advice.

**Original signed by Chair Terry Massie**

**06-75 & 06-81 – Outside Employment - Agency Contractor: Waiver Granted. A waiver was granted so the following opinions are not confidential. *29 Del. C. § 5807(b)(4)*.**

**Advisory Op. No. 06-75 & 06-81 - Employment with Agency Contractor**

***Hearing and Decision by: Chairman Terry Massie, Vice Chairs; Barbara Green and Bernadette Winston, Commissioners; William Dailey and Dennis Schrader***

Dear Ms. Barile and Ms. Short:

The State Public Integrity Commission reviewed your disclosures identifying your financial interest in a private firm, New Behavioral Network (NBN) that contracts with your agency, the Department of Children, Youth and Their Families. The facts are nearly identical. Based on those facts, we grant a waiver, with the restrictions discussed below, so that you can continue your outside employment with NBN.

The law requires that State employees file a disclosure if they have a financial interest in a private company that does business with or is regulated by the State. 29 *Del. C.* § 5806(d). As your financial interest is private employment with NBN, and it contracts with your agency, you filed the required disclosure.

You both are State employees in the Family Services Division of the Department. NBN contracts with a different division, Child Mental Health. In your State job, you may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. 29 *Del. C.* § 5805(a). Neither of you are in any manner involved in making decisions about NBN in your State job. As long as there is no change in those facts, there is no violation.

In your private job, you may not represent or otherwise assist a private enterprise on matters before your agency. 29 *Del. C.* § 5805(b)(1). In your private jobs, you are both Treatment Mentors. The Child Mental Health Division employees do not evaluate your private work and you will not have contact with that Division's caseworker. Neither of you will work with children who are, or were, involved in abuse investigations by you or anyone in your division. To the extent your activities in your private job might literally mean that you are otherwise assisting NBN before your own agency, you both sought waivers.

Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. 29 *Del. C.* § 5807(a). The public purpose of restricting State employees from representing or assisting private entities before their own agency is to ensure that the private entity does not get a leg up on its competitors because of your State connection. Further, it ensures that your co-workers and colleagues are not engaging in biased decisions in such matters as awarding a contract, etc., because of your private employment connection.

Here, the public purposes are achieved because the connections between your State and private employment are very remote. You are not involved in any of the contract actions; the contract is not even with your own Division; the contract was awarded before you were even hired; your clients are not the same in the two jobs; in your private capacity you do not report to, nor are you evaluated by anyone in your Division, or by anyone in the Department. Those facts indicate that the public concerns identified above are achieved because of that remoteness.

Accordingly, we grant waivers to each of you. However, should there be any change in your circumstances you are free to return to the Commission for advice.

**Original Signed by Chair Terry Massie**

**06-44 – Out-of-State Clients:** State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 Del C. § 5806(b).

A State employee created a private company with clients primarily from out-of-state. However, two Delaware firms had expressed interest in contracting with the private firm. As a State employee, the individual made no decisions about the private company, as it did not do business with the employee’s agency. Thus, he did not review or dispose of matters where he had a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5806(b)(1) and 29 Del. C. § 5805(a). In a private capacity, the employee did not seek to contract with any State agency. Thus, he would not be dealing with his own agency. 29 Del. C. § 5805(b)(1). This would preclude his colleagues and coworkers from showing him or the firm preferential treatment, as they would not be making any decisions about him or the firm. 29 Del. C. § 5806(b)(2). The company is not involved in the type of work done by the individual or the employing Department. The private company advertised through the Internet and other ads to identify its services. The employee said it was possible that State employees would see those ads, but State employees were not “targeted” by the company. The Commission found no violation.

**01-18 – Dual State Positions:** A State employee asked if he could serve as an appointee to a Commission while holding a full-time State job. Based on the following facts and law, he could hold the dual State positions if he recused himself from the types of matters identified herein.

The State employee was being appointed to the Commission pursuant to a State statute which required that certain persons be appointed. The Commission had some oversight of appeals presented to the Commission by the State employee’s supervisor. The Commission also selected the individual who held the supervisory position. Its other functions, which were its primary duties, did not entail decisions about, or affecting, the supervisor.

The Code of Conduct prohibits State employees from accepting other employment if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; and (4) any adverse effect on the public’s confidence in the integrity of its government. 29 Del. C. § 5806(b).

“Other employment” includes secondary positions with the State. *Commission Op. No. 99-35*. In that opinion, the Commission held that it would be a conflict for a State employee to render decisions that had significant impact on his supervisor, and accordingly he should recuse himself. Here, the State employee, to avoid violating the restriction on participating in decisions where his judgment might be impaired, would recuse himself when the Commission made decisions about his supervisor. As he would recuse himself, nothing indicated he would be able to give preferential treatment to his supervisor or make official decisions outside official channels.

The Code also prohibits State employees from incurring any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest.

29 Del. C. § 5806(b). We understood that his Commission duties would not substantially interfere with the performance of his State job.

If a person holds a full-time State job and also a paid appointed position with the government, he cannot be paid more than once for coinciding hours of the workday. 29 Del. C. § 5821, *et. seq.* He was advised to review that subchapter, and if he had questions on its applicability to his situation, he should review our prior opinions interpreting that section and/or seek further guidance from us.

**01-17 – State Nursing Specialists to Contract for Private Study:** Several State nurses wanted to contract with a private company to provide services to test children who were part of a study being conducted by a private enterprise. Based on the following law and facts, the Commission concluded that the conduct would not violate the Code as long as the contract work was performed during non-State work hours.

#### **(A) Applicable Law**

State employees may not have any interest in a private enterprise or incur any obligation of any nature which is in substantial conflict with the proper performance of their duties in the public interest. 29 Del. C. § 5806(b). Also, they may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *Id.*

#### **(A) Application of Facts to Law**

In deciding if the obligation to a private enterprise substantially conflicted with performing State duties, one fact we considered was when the outside employment would be performed. *Commission Op. No. 96-17.* At the time, the nurses had a backlog at their State job. As a result, they worked their regular State hours and also worked with clients and their families at night and occasionally on weekends. They received compensatory (comp) time for performing State duties during non-regular work hours. If they contracted with the private company, they would conduct the study tests for the study during their evenings, weekends, holidays, vacation or comp-time.

A representative of the private enterprise said she expected she would need about three nurses to test approximately 40 children. The test took about 1 to 2 hours per child. It was given only at a certain age, and she expected an average of two children would be tested each month. The Division Director was aware of the contract and did not foresee any disruption to their job performance resulting from using non-State hours to give the tests.

Regarding the remaining criteria used to decide if outside employment was acceptable, the criteria and applicable facts were as follows:

#### **(1) Impaired judgment in performing official duties.**

In their official capacity, they had no decision-making authority over any funding the private enterprise may obtain from the State; did not decide if the private enterprise would be selected to perform studies; would not see the same clients in their private capacity that they saw in their State capacity; and did not decide who qualified for the private study. As they had



no decision-making authority over the private enterprise or the private clients in their State capacity, it did not appear their judgment would be impaired.

**(2) Preferential treatment to any person.**

At first glance, as their State work was backlogged, and they even worked some evenings and weekends, it may have appeared that in deciding how to use their time they would opt to perform the private work because of the additional pay, which could result in preferential treatment for the private enterprise's study rather than spending their off-duty time to perform compensatory work for the State. Having discussed this at length, it appeared there would be enough time to perform the contract work. Also, the agency, which decided when and how the backlog would be addressed, did not object to the contract work.

**(3) Official decisions outside official channels.**

No facts indicated that this was an issue.

**(4) Any adverse effect on the public's confidence in the integrity of its government.**

This is basically an appearance of impropriety test. *Commission Op. No. 96-72*. As it did not appear that: (1) their judgment would be impaired; (2) they could give preferential treatment to the private organization or the children in its study; or (3) they were in a position to make official decisions outside official channels, there was no appearance of impropriety based on those facts. Further, to ensure that approval of their outside work under the Code of Conduct would not violate or circumvent the Merit rule on outside employment, they obtained a decision from the Deputy Attorney General assigned to their agency stating that the conduct would not violate the Merit Rules. See, e.g., *Commission Op. No. 99-26* (conduct that would violate or circumvent Merit Rules would have adverse effect on public's confidence). Finally, we also discussed at length that the tests could only be provided by nurses who hold certain credentials and who had obtained a given number of hours of experience in performing the tasks involved. This limited the number of nurses who could give the tests and those nurses were primarily State workers. This fact reduced the possibility that they used their public office to obtain the private contract as there were objective criteria to establish the limited number of nurses available and the *bona fides* of the nurses seeking to contract.

**(B) Conclusions**

Based on the above law and facts, the private contracts would not violate the Code of Conduct as long as the nurses performed the contractual work during non-State work hours.

**01-11 – Outside Employment—Part-time with Local Government:** A local government asked if it would violate the Code of Conduct if the local government hired an engineer to work part-time to provide “certain internal management assistance” for approximately one year, while still employed by a private enterprise. Based on the following law and facts, we concluded that with the following restrictions, the employment would not violate the Code of Conduct.

The local government planned to enter an arrangement to hire an engineer to work part-

time for a year performing functions related to internal management assistance. The private employer apparently required a year's notice. The local government wanted to keep the individual's interest in a full-time job with the local government by offering a part-time job during the one-year period. If the private enterprise decided that a full year's notice was not necessary, the individual would have the opportunity for full-time employment earlier.

### **A. Jurisdiction**

The local government posed two scenarios for its hiring plan: (1) hire the individual during the one-year interim and not pay any wages or benefits during that time; and/or (2) hire the individual during the one-year interim and have the compensation deferred until hired full-time, without violating the Code of Conduct.

As the first scenario envisions not paying the individual, the first issue was whether the Commission has jurisdiction over a non-paid employee. The Code of Conduct applies to employees who are "compensated" by a government agency. 29 *Del. C.* § 5804(11)(a)(1). "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." 29 *Del.* § 5804(4). The Commission held that the promise of a future full-time job with the local government is within that definition of "compensation." Thus, even if the individual received no pay or benefits for working for the local government during the notice period, we had jurisdiction to decide if the concurrent employment would violate the Code.

Having concluded that the promise of a future full-time job was within the Code's definition of "compensation," the particular payment plan becomes irrelevant. In fact, the Commission asked why the local government posed those two scenarios rather than just paying the individual from the start of the part-time employment. The local government thought the payment arrangement might have some impact on whether there was a violation of the Code of Conduct, and that by not paying or deferring the compensation there might not be a violation. As noted above, the local government's method of payment was basically immaterial to whether the employment violates the ethics law because, regardless of the payment plan, (no pay, deferred pay, or payment throughout the interim employment), the individual was being "compensated" as that term is defined under the Code of Conduct.

### **B. Code of Conduct Restrictions**

As noted above, it is not the method of payment that drives the issue of whether the employment violates the Code. Rather, it is the individual's conduct once he begins work for the local government that must be considered and where necessary, curtailed to avoid violating the Code.

The local government asked if the employment would violate the Code restrictions on: (1) government employees reviewing or disposing of matters where they have a personal or private interest which would tend to impair independent judgment in performing official duties, 29 *Del. C.* § 5805(a)(1); or (2) having other employment if it may result in: (a) impaired independent judgment in performing official duties; (b) preferential treatment to any person; (c) official decisions outside official channels; or (d) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

In his official capacity, he would not be involved in any present local government operations with third parties, as he would “render certain internal management assistance” to the hiring agency. As long as he would not be involved in his official capacity with the private company which employed him, he would not be in violation of the restriction against reviewing or disposing of matters where there is a personal or private interest (the private employment) which tends to impair judgment in performing official duties. *See, 29 Del. C. § 5805(a)(1).*

As an aid to understanding the restriction on “reviewing or disposing” of matters where there is a personal or private interest, Delaware Courts, in interpreting that restriction, said that even “neutral and unbiased comments” are improper. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff’d, Del. Supr., No. 304 (January 29, 1996).* Moreover, the official’s involvement cannot consist of “indirect and unsubstantial” participation. *Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).* We understand that if issues related to the private enterprise arose, the deputy engineer, who would not be reporting to the individual, would make decisions about the private enterprise.

The request did not ask what limits might be imposed on his activities on behalf of the private enterprise while he continued to be employed there. As noted above, he could not represent or otherwise assist the private enterprise before his local government agency. *29 Del. C. § 5805(b)(1).* For example, it was our understanding that the private enterprise sometimes did business with the local government agency which sought to hire him. He would not, in his private capacity, be able to “represent” the private enterprise before his agency (e.g., formally represent), or “otherwise assist” the private enterprise on the matter (e.g., performing engineering duties relative to the matter; preparing a response to a bid proposal; etc.).

The next substantive question was whether the arrangement would violate the restriction on holding outside employment which is restricted if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. *29 Del. C. § 5806(d).*

As noted, the individual could not participate in decisions about the company and could not represent or otherwise assist the company before his own agency. This diminished the possibility that his judgment would be impaired or that he could give the company preferential treatment or make official decisions outside official channels. Regarding whether the private employment may result in any adverse effect on the public’s confidence in the integrity of its government, we have held that this is basically an appearance of impropriety test. To decide the issue, we look at the totality of the circumstances. *Commission Op. No. 96-76.*

Beyond the fact that he would not make decisions about the company in his official capacity, or in any way assist it before his own agency in his private capacity, we noted that the local government intended to publicly announce its decision regarding his employment. This would serve to diminish any appearance that the local government was trying to bring him in from the private sector without the public’s knowledge while he was still working for that company. Without such information being disclosed, it may raise appearances that he, or the company, received preferential treatment. Additionally, if his private firm did business with the local government, the Code of Conduct requires that where an individual has a financial interest in a private enterprise which does business with their government, they must file a “full disclosure” of those business dealings with the Commission. *29 Del. C. § 5806(d).* Such

disclosure is a condition of commencing and continuing employment with the government. *Id.*

As indicated at the meeting, it was not possible to envision, at the time, every conceivable situation that may have the potential for a conflict because of the individual's concurrent private employment. However, as to those situations where his private enterprise did business with the local government, we address those aspects on a case-by-case basis. Also, if other situations arose involving the private company, which would not require a full disclosure under 29 *Del. C.* § 5806(d), but which may have required a resolution of whether there was a conflict under any other Code provision, the local government or the individual could seek further advice.

### **C. Conclusion**

Based on the preceding law and facts, the conduct of the individual, once he started to work for the local government, was curtailed in that he may not: (1) review or dispose of matters related to his private employer; and/or (2) represent or otherwise assist the private enterprise before his government agency. Additionally, the law mandates as a condition of commencing and continuing employment, if the private enterprise does business with the local government, he must file a full disclosure of that business dealing with the Commission so that it can decide if there is a conflict of interest. Aside from that mandated requirement, he or the local government could seek further advice as issues arose that may have the potential for a conflict.

**01-08 – Outside Employment—Same Area of Responsibility:** A State employee filed a request for an opinion on whether his proposed outside employment would violate the Code of Conduct. In the meantime, his agency was checking to ascertain if the outside employment would violate the Merit Rules, as he was a Merit Employee. The agency concluded that the outside employment would violate the outside employment restriction in Chapter 18 of the Merit Rules which restricts State employees from holding outside employment in their area of responsibility. Thus, the request to this Commission on whether it would violate the conflicts of interest restriction in the Code of Conduct was moot.

**99-49 – Outside Employment—Driving for a State Contractor:** A State employee asked if he could accept employment with a company which contracted with his agency. Based on the following law and facts, he could accept employment as a driver, but based on the company's State contract, if it again offered to hire him as a counselor, such employment would violate the Code of Conduct.

#### **(A) Facts**

Initially, a State employee was offered a job with a private company which contracted with his agency to make home contact with State clients as well as provide organized activities for them. However, at the Commission's meeting, he said that the company changed its employment offer and wanted to hire him to transport its clients to various locations. He said that the company's administrator also indicated that he might be used to make home contacts, etc., if he was needed as a backup. The company's clients were the result of a contract with his agency. In his official capacity, he had no decision-making authority over the terms of the contract, selecting the contractor, etc. That was confirmed by his supervisor. The employee's supervisor provided a copy of the company's contract and spoke with the Commission's legal counsel regarding the company's contractual duties and the employee's State duties. Under the

contract, the company worked with clients who were previously assigned to certain State centers. The employee's job was as a shift supervisor. As such, he supervised staff, maintained time records, wrote employee evaluations, etc. Additionally, he had some limited dealings with the clients at the center, but his primary responsibility was supervising the staff.

The employee's supervisor said that in performing his duties, the State employee was not responsible for referring any State clients to the company's program. He said that each client was assigned a case manager when they came to the facility. The case managers meet weekly to discuss what programs, treatment, etc., were appropriate for their assigned clients. That may include a decision that the client should be recommended for some of the contractual programs offered by private companies, including the one which offered the employee a job. If the case managers concluded a particular contract program offered an appropriate program, they could make the recommendation to the Court and the Court decided what program the client would follow. The State employee did not attend the case managers' meetings to discuss placement; did not make recommendations on placements; and did not participate in Court appearances where placement recommendations were made. Moreover, the employee's supervisor said the case managers were on a different shift than the employee.

### **(B) Applicable Law**

The Code provides: No state employee shall have any interest in any private enterprise nor incur any obligation of any nature which is in substantial conflict with the proper performance of his duties. It restricts other employment if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

To decide if the other employment substantially conflicted with performing official duties, the Commission looked first to see if the employee could perform his outside employment during hours other than those for which he was obligated to perform his State duties. Commission No. 95-39. He said he would perform the other employment when he was not required to be at his State job. His supervisor also believed he could perform the other job without it interfering with his normal duties.

Regarding whether the other employment would result in impaired independent judgment in performing official duties, as previously indicated, he had no involvement in making decisions over the terms of the company's contract, selecting the contractor, determining if it is complying with the contract, etc. Moreover, he did not make decisions or recommendations on what program a client would be placed in. He was not a case manager; did not attend their meetings; did not supervise them; nor did he work on the same shift. Thus, in his official capacity, he would not be in a position to make official decisions about the company's contract. Nor would he be able to give it, or the State client's, preferential treatment in such matters as recommending the company's program to the Court or funneling clients to its program. In light of those facts, the Commission did not believe that employment with the company to transport its clients raised a problem. However, if he were involved in aspects such as home visits, etc., the Commission believed that conduct could violate the Code for the reasons below.

The contract stated that on a monthly basis, the agency's case managers were to review the clients' progress on identified service/treatment goals, and on an annual basis, the agency's contract administrator would review the performance measure data with the company. The information was also subject to review by another entity within his department. If he were

involved in home visits, etc., to the extent that such work involved dealing with the clients' program, their service, and treatment, etc., it appeared that such work was the substance of the company's contract. Thus, his work, if he were a counselor, might be evaluated by his own agency. The Code prohibits a State employee from representing or otherwise assisting a private enterprise on matters before his own agency, 29 *Del. C.* § 5805(a)(1), and it restricts other employment if it may result in any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b)(4). To the extent that employment with the company in the capacity of conducting home visits, etc., would entail work in areas that were, in essence, the substance of the contract with his agency, it could appear that he would be assisting the company on matters involving his agency. This may result not only in a violation, 29 *Del. C.* § 5805(a)(1), but may also result in an adverse effect on the public's confidence in the integrity of its government, which is prohibited by 29 *Del. C.* § 5806(b)(4).

**99-42 – Outside Employment—Representation of Private Employer Before Own Agency:**

A State employee wanted to privately contract with a firm and represent it on contract matters before her own agency. The Code specifically and clearly prohibits representing or assisting a private agency before one's own agency. Thus, the concurrent employment she sought would violate that provision. Moreover, such employment may result in an adverse effect on the public's confidence in its government because: (1) it is clearly contrary to the law; and (2) it could appear that she would be in a position to unduly influence her colleagues in making any contract renewal decision; could give the company preferential treatment; and could obtain official decisions outside official channels.

**99-41 – Outside Employment—Contract with Company Contracting with Agency:** A State employee asked if it would violate the Code of Conduct for her to privately contract with a firm to consult on another program, when she occasionally dealt with the firm several years ago. Based on the following law and facts, we conclude that such conduct would not violate the Code.

**(A) Applicable Law**

State employees are prohibited from having any interest which may be in substantial conflict with performing their State duties and from holding other employment if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

**(B) Application of Law to Facts**

As a State employee, she was responsible for operations and programming for a program run by her agency. For other employment, she wanted a 2-year contact with a private firm to consult on another State's similar program. She would consult on: organizational structure, training, program services, policy and procedures, pilot programming, and staffing. To ensure there was no substantial conflict with performing official duties, the individual should not perform functions related to the other employment during the hours when the individual is supposed to be performing State duties. See, e.g., *Commission Op. Nos. 95-13, 95-30, 95-39*. She said she would perform the work for the private company during non-State duty hours, e.g., weekends, annual leave.

We also apply the facts to the four criteria identified above.

**(1) Impaired judgment in performing official duties** - In her official capacity she had no decision-making authority over the company. It did not contract with her agency at the time. It did not expect to contract with her agency anytime within the next two years. However, it had subcontracted with a firm which had a contract with her agency. She did not participate in the decision in either putting together that contract or awarding the contract. Once the contract was undertaken, she dealt with the contractor and occasionally dealt with the subcontractor. Most of her dealings were with the contractor. The contract was completed in 1997. The Commission has given "some weight" to the lapse of time between when the government official last contacted the company to decide if an ethical issue is raised when a State employee contracts with a private enterprise which previously dealt with his agency. *Commission Op. No. 99-31*. Here, she was not involved in the contract decision; had few dealings with the subcontractor which now sought to hire her; and those dealings were more than two years ago. That reduced the possibility that in her few dealings with the company that her judgment was impaired as nothing indicated that two years ago, she was entertaining any prospective contract with the firm.

**(2) Preferential Treatment to Any Person** - As the firm did not presently contract with her agency, and no other matters would be decided about the firm by her, it did not appear that she was in a position to give the firm preferential treatment. Moreover, the subcontract had expired more than two years before the company sought her as a consultant, again reducing the possibility that a potential contract may have resulted in preferential treatment at the time. Finally, since the firm would not seek to contract with her agency, at least for the length of her private contract, she would not be in a position to render preferential treatment to it. However, once the contract expired, if the firm decided to seek a contract with her agency, and she would normally participate in such decisions, she could return to the Commission for further advice.

**(3) Official Decisions Outside Official Channels** - As the firm had no contract or other matter pending with her agency, it did not appear that she could render any official decision outside official channels as the company was not in search of any kind of decision, officially or unofficially, from her agency.

**(4) Adverse effect on the public's confidence in its government** - The Commission looks to the totality of the circumstances to decide this issue. *Commission Op. No. 96-78*. It also must show consistency in its opinions. *29 Del. C. § 5809(11)*. Last month, the Commission ruled on a similar situation where a State employee, in a similar situation, sought to contract to consult for a company which was contracting with another State. *Commission Op. No. 99-34, "Scope of the Code when Working for State Contractor."* In that instance, the private company had an existing contract with his agency. Under those facts, the Commission held that to avoid an adverse effect on the public's confidence in its government, he should recuse himself from participating in his agency's decisions regarding the private enterprise. Here, that issue would not arise because the company she wanted to contract with had no contracts or other matters before her agency in which she would participate in her official capacity. Accordingly, to be consistent with our prior rulings, it did not appear that, under those facts, there was a violation of the Code.

**99-35 – Outside Employment—Includes Dual Employment with the State:** The Code of Conduct restricts the conduct of State employees when they hold "other employment." *29 Del. C. § 5806(b)*. The issue was whether a State elective office constitutes "other employment"

when an individual holds a full-time State position. We have held that State employees, who also hold elective office in a local government, are subject to the "other employment" restriction. *Commission Op. Nos. 92-2; 96-02; 96-22; 97-06*. The jurisdictional basis was not specifically addressed in those cases.

At common law, it was incompatible for an individual to hold dual government positions if in one position the individual could act upon the appointment, salary and budget of his superior in the second position. See, e.g., *People Ex. Rel. Teros v. Verbeck*, Ill. App. 3 Dist., 506 N.E. 2d 464 (1987). The common law prohibition on holding two government positions under such situations was because of the potential for influencing their superior's salary and budget, and ultimately their own salary. *Teros*; *People Ex. Rel. Fitzsimmons v. Swailes*, Ill. Supr., 463 N.E. 2d 431 (1984); *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997); *Mead v. Board of Review*, Ill. App. 2d, 494 N.E. 2d 171 (1986). In such situations, Courts said there could be "conflict of duties" between the two offices and a "conflict of interest," or at least the potential for such conflict if the individual held both jobs. *Teros*, *Swailes*, *Claar*, and *Mead*. Some courts held that recusal from participating in such decisions was not a sufficient remedy; rather, one of the jobs must be relinquished. *Teros* at 466. It held that banning dual government employment under such situations "ensures that there be the appearance as well as the actuality of impartiality and undivided loyalty." *Id.* (citing *Rogers*; See also, *O'Connor v. Calandrillo*, N.J. Super., 285 A.2d 275, *aff'd.*, 296 A.2d 325, *cert. denied.*, 299 A.2d 727, *cert. denied.*, U.S. Supr. Ct., 412 U.S. 940, 93 S.Ct. 2775, 37 L.Ed. 2d 399). The common law rule also had application if the individual held a government post and a second job in the private sector. *63C Am. Jur. 2d Public Officers and Employees* § 62. The doctrine arises out of the public policy that an officeholder's performance not be influenced by divided loyalties. *Id.*

Subsequently, States began to change the common law by adopting statutes regarding concurrent employment in both the public and private sector. *63C Am. Jur. 2d Public Officers and Employees* § 62, et. seq.; Annotation: *Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 671. Regarding holding a second job in the public sector, the statutes identified certain positions where a government employee could not hold dual positions. In other situations, it permitted dual employment, but restricted the conduct of persons holding dual positions. 62 ALR 5th 671 and *63C Am. Jur. 2d Public Officers and Employees* § § 62 thru 70. Moreover, Courts acknowledged the distinction between a "conflict of duties" and a "conflict of interest." *Claar* at 217; *Reilly v. Ozzard*, N.J. Supr., 166 A.2d 360 (1960).

A "conflict of duties" inheres in the very relationship of one office to the other; but a "conflict of interest" will not inevitably arise as an incident of the relationship of the two offices. *Reilly*; *Dunn v. Froehlich*, N.J. Super., 382 A.2d 686 (1978). "Conflicts of interest" could arise because of the "personal interests" of the officer in question. *Dunn*. It could depend on what legislation was being considered. *Reilly*. If there was a "conflict of duties," dual positions could be incompatible. But if there were a "conflict of interest," or the "potential for a conflict," they were "routinely cured through abstention or recusal on a specific matter." *Claar* (citing *56 Am. Jur. 2d Municipal Corporations* § 172 (1971)); *Reilly* at 370.

This approach to dealing with concurrent employment was meant to allow citizens, including government employees, an opportunity to hold a second job to supplement their income and, in the case of dual government positions, permit them to participate in politics more fully. 62 ALR 5th 671 and *63C Am. Jur. 2d Public Officers and Employees* § § 62 thru 70. Delaware's General Assembly adopted the less restrictive approach. In some instances, it identified government positions where dual occupancy is prohibited by law. See, e.g., 29 Del.



C. § 5808 (b) (Public Integrity Commission members may not hold elected or appointed office under the government of the United States or the State or be a candidate for such offices; 15 Del. C. § 301(d) (Board of Elections Commissioner may not hold or be a candidate for office). Where dual government positions were not expressly prohibited, the General Assembly restricted the conduct of government employees. For example, when State employees also seek an elected office, the General Assembly restricted their conduct regarding political activity. See, e.g., 29 Del. C. § 5954 (no person shall use or promise to use, directly or indirectly, any official authority or influence, to secure or attempt to secure for any person an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration).

More significant to this Commission, is that the General Assembly, in enacting the statute we administer, said the purpose was to ensure that the conduct of such persons holds the respect and confidence of the people, and therefore such persons are to avoid conduct which violates the public trust or which creates a justifiable impression among the public that such trust is being violated. 29 Del. C. § 5802(1). However, it also recognized that 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." 29 Del. C. § 5802(3). To balance the protection of the public's interests and at the same time encourage citizens to take public office, it said that State employees must have the benefit of specific standards to guide their conduct. 29 Del. C. § 5802(2). Among the "specific standards" is the restriction on "other employment." 29 Del. C. § 5806(b). That standard provides that: No state employee, state officer or honorary state official shall...incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment ... under circumstances where such acceptance may result in any of the following: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

As noted, we have held that "other employment" restriction applies if a State employee also holds elected office. *Commission Op. Nos. 97-06; 96-02; 96-22*. Those holdings are consistent with: (1) the plain language of the provision; and (2) the statutory purpose and intent. First, the plain language refers to "any" obligation in substantial conflict with performing official duties. The term "any" is all encompassing. *Commission Op. No. 95-06*. Also, the plain language does not refer to employment by a private enterprise, rather it refers to "other employment." Had the General Assembly desired to restrict the provision only to employment by a private enterprise, it could have said so because in other Code of Conduct provisions it clearly and specifically refers to standards to be followed where the individual is a State employee, and at the same time has an interest in a private enterprise. See, e.g., 29 Del. C. § 5805(a)(2)(b); § 5805 (b); § 5805 (c) and (d); § 5806(c) and (d). Reading those terms in the context of the whole statute, we note that the General Assembly inserted a specific subchapter addressing procedures to ensure that persons holding elected positions and are "also employed" by the State are not paid by more than one tax-funded source for duties performed during coincident hours. 29 Del. C., subchapter III. Thus, the General Assembly is presumed to have been aware of such dual positions when it enacted Title 29, Chapter 58. To hold that "other employment" did not include elected positions would not only be contrary to the plain language but would mean that State employees with a second job in the private sector would be subject to having their other employment curtailed if there was a conflict, while State employees whose second job was with another government agency would not be so curtailed. Such interpretation would ignore the fact that the law recognizes that conflicts can arise when the

"other employment" is another government job. See, *Teros, et. al, supra*. Where an interpretation would lead to an absurd or unreasonable result, such interpretation could not be the expressed legislative intent. *Commission Op. No. 96-08; 96-14*.

Accordingly, we hold that "other employment" in the Code of Conduct applies to State employees who concurrently are General Assembly members because to do so is consistent with the plain language and the expressed statutory purpose. The effect of this interpretation is that the Commission can decide if the person in their full-time State job has a conflict of interest on that job. However, it does not mean that the Commission can decide if the person in their capacity as a member of the General Assembly has a conflict because conflicts for members of the General Assembly are governed by other laws. See, *Commission Op. No. 96-11*.

Having concluded that we have jurisdiction, the next issue is whether participating in decisions regarding the salary of a superior creates an obligation "in substantial conflict" with performing public duties and/or whether the other employment may result in: (1) impaired judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b). Here, because of the dual employment, a State official was in a position to influence his supervisor's salary at hearings in the General Assembly. His supervisor had the authority to hire, promote, or fire him in his State position. Thus, actions he may take on the matter could impact on his own full-time employment. Consequently, it could appear that he had a "personal or private interest" in the matter. The statutory remedy under the Code of Conduct, 29 *Del. C.* § 5805(a)(1), if there is a personal or private interest which tends to impair independent judgment, is that the State employee not participate in the decisions. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993). The question of whether an interest is sufficient to warrant recusal is an issue of fact. *Prison Health*.

Applying the facts to the "other employment," we must decide if his participation "may result in":

### **(1) Impaired Independence of Judgment**

When an official makes decisions about his superior's salary, his independent judgment may be compromised in two ways. First, his personal or private interest in ensuring his own job security has the potential of not only affecting his superior's salary, but ultimately his own because the supervisor has the power to hire, fire, and promote him. See, *Teros*; *Swail*; and *Mead*. Second, it creates, at least the appearance, that the supervisor could use his supervisory role as leverage to influence the official or maybe take retaliatory action against the official if he did not vote as his supervisor desired. *Township of Belleville v. Fornarotto*, N.J. Super., 549 A.2d 1267, 1274 (1988).

### **(2) Preferential Treatment to Any Person**

Preferential treatment could also arise in two ways: (a) it could appear that the elected official would give preferential treatment to his employing supervisor because he can hire, fire or promote at will; and (b) the supervisor could give the dual employment holder preferential treatment with respect to his employment conditions. *Fornarotto* at 1274. Under those circumstances, not only could it result in preferential treatment, but it could appear that either or

both of them, were using public office to secure unwarranted privileges, private advantage or gain, which is prohibited by 29 *Del. C.* § 5806(e).

### **(3) Official Decisions Outside Official Channels**

It could, at a minimum, appear that the dual employment holder could operate outside official channels to obtain the salary increase for his supervisor; or that the supervisor could use his authority and power over the employee to obtain such decision.

### **(4) Any adverse effect on the public's confidence in the integrity of its government**

This provision and the one against raising suspicion among the public that a State employee is engaging in conduct violating the public trust, 29 *Del. C.* § 5806(a), are basically an "appearance of impropriety" test. *Commission Op. Nos. 98-11; 98-23; 98-31*. That is not to say that, in fact, his judgment would be impaired, or that he would give or receive preferential treatment, etc. However, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14*. It only requires that it "may result in an adverse effect on the public's confidence" or that it may "raise suspicion" that the dual employment holder is acting in violation of the public trust. *Id*; See also, 29 *Del. C.* § 5811(2) (public officers and employees should avoid even the appearance of impropriety); 63C *Am. Jur. 2d Public Officers and Employees* § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict). Courts have held that there is at least a potential for a conflict of interest when a government employee is a subordinate to another government employee, and in his other government position would have the opportunity to make decisions regarding his superior's salary. See, cases cited herein. Because of at least the potential for a conflict of interest, the remedy mandated under the Code of Conduct is that: No State employee 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 which tends to impair his independent judgment. 29 *Del. C.* § 5805(a)(1). See, *Beebe Medical Center v. Certificate of Needs Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996) (interpreting 29 *Del. C.* § 5805(a)(1) as requiring State official to recuse himself, where a conflict was "assumed," although his participation consisted of neutral comments and he did not vote on the matter); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett V.C. (June 29, 1993) (interpreting 29 *Del. C.* § 5805(a)(1) as requiring that State official should not have participated in a meeting, even though he was not the final decision maker and did not vote on the matter).

**99-12 – Outside Employment—Employment with Temporary Agency Contracting with State:** To operate a 24-hour program, a Division sometimes needed temporary help to fill on shifts during weekends and nights. There was a State-wide contract with a private enterprise to provide all types of temporary employees to any agency. The private enterprise also provided temporary employees to non-State entities. This Division, like any other State agency, could call the private enterprise for temporary help. The Division was not involved in selecting the State contractor. However, some of its staff had signed up with the private enterprise for other employment. Thus, it was possible that the Division could call the company and end up with one of its full-time employees coming in as a temporary employee under the contract.

The Code restricts other employment if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3)

preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

Here, the State employees did not make any official decisions about which private company would contract with the State to provide temporary services. Thus, their judgment in performing official duties could not be impaired. It also did not appear that they would be in a position to make an official decision outside official channels because the selection of the contractor was not even made by their agency. It also did not appear that they would be in a position to give preferential treatment to the company because they could not control when the Division would need temporary help, so they could not "throw work" to the temporary agency. Also, the Division Director said that if the private enterprise was called and more than one person was available to work, if one of those persons was one of his State employees, he could select someone else. Thus, the agency would not act to ensure that as a result of their State position its employees would get the temporary assignments. Under those facts, the Commission found no violation.

**99-06 – Outside Employment—State Employee Serving as Local Elected Official:** A State employee held an elected position with a municipality. He asked if there was a conflict of interest for him to participate in his State agency's decisions regarding certain property when he also may be participating in decisions about this same property in his other employment as an elected official of a municipality. He further indicated that it was possible that several other properties that his State office was involved with might have issues that could come before the municipality and asked for guidance. Based on the information submitted a majority of the Commission members at the meeting concluded that at the time there was no conflict of interest.

#### **(A) General Guidance**

First, as a general matter of guidance, the Commission must base its opinions on a "particular fact situation" pursuant to 29 *Del. C.* § 5807(a). Thus, it addressed only the facts available relative to one property. The State employee was advised to use the decision on those facts as an aid in his future conduct, and as specific issues arose in his State capacity, he was advised to review the pertinent Code sections. The Commission also enclosed synopses of its opinions from previous years to use as a reference guide. In particular, it was suggested that he may wish to review the Commission's prior decisions dealing with persons who sought elective office while employed by the State. See, *Commission Op. Nos. 92-02, 96-02, 96-22, 97-06*. If he encountered a particular issue which he could not resolve, he could return to the Commission for guidance based on the particular facts.

Second, in his elected position, he is subject to the City's Code of Conduct, which was approved by this Commission pursuant to 68 *Del. Laws*, c. 433 § 1. Thus, the Commission had no jurisdiction in that area. Accordingly, guidance of his conduct in his City position should be sought through the City's Ethics Commission and/or its attorney, as he had done in this instance.

#### **(B) Applicable Law**

State employees are restricted from having any interest which may be in substantial conflict with performing State duties and are restricted in their other employment if it may result in: (1) impaired independent judgment in performing official duties; (2) official decisions outside

official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). The Code, among other things, also prohibits State employees from:

- (1) using public office to secure unwarranted privileges, private advancement or gain, 29 *Del. C.* § 5806(e);
- (2) engaging 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 through his public position; 29 *Del. C.* § 5806(f);
- (3) disclosing, beyond the scope of his public position, confidential information gained by reason of that public position or otherwise using such information for personal gain or benefit. 29 *Del. C.* § 5806 (g).

### **(C) Facts and Discussion**

As it related to his elected position, the particular property was expected to be considered for re-zoning from commercial to residential by the municipality. The issues of re-zoning and subdivision of the property would go to the City's Planning and Zoning Board. It would make a recommendation to City Council. Thus, as a Council member, he might be involved in future debates and decision-making concerning re-zoning/subdivision. According to the City Solicitor's letter, the outcome may be influenced by certain aspects of the property, and the State employee would have "special insight" into those particular aspects that "may not be a matter of public record," but "may be highly relevant in terms of the outcome of discussions." However, at the time, no particular issue was pending before the City. In his State job, his staff conducted studies of the property, but the studies were not related to re-zoning/subdivision. The study was conducted before he was elected to his municipal position. Thus, when the decision on the study was made, he did not have the other position so no facts indicated even a potential conflict at that time.

The property was being sold and the new owner would become responsible for regulatory requirements resulting from the State study. If the sale did not go through, the old owners would be responsible. In his State job, he would be involved in developing and approving a proposed plan regarding compliance with the State agency's requirements, which his office would issue to the public after its plan was prepared. He would have a significant role in developing/approving the plan. After that plan was issued, his State agency must accept public comments and then issue a final plan. Again, he would have a significant role. He was not the final decision-maker. However, the Commission has held that the Code does not limit its parameters to only those who make final decisions. *Commission Op. Nos. 96-78 and 98-12*. For example, it restricts officials from reviewing or disposing of matters if there is an interest which tends to impair independent judgment. 29 *Del. C.* § 5805(a). This was pointed out as a matter of clarification to aid him in making any future decisions relative to any conflict. No facts indicated that any decisions made in his State capacity regarding the particular property were impaired by his other employment. His supervisor was monitoring the decisions on the property and other properties which may be subjected to review and/or action by him and his office, which may also arise before the City. The Commission said that while it cannot dictate personnel management procedures within his office, that may serve to reduce "any adverse effect on the public's confidence in the integrity of its government," under 29 *Del. C.* § 5806(b)(4).

The State employee indicated that the public would have 20 days to appeal the State agency's decision regarding the plan for the particular site. It was possible that he would testify

before an appeals board. However, it was not probable because in the nine (9) years in his State job, he had never been called to testify. After the final plan, the property owner was to take action based on the plan and the State employee's technical staff would oversee compliance. No civil action or criminal action was pending regarding the problems with the property which were regulated by his agency. However, the law permits both possibilities. If either should occur, his office would be looked to as a source of information on the actions. While most of the activity would be a matter of public record, he said sometimes proceedings relative to the regulatory matters may not be matters of public record. Thus, in his State capacity, as indicated in a letter from the City's attorney, he might obtain information that was not a public record which may be relevant to his decisions as a Council member. However, from his statements at the Commission's meeting he was clearly aware of his obligation not to improperly disclose or use confidential information as provided by 29 *Del. C.* § 5806(e) and (f). Aside from that issue, the possibility of his testifying or being involved in his State capacity in a civil or criminal action related to the issues, was merely speculative. Thus, there were no "particular facts" on which to base a concrete decision as required. 29 *Del. C.* § 5807(a). Also, there were building and housing code violations being brought against the present owner, which would come before the City Council. He, as any other Council member, would receive status reports on the prosecution of the violations. However, such violations were entirely unrelated to the issues being handled by his State agency. His State office was not in any manner involved and did not even have authority over buildings. Thus, it did not appear that he would be in a position in his State capacity to review or dispose of the issues; to obtain any confidential information, etc. Accordingly, no facts indicated a conflict relative to those matters.

As to the issues of re-zoning/subdivision, as noted, no particular facts were available on what the issues may be and we could not give any concrete guidance on speculative matters. He was again advised that as issues began to frame themselves he should be cognizant of his involvement on the State level with this property and of the Code provisions to aid him in deciding, for example, if he should recuse himself from participating as a result of the State Code restrictions.

**98-43 – Outside Employment—Maintaining a Private Professional Practice:** A State agency sought to hire an individual who also had a small private professional practice. The agency wanted him to maintain the professional practice because it believed that having an active member of the profession would be an asset to the agency.

The agency had discussed outside employment with him and it was understood that his private practice work would be accomplished at hours other than those during which he was to be working for the State. This was consistent with the Commission's prior rulings that State employees must not have any interest in a private enterprise that is in substantial conflict with performing State duties, which is prohibited by 29 *Del. C.* § 5806(b).

Additionally, if a matter arose with the State agency regarding his private clients, he would not review or dispose of the matter, but would recuse himself, consistent with 29 *Del. C.* § 5805 (a), which restricts officials from reviewing or disposing of matters where they have a personal or private interest, including a financial interest, which may tend to impair independent judgment. The outside employment provision also restricts officials from outside employment which may result in impaired independent judgment. 29 *Del. C.* § 5806(b).

Also, he would not represent or assist his private enterprise on matters pending before his State agency, which is prohibited by 29 *Del. C.* § 5805(b). This provision is meant to ensure

that an official does not use any undue influence on his co-workers to obtain preferential treatment for the private enterprise. Similarly, the outside employment provision restricts officials from outside employment which may result in preferential treatment. 29 *Del. C.* § 5806(b). With those restrictions, the Commission found no violation, but advised the agency that if the individual was hired and additional situations arose, that the agency or the individual could return to the Commission for further guidance.

**98-18 – Outside Employment—Workshops for Physically Impaired:** The Commission concluded that a State employee may contract to give workshops for a private enterprise on its equipment, which was used by persons with a physical impairment, during her off-duty hours.

The Code restricts outside employment if it may result in: (1) impaired independence of judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

In her State job, the employee provided information on technological devices to those with physical impairments through workshops, training, phone, mail, or fax, etc. As part of the activity, she included information on the system which would be taught in the workshops for the private enterprise. The company was the only one in Delaware to have that particular type of equipment. She also provided information on other devices, which the company and its competitors provided. Specifically, she provided listings to those with the physical impairment of all equipment providers.

The company wanted her to provide workshops on its behalf only on the equipment it had which was unique to that company in Delaware. The contract would be for six workshops over a six-month period. She would conduct the workshops during off duty hours. The private enterprise did not charge persons who attended the workshop.

It was not expected that persons attending the workshops would be interested in other technological devices where the particular company had competitors. However, if inquiries were made about other technology at the workshop, the employee would provide a list of all providers to avoid even the appearance of any preferential treatment to the company sponsoring the workshops on its unique equipment.

Additionally, someone from the State agency, other than the employee, would notify persons on its client list of the workshops. However, that was not preferential treatment for the particular company because the agency provided the service to any service provider when they conducted similar activities. The action avoided having private providers obtain the agency's client list, while also ensuring that clients were aware of technological aids and/or training on such devices. Under those particular facts, no violation of the restrictions on accepting outside employment was found.

**98-14 – Outside Employment—Representing Private Client Against the State:** After accepting full-time employment with the State, an attorney asked if he could continue as legal counsel for a private client in a lawsuit against a former employee of a State agency. The attorney had represented the State agency when he was a Deputy Attorney General. He had left the Attorney General's office; gone into private practice; and then returned to another State position. The Commission, based on the following facts and law, concluded that such

concurrent employment would violate the Code of Conduct.

## I. FACTS

While in private practice, the employee accepted a case representing a client who was suing a former State employee. It was alleged that while employed by State, the former State employee had violated the client's civil rights. The Attorney General's office was representing the former employee. If his client prevailed, the State might have to indemnify the former State employee. The current State employee had not been compensated by the private enterprise which asked him to take the case since late in 1997; was not currently being paid for work on the case; and had no compensation agreement for continued participation in the suit. If attorney's fees were awarded to the client, the private enterprise would be the recipient.

In his State duties, the current employee was a hearing officer for a State agency. He had the power to hear and determine cases; provide legal advice to and write opinions for the State agency; and he supervised other hearing officers. As a hearing officer, Deputy Attorneys General could appear before him representing State agencies, including the State agency he had previously represented and whose former employee was being sued.

The attorney discussed his representation of the private client with his agency, which concluded that his activities would not violate the agency's restrictions on concurrent employment as long as he did not use State property in connection with the case and received no State compensation while working on the case. He also obtained a decision from the Delaware State Bar Association that his activities would not violate the *Rules of Professional Responsibility*, specifically *Rules 1.7 and 1.11*, as long as he was not using confidential information gained while he served as a Deputy Attorney General to the agency where the former employee worked. Further, he advised his agency, his private client, the organization which hired him, and the Court of the possibility of a conflict.

## II. APPLICABLE LAW

### A. Jurisdiction

First, the Commission noted that it had no authority to interpret the employee's agency's restrictions on concurrent employment, including the practice of law. Nor did it have authority to interpret the *Delaware Rules of Professional Responsibility*, governing the acts of Delaware lawyers. However, *Rule 1.11, "Successive Government and Private Employment,"* provides that a lawyer representing a government agency is subject not only to the Rules of Professional Responsibility, but also subject to statutes and government regulations regarding conflicts of interest. See, *Rule 1.11(d)(2) and "Comment"* (lawyers representing government agency are subject to the Rules of Professional Conduct and to statutes and government regulations regarding conflicts).

Thus, while generally it is within the Delaware Supreme Court's exclusive power to supervise the conduct of attorneys, in this particular fact situation, the Commission's authority extended to interpreting the Code of Conduct as it applied to State employees who also were attorneys.

Courts have upheld the authority of State Ethics Commissions to impose standards of conduct, apart from the Rules of Professional Responsibility, on State employees who are attorneys. See, *Maunus v. State Ethics Commission*, Pa. Supr., 544 A.2d 1324, 1326 (1988)



(Ethics Commission could apply State Ethics law to attorneys employed by the State without “running afoul” of Court’s authority, because employers, including the State, may properly adopt professional and ethical standards for employees including attorneys); *Howard v. State Com’n on Ethics*, Fla. App., 421 So. 2d 37 (1982)(application of State Ethics law restricting concurrent employment by attorney did not interfere with Florida Supreme Court’s authority to regulate the practice of law).

Having concluded that the Commission had jurisdiction over this particular fact situation, it looked to the Code of Conduct provisions relative to the substance of the issue proposed--that is, did the Code restrict him from engaging in the outside employment described above?

## **B. Code of Conduct**

The Code of Conduct provides:

“No state employee, state officer or honorary state official shall have any interest in a 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 acceptance may result in any of the following:

- (1) impaired independence of judgment in the exercise of official duties;
- (2) an undertaking to give preferential treatment to any persons;
- (3) the making of a government decision outside official channels; or
- (4) any adverse effect on the public’s confidence in its government. 29 Del. C. § 5806(b).

The Code also admonishes that:

“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.” 29 Del. C. § 5805(a).

## **III. APPLICATION OF LAW TO FACTS**

As noted above, the employee’s State duties included acting in a quasi-judicial capacity for the State, as he had authority to hear and make final decisions on certain agency cases. In other situations, he served as the agency’s legal counsel. In cases where a State employee sought an agency decision, he had decision-making authority and legal counsel responsibility in matters involving the State in which the Attorney General’s Office would represent the State. Moreover, he supervised the other hearing officers, who heard such matters.

Conversely, in his representation of the private client, he would go “head-to-head” against a fellow law officer of the State in a case against a former State employee who had worked for an agency which he previously represented for the State. He would be litigating against his full-time employer (the State) which may have to indemnify its former employee.

We have held 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.” *Commission Op. No. 92-11*. We said that provision did not require actual misconduct; only a showing that the conduct could “raise suspicion” that it reflected unfavorably upon the State and its government. *Id.* Similarly, Section 5806(b) does not require actual misconduct. It only requires conduct that “may result in” impaired judgment; preferential treatment; official decisions outside official channels; or any adverse effect on the public’s confidence in its government. See, *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987) (interpreting federal restriction prohibiting “any adverse effect on the public’s confidence in its government,” Court noted that the Standards of Conduct prohibited activities that may be considered impermissible because it *appears* to the public to be a violation) (emphasis added). Thus, the Commission considered the appearance created by his private employment.

In speaking with the Commission, he said that if he viewed this situation from the public’s perspective, he would find the representation of a private client under these circumstances “highly suspicious.” We agree.

If he acted in his quasi-judicial capacity and decided cases where the State Attorney General’s law officers appeared before him on behalf of the State and/or the Department he had previously represented, it may, as a minimum, appear to the public that his judgment would be impaired since in his private representation, he would be opposing the Attorney General’s law officers and the Department’s former employee. Even if he recused himself from the State activities, he would still be representing the private client in litigation against a fellow law officer of the State and would be opposing the position taken by his full-time employer, the State. If his private client did prevail, the public may suspect that he had gained unfair advantage as a result of his prior representation of the Department. If his private client did not prevail, the public may suspect that he had not properly performed his duties to his client because of his affiliation with the State. Thus, regardless of the trial’s outcome, it may result in an adverse effect on the public’s confidence in its government.

#### **IV. CONSIDERATION OF WAIVER**

The Commission may grant a waiver if: (1) the literal application of the statute is not necessary to achieve the public purpose; or (2) there is an undue hardship on the State employee or State agency. 29 *Del. C.* § 5807(a). We discussed above the need to achieve the public purpose; therefore, no waiver will be granted on that basis. Additionally, no facts were submitted which substantiated the need for a waiver based on a hardship to the State employee or State agency.

#### **V. CONCLUSION**

For the foregoing reasons, the Commission concluded that the representation of a private client by a law officer of the State, in a suit against a former State employee represented by another law officer of the State, where the State may be required to indemnify the former employee, under these circumstances would violate the Code of Conduct.

**98-03 – Outside Employment—Inspecting Federal Agencies:** The Commission concluded that a State employee’s outside employment, which consisted of inspecting certain equipment for federal agencies, outside the State of Delaware, did not violate the restrictions on holding outside employment.

Specifically, the Code restricts outside employment if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

Here, the federal equipment was statutorily exempted from State inspections. Thus, in the employee's State capacity he had no decision-making authority regarding the federal equipment. Further, his inspections of federal agencies could not result in any enforcement action by him, as the federal government may accept his inspections, but did not have to act on his recommendations. Also, the inspections would be performed outside the State of Delaware and completed during hours when he was not working for the State.

The agency had a conflicts of interest provision which applied specifically to his State agency. The Commission is limited to interpreting only Title 29, Chapter 58. See, *Commission Op. No. 98-25*. It therefore has no jurisdiction to interpret other conflicts of interest provisions.

**97-31 – Outside Employment—Employment with Company Contracting with State:** A State employee held a professional degree and used that education in both her State position and with a private enterprise. The private enterprise contracted with her State agency.

The Code of Conduct prohibits State employees from representing or assisting a private enterprise on matters pending before the agency which employs them. 29 *Del. C.* § 5805(b)(1). Here, the individual was not in any manner involved with the contracts which the private enterprise had with the State. Thus, she provided no input to the private enterprise, nor did she in any other manner represent or assist the private enterprise before her agency.

The Code also provides that outside employment may not result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 *Del. C.* § 5806(b). Here, in performing her official duties, she did not decide if the agency would contract with the private entity, or if the existing contracts should be renewed. Moreover, in her State position, she did not engage in such matters as evaluating her own performance on behalf of the private employer. Additionally, if the private enterprise needed assistance from her State agency, it would pursue such assistance through the proper channels, rather than having her make recommendations to the agency on its behalf as it may appear that it was receiving preferential treatment.

**97-06 – Outside Employment—Merit Employee Running for Elected Office:** A State agency asked if a Merit employee, in a federally funded position, could serve in an elected office without a conflict with the federal grant or any State law. The State employee was contemplating running for a local government position.

As noted in previous opinions, no specific provision in the Code of Conduct prohibits running for elective office. See, *Commission Op. Nos. 92-02, 96-02, and 96-22*. However, while running for elective office, individuals should be aware of the provisions which restrict State employees, officers and officials from engaging in conduct that would appear improper and from engaging in activities in substantial conflict with official duties. *Id.*; See, 29 *Del. C.* § 5806(a) and (b). The Commission has interpreted those provisions as precluding the individual from engaging in political activities or soliciting political contributions, assessments or

subscriptions during State work hours or while engaged in State business. See, *Commission Op. Nos. 96-02 and 96-22*.

Regarding any other State statutes that applied, the Commission has no authority to interpret such provisions. However, the Commission referred the agency and the Merit employee to 29 *Del. C.* § 5954. See also, *Att’y Gen. Op. No. 78-016* (discussing application of Merit Rules if running for elected office). Also, the Delaware Code may have other provisions that may apply to the individual which the Commission had no jurisdiction to interpret. For example, in other cases the Commission referred individuals to the Police Officer’s Bill of Rights, etc., and advised the individual to check the Delaware Code to see if other provisions may affect their decision to run for office. (Note: See, 29 *Del. C.* § 5822 (provides that those employed by the government and who also serve in an elected position shall have their pay reduced on a prorated basis for hours or days missed during the normal workday while serving in an elected position which requires the employee to miss time which is normally required of other employees in the same or similar positions).

Regarding the fact that the individual may move to a federally funded State position, the Commission was aware of a Federal provision referred to as “The Hatch Act,” governing political activities for federal employees. See, “*Hatch Act*,” c. 410, 53 *Stat.* 1147 (1939) (codified in scattered sections of 5 and 18 U.S.C.). Whether that provision applied to State employees who were paid by federal funds would not be a matter within the Commission’s jurisdiction. See, *Att’y Gen. Op. No. 78-016* (discussing application of Hatch Act to certain State employees). Here, the agency had discussed the Federal statute with the Federal agency which would fund the position.

As noted in other Commission decisions, specific facts must be presented before the Commission can decide if holding elected office while a State employee creates a conflict. 29 *Del. C.* § 5807(c). Here, the individual had not yet been elected. As there were no specific facts on which to rule, the Commission advised the agency and the individual to be alert to the Code of Conduct provisions referred to above and to provisions restricting outside employment. See, 29 *Del. C.* § 5806(b).

As the individual was running for an elected office in a local government which had not adopted its own Code of Conduct, he also was alerted to the fact that the State Code of Conduct applied to him not only in his State position, but also would apply to him if elected as a local government official. See, 68 *Del. Laws* c. 433 § 1 (State Code of Conduct applies to local government employees and officials unless it adopts a code at least as stringent as the State Code).

If he were not elected, he would have no further concerns about an actual conflict between the elected position and the State position.

**97-03(a) – Outside Employment—Employment with Company Regulated by State Agency:**

A State employee held a part-time job with a private corporation which was subject to regulation by the State agency for which he worked. As a State employee, his duties entailed investigating whether private corporations were complying with the State regulations which his agency administered.

In his State position, he had never investigated the business, nor had he ever had occasion to make any official decision regarding the company. Thus, it did not appear that he

had reviewed or disposed of matters pending before the State in which he had a personal or private interest. *See, 29 Del. C. § 5805(a)(1).*

The Code also prohibits State employees from representing or otherwise assisting private enterprises on matters pending before the State agency which employs them. *29 Del. C. § 5805(b)(1).* While working for the private company, the State employee did not: (1) assist it in such matters as insuring that its records complied with the laws and regulations enforced by his agency; (2) interpret the laws and regulations in his non-State capacity; (3) work with the company on any matters regarding compliance with the State laws and regulations, etc. Thus, the Commission found no violation of that provision.

State employees also are restricted from accepting outside employment if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in State government. *29 Del. C. § 5806(b).* As he did not have occasion to make decisions for the State regarding the company; did not decide if it was complying with applicable State laws or regulations; did not assist it in responding to matters pending before the State; did not work in the company's department which dealt with the records which his State agency would review, etc., the Commission found no violation of the Code.

**97-03(b) – Outside Employment—Installing Computer Software:** A State employee installed an accounts payable/receivable computer software program for a friend's business. It was a one-time job which took approximately three hours and he had no other occasion to be involved with the company's computer system. The friend's business was required by law to register with the State division where the employee worked. As a State employee, he had no decision-making authority over the friend's company. Thus, he did not review and dispose of matters in which he may have had a personal or private interest which would have tended to impair his judgment. *29 Del. C. § 5805(a)(1).* He also did not represent or assist the friend's private business on matters before his Division, which may be prohibited by the Code. *See, 29 Del. C. § 5805(b)(1).*

The computer software he installed was not in any way related to laws and regulations enforced by his agency. Rather, it was a commercially available product which functioned as a bookkeeper. The program was not set up to track payments monitored by his agency.

Based on these facts, the Commission found no violation of the provision which restricts outside employment if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in State government. *29 Del. C. § 5806(b).*

**96-66 – Outside Employment—Consulting with Facility Regulated by Employee's Agency:** A State employee who inspected private facilities for compliance with Federal and State regulations had duties which included going to the facilities, interviewing clients and residents, making observations, etc., and writing a report on whether the facility complied with regulations. When a facility had not complied with the regulations, it had to write a plan of correction, and submit the plan to his office for approval.

The employee was contemplating becoming a consultant during off duty hours and

anticipated two consulting possibilities. First, he asked if he could be a consultant to the same type of facilities in another state. He wanted to provide quality assurance to improve facility compliance with the State and Federal regulations. He said the Delaware facility owners, which his office licensed and certified, might also own the same kind of facility in other states and that he would seek clients from those Delaware owners. Second, he asked if he could consult with the regulated facilities in Delaware if he transferred to another division in his own agency or to another State agency. He would call the Delaware providers to see if they wanted to hire him. For out-of-state clients, which Delaware providers did not own, he would go door-to-door. He intended to tell prospective clients that he regulated such facilities in Delaware.

The Code prohibits outside employment under circumstances where it may result in any of the following: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give 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).

State employees, officers and officials also must not engage in conduct that would raise suspicion among the public that they are violating the public trust and that would not reflect favorably upon the State. 29 *Del. C.* § 5806(a). State employees also may not use public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e).

#### **(A) Consulting Work Outside the State**

The Commission concluded it might appear to the public that he would give preferential treatment to companies with facilities regulated in Delaware if he consulted for those same companies in other States. Thus, the public's confidence in the integrity of its government could be adversely affected, which would violate 29 *Del. C.* § 5806(b)(4). Additionally, there could be an appearance of impropriety, even if the Delaware companies he regulated did not own the out-of-state facilities. When the employee inspected for compliance with federal regulations, federal monitors followed-up on his inspections. If he advised an out-of-state client how to comply with the same federal regulations he enforced in Delaware, and the federal agency that monitored his Delaware work challenged his advice, he could find himself in an adversarial role with the federal agency he must work with as part of his State position.

The Commission previously recognized that if an individual worked as a private consultant to companies outside of Delaware on the same matters his agency was responsible for in Delaware, his advice as a consultant could be later challenged, and his State position would certainly be brought out. *Commission Op. 91-19*. The Commission believed the adversarial position would reflect unfavorably on the employee's position of holding the public trust, and therefore would violate the Code. Similarly, if this employee advised clients outside of Delaware on federal regulations he enforced in Delaware, and had his advice challenged, his State position would certainly be brought out in an adversarial proceeding. The Commission must issue advisory opinions with a view toward consistency. 29 *Del. C.* § 5809(5). To ensure consistency in its opinions, the Commission found that the activities he wished to engage in with out-of-state clients would violate 29 *Del. C.* §5806(a).

In soliciting out-of-state clients, he planned to inform prospective clients of his position as a specialist with Delaware and tell them he inspected the same type of facility in Delaware. Even if the out-of-state facilities were not owned or operated by a Delaware company regulated by his agency, he could persuade out-of-State clients to hire him because such facilities in all States have to comply with the federal regulations he enforced as part of his State job.

Prospective clients would believe he had an inside track on applicable federal regulations. Also, if clients followed his advice, and later had a compliance problem, they might argue that because he inspected Delaware facilities for compliance with the same federal regulations, his advice carries an inspector's seal of approval.

The Code prohibits State employees from using public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5805(e). It also prohibits conduct that would raise suspicion among the public that an employee is engaging in acts violating the public trust. 29 *Del. C.* § 5806(a). At a minimum, because he would be soliciting clients and telling them of his State position, it might appear to the public that he was using his State position to secure private clients for his own financial gain.

## **(B) Consulting with Delaware facilities**

### **(1) While working in another position in the same agency**

The employee had applied for another position in the same division where he presently worked. That would mean that he would still be an inspector in the same field but would be inspecting different facilities. Assuming he was selected for the position, the outside employment provision would still apply. See, 29 *Del. C.* § 5806(b)(4). If clients hired him to consult on issues regulated by his same division, it might appear that his clients would receive preferential treatment from the persons within that division.

The Commission previously ruled that accepting outside employment with businesses regulated by their agency would be improper for State employees. *Commission Op. No. 96-41* (where State employees enforced regulations against a specific industry, accepting outside employment with those same companies would be improper because, at a minimum, it could adversely affect the public's confidence in government because the public might assume that the employees would give preferential treatment to the outside employer when enforcing the regulations. Also, the public may believe that the employees' judgment would be impaired because of the conflict between performing duties for the outside employer and the need to enforce State laws against that same employer).

Beyond the outside employment restrictions, the Code prohibits State employees from representing or otherwise assisting private enterprises with respect to any matter before the State agency with which they are associated by employment. 29 *Del. C.* § 5805(b)(1). Thus, if selected for the job, if he consulted with private facilities regulated by the same agency that employed him, he would be at least "assisting" them with respect to matters before his agency because he would be advising them on how to comply with the regulations enforced by his agency. Thus, the Commission concluded that serving as a consultant to a private enterprise regulated by his agency under such circumstances would violate 29 *Del. C.* § 5805(b)(1).

### **(2) If employee transferred to another agency**

He also asked if he went to another State agency, whether consulting with the facilities in Delaware would be permissible. The Commission must issue advisory opinions based on "particular facts." 29 *Del. C.* § 5807(c). Without the particulars of what the job would entail, what regulatory authority would be exercised in the position, etc., the Commission did not have the particular facts to render a decision.

**96-48 – Outside Employment—Contracting with a State Agency:** A State employee started his own computer company as an outside business. He asked if he could bid on a State contract that was to be publicly noticed and bid. The contract was not with his own agency, nor did he have any dealings with the agency in his official capacity. He asked if his outside employment violated the Code of Conduct.

The Code prohibits State employees or any private enterprise in which they hold a legal or equitable ownership of more than 10% (more than 1% if the corporate stock is regularly traded on the securities market) from bidding on State contracts of more than \$2,000 if there is no public notice and bidding. 29 *Del. C.* § 5805(c). As there was notice and public bidding for the contract, the amount of the contract and the amount of the ownership interests were immaterial, and as a State employee, he could bid on the contract.

The Code also prohibits State employees from representing private enterprises before the agency by which they are employed. 29 *Del. C.* § 5805(b)(1). As he would not be representing the private enterprise before his own agency, there was no violation of this section.

Regarding whether his outside employment created a conflict, the statute provides:

No State employee 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 shall accept other employment under circumstances in which such acceptance may result in any of the following: (1) impairment of judgment in exercising 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 the government. 29 *Del. C.* § 5806(b).

The Commission had previously held that to ensure there was no substantial conflict with performing official duties, the individual should not perform any functions related to the outside employment during the hours when the individual is supposed to be performing State duties. See, e.g., *Commission Op. Nos. 95- 13, 95-30, 95-39*. Here, the State employee would perform the contract obligations in the evenings and on weekends, when he was not working.

The facts did not appear to create a situation which would tend to impair judgment, or result in preferential treatment or decisions outside official channels because the agency with which the employee sought to contract was not the same agency where he was employed, and the official decisions made for the agency where he worked did not impact on the contracting agency or vice versa. The law permits State employees to contract with State agencies if there is notice and public bidding, and he was not representing the private enterprise before the agency which employed him. Therefore, it did not appear that such actions would have any adverse effect on the public's confidence in its government.

However, the Commission based its opinion on a particular fact situation. 29 *Del. C.* § 5807(c). If he was selected as the contractor and learned additional facts which raised issues under the above provisions, or any other Code of Conduct provision, he was to re-evaluate his situation and return to the Commission for additional advice if necessary.

**96-41 – Outside Employment—Companies Regulated by Employee's Agency:** Employees of a State agency were offered temporary jobs by a company regulated by their agency. Their



State position required them to enforce regulations against the company, when necessary. While performing the temporary job, they could observe whether the company was violating the regulations.

The Code prohibits outside employment if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment of any person; (3) official decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of the government of the State. 29 *Del. C.* § 5806(b).

Because they would be paid by a company for which they enforced State regulations and their off-duty work for the company could result in observations that State regulations were being violated, the Commission concluded that accepting the outside employment could adversely affect the public's confidence in the integrity of government because the public might assume the employees would give preferential treatment to the outside employer or assume that the employees' judgment could be impaired because of the conflict between performing duties for an employer against whom they must enforce State regulations.

**96-22 – Outside Employment—Appointee to State Board Running for Elected Office:** An individual who was an appointee to a State Board wanted to run for either a city or county elected position. He had not decided which one.

The Commission referred the individual to its earlier rulings which held the Code of Conduct does not specifically prohibit running for elective office. (*Commission Op. Nos. 92-02 and 96-02*). However, in those opinions, the Commission noted that the Code of Conduct does preclude acts appearing to be improper and acts in substantial conflict with properly performing public duties. 29 *Del. C.* § 5806(a) and (b). Viewing those provisions in the context of running for elective office, the Commission held that individuals seeking political office should not engage in political activities or solicit any political contribution, assessment or subscriptions during hours of State employment or while engaged in State business. *See, Commission Op. No. 96-02*. The Commission noted that apart from the Code of Conduct, other statutes prohibit certain persons from being a candidate or holding elective office. For example, Public Integrity Commission members cannot be elected or appointed to U.S. or State office or be a candidate for those offices, 29 *Del. C.* § 5808(b); the State Election Commissioner may not hold or be a candidate for office, 15 *Del. C.* § 301, etc. The Commission pointed to those provisions to alert the individual to check beyond the Code of Conduct for other statutes that might affect his decision to run for office.

The Commission held that it could not rule on whether any conflict would be raised if the individual were actually elected because it can render decisions based only on particular facts. 29 *Del. C.* § 5807(c). Here, the individual had not even decided which elected office he intended to seek. Assuming he was elected, it would still need a particular fact situation to decide if the concurrent employment would violate the prohibition against holding other employment where it may result in: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give preferential treatment to any person; (3) making a governmental decision 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). Without specific facts, the Commission would not speculate on whether holding the concurrent positions would violate the Code.

If the individual was elected, as an elected official he would be subject to the State Code

of Conduct, unless the particular local government had adopted its own code of Conduct. See, 68 Del. Laws, c. 433 § 1. Only four local governments had adopted their own codes of conduct—Lewes, Newark, Wilmington and New Castle County. Also, as a State official, he would remain subject to the State Code of Conduct as a result of that position.

The Commission advised the individual that if elected and a specific situation arose, he should feel free to seek a decision from the Commission based on that specific situation. (Merit Employees, See, 29 Del. C. § 5954 & AG Op. No. 78-016).

**96-20 – Outside Employment—Second Job for Public School Teacher:** A State employee asked if it was a conflict of interest for him to hold outside employment teaching a private course similar to a course he taught in the public schools for students. He and his spouse owned a company that offered the course.

The Code of Conduct prohibits State employees from having any interest in a private enterprise or incurring any obligation of any nature in substantial conflict with the proper performance of official duties. It also prohibits outside employment if it may result in: (1) impaired independence of judgment in exercising official duties; (2) an undertaking to give preferential treatment to any person; (3) a government decision outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The employee did not conduct business related to his private enterprise during hours when he was working for the State. He also did not use supplies, vehicles, books, etc., from his State employment to teach the outside course. If he used State facilities to teach the course, his private enterprise would pay a rental fee set by the State. The course was advertised by either notice in newspapers or to insurance companies to their clients and did not specifically target students at the school where he taught. Students or their parents from the public school might respond to the ads, but not many had done so. When teaching the outside course, he did not mention the specific school where he taught but did say he was teaching a similar subject in public schools. Under those facts, the Commission found no violation of the outside employment provision.

**96-17 – Outside Employment—Employment with Agency Contractor:** A company which contracted with a State agency was unable to fulfill the contract in three areas because it did not have the necessary expertise. The agency asked another agency if the contractor could hire some of its employees to provide the expertise. They would provide the services to the contractor during their off-duty hours. If the contractor could not hire the State employees, the contract restrictions would result in a funding reversion if the deadline was not met. The State employees who would fulfill the contract were well qualified to provide the services and would perform the functions during non-regular business hours so that it would not interfere with their full-time employment. One was a Merit employee and the other was a non-Merit employee. The agency asked if the contractor could hire the employees, and if so, whether they should be paid or receive compensatory time.

The Code restricts employees from accepting other employment if it would result in: (1) impaired judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) appear improper. 29 Del. C. § 5806(b).

The Commission found no violation of the Code under those facts. Even assuming a violation, the Commission may grant waivers if there was an undue hardship for the State agency. 29 Del. C. § 5807(a). Here, the need of the agency to fulfill the contract obligation, with consideration of both the expertise required for the program and the need to meet the contract deadline, would constitute a hardship for the agency. Regarding whether the employees should be paid or receive compensatory time, the Commission did not find that decision to be within its jurisdiction. Rather, the agencies should determine how compensation would be made based on the contract provisions and any other relevant law or rule. For example, as to the Merit employee, the agency could review such things as the *Merit Rules* regarding dual employment with another State agency (*Rule 5.0500*) and the *Merit Rule* on partial compensation received from another agency (*Rule 5.0500*). See, *Merit Rules* (Revised August 12, 1994).

**96-09 – Outside Employment—Security Concerns:** An agency asked if it would violate the Code of Conduct for one of its employees to accept part-time employment which would result in the employee having access to the agency’s offices after duty hours. The agency was concerned that a security problem could occur, although no such incident had occurred. Further, the agency said its concern was not specifically about this individual. Rather, it resulted from a risk analysis determination that there could be a problem in granting agency employees access to areas where confidential information was retained as it could set precedent and create a problem.

The Code prohibits concurrent employment if it would result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (3) any adverse effect on the public’s confidence in the integrity of the government. 29 Del. C. § 5806(b).

The Commission issues advisory opinions on a particular fact situation. 29 Del. C. § 5807(c). As the agency concerns were not related to this individual and no security incident had occurred, the Commission held that the matter was not ripe for decision. Further, the agency was charged by the federal government with risk analysis for security problems based on federal statutes and/or regulations. The Commission’s jurisdiction is limited to implementing and administering the Code of Conduct. See, 29 Del. C. § 5808(a). Thus, it had no jurisdiction over federal provisions relating to security matters.

**96-02 – Outside Employment—Local Government Employee Running for Elected Office:** An individual who worked for a city government was subject to the State Code of Conduct because the Code of Conduct applies to local governments that have not adopted their own Code. 68 Del. Laws, c. 433 §1. Besides holding his government position, he wished to run for office in a different city. The Commission referred the individual to its prior holding that no specific Code of Conduct provision prohibits running for elective office while employed by the government. *Commission Op. No. 92-02*.

This individual was a law enforcement officer, so he also was referred to the Police Officers’ Bill of Rights regarding participating in political activities. See, 11 Del. C. § 9200(a). The restriction against police officers engaging in political activity while on duty or when acting in an official capacity or while in uniform was similar to the statute governing political activities by State Merit employees, which prevents them from engaging in political activity or soliciting political contributions, assessments or subscriptions during hours of employment or while

engaged in State business. See, 29 Del. C. § 5954. Although the Commission has no jurisdiction over those laws, it noted that those restrictions were consistent with the Commission's interpretation of Code of Conduct provisions which preclude acts appearing to be improper and acts in substantial conflict with properly performing public duties under the concurrent employment provision. See, 29 Del. C. § 5806(a) and (b).

As the individual had not been elected to office, the Commission found that the issue of whether being an elected official would create an actual conflict with his government employment was not ripe for decision. The Commission advised the individual that if elected, he should be aware of the restrictions on holding concurrent employment. See, 29 Del. C. § 5806(b). He was advised that if elected, he would be subject to the State Code of Conduct not only in his employed position, but also in his elected position. It said if a particular fact situation arose after being elected, he could return to the Commission for an opinion on a particular fact situation. (Merit Employees, See, 29 Del. C. § 5954 & AG Op. No. 78-016).

**NOTE:** The Delaware Supreme Court, in a 1998 advisory opinion interpreting the State Constitution, held that a State trooper must resign as a State trooper if elected to the General Assembly as he would be exercising both legislative powers (enacting State laws) and executive powers (enforcing State laws) and the combination would be "antithetical to Separation of powers between the three branches of government." *In Re: Request of the Governor for an Advisory Opinion*, Del. Supr., 722 A.2d 307 (1998).

**95-39 – Outside Employment—Writing a Book:** 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 did not substantially conflict with the individual's official duties because the employee worked on the book on the employee's own time. The Commission found no violation under those facts and directed the individual to observe the self-imposed limitation of not marketing in Delaware.

**95-30 – Outside Employment—Real Estate:** A State employee worked for an agency that engaged in real estate transactions and 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 was needed.

**95-28 – Outside Employment—Realtor:** 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 developments that 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 was needed.

**95-13 – Outside Employment—Employee's Own Business:** 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 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, was 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.

**93-01 – Outside Employment – Elected Official:** 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.

**92-11 – Outside Employment:** An employee’s State position was as a Senior Counselor. He wanted 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 would 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 would be in the position of identifying for the State client the companies that offered the type of services 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 would 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, would 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.

**92-07 – Outside Employment:** 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 did 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.

**92-03 – Outside 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.

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**From:** Devon Adams  
**Sent:** Friday, May 3, 2019 2:54 PM  
**To:** DOEregulations comment  
**Subject:** Proposed DIAA Regulations

To Whom It May Concern-

I support the concerns of the Delaware Athletic Trainers' Association and the Athletic Directors of the Delaware Independent School Conference regarding the proposed amendment to **14 Delaware Code, Section 122(b) and 303(a) (14 Del.C. §§122(b) & 303(a)) 14 DE Admin. Code 1009.**

As a certified athletic trainer working in the secondary school setting for 10 years, I routinely see injuries stemming from specialization in sport and overuse injuries from a lack of periodization. Our coaches do an excellent job managing their team in season, but student athletes also face pressures from the world of club sports and outside positional coaches. Working in a small private school, it's also imperative to our athletic program that students are well rounded- both academically, athletically, and in the arts. Smaller secondary schools also lack the resources in facilities, coaching staff, and support staff needed to sustain the impact of increased practices- and thus athlete exposures to injury.

Please reconsider the impact of this amendment to the health and well being of our student athletes, the competitiveness of schools at all levels in the DIAA, and the additional costs to schools beyond the obvious.

Best in Health-

Devon Adams, LAT, ATC  
Head Athletic Trainer  
Wilmington Friends School

[www.wilmingtonfriends.org](http://www.wilmingtonfriends.org)



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**From:** Michael Axe  
**Sent:** Friday, May 3, 2019 5:49 AM  
**To:** DOEregulations comment  
**Subject:** proposed/22 DE Reg. 838 04-01-19

I am writing this letter in opposition to the current language of subsection 7.6, year round coaching in my capacity as Chair of the Sports Medicine Advisory Committee-DIAA, a member of the School Health Committee of the Medical Society of Delaware, founding member of the AOSSM STOP youth sports injuries committee, and team physician for more than 35 years. All sports Medicine disciplines recognize sports specialization without a period of rest is the leading cause of overuse injuries and "burn out". 3 months of "rest" is often the recommendation by the medical committees. Please consider this.

Michael J. Axe, MD  
Chair, DIAA SMAC

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**From:** John Bellace <  
**Sent:** Friday, May 3, 2019 2:42 PM  
**To:** DOEregulations comment  
**Subject:** Public comment on out-of-season coaching

To Whom It May Concern,

I want to register my concerns with the proposed policy changes as I understand them. As a coach at a school that emphasizes multiple sport athletes (including often having coaches involved in multiple sports) and places a priority on player safety, I think this policy is wrongheaded and dangerous on both these fronts and others.

1) Multi-sport/multi-coach: Kids are pulled in enough ways as is and we are already seeing more and more "specialization". A policy that essentially allows for year-round coaching puts more pressure on kids to give even more of their time and energy. If I'm in the middle of football season, is it really fair for the basketball coach to expect my guys to come to shoot-around after practice when they're already tired? How about if the baseball coach wants batting practice as well? And when, exactly, do they study, spend time with their families and, importantly, rest? Ultimately, players will have to choose between coaches, sports and teammates in this scenario. Adding to that issue is the impact it will have on all teams. At a school like ours, we need every athlete in every program. If they have to start choosing where to go, all of our sports will suffer and some programs may not even survive. Perhaps it will not come to that but the avenue is clearly opened in this proposal. Going further, what about the additional demands on coaches out of season? When do coaches get time to coach or be part of other things, spend time with families, catch up on other work or work other jobs, etc.? If the argument is that this is a "choice" coaches and players can make, I'd address that in point #2.

2) Competitive disadvantage: There is no scenario in which this policy does not disproportionately benefit larger schools, larger coaching staffs, larger budgets, and schools with a focus on athletics above all else. The "choice" for everyone is to either find a way to practice out of season according to the new guidelines or find a way to make up for the fact that competitors have gotten far, far more practice time than you and your players have. How is that fair? The competitive balance of the system is already unstable in many ways and this would just be one more thing. The reality is if I have a staff of 15 coaches or the ability to hire outside help or if I have 90 guys on a roster many of whom only play 1 sport, this allows me to create a year-round program. If I have 5 coaches, 30 players and all of them are busy year round, I'm not able to do this and I'm behind my competition, making the whole idea of "fair competition" a farce. The "haves" get stronger and the rest play catch-up.

3) Player safety: We have already seen the impact in person as we have already had players attempting to play out-of-school club sports while also playing varsity sports. The toll it takes on their body and energy level is significant. My understanding is that the athletic trainers are already against this policy. At a time when player safety is more important and more heavily discussed than ever before, why would we institute a policy that potentially counteracts that and overrides the concerns of the very people who will deal with the fallout?

4) Academics: I'd like to believe that the point of our educational system is still "education". Perhaps it will not come to this but in some reasonable scenarios, the time demands placed on players will be significantly increased making it that much harder to find adequate time to study, contact teachers, receive tutoring, and get needed rest. Again, perhaps this benefits players and coaches who want to place their athletic development over everything else, but what message is that sending about the mission of our schools and the department of education in state?

I hope you will reconsider this policy. I believe it completely overshoots any intended result and brings us into an area where competition will be unbalanced to the point of being meaningless, player health and overall wellness will be secondary to athletic achievements, coaching demands (both by coaches and on them) will be unreasonably extended, and athletes will become "professionals" instead of athletics serving the purpose of developing the individual and furthering the missions of the schools. I have no doubt that there will be colleagues of mine who love this idea; I would suggest that you look carefully at the means they have to accomplish this relative to many others and ask yourself if it represents a fair state of play across the board. I would hope we would support policies that, as close as possible, bring more equity to programs and greater emphasis on our young people's overall well-being, not less.

Thank you for your time.

Sincerely,  
John Bellace  
Archmere Academy Head Football Coach/Head Rugby Coach

My name is Bob Beron and I am here today representing the Delaware Association of Athletic Directors (DAAD) as a paid dues member, a public citizen, resident of Delaware as well as the Athletic Director for Caesar Rodney High School. I stand before you today opposed to the proposed regulation change to 7.6.1 (Coaching out of season) which states as proposed:

A certified or volunteer coach shall be allowed to provide instruction in his or her assigned sport to all accepted and registered students of the school at which he or she coaches. Instructional contact with all accepted and registered students must be approved by the member school and shall be subject to the following conditions:

I will specifically speak in regards to proposed regulation 7.6.1.2.2 which states Instruction of accepted and registered students or participation by accepted and registered students in formal conditioning or practice shall be limited to a maximum of 6 hours per week and no more than 2 hours per day with the exception of school-sponsored camps and clinics. A week shall be designated as starting on Monday and ending on Sunday.

The reason for my opposition falls under 7 major points of emphasis. The first point is that I am concerned about the process of how this regulation was written and it did not give schools in Delaware appropriate time to review this regulation change. DAAD members were made aware of these proposed changes on April 10, 2019.

The second point is that student-athletes were not involved in the process of the survey as they are the front line that would be impacted the most.

The third point is that this increases the likelihood of overuse injuries and sport specific specialization. Many studies have shown (see attached) that overuse injuries can be caused by early specialization and can result in stress fractures, micro trauma injuries, and injuries to the growth plates as well as tendinitis.

The fourth point is that many schools will now see a decrease in the multisport coach. Many schools are having a difficult time finding qualified coaches which now would mean that the multisport coach may need to make a decision on which sport to coach.

The fifth point is that many schools will now see a decrease in the multisport athlete. High School should be a time for student-athletes to explore and be able to try new clubs/activities/sports. By allowing, essentially, year-round coaching in a specific sport the demand for the multisport athlete will drop.

The sixth point is that the Sports Medicine Advisory Committee (SMAC) has not reviewed this proposed regulation change for the overall mental health and safety of the student-athlete.

The seventh and biggest point is that, as stated on the DIAA website, the purpose of DIAA is broken down to 7 areas and 3 specifically that go against the proposed regulation change for Coaching out of Season.

# The Risk of Overuse Injuries

## OVERUSE INJURIES CAN BE CAUSED BY

training errors, improper technique, excessive sports training, inadequate rest, muscle weakness and imbalances and early specialization.

## LONG-TERM CONSEQUENCES INCLUDE

loss of playing time, reduced function and psychological exhaustion.

## SYMPTOMS OF OVERUSE INJURIES

tend to be gradual, resulting in athletes going undiagnosed and untreated for longer periods of time.



## COMMON OVERUSE INJURIES ARE

general stress, inflammation and tendinitis.

## INJURIES TO THE GROWTH PLATE CAN RESULT

from repeated microtrauma, which is microtearing of the muscle fibers and connective tissues.

## STRESS FRACTURES

occur when shock that can't be absorbed from fatigued muscles is transferred to the bone.

### OVERUSE INJURIES ARE MORE FREQUENT IN



Rowing • baseball • volleyball • cross-country  
• track and field • other low-contact sports

APPROXIMATELY **50%** of all sports-related injuries for pediatric athletes—children ages 6 to 12 and adolescents ages 13 to 18—are due to overuse

Acute overuse injuries occur when there is too much activity, too quickly, while chronic overuse injuries result from repetitive activities over the course of several weeks or months.

### WOMEN'S SPORTS, INCLUDING



Field hockey • soccer • cross-country • volleyball

**HAVE THE MOST OVERUSE INJURIES**

## PREVENTING OVERUSE INJURIES

- Avoid specialization and repetitive sport activity at a young age. Athletes who participate in a variety of sports tend to have few injuries and play longer.
- Limit training in one sport to no more than five days a week with at least one day off from any organized physical activity.
- Take time off from one sport for two to three months each year to allow physical injuries to heal, the body to recoup and for the athlete to focus on strength training and conditioning. This is also a psychological break that can help the athlete avoid burnout and overtraining syndrome.
- Pediatric athletes should only play one overhead throwing sport at a time and should avoid playing the same sport year-round. Participation in multiple sports throughout the year provides a wider range of skills as well as rest from repetitive, single-sport activities.
- Although there aren't injury thresholds for specific sports or age ranges, data suggest limiting vigorous physical activity to 16 to 20 hours a week for pediatric athletes.
- Conduct a pre-participation physical exam on an annual basis to detect life-threatening conditions as well as factors that may predispose the athlete to overuse injuries.

**RUTH BRIGGS KING**  
STATE REPRESENTATIVE  
37<sup>th</sup> District



HOUSE OF REPRESENTATIVES  
STATE OF DELAWARE  
411 LEGISLATIVE AVENUE  
DOVER, DELAWARE 19901

COMMITTEES  
Health & Human Development  
Manufactured Housing  
Public Safety &  
Homeland Security  
Transportation Land Use &  
Infrastructure  
Veterans Affairs

April 26, 2019

Dr. Susan Bunting  
Delaware Department of Education  
The Townsend Building  
401 Federal Street, Suite 2  
Dover, DE 19901

Dear Dr. Bunting:

I am writing to share my concern over proposed rule changes to 1009 DIAA High School Interscholastic Athletics currently open for comment.

First and foremost, I reviewed the impact criteria as the basis for decision making and offer the following for consideration. I take particular exception to two areas, as noted in 6 and 7. The proposed changes bring to the forefront several compensation and liability issues for the School Districts in Delaware. The teacher/coach is contracted with specific language and duties. If an injury, incident, or other liability as a result of the off season coaching, is the individual's coach liable or is the district liable? Equally important, who will pay for the cost for utilities, maintenance, and other requirements placed upon District facilities? Under the guidelines, proposed rule changes would place unnecessary administrative mandates upon the district, as well as increased, unfunded, mandates.

The proposed rule eliminates 6.4 Open Gym Programs which are very important to our communities. Many students desire to be engaged in sports related activities; however, few make the team. The open gym programs promote team work, physical activity, and guided instruction that may be provided to any not for profit groups, such as the Richard Allen Coalition, First State Community Action Agency and The Boys and Girls Clubs. Additionally, students may wish to "self-organize" for fun, yet this section is removed. As we strive to provide more after school programs, this would reduce the availability of recreational areas to those organized groups.

Second, the emphasis in our schools should be on an academic and educational outcomes. Although I was a student athlete and I raised student athletes who received academic and athletic scholarships, I am concerned about the focus and intent. The addition of "year round" season play may diminish the focus on education achievement and place a focus on a particular sport. A student would have competing interests of athletic endeavors with academic endeavors. Parent and student aspirations for an athletic scholarship or professional aspirations may overshadow the need for academic focus and overall success in collegiate interests.

3 Par Court, Georgetown, DE 19947  
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Email: [Ruth.BriggsKing@state.de.us](mailto:Ruth.BriggsKing@state.de.us) [www.repruthbriggsking.com](http://www.repruthbriggsking.com)

Third, 7.6 Coaching Out of Season: Several concerns arise from the proposed changes. A coach would be allowed to continue coaching, participate in organized sports by their employing school, and officiate the sport at which they customarily coach. Under Section 7.6.1.2.1, the change created a disadvantage to schools or communities that may lack financial resources to support the program.

Fourth, 7.6.1.2.2: Instruction of Accepted and Registered Students or participation by Accepted and Registered Students. In the information, conditioning or practice is limited to a maximum of 6 hours per week and no more than 2 hours per day, but the week is designated as starting on Monday and ending on Sunday. This is an extension beyond the normal school week and creates a dilemma for those who need to work, or attend religious gatherings. Families will be challenged to pick and may feel as though a sacrifice is required.

In closing, as a duly elected representative to Delaware's legislature it is incumbent upon me to share the concerns that have been expressed by several coaches, as well as school administrators, regarding the proposed rule change that serves the purpose of a small group and not a collective call for action. I appreciate the process and your attention to these concerns.

Sincerely,



Ruth Briggs King  
37<sup>th</sup> District  
State Representative

RBK/ab

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**From:** Collins Dave  
**Sent:** Wednesday, April 17, 2019 2:33 PM  
**To:** DOEregulations comment  
**Subject:** Comment on proposed changes to athletics

Good Afternoon,

I am writing to express concerns over the proposed changes to the DIAA policy in regards to out of season coaching. While there are some positive aspects of the proposal as it is written there are several alarming concerns with the proposed changes...

1. How was the amount of time allotted per week for out of season coaching/practices determined? Does the 2 hour per day, 6 hour per week include weight training/condition?
2. What is the maximum number of hours an athlete can participate in athletics during the day? Can an athlete have an in season practice for 2 hours and then go to an out of season practice for two hours as well?
3. Has data been studied about overuse injuries?
4. Has data been studied/presented about the negative effects of sports specialization? Because if this passes as it is currently written you will see many multi sport athletes becoming specialized athletes.
5. Has any data/research been collected on the effect this has on academics? They are STUDENT-Athletes

As an athletic director I cannot support this proposal as it is currently written. The coaches in my building would love more time with their athletes, but they too agree this is not the answer. This proposal does not address many of the previous concerns/issues brought forth by athletic directors' state wide. There is not an athletic director across our state who 100% supports this proposal as it is currently written.

Dave Collins  
Athletic Director, CAA  
Head Boys Lacrosse Coach  
Assistant Football Coach  
Hodgson Vo Tech  


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To the DIAA Board, Rules and Regulations Committee, and the Department of Education:

I am writing in opposition to the newly written rules and regulations regarding "Coaching Out of Season." As an the Athletic Director and the Head Coach of two sports of a Member School for the last 30+ years, I have noticed, at my school, the decline in student participation in athletics. It's not because we don't offer them, we struggle because the feeder school students we are supposed to have, choose to go other places. School choice has placed a huge burden on our enrollment numbers, and thus our sports teams also suffer because of it.

We will begin to suffer even more if the suggested rule changes are approved. These proposed rule changes will destroy many of our programs and make it even more difficult for us to compete with the schools who already have "our" kids. The kids we do have are amazing. We have kids that may not have the best equipment or uniforms, but they work and play hard.

Because of our low enrollment, many of our student-athletes choose to play multiple sports during the school year; this overwhelmingly helps our teams continue to be teams. These rules changes will have an adverse effect on our teams; it will afford the students that we do have, to choose to "specialize" in one sport only, something the NFHS and DE SMAC are vehemently opposed to.

Specialization may be the issue for the student-athlete, but what are the issues for the schools?

There are a number of factors that will affect the schools with the rule changes.

- Try to be competitive against schools who don't have budget constraints
- Increased Transportation and Insurance costs
- Increased costs for Custodial coverage
- Are we paying coaches to "Coach out of Season" for the extra 6 hours per week?

6 hours of practice per week is as much or equal to the amount of practice time available for practice DURING the season. The other days would be for contests. This, in addition to in-season practices, will undoubtedly increase over-use injuries for the student athlete, as well as increase liability and expense for the member schools.

I think there **could** be some benefit to changing the current "Coaching out of Season" regulation, but this drastic change of how it would be if the new change passes, is way too aggressive and it has not given any of us time to work out the logistics of what will happen in the future. Too much of what has been re-written was taken from the coaches answers to the survey questions and from a political push. The Superintendents and Heads of Schools are against this; so are the Athletic Directors. These are the major shareholders in all of this, and as written will not benefit the student-athletes.

Please vote against the changes as written. Take time to re-write the change with input from all of the respective parties involved.

Respectfully submitted,

Andy Dick  
John Dickinson High School  
Athletic Director  
Certified Athletic Administrator  
Head Girls' Basketball Coach  
Head Softball Coach

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**From:** Dukes, Timothy (LegHall) <Timothy.Dukes@delaware.gov>  
**Sent:** Thursday, April 18, 2019 3:59 PM  
**To:** DOEregulations comment  
**Subject:** Dukes Comment - DIAA Regulations

To Whom It May Concerned,

I am concerned about the recent regulations and would request more time is given to receive input from local superintendents. I am concerned that this would create an unfair advantage for the larger districts.

Timothy D. Dukes  
State Representative District 40

Sent from my iPad



**DELAWARE STATE UNIVERSITY**  
DEPARTMENT OF PUBLIC & ALLIED HEALTH SCIENCES

Cara Gomez, Ed.D, ATC, CSCS  
Assistant Professor  
Delaware State University  
1200 N. DuPont Highway  
Dover, DE 19938

April 16, 2019

Dr. Susan Bunting  
[Susan.bunting@doe.k12.de.us](mailto:Susan.bunting@doe.k12.de.us)

Emily Cunningham  
[Emily.cunningham@doe.k12.de.us](mailto:Emily.cunningham@doe.k12.de.us)

Dear Dr. Bunting and Ms. Cunningham,

This letter is about the Amendment of 14 Del.C. Section 122(d), 1009 DIAA High School Interscholastic Athletics. I have read the Education Impact Analysis and understand that some of the proposed changes would allow out-of-season coaching, summer camps, and training sessions. As a healthcare professional, I would like to voice some concerns regarding the impact of this amendment to the health and safety of the student athletes.

**Concern 1: Year-round sport-specific training can increase injury risk**

While the proposed amendment states that coaches cannot make these out-of-season training sessions mandatory for making the in-season school team, students will feel additional pressure to participate in year-round training to be as competitive as possible to make the team. Sports specialization is defined as "intense year-round training in a single sport with the exclusion of other sports ([Jayanthi, Pinkham, Dugas, Patrick, & LaBella, 2012](#)). While hypothesized that early sport specialization and dedicated practice would result in athletes who will perform better, research indicates that is not the case for most sports (with the exception of gymnastics) and in reality, sport diversification is more likely to lead to world-class athletes ([Jayanthi et al, 2012](#)).

For more concerning though, is the fact that single-sport intense training increases injury risk ([Jayanthi, 2012](#)). Additionally, athletes who try to participate with both in-season sports and out-of-season training (if not also club sports participation) are additionally at risk for injury as cumulative match/practice exposure increases injury risk and can lead to burnout ([Jayanthi et al., 2012](#); [Meyer et al, 2015](#)). While there are few studies that indicate there are no difference in injury risks between single-and multi-sport athletes ([Mosei et al, 2019](#)), much more evidence

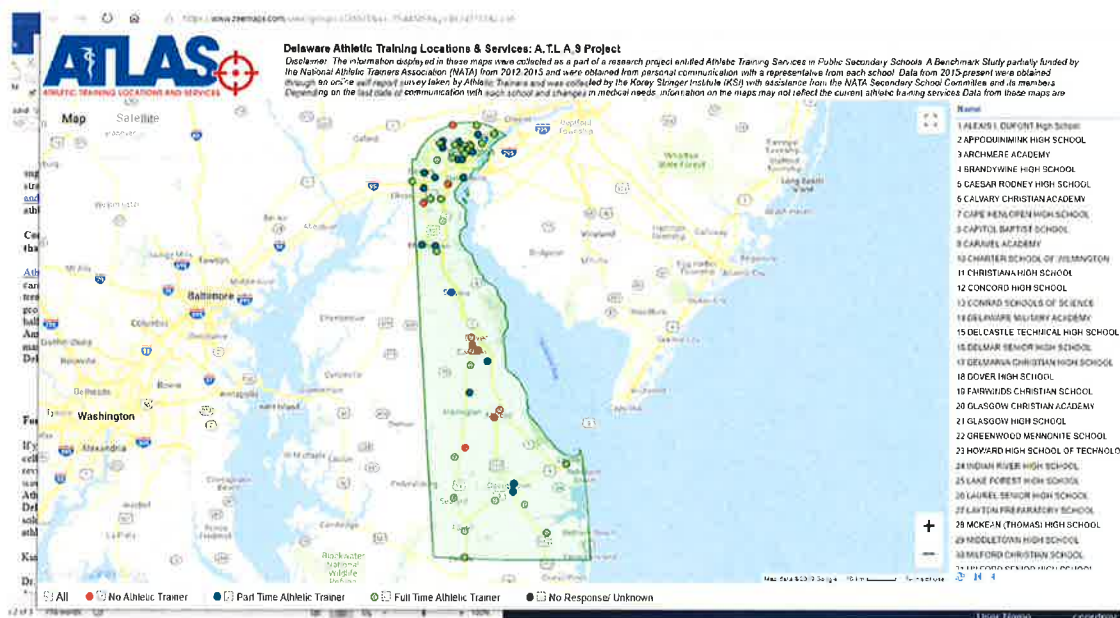
suggests otherwise. [Walters and colleagues](#) (2017) found that early sport specialization places stress on fewer muscle groups which can lead to overuse injuries and early sport dropout and [Post and colleagues](#) (2017) reported higher levels of overuse injuries in highly specialized youth athletes, and these articles are just representative of other research available on this topic.

**Concern 2: Schools do not employ enough Athletic Trainers to provide the medical care that would be necessary to accommodate out-of-season training sessions and camps**

[Athletic Trainers](#) are allied health professionals who collaborate with physicians to provide health care services for injuries and medical conditions. Athletic Trainers prevent, examine, diagnose, treat, and rehabilitate injuries and are employed by high school, club/travel, college, and professional sports teams; military, fire and police departments and academies; Cirque du Soleil, ballet troupes and other performance productions; warehouses and factories for companies such as Amazon and Walgreens; and physician offices. Athletic Trainers must attend an accredited masters-level Athletic Training Program and pass a national Board of Certification exam, and in Delaware, obtain a [State License](#) to practice.

Athletic Trainers are hired or contracted to work in Athletic Training facilities at Delaware public and private schools during interscholastic practices and competitions to provide emergency first aid care in the event of a sport-related injury. During free periods or in the afternoons, the Athletic Trainers will evaluate athletes who are injured and conduct injury treatment and rehabilitation in the Athletic Training facility on campus. Delaware Athletic Trainers work with coaches and athletes to help students who may have diabetes or sickle-cell trait participate safely in their sport. When an athlete needs to see a physician, the Athletic Trainer can often [facilitate quick appointments](#) and will work with the doctor to implement follow-up care and return-to-play criteria when the student is back on campus. The Athletic Trainer often sorts through physicals and informs the Athletic Director and coaching staff when the students are “cleared” to begin the season and alerts the staff when students are being withheld from activity due to injuries.

As you can see from the Delaware Athletic Training Locations & Services ([A.T.L.A.S](#)) map below, some Delaware schools employ Athletic Trainers full time, but nearly half of Delaware’s school have a part-time or no Athletic Trainer. Some schools with a part-time Athletic Trainer only contract Athletic Training services for 10 hours a week to meet the minimal DIAA standard for medical care during football season. Most schools with a full-time Athletic Trainer only have one Athletic Trainer on staff, who is responsible for the medical care (emergency care, injury evaluations and diagnosis, and rehabilitation) for several hundred athletes.



Delaware Athletic Trainers are working understaffed, trying to meet the healthcare needs of entire athletics programs with a single Athletic Trainer. Unlike a Physical Therapist who may see 5-15 patients per day, Athletic Trainers may easily see 30-40 athletes a day and complete preventive treatment (stretching and taping), injury evaluation (“Can you look at my ankle? It hurts”), providing injury care (evaluating a concussion from practice), to rehabilitation (conducting exercises for shoulder stability after a dislocation). Just as with other health care professionals, Athletic Trainers’ must document every treatment and evaluation.

Delaware Athletic Trainers are concerned that the proposed amendment will not only increase the athlete’s injury risk but with their limited resources and time constraints, that they will not be able to adequately provide the medical care for these student athletes. Even six additional practice hours per week in the off-season, spread across several teams, will require additional medical care and time, energy, and resources from Athletic Training Departments. Here are some of the concerns the Athletic Trainers have:

- If an athlete sustains a **life-threatening injury** (loss of consciousness, no breathing, severe bleeding, etc.) during an out-of-season sports practice, who will be responsible for providing life-sustaining care? Athletic Trainers already have multiple in-season sports and competitions they are covering. Should an Athletic Trainer leave an in-season competition/game to attend to a life-threatening condition for an out-of-season athlete?
- If an athlete needs an **injury evaluation** (ankle sprain, concussion, shoulder pain) due to an out-of-season practice or training, who will be responsible for the injury evaluation? Athletic Trainers have a high patient load with just their in-season athletes.
- If an athlete needs **taping, stretching, or rehabilitation** due to an out-of-season training session, who will be responsible to provide those services for the athlete
- Who will be responsible for assuring the physicals are completed for out-of-season practices? Who will communicate to the coaches regarding **which athletes have sickle-**

**cell trait or diabetes?** Athletic Trainers have little time to manage the medical documentation of in-season athletes without the extra case load.

- If an out-of-season team wants to practice when in-season teams are off, **or outside of the contract hours of the Athletic Trainer**, who will be on campus to be responsible for the health care of those student athletes?

Athletic Trainers are highly qualified to manage all the healthcare needs related to sports-related injuries for Delaware's student athletes. The concern from the Delaware Athletic Trainers' Association and Athletic Trainers across the state is that Athletic Trainers currently are under-resourced to adequately care for in the in-season athletes, let alone the additional patient and work load associated with out-of-season training and practices.

### **Solution**

One potential solution is to first ensure that all Delaware schools have adequate and quality sports medicine healthcare services provided by Athletic Trainers for in-season athletes. Depending on the size of the school, this may mean ensuring the school has one (1) to three (3) full-time Athletic Trainers (depends on the number of teams and number of athletes) and a sufficient supply budget for each Athletic Training facility on school campuses. Then the conversation could shift to the feasibility and cost of caring for the healthcare needs of the out-of-season athletes perhaps by schools approving additional per diem or part-time Athletic Training healthcare services.

### **For Follow Up**

If you have any questions or would like to follow up with me regarding this letter, my email is [ccordrey@desu.edu](mailto:ccordrey@desu.edu) or my cell phone number is 305-975-4949. I would be happy to conduct a more thorough literature review regarding injury risk with year-round training to help your team make an evidence-based decision for Delaware's student athletes. I would also be happy to meet with DOE representatives to explain the scope of practice of Athletic Trainers and how they work to prevent, respond to, and treat athletic-related injuries in Delaware's schools. And lastly, I would be happy to provide any advice or assistance to find solutions to help coaches be successful while ensuring the health and safety of our student athletes.

Kind regards,

Dr. Cara Gomez

Assistant Professor, Department of Public and Allied Health Science, Delaware State University  
Past-President, Delaware Athletic Trainers' Association

## Works Referenced in Letter:

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**From:** Haller John  
**Sent:** Tuesday, April 16, 2019 2:06 PM  
**To:** DOEregulations comment  
**Subject:** Comments on Sports Policy Change

In regards to out of season coaching, regulate the latest a practice can go. Coaches will be practicing to 9 or 10 PM if allowed in order to squeeze in their extra practices. Athletes will have to pick between sports and their education. Coaching your sport out of season is not a healthy change for the athletes or the coaches.

Out of season coaching basically raises the expectations of coaches without raising their pay. I realize it is the coaches choice to work out of season but coaching out of season will be the new standard to keep up with. College coaches get anywhere to 10-20K for all year coaching and we get 2-4K?? Expecting more without paying more is wrong.

John Haller  
Smyrna High School AP Chemistry  
Boys and Girls Cross Country  
Boys JV Lacrosse

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**From:** Heather Heidel [REDACTED]  
**Sent:** Friday, April 19, 2019 2:44 PM  
**To:** DOEregulations comment  
**Subject:** Proposed Changes to DIAA Regulations: Coaching Out of Season

Dr. Bunting and Ms. Cunningham,

My name is Heather Heidel and I am the Certified Athletic Trainer at Sussex Technical High School. Two of my more important priorities at our school are to protect the health and safety of all of our student-athletes, and protect my school and myself from any liability issues.

With the proposed changes in DIAA regulations sections 6 & 7, which concern out-of-season coaching and the ability of our student-athletes to ultimately participate year-round without restrictions, is truly worrying to me. Not only does it take away the ability of myself, my school, and other athletic trainers in our state to protect the health and safety of our student-athletes, it goes against all current research about sport specialization and overtraining. There is already an abundance of overuse injuries and burnout in athletes as it is, now you add in year-round (including summers) practices for potentially 2 or more sports- the injury rate will increase significantly.

Example scenario: Today I will be covering 4 in-season games: baseball, softball, and 2 boy's lacrosse, I will also have 2 in-season teams practicing. That means I will have 5 of my own teams to cover as well as 4 teams from other schools: a total of 9 teams to cover. If the proposed regulations change: I could potentially have 15 or more teams on campus practicing or participating in games. This will take away my ability and my school's ability to protect the health and safety of our student athletes, and will place an unwanted liability on both.

I also believe that this will take a toll on community and academic aspects of our school. Coaches would be "fighting" over athletes and overstepping on practice times/seasons. The unneeded pressures on the athletes to specialize in one sport and please certain coaches would be unnecessary. Not to mention, specializing in one sport goes against research that states that multi-sport athletes end up with less injuries, burnout, overuse, etc. Most of my athletes already compete in club or travel teams (some year-round) on top of our school teams, which requires a lot of extra time dedicated to sport- this allows them no rest time.

This new regulation would just add to the issues of: overuse injuries and athlete burnout, liability, employing faculty to cover practices, facility issues, financial burden, and burnout of the athletic trainer. The health and safety of our athletes is at risk here, as well as the liability of our schools.

I hope you take into consideration the negative effects these changes could have on student-athletes and that there can be a discussion to reject these proposed changes!

Thank You for your time and consideration,

Heather Heidel

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Heather Heidel ATC, PES

Head Athletic Trainer

Sussex Technical High School

Delaware Athletic Trainer's Association Secretary

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**From:** Heiss, Susan  
**Sent:** Friday, May 3, 2019 11:48 PM  
**To:** DOEregulations comment  
**Subject:** Out of season coaching rule

To Whom It may concern,

I want to state my disapproval of the proposed out of season coaching rule that was suggested by the Rules and Regulation committee. I feel that this rule will encourage student athletes to pursue their in season sport AND their out of season sport at the same time, resulting in overuse injuries.

Also, Ursuline Academy has a small enrollment. We need all our athletes to be multi sport athletes so we can field our teams- varsity and JV. With this suggested rule change, I am concerned that athletes will quit their in season sport- perhaps due to lack of playing time - to receive outside coaching from an out of season coach. This may result in no JV or low number varsity teams.

Also, Ursuline only has one gym/ practice site. It is not possible to schedule these extra practice sessions.

Again, I am against this rule change.

Susan Heiss  
Director of Athletics  
Ursuline Academy

## Delaware Pediatrics, P.A.

1403 Foulk Road, Suite 100  
Wilmington, DE 19803  
302-762-6222

3920 South Dupont Parkway  
Townsend, DE 19734  
302-449-2570

[www.depeditrics.com](http://www.depeditrics.com)

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April 25, 2019

Dear DIAA Board Members,

Re: Proposed rule change to allow coaching out of season

We are writing with the goal of providing the board with the perspective of two pediatricians who provide care to student athletes, and as parents, whose children have been intimately involved in the DIAA over the past decade. We believe that our perspective is worth your consideration, as you make a decision on this proposal.

It comes as no surprise that the DIAA board is being asked to make changes to the to the coaching rules. All one needs to do is appreciate basic economics. As of 2017, youth sports have grown to become a \$17 billion industry.<sup>1</sup> This means that, in terms of dollars, youth sports are collectively a bigger business than any of the major professional sports leagues in the United States, including the NFL, the NBA, MLB, the NHL, and the MLS. It is projected that the youth sports market should reach \$57.8 billion by 2024.

Unfortunately, while participation in youth sports has increased over time for children in wealthy families, participation has decreased for children in poorer families. This is not to say that families with economic means should be prohibited from spending money on their children, but merely to point out that the "pay-to-play" culture in youth sports is not without consequences. Disadvantages of this system include: decreasing the participation of children from less privileged families, fracturing our school communities, and diminishing the quality of the sports overall. It is imperative that DIAA consider the impact of these phenomena, and advocate for the greater good. We understand that making this type of decision may be personally challenging, particularly in a small state like Delaware, and want to thank you all for your efforts and service on this board, and your commitment to Delaware's youth. We appeal to your sense of fairness for all students in your consideration of this proposed change.

We must assume that much of the momentum toward this proposal is driven by the assumption that specialization in a specific sport creates some type of advantage for the young athlete. Yet, science, statistics, and experience contradict this premise. Studies demonstrate that sports specialization in high school *increases risk of injury among high school athletes*. This is not only well documented in sports medicine analyses; it is something that we witness first-hand as we treat our patients. The proposed rule change is, without a doubt, designed to make it easier for a student athlete to specialize in a specific sport.

The change would unequivocally encourage, if not compel, many athletes to specialize in a single sport. Medical research has established that, although a child's parents play the dominant role in determining

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<sup>1</sup> Copyright 2018 WinterGreen Research, Inc. 6 Raymond St. Lexington, MA 02421  
(781) 863-5078. [www.wintergreenresearch.com](http://www.wintergreenresearch.com)

whether a child starts playing a sport, the coach plays a major role in deciding how much to train *and whether to specialize in a sport.* <sup>234</sup>

There is already a distinct perception in Delaware that in order to be considered for a starting position on certain teams at some high schools, children must participate in the youth "pay-to-play" organization in which that high school's coach is involved. This opinion will certainly be reinforced if the coach is permitted to directly train high school age athletes within these "pay-to-play youth programs. Whether this belief is valid or not, kids who cannot, or do not, participate in these organizations for a school's coach will feel that they are less likely to make the team, or be given a starting position. This will pressure those athletes who have the financial means to do so to specialize. By the same logic, it will discourage kids who do not have the economic means available to attend these "pay-to-play" programs, or a desire to specialize, from participating in that sport.

Additionally, if players specialize in a specific sport, and follow a coach to "pay-to-play" leagues out of season, it will likely result in diminished participation in other sports at their high school, and will cause schools to field less competitive teams, or, realistically, not have enough participants to field a team at all. As a consequence, participation in high school sports may understandably diminish, as the number of teams, and/or quality of teams, declines.

The effect of the proposed rule change would differ in Delaware compared with other states, given our unique school choice system, and the fact that a large percentage of our students attend private schools. At Delaware schools with a student population from higher income families, incentivizing arrangements could be made for coaches who already coach at local pay-to-play organizations to recruit as many skilled players to their schools as possible. This would be an easy way to recruit an entire club team to a given school. What this translates into is a direct step toward endorsing the idea of having pay-to-play club teams to compete as a team within the DIAA, against, or in place of, legitimately school-based teams.

Setting economic advantages aside, after recognizing again that this rule change will benefit pay-to-play leagues, and likely please some parents of children who play in those leagues, we would like to return to the other idea that flows naturally from this proposal, which is sports specialization. This is a time when the DIAA should be consciously making it harder for young athletes to specialize. Authorities on the topic, including researchers, practicing physicians, athletic trainers, and physical therapists agree that sports specialization for this age group is a bad idea. This rule change makes no sense medically, since it would adversely impact the health of 13, 14, 15, and 16-year-old children. The American Academy of Pediatrics has clearly stated that children should not specialize in a sport until after puberty <sup>5</sup>.

Why would the board contradict a recommendation by the organization that is recognized as the authority on the health of children by changing a rule to *increase* specialization among pubertal and pre-pubertal athletes?

In summary, we respectfully ask why the DIAA board would approve a rule change that:

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<sup>2</sup> Hill GM, Simons J. A study of the sport specialization on high school athletics. J Sport Soc Issues. 1989 ;13(1) :1-13

<sup>3</sup> Baxter-Jones ADG, Maffulli N; TOYA Study Group. Parental influence on sport participation in elite young athletes. J Sports Med Phys Fitness. 2003;43(2):250-255

<sup>4</sup> Jayanthi N, Pinkham C, Dugas L, Patrick B, Labella C. Sports specialization in young athletes: evidence-based recommendations. Sports Health. 2013;5(3):251-257

<sup>5</sup> Brenner, J. S., LaBella, C. R., Brooks, M. A., Diamond, A., Hennrikus, W., Weiss Kelly, A. K., Council on Sports Medicine and Fitness (2016). Sports specialization and intensive training in young athletes. Pediatrics, 138(3), [e20162148]. <https://doi.org/10.1542/peds.2016-2148>

- 1) would increase the rate of injuries by as much as 60% <sup>6</sup>. And, as noted in the conclusion of a recent consensus statement by the American Orthopaedic Society for Sports Medicine (AOSSM), "*Early sports specialization has been identified as damaging for the future physical and mental health of the athlete*".<sup>7</sup>
- 2) widens the inequality gap between students of means and poorer students
- 3) has the potential to decrease the quality and number of sports teams at a school, particularly at smaller schools.
- 4) promotes sports specialization, which is distinctly opposed by the country's leading authority on children's health

All of this occurs at a time when 94% of players picked in the first round of the 2017 NFL draft and 91% of those picked in the 2018 NFL draft were multi-sport high school athletes *and* when only 22.3% of professional athletes want their own children to specialize in one sport?<sup>8</sup>

As the DIAA board, the onus is upon you to make an informed decision which benefits as many students and schools as possible, while keeping athletes safe.

What evidence does the board have before it to suggest that this rule change is a good idea?

This proposed rule change may be a desire of well-meaning parents advocating for the benefit of their individual child, but there is absolutely no evidence that it would benefit athletes or schools. It has been suggested that some rules which the DIAA currently has in place which help to limit sport specialization are antiquated. We would instead contend that these rules place the DIAA on the vanguard of protecting young athletes from a harmful trend. Although the current rule regarding coaching out of season may be politically challenging to maintain, the evidence overwhelmingly favors rejecting this rule change request outright. As practicing pediatricians caring for young athletes, we support the American Academy of Pediatrics position on sports specialization, and support the DIAA board in making evidence-based decisions which protect the health and well-being of Delaware student athletes.

Sincerely,



Jason Hann-Deschaine, MD, FAAP



Matthew P. Gotthold, MD, FAAP

Delaware Pediatrics, PA

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<sup>6</sup> McGuine TA, Post EG, Hetzel, S, Pfallar A, Brooks MA, Bell D. A Prospective Study on the Impact of Sport Specialization on Lower Extremity Injury Rates in High School Athletes. *Am J Sports Med.* [doi.org/10.1177/0363546517710213](https://doi.org/10.1177/0363546517710213)

<sup>7</sup> LaPrade RF, Agel J, Baker J, Brenner JA, Cordasco FA, Côte J, ... AOSSM early sport specialization consensus statement. *Orthopaedic journal of sports medicine* 4 (4), 2325967116644241

<sup>8</sup> Buckley PS, Bishop M, Kane P, Selverian S, Hammoud S, Freedman K, Cohen SB, Ciccotti MG. Early single Sport Specialization: A Survey of 3090 High School, Collegiate, and Professional Athletes. *Orthopaedic Journal of Sports Medicine.* 2017 Jul 28; 5(7):1-7. 2325967117703944 DOI: 10.1177/2325967117703944

# HENLOPEN CONFERENCE

CAPE HENLOPEN SCHOOL DISTRICT

1270 Kings Highway

Lewes, Delaware 19958



2017/2018 2018/2019

## NORTHERN DIVISION

Caesar Rodney  
Cape Henlopen  
Dover  
Polytech  
Smyrna  
Sussex Central  
Sussex Tech

## SOUTHERN DIVISION

Delmar  
Indian River  
Lake Forest  
Laurel  
Milford  
Seaford  
Sussex Academy  
Woodbridge

DIAA Board Members

April 26, 2019

The Henlopen Conference athletic directors met on April 17, 2019, and discussed the DIAA Coaching Out of Season By-Law changes. After a lengthy discussion, the directors directed me as Executive Secretary to draft this response.

The Henlopen Athletic Conference is opposed to this change as it currently is written. Our major concerns are:

- The process did not give member schools appropriate time to review and comment.
- Students were not involved in the process of the survey.
- Overuse injuries and sports specialization increase insurance cost per National Trainers' Association and American Academy of Pediatrics.
- The purpose of DIAA is to protect the physical wellbeing of the athletes and provide fair and equitable competition between member schools. The feeling was that this by-law change will hurt the smaller schools.
- The change will decrease the number of multi-sport athletes and multi-sport coaches and create a lack of sub-varsity level programs.
- SMAC (Sports Medicine Advisory Committee) has not reviewed this for mental health/over-use/injuries and medical concerns.

Thank you for your consideration in this matter.

Respectfully,

*Bud Hitchens*

Executive Secretary of the Henlopen Conference

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**From:** Roger Holt <  
**Sent:** Friday, May 3, 2019 4:00 PM  
**To:** DOEregulations comment  
**Subject:** Out of Season Coaching

Good Afternoon

I want to first thank you for addressing this topic. As a former coach, this was something that I thought should be reviewed.

I am in support of coaches having out-of-season contact with their athletes for many reasons and I feel that one of the arguments against allowing this to move forward is a claim that is not supported by peer reviewed, conclusive data.

1- Many student athletes do not engage in structured physical activities after their sport of choice ends for various reasons:

- They do not make the team
- They do not enjoy other sports
- Their parents cannot afford travel programs
- They do not have transportation to allow them to engage in non-school supported activities

2- Student athletes, that would seek training/sports from outside the district, would be best served by their coaches for many reasons:

- District-based coaches have passed criminal background checks- many of the "for-profit" trainers and club sports do not ensure this
- District-based coaches ultimately answer to the district and to DIAA
- Student athlete will be training in controlled environments

3- An argument against this concept is the worry that student athletes will abuse their bodies excessively

- I have not seen conclusive peer reviewed data to support this claim
- Student athletes are already single sport year around athletes, they just seek the training from "for profit" groups
- District-based coaches are ultimately seeking to improve their student athletes as all-around students, they are more motivated to protect / guard their students from injury.

Thank you for taking the time to read my feedback.

Roger Holt



## Shockley Tina

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**From:** Alycia Jefferson  
**Sent:** Wednesday, May 1, 2019 10:30 AM  
**To:** DOEregulations comment  
**Cc:** 'ajefferson@motcharter.com'  
**Subject:** DSAC Letter Regarding Proposed Amendment to DE Admin. Code 1009 DIAA High School Interscholastic Athletics

**Importance:** High

To Whom it May Concern:

Here in Delaware we have always prided ourselves on the fact that our athletic programs are student centered and education based. We focus on the experience as an opportunity for our students to learn and grow both as athletes and as young adults. We all take great pride in the number of multi-sport athletes who have successfully graduated from our high schools each year since the DSAC was founded more than a decade ago – and we feel very strongly that the proposed regulation could have an immediate and irreversible negative impact on our conference.

If passed as it is written, this new regulation would lead to specialization for student athletes and dramatically cut the total number of athletes available for multiple sports programs each season; this would cripple certain programs and allow others to thrive creating an imbalance that is nearly impossible to regulate fairly.

It would create safety concerns for our student athletes by permitting students to practice nearly twice the currently allowed time, as they will now be permitted to attend both an in-season practice and then an out-of-season season practice in the same day. Potentially increasing practice time from two to four hours each day, after having completed a full academic day, would be both mentally and physically exhausting for our student athletes. Further, it could prove detrimental to both their academic standing as well as their mental well-being, which flies directly in the face of our most central belief – that our student athletes are students, and athletes second.

This regulation would also exacerbate the divide between the most established schools and those that are new and in the beginning stages of development in terms of space and facilities. In most schools in our conference, we currently share and schedule our fields, gyms, and even general spaces to accommodate our in-season sports along with the myriad other extracurricular clubs and programs that we offer. By offering out-of-season practices, we would place even greater demands on our facilities, and some programs would likely no longer be able to be offered. In addition to the over-use of our facilities and the potential negative impact on student health and safety, there would no doubt be significant additional costs in order to accommodate these practices - we would have to provide proper supervision of student athletes as well as have a certified athletic trainer on site for extended hours each day. This would once again further the divide between more established and those that are still in a more developmental stage.

We ask that you please reconsider this decision, as we do not feel it is in the best interest of our conference, our schools, or, most importantly, our students.

Sincerely,

DSAC Athletic Directors

## Shockley Tina

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**From:** Patrick Jones [REDACTED]  
**Sent:** Wednesday, April 24, 2019 9:56 PM  
**To:** DOEregulations comment  
**Subject:** Out of Season Coaching

To the Department of Education,

The purpose of my email is in response to the possible rule change regarding out of season coaching. The ever increasing pressure to prepare and guide young athletes has greatly intensified over the last decade. This is in large part due to social media and dreams of potential collegiate athletic scholarships. I have been in education for 30 years and wrote my masters thesis on the reasons why children play and drop out of youth sports. The findings then and now have not changed. Children begin playing sports for fun and drop out due to increasing pressure and the lack of fun. The whole point of high school athletics is to educate our youth in the life lessons of team work, perseverance, goal setting and sportsmanship. The current out of season restrictions with respect to high school coaches limits contact between the coach and their student athletes. Thus, this allows for outside groups/clubs who are often not invested in the child's growth, but their own finances to overly involve themselves with our high school athletes. Although, Athletic Directors have been asking for a rule change that allows for more contact hours between coaches and their athletes, the proposal currently up for discussion is not what Athletic Directors intended. I have outlined below the potential negative impact that this new proposal could have on our young athletes, our high school programs, as well as the overall participation in sports in Delaware.

### 1.) Increase in Potential Lawsuits

- The lack of an athletic trainer or appropriate medical personal would on site would be impossible for already restricted budgets. Thus, this would result in athletics taking place without the correct medical personnel on site to oversee practices. The potential for a serious injury could result in a district being sued.

### 2.) Increased Costs

- I do believe we dropped 10% of our game totals back in 2009 due to lack of funds. How can we consciously change a rule that would involve an increase in budgets
- This would result in a greater separation of schools being able to afford to offer this opportunity and therefore result in an unfair advantage and uneven literal playing field

### 3.) Less Time Spent on Academics

- A student presently participates for 2 hours a day 6 out of 7 days a week. If the proposal is passed this means potentially another six hours a week of practice would be possible for a student to practice an out of season sport. This ultimately lends itself to less time spent on academics and or much needed rest for a growing body and brain.

### 4.) Increase Injuries

- Overuse injuries in our young athletes is already on the rise. Thus, we could expect an increase in these types of injuries and therefore the level of participation in our school athletic programs would drop.
- Studies show that students who play multiple sports are at less risk for developing an overuse injury.

I ask that you seriously research the negative implications of this policy change. We need a group of well trained athletic educators and medical personal to discuss all options and the best approach when considering "out of season coaching" in order to devise a more appropriate plan for consideration.

Sincerely,  
Patrick Jones M.Ed, CMAA

Director of Athletics

The Tatnall School

1501 Barley Mill Road | Wilmington, DE 19807

*"Tatnall is not just a school. It's a way of life." – Frances D.S. Tatnall*

Patrick Jones, CMAA

Director of Athletics

The Tatnall School

1501 Barley Mill Road | Wilmington, DE 19807

*"Tatnall is not just a school. It's a way of life." – Frances D.S. Tatnall*

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**From:** Judy Michael  
**Sent:** Wednesday, May 1, 2019 10:33 AM  
**To:** DOEregulations comment  
**Subject:** DIAA Out-Of-Season Proposal Comments

Greetings-

First I'd like to thank all of those involved in this tedious process- it is not easy to amend current regulations and often one faces much scrutiny throughout the process...thank you for considering making changes to help our student athletes!

I applaud the proposed changes. Clearly our student-athletes are not just in competition with each other during their competitive seasons, but they are also competing against other states' student-athletes for college opportunities. I wholeheartedly believe that these proposed changes would allow Delaware student-athletes to stand on an even surface while competing with our surrounding states.

There are a few suggestions I have that will be explained below:

-7.6 Amendment

I agree with all of this including the necessity to minimize any possible contact during the offseason. However, the proposed restrictions on football and lacrosse need adjusting.

1. From a player-safety perspective, prohibiting safety equipment like hand shields is unnecessary- these implements are designed TO mitigate player-on-player contact. I fully understand and agree with the proposal to keep this drill work to non-contact. To be effective, a football coach would need to implement the use of shields and dummies to do so. A better regulation may be to adhere to USA Football's Level of Contact #0-2 (those levels can be found [here](#).) USA Football is our governing body for Youth Football and the organization we uphold their safety regulations through annual training.
2. Lacrosse should be non-contact as well, but prohibiting the use of chest-protection by the field players (the chest protector is part of the "shoulder pads") could expose players to a safety issue in shooting drills. The safety equipment of lacrosse is much more important to protect the player from shots/ricochets/stick checking than it is about protecting the player from player contact. The rule should allow the lacrosse players to wear their "full protective equipment" that includes a sternum/cardiac shield and elbow pads but the drills remain not full-contact. As a lacrosse coach, I would NEVER let any of my players practice (even on air) without their FULL protective equipment as it is too much of a safety issue to do so.

Thank you so much for taking the time to read this. If you would like clarification on any of the comments please feel free to e-mail me or call me (302) 670-6669.

Michael Judy, M.Ed.  
Health/PE Instructor  
Smyrna High School

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**To:** Cunningham Emily  
**Subject:** RE: DIAA Proposals Sections 6 &7

**From:** Kathleen Kenney <[REDACTED]>  
**Sent:** Monday, April 15, 2019 12:30 PM  
**To:** Bunting Susan <[Susan.Bunting@doe.k12.de.us](mailto:Susan.Bunting@doe.k12.de.us)>; Cunningham Emily <[Emily.Cunningham@doe.k12.de.us](mailto:Emily.Cunningham@doe.k12.de.us)>  
**Subject:** DIAA Proposals Sections 6 &7

Dr. Bunting & Ms. Cunningham :

My name is Kathleen Kenney and I am the certified Athletic Trainer who covers the Laurel School District (middle & high school athletics). I always consider myself, as many hats as I sometimes wear, with 2 *major* priorities at school:

1. Protect the health and safety of all student-athletes
2. Protect the school district from any liability issues

The new proposed DIAA regulations in sections 6 and 7 concerning out of season coaching and the ability of our student-athletes to more or less participate all year round with no restrictions is extremely worrisome and goes against all research that is currently out there in the world of Sports Medicine pertaining to overtraining. I feel that it takes away the ability of school's and my fellow athletic trainers to protect the health and safety of our student-athletes and protect the school districts.

I envision a scenario such as this: Tomorrow afternoon I will be covering 3 Varsity contests - softball, baseball and soccer. I will also have 4 teams practicing on campus. That makes 10 total teams on campus, including the away teams visiting for the Varsity contests. If we allow these proposals to move forward, I now have potentially 11 or more teams on campus to cover, which puts the liability on my school extremely high. Most schools in Delaware are equipped with one athletic trainer, and the strain on us is already high most days. Being at a smaller school, I am well aware that my strain is nowhere near what someone at a school like Dover, CR, or elsewhere experience where they probably have 15 or more teams on campus at once.

I also believe that this will negatively affect the community of the schools. If I am a coach, this means I can take my athletes at any time, thus overstepping on other coach's seasons/times. Student-athletes will feel pressure to specialize in one sport, and we will be going against the research that shows multi-sport athletes end up with less injury, less burnout, etc. There are already club sports that many of my student-athletes participate in that require extra time to sport outside of school. This is just opening up to MORE of that - Overuse injuries, liability issues, employing people to cover these events, facility issues are just some of the consequences that will come from these proposals. Will athletic trainers then be required to be 12 month employees in the schools covering year round practices? I think the health and safety of our high school (and middle school) athletes is at stake here as well as the liability on the districts.

I hope there can be a discussion to change this back to the restrictions that were in place before.

Thank you,

Kathleen Kenney, MS, ATC  
LMHS Athletic Trainer  
Treasurer - DATA  
[REDACTED]

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**From:** Cunningham Emily  
**Sent:** Monday, April 15, 2019 9:23 AM  
**To:** Shockley Tina  
**Cc:** Makransky, Laura  
**Subject:** FW: Safety Concern to Proposed Regulation

**Categories:** Emily

**From:** Bunting Susan <Susan.Bunting@doe.k12.de.us>  
**Sent:** Sunday, April 14, 2019 8:54 PM  
**To:** ~~jmoeyerknowles@gmail.com~~  
**Cc:** Cunningham Emily <Emily.Cunningham@doe.k12.de.us>; Ahner Jenna <Jenna.Ahner@sbe.k12.de.us>  
**Subject:** FW: Safety Concern to Proposed Regulation

Julie,  
Thank you for sharing your concern. I have forwarded your email to those in the department who work directly with regulations and with the body that actually has the final say regarding the regulation.

**From:** Julie Knowles [REDACTED]  
**Sent:** Saturday, April 13, 2019 10:31 AM  
**To:** Bunting Susan <Susan.Bunting@doe.k12.de.us>  
**Subject:** Safety Concern to Proposed Regulation

Dr Susan Bunting,

I recently read the proposed DIAA regulatory changes and believe that subsection 7.6 regarding coaching out of season has been written in error. According to discussion by the DIAA Sports Medicine Advisory Committee (DSMAC), I believe the proposed changes in subsection 7.6 is contradictory to the recommendations made by DSMAC advising against sports specialization.

While DSMAC recommended pre-season practice in some activities such as baseball pitching, these recommendations were made to minimize the risk of injuries specific to pitchers. By opening pre-season activities to all sports and all positions, the promotion of sports specialization will occur which is contrary to DSMAC's objectives. Likewise, many major medical organizations are against sports specialization stating, 'sports specialization is believed to be unhealthy physically and mentally for young athletes'.

With this in mind, I strongly object to the language in the proposed DIAA regulatory changes of subsection 7.6, and advise for rejection of the subsection at this time.

Respectfully,

Julie Moyer Knowles EDD DPT ATC CVRS  
Vice Chairman, DIAA Sports Medicine Advisory Committee  
[REDACTED]

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**From:** MaryPat Kwoka  
**Sent:** Friday, May 3, 2019 12:30 AM  
**To:** DOEregulations comment  
**Subject:** Public Comment about 1008 and 1009

The letter below was emailed to the DIAA Board Members, DIAA Rules & Regulations Committee members and Executive Director, DIAA on March 8, 2019. Please add to the public comment.

March 8, 2019

Dear Dr. Layfield:

We write concerning current proposed changes to the coaching out of season regulation. We greatly appreciate the time and attention the Board and its Rules and Regulations Committee has given to this issue to date and understand it requires careful deliberation to ensure DIAA's mission is preserved. We're particularly grateful for the Board's action to commission WestEd to conduct the 2018 DIAA Member School Survey, finalized in January 2019. The results verify the concerns expressed by a majority in the high school sports community – that we need to modernize Delaware's coaching out of season rules.

That said, the recent work of the Rules and Regulations Committee on February 12, 2019 and the DIAA Board on February 14, 2019, goes well beyond the scope of the motion that was passed at the Board's January 17, 2019 meeting. At that January meeting, a motion was passed to "move the survey data from questions 22 and 24 dealing with coaching out of season for non-school sports [during the school/academic year], and coaching out of season considering the restrictions that are currently in place for the summer to Rules and Regulations Committee for modifications to subsection 7.6 where it pertains to those two areas."

The survey did not provide any data to support the unilateral changes regarding elimination of open gyms, conditioning and unfettered access to the student athletes during the school year. The survey did not ask any questions regarding coaching of entire team or any student-athletes by their high school coaches in school-sponsored events during the school/academic year. At present, there has been no comprehensive data to show that the member schools want this.

In addition, while we do not favor private lessons or exclusive team events which allow coaches to be paid, we do favor fair compensation of our high school coaches who choose to coach outside the school setting that has the potential to benefit all student-athletes from a variety of different schools and backgrounds. These non-school teams must be affiliated with the national organization that monitors and regulates the activity. This issue should receive a fresh look and ensure that the ethical issue relating to a school coach providing private lessons to a student athlete is not being confused with that coach providing professional coaching services to a non-school team.

A proposal suggesting these limitations was submitted jointly by us to the Rules and Regulations Committee in July 2018 (at the Committee's request), yet it has not been referenced or utilized. That proposal is enclosed for the Board's reference and reconsideration.

In conclusion, we request that DIAA stay within the parameters voted on at its January Board meeting – a focus on questions 22 and 24 of the survey, with further discussion around question 23. We purport that an incremental approach allows for more oversight and less impact concerning unintended consequences.

Sincerely,

Trina Leclerc  
Parent of Former  
DIAA Student Athlete

MaryPat Kwoka  
President, DE Interscholastic Volleyball  
Coaches Association (DIVCA)

Jennifer Mayer  
Athletic Director/Coach

Enclosure

cc: DIAA Board Members  
DIAA Rules & Regulations Committee members  
Tommie Neubauer, Executive Director, DIAA



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**From:** MaryPat Kwoka  
**Sent:** Friday, May 3, 2019 12:11 AM  
**To:** DOEregulations comment  
**Subject:** Public Comment on 1008 and 1009

I have spent more than a year working on the coaching out of season regulations. I have attended meetings with the DIAA Board, Rules and Regulation committee meetings and met directly with the Executive Director trying to get our Delaware athletes to be competitive with our surrounding states. But based on the current proposal by the DIAA board this was nothing at all like the changes we wanted to see or even in line with the responds received back from the current DIAA survey questions 22 and 24.

Our intention was not for the schools to have more liability and definitely not looking for the Athletic Directors to have more responsibilities. The intent was to preserve the DIAA mission of academic-based athletics by allowing the high school coaches that believe in academic-based athletics coach some of their own players in a non-school setting out side of their high school season.

As with any profession when services are rendered compensation is received. Since these services would be rendered outside the school setting compensation would be appropriate. However, if the high school coaches want to work with their student athletes only this would be consider an open gym concept and no compensation would be received as it is extension of the high school program and school approve time constraints would be required.

It would be a tragedy for the athletes, if the Board doesn't modify the current proposal and a disaster if it's approved as written.

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**From:** Seth Kushkin [REDACTED]  
**Sent:** Monday, April 22, 2019 1:40 PM  
**To:** DOEregulations comment  
**Subject:** Out of season Proposal

I would like to share my thoughts on rejecting the proposal for all out of season coaching changes that are being present to the DIAA Board.

There are many reasons that this proposal should be rejected, but here is a small list :

1. no mention of medical coverage for the athletes form athletic trainers
2. this will encourage sports specialization which is proven to hurt student athletes and will certainly impact overall programs, size of programs and competitive advantage moving to all larger schools
3. years go the state was took away 10% of competitions for financial reasons and now to add this kind of open coaching will increase costs associated with facility use (wear and tear / electricity) coaches time, athletic trainer coverage
4. Where does the liability fall in the case of all practices that will be added on campuses
5. This takes away form all educational based sports
6. There will be a larger need to hire more coaches as those coaches that coach multiple sports will coach less sports and put all time into their primary sport (just like player specialization you will get the same in coaches)

Surveys that have been shared amongst coaches, heads of schools and Athletic directors have not been specific enough to gather the necessary information needed to open up out of season in a manner that is being presented here. This decision needs to be one that is made with all areas in mind and with continuous discussions happening in person with representatives of all sections of DIAA athletics.

I hope that this proposal is rejected and that time is take to do what is right for all student-athletes and programs within the state.

Thank you

Seth Kushkin

--  
Seth Kushkin  
Director of Athletics  
Tower Hill School

2813 West 17th Street  
Wilmington, DE 19806  
[REDACTED]  
[REDACTED]

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**From:** Seth Kushkin <  
**Sent:** Thursday, May 2, 2019 8:44 AM  
**To:** DOE regulations comment  
**Subject:** Opposition to the "Coaching out of Season" Proposal

The following is from the AD for both boys and girls at St. Andrews School.

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The purpose of this letter is to state St. Andrew's opposition to the proposed changes to DIAA regulations regarding "Coaching Out of Season". St. Andrew's feels strongly that the proposed regulation changes will have numerous negative effects on schools as well as many harmful effects on Delaware student athletes.

Access that coaches will have to athletes out of season (a proposed 6 hours per week) will cause athletes to make one of three decisions:

1. Play their current sport at an approximate 12 hours of practice/competition per week AND practice with their out of season coach for an additional 6 hours per week.
2. Play their current sport and NOT attend practices with their out of season coach.
3. Not play a 2nd or 3rd sport to practice with their out of season coach year round.

To examine choice #1, a multisport athlete will have a 50% increase in their physical demands in a given week. 18 hours of practice is the equivalent of having 6 practices a week lasting 3 hours each. If a single sport had this kind of practice schedule it would be considered abusive and negligent but as a state we are standing by and endorsing this practice. Injury rates in our student athletes will increase significantly with this proposed regulation change, not to mention the effect on grades when 6 hours of homework time is removed from a student's schedule.

To examine choice #2, an athlete who takes the approach of committing fully to their current sport and not working with their out of season coach will be under constant pressure that they are missing opportunities to impress that out of season coach. The line of proposed regulation: "7.6.1.2.1 Participation shall not be a prerequisite for making an in-season school team." does nothing to regulate the subjective nature of both making a team and receiving playing time. A football player that is fully dedicated to football during the season may be seen as lazy or not committed to a basketball coach holding October practices.

Choice #3 is, in many ways, a culmination of the failures of choices #1 and #2. A multisport athlete feeling burned out, overworked, and possibly injured from choice #1 or one that feels they will be letting down an out of season coach or not able to earn a roster spot or playing time from choice #2 will eventually be forced to rank the sports they play and choose the top one, quitting all others to specialize.

The State of Delaware should be promoting and encouraging multi-sport athletes instead of discouraging it and promoting specialization. It is well documented that adolescent sports specialization results in higher injury rates and psychological burnout in athletes. Logistically, coaches at the same school but in different seasons will be competing against each other to recruit the same athletes into specializing into their one sport fostering feelings of resentment and poor community culture. No one wins with these proposed regulation changes, not the state of Delaware, not the schools, and especially not our student athletes.

Sincerely,

Al Wood - Boys AD St. Andrew's School

Heidi Pearce - Girls AD St. Andrew's School

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**From:** Seth Kushkin >  
**Sent:** Thursday, May 2, 2019 8:46 AM  
**To:** DOEregulations comment  
**Subject:** Opposition to "Coaching Out of Season" proposal

To Whom It May Concern:

The DISC Conference that is made up of the following schools (Tower Hill School, Sanford School, Tatnall School, Wilmington Friends School, St. Andrews School and Wilmington Christian School) would like to share our thoughts as a conference as it pertains to the Coaching Out of Season Proposal that is currently before the DIAA Board.

The DIAA survey that was completed during the 2018-19 school year, by people across Delaware, simply sought input/opinion as to whether the coaching out of season rule should be changed. Although, Athletic Directors have been asking for a rule change that allows for more contact hours between coaches and their athletes, the proposal currently up for discussion is not what Athletic Directors intended. The survey did not, in any way, provide any glimpse as to the extent of what that rule change would look like. We have outlined below the potential negative impact that this new proposal could have on our young athletes, our high school programs, as well as the overall participation in sports in Delaware.

The following points are some of our concerns:

- The **health, safety and well-being of our student-athletes will be compromised** if they are allowed to participate in an out-of-season sport up to 6 hours per week. The amount of time suggested, 6 hours/week/sport, is excessive. Although participation is voluntary for the off-season workouts, three-sport athletes could be subject to as many as 6 hours a day, three days a week, in school related workouts. As a result, over-use injuries will likely increase.
- With the issues around health and safety you will have an increase in Potential Lawsuits
  - The lack of an athletic trainer or appropriate medical personnel on site would be impossible for already restricted budgets. Thus, this would result in athletics taking place without the correct medical personnel to oversee practices. The potential for a serious injury could result in a district being sued.
  - Overuse injuries in our young athletes is already on the rise. Thus, we could expect an increase in these types of injuries and therefore the level of participation in our school athletic programs would drop. Studies show that students who play multiple sports are at less risk for developing an overuse injury. As simply shared by a DISC athletic trainer, "I would like to join my fellow Athletic Trainers in rejecting the proposed DIAA regulation changes regarding out of season coaching. Among many other reasons, but specifically, there is no mention of medical coverage for the athletes, camps etc, and it will encourage sport specialization which has been proven to be detrimental to the future of the athletes. Please reconsider your position on these changes."
- The DIAA mandated daily practice time limit on official school days is 2 hours. The proposed change supports up to **6 hours** of participation by an athlete on multiple days each week (2 hours of practice for the in-season sport, 2 hours of work-outs for off-season sport #1, and an additional 2 hours of work-outs for off-season sport #2). This does not protect the physical well being of our students, nor does it promote a healthy lifestyle when extracurricular activities are seemingly taking priority over

academics. This ultimately lends itself to less time spent on academics and or much needed rest for a growing body and brain.

- The multi-sport athlete, that many of our schools depend on, will be discouraged to pick up additional sport seasons if they have the chance to work out with their school coach year around in their primary sport of choice. As a result, we anticipate participation numbers will be impacted in many sports, at many schools, and will lead to the elimination of sub-varsity level teams. This proposed rule change unfortunately encourages sport specialization.
  - Specialization will also come from coaches. Currently, many coaches choose to coach multiple sports and make an impact on kids from season to season. Schools will lose multi season coaches as they will specialize in the coaching of one sport, forcing schools to have to search even more to find qualified coaches to fill coaching positions.
- Passing of the current proposal will certainly be a burden on budgets connected to all athletic programs across the state. In 2009 we dropped 10% of our game totals back due to lack of funds. How can we consciously change a rule that would involve an increase in budgets? Costs associated with facility use, field use and security will all increase. This would result in a greater separation of schools being able to afford to offer this opportunity and therefore result in an unfair advantage and uneven playing field.
- Over many years, DIAA Executive Directors and Board members have often preached about trying to "level the playing field" and not have rules and regulations that allow for "the haves and the have nots". This rule change will place a financial burden on many schools who would have to pay for additional activity buses and an after-hours custodian. Those schools might then choose to not allow their coaches/athletes to take part in the coaching out of season opportunities. Other schools may be able to afford the additional financial burden that will, in turn, help to increase the student-athlete success rate. The athletic gap between schools and programs will continue to widen. This proposed rule change further magnifies the "haves and have nots", it does nothing to help level the playing field.
- DIAA publishes seven points to define its "Purpose". We believe that three of those points are severely compromised by the proposed rule change: "to provide fair and equitable competition between member schools, " "to protect the physical well-being of the athletes," and "to promote healthy adolescent lifestyles."

The entire process appears to be very rushed to get the DIAA Board to pass such a significant change in the DIAA rules in a short amount of time. This kind of change will have too large an impact on athletics in the state and we all believe there are other solutions to a change in this rule, without going to the excess of multiple hours added to a student's day. The DIAA member schools, and those tasked to implementing such a significant change at member schools, need to be given sufficient time to provide alternative solutions and have details about the implementation of the proposed change fully vetted before a final decision is put forth for a vote.

We, as members of the DISC conference, appreciate you taking into consideration all of the factors that we have discussed. This proposal is too important to rush to approve what is currently set before the board.

Thank you,

Joan Samonisky - Sanford School  
Seth Kushkin - Tower Hill School  
Pat Jones - Tatnall School  
Al Wood - St. Andrews School  
Jeff Ransom - Wilmington Friends School  
Pam Love - Wilmington Christian School

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Seth Kushkin  
Director of Athletics

Tower Hill School

2813 West 17th Street  
Wilmington, DE 19806

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**From:** The Leclerc Family  
**Sent:** Friday, May 3, 2019 10:11 AM  
**To:** DOERegulations comment  
**Subject:** Public Comments to Proposed Regulations 1008 and 1009  
**Attachments:** DIAA ltr March 8 - Final.docx; Public Comment to DIAA Regulation Change to 1009 - T. Leclerc - 10-2-2018.pdf; Out of coaching proposal.pdf; Public Comment - May 3rd.pdf

May 3<sup>rd</sup>, 2019

Department of Education  
Office of the Secretary  
Attn: Proposed Changes to Regulation 1008 and 1009

Subject: Proposed DIAA Regulations Regarding Out of Season Coaching by High School Coaches

I write to you today about the proposed changes to DIAA regulations regarding Out of Season Coaching. I am a parent of a former DIAA student athlete and a professional involved with multiple youth organizations now and for over ten years.

I have been following this issue very closely and have been at every DIAA Board Meeting since August and both Rules and Regulations Committee meetings in February and March of 2019 and I have made a public comment at every single one of those meetings, often twice. In addition, I have already directly sent two letters (one to the entire DIAA Board and Rules and Regulations Committee and one to Mr. Neubauer, Dr. Layfield, and Mr. Cimagila) that have gone essentially unanswered about my concerns about the proposed regulations in regards to the clarity in the language and the scope of the changes. My public comment at the DIAA Board meetings in my opinion has never been reflected accurately in the meeting minutes and often has been misstated. So, I write this letter with a lot of background to the proposed changes on the table.

First, I do believe that the current rules for out of season coaching in Delaware do need to be updated to reflect the current environment of youth sports and should be revised to be more in line with our surrounding states. The current regulations do put our Delaware student athletes at disadvantage because they are often limited in selecting the coach or team that they believe will allow them to be successful in the athletic endeavors. This decision/choice on who can and how a student athlete should receive training from for their athletic development belongs with the student athlete and their parents and no regulations should restrict that choice. In addition, we are losing qualified coaches in both the school and non- school setting because coaches are making a choice. Many qualified coaches are not coaching high school and many high school coaches (which are some of the best in the state in their sport) are not coaching outside of the school because of these restrictions. Our high school coaches are normally the best vetted coaches and understand the importance of academic-based athletics and why would we not want them to have more reasonable interaction with their student athletes if possible. However, my opinion regarding the out of the season coaching has never supported basically unrestricted year around coaching in any environment that is currently being proposed but instead just for the flexibility for student-athletes and their parents to have the choice of coach, team, club, clinic, camp, etc. in non-school setting in the off-season. I have attached my public comment from 10-2018 as a reference regarding the case for relaxing the restrictions on out of season coaching as well as a proposal that was submitted to the board in July 2018. I also attached the letter (referenced above) that was sent on March 8<sup>th</sup> DIAA Board and Rules and Regulations Committee about my concerns about the proposed regulations.

More importantly, I would like to address my concerns about the proposed changes. These changes go beyond the scope of the original motion that was passed/approved at the January DIAA meeting in regards to Question #22 and Question #24 dealing with coaching out of season for non-school sports activities [during the school/academic year], and relaxing the restrictions that are currently in place for the summer from the WestEd Out of Season Coaching Survey which was also agreed with the Member Schools at their annual meeting with DIAA in January 2019. These proposed regulations will create undue pressure on and burn-out for the student athlete which was never the intent of any effort to change the rules. Student athletes could end up in the gym, court, or field up to 6 hours for each sport they play just at their school in addition to their current sports season without even mentioning the possibility of non-school training activities. The multi-sport athlete, which everyone including yourself says they want to preserve, will end up the victim in this new world. Multi-sport athletes will now feel more pressure to select a single sport simply because 1) the avenue has been given to them to specialize in their own school setting and 2) they will not be able to keep up in the new world. Not to even mention this environment will create the potential for more injuries to the athletes by not allowing them rest or recover.

In addition, stronger programs in school will get stronger, struggling programs will continue to struggle and be discontinued. School programs with better financial resources will far surpass those without, as those programs are able to finance outside locations to hold practices. Programs that do not rely on transportation for students will have more opportunities for their programs than those that do.

In speaking with multiple parents of student athletes, these proposed changes do not align with their original concerns around out of season coaching restrictions. The majority of parents are looking for the ability to select their athlete's coach for coaching services outside of the school season without any restrictions on their choices. Now by allowing high school coaches to hold regular school-based practices during the school year, their choice has essentially been made for them again even if these practices or activities are labeled voluntary.

Also, these proposed changes do not align with the WestED survey data. The survey did not provide any data to support the unilateral changes regarding elimination of open gyms, conditioning and unfettered access to the student athletes during the school year. The survey did not ask any questions regarding coaching of an entire team or any student-athletes by their high school coaches in school-sponsored events during the school/academic year. At present, there has been no comprehensive data to show that the member schools want this and the large majority of athletic directors recently validated that in their April's meeting that they do not support the regulations 100% as written and were not pleased with the change in scope. It is my understanding this occurred before the last DIAA Meeting and several DIAA Board members were aware of the athletic directors' concerns and nothing was raised at DIAA Board Meeting on April 11<sup>th</sup> which could have been an opportunity for the DIAA Board to revisit proposed regulations at that time.

While my suggestion would be to modify these regulations before approving and passing, if DIAA chooses to stay with the regulations as they are drafted, they need to be rewritten for more clarity in language. Recently, I have engaged in discussion with others about them and received two different interpretations from two separate attorneys. The use of the word "programs" being defined as "school sponsored" in section 1.1 clearly impacts the application/meaning of section 7.6.1.2. One opinion states that the subsections of 7.6.1.2 only applies to the out of coaching season in a program (i.e. school sponsored). With that said, high school coaches would now be able to provide instructional contact to their school students outside their designated sports season in a non-school affiliated organization without any restrictions, rather it be time, numbers, availability, compensation, etc. This is consistent with the comments I heard from DIAA Board and Rules and Regulations Committee members that they cannot regulate the practices of outside organizations. On the other side, another attorney has interpreted that since 7.6.1.2 states "Programs" that high school coaches are only allowed to coach their school students outside of the designated sports season if it is in a program (school-sponsored). While he stated this is the proper way to read the regulation, he also stated the 7.6.1.2.4 reference to non-school affiliated organization does not fit in that section and creates inconsistent language and intent of the regulations. Again, based on the meetings I attended, there is clearly an intention to allow the high school coaches to provide instructional contact outside of the designated sports season to their school students in non-school setting. This is further reinforced based on the fact that the original motion passed at the January meeting was to review the rules and regulations specifically related to Question #22 in the DIAA's Out of Season Coaching survey as it relates to non-school affiliated programs. A few other areas of inconsistent or unclear language raised are:

- 1) Do the dead periods apply only to programs or any type out of season coaching in any environment?
- 2) Are the dead periods applied only to student athletes that are participating in the current sports season?
- 3) Also, does the 6 hours limit apply to non-school camps and clinics? The regulations only seem to waive that specifically for school sponsored camps and clinics.

I suggest strongly that wording of the regulations needs to be addressed to make it clearer before the regulations can put into effect. Yes, they will be a learning period and yes, they will misinterpretations but I do believe for a change of this magnitude that could impact the next year's sports season tremendously that it should start in a place with consistent language, wording and understanding. To ignore these inconsistencies or lack of clarity is a bad business practice and opens the DIAA Board to the opportunity for negative criticism and puts the coaches, athletic directors and student athletes in a world of ambiguity.

Next, I would like to address the compensation (or lack thereof) to these coaches for out of season coaching. While I understand this stance lies in the Public Integrity Committee opinion of 2003 (16 years old), the climate of youth sports and student athletics is much different now. While I do not favor private lessons or exclusive school team events which allow coaches to be paid, I do believe in fair compensation of our high school coaches who choose to coach outside the school setting that has the potential benefit to all student-athletes from a variety of different schools and backgrounds. This issue should receive a fresh look and ensure that the ethical issue relating to a school coach providing private lessons to a student athlete is not being confused with that coach providing professional coaching services to a non-school team, camp, clinic, as long as the program is open, voluntary and available to all student athletes. How is this any different from a teacher that works for outside organization and teaches SAT class? What about athletic trainers or school doctors that are providing services to a school for their athletes during school season and then those athletes go to their practice for additional services or follow up treatment? Should these trainers or doctors not receive payment for these services?



If compensation for coaching your players out of season is 100% prohibited, I ask the following scenario to be considered or addressed. If a coach is coaching a team of 10 players, and 3 of them are from their school, can the coach's salary be reduced by number of players from their school – in case by 30%. In this scenario, the coach is not being paid to coach those players.

In closing, at this time, as written, I recommend that the DIAA Board not simply reject the proposed changes but modify these proposed changes to stay in the scope of the original motion in January 2019 board meeting and adjust the regulations to only address out of coaching in non-school setting (Question #22) during the academic/school year and changes in the summer months (Question #24). The DIAA Board and Rules and Regulations Committee has made progress on this complicated task and heard from both the public and members schools positively that some of the restrictions should be relaxed. Therefore to fully reject this proposal would be a step in the wrong direction but instead scaling back the access of coaches will allow for this initiative to move forward and give the opportunity for more oversight and less impact concerning unintended consequences as well as a better understanding what changes are causing any negative impact to our student athletes.

Respectively submitted  
Trina Leclerc  
Parent of Former DIAA Student Athlete

Attachments (3)  
Letter Sent to DIAA on March 8th  
Public Comments (T. Leclerc) - 10-2-2018  
Out of Season Coaching Proposal Submitted

March 8, 2019

Dr. Bradley Layfield, Chair  
DIAA  
Collette Educational Resource Center  
35 Commerce Way  
Dover, DE 19904

Dear Dr. Layfield:

We write concerning current proposed changes to the coaching out of season regulation. We greatly appreciate the time and attention the Board and its Rules and Regulations Committee has given to this issue to date and understand it requires careful deliberation to ensure DIAA's mission is preserved. We're particularly grateful for the Board's action to commission WestEd to conduct the 2018 DIAA Member School Survey, finalized in January 2019. The results verify the concerns expressed by a majority in the high school sports community – that we need to modernize Delaware's coaching out of season rules.

That said, the recent work of the Rules and Regulations Committee on February 12, 2019 and the DIAA Board on February 14, 2019, goes well beyond the scope of the motion that was passed at the Board's January 17, 2019 meeting. At that January meeting, a motion was passed to "move the survey data from questions 22 and 24 dealing with coaching out of season for non-school sports [during the school/academic year], and coaching out of season considering the restrictions that are currently in place for the summer to Rules and Regulations Committee for modifications to subsection 7.6 where it pertains to those two areas."

The survey did not provide any data to support the unilateral changes regarding elimination of open gyms, conditioning and unfettered access to the student athletes during the school year. The survey did not ask any questions regarding coaching of entire team or any student-athletes by their high school coaches in school-sponsored events during the school/academic year. At present, there has been no comprehensive data to show that the member schools want this.

In addition, while we do not favor private lessons or exclusive team events which allow coaches to be paid, we do favor fair compensation of our high school coaches who choose to coach outside the school setting that has the potential to benefit all student-athletes from a variety of different schools and backgrounds. These non-school teams must be affiliated with the national organization that monitors and regulates the activity. This issue should receive a fresh look and ensure that the ethical issue relating to a school coach providing private lessons to a student athlete is not being confused with that coach providing professional coaching services to a non-school team.

A proposal suggesting these limitations was submitted jointly by us to the Rules and Regulations Committee in July 2018 (at the Committee's request), yet it has not been referenced or utilized. That proposal is enclosed for the Board's reference and reconsideration.

In conclusion, we request that DIAA stay within the parameters voted on at its January Board meeting – a focus on questions 22 and 24 of the survey, with further discussion around question 23. We purport that an incremental approach allows for more oversight and less impact concerning unintended consequences.

Sincerely,

Trina Leclerc  
Parent of Former  
DIAA Student Athlete

MaryPat Kwoka  
President, DE Interscholastic Volleyball  
Coaches Association (DIVCA)

Jennifer Mayer  
Athletic Director/Coach

Enclosure

cc: DIAA Board Members  
DIAA Rules & Regulations Committee members  
Tommie Neubauer, Executive Director, DIAA

## Coaching out of Season Rationale and Proposal for Delaware Member Schools

### **Rationale:**

Student athletes should have the opportunity to work with coaches who they believe will develop their skills and support their athletic goals. It is the goal of this proposal to support that endeavor, while still protecting the integrity of education based athletics.

Additionally, it is the duty of athletic administrators to find the best qualified coaches for our interscholastic teams. As the coaching out of season rules currently stand, some of the most qualified coaches will not coach in Delaware High Schools because of the limitations set on out of season coaching.

**Open Gyms:** Currently there is no limitation as to the number and duration of open gyms allowable, which can cause student athletes to be pressured to attend open gyms rather than to participate in other activities. Additionally, the definition of an open gym is unclear. We propose the following:

For each member school, a maximum of 1 open gym per week is allowable provided that:

- It is open to the entire student body of the member school
- It is student requested and initiated, and that request is processed by the Athletic Director or School Administrator
- It is published on the school/sport calendar so that periodic checks for compliance can be administered.
- Must be scheduled beyond the regular athletic schedule
- Adult supervision is present, but there is no sport specific coaching involvement.
- Only equipment that is used in a regulation game/competition is provided.
- A sign in sheet must be provided to the Athletic Director or School Administrator

**No contact periods:** In order to allow student athletes the opportunity to rest, recover, consider options as well as to explore other areas of interest:

For a period of 10 days prior to the start of each high school season, there shall be a no contact period. High School coaches (volunteer or paid) may not work with any returning athletes in any sport specific activities. It is allowable to have a school wide strength and conditioning program if approved by the athletic administration at the member school.

(Exception: If the student-athlete is competing on a club team during these times, they may continue to do so without penalty).

### **Out of Season – August 15 – June 10 (i.e. during the academic year)**

In order to allow student athletes the opportunity to participate in activities of their choice with coaches of their choosing, as well as to reduce the possibility of undue influence on the student athlete.

- Coaches may coach non-school teams that have no direct or indirect affiliation with the school. Returning school players allowed with number of players limited based on sport, not to exceed 60% of returning players constituting starting lineup (soccer = 7, football = 7, baseball = 5, basketball = 3, volleyball = 4, wrestling = 8, etc.). In the cases of sports where there is no standard "starting line-up" (track, swimming, etc.) the number of returning school players may not exceed 15% of the entire team roster (to a maximum of 8 athletes). This information will be outlined on the DIAA website.

Team must be non-school affiliated, but in order to protect the student athlete with regards to credentials and insurance, the team must be affiliated and in good-standing with an overseeing national organization, such as AAU, ODP, USAV, USATF, etc. for a period of no less than 30 months.

Coaches may be compensated for these activities by the organization/club, but not by the member school, booster club or by the individual athlete(s) or families.

- Coaches may provide instruction at clinics and camps not affiliated with the member school that include returning players, provided that:
  - Clinic/Camp is sponsored by an outside organization that must be affiliated and in good-standing with an overseeing national organization, such as AAU, ODP, USAV, USATF, etc. for a period of no less than 30 months.
  - they are well advertised, (print, online, no less than 2 weeks prior)
  - open to all student athletes regardless of school attendance,
  - affiliated with a group in good standing with their national organization,
  - at least 25% of the attendance is from students outside of the coach's member school

Coaches **may** be compensated for these activities by the organization/club, but not by the member school, booster clubs or by the individual athlete(s) or families. Exception: If the attendance percentages are not met, then the coach may NOT be paid.

For any activities during the academic calendar year (August 15 – June 5) that involve student athletes from the member school, the involved coach must provide the school administration with documentation proving compliance with the set conditions.

#### **Out of Season – June 11 – August 1 (i.e. during the non-academic year)**

- Coach may provide instruction at clinics and camps not affiliated with the member school that include returning players, provided that:
  - Clinic/Camp is sponsored by an outside organization that must be affiliated and in good-standing with an overseeing national organization, such as AAU, ODP, USAV, USATF, etc. for a period of no less than 30 months.
  - they are well advertised (print, online, etc. No less than 2 weeks prior)
  - open to all student athletes regardless of school attendance,
  - at least 25% of the attendance is from students outside of the member school
  - are affiliated with a group in good standing with its national organization for a period of no less than 30 months

Coaches **may** be compensated for these activities by the club/organization but not by the member school, booster club or individual student athlete(s) or families. Exception: If the attendance percentages are not met, then the coach may NOT be paid.

- **Lessons for member school athletes**

At players request coaching staff may work with a maximum number of returning players equivalent to 60% of the traditional starting lineup (as described previously) for a period of 2 hours per day. Individual student athletes are limited to 2 hours per day.

Coaches must provide documentation of these sessions including the player request to their athletic department or school administration.

Coaches **may not** be compensated for these activities

- **Summer League**

A coach may provide instruction to an unlimited number of returning school team members in formal league or tournament competition or in formal instructional camps or clinics provided the league or tournament or instructional camp or clinic is insured, organized and conducted by a non-school affiliated organization. Coaches are permitted to hold an organizational practice for formal league/tournament competition only as permitted by the written, pre-established rules of the formal league/tournament. In no event shall more than one organizational practice be permitted and the number of games and practice shall not exceed three in one week. If the formal league/tournament does not have written, pre-established rules regarding practice, then no practice is permitted.

Coaches may **not** be compensated for these activities.

For any activities outside the academic calendar year (June 5 – August 1) that involve student athletes from the member school, the involved coach must provide the school administration with documentation proving compliance with the set conditions.

In all cases, student athletes from school teams receiving individual or team skill/coaching instruction shall not be required to participate in sessions or on teams where individual skill/coaching instruction is provided. Coach cannot imply chance to be on team is contingent on this participation.

Any coach choosing to participate in coaching out of season activities is required to provide evidence that the organization they are coaching through has provided a minimum of 50 hours of donated services in the form of clinics (coaching or player) lessons, camps to underserved and underrepresented member schools.

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**From:** Pamela Love  
**Sent:** Monday, April 29, 2019 9:55 AM  
**To:** DOEregulations comment  
**Subject:** Coaching out of season concerns

I would like to say that I am not in favor of the current recommendation for coaching out of season for the following reasons:

Health and Safety - over use for our athletes is very high when concentrating on one particular sport throughout the year, supervision by the trainer will be very limited, liability concerns

Cost - utilities will be used more in the school, equipment will be extensively used so purchasing of additional equipment more frequently, trainer's hours will increase, transportation for the athlete to and from practices, hiring more coaches

Fielding teams during the regular season - athletes will choose more often to specialize, which will decrease the multi sport athlete involvement, we will lose coaches because they will not want to coach other sports throughout the year(stay with their athletes and sport for the year), provide opportunities for athletes to quit instead of being committed to a sport (things aren't going well - just go back to the sport they love)

Academic - the athlete that wants to play everything, will try to do and please everyone at the cost of their academics, and will not be successful in anything

We are not helping the student athlete with the recommendation that is out there now - please go back to the drawing board!

Pam Love  
Athletic Director, CMAA  
Wilmington Christian School  
Sent from my iPad

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**From:**  
**Sent:** Wednesday, April 17, 2019 11:45 AM  
**To:** DOEregulations comment  
**Subject:** Malseed Comment Proposed Changes to DIAA Rules on out of season coaching

To whom it may concern:


I would like to express my opposition to the proposed rule changes to the DIAA coaching out of season rules. I understand that the current rules allow "club" team coaches undo influence over secondary school athletes. I am also aware athletes who wish to specialize in a single sport may not have access to "club" programs, due to geographic location, cost, or other issues. These facts do not mean that high school athletic programs should now become defacto "club" programs.

The dangers of these proposed changes are many and varied, including health and safety of the athletes, time away from academics, increased wear and tear on already stressed facilities, increased work loads on athletic directors, athletic trainers, coaches, custodial staff and a direct attack on what the real purpose of secondary school athletics should be.

The biggest issue of course is the health and safety of the student athletes. There are numerous studies which show a marked increase in injury rate for athletes who specialize. This increase is in both traumatic and overuse type injuries. The most dramatic increase is in overuse injuries. According to the National Athletic Trainers Association overuse injuries increase by almost 70% for athletes who specialize. This does not even take into account the possible increase in the injury rate for an athlete participating during in season games and practices of 8 to 14 hours a week, then out of season practices of 6 hours for one out of season sport and 12 for two out of season sports.

Also, where will those additional practice hours come from? Time away from other extra curricular activities, academics, family, social interactions or working.

As a parent, health care provider, and educator, in my opinion, any benefit gained in mastery of a sport, are negated by the negative impact of the extra practice time. I am of course will to speak with anyone about this issue. Please contact me at the information below.

Respectfully submitted,  
James F. Malseed, M.Ed., ATC, RAA  
Athletic Trainer/Chair Dept. of Health and Physical Education  
NPI #1053387845  
Archmere Academy  
  
E-mail: [jmalseed@archmereacademy.com](mailto:jmalseed@archmereacademy.com)

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**From:** Kathleen Martin <[REDACTED]>  
**Sent:** Tuesday, April 16, 2019 7:31 AM  
**To:** DOERegulations comment  
**Subject:** Out of season practices - just say NO!!

DOE,

I am very concerned about the movement toward allowing out of season practices. As the mother of two athletes, I have seen the negative outcome of sports specialization and overuse injuries. Multiple sports practices in one day increases injury (and stress!) As an educator at a school, I am also concerned about the potential lack of medical coverage at these out of season practices.

Please support our athletes' mental and physical health by NOT allowing out of season practices!

Thank you,

Kathleen Martin

Kathleen Martin (she/her/hers)  
Director of College Guidance, The Wilmington Friends School  
101 School Road Wilmington, DE 19803  
[REDACTED]

CEEB code: 080160

**College admission representatives can now go to [RepVisits.com](http://RepVisits.com) to schedule an appointment at Wilmington Friends.**



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**From:** MAYER JENNIFER  
**Sent:** Tuesday, April 30, 2019 4:00 PM  
**To:** DOEregulations comment  
**Subject:** DIAA Regulation 1008&1009 proposed changes

To the DIAA Board, Rules and Regulations Committee and Department of Education:

I am writing as a the Athletic Director of a Member School. My school falls squarely in the "have not" category. We struggle to field teams. We struggle to find coaches. We struggle to keep up with all that the "have" schools are able to provide for their student athletes. We have to provide transportation in order for our kids to participate. We have amazing kids. We have kids that may not have the latest and greatest in equipment or uniforms, but they work hard and play harder. These proposed rule changes will destroy many of our programs and make it even more difficult for us to compete with the "haves". The increased costs and liability to member schools will insurmountable for many of the "have-nots". I have outlined some of my concerns below. In addition I have proposed what I believe to be a reasonable compromise for the proposed rule change.

6 hours of practice per week is as much or equal to the amount of time available for practice DURING the season. This in addition to in-season practices will undoubtedly increase over use injuries for the student athlete, as well as increase liability and expense for the member schools.

- During the Academic Year
  - If we are lucky, kids will go from in-season practice/game (2hrs) to their out of season practice (2 hours), but it is more likely that kids will choose their primary sport rather than spend 4 hours or more in a gym
  - Within a single school, strong programs will get stronger, while struggling programs will die.
    - Basketball player is playing football, football team starts to not do well (or traditionally has struggled) player A says, "I'm quitting football because I can practice with the basketball team/coach instead".
    - Incoming freshman that has only ever played soccer normally would have tried another sport in offseason, now will not because can play/workout with the soccer coach and team all year, and still have time for academics.
    - As students leave programs, programs get dropped which, as evidenced by DAPSS will have far reaching consequences for other member schools.
  - Athletic directors now have to not only schedule their in-season teams, but also provide out of season teams with 6 hours of practice time.
    - School programs with better financial resources will far surpass those without, as those programs are able to finance outside locations to hold practices.
    - Programs that do not rely on transportation for students (again the haves) will have more opportunities for their programs than those that do (the have-nots).
  - This increases the liability of the member schools for insurance, building usage, and related costs.
    - To provide the 6 hours for EVERY team,
      - schools will have to be open and available longer and on weekends
      - personnel will be required in order to open the school
      - Additional funding for trainers will also be necessary

- transportation costs will increase to accommodate the increased gym usage
  - increased number of buses
  - increased frequency of buses
- Outside the Academic Year
  - To provide the 6 hours for EVERY team,
    - schools will have to be open and available longer and on weekends
    - personnel will be required in order to open the school
    - Increased costs and liability due to the increased usage.
    - Increased funding will be necessary for Athletic Trainers
  - To provide equal access, member schools must provide transportation to these extra programs (or those schools with better financial resources have an unfair advantage over those that do not) **unless that is the underlying goal of this decision?**

Please do not suggest that the member schools will self-regulate this Free-for-all unfettered access to student athletes. It is the job of the DIAA to put in place regulations that protect student athletes from potential harm.

Rather than this unrestricted access to the student athletes, I would ask that you consider the following:

#### DURING THE ACADEMIC YEAR

- Reinstatement of the school wide conditioning program
  - School wide means that any coach can supervise so there is flexibility in staffing
  - School wide means that the student athletes for different programs can be working together fostering an overall team atmosphere
- Reinstatement of a modified open Gym policy
  - Allow for 1 sport specific open gym period per week (2hrs) student initiated, but coaches are able to provide instruction
  - Maintains the coach athlete relationship while still promoting opportunities to participate in different activities
  - Open to all Registered and accepted students to foster increased involvement in the sport of focus
  - Open gyms scheduled on School website
- No Contact period
  - 10 days before the start of the season (like exists currently for fall sports)
  - Gives athlete a chance to rest/recover prior to try outs

SUMMER (I actually liked the old summer rules, and would have just increased the number of athletes to 4 athletes at a time for 2 hours at a time)

- At athlete request:
  - Allow coaches to work with athletes for max of 4 hours per week (any number of athletes, any number of coaches)
  - Sport specific open gym open to all registered and accepted students
- Camps/Clinics
  - Allow coaches to work for camps run by non-school affiliated organizations provided that the number of returning players does not constitute more than 50% of the population of the camp.
  - If returning players exceeds the 50% threshold, then coaches may not be paid for those activities.

Respectfully submitted,

Jennifer M Mayer  
Christiana High School  
Mathematics Department  
Athletic Director  
Head Volleyball Coach  
Master Teacher

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**From:** Jennifer Mayer  
**Sent:** Wednesday, May 1, 2019 3:31 PM  
**To:** DOEregulations comment  
**Subject:** Public Comment Regarding DIAA Regulations 1008 & 1009

To whom may concern:

I am writing this letter to voice my concerns as a private citizen but also as an independent Contractor that happens to be a volleyball coach, and to implore you to vote no and to reject the proposed changes to the DIAA regulations 1008 & 1009.

I coach both club and HS volleyball in Delaware. I am also a public school teacher and Athletic director (just putting all of my cards on the table). I had the opportunity to fill out a survey and to attend the following DIAA board meeting concerning coaching out of season. As the survey results were presented there was much discussion. The ultimate decision by the board was to direct the Rules and Regs Committee to address questions 22 and 24.

As a reminder,

**Question 22: Would you be in favor of changing the current coaching out of season rule so that a coach would be permitted to coach student athletes on a non-school based team or program outside of the designated sports season during the school year?**

NOTHING in the proposed changes addresses this question. These changes do not address the non-school based team or program at all. I think that it is important to recognize that youth sports is a multi-billion dollar industry. Club teams are here to stay and parents are going to make decisions for their kids that we will not be able to change/impact. Parents recognize relationships are built between coaches and athletes and choose accordingly. Current regulations unnecessarily restrict those choices. As a High School athlete in a different state, for my school I played volleyball and basketball; and I played club volleyball. My HS coach was a club coach, and it was harder for me to make her club team than it was to make the HS team (they could only coach 3 of their returning players)... Yes, she cut kids from the club team that she kept on our HS team... I'm sure it was hard for her, but she did it. She was a coach and her job was to select the best players at that age group for our team. As a HS coach I select the best players for my HS team. As a club coach I'd like to be able to do the same..., but in Delaware we have to worry about where the kids go to school... the DIAA board, via the rules and regulations committee was supposed to change the current regulation to address question 22, the non-school team, and as far as I can tell, they did not. So as a club coach I have the following questions:

NOTE: "Programs" means SCHOOL-SPONSORED camps, clinics, formal leagues, and formal tournaments that allow the school's Accepted and Registered Students to participate.  
(As defined in the new regulations)

1. Can a high school coach ONLY coach their players in a program (school-sponsored)?
2. What are the restrictions on high school coaches in non-school affiliated organizations coaching players from their high school out of season?
3. Do the "dead periods" (Instruction is not allowed during the period at the beginning of each sport season when practice is allowed and before competition for that season begins) only relate to when a coach is coaching in programs (school sponsored)?

4. Do the "dead periods" relate to a coach coaching in a non-school affiliated organization?
5. Do the "dead periods" only relate to the student-athlete participating in the active high school sports season?
6. Can coaches coach in summer leagues or tournaments run by non-school affiliated organizations?
7. Can coaches get paid to coach in non-school affiliated organization i.e. camps, clubs, tournaments, clinics, leagues, etc. while coaching their accepted and registered students?
8. Can a coach receive a reduced salary for coaching a club team, in a clinic or a camp or training with some players of their accepted and registered students?
9. Does a non-school affiliated organization that runs camps and clinics have any time restrictions?

I have read and re-read the proposed regulation changes several times, and I am still unsure as to how they apply to the situation of a non-school based team (as question 22 indicates). This ambiguity alone should be reason enough to vote NO.

Since the proposed changes do not address question 22 (as the DIAA board directed the rules and regs committee to address), I would like to propose changes to the current regulations that DO address the concerns raised by question #22.

### **Rationale:**

Student athletes should have the opportunity to work with coaches who they believe will develop their skills and support their athletic goals. It is the goal of this proposal to support that endeavor, while still protecting the integrity of education based athletics.

Additionally, it is the duty of athletic administrators to find the best qualified coaches for our interscholastic teams. As the coaching out of season rules currently stand, some of the most qualified coaches will not coach in Delaware High Schools because of the limitations set on out of season coaching.

### **Open Gyms:**

For each member school, a maximum of 1 **sport specific** open gym per week is allowable provided that:

- It is open to the entire student body of the member school
- It is published on the school/sport calendar so that periodic checks for compliance can be administered.

**No contact periods:** In order to allow student athletes the opportunity to rest, recover, consider options as well as to explore other areas of interest:

For a period of 10 days prior to the start of each high school season, there shall be a no contact period. High School coaches (volunteer or paid) may not work with any returning athletes in any sport specific activities. It is allowable to have a school wide strength and conditioning program if approved by the athletic administration at the member school.

(Exception: If the student-athlete is competing on a club team during these times, they may continue to do so without penalty).

### **Out of Season – August 15 – June 10 (i.e. during the academic year)**

In order to allow student athletes the opportunity to participate in activities of their choice with coaches of their choosing, as well as to reduce the possibility of undue influence on the student athlete.

- Coaches may coach non-school teams that have no direct or indirect affiliation with the school. Returning school players allowed with number of players limited based on sport, not to exceed 50% of returning players constituting starting lineup (soccer = 7, football = 7, baseball = 5, basketball = 3, volleyball = 3, wrestling = 8, etc.). In the cases of sports where there is no standard “starting line-up” (track, swimming, etc.) the number of returning school players may not exceed 15% of the entire team roster (to a maximum of 8 athletes). This information will be outlined on the DIAA website.

Team must be non-school affiliated, but in order to protect the student athlete with regards to credentials and insurance, the team must be affiliated and in good-standing with an overseeing national organization, such as AAU, ODP, USAV, USATF, etc. for a period of no less than 30 months.

Coaches may be compensated for these activities by the organization/club, but not by the member school, booster club or by the individual athlete(s) or families.

- Coaches may provide instruction at clinics and camps not affiliated with the member school that include returning players, provided that:
  - Clinic/Camp is sponsored by an outside organization that must be affiliated and in good-standing with an overseeing national organization, such as AAU, ODP, USAV, USATF, etc. for a period of no less than 30 months.
  - they are well advertised, (print, online, no less than 2 weeks prior)
  - open to all student athletes regardless of school attendance,
  - affiliated with a group in good standing with their national organization,
  - at least 50% of the attendance is from students outside of the coach’s member school

Coaches **may** be compensated for these activities by the organization/club, but not by the member school, booster clubs or by the individual athlete(s) or families. Exception: If the attendance percentages are not met, then the coach may NOT be paid.

For any activities during the academic calendar year (August 15 – June 5) that involve student athletes from the member school, the involved coach must provide the school administration with documentation proving compliance with the set conditions.

### **Out of Season – June 11 – August 1 (i.e. during the non-academic year)**

- Coach may provide instruction at clinics and camps not affiliated with the member school that include returning players, provided that:

- Clinic/Camp is sponsored by an outside organization that must be affiliated and in good-standing with an overseeing national organization, such as AAU, ODP, USAV, USATF, etc. for a period of no less than 30 months.
- they are well advertised (print, online, etc. No less than 2 weeks prior)
- open to all student athletes regardless of school attendance,
- at least 50% of the attendance is from students outside of the member school
- are affiliated with a group in good standing with its national organization for a period of no less than 30 months

Coaches **may** be compensated for these activities by the club/organization but not by the member school, booster club or individual student athlete(s) or families. Exception: If the attendance percentages are not met, then the coach may NOT be paid.

- **Lessons for member school athletes**

At players request coaching staff may work with a maximum number of returning players equivalent to 50% of the traditional starting lineup (as described previously) for a period of 2 hours per day. Individual student athletes are limited to 2 hours per day.

Coaches must provide documentation of these sessions including the player request to their athletic department or school administration.

Coaches **may not** be compensated for these activities

- **Summer League**

A coach may provide instruction to an unlimited number of returning school team members in formal league or tournament competition or in formal instructional camps or clinics provided the league or tournament or instructional camp or clinic is insured, organized and conducted by a non-school affiliated organization. Coaches are permitted to hold an organizational practice for formal league/tournament competition only as permitted by the written, pre-established rules of the formal league/tournament. In no event shall more than one organizational practice be permitted and the number of games and practice shall not exceed three in one week. If the formal league/tournament does not have written, pre-established rules regarding practice, then no practice is permitted.

Coaches **may not** be compensated for these activities.

For any activities outside the academic calendar year (June 5 – August 1) that involve student athletes from the member school, the involved coach must provide the school administration with documentation proving compliance with the set conditions.

In all cases, student athletes from school teams receiving individual or team skill/coaching instruction shall not be required to participate in sessions or on teams where individual skill/coaching instruction is provided. Coach cannot imply chance to be on team is contingent on this participation.

Any coach choosing to participate in coaching out of season activities is required to provide evidence that the organization they are coaching through has provided a minimum of 50 hours of donated services in the form of clinics (coaching or player) lessons, camps to under-served and under-represented member schools.

---

**From:** MCCANTS SHANNON  
**Sent:** Friday, May 3, 2019 9:28 AM  
**To:** DOEregulations comment  
**Subject:** Coaching Out of Season

Good Morning,

My name is Shannon McCants and I am the Varsity Boys Basketball coach at Newark High School. I read up on some of the proposed changes for coaches being able to **coach out of season**. I believe this will be a great benefit to our state and towards Delaware players getting better overall. Some coaches may not feel the need to do extra stuff with the athletes all the time, but having the option to do workouts and development outside of the season would be a wonderful privilege to have. Most other states are ahead of us due to this rule. I am for the changes!

Thanks  
Shannon McCants  
Newark HS  
Boys Basketball



---

**From:** Mandy Minutola <[REDACTED]>  
**Sent:** Thursday, April 18, 2019 10:55 AM  
**To:** DOeregulations comment  
**Subject:** Minutola #2 Comment - Proposed Out of Season Coaching Change

As the President of the Delaware Athletic Trainers' Association (DATA) & a member of the DIAA Sports Medicine Advisory Committee, I am writing to express my objection & concern to the proposed DIAA regulatory changes of subsection 7.6. Sports specialization has been found to include higher rates of injury, increased psychological stress, and quitting sports at a young age. This proposed DIAA regulatory change of subsection 7.6 would be encouraging sports specialization, which many medical institutions have researched and are strongly against. Athletes that are multi-sport athletes will feel pressure to participate in their "main" sport's out of season practices and if they overlap their 2<sup>nd</sup> or 3<sup>rd</sup> sport, they will quit those to be available. This pressure will also be placed on their parents.

Should this proposed regulatory change go through, there is an entirely separate issue regarding the Athletic Trainer. Will there be Athletic Training coverage of these out of season events? If so, this will be an **increased cost** to the schools to add this extra coverage. If not, athletes are not protected with medical coverage. Will athletes be required to have physicals? Who will manage this and make sure they are cleared to participate? This is **increased work** on the school to manage this as athletes can could participate in summer sessions without a valid physical. We as Athletic Trainers are already dealing with immense overuse injuries due to athletes participating in HS & club sports at the same time; this would now add a 3<sup>rd</sup> or even 4<sup>th</sup> practice/session to the mix. I strongly urge for the rejection of subsection 7.6 and express the objection of the DATA and DIAA SMAC on this. I hope you will consider these negative health and safety risks and I am happy to discuss further if you'd like!

**Mandy Minutola, LAT, ATC, ITAT**  
Delaware Athletic Trainers' Association President  
Director of Athletic Training & Sales-Premier Physical Therapy & Sports Performance  
[REDACTED]

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**From:** Mandy Minutola  
**Sent:** Thursday, May 2, 2019 3:27 PM  
**To:** DOEregulations comment  
**Subject:** DIAA out of season coaching

Hello,

On behalf of the Delaware Athletic Trainers Association, we strongly ask for the rejection of the DIAA out of season proposed changes. Should a change MUST occur, we recommended a limited timeframe in the summer in which out of season coaching is allowed. We do not feel ANY out of season coaching during the school year should be allowed. The current proposed changes are risking the health and safety of our athletes.

Thank you

***Mandy Minutola, LAT, ATC, ITAT***

Director of Athletic Training/Director of Sales  
Premier Physical Therapy & Sports Performance  
Delaware Athletic Trainers' Association President  
Mobile Contact: [973-800-8566](tel:973-800-8566)

**Kirkwood Office**

[4345 Kirkwood Highway, Suite 201](#)  
[Wilmington, DE 19808-5131](#)  
[302-635-9009](tel:302-635-9009)

**Middletown Office**

[210 Cleaver Farm Road, Suite 1](#)  
[Middletown, DE 19709](#)  
[302-449-2048](tel:302-449-2048)

**Smyrna Office**

[100 S. Main Street, Suite 300](#)  
[Smyrna, DE 19977](#)  
[302-389-7855](tel:302-389-7855)

**Dover Office**

[642 S. Queen Street, Suite 101](#)  
[Dover, DE 19904](#)  
[302-724-6344](tel:302-724-6344)

**Milford Office**

[1004 N. Walnut Street](#)  
[Milford, DE 19963](#)  
[302-503-0440](tel:302-503-0440)

**Lewes Office**

[20268 Plantations Road, Suite B](#)  
[Lewes DE 19958](#)  
[302-727-0075](tel:302-727-0075)

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**From:** Cunningham Emily  
**Sent:** Monday, April 15, 2019 9:24 AM  
**To:** Shockley Tina  
**Cc:** Makransky, Laura  
**Subject:** FW: Proposed DIAA Changes Minutola

**From:** Bunting Susan <Susan.Bunting@doe.k12.de.us>  
**Sent:** Sunday, April 14, 2019 8:32 PM  
**To:** Mandy Minutola  
**Cc:** Cunningham Emily <Emily.Cunningham@doe.k12.de.us>  
**Subject:** RE: Safety Concerns-Proposed DIAA Changes

Mandy,

Thank you for sharing your concerns. I have copied your email to the person who handles regulations for the department and will forward it also to the parties who will actually approve/disapprove the change.

**From:** Mandy Minutola [<mailto:mandyminutola@premierptsp.com>]  
**Sent:** Sunday, April 14, 2019 7:35 PM  
**To:** Bunting Susan <[Susan.Bunting@doe.k12.de.us](mailto:Susan.Bunting@doe.k12.de.us)>  
**Subject:** Safety Concerns-Proposed DIAA Changes

Dr. Susan Bunting,

As the President of the Delaware Athletic Trainers' Association (DATA) & a member of the DIAA Sports Medicine Advisory Committee, I am writing to express my objection to the proposed DIAA regulatory changes of subsection 7.6. Sports specialization has been found to include higher rates of injury, increased psychological stress, and quitting sports at a young age. This proposed DIAA regulatory change of subsection 7.6 would be encouraging sports specialization, which many medical institutions have researched and are strongly against. Why would we want to place our youth in a scenario of increased injury and stress? Should this proposed regulatory change go through, there is an entirely separate issue regarding the Athletic Trainer. Will there be Athletic Training coverage of these out of season events? If so, this will be an **increased cost** to the schools to add this extra coverage. If not, athletes are not protected with medical coverage. This will also increase the demand on the Athletic Trainer which faces burn out frequently in their career. Will athletes be required to have physicals? Who will manage this and make sure they are cleared to participate? We as Athletic Trainers are already dealing with immense overuse injuries due to athletes participating in HS & club sports at the same time-this would now add a 3<sup>rd</sup> or even 4<sup>th</sup> practice/session to the mix. I strongly urge for the rejection of subsection 7.6 and express the objection of the DATA and DSMAC on this. I am happy to discuss further if requested.

Thank you,

***Mandy Minutola, LAT, ATC, ITAT***  
Director of Athletic Training/Director of Sales  
Premier Physical Therapy & Sports Performance  
Delaware Athletic Trainers' Association President

**Kirkwood Office**

4345 Kirkwood Highway, Suite 201  
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**From:** Moffett Frank  
**Sent:** Friday, May 3, 2019 2:03 PM  
**To:** DOEregulations comment  
**Subject:** Proposed Regulation Changes-Out-of-Season-Coaching

To increase the effectiveness for Delaware high schools athletics, I believe there are changes needed for out of season coaching. I has the potential to increase the athletic potential of our high school athletes across the board.

Frank Moffett, Jr M.Ed.  
Hodgson Vo-Tech HS  
Discipline Management Team  
Head Football Coach

**From:** Bunting Susan  
**Sent:** Wednesday, April 17, 2019 3:59 PM  
**To:** Shockley Tina  
**Subject:** Fwd: Proposed Changes to

Sent from my iPhone

Begin forwarded message:

**From:** Chris Morrow <[cmorrow@towerhill.org](mailto:cmorrow@towerhill.org)>  
**Date:** April 17, 2019 at 3:57:08 PM EDT  
**To:** [Emily.Cunningham@doe.k12.de.us](mailto:Emily.Cunningham@doe.k12.de.us),  
[Susan.Bunting@doe.k12.de.us](mailto:Susan.Bunting@doe.k12.de.us), [DOEregulations.comment@doe.k12.de.us](mailto:DOEregulations.comment@doe.k12.de.us)  
**Subject:** re: Proposed Changes to

I would like to join my fellow Athletic Trainers in rejecting the proposed DIAA regulation changes regarding out of season coaching. Among many other reasons, but specifically, there is no mention of medical coverage for the athletes, camps etc, and it will encourage sport specialization which has been proven to be detrimental to the future of the athletes. Please reconsider your position on these changes.

Thank you,

Christine Morrow

--  
Christine Morrow  
Upper School Science  
Athletic Trainer  
Tower Hill School  
2813 West 17th Street  
Wilmington, DE 19806

**From:** Mike Phillips <[REDACTED]>  
**Sent:** Wednesday, April 24, 2019 6:30 PM  
**To:** DOERegulations comment  
**Subject:** DIAA Out of Season Practice Regulation Changes

After reviewing the proposed DIAA regulation changes regarding out of season coaching, we, here at Tower Hill, would oppose passing these regulations. The main concern would be centered around the lack of medical coverage and the difficulties finding adequate coverage during these time periods. Nowhere within the regulations is this mentioned or considered, and we've seen that increasing the amount of athletic event exposures increases risk of injury. There is also the conflict of specificity, which we now know is detrimental to the future all of athletics. This becomes a major issue between sports when an out of season sport "practices" during other seasons or time periods where student athletes may be involved in another sport then the one providing the camp/clinic/sessions. This is not limited to just DIAA athletics. As the proposal stands now, we would reject the proposed changes, and please ask that you reconsider your position regarding these regulations.

Thank you.

Michael Phillips ATC

--  
Michael Phillips ATC  
Tower Hill School  
2813 W 17th Street  
Wilmington, DE 19806  
[REDACTED]





# Sussex Technical High School

*A United States Department of Education National School of Excellence*

John L. Demby, Ed.D. Principal

George W. Fisher, M.Ed.  
Dean of Students

Holly Briel, Ed.D.  
Assistant Principal

Dean Johnson, M.Ed.  
Assistant Principal

May 2, 2019

DIAA Board of Directors  
Collette Educational Resource Center  
35 Commerce Way  
Dover, DE 19904

RE: Opposition to Proposed Coaching out of Season Regulations

Dear DIAA Board of Directors,

I am writing to express strong opposition to the proposed regulation changes, specifically those dealing with coaching out of season. The proposed regulation would allow coaches to hold a 2-hour practice with a limit of 6 hours per week as stated by purposed regulation 7.6.1.2.2:

*7.6.1.2.2 Instruction of accepted and registered students or participation by accepted and registered students in informal conditioning or practice shall be limited to a maximum of 6 hours per week and no more than 2 hours per day with the exception of school-sponsored camps and clinics. A week shall be designated as starting on Monday and ending on Sunday.*

According to the impact criteria listed, it is stated that "the amended regulation is intended, in part, to help ensure all students' health and safety are adequately protected. However, I believe that the proposed regulation would do just the opposite and have a severely negative impact on the health and safety of the student-athletes. As proposed, a student-athlete may attend their in-season practice for 2 hours, then proceed to out of season practice afterwards for another 2 hours. A three-sport athlete could practice for 6 hours in one day. This would no doubt cause physical, mental, and emotional stress on the student-athlete. Furthermore, for those students who decide to stop playing multiple sports and instead specialize in one sport, this regulation will allow them to essentially practice year-round. This is especially concerning as the National Athletic Trainers Association reports that approximately 50% of adolescent sports injuries are due to overuse (see attached graphic). Finally, in regards to the health and safety of student-athletes, the overwhelming majority of athletic trainers in the state are 10-month employees. This means there would be no trained medical professionals on school campuses during the summer when teams would be permitted to hold allowable practices. In order to provide a safe

17099 County Seat Highway

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environment, our school would have to add the additional expense of a trainer during summer hours.

Impact criteria 10 states, "There is no expected cost to the state and to the local school boards of complying with the amended regulation." In order to provide a safe and healthy environment, this is not true. As stated above, our school would need to employ a trainer during the summer months. It is during these summer months, when temperatures often soar above 90 degrees, significantly increasing the risk of heat exhaustion, that it is vital to have a medical professional on site. With the tightening of public-school budgets, this is not an expense our school can handle. There would also be additional maintenance costs the district would be burdened with in order to maintain safe playing fields for our student-athletes. This additional personnel and maintenance cost would be severely prohibitive for our school.

According to the DIAA website, the stated purpose of the Delaware Interscholastic Athletic Association is:

- To preserve and promote the educational significance of interscholastic athletics;
- To ensure that interscholastic athletics remain compatible with the educational mission of the member schools;
- To provide for fair and equitable competition between the member schools;
- To promote sportsmanship and ethical behavior;
- To establish and enforce standards of conduct for athletes, coaches, administrators, officials, and spectators;
- To protect the physical well-being of the athletes; and
- To promote healthy adolescent lifestyles.

In closing, the proposed regulation changes do not seem to align with the stated purpose of the DIAA. The increased allowable practice time is sure to come at the expense of school and academic work. This does not fit with the educational-based athletics model. Furthermore, due to the increased cost associated with the proposal, the schools who have money will be able to provide for their student-athletes while those schools with budget concerns will not. This will widen the gap between team, failing to provide for fair and equitable competition between member schools. Lastly, as stated earlier, this proposal increases the health risks to our student-athletes.

Respectfully, I ask that you reconsider the proposed regulation changes. As drafted, the proposed changes are harmful to the current state of interscholastic athletics in Delaware.

Sincerely yours,



Nick Pegelow  
Director of Athletics

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# The Risk of Overuse Injuries

## OVERUSE INJURIES CAN BE CAUSED BY

training errors, improper technique, excessive sports training, inadequate rest, muscle weakness and imbalances and early specialization.

## LONG-TERM CONSEQUENCES INCLUDE

loss of playing time, reduced function and psychological exhaustion.

## SYMPTOMS OF OVERUSE INJURIES

tend to be gradual, resulting in athletes going undiagnosed and untreated for longer periods of time.



## COMMON OVERUSE INJURIES ARE

general stress, inflammation and tendinitis.

## INJURIES TO THE GROWTH PLATE CAN RESULT

from repeated microtrauma, which is microtearing of the muscle fibers and connective tissues.

## STRESS FRACTURES

occur when shock that can't be absorbed from fatigued muscles is transferred to the bone.

### OVERUSE INJURIES ARE MORE FREQUENT IN



Rowing • baseball • volleyball • cross-country  
• track and field • other low-contact sports

APPROXIMATELY **50%** of all sports-related injuries for pediatric athletes—children ages 6 to 12 and adolescents ages 13 to 18—are due to overuse.

Acute overuse injuries occur when there is too much activity, too quickly, while chronic overuse injuries result from repetitive activities over the course of several weeks or months.

### WOMEN'S SPORTS, INCLUDING



Field hockey • soccer • cross-country • volleyball

HAVE THE MOST OVERUSE INJURIES

## PREVENTING OVERUSE INJURIES

- Avoid specialization and repetitive sport activity at a young age. Athletes who participate in a variety of sports tend to have few injuries and play longer.
- Limit training in one sport to no more than five days a week with at least one day off from any organized physical activity.
- Take time off from one sport for two to three months each year to allow physical injuries to heal, the body to recoup and for the athlete to focus on strength training and conditioning. This is also a psychological break that can help the athlete avoid burnout and overtraining syndrome.
- Pediatric athletes should only play one overhead throwing sport at a time and should avoid playing the same sport year-round. Participation in multiple sports throughout the year provides a wider range of skills as well as rest from repetitive, single-sport activities.
- Although there aren't injury thresholds for specific sports or age ranges, data suggest limiting vigorous physical activity to 16 to 20 hours a week for pediatric athletes.
- Conduct a pre-participation physical exam on an annual basis to detect life-threatening conditions as well as factors that may predispose the athlete to overuse injuries.

Source: National Athletic Trainers' Association, Journal of Athletic Training, American Academy of Pediatrics. Infographic provided by the National Athletic Trainers' Association.

**From:** Jeff Ransom <jransom@wilmingtonfriends.org>  
**Sent:** Friday, April 26, 2019 9:43 AM  
**To:** DOEregulations comment  
**Subject:** DIAA REG. coaching out of season

DIAA Board,

Please do not go forward with the out of season proposal as currently constructed. This proposal has many flaws that will hurt the athletes, member schools, and Coaches.

Here would be a list of concerns that we would have in regards to passing the out of season regulation that has already been approved by the DIAA Board

- We are an education-based institution yet by passing this regulation our athletes will be under pressure to extend their time spent on sports in lieu of outside school assignments.
- If we do not open our facilities and fields to out of season activities we run the risk of losing our students to schools that elect to do so creating an unfair advantage for those schools.
- In regards to facilities we would incur additional costs and create security issues and concerns.
- We as a small school would be greatly affected that specialization of sports (already a rising issue nationally that this will accelerate) and could put some of our programs in jeopardy.
- Why is this regulation being passed when the specific interest group that first presented it says it does not meet their needs and it actually more than they wanted?
- I fear that the pressure for our coaches to keep up with others will burn out our more veteran coaches and they will leave the sport or if we have coaches that want to do more than we allow they will leave us for other programs that will accommodate them.
- Because we believe in protecting the safety and well-being of our athletes at all times – we would need to hire an additional trainer to have proper coverage.

I know that the Regs state that it is up to each school to determine their level of compliance to the new Reg and do less if they so choose however that is not a real world scenario – the real world scenario is some schools will embrace this and value athletics more as part of the programs and others will maintain the value of education based athletics resulting in schools losing students and the gap of the have's and have nots will widen even more than it has now.

Thank you all!

Jeff Ransom  
Director of Athletics  
Wilmington Friends School  
302.576.2937 office  
302.502.5949 mobile



May 3, 2019

Dear Secretary Bunting,

As Delaware's State Health Official, Pediatrician and mother of two student-athletes, I am writing to oppose the proposed regulation change to 14 Del.C. Sections 122(b) and 303(a) that is currently open for public comment. Specifically, if passed, I am concerned that year-round coaching would compromise the health and well-being of our student-athletes. While I am a strong promotor of the value of sports and fitness, this regulation has the potential to result in a number of increased physical and mental stressors for our student-athletes. Here are just a few listed below:

- Mental health stressors due to increased expectations on time and commitment placed on student-athletes by coaches year-round.
- Physical injuries from overuse and repetition from becoming sport-specific at too young an age.
- Time management issues for multi-sport athletics that may be expected to practice up to six hours a day on top of a full school day resulting in stress, anxiety and depression.
- A mixed message to student-athletes that athletics is the priority over scholarship, causing heightened stress and decrease in focus to attain scholarship goals.
- Athletic and academic burnout – negatively impacting mental health.

Please reconsider the passage of this regulatory change in favor of the status quo.

Thank you,

A handwritten signature in black ink, appearing to read "K. Rattay MD".

Karyl T. Rattay, MD, MS, FAAP  
Director

**From:** Repole Theresa  
**Sent:** Tuesday, April 16, 2019 1:30 PM  
**To:** DOEregulations comment  
**Subject:** Repole Comments - Coaching Out of Season Regulation

To whom it may concern:

The recent release of the high school coaching out of season regulation is a set back to student-athletes, athletics, schools, and health professionals- specifically certified athletic trainers who take care of the student-athletes on the front line.

A research article that focused on baseball was published by Wilhelm et al (Wilhelm, A., Choi, C., & Deitch, J. (2017). Early Sport Specialization: Effectiveness and Risk of Injury in Professional Baseball Players. *Orthopaedic journal of sports medicine*, 5(9), 2325967117728922. doi:10.1177/2325967117728922) concludes the following:

- "Our study demonstrated a statistically significant higher rate of serious injury during a baseball player's professional career in those players who specialized early. Most current professional baseball players surveyed believed that sport specialization was not required prior to high school to master the skills needed to play at the professional level. Our findings demonstrate an increased incidence of serious injuries in professional baseball players who specialized in baseball prior to high school. **Youth baseball athletes should be encouraged not to participate in a single sport given the potential for an increased incidence of serious injuries later in their careers.** No data are available to suggest that early specialization is needed to reach the professional level."

Another paper published,

[https://digitalcommons.brockport.edu/cgi/viewcontent.cgi?article=1031&context=pes\\_synthesis](https://digitalcommons.brockport.edu/cgi/viewcontent.cgi?article=1031&context=pes_synthesis), found the following

- "There were many more negative effects on athletes that specialized compared to multi-sport athletes."
- "Within the literature review there was various negative effects on athletes that specialized. Some of these negative effects included higher rates of injury, increased psychological stress, quitting sports at a young age, and burnout, both physically and mentally. Athletes that specialize were much more likely to report a history of overuse knee injuries. Specialization in a single sport also showed an increased risk of patellofemoral pain in female athletes. Participants who specialized in sport at a younger age were also less likely to continue to participate in sports as they got older."
- "In terms of participating in multiple sports athletes gain more positive effects than negative effects. The positive effect that is most important is that spending multiple hours in sports and participating in a variety of sports will better develop an athlete's strength, speed, endurance and gross motor coordination. This is especially important at younger ages. Research has also shown that participants that participated in multiple sports at a young age were much more likely to compete at the national level compared to those who only specialized and focused on one sport. Diversification in sports at an early age provides a child's body to develop multiple motor skills that may crossover between sports."

Overall the results and findings in this synthesis demonstrate and support the need for sport diversification over specialization, especially at the younger ages."

One more article released by the American Academy of Pediatrics,

[Sport Specialization and Risk of Overuse Injuries: A Systematic Review With Meta-analysis](#)

[David R. Bell, Eric G. Post, Kevin Biese, Curtis Bay, Tamara Valovich McLeod](#)

[Pediatrics Sep 2018, 142 \(3\) e20180657; DOI: 10.1542/peds.2018-065,](#)

comes to the following conclusion:

- "Sport specialization is associated with an increased risk of overuse musculoskeletal injuries (Strength of Recommendation Taxonomy grade: B)."

There is plenty more research available that shows an athlete that specializes, which is where coaching out of season is going to take our athletes, leads to an increase in injuries. Personally, I see this every spring season with girls soccer because they can play up to 5 games in a single weekend, then come back to their high school and play 3 games in a week; and they seek out the high school athletic trainer to treat the injuries. Plus, practice between those games. Keep in mind, many of these injuries occur outside of the high school sport, but they seek out their high school athletic trainer. As a certified athletic trainer, I see numerous overuse injuries from athletes that specialize. We are working with students, many will not play college sports, they play for their high school teams and have fun doing so, why take that away?

I've been an athletic trainer in Delaware for 16 years, I have a 12 year old son and he plays baseball. The first question I ask him after every game or practice- "Did you have fun?" He loves baseball, he's competitive, but I've raised him to have fun. On game day, after I see a student-athlete for treatment, I tell them good luck and have fun. Coaching out of season is going to take away the fun. It will increase the academic demands on the student as they will have less time to complete assignments. We have student-athletes, student comes first and athlete comes second.

As a certified athletic trainer and parent, this legislation should not pass and the regulation as it is now, needs to remain the same. If it passes, we will see an increase in injuries, a needed increase in school budgets, and a decrease in home-life balance for students, coaches, parents, and athletic trainers. Delaware's response to impact criteria 3, 6, and 10 are not sufficient and they are not correct. Student' health will suffer, there will be an increase in reporting and administrative requirements, and the cost to the state will increase in order to comply.

I end this email with the following link from the NFHS and the value of multiple sport participation (National Federation of High School Sports): <http://www.nfhs.org/media/1017674/encourage-multiple-sport-participation-hensley-robertson.pdf>

- "...research shows that over 80% of current Division 1 football scholarship recruits played another sport in high school. The Heisman Trophy Finalists are no exception and not one of them "specialized" during high school. Actually three of the finalists were three sport athletes in high school (Peppers, Watson, Westbrook)"

- "Urban Meyer is obviously one of the best college football coaches. On his recruiting visits, Meyer specifically asks if the athletes play multiple sports. There was a leaked chart that 42 of 47 of urban Meyers recruits in 2015 played more than just one sport in high school."
- A UCLA Study showed that varsity athletes began specializing at a single sport on average at age 15.4. While undergrads who played sports in high school but not at the college level began limiting themselves to one sport on average at 14.2.

Respectfully,

Theresa M. Repole

Theresa Repole, MS, LAT, ATC  
Science Teacher  
Certified Athletic Trainer  
Newark Charter School  
200 McIntire Dr. Newark, DE 19711





**From:** [REDACTED]  
**Sent:** Friday, May 3, 2019 11:10 AM  
**To:** DOE regulations comment

Hi.

I'm Coach Chuck Robinson Head coach for the Middletown High school Boy's Varsity basketball team. I just would like to say that I am in favor of the coaching change, for out of season coaching.

The only downside is if coach's don't take advantage of this great opportunity. I believe this will allow coaches to be TEACHERS of the sports they coach. If we want STUDENT-ATHLETES then we need TEACHER-COACHES. Coaches have a big influence on their athletes and this would help them to monitor them, not only athletically but academically as well. I look at the Middletown basketball program as a Co-curriculum activity not an extra curriculum one. The basketball program must co-exist with the academics. NO GRADES NO PLAY. But there is teaching, except I use the gym as a classroom. With this change more teaching can be done and hopefully greater success in the classroom. Must players grades drop when they are not playing. This would give coaches, parents and teachers a bigger carrot to put in front of the cart to motivate student athletes.

Thanks,  
Coach Chuck Robinson  
GO CAVS!

**From:** Robinson Mark  
**Sent:** Friday, May 3, 2019 1:26 PM  
**To:** DOE regulations comment  
**Subject:** Proposed changes to Reg. 1009 DIAA High School Regulation

The following are my concerns with the proposed changes to the regulations concerning coaching out of season in High School Sponsored Athletic Programs:

1. The initial concern comes from the process or lack of process regarding the proposed changes. Without consulting the educational-based leaders presently in the role of administration of athletics, the wide ramifications of liability and health of student athletes were not sought out for advice in crafting changes.
2. As an athletic director, coach, athletic trainer, and strength and conditioning specialist, there is not support in research or medical findings that supports increasing the opportunity of specialization in sports. In fact, most if not all counter it by saying multi-sport participation during different seasons not only reduces the risk of injury, but enhances the athleticism of those who choose to participate in more than one sport. The proposed changes go against Reg. 1006, 5.2.1.5, where the school is responsible... in conducting practices... in a manner which minimizes risk to health and safety to student athletes." Adding unregulated practices out of season creates an added health, safety risk, and liability to schools since the medical evidence demonstrates that this is more likely to occur with sport specialization.
3. Many of our schools programs are dependent on athletes playing more than one sport, which provides opportunities for more of our adolescents to be able to be a part of a team. Allowing sport seasons to practice beyond the designated season will pull those who would normally choose another sport. Opportunities for the beginning student athlete will diminish with the reductions in sub-varsity experiences as numbers begin to dwindle. The demand on coaches who are also multi-sport coaches will be greater to extend what they are allowed to do in a season to all-year availability. Credible and competent, educational-based coaches will be lost to the need to work with one season sport.
4. The added cost in liability and insurance will most likely increase due to the added unregulated practices in school facilities afforded by the proposed changes. With the out of season coach not being compensated, the timing of these activities taking place after hours of in-season practices/competitions, it is likely that schools/state will also not compensate the essential medical coverage by licensed/certified Athletic Trainers, further increasing risk and liability.

It is my hope that these changes be seriously scrutinized by not passing the changes at this time and contain them to the summer time between the spring and fall seasons. This way, coaches will be able to extend their duties without interfering with in-season activities, students will be able to participate without overuse injury risk, and liability to schools and programs will be minimized.

Sincerely,

***Mark Robinson, CAA, MS, MEd., ATC, CSCS, NASM-PES, ITAT***  
***Athletic Director, Health/PE Teacher, Athletic Trainer, and Varsity Golf Coach***



***St. Georges Technical High School***

***555 Hyetts Corner Road***  
***Middletown, DE 19709***

**From:** DIBCA President [REDACTED]  
**Sent:** Thursday, May 2, 2019 3:30 PM  
**To:** DOERegulations comment  
**Subject:** Out of Season Practicing

Dear DOE Rules and Regulations Committee Members,

I am the President of the Delaware Interscholastic Basketball Coaches Association (DIBCA) and while I cannot guarantee 100%, I can state the vast majority of Varsity Coaches having been begging for changes for years and are extremely excited about the potential of these proposed regulations.

While I'm sure it's not 100% perfect, I feel that these new rules would greatly help the student athletes in Delaware who come from low income homes.

By allowing practice during the summer this will strengthen the bond between players and coaches, protect our students from crooked AAU coaches, keep kids off the street and on the court or field, and it will give them more contact with a positive role-model who is highly trained and has access to IEPs, grades, special ed and medical needs...

Hundreds of our students cannot afford these fancy elite camps that cost thousands of dollars or these expensive club and AAU teams.

These rules are a big step in the right directions.

Sincerely,

Michael Sanford  
DIBCA President  
NHSBCA Board of Directors  
[www.msanfordpehealth.weebly.com](http://www.msanfordpehealth.weebly.com)

**From:** Joan Samonisky [REDACTED]  
**Sent:** Tuesday, April 23, 2019 9:17 AM  
**To:** DORegulations comment  
**Subject:** DIAA Coaching Out of Season

To Whom It May Concern:

The DIAA survey that was completed by people across Delaware simply sought input/opinion as to whether the coaching out of season rule should be changed. It did not provide any glimpse as to the extent of what that rule change would look like. While I am in total agreement that the DIAA regulation regarding coaching out of season (1009 7.6.1) needs to be opened up to allow more school coach and student-athlete contact in the off-season, I am in disagreement with the proposal, as written. The following points are some of my concerns:

- The **health, safety and well-being of our student-athletes will be compromised** if they are allowed to participate in an out-of-season sport up to 6 hours per week. The amount of time suggested, 6 hours/week/sport, is excessive. Although participation is voluntary for the off-season workouts, three-sport athletes could be subject to as many as 6 hours a day, three days a week, in school related workouts. As a result, over-use injuries will likely increase.
- The DIAA mandated daily practice time limit on official school days is 2 hours. The proposed change supports up to **6 hours** of participation by an athlete on multiple days each week (2 hours of practice for the in-season sport, 2 hours of work-outs for off-season sport #1, and an additional 2 hours of work-outs for off-season sport #2). This does not protect the physical well being of our students, nor does it promote a healthy lifestyle when extracurricular activities are seemingly taking priority over academics.
- The multi-sport athlete, that many of our schools depend on, will be discouraged to pick up additional sport seasons if they have the chance to work out with their school coach year around in their sport of choice. As a result, I anticipate participation numbers will be impacted in many sports, at many schools, and will lead to the elimination of sub-varsity level teams. This proposed rule change unfortunately encourages sport specialization.
- Over many years, DIAA Executive Directors and Board members have often preached about trying to "level the playing field" and not have rules and regulations that allow for "the haves and the have not's". I feel this rule change will place a financial burden on many schools who would have to pay for additional activity buses and an after-hours custodian. Those schools might then choose to not allow their coaches/athletes to take part in the coaching out of season opportunities. Other schools may be able to afford the additional financial burden that will, in turn, help to increase the student-athlete success rate. The athletic gap between schools and programs will continue to widen. This proposed rule change further magnifies the "haves and have not's", it does nothing to help "level the playing field".
- DIAA publishes seven points to define its' "Purpose". I believe that three of those points are severely compromised by the proposed rule change: "to provide fair and equitable competition between member schools, " "to protect the physical well-being of the athletes," and to promote healthy adolescent lifestyles."

The entire process appears to be very rushed to get the DIAA Board to pass such a significant change in the DIAA rules in a short amount of time. Many members of the DIAA rules and regs committee are in agreement, having had only two meetings to write this proposed, significant change. I believe there are other solutions to a change in this rule, without going to the excess of multiple hours added to a student day. The DIAA member

schools, and those tasked to implementing such a significant change at member schools, need to be given sufficient time to provide alternative solutions and have details about the implementation of the proposed change fully vetted before a final decision is put forth for a vote.

Best,

Joan Samonisky

**Joan Samonisky**  
Sanford School  
Director of Athletics

[REDACTED]  
[REDACTED] (Office direct line)  
[REDACTED]

**GO WARRIORS!!!**

**From:** Bill Schultz [REDACTED]  
**Sent:** Friday, May 3, 2019 4:16 PM  
**To:** DOE regulations comment  
**Subject:** Out of Season Coaching Concerns

DIAA Board of Directors and DE Department of Education,

After careful consideration and numerous conversations with Coaches and Athletes I have summarized there and my concerns below. If you have any questions please feel free to reach out to me and I would gladly sit down with anyone as it relates to these changes.

Many of the concerns are about what it will do to the student athletes.

#### **Major points of Concern:**

1. The process was not followed and did not give member schools the appropriate time to review and comment on the changes to the Rules and Regulations Committee made before it went to the DIAA Board for approval.
2. DIAA own Sports Medicine Advisory Council or state trainers association was not been involved in the process for the changes to Rules and Regulations concerning the physical and mental health of the athletes. The concern of overuse injuries and the fact statistics are supporting the data that student athletes are increasingly suffering from these types of injuries due to sport specialization.
3. The student athletes were never asked about the idea of the out of season practices.
4. Purpose of DIAA, one of which is to protect the physical wellbeing of the athletes and making it fair and equitable competition between member schools. These regulation changes could in fact go directly against the purpose and mission of DIAA.

#### **6.1 Questions/Thoughts:**

- Who is responsible for these camps Liability coverage?
- Are there time limits on the length of the camp session 4-6-8 hours? 3-4-5 days per week?
- Are there limits to the number of camps that a school or organization are allowed to sponsor?
- Who is responsible for monitoring these hours and schedules?
- We are an organization about Educationally Based Athletics but, the student athlete does not have to be Academically Eligible

#### **6.4 Questions/Thoughts:**

- Does this do away with any type of open gym that we are allowed to hold for any sports?
- If a coach wants to hold an open gym and not provide instruction but allow his/her players to get time on the field/court? If there is not a rule against it then they would be able to hold these types of situations or "Open Gyms" in addition to the out of season practices.

## 6.5 Questions/Thoughts:

- Are these programs restricted in any way to the number of hours?
- Are the conditioning programs now able to restrict this to certain teams and/or certain members of a team?
- Does this time count towards the 6 hours? 2 hours/per day?
- **Questions/Thoughts:**
  - Is this going to be open to all athletes and all levels? How is a varsity coach going to instruct field hockey/lacrosse formations and schemes to a freshman that has never played the game before?
  - Are coaches allowed to state that a certain practice is for “returning Varsity Players Only”? football, soccer dealing with the various levels of players at the same time or are they allowed to separate.
  - For a small school with few facilities or field space scheduling may be very limited as opposed to a school with various areas and space.ave multiple teams trying to find time to practice out of season especially when it is a small school with one indoor practice area.
  - Don’t know of any tournament pre-established schedule for a tournament or league states that a high school coach can coach the team entered into the tournament.
  - What if a league is scheduled for twice a week does that mean they can practice up to 6 hours in addition to the 2 games?
  - Can a coach receive payment from a clinic of this type?
  - This would be like a coach working for a college team camp and be paid for that instruction.
  - If an outside camp is different than a school based camp/clinic, why can they be paid from the outside company and not a school based.
  - Is this money coming from Booster clubs and or parent donations?
  - Who is defining these items such as batting helmets, goggles in FH and Girls Lacrosse?
  - Can a baseball/softball team use a pitching machine?
  - Lacrosse: Should Include gloves for protection and feel of the stick
  - Are the players permitted to wear protective equipment during school/booster sponsored camps or clinics that have been approved by DIAA following the guidelines ex: Lacrosse, football camps
  - SMAC is 100% against the new proposal their concerns are overuse injuries, sports specialization is going to increase which in turn will increase injuries. The national movement is to get away from sports specialization research shows.
- The health and wellbeing of our student athletes
- The mental health of the student athlete is also a concern: dealing with the direct or indirect pressure from coaches, teammates or others to take part in the Out of Season Practices
- Currently, some athletes are going from one practice to another practice (Club, Travel...) but with the new legislation the school districts are sponsoring the “other practices” so where does that put the district when those athletes are suffering from overuse injuries such as Tommy Johns, tendonitis and ....
- Athletic Training coverage for out of season practices. If sanctioned by the schools, will they need to be on site for all practices? and if not will the school be liable if an injury occurs?
- Will the district insurance increase as a result of the schools coaching staff running camps?
- What teams have priority over the others? In-season then next season followed by out of season?
- Would we allow an in-season player to attend an Out of Season Practice after their in-season practice? Essentially 2 hour practice followed by a 2/4 hour of Out of Season practice.
- Outside organizations will be limited to the availability of our facilities. Example: Little Wrestlers, Upward basketball, Volleyball Club, Soccer Club or Lacrosse Club...
- Will coaches directly or indirectly holding important players from playing other sports.

- What if out of season practices start at 5:00 or 5:30 and student can't get transportation back to school? Who is responsible for supervises these athletes if they stay on campus?
  - What about athletes that have to work and the pressure they may feel for not attending Out of Season practices.
  - Will physicals need to be on file for them to take part in the out of season workouts
  - Emergency cards completed for all athletes that may want to stay after and do an out of season workout.
  - What if an in season athlete quits is he/she able to go to an Out of Season Practice?
    - If an In-season team is 0-6 and they quit and want go to an Out of Season Practices
  - What if a student athlete doesn't attend the first 2-3 weeks of Out of Season practices but wants to come out after this time frame? Does the coach have to allow him to come?
  - Are parents going to expect coaches to coach out of season? And if not, are they going to accept that decision? or Are they going to transfer to other schools?
- 
- The survey tool that was used was leading and skewed to the side of opening the out of season regulations
  - The way the new regulations are written now puts the onus and responsibilities on the school principals/athletic directors not DIAA.
  - What will the Out of Season practices do to the facilities and fields of school that don't have turf?
  - Do these new regulation changes go against the DIAA Purpose (examples #2, #3 & #6)

**The purpose of the Delaware Interscholastic Athletic Association is**

- to preserve and promote the educational significance of interscholastic athletics;
- to ensure that interscholastic athletics remain compatible with the educational mission of the member schools;
- to provide for fair and equitable competition between the member schools;
- to promote sportsmanship and ethical behavior;
- to establish and enforce standards of conduct for athletes, coaches, administrators, officials, and spectators;
- to protect the physical well-being of the athletes; and
- to promote healthy adolescent lifestyles.



**From:** Sfamurri Christopher  
**Sent:** Friday, May 3, 2019 10:45 AM  
**To:** DOEregulations comment  
**Subject:** DIAA Out-of-Season Coaching Regulation Comments

Good Morning,

Thanks to all involved in this process of amending current regulations! I am sure it is not a simple process, but thank you for considering making changes to help our student athletes!

I appreciate the proposed changes. I believe our student-athletes are not just in competition with each other during their seasons, but they are also competing against other states' student-athletes for college opportunities. I wholeheartedly believe that these proposed changes would allow Delaware student-athletes to stand on an even surface while competing with our surrounding states.

There are a few suggestions I have that will be explained below:

-7.6 Amendment

I agree with all of this including the necessity to minimize any possible physical contact during the offseason. However, I believe the proposed restrictions on football and lacrosse need adjusting.

1. From a player-safety perspective, prohibiting safety equipment like hand shields is unnecessary- these implements are designed TO mitigate player-on-player contact. I fully understand and agree with the proposal to keep this drill work to non-contact. To be effective, a football coach would need to implement the use of shields and dummies to do so. A better regulation may be to adhere to USA Football's Level of Contact #0-2 (those levels can be found [here](#).) USA Football is our governing body for Youth Football and the organization we uphold their safety regulations through annual training.
2. Lacrosse should be non-contact as well, but prohibiting the use of chest-protection by the field players (the chest protector is part of the "shoulder pads") could expose players to a safety issue in shooting drills. The safety equipment of lacrosse is much more important to protect the player from shots/ricochets/stick checking than it is about protecting the player from player contact. The rule should allow the lacrosse players to wear their "full protective equipment" that includes a sternum/cardiac shield and elbow pads but the drills remain not full-contact. As a lacrosse coach, I would NEVER let any of my players practice (even on air) without their FULL protective equipment as it is too much of a safety issue to do so.

Thanks for your time,

*Chris Sfamurri*

*Health/PE Teacher - North Smyrna Elementary School*

*Assistant Football Coach - Offensive Line - Smyrna High School*

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[REDACTED]

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**From:** Sfamurri Sarah  
**Sent:** Tuesday, April 16, 2019 12:09 PM  
**To:** DOEregulations comment  
**Subject:** Sfamurri Comment - Proposed changes to DIAA regulations

Good afternoon-

Below are my thoughts regarding the proposed changes to the DIAA regulations for camps, open-gyms, and out of season coaching.

The proposed changes will allow for our coaches to retain a higher quality of player and improve the players athletic abilities during the off-season. It also allows families to seek free coaching from expert and vetted individuals rather than paying out of pocket for athletic activities. This will only lead to better quality for all sports in the state of Delaware- especially compared to surrounding states who have had these regulations in place for years.

*Sarah Sfamurri*  
Specialist- Smyrna High School  
Jobs for Delaware Graduates



*Jobs for Delaware Graduate's mission is to enable students to achieve academic, career, personal and social success.*

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**From:** Shivery Greg  
**Sent:** Friday, May 3, 2019 7:38 AM  
**To:** DOEregulations comment  
**Subject:** Public Comment

Good morning! I would like to comment on the proposed regulations on changing the current coaching out of season policy.

As an athletic director it is important I realize that we do not have athletes, we have student athletes. This should be the approach for all in athletics. We continue to look to change policy to make it easier to participate in athletics & at the same time perform less in the classroom. This is completely against what our mission is for our student athletes. This proposed regulation not only allows ineligible student athletes to participate but also increases the number of hours they could be at practice & reduces the numbers of hours they can spend on academics or be involved in other clubs or activities. Our job is to develop well-rounded citizens & this proposal does not meet this responsibility. Please see below for additional concerns.

- Mental health stressors due to increased expectations on time and commitment placed on student athletes by coaches year-round.
- Physical injuries from overuse and repetition from becoming sport-specific at too young an age.
- Time management issues for multi-sport athletics that may be expected to practice up to six hours a day on top of a full school day resulting in stress, anxiety and depression. This also could decrease the number of multi-sport student athletes & lead to specialization in one sport.
- A mixed message to student-athletes that athletics is the priority over scholarship causing heightened stress and decrease in focus to attain scholarship goals.
- Athletic and academic burnout.

I do agree that we do need to take a closer look at our current regulations with open gyms & strength & conditioning specifically during the summer time. I recommend that that this proposal be sent back to the rules & regulation committee for further review & allow more time & receive the proper input from all parties. Again, I appreciate the opportunity to present public comment.

GO PATRIOTS

Greg Shivery  
Athletic Director  
Newark Charter JR/SR High School

**From**  
**Sent:** Monday, May 6, 2019 8:44 AM  
**To:** Shockley Tina  
**Subject:** FW: proposed rules and regs

**From:** Lynn Snyder-Mackler <[smack@udel.edu](mailto:smack@udel.edu)>  
**Date:** May 3, 2019 at 4:24:13 PM EDT  
**To:** [susan.bunting@doe.k12.de.us](mailto:susan.bunting@doe.k12.de.us)  
**Subject:** proposed rules and regs

My name is Lynn Snyder-Mackler. I am Alumni Distinguished Professor of Physical Therapy at UD and a member of the DIAA Sports Medicine Advisory Committee. I am writing in strong opposition to the proposed DIAA regulatory changes specifically subsection 7.6 regarding coaching out of season. The proposed changes in subsection 7.6 are contradictory to the recommendations made by DIAA SMAC advising against sports specialization.

Specialization in youth sports has led to an increased number of overuse injuries in young athletes, acute injuries, overuse injuries and withdrawal from play, according to prominent mounting scientific evidence

Parents and kids should NOT be the arbiters. Parents think the more you pitch [for example], the better you are going to be in terms of playing further into college or into the professional level, but the reality is, the more you throw at that level, the less chance you have of a long career playing baseball or moving on to the next level because of the overuse injuries we see limiting these players long term

James R. Andrews, MD, of Andrews Institute for Orthopaedics & Sports Medicine, said, "Fatigue is the big factor in youth sports," which he said has led to a 10-fold increase in overuse injuries since 2000. "For example, in youth baseball, our research at American Sports Medicine Institute, shows that if you pitch with fatigue, there is a 36-to-1 [increased likelihood that] you can injure your throwing shoulder or elbow," he said.

The number of young athletes experiencing overuse injuries has increased, according to American Orthopaedic Society for Sports Medicine (AOSSM) and American Academy of Orthopaedic Surgeons' (AAOS) STOP Sports Injury program. According to data from AAOS and American College of Sports Medicine, more than 3.5 million athletes aged 14 years or younger incur sports medicine injuries, many of which are preventable.

Mininder S. Kocher, MD, MPH, professor of orthopedic surgery at Harvard Medical School and associate director of the Division of Sports Medicine at

Boston Children's Hospital, noted the upward trend in overuse injuries during his 15 years of practice is due to the "professionalization" of youth sports as well as too much specialization and lack of free play. "Core strength and balance [are] things they would have gotten from free play like climbing and jumping, but free play is pretty much gone now," Kocher said.

Pressure to compete at a higher level leads many young athletes to not only play more intensely but also more often, leading them to play a single sport year round. Omitting a rest period between seasons and not switching to a different sport with alternate motions and stress loads are major factors in the risk of overuse injury and burnout. A common perception among parents, children and coaches is that athletes who are not playing for the entire year are losing that advantage over somebody else who is also playing year round, but there is no actual advantage and the potential for injury grows exponentially.

Lynn Snyder-Mackler, PT, ScD, FAPTA  
Alumni Distinguished Professor, Department of Physical Therapy  
Francis Alison Professor  
STAR University of Delaware  
540 South College Avenue  
Newark, DE 19713

[REDACTED]

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**From:** Marcus Thompson <[REDACTED]>  
**Sent:** Wednesday, May 1, 2019 7:58 AM  
**To:** DOEregulations comment  
**Subject:** Coaching out of season rule

This change to the coaching regulation is long overdue. Our current rules are antiquated and they are unenforceable. While some adaptations/oversight may need to be made at the school or individual district level, those minor hurdles in no way should diminish the positive impact that this change will make for our student athletes. Kudos to those who have brought this change forward in the best interest of our student athletes. Move this forward immediately!

Yours in sport,

Marcus Thompson  
Head Girls Basketball Coach  
Sanford School

**From:** Wagner Daniel  
**Sent:** Monday, April 29, 2019 10:21 AM  
**To:** DOEregulations comment  
**Subject:** DOE/DIAA regulation changes

I am writing today in support of change regarding DIAA regulation 7.6 (Amendment- Out of Season Coaching) and the removal of regulation 6.4. As a parent, middle school coach, and high school coach, I see what other parents and student-athletes are doing in order to improve and prepare for various athletic seasons. We need change.

- Cost of training sessions, camps, and clinics is very expensive while DE coaches are NOT asking to be paid.
- These camps can be run by coaches who have not been screened or approved by the state.
- Many of these coaches are unqualified while the school coach is very qualified.
- Why should a parent have to pay to have someone else coach their child when they may trust the school coach?
- Parents and children have the right to choose which sports/activities they participate in.
- Delaware is behind other states when it comes to out-of-season coaching.
- Our athletes are at a disadvantage when competing with athletes from other states for college scholarships.
- By giving coaches a 'no-contact' window, that allows for student-athletes to focus on their current sport season.

With regards to lacrosse equipment that is allowed, I am asking for the following amendment: Lacrosse players should be allowed to wear chest/shoulder pads in addition to helmets and gloves. Safety is of the utmost concern and these pads are specifically designed to protect against a shot to the chest/heart. Wearing a chest/shoulder pad will not mean there will be more player-on-player contact.

Daniel A. Wagner, M.Ed.  
Smyrna HS Varsity Football Assistant Coach  
Smyrna MS Boys Lacrosse Head Coach  
Physical Education - Smyrna Middle School

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Dear DIAA board members:

In regards to rule changes for coaching out of season:

I write to you today as a past DIAA board member, a Delaware pediatrician for over 25 years caring for generations of Delaware student athletes, and as a parent of a former middle/high school volleyball player.

I have read the thoughtful public comments about this issue from several coaches, parents, and athletic directors. It is interesting to me that this has become such a hot button issue now - I never heard it brought up in all my years on the board. Every year student athletics becomes a bigger and bigger business and I appreciate that the DIAA board's role in guarding against business interests and pay to play influences on high school and middle school athletics.

YES I think that changing the rule will further push some student athletes to specialize in one sport earlier and YES that will lead to some more injuries. In my daughter's case she knew that playing club volleyball year-round in her first years of high school would be the best way to make varsity, even if it was not with her own coach. She chose not to do this and played other sports in high school, but I think that if her High School volleyball coaches were also the club coaches, she more likely would have only played volleyball. It is ironic to me that much of the push for this rule change seems to be coming from volleyball, which is the girls sport in which I see the most concussions - and that certainly won't be helped if more younger girls are playing year-round.

YES I think that this rule change will increase recruitment of student athletes to certain schools. I take care of student athletes now from Delaware, Pennsylvania (including many who play for DE private schools) and New Jersey and grew up in New York and trained in Chicago. I love Delaware, but it is a pretty unique state in the number and breath of private schools compared to public and in the ability for individual Delaware students to choice into many different public schools. I fear this rule change can open the door for some Delaware schools to use school coaches as a recruiting tool for middle school students to create superteams that are coached year-round in sports such as football, basketball, field hockey, and soccer. When I was on the DIAA board, we spent much of our time ensuring that students did not transfer for athletic advantage. This makes it easier for school programs to recruit the same way. The board is entrusted to protect young athletes as well as keep the playing field level between all Delaware schools, big and small, private and public.

Lastly, if the DIAA board feels it must allow some out of season coaching to occur and is contemplating hour limits and % of athlete limits, I would suggest that they also consider simply allowing only 11th and 12th graders to be coached out of season by their high school coaches. . This way these coaches will be available in the off-season to help showcase these older students for college recruiters etc. while recruiting advantages will be reduced and it will be less likely that 9th and 10th graders (who have often not completed puberty so have higher injury rates) will be put at increased risk.

Sincerely,

Robert S Walter MD FAAP

Brandywine Pediatrics

Wilmington Delaware



**From:** John Wilson  
**Sent:** Friday, May 3, 2019 1:43 PM  
**To:** DOEregulations comment  
**Subject:** Proposed Regulation Changes

This would be a bad idea for interscholastic sports in Delaware. Here are my reasons:

1. It would pull kids from other sports. If a player's first sport is football, and he's on the baseball team but not a starter, he would feel obligated to be with the football team if he knew they were practicing football plays. I'm a football coach, and I don't think this is fair to other sports.
2. Facilities – there's just not enough room. Spring is bad already, can you imagine all the other teams out there as well.
3. Increased injuries – playing multiple sports or at least training athletes to be more functional will just break down bodies.
4. The need for increased athletic trainers – for some schools this would not be a problem, but for many of the public schools this puts them at a complete disadvantage.
5. Player Burnout – unless you are a top DI athlete, which we have very few in this state, kids are will simply get tired of doing the same sport and its skills year round.
6. Non-educators will be a bigger influence on our scholastic athletes – sadly we do a lot already, now we have to do more. Are we going to get paid more?

More research and education are important before we make a decision. We should be looking at other states with similar philosophies and values as Delaware. Coaches will say we are at a disadvantage compared to some of our neighboring states, but we can't be swayed by that. Pennsylvania has over 525 High Schools alone. How do we take what they are doing and try to make it work for us.

If you allow coaches to work with kids all year round for six hours a week, then the amount of unintended consequences will be considerable. Sure, I would love to coach my kids more then I'm allowed, but I think each sport is different, and we need to look at what each specific sport needs, not what they want.

**From:** Woods Patrick  
**Sent:** Wednesday, May 1, 2019 9:48 AM  
**To:** DOEregulations comment  
**Subject:** Coaching Out of Season

To Whom it Concerns,

I am in support of the change now allowing coaches to coach players in the off-season rather than allowing that task to be done by, oftentimes, unqualified travel team coaches and trainers. I have personally had to inform parents of my players of trainers and travel team coaches that have reputations for being dangerous for youth. School coaches, as you know, have to be vetted and qualified by administration of school districts. For the safety of our players, I think it is in the best interested to allow (on a volunteer basis) coaches to coach traveling teams and offering training options to their own players.

Why would, seemingly the most qualified coaches, not be allowed to coach the players for most of the year?

Thanks,

Pat Woods

Cape Henlopen Girls Basketball

**Subject:**

FW: DIAA proposals

**From:** Yingling Craig <[REDACTED]>

**Sent:** Monday, April 15, 2019 3:55 PM

**To:** Bunting Susan <[Susan.Bunting@doe.k12.de.us](mailto:Susan.Bunting@doe.k12.de.us)>; Cunningham Emily <[Emily.Cunningham@doe.k12.de.us](mailto:Emily.Cunningham@doe.k12.de.us)>

**Subject:** DIAA proposals

My name is Craig Yingling and I am the State Licensed and Nationally Certified Athletic Trainer at Delmar Junior/Senior High covering both middle and high school athletics. I have over 25 years of experience with 19 years of those having been in the secondary school setting. I am employed full time as the athletic trainer at the school with no additional responsibilities.

I was recently made aware of the changes potentially being introduced by the DIAA regarding out of season coaching and participation by the secondary school athletes. Sections 6 and 7 are particularly disturbing and I believe could be harmful to the athletic population in several ways. Without addressing the increased responsibilities and time demands of the athletic trainers, lets examine how this impacts the athletes. The demands on the athlete will change as they could potentially have 2 hours of in season practice and up to several hours of out of season practice depending on how many seasons they participate. This will take away from their home life, academic and homework time, and any employment demands. This will cause many athletes to make a choice if their grades start to suffer or if they cannot work and they need to make money. This along with the pressure of coaches wanting the extra time with the athletes will cause many athletes to "specialize" in one sport. This is against all of the current research in sports medicine. Current research says it is better for an athlete to cross train, working within different sports to change the demands placed on the body, allowing rest and recovery while still training for both physical and mental success. Athletes who have specialized in just one sport since a young age are far more likely to "burn out" and quit that sport prior to finishing high school.

Let's also look at the changes it would have to the individual schools. Facilities will have additional wear and tear as more practices and individual drills will be taking place in the same areas and over longer times. Many schools in Delaware will potentially be facing additional costs. In Sussex County, we are very fortunate where most of our Athletic Trainers are employed full time. Across the state, the majority of our schools employ Athletic Trainers through a clinic contract. These contracts are an hourly contract where time is split between the clinic and the school. More often than not, the Athletic Trainer exceeds their time allotment at the school because they want to see their athletes do well, become invested in the school, and feel a need to be there for those athletes. With these potential changes and demands on facilities, these out of season practices will often have to be after in season practices. This means it will require additional hours of coverage. Will the clinics be willing to provide these additional hours at the same rate or will the cost of these clinical contracts go up? It will also be additional administration duties of collecting physicals, coordinating times and facilities, as well as duties of monitoring weather, heat and cold issues with acclimatization. There is currently no regulation that out of season participation requires a current DIAA physical. With this change in policy, that should also change. Someone will have to assume all of these responsibilities for the out of season teams. Most often this will fall on the Athletic Trainer. Lastly, if the demands placed on the athletes becomes too much or more athletes tend to specialize in just one sport, you will start to see the decline of athletic programs across the state. The smaller schools are already having a hard time with today's generation in fielding junior varsity teams because participation is down. This will in no way increase overall participation.

All Athletic Trainers should have the same overall goals in their employment setting. To protect the health and welfare of their student athletes and to reduce the liability of their employer. These potential changes to

the DIAA out of season policy does not allow us to do that. It puts our student athletes at risk for overuse injuries as well as places increased stress on them mentally from coaches demanding increased time and having to prioritize their commitments. From an athletic training standpoint, the liability increases as the time demands of each athletic trainer could increase from 1 to 18 hours extra a week. Contractually that isn't possible and that could mean uncovered events when the precedent has been set for having events covered. Going backwards as far as coverage would make each District negligent. The proposed policies of the DIAA do not make sense and should not be pushed through for approval. Please support the welfare of our student athletes and deny these proposals. Thank you for your consideration in this matter.

*Craig D. Yingling, MA, ATC*

Head Athletic Trainer

Delmar High School

~~XXXXXXXXXX~~

NPI # 1619909462

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[REDACTED]

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**From:** Rebecca Zug [REDACTED]  
**Sent:** Wednesday, May 1, 2019 2:20 PM  
**To:** DOeregulations comment  
**Cc:** Jeff Ransom  
**Subject:** new DIAA regulations

To Whom It May Concern,

I support the concerns of the Athletic Directors of the DISC conference. The proposed increased coaching access to athletes has serious ramifications for multi-sport athletes and for small schools with fewer resources. We need athletes to play multiple sports and not feel pressured by coaches to practice one sport year round. We need kids to rest their bodies to avoid injuries. We can't expend the resources to hire more coaches, more athletic trainers and to maintain our athletic facilities at a higher level to be competitive with peer schools in Delaware if these regulations are changed. We also value faculty-coaches and the pressure on them to practice year round will drive them from coaching and thus lead to more specialization, higher coaching costs and the loss of faculty-coaches in schools. Please take the time to listen to more feedback from Delaware schools before changing regulations.

Sincerely,

Rebecca Zug  
Head of Upper School  
Wilmington Friends School

[www.wilmingtonfriends.org](http://www.wilmingtonfriends.org)

Quaker Matters. Come see why.

[REDACTED]

**From:** Zulkowski Michael  
**Sent:** Monday, April 29, 2019 9:10 AM  
**To:** DOEregulations comment  
**Subject:** Out of Season Regulations

To the members of DIAA,

My name is Mike Zulkowski and I am emailing you today in regards to the proposed changes for out of seasoning coaching. I am in full support of the proposal as a the head coach for lacrosse and assistant varsity coach for football at Smyrna High School. The changes would allow more activities to keep players engaged with their communities leading to less behavioral concerns, close the gap with out of state competition that are already in use of coaching out of season and raise the level of competition in Delaware.

My only concern, as a lacrosse coach, would be the regulation 7.6.1.2.6.1.2 for equipment being worn. I am in full support of non-contact sessions and running concepts on air but my concern lies in the fact of player safety. Lacrosse shots in high school can range from 75-90 mph and should pads are made mostly for protecting a players heart. I have attached multiple news articles from players being hit in the chest and losing their lives. As a coach, player safety is the number one concern. Taking the physicality and contact out of off-season work makes complete sense but asking a player to avoid a shot off of a lacrosse goal pipe at 90 mph is something that can not be avoided. I ask that player, at minimum be able to wear helmets and shoulder pads during the off-season for this reason.

Thanks for being the governing body of high school sports in Delaware and letting coaches have a voice.

<http://news.cornell.edu/stories/2004/03/george-boiardi-22-cornell-senior-and-lacrosse-player-dies-after-being-struck-ball>

<https://www.nytimes.com/1999/05/11/sports/lacrosse-a-ball-strikes-a-chest-on-the-field-and-a-young-life-is-lost.html>



LACROSSE; A Ball Strikes a Chest on the Field, and a Young Life Is Lost - The New York Times - nytimes.com

Sudden cardiac arrest is a rare killer of young athletes that is nonetheless responsible for deaths in Little League baseball, softball, hockey, football, karate and lacrosse, according to the ...

[www.nytimes.com](http://www.nytimes.com)

## George Boiardi, 22, Cornell senior and lacrosse player, dies after being struck by ball during game | Cornell Chronicle

George Boiardi, a Cornell University senior student, was struck in the chest with a lacrosse ball late in the fourth quarter of a game against Binghamton University last night (March 17) at Cornell's Schoellkopf Field. He collapsed, and medical personnel tried to revive him on the field. He was rushed to Cayuga Medical Center, where he was pronounced dead at 6:44 p.m. Boiardi, 22, a history ...

news.cornell.edu

Michael Zulkowski  
Health/P.E~Smyrna Middle School  
SHS Head Lacrosse Coach & SHS Assistant Varsity Football  
700 Duck Creek Pkwy  
[REDACTED]

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**BERNARD J. BRADY**  
SECRETARY OF THE SENATE

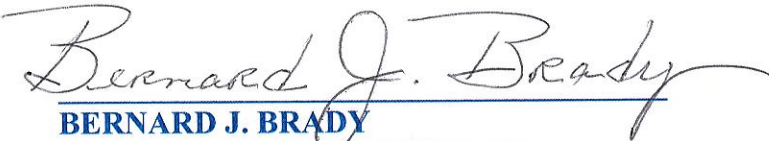
Room S-135  
Home: (302) 655-0551  
Office: (302) 744-4129  
Fax: (302) 739-7718

**SENATE**  
**STATE OF DELAWARE**  
**LEGISLATIVE HALL**  
**DOVER, DELAWARE 19903**

**I, BERNARD J. BRADY, SECRETARY OF THE DELAWARE STATE SENATE,  
DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND EXACT COPY OF:**

**SENATE CONCURRENT RESOLUTION NO. 79**

**AS ADOPTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES  
OF THE 149<sup>th</sup> GENERAL ASSEMBLY.**

  
**BERNARD J. BRADY**

**SECRETARY OF THE SENATE**





SPONSOR: Sen. Poore & Rep. Jaques & Rep. Ramone  
Sens. Ennis, Hansen, Sokola, Walsh; Reps. Mitchell,  
Yearick

DELAWARE STATE SENATE  
149th GENERAL ASSEMBLY

SENATE CONCURRENT RESOLUTION NO. 79

DIRECTING THE DEPARTMENT OF EDUCATION, WITH THE ASSISTANCE OF THE DELAWARE INTERSCHOLASTIC ATHLETIC ASSOCIATION, TO PROMULGATE REGULATIONS THAT PERMIT COACHES TO COACH ATHLETES OUT OF SEASON, WITH RESTRICTIONS THAT MINIMIZE THE RISK OF UNETHICAL ACTIVITY.

1           WHEREAS, the nature of youth athletics have changed so that youth often participate in the same sport  
2 throughout the year; and

3           WHEREAS, student athletes should have the opportunity to work with coaches the student athletes believe will  
4 develop their skills and support their athletic goals; and

5           WHEREAS, the State Public Integrity Commission has issued Advisory Opinions stating that a public school  
6 coach violates the State Employees', Officers' and Officials' Code of Conduct if the coach provides out of season  
7 instruction for pay for returning members of the varsity or sub-varsity teams of the school where the coach works as a  
8 coach; and

9           WHEREAS, the goal of this Senate Concurrent Resolution is to support the ability for student athletes to work  
10 with a coach they believe will develop their skills and support their athletic goals, while still protecting the integrity of  
11 education-based athletics; and

12           WHEREAS, because of the changed nature of youth athletics, states such as Maryland and West Virginia now  
13 allow public school coaches to provide instruction, with or without pay, to students they coach under limited circumstances  
14 that include organized camps, clinics, leagues, lessons, and clubs supervised by a member of an overreaching national  
15 program or organization that is not affiliated with a resident school, such as the Amateur Athletic Union ("AAU"), Olympic  
16 Development Program ("ODP"), United State of America Volleyball ("USAV"), and United States of America Track and  
17 Field ("USATF"); and

18           WHEREAS, Delaware athletes are at a disadvantage when competing against youth from other states because the  
19 Delaware coaches cannot coach their students out of season.

20           NOW, THEREFORE:

21           BE IT RESOLVED by the Senate of the 149th General Assembly of the State of Delaware, the House of  
22 Representative concurring therein, that the Department of Education, with the assistance of the Delaware Interscholastic

23 Athletic Association, is directed to promulgate regulations that permit coaches to coach student athletes out of season, with  
24 restrictions that minimize the risk of unethical activity.

25 BE IT FURTHER RESOLVED that the Department of Education and the Delaware Interscholastic Athletic  
26 Association should consider model guidelines from other states, including rules regarding the number of athletes who can  
27 be coached, no contact periods, the amount of contact time, and enforcing compliance by organizations.

28 BE IT FURTHER RESOLVED that the Department of Education and the Delaware Interscholastic Athletic  
29 Association should specifically address all of the following in drafting the regulations under this Resolution:

- 30 (1) No contact periods.
- 31 (2) Programs and activities in which high school coaches may work with returning student athletes.
- 32 (3) Programs and activities in which high school coaches may not work with returning student athletes.
- 33 (4) Out of Season coaching, including all of the following:
- 34 a. Terms under which a coach may provide instruction to non-school teams which are affiliated and in  
35 good-standing with an overseeing national organization such as AAU, ODP, USAV, or USATF, but  
36 which do not have a direct affiliation with a coach's school.
- 37 b. Compensation for coaching non-school teams.
- 38 c. The percentage of returning student athletes allowed for the starting lineup of non-school teams,  
39 for each sport.
- 40 d. Terms under which a coach may provide instruction to returning student athletes at clinics,  
41 lessons, and camps not affiliated with the member school.
- 42 e. Compensation for instruction at clinics, lessons, and camps not affiliated with the member school.
- 43 (5) When a high school coach is permitted or prohibited from working with returning student athletes at  
44 out of season programs and activities, addressing all of the following:
- 45 a. When a coach may provide instruction at clinics, lessons, and camps that include returning student  
46 athletes but are not affiliated with the member school.
- 47 b. Coach compensation for instructing at clinics, lessons, and camps that include returning student  
48 athletes but are not affiliated with the member school.
- 49 c. Conditions under which a coach may work with a returning student athlete, at an athlete's request,  
50 including the maximum number of returning players and the maximum amount of time.

51 BE IT FURTHER RESOLVED that the Department of Education shall publish the proposed regulations  
52 developed under this Resolution no later than October 1, 2018.

SYNOPSIS

This Senate Concurrent Resolution directs the Department of Education, with the assistance of the Delaware Interscholastic Athletic Association, to promulgate regulations that permit coaches to coach student athletes out of season, with restrictions that minimize the risk of unethical activity.

Author: Senator Poore