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DELAWARE STATE SENATE
144th GENERAL ASSEMBLY

SENATE BILL NO. 264

AN ACT TO AMEND THE DELAWARE CODE TO PROVIDE FOR THE REORGANIZATION OF STATE GOVERNMENT BY CREATING THE OFFICE OF GENERAL COUNSEL; TRANSFERRING SELECTED DIVISIONS AND OTHER ORGANIZATIONAL UNITS, PERSONNEL, FUNCTIONS, AND DUTIES FROM THE DEPARTMENT OF JUSTICE TO THE OFFICE OF GENERAL COUNSEL; DELETING FUNCTIONS, DUTIES, PERSONNEL, DIVISIONS AND ORGANIZATIONAL UNITS OF THE DEPARTMENT OF JUSTICE; ESTABLISHING THE DUTIES OF THE GENERAL COUNSEL; AND ADDRESSING OTHER RELATED ISSUES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 29 of the Delaware Code by adding a new Chapter 26 thereto as follows:

“Chapter 26. Office of General Counsel

§2601. Establishment of the Office of General Counsel.

An Office of General Counsel, also referred to in this Chapter as ‘Office’ is hereby created.

§2602. General Counsel; appointment and salary; and employees.

(a) There shall be a General Counsel to be appointed by and to serve at the pleasure of the Governor, with the advice and consent of the Senate. The General Counsel shall supervise, direct and control the Office of General Counsel. The General Counsel shall be paid a salary established by the Governor within the limitation of the funds appropriated therefore.

(b) In the event of a vacancy in the position of General Counsel, including death, resignation, temporary incapacity or removal of the incumbent and prior to the appointment of a successor, the Governor may appoint any qualified individual to serve as Acting General Counsel.

(c) The General Counsel may employ such employees as may be required to carry out the duties of the Office and may fix the salaries of such employees within the limitation of funds appropriated therefore.

§2603. Powers, duties and authority of the Office of General Counsel.

The Office and the General Counsel shall have the following powers, duties and functions:

(1) To provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercise of their official powers or duties. The courts, counties and incorporated municipalities are excepted from this chapter;

(2) To represent as counsel in all proceedings or actions which may be brought on behalf of or against them in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government. However, the General Counsel shall not represent the Attorney General or Department of Justice in any proceeding or action brought on behalf of or against the Attorney General or Department of Justice; and

(3) To draft or cause to be drafted such bills or amendments as may be requested by any state officer or any department, division, commission or other state agency and otherwise render assistance, aid, information, counsel and advice in the preparation and drafting of any such proposed legislation.

§2604. State Solicitor, assistants, special assistants and law clerks.

(a) The General Counsel may appoint, with the approval of the Governor, a resident who is a member of the Bar of this State who shall be the State Solicitor and who shall have such powers, duties and responsibilities as designated by the General Counsel and shall serve on a full-time basis under the direct control of the General Counsel. The State Solicitor shall be responsible for all civil actions and matters wherein the State or its agencies or subdivisions are involved and shall have such powers and duties as the General Counsel may designate.

(b) The General Counsel may appoint, within the limits of appropriations made to the Office of General Counsel, persons, authorized by rule of the State Supreme Court to practice law in the courts of this State, to be assistants or special assistants, who shall have such powers, duties and responsibilities as designated by the General Counsel.

(c) The General Counsel may appoint law clerks, within the limits of the appropriations made to the Office, who shall have such powers, duties and responsibilities as the General Counsel may designate.

(d) The General Counsel may assign an assistant or special assistant to serve in any legal capacity in or for any office, department, board, agency, commission or instrumentality of the state government on a part-time or full-time basis whenever, in the judgment of the General Counsel, such assignment will contribute to the efficiency of the operation of such office, department, board, agency, commission or instrumentality; but such assistant shall remain under the supervision and control of the General Counsel while so serving.

(e) The General Counsel and assistants shall work for the Office on a full-time basis and shall not be engaged in the private practice of law while working for the Office. The General Counsel shall fix the salaries of all attorneys employed by the Office within the appropriations made to the Office pursuant to a salary plan established by the General Counsel.

§2605. Prohibition on employment of attorneys by state officers, departments, boards, agencies, commissions or instrumentalities.

No officer, department, board, agency, commission or instrumentality of the state government shall employ any person to act as attorney, counsel, solicitor, legal assistant or other legal advisor to such officer, department, board, agency, commission or instrumentality except as otherwise set forth in this chapter. However, such special counsel may be employed by such officer, department, board, agency, commission or instrumentality with the approval of the General Counsel and the Governor upon such terms and conditions as the General Counsel and Governor may prescribe. The special counsel so appointed shall have such powers, duties and responsibilities as designated by the General Counsel. Expenses of such employment shall be paid by the State Treasurer out of general funds not otherwise appropriated upon the approval of the General Counsel and the Governor.

§2606. Access to records.

The General Counsel shall have the right of access at all times to the books, papers, records and other documents of any officer, department, board, agency, instrumentality or commission of the state government.

§2607. Conflict of interest.

No member of the Office shall act as attorney or counsel in any controversy in which the State, a county or a municipality has an interest except in the member's official capacity.

§2608. Political activity of Office of General Counsel employees.

(a) Employment by the Office does not affect any right or obligation of a citizen under the Constitution and laws of the United States or under the Constitution and laws of the State.

(b) Except as otherwise provided in this section or by federal law, an individual employed by the Office may freely participate in any political activity, may vote in an election, and may express opinions on political subjects and candidates.

(c) No attorney or other employee regularly employed by the Office may:

(1) Use that attorney's or other employee's official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) Use that attorney's or other employee's official authority or influence for the purpose of directing or coercing another to contribute anything of value, including but not limited to money, services, or time, in support of a political party, political organization, or political candidate;

(3) Engage in political activity while on duty in the employment of the Office;

(4) Directly or indirectly solicit, receive, collect, handle, disburse, or account for assessments, contributions, or other funds for a partisan political purpose during working hours;

(5) Organize or reorganize a political party organization or political organization during working hours;

(6) Organize, sell tickets to, or promote a fund-raising activity of a candidate in a partisan election or of a political party or political organization during working hours; or

(7) Be a candidate for or hold any elected state or local office provided however, any attorney or other employee regularly employed by the Office shall request a leave of absence in accordance with Office personnel policies to be a candidate for any elected state or local office and such leave request shall not be denied.

(d) In addition to the provisions of subsection (c) of this section above, no individual employed as State Solicitor shall directly or indirectly give, pay, lend, or contribute money or any other thing of value to or for the benefit of a candidate for any elected state or local office or to any political party or political organization in support of such candidate, or for any other political purpose intended to support such candidate.

(e) 'Political activity' means participating in any activity in support of or in opposition to a political party or partisan candidate for public or political party office, including but not limited to writing or distributing statements in support of or in opposition to a candidate, initiating or circulating a partisan nominating petition, contributing money or anything of value to or for the benefit of a candidate, and soliciting votes of support for a candidate. 'Political activity' does not include registering or voting in an election, or expressing opinions on political subjects or candidates.

(f) In addition to any penalty contained in any other provision of law, any employee subject to the provisions of this section who knowingly violates a provision of this section may be subject to disciplinary proceedings by the Office or as otherwise provided by law.

§2609. Tenure.

(a) Any attorney or other employee regularly employed by the Office to render services shall be appointed by the General Counsel to serve at the General Counsel's pleasure. After 3 years full-time service the employee shall have attained tenure and shall continue to be regularly employed during efficient and good

behavior and shall not be removed because of religious or political opinions or affiliations or except for due cause, after a hearing before a court consisting of 3 judges of the Superior Court of the State.

(b) The term 'full-time' when used in references to attorneys in this section, prohibits such attorneys from engaging in the private practice of law. The term 'regularly employed' as used in this section, refers to those attorneys and other employees appointed or employed on a full-time basis by the Office. The General Counsel shall so designate such attorneys and other employees in writing at the time of their employment or at such other time at the General Counsel's pleasure.

(c) Nothing contained in this section shall limit the power of the General Counsel to assign attorneys or other employees to any of the various positions provided for in this chapter and to change said personnel in said positions from time to time at the General Counsel's pleasure; provided, however, that any attorney or other employee who shall have been regularly employed in a certain position may not be deprived of regular employment or tenure by virtue of such change in position.

§2610. Exceptions.

(a) The provisions of this chapter relating to the supplying of legal advice, counsel, services and representation in proceedings and actions shall not apply to the University of Delaware, Delaware State University, Delaware Technical and Community College or to any school district or special school district of this State, and these organizations may each employ their own attorney or attorneys, notwithstanding §2605 of this title, except that legal services in connection with all bond issues in which the faith and credit of this State is pledged and all legal services for any school district or special school district bond issue which is for the purpose of providing funds for any project to which moneys or bond issue funds of this State are to be contributed on a matching or percentage basis shall be provided solely by the Office of General Counsel.

(b) Notwithstanding §2605 of this title, the provisions of this chapter relating to the supplying of legal advice, counsel, services and representation in proceedings shall not apply to the State Public Integrity Commission established pursuant to Chapter 58 of this title.

§2611. Functions prior to effective date of this Act.

The Office of General Counsel, through appropriate divisions, subdivisions and offices, shall have the power to perform and shall be responsible for the performance of all the powers, duties and functions of the Department of Justice transferred by this Act, immediately prior to the effective date of this Act.

§2612. Transfers and continuity.

(a) All books, records, papers, maps, charts, plans and other materials in the possession of the Department of Justice and used in connection with a function or duty transferred by this chapter to the Office of General Counsel shall, on the effective date of this Act, be delivered into the custody of the Office. All petitions, hearings, civil cases and legal proceedings pending before, instituted by or defended by the Department of Justice related to functions and duties transferred by this chapter and not concluded prior to the effective date of this Act, shall continue unabated and remain in full force and effect, notwithstanding the establishment of this chapter and, where necessary, may be completed before, by or in the name of the Office. All orders, rules and regulations made by the Department of Justice related to functions and duties transferred by this chapter that govern such functions and duties, and which are in effect prior to this Act, shall remain in full force and effect until revoked or modified by the Office. All contracts and obligations of the Department of Justice made or undertaken in the performance of a function or duty transferred to the Office by this chapter and being in force the day this Act is effective, shall, notwithstanding this chapter, remain in full force and effect and be performed by the Office.

(b) Employees of the Civil Division within the Department of Justice and employees whose duties, functions, or positions have been transferred by this Act, shall be employees of the Office of General Counsel on the effective date of this Act, and, where applicable, shall be transferred with all the benefits accrued as merit or tenured employees as of the effective date of this Act.

(c) The personnel, funds, appropriations, equipment and other items and materials transferred by this chapter shall include a proportionate share of administrative and support personnel, appropriations, equipment and other materials possessed by or within the control of the Department of Justice prior to the effective date of this Act, and shall also include, where applicable, Federal grants and funds and other benefits from any Federal program.”

Section 2. Delete §2501, Title 29 of the Delaware Code in its entirety.

Section 3. Amend §2504 , Title 29 of the Delaware Code by deleting subsections (2), (3) and (8) in their entirety and renumbering the remaining subsections accordingly, and further by adding to subsection (1), after the phrase “January 1, 1969”, the phrase “, that is not inconsistent with Chapter 26 of this Title”.

Section 4. Amend §2505, Title 29 of the Delaware Code by deleting the words “State Solicitor,” in the title, and by deleting subsections (b) and (f) in their entirety and redesignating the remaining subsections accordingly.

Section 5. Amend §2507, Title 29 of the Delaware Code by deleting the said section.

Section 6. Amend §2508(b), Title 29 of the Delaware Code by deleting the “.” at the end of the sentence and adding “for the purpose of carrying out his/ her official duties related to criminal prosecution”.

Section 7. Amend §2515, Title 29 of the Delaware Code by deleting such section in its entirety.

Section 8. Amend §3905(b)(2), Title 7 of the Delaware Code by deleting “Attorney General” as it appears therein and replacing it with “General Counsel”.

Section 9. Amend §3911, Title 7 of the Delaware Code by deleting “Attorney General” as it appears therein and replacing it with “General Counsel”.

Section 10. Amend §4139, Title 7 of the Delaware Code by deleting “Attorney General” as it appears in the title and the text of the Section and by replacing it with “General Counsel” at each location.

Section 11. Amend §6426, Title 7 of the Delaware Code by replacing “Attorney General” with “General Counsel” as it appears at each location therein, and further by deleting the phrase “Attorney General’s” with the phrase “General Counsel’s” as it is found in subsection (b).

Section 12. Amend §3103(c), Title 10 of the Delaware Code by deleting the phrase “Attorney General or upon the person of the State Solicitor or upon the person of the Chief Deputy Attorney General”, and by substituting in lieu thereof, the phrase “General Counsel or upon the person of the State Solicitor”.

Section 13. Amend §223(d), Title 14 of the Delaware Code by replacing “Attorney General’s Office” with “Office of General Counsel” as it appears therein.

Section 14. Amend §4006(f), Title 14 of the Delaware Code by replacing “Attorney General” with “General Counsel” as it appears therein.

Section 15. Amend §5172(c), Title 16 of the Delaware Code by replacing “deputy attorney general” with “Assistant General Counsel” as it appears therein.

Section 16. Amend §132(c)(11), Title 17 of the Delaware Code by inserting “, or the General Counsel for the General Counsel’s opinion or advice,” between the words “advice” and “touching” as it appears therein.

Section 17. Amend §2396(b), Title 19 of the Delaware Code by replacing “Deputy Attorney General” with “Assistant General Counsel” as it appears therein.

Section 18. Amend §3129(a), Title 19 of the Delaware Code by replacing “Attorney General” with “General Counsel” as it appears therein.

Section 19. Amend §3322(b), Title 19 of the Delaware Code by replacing “Attorney General” with “General Counsel” as it appears therein.

Section 20. Amend §178(c), Title 20 of the Delaware Code by replacing the words “Attorney General” throughout the subsection, and replacing them with the words “General Counsel”.

194 Section 21. Amend §3129(c), Title 20 of the Delaware Code by replacing “Department of Justice” with “Office
195 of General Counsel” as it appears therein.

196 Section 22. Amend §1733(g), Title 24 of the Delaware Code by replacing the words “the Attorney General” with
197 “General Counsel” as it appears therein.

198 Section 23. Amend §2813(b), Title 24 of the Delaware Code by replacing the words “Attorney General”
199 throughout the subsection, and replacing them with the words “General Counsel”.

200 Section 24. Amend §2824(c)(2) c. 3, Title 24 of the Delaware Code by deleting the phrase “Deputy Attorney
201 General”, and by substituting in lieu thereof, the phrase “Assistant General Counsel”.

202 Section 25. Amend §10005, Title 29 of the Delaware Code, by deleting subsection (f) in its entirety.

203 Section 26. Amend §4001, Title 10 of the Delaware Code, by inserting between the phrases “Deputy Attorneys
204 General,” and “and members,” the phrase “the General Counsel and Assistant General Counsel,”.

205 Section 27. Amend §4004, Title 10 of the Delaware Code, by deleting the phrase “the Attorney General” as it
206 appears therein and substituting in lieu thereof, the phrase “the General Counsel”.

207 Section 28. Amend §5903(7), Title 29, Delaware Code, by inserting between “Defenders,” and “Deputy”, the
208 words “Assistant General Counsel,”.

209 Section 29. Amend §930, Title 3 of the Delaware Code by deleting “Attorney General” as it appears in the title
210 and the text of the Section and by replacing it with “General Counsel” at each location.

211 Section 30. Amend §8720(b)(4), Title 3 of the Delaware Code by deleting “Attorney General” as it appears
212 therein and substituting in lieu thereof “General Counsel”.

213 Section 31. Amend §8720(c)(3), Title 3 of the Delaware Code by deleting the phrase “Deputies Attorney General,
214 under the direction of the Attorney General” and substituting in lieu thereof the phrase “Assistant General Counsel, under
215 the direction of the General Counsel”.

216 Section 32. Amend §508, Title 8 of the Delaware Code by deleting the phrase “Attorney General, either of the
217 Attorney General’s own motion or” as it appears therein and substituting in lieu thereof the phrase “General Counsel”.

218 Section 33. Amend §1107, Title 5 of the Delaware Code by deleting “Attorney General” as it appears in the title
219 and the text of the Section and by replacing it with “General Counsel” at each location, and further by inserting the word
220 “civil” between the words “all” and “actions”.

221 Section 34. Amend §4331, Title 7 of the Delaware Code by deleting “Attorney General” as it appears in the title
222 and text of the section and substituting in lieu thereof “General Counsel”.

223 Section 35. Amend §4948(h)(2), Title 15 of the Delaware Code by deleting the phrase “Attorney General shall
224 appoint a Deputy Attorney General” and substituting in lieu thereof the phrase “General Counsel shall appoint an Assistant
225 General Counsel”.

226 Section 36. Amend §605, Title 29 of the Delaware Code by deleting “Attorney General” as it appears in the title
227 and the text of the Section and replacing it with “General Counsel” at each location.

228 Section 37 . All reference to the Attorney General, Deputy Attorney General and Department of Justice in the
229 Delaware Code, to the extent that it is inconsistent with this chapter, in connection with the functions or duties transferred
230 to the Office of General Counsel, shall be construed as referring and relating to the General Counsel, Assistant General
231 Counsel, and Office, respectively, as created and established by this Act.

232 Section 38. Severability. The provisions of this Act are severable. If a court determines that a word, phrase,
233 clause, sentence, paragraph, subsection, section, or other provision is invalid or that the application of any part of the
234 provision to any person or circumstance is invalid, the remaining provisions and the application of those provisions to other
235 persons or circumstances are not affected by that decision.

236 Section 39. This Act shall become effective on January 27, 2009.

SYNOPSIS

This legislation amends the Delaware Code by establishing the Office of General Counsel and transfers organization units, personnel, functions and duties from the Department of Justice to the newly established Office of General Counsel. The General Counsel shall supervise, direct and control the Office of General Counsel. The Office of General Counsel shall provide legal advise, counsel and services to administrative offices, agencies, departments, boards, commissions, and officers of state government. Furthermore, the Office of General Counsel shall represent in all proceedings or actions brought on behalf of or against them in any court all officers, agencies, departments, boards, commissions and instrumentalities of state government. The creation of the Office of General Council will eliminate certain existing or potential conflicts of interest reducing the cost and need for outside counsel in certain situations. Additionally, it allows the Attorney General to render opinions for citizens as to whether a state agency has violated the Freedom of Information Act.

Author: Senator DeLuca