



ADVISORY OPINION 18-05

Date: July 11, 2018

Decision by Commissioners: Eric Monzo, Paula Jenkins-Massie, Sally Jensen, Robert Ralston, Kellie Tetrack, Charles Toliver

Question

Is it a violation for a County official to accept the gift of costs of attendance and travel to an international conference being held in China and focusing on trade and development opportunities, where the conference is organized by an independent, non-profit foundation which exists for the pursuit of global well-being through the development of a positive relationship between the United States and China through the in-person exchange of knowledge and information?

Conclusion

The County official, under the circumstances presented here, may accept the gift of the cost of attendance and travel to an international conference being held in China, so long as such gift is recorded in the departmental gift log as required by the Ethics Code. The Ethics Code provides that a gift that covers training expenses, including reasonable transportation/lodging/subsistence costs, may be accepted by a County official or employee when such payment or reimbursement of such expenses is from a governmental body or associations of governmental bodies. While the conference in question is run by an independent, non-profit foundation organization, such an organization is not attempting to obtain business from, or provide paid service to, the County or the County attendee. This approval by the Commission does not extend to a delegee of the County official; he may not send someone in his place on this trip.

Facts

The County official, or Requester, consulted the Ethics Commission regarding an invitation he received to participate in a bipartisan delegation of state and local officials in China with the China-U.S. Exchange Foundation ("CUSEF"). CUSEF describes itself as "an independent, non-profit and non-governmental foundation committed to the belief that a positive and peaceful relationship between the strongest developed nation and the most populous, fast-developing nation is essential for global wellbeing. Founded in Hong Kong in 2008 and privately funded, builds platforms to encourage constructive

dialogue and diverse exchanges between the people of the U.S. and China.”¹ CUSEF organizes many different programs, and the one at issue here is involves sending its fifth annual bipartisan delegation of state and local officials to three different cities in China. The focus of this year’s delegation is trade and development opportunities between the United States and China.

The Requester received the invitation to be part of this overseas delegation from an organization called The NewDEAL, a nonprofit organization, which describes itself as a “national network of rising state and local elected leaders who are pro-growth progressives.”² Its mission is to “bring together leaders focused on expanding opportunity and to help them develop and spread innovative ideas to spur economic growth that is broadly-earned and sustainable.”³ It does this by “connecting the New Deal leaders with each other to exchange ideas, and connecting them with other pro-growth progressive political, policy, and private sector leaders.”⁴ The roster of honorary chairs of this organization is comprised of a long list of distinguished current and former public servants, from both the national and state levels, including the Honorable Christopher Coons and the Honorable Jack Markell.

Code or Prior Opinion:

Relevant Ethics Code Provisions and Case Law

In Section 2.03.102, the following relevant terms are defined by the Ethics Code, as follows:

Appearance of impropriety means conduct which is prohibited by Section 2.03.104A.

Authority of office or employment means the actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular County office or position of County employment.

Business means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

¹ See www.cusef.org.

² See www.newdealleaders.org.

³ Id.

⁴ Id.

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 oneself or another.

Conflict or conflict of interest means conduct which is prohibited by Section 2.03.103.

County official means any person elected or appointed to any County office, board, commission or the New Castle County Council Audit Committee provided, however, that for purposes of Sections 2.03.103(B)(2), 2.03.103(C), and 2.03.104(C). "County official" does not include any member of a board or commission which operates solely in an advisory capacity, and whose members are not compensated, other than reimbursement for expenses.

Gift means anything that is received without consideration of equal or greater value. The term "gift" shall not include a political contribution otherwise reported as required by law or a commercially reasonable loan made in the ordinary course of business. A gift to a member of an official or employee's immediate family, or a gift which is not personally accepted by an official or employee but is controlled by or directed by that person to another recipient, is considered to be a gift to the official or employee. Any gift of more than de minimis value accepted by a County official or employee, or by his or her spouse or dependent child because of the official or employee's holding public office or employment, must be promptly entered in a public gift log as a recordable gift by the employee or official. A gift is considered accepted upon receipt or control or direction unless it is promptly returned in its entirety. An email invitation, unless specifically accepted, is not considered a gift.

Governmental body means any department, authority, commission, committee, council, board, bureau, division, service, office, official, administration, legislative body, or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any department performing a governmental function.

Person means a business, governmental body, individual, corporation, union, association, firm, partnership, committee, trust, joint venture, club or other organization or group of persons.

Private enterprise means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the federal, State or local government or of any department, authority or instrumentality of the federal, State or local government.

Promptly means within thirty (30) days when used in reference to recording the acceptance of a gift in a public gift log or returning such a gift to the donor.

Public gift log means a public document kept by County Council, a County department, or County agency for the purpose of memorializing the acceptance of gifts by County employees and officials and which shall include entries for the date of receipt, the name, workplace or other address of the donor and recipient, a description of the gift and an approximate valuation.

Recordable gift means a gift which shall be promptly listed in writing by the recipient in a public gift log maintained for that purpose which is available to the public.

Regulated by New Castle County means that an entity operating in New Castle County as a business or nonprofit organization requires approval from or regulation by New Castle County in order to lawfully conduct one or more business activities.

The New Castle County Ethics Code recognizes that public office, that is, employment by the County, is a public trust, and a violation of that trust by a County official or employee for personal gain or profit may cause serious harm as such a violation will undermine the confidence of the public in its government.⁵ For this reason, the Code requires, among other things, public disclosure of financial interests of certain County officials, employees, and candidates for office, so that the public may be assured that their financial interests do not conflict with the public trust.⁶ The Code further recognizes that because the public confidence in County government is best secured by assuring the impartiality and honesty of their County officials and employees, the Ethics Code sets forth minimum standards for ethical conduct and that the Code should be liberally construed to promote complete public financial disclosure, and official and employee conduct, which is deserving of the public's trust.⁷

⁵ *New Castle County Code*, Section 2.03.101.A:

It is hereby declared that public office is a public trust and that any effort to realize personal financial gains through public office other than compensation provided by law is a violation of that trust. It is further declared that the people have a right to be assured that the financial interests of holders of or nominees to or candidates for public office do not conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this Division shall be liberally construed to promote complete financial disclosure as specified in this Division. Furthermore, it is recognized that clear guidelines are needed in order to guide public officials and employees in their actions. Thus, this Division intends to define as clearly as possible those areas which represent conflict with the public trust.

⁶ *Id.*

⁷ *Id.* See also *New Castle County Code*, Section 2.03.101.D, which states:

This Division is intended to establish a minimum standard for ethical conduct and financial disclosure. Elected officials may superimpose conduct rules for officials and employees which are more strict, but not less strict, than

For these reasons, the Code of Conduct discourages the acceptance of gifts by County officials and employees.⁸ While the Code includes a description of gifts which may be accepted⁹, the prudent County official or employee will consult the Ethics

these minimum standards. The Ethics Commission has jurisdiction to decide whether superimposed rules fall below the minimum standards expressed in this Division.

⁸ *New Castle County Code Section 2.03.104.H:*

New Castle County discourages the acceptance of gifts from the public by County employees or County officials. No County employee or County official shall accept any compensation, gift, payment of expenses, promise of future financial benefit, or any other thing of monetary value which is intended or received to influence the vote, official action or judgment of the recipient or which creates the reasonable perception in the public that the vote, official action or judgment of the recipient would be influenced or impaired by the gift. An unsolicited gift which is promptly returned in its entirety is not considered accepted by the recipient.

In addition, gifts are prohibited in the following circumstances:

1. Any gift of greater than de minimis value which is not promptly recorded in a public gift log.
2. No gift of cash shall be accepted other than a political contribution otherwise reported as required by law.
3. No gift shall be accepted by a County official or employee for performing an official duty or service or as an incentive to perform an official duty or service unless the gift is a public and commemorative gift of de minimis value in honor of public service or unless the gift is tendered by a governmental source or association of governmental sources. The commemorative gift shall be promptly recorded in a public gift log.
4. Gifts of greater than negligible value from entities doing business with, regulated by, or which may be reasonably foreseen to do business with or be regulated by the County within the next three years, with the exception of gifts described in Subsections I.5. through I.7. of this Division, shall not be accepted by officials, employees, or governmental departments unless a prior Advisory Opinion is sought from the Ethics Commission regarding compliance with the Code of Ethics. Any such gift or donation of other than negligible value which is accepted following the receipt of an Opinion of the Commission shall promptly be recorded by the recipient in a public gift log.
5. County officials or employees in supervisory positions shall not accept gifts from individual persons they supervise or from individual employees in a lower pay scale other than on an infrequently occurring milestone occasion (such as birth, death in family, marriage, divorce, retirement, casualty) or a de minimis hospitality gift on social occasions held outside of the workplace. On any other occasion, receipt of gifts shall be limited to group gifts, in which the amount contributed is both voluntary and of a de minimis amount per individual, and the names of the individual donors are not disclosed to the recipient. Gifts tendered as a result of a relationship described in Subsection I.9. shall be an exception to this rule.

⁹ *New Castle County Code Section 2.03.104.I:*

1. Gifts that do not have any market value as presented or any reasonably foreseeable future monetary value, such as a card, plaque or framed certificate with the recipient's name inscribed, or a child's drawing.
2. Gifts made to the people of New Castle County may be accepted by a representative or agent of County Government as long as the gift does not create an appearance of impropriety. Such a gift shall not become the property of or be attributed to the representative or agent. The gift shall remain in locations controlled by New Castle County. Any such gift shall be promptly recorded in a public gift log.
3. Refreshment of negligible value volunteered by a recipient of County service may be accepted if the County service is provided at a time and/or location where such refreshments are not reasonably available for purchase by the employee or official.
4. A gift consisting of drinks or snacks of a negligible value offered during the conduct of official business meetings, served to all individuals present and consumed on the premises, may be accepted.
5. A gift of a ticket of attendance, or an invitation which waives the cost, valued at less than one hundred one dollars (\$101.00), for publicly advertised or regularly scheduled functions of a non-profit organization, civic or government group, or association of businesses or trade groups, which is open to the public may be accepted without recording in a public gift log.
6. A gift of a ticket of attendance or an invitation which waives the cost, valued at more than one hundred one dollars (\$101.00), for publicly advertised or regularly scheduled functions of a non-profit organization, civic or

Commission before accepting any gift as such matters can be complicated and easily misunderstood by the public.¹⁰ Certain gifts must be recorded in a departmental gift log.¹¹

It is important that the Code also recognizes that County officials are citizens which bring to their office their knowledge and concerns for issues facing the ordinary citizen.¹² The Code is not intended to cause County officials or employees to disengage from their contacts in their communities. However, the Ethics Code prohibits the disclosure of confidential information gained as a result of a County official or employee during their official duties.¹³ For these reasons, the Commission strives to provide guidance to County officials and employees regarding the application of the Ethics Code to their actions taken as County officials or employees in a manner which best promotes compliance with the Ethics Code.¹⁴

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which creates the appearance of impropriety even where no direct conflict of interest is present. Specifically, conduct which creates an appearance of impropriety is prohibited by Section 2.03.104.A of the New Castle County Code.¹⁵ To determine if an appearance of impropriety exists, the Delaware courts have stated that

government group, or association of businesses or trade groups which are open to the public and the gift shall be promptly recorded in a public gift log.

7. Payment of training expenses, including reasonable transportation/lodging/subsistence costs or reasonable reimbursement for such expenses from governmental bodies or associations of governmental bodies may be accepted at any time without recording in a public gift log if approved by a department manager, agency head, or elected office holder.

8. Gifts tendered and accepted under clear circumstances demonstrating relationships that exist apart from the employment relationship and which do not create an appearance of impropriety.

9. An Advisory Opinion request shall be made to the Ethics Commission prior to the acceptance of any gift not described by or limited in Subsections I.1. through I.9.

¹⁰ See *New Castle County Code* Section 2.03.104.I.9.

¹¹ See *New Castle County Code* Sections 2.03.104.H and I.

¹² *New Castle County Code*, Section 2.03.101.B:

It is recognized that many public officials are citizen-officials who bring to their public offices the knowledge and concerns of ordinary citizens and taxpayers. They should not be discouraged from maintaining their contacts with their community through their occupations and professions. Thus, in order to foster maximum compliance with its terms, this Division shall be administered in a manner that emphasizes guidance to public officials and public employees regarding the ethical standards established by this Division.

¹³ *New Castle County Code*, Section 2.03.104.F:

No County employee or County official shall, beyond the scope of such public position, disclose confidential information gained by reason of such public position nor shall such employee or official otherwise use such information for personal gain or benefit.

¹⁴ *Id.*

¹⁵ *New Castle County Code*, Section 2.03.104.A: No County employee or County official shall engage in conduct which, while not constituting a violation of Subsection 2.03.103.A.1 undermines the public confidence in the impartiality of a governmental body with which the County employee or County official is or has been associated by creating an appearance that the decisions or actions of the County employee, County official or governmental body are influenced by factors other than the merits.

“[t]he test is... if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official’s ability to carry out [his or] her duties with integrity, impartiality and competence is impaired.” *Hanson v. Delaware State Public Integrity Com’n*, 2012WL3860732, at *16 (Del.Super. 2012), *aff’d*, 69 A.3d 370 (Del.Super. 2013); and “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the [official’s] ability to carry out [the official’s] responsibilities with integrity, impartiality and competence is impaired.” *In re Williams*, 701 A.2d 825, 832 (Del.Super. 1997). Delaware court decisions must be interpreted such that the Commission must look at the totality of the facts presented, and this Commission has historically applied this standard when reviewing the conduct of County officials and employees.

The Ethics Code, in its Code of Conduct section, contains directive related to solicitation.¹⁶ A County official or employee may not solicit from any entity which does business with the County or is regulated by the County.¹⁷ The only exception to this prohibition is when a written policy covering such solicitation has been issued by the authorized person representing the County government’s interest which states that such solicitation is in the best interests of the public.¹⁸ A County official or employee may not solicit personal donations from other County subordinates including subordinate County officials or employees or members of their respective immediate family.¹⁹ Further, on the subject of solicitation, the Code states that County elected officials are permitted to set “office-wide, non-coercive” solicitation policies which benefit charities or charitable events, so long as that policy does not violate the Ethics Code by creating a conflict of interest or an appearance of impropriety, or any other section of the Ethics Code.²⁰

Additionally, the Code recites prohibitions on County officials concerning their involvement with outside interests which interact with the County government. Section 2.03.103.B.2 prohibits the official from representing or assisting any private enterprise with respect to any matter before the County. This restriction extends to non-profit

¹⁶ *New Castle County Code*, 2.03.104.J: Solicitation.

1. Solicitation from entities which do business with or are regulated by New Castle County are prohibited unless such solicitation is pursuant to New Castle County written policy decision and for the benefit of the public.

2. Personal solicitation of donations by County officials and County employees, or by their agents, spouses or minor children, from subordinates of the County official or employee is prohibited.

3. Elected Officials may set office-wide, non-coercive solicitation policies intended to benefit charitable entities or events if the policy does not create a conflict of interest or appearance of impropriety and does not violate Subsection J.2.

¹⁷ See *New Castle County Code*, Section 2.03.104.J.1, fn. 10.

¹⁸ *Id.*

¹⁹ See *New Castle County Code*, Section 2.03.104.J.2, fn. 10.

²⁰ See *New Castle County Code*, Section 2.03.104.J.3, fn. 10.

organizations as well as private businesses or private concerns.²¹ Further, the Code restricts the ability of a County official or employee to “represent or otherwise assist” any private or non-County entity in connection with any matter which comes before the County department or division with which the County official or employee is associated or employed.²² Importantly, the Ethics Code expressly does not prohibit a County official or employee from appearing before the County or assisting a non-County entity on a matter in the exercise of his or her official County duties.²³

Prior Commission Opinions

In Advisory Opinion AO16-02, the Commission noted that the prohibition of the acceptance of gifts by County officials and employees includes an exception specifically designed for the gift of the costs associated with the attendance at programs which are sponsored or organized by other governmental bodies. The Commission determined that, while the training program at issue in that opinion was technically not organized by a governmental body, it was underwritten by federal funds and the attendees were all governmental emergency responders. The purpose of the program was not an attempt by the sponsoring company to find new business among the attendees and to raise its profits in that manner. Further, by sponsoring that training program, the sponsoring company was not trying to place itself in a more advantageous competitive position in its marketplace. The purpose of the program was to expend federal funds earmarked for HazMat training in order to meet federal regulations placed upon transporters of hazardous materials. The Commission reasoned that the overwhelming benefit of such training programs inures to the citizens through state-of-the-art training to emergency responders. The Commission concluded that the acceptance of the gift in that case would not create an appearance of impropriety or conflict in the mind of the reasonable observer but instructed the County employee accepting the gift to record the gift in the departmental gift log.

In Advisory Opinion 15-08, the Commission was asked whether a trustee of the New Castle County Employees Retirement System Board of Trustees may accept a gift

²¹ *New Castle County Code*, Section 2.03.103.B.2, and 3:

2. No County official may represent or otherwise assist any private enterprise with respect to any matter before the County. This prohibition is to be considered personal to the County official and is not, for purposes of the New Castle County Ethics Code only, deemed to impact other members of a firm, business, or other employer by which the County official is employed.

²² *New Castle County Code*, Section 2.03.103.B.1:

No County employee or County official may represent or otherwise assist any private enterprise with respect to any matter before the County department with which the employee or official is associated by employment or appointment.

²³ *New Castle County Code*, Section 2.03.103.B.3:

3. This subsection shall not preclude any County employee or County official from appearing before the County or otherwise assisting any private enterprise with respect to any matter in the exercise of his or her official duties.

of a conference registration fee waiver and travel stipend for a conference that is sponsored and offered by for-profit, private companies. In denying the request, the Commission explained that because the conference was, in essence, a vehicle for the sponsoring companies to advertise their services and gain more business, the acceptance of such a gift was prohibited by the Ethics Code.

In Advisory Opinion 11-06, the Commission was asked whether an employee could accept an all-expense paid seminar trip from a vendor to attend a seminar offered by a manufacturer of products carried by the vendor. In finding that the proposed action would violate the then-newly adopted gift law, the Commission held that Section 2.03.104.H.4 would be violated by the acceptance of the gift.

In Advisory Opinion 08-02, a County employee, who serves on a State board, asked whether he could accept gifts of reasonable costs of attendance at professional conferences given by the State board. The Commission approved, and stated:

Section 2.03.104.I.7 of the New Castle County Ethics Code gift law is determinative regarding this request. Unlike gifts, training expenses from private non-governmental sources which may not be accepted unless they are approved in advance by the Ethics Commission, gifts from governmental bodies or associations of governmental bodies of “training expenses, including reasonable transportation/lodging/subsistence costs or reasonable reimbursement for such expenses,” may be accepted at any time without the recording in a public gift log if approved by a department manager, agency head, or elected office holder.” (footnotes omitted.)

Analysis

The ultimate determination of what is, or is not, a permissible gift under the Ethics Code is decided only by the Ethics Commission, and that determination can sometimes be complicated. This is true even when the County official or employee consults prior Commission decisions on gifts because the County’s gift laws have changed over the years. Every County official and employee is strongly encouraged to consult with the Ethics Commission before accepting anything, even where the official or employee believes it is a permissible gift under the Ethics Code.

The trust of society in its public officials and employees is an essential element for government stability, and government stability is a critical factor in economic growth. New Castle County deals with hundreds of vendors on a regular basis, involving millions of dollars. Businesses literally compete for County publicly-bid contracts, which are awarded per statutory factors, and professional services contracts, which are awarded on a discretionary basis. The public trust is compromised when the public believes,

rightly or wrongly, that its government leaders may be using their official positions to obtain favors and gifts.

One of the theories underpinning the Ethics Code's discouragement against the acceptance of gifts by County officials and employees, and the Commission's decisions regarding gifts, is the commonly-held belief that "there is no such thing as a free lunch." Businesses often promote themselves, and attempt to create an edge over their competitors, by offering gifts to current or potential customers. Many such profit-based gifts are part of a marketing campaign or growth philosophy of a profit-based company. These gifts can take many forms; thus, a County official or employee may not immediately realize that he or she is accepting a gift which may be prohibited by the Ethics Code.

The Code's prohibition against the acceptance of certain kinds of gifts includes an exception specifically designed for the gift of the costs associated with the attendance at programs which are sponsored or organized by other governmental bodies. The program at issue here is being offered by a non-profit foundation and, while it does not fit squarely into the exception carved out of the Code for acceptance of certain gifts from governmental associations, the purpose of this organization is more closely aligned to an association of governmental organizations than it is aligned to those of a profit-based business, attempting to get business from the County. This organization is not motivated by a desire to obtain contracts with the County, and, therefore, is not attempting to secure a competitive edge to defeat other, similar companies which want County business. Consequently, denying the Requester the opportunity to be part of this delegation and to accept this gift from this non-profit foundation would do nothing to promote the reason for the prohibition against the acceptance of gifts in the Ethics Code. The focus of this international conference is trade and development opportunities, and the potential benefit of the attendance at this conference by the Requester to New Castle County citizens provides additional support for this decision. The acceptance of this kind of gift under these circumstances should not create an appearance of impropriety or conflict in the mind of the reasonable observer with knowledge of the facts. The County official accepting this gift must, however, record the gift in the departmental gift log.

Finding

The Commission commends the Requester for bringing this matter involving the acceptance of a gift to its attention. While the Commission is often consulted on questions involving the acceptance of a gift in the form of the costs of attending an event, each set of facts differ in material respects, and every decision by the Commission turns on the specific details of the matter presented. Under the facts presented here weigh in favor of a finding by the Commission that the County official

may accept the gift of the costs of attendance and travel to attend this international conference being held in China. The Requester must, however, promptly record all details of the gift accepted in the departmental gift log for public review. This approval by the Commission does not extend to a delegee of the County official; he may not send someone in his place on this trip.

In rendering this advisory opinion, this Commission has applied the New Castle County Ethics Code, which establishes the minimum level of ethical conduct required of County officials and employees.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION

ON THIS 11th DAY OF JULY 2018.

Eric J. Monzo, Esquire, Chairperson
New Castle County Ethics Commission

Decision: 6 – 0, unanimous.