



ADVISORY OPINION 18-06

Date: August 8, 2018

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

Question

Whether the question posed by the Requester, the Office of Human Resources, is within the jurisdiction of the Ethics Commission when the question posed was whether the Requester would be in violation of the Ethics Code if it places the name of a former County employee on a re-employment eligibility list for potential future County employment when such former County employee resigned from County employment a couple of months ago and, thereafter, requested and received a distribution of funds which had been held in his deferred compensation account?

Conclusion

Under the scenario presented to the Commission by the Requester, the question posed by the Requester is outside of the jurisdiction of the Ethics Commission inasmuch as an answer to the question requires a legal interpretation of laws covering distributions of earned deferred compensation, as well as the County Merit Code.

Facts

The Office of Human Resources ("Requester" or "OHR") contacted the Ethics Commission for an advisory opinion to avoid any potential violation of the Ethics Code in connection with the facts presented. The scenario supplied by the Requester involves the following sequence of events:

1. A County employee ("Subject") worked for the County for many years in one department (1st County Employment") and, during that time, deposited funds from his salary into a deferred compensation account.
2. The Subject retired from the 1st County Employment last year.

3. The Subject was immediately hired¹ into a position in a different County department ("2nd County Employment").
4. The Subject requested a distribution from the County of the funds accrued in his deferred compensation account during the 1st County Employment.
5. The OHR denied the Subject's request on the basis that, because he had been immediately hired into a 2nd County Employment upon his resignation from his 1st County Employment, he had not satisfied the federal legal requirement of a bona fide separation from County employment.
6. The subject then resigned from his 2nd County Employment, and thereafter requested and received a distribution from his deferred compensation account.
7. Less than 2 weeks after receipt of the funds, the Subject requested the OHR to place his name on a County re-employment eligibility list for consideration for re-hire by the County.
8. The OHR requested guidance from the Ethics Commission as to whether, under these circumstances, placing the Subject's name on the re-employment eligibility list will violate the Ethics Code.

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.

Commission means the County Ethics Commission established by this Code.

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

County means New Castle County, including any County Department.

¹ Terminology provide by the Requester in its request for an advisory opinion.

County Employee means any person who receives compensation as an employee of a County Department or County row office.

Income means any money, thing of value or other pecuniary benefit received or to be received in return for, or as reimbursement for, services rendered or to be rendered. The term does not include gifts; governmentally mandated payments or benefits; retirement, pension or annuity payments funded totally by contributions of the County official or employee; or miscellaneous, incidental income of minor dependent children.

Ministerial action means an action in which the person exercises his or her own judgment as to the desirability of the action taken.

Nonministerial action means an action in which the person exercises his or her own judgment as to the desirability of the action taken.

Opinion means advice of the Commission issued pursuant to Section 2.04.102I setting forth the duties of a County official or County employee under this Division.

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

Recusal means, including but not limited to, withdrawing from sponsorship, deliberation, vote, research, preparation, discussion, negotiation, contract formation, policy making, planning, decision making, and/or implementation of a matter. It also includes a prohibition on conducting, in an official capacity, any private or public discussion of a measure raising a conflict or improper appearance. As soon as a potential conflict or improper appearance arises or is recognized, an official or employee must end direct or indirect participation, advice, input, direction, recommendation, or discussion, as well as refraining from vote, if the person is a not an elected official. Elected officials may choose to avoid recusal and may vote if they follow the alternate process described in Subsection 2.03.103.A.2.

Section 2.04.102.I of the County Code gives the Ethics Commission the power to issue advisory opinions for matters which fall under the Ethics Code. It states that the Commission shall: “[i]ssue to any person, upon such person’s written request, or to the appointing authority or employer of that person, upon the written request of such appointing authority, an opinion with respect to such person’s duties under Division 2.03.100 [the Ethics Code].”

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.² To determine if an appearance of impropriety exists, the Delaware courts have stated that “[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.

This request references County Merit Code Section 26.03.401.A, regarding re-employment lists, and it states:

Sec. 26.03.401. - Re-employment lists.

A. An ordinary reemployment list is composed of permanent employees who were separated from service by resignation. A permanent employee separated from the service by resignation may, at his or her request, be placed on an ordinary reemployment list for the class from which he or she was separated. If the separation was by resignation, it must include a positive recommendation for reemployment from the employee's department general manager at the time of resignation in order to make the employee eligible to be placed on the reemployment list.

B. A preferred reemployment list is composed of permanent employees laid off as a result of reduction in force or position abolishment or who retired on disability retirement because of a service-related disability. The name of such a permanent employee

² *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.

shall be placed on a preferred reemployment list for the class of position which he or she occupied at the time of separation. An employee on disability retirement who requests rehire must be certified by the designated County medical facility as able to return to his or her former employment.

C. In selecting individuals for reemployment, consideration will be given to technical competence and the ability to satisfactorily meet the job duties and requirements of the classifications. If employment is requested in a new classification, the individual must pass the standard County test for that classification. Upon rehire under Subsection B, the employee shall be eligible for all County fringe benefits from the date of the most recent employment, except that pension rights will be determined in accordance with pension system regulations. An employee rehired after resignation shall be treated as a new employee.

D. An individual's opportunity to be reemployed in accordance with this Section shall expire one (1) year after the date of his or her separation from the service.

This request for an advisory opinion also references IRS guidelines and regulations regarding the distribution of deferred compensation funds and the propriety of distributing such funds to a former employee when such former employee soon thereafter returns to service for the employer.

Prior Commission Opinions

In Advisory Opinion AO09-06, the Commission was asked whether the County should sell advertising on its website. The Commission declined to answer the question, and stated:

The Code does not give the Ethics Commission authority to decide whether the sale of advertising on County assets is in the public interest or to draft an acceptable use policy regarding the sale of advertising. Those tasks are solely within the jurisdiction of the Administration or Council. The Commission is limited to deciding whether the proposals advanced by the Administration or Council comport with Ethics Code provisions. If the Administration or Council balances the question of the money for the sale of advertising against the erosion of the County's image of impartiality, a risk of appearing to endorse businesses that can afford to advertise, or degradation of the County assets themselves and

decides that the sale of advertising space is in the public interest, it must examine the nature of restrictions necessary to avoid an appearance of impropriety and draft an acceptable use policy.

In Ethics Commission Complaint Matter C00-20, a complaint was filed about alleged manipulation of the County's hiring process in a particular situation. Among other issues, the complaint involved whether certain County officials and/or employees manipulated the posting of job openings and maintained eligibility lists in favor of a candidate, who was a relative of an Executive office employee, over other applicants. While the Commission did not conclude that any express violation of the Ethics Code occurred, the formal investigation into the matter revealed the existence of a culture of employee resignation to the perceived regularity of manipulation of the hiring process by some officials or employees at management levels to obtain their preferred hiring results. The Commission stated:

These employees reported that they felt, at times, that it was expected of them to perform actions which were necessary to obtain a result desired by their supervisory personnel even when such action may not comport with the rules or the law, and, importantly, even in the absence of any verbalized, express direction to the employee by supervisory personnel to produce that result. The employees reported that this "County culture" simply expected the bad actions of them, and that there would likely be no negative consequences for these actions.

The Commission stated, further:

The Commission believes that such a culture is unacceptable and strains the edges, if not the body, of the Ethics Code. It should go without saying that a County employee should never be placed in a position where he or she is silently (or expressly) expected by a supervisor to perform an action that may be in abrogation of the rules or the law. The County employee culture should reflect the good values of the County government, not the unwanted reality that certain County employees get what they want regardless of the rules or the law.

Additionally, the Commission cautioned that any County official or employee who has an actual or perceived conflict of interest in connection with someone or some issue involved in the County hiring process, that person must take the steps necessary to expressly recuse him or herself from any aspect of that hiring process.

In Advisory Opinion AO17-09, the Commission was asked about non-ministerial acts and it decided that a County Department may award discretionary grants or funds using a process which includes an application process and a thorough review of such application by a small internal committee within the Department, with the final decision resting with the Department head, where actual or potential conflicts of interest are avoided through the recusal process. The Commission concluded, based upon the facts presented, that, in the event that a conflict of interest or other issue arises in connection with the discretionary grant process which implicates the application of the Ethics Code, the Department should contact the Commission regarding such decision to obtain an Advisory Opinion on the specific issue.

Analysis

The Commission has not before been asked to provide an advisory opinion on this subject, and it appreciates the fact that the OHR has requested its guidance on this matter. The Commission, however, is not in a position to provide an advisory opinion to the Requester on this question at this juncture as the question may not be resolved without the interpretation of laws which are outside of the Commission's jurisdiction upon which to opine.³

The legality and propriety of the facts in the scenario presented by the Requester which have already taken place, that is, the distribution of the deferred compensation funds to the Subject, rests upon the proper interpretation and application of the laws pertaining to deferred compensation by the Requester. The Commission does not have the authority, nor has it been asked by the Requester, to render an opinion on actions which have already taken place.⁴

The legality and propriety of the facts in the scenario presented by the Requester which have not yet taken place, that is, the placement by the Requester of the Subject's name on a re-eligibility list, is determined initially, and perhaps entirely, by an interpretation of a section (or sections) of the Merit Code. Perhaps the most relevant Merit Code section, here, Section 26.03.401.A, states, in pertinent part, that a "permanent employee separated from the service by resignation may, at his or her request, be placed on an ordinary reemployment list for the class from which he or she

³ The Commission recognizes and acknowledges that the Requester did not expressly ask the Commission to issue an opinion on laws other than those contained in the County Ethics Code.

⁴ See, e.g., Ethics Commission Advisory Opinion No. AO15-05.

was separated.” (emphasis added.) The Ethics Commission does not have authority to issue an opinion on the interpretation of the meaning of the Merit Code.⁵

The answer to the question of whether that section of the Merit Code is discretionary or non-discretionary on the part of the Requester is critical to any application of the Ethics Code to the question posed by the Requester because a reasonable member of the public could perceive that the existence and use of a re-eligibility list by the County is a veritable hotbed for potential or actual favoritism; one where it is possible for certain former employees to receive better treatment than others. Those potential scenarios can present serious Ethics Code issues. If that section of the Merit Code is discretionary, the Commission expects that the Requester has a policy in place to guide its fair application of that and other relevant Code section, such that potential perceptions by the public of favoritism are purely speculative.

Finding

The Commission does not have the authority to issue an advisory opinion on a matter which turns on an interpretation of the County Merit Code, and the application of that interpretation. The Ethics Commission further finds that the issue presented by the Requester does not call into question an interpretation of the Ethics Code. As far as the Ethics Commission is concerned, its role in this matter is at an end.

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 8th DAY OF AUGUST 2018.

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

Decision: 5 – 0, unanimous.

⁵ See Section 2.04.102.I, above.