



ADVISORY OPINION 18-10

Date: August 8, 2018

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

Question

Whether a County Council employee may operate his own part-time photography business outside of his working hours without violating the Ethics Code?

Conclusion

So long as the employee carefully observes Ethics Code issues which relate to outside employment and discussed herein, the employee will not violate the Ethics Code by operating a part-time photography business outside of his County working hours.

Facts

A County Council employee (the "Requester") has asked the Ethics Commission whether he will violate the Ethics Code if he begins and operates a part-time photography business outside of his County working hours. The Requester's job classification and duties are varied and cover many aspects of the work of County Council, and sometimes include taking photographs for official Council purposes.¹ The Requester has received approval of the proposed outside employment per his County employer's personnel policies.²

¹ The Requester has described his County duties in the following manner:

"Advises members of New Castle County Council relating to legislative, financial and marketing/communications matters. Completes investigations and research for Council requests. Researches and drafts legislation for Council members in cooperation with Counsel to Council. Liaison with local, state and federal legislators and agencies. Researches and compiles factual information and statistics to provide to Council members, the media and the public. Produces news releases, quotes, comments, articles for publication, brochures, reports and other media items. Performs graphic, design, print production and photographic functions for publications, advertisements and other media and communications efforts. Maintains and updates the Council website. Drafts and manages \$3,300,000 annual operating budget."

² The Requester complied with, and received approval per, Section 3.13 of the Personnel Handbook. In such documentation, the Requester stated, in pertinent part: "In accordance with the rule, I will not be conducting my photography business during my Council working hours. I will not be soliciting any photos

Code and 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 2.03.104.A.

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.

Business with which he or she is associated means any business in which the person is a director, officer, owner or employee; or a business in which a member of the person's immediate family is a director, officer, owner or has a financial interest.

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.

Contract means an agreement or arrangement for the acquisition, use or disposal by the County of consulting or other services or of supplies, materials, equipment, land or other personal or real property. "Contract" shall not mean an agreement or arrangement between the County as one (1) party and a County official or County employee as the other party concerning his or her expense, reimbursement, salary, wage, retirement or other benefit, tenure or other matters in consideration of his or her current public employment with the County.

County means New Castle County and including any County Department.

that I have produced or will produce on my own time of New Castle County facilities, events, or personnel while employed by New Castle County.”

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

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.

Financial interest means any interest representing more than five (5) percent of a corporation, partnership, sole proprietorship, firm, enterprise, franchise, organization, holding company, joint stock company, receivership, trust, or any legal entity organized for profit.

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 dependant 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.

Governmental body with which a County official or County employee is or has been associated means the governmental body within County government by which the County official or employee is or has been employed or by which the County official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Immediate family means, for the purposes of the Statement of Financial Interests reporting only, a spouse, domestic partner, and the adult children of the filer,

spouse, or domestic partner. "Immediate family" means a spouse, child whether by blood or operation of law, parent, step-parent, spouse's parent or child, or sibling of the whole or half blood of a County official or employee.

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.

Political contribution means any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, pledge, purchase of a ticket to a testimonial or similar fundraising affair, or subscription of money or anything of value, except volunteer services, in connection with a political campaign.

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.

Reasonably foreseeable means an event which should be expected or anticipated based upon credible past and present facts known to a reasonable observer or participant at the time a decision is made or an action taken.

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.

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.

Regulation includes, but is not limited to, obtaining permits, registering residential rental property, or trade licensing, but does not include the payment of property taxes, sewer service charges, individual library use charges, park fees, animal licensing fees or other similar fees.

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which either 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.³ 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.Supr. 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). The courts have advised the Commission to 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.

It is a violation of the New Castle County Ethics Code if a County official or employee uses his or her office or employment for his or her personal or private benefit, the benefit of a member of his or her immediate family, or a business with which he or she is associated.⁴ Economic benefits thereby derived with a *de minimus* impact may be exempted.⁵

The Ethics Code’s conduct rules in Section 2.03.104.A prohibit exercise of official authority which creates an appearance that the decisions or actions of a County official or employee are influenced by factors other than the merits of the matter for the decision. This prohibition exists because such conduct undermines public confidence in the impartiality of the individual or governmental body with which the employee or official is associated.

³ New Castle County Code Section 2.03.104.A states: “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.”

⁴ New Castle County Code Section 2.03.103.A.1.

⁵ *Id.*

The Code recites special prohibitions on County officials concerning their involvement with outside interests which interact with the County government. Section 2.03.103.B.1 prohibits any County official or employee from “represent[ing] or otherwise assist[ing] any private enterprise with respect to any matter before the County Department with which the employee or official is associated by employment or appointment.” Further, 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 organizations as well as private businesses or private concerns.⁶

Prior Commission Opinions

In Advisory Opinion 11-07, the Commission was asked whether an employee who owns an outside business may secure financial services from institutions that contracted, or in the future may bid for business, with New Castle County. The Commission concluded that the employee owning the non-conflicting outside business was permitted to seek financial services from financial institutions that had, or in the future may bid for, financial services business with New Castle County, as long as the employee avoided using his senior status with his County department to secure financial services for the outside business. The Commission further prohibited the employee from entering into contracts with those institutions which created the appearance that he was using his County employment to secure unwarranted advancement for that business. The employee was required to disclose the fact and extent of his relationship to the selected institutions to his superiors and completely recuse from the exercise of County authority in relation to the institutions he selected and to his competitors.

In its analysis in that opinion, the Commission highlighted some of the Ethics Code issues involved with outside employment undertaken by County employees. The Commission stated:

That issue is only problematic here because of the senior level of authority the requester holds in his department, a department which has significant relationships with a variety of outside financial institutions.

⁶ New Castle County Code Section 2.03.1.03.B.2, and 3. *Prohibitions relating to conflicts of interest.*
B. Restrictions on representing another’s interest before the County.

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 inly, deemed to impact other members of a firm, business, or other employer by which the County official is employed.

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.

The requester will have to disclose his employment with the County to the financial institutions but he must adopt stringent measures to avoid trading on his County status to advance the interests of the private business. He may not seek or accept any contracts or loans if a reasonable person would suspect that they bear any relationship to his level of County authority. He must be prepared to be transparent about his business relationships with the selected financial institution by keeping his superiors informed about both the existence and extent of them.

The requester is aware that he would violate the Ethics Code conflict rules if he performs official acts related to the financial institution he selects for his business. However, he may not understand that official conduct regarding the competitors of his business or his official conduct regarding the competitors of the selected financial institution will also come under scrutiny. Depending on the factual circumstances, recusal may be necessary in those circumstances as well since his conduct may create an appearance of partiality when the competitors are disadvantaged by his actions. In such situations, if he does not recuse, he must consult the Commission for clarification prior to performing official acts.

In Advisory Opinion 07-09, a County official, who was an attorney, requested guidance on whether she was permitted to engage in outside employment in matters in which the County was not a party and which would not come before the County as a plan, permit or application. The Commission determined that the attorney was permitted to pursue outside employment if the outside legal work had no nexus with the County, and the Commission cautioned the attorney that she must make the County Attorney aware of each specific representation so that matters pending before the law department, about which she may be unaware, could be reviewed for conflicting representation, disclosure of confidentiality, or appearance of impropriety purposes. Because the law department represents the whole of County government, the Commission reasoned that the attorney may not represent clients who had other business presented to or which was pending before the County in any unrelated matter. Further, the Commission stated that the employee must be careful not to use confidential information obtained in County employment for the benefit of her private clients.

In Advisory Opinion 07-07, a County employee secured part-time employment with a business which used his professional services in projects primarily for the federal government. In that scenario, the outside employer did not seek or bid on work for the County and was not otherwise regulated by the County. The Commission reasoned that because the outside employer did not do any business with and was not regulated by New Castle County, the part-time employment did not violate the Ethics Code. The employee was further advised to make his supervisor aware that he had secured outside employment.

Analysis

The Ethics Code does not expressly prohibit outside employment of County officials or employees, and it may be permitted as long as there is no nexus between the employee's County position and the proposed outside employment. The Commission has issued many opinions over the years regarding the propriety of various outside employment situations. The goal of the Commission in rendering opinions on outside employment issues is to prevent harm to the trust of the public that County officials and employees are not using their respective County positions for personal gain, and to prevent or minimize conflicts or the appearance of conflicts. The conclusions reached by the Commission turn on the application of the Ethics Code and its prior opinions to the facts presented in each individual scenario. Certain questions or factors, however, are considered most often, including:

1. The nature and scope of the employee's County position as it may relate to the proposed outside employment;
2. Whether the proposed business is regulated by the County;
3. Whether the work involved in the proposed outside employment is the same as, or similar to, the work performed by the employee for the County;
4. Whether County resources of any kind are likely to be used by the employee in the outside employment; and
5. Whether any conflicts exist and the methods to prevent or minimize potential conflicts;

When the proposed outside employment involves work which will take place outside of New Castle County, it is easier for the Commission to approve the proposed outside employment as not likely to violate the Ethics Code because if the work is performed outside of New Castle County, the business is not regulated by the County

and the possibility of any conflict of interest or appearance of impropriety is greatly reduced.⁷

Here, the County employee would like to create a part-time outside business of photography. This scenario includes aspects which could be problematic under the Ethics Code. A photography business could be undertaken anywhere, including within New Castle County. Additionally, the Requester sometimes takes photographs as part of his duties for official County use. Also, the Requester takes direction from many County officials and his duties are extensive. They can vary greatly from day to day depending on his employer's needs. While the County does not regulate photography as a business, the regular and on-going business of the Requester's employer covers a myriad of topics which may affect any number of aspects of the lives of the citizens of New Castle County.

These concerns, however, can be eliminated or minimized with the careful and deliberate separation of actions by the Requester of the practice of his proposed outside business and his performance of his County duties. As stated above, his employer has approved his request to create a part-time outside business of photography. To receive such approval, the Requester agreed not to perform his photography business during County work hours and not to use any County resources. These are critical factors for the approval by this Commission and the Requester is cautioned to carefully abide with such representations and agreements.

The Requester's County job requires only occasional photographic duties and those photographs are the property of the County and for its use. While the Requester takes direction from many people in his County job, the professional level of his position allows for a certain amount of self-supervision and oftentimes requires work outside of what many people consider to be the regular work day. The Requester must make sure that he conducts himself in a manner in which a reasonable person could not perceive that he is using any County time or other County resource for his photography business. Indeed, it may be advisable for the Requester to keep very detailed records of his time spent working for the County versus his time spent on his photography business, in the event that the existence of such records may be helpful.

Further, the Requester must remain aware of the fact that his County job requires his interaction with many people who work for the County and with many people who do not. The citizens of New Castle County are oftentimes well-acquainted with one another and the Requester must take all steps necessary and/or advisable to ensure that his County work does not in any way overlap with his outside business. Failure to secure and an ability to readily prove such a separation between his County work and his

⁷ See, e.g., Advisory Opinions AO06-15, AO06-05, AO04-09, AO01-01, and AO97-07.

photography business could result in a violation of the Ethics Code, and this opinion may not, under such circumstances, be used as a defense to an Ethics Code complaint filed on those or other appropriate grounds. If the Requester proceeds with his part-time photography business, he is encouraged to consult with the Ethics Commission in the event that issues arise which may implicate the application of the Ethics Code to the activity.

Finding

As stated in the Analysis section above, the Requester may operate a part-time photography business outside of his County employment so long as his employer continues to approve of such activity and the admonitions and advice of the Commission, as set forth above, are strictly observed.

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.