



ADVISORY OPINION 19-01

Date: June 12, 2019

Decision by Commissioners:

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Question

Whether a County employee who is a plan examiner in the Land Use Department, and who is also a registered architect in Delaware, may take on private contractual employment as an architect for clients outside of New Castle County without violating the Ethics Code?

Conclusion

The County employee must very carefully observe Ethics Code issues which relate to outside employment and discussed herein, including, but not limited to, taking on contracts with persons or entities which are not regulated or serviced by New Castle County; conducting any such private work outside of County working hours only; not using any information gained through employment with the County; and keeping his supervisors informed of any and all such outside work, to prevent the creation of a situation which is in violation of the Ethics Code.

Facts

A County employee (the "Requester") who is a plan examiner in the Land Use Department, and who is also a registered architect in Delaware, has asked the Ethics Commission whether he will violate the Ethics Code if he accepts work opportunities from private entities or people outside of his County employment. When the Requester discussed the possibility of outside work with his supervisor, his supervisor suggested that he contact the Ethics Commission. The Requester resides outside of New Castle County and, to the extent that he accepts outside architectural work, it would involve assignments which are not located in New Castle County. The Requester is aware that the Ethics Code prohibits him from reviewing plans while working for the County submitted by any person or entity for whom he performed any outside or private work. He is further aware that the Ethics Code prohibits him from engaging in any conduct which would give the reasonable person the impression that he is performing his County responsibilities, including plan approval, for any reason other than the merits.

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.

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 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.

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.

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 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.¹ 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). 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.² 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.

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

¹ 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.”

² New Castle County Code Section 2.03.103.A.1.

restriction extends to non-profit organizations as well as private businesses or private concerns.³

Prior Commission Opinions

In Advisory Opinion 92-07, the Commission was asked under what circumstances may a County inspector, that is, a County employee with building and construction code inspection responsibilities, undertake secondary employment in the construction industry? The Commission concluded that a County inspector may never inspect a structure which he constructed, or which was constructed by a business with which he is associated, as this would create a conflict of interest. Additionally, the Commission concluded that such an ethical problem could not be cured by having another County inspector inspect construction done by his fellow inspector or by a business with which his fellow inspector is associated, as this would create an appearance of impropriety. The Commission stated:

Therefore, the following restrictions must apply to all County inspectors:

A.) A County inspector must limit work done as an individual to construction which would not be subject to County inspection, either by virtue of the nature of the construction or its location outside the County's geographic jurisdiction.

B.) A County inspector must not be associated with a business which does any construction subject to County inspection.

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

³ 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.

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.

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 13-10, a County employee asked the Commission whether she may seek outside employment performing duties similar to those she performs for the County involving grant writing. The Commission concluded that the requester may not provide grant writing services to any entity if her department is potentially eligible for the same grant. The Commission further prohibited the requester from providing services to any entity which was affiliated with the County, sought or did business with the County, or was regulated by or was reasonably foreseen to be regulated by the County in the next three years. The requester's department's administrative prohibition regarding outside employment with the specific County affiliated nonprofit is in accord with the restrictions imposed by the Code and this opinion.

In Advisory Opinion 12-05, a County official asked the Commission whether he could become an administrative employee of an outside business that contracts with private associations to maintain real estate which may include structures inspected by the County department where he is employed. The Commission concluded that in order to avoid a violation of the Ethics Code, the requester may not become an employee of the outside business since a portion of its work is inspected by his Department.

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, as in the case here, it is easier for the Commission to approve the proposed outside employment as it is less likely to result in conduct which will violate the Ethics Code. When outside work is performed in places other than New Castle County, the business is less likely to be a customer of, or regulated by, the County, and the possibility of a conflict of interest or appearance of impropriety may be reduced.⁴ In this instance, if the Requester is hired to perform architectural services in places other than New Castle County, that reduces the possibility of a creation of a conflict or an appearance that the Requester is acting in any manner which is in violation of the Ethics Code. Whether the outside work is performed in places other than New Castle County, however, is not the end of the inquiry because it is entirely possible that the person or entity which hires the Requester for architectural work also does work

⁴ See, e.g., Advisory Opinions 06-15, 06-05, 04-09, 01-01, and 97-07.

in New Castle County and may be a customer of the County or may be regulated by the County on matters other than the one for which it hired the Requester.

As is often the case with matters brought to the Ethics Commission for advice, ongoing care and diligence on the part of the Requester and, at the very least, his supervisor, will be necessary for adherence to the Commission's decision. The Requester works in the Land Use Department and is one of five (5) plan examiners. If the Requester takes on any outside architectural work, such work must take place during his unpaid, free time and must not take place within New Castle County. Also, the Requester must make very sure that he never examines any plans or does any County work on any matter involving the person or entity which has hired him for outside work. The Requester must inform his supervisor of any outside architectural work which he takes on, even if it occurs outside of New Castle County, and he must recuse himself from involvement in any matters which come before him which involve the person or company for whom he performs or performed outside work. The Requester must be very careful to determine whether anyone who hires him for outside work beyond New Castle County is operating under different names in New Castle County, so that he knows if he needs to recuse himself from plan review involving that person or entity doing business under the other name(s).

Finding

The Requester may accept outside architectural work so long as the work will be performed somewhere other than New Castle County; it is done entirely during the Requester's non-paid, free time; the Requester informs his supervisor of the work before such work begins; and the Requester recuses himself from any County work which is or may be related to any person or entity which hires or hired him.

The Requester was correct to ask the Commission for an advisory opinion on this matter and the Commission commends and thanks the Requester's supervisor for recommending that the Requester contact the Commission. The Commission receives questions, formal or informal, involving outside employment on a regular basis. The Commission can issue advisory opinions on an individual basis as the questions about outside employment arise, but it is not in a position to follow-up after each inquiry to determine whether its advice and/or prohibitions are being followed. The Commission can handle complaints involving outside employment as they are filed.

The Commission's jurisdiction is clearly limited to the interpretation and application of the Ethics Code when it issues advisory opinions or handles complaints. The Commission, however, is not able to determine whether its opinions are adhered to, and when they are, how they may affect the flow of work and execution of County business. This practice involving outside employment has resulted in varied and

inconsistent outcomes, the propriety of which depend entirely on the integrity of the particular persons involved. The Commission is aware that certain County employees, such as those working in Public Safety, must seek and receive permission from management before engaging in outside employment. Indeed, many governments require that of their employees across-the-board. For many years, the Commission has held the belief that implementing such a County-wide policy could be beneficial, and it continues to believe that the implementation of a system which regulates and monitors the outside employment of all County employees would enhance the public's trust in County government.

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 12TH DAY OF JUNE 2019.

Paula Jenkins-Massie, Chairperson
New Castle County Ethics Commission

Decision: Unanimous, 4 – 0.