



ADVISORY OPINION 19-04

Date: January 16, 2020

Decision by Commissioners:

Paula Jenkins-Massie, Sally Jensen, Robert Ralston, Kellie Tetrick, Charles Toliver

Question

May New Castle County, through the Public Works Department, promote the County's environmental awareness, its involvement in environmental matters on behalf of the citizens of the County, and its participation in programs which encourage New Castle County students to pursue careers in the environmental fields, by becoming a sponsor and/or exhibitor at an annual youth environmental conference which was created by a nonprofit organization founded by someone who is currently holding New Castle County elective office without violating the Ethics Code?

Conclusion

The County, through the Public Works Department, may sponsor and/or exhibit at an upcoming annual youth environmental conference without violating the Ethics Code so long as the decision is not influenced in any way by the elected official, so long as the elected official recuses from any matter involving the conference and the nonprofit organization which developed the conference, and so long as the funds paid by the County to the non-profit for the annual youth environmental conference are used in their entirety for that conference, only, and are not used by the non-profit for any other purpose. Due care must be exercised by every County official and employee involved to ensure that these conditions are met, and continue to be met, in the event that the County continues to be involved with this conference or anything related to the nonprofit.

Facts

A representative of the Public Works Department (the "Requester") has informed the Commission that the Public Works Department (the "Department") is involved in many forms of outreach to involve youth in the County to raise their awareness of the importance of our environment and to make the youth aware of County environmental functions. In fact, the County has a National Pollutant Discharge Elimination System ("NPDES") permit obligation to conduct public education and outreach on water quality

topics. In addition to meeting any permit requirements, the Department hopes that these actions result in many positive outcomes including making youth aware of the potential for a career with the County when they are older. One such activity is the Great Schools Clean Streams Contest which is run by the County each year to raise awareness, from an early age, that no one should be pouring cooking grease down any drains.¹ Additionally, the Public Works Department, for the past two years, has manned a booth at the Wilmington Earth and Arbor Day event to get the County's message to respect our environment to school-aged children. The Department has also been a presenter at the Wilmington Green Jobs Partner statewide career day, as well as attending other job fairs at local colleges. The Department is considering participation next year in the statewide Make a Splash event which provides education to Delaware's fourth graders on water resources. Other County departments, such as Community Services, are involved in additional events and programs which inform Delaware youth of the importance of environmental concerns and the County's involvement in environmental matters on behalf of County citizens.

Some years ago, before becoming a County legislative elected official (the "Elected Official") began a nonprofit organization to provide educational programs, build awareness through events and projects, and advocate for initiatives to secure its goal of greatly reducing single-use plastics in Delaware. One such event will be an annual conference involving Delaware nonprofit organizations, businesses, and students in grades 6 through 12 designed to inspire, encourage, and prepare the youth involved or attending the conference for a lifetime of environmental responsibility and service (the "Conference").²

The Elected Official informed the Requester about the Conference and the opportunity it presents the County to further its goal of informing youth residing in New Castle County about environmental responsibility, how the County functions in environmental preservation, and that the County should be considered as a potential future employer for students who eventually pursue careers in that field. The Conference has broad community support from private and public entities, and appears to be off to a great

¹ More information about this event can be found at <https://www.greatschools-cleanstreams.org/>.

² It should be noted that the information provided to the public by the nonprofit and the Conference makes no mention of the County position held by the Elected Official. See, e.g., Advisory Opinion 01-08, in which the Commission decided that County officials and employees have been permitted to lend their names, but not identification of their official County status, to fundraising activities of non-profits. The Commission found that the Code did not prohibit the organization from seeking funds from individuals or contractors. The Commission stated, however, that "[i]n doing so,...the Commission notes that precautions should be followed to minimize any possible appearance that the party being solicited will receive favorable treatment from the County or feels compelled to donate to the organization due to the requesting party's inspection responsibilities. Such safeguards include: (1) having an individual, other than the requesting party, sign any direct written solicitations being made to contractors; and (2) not mentioning the requesting party's [County] employment in any such solicitation."

start, even in its first year.³ The Requester and other members of the Department recognized the value of its involvement in this Conference and that such involvement would further its goals in this regard. Donations to the nonprofit for involvement at the Conference as a sponsor and/or exhibitor at the Conference range from \$100 to \$5,000, and the Department is thinking in terms of donating a mid-range amount, such as \$1,000. Recognizing the potential for an appearance of a conflict of interest because of the Referenced Elected Official's involvement in the nonprofit which is organizing the Conference, however, before becoming involved in the Conference, the Requester contact the Ethics Commission for an opinion as to the appropriateness under the Ethics Code of the Department's involvement in the Conference.

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.

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.

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.⁴ For this reason,

³ The Conference has support from many nonprofits, governmental, and other organizations including, but not limited to, Zero Waste First State, Odyssey Charter School, Green Buildings United, TeenSharp, Delaware Interfaith Power & Light, the Charter School of Wilmington, and the Brandywine School District.,

⁴ New Castle County Code, Section 2.03.101.A:

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.⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹

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

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.

⁵ Id.

⁶ 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 these minimum standards. The Ethics Commission has jurisdiction to decide whether superimposed rules fall below the minimum standards expressed in this Division.

⁷ 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.

⁸ 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.

⁹ Id.

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.¹⁰ 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.

The Ethics Code, in its Code of Conduct section, contains directive related to solicitation.¹¹ A County official or employee may not solicit from any entity which does business with the County or is regulated by the County.¹² 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.¹³ 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.¹⁴ 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

¹⁰ 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.

¹¹ 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.

¹² See New Castle County Code, Section 2.03.104.J.1, fn. 10.

¹³ *Id.*

¹⁴ See New Castle County Code, Section 2.03.104.J.2, fn. 10.

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.¹⁵

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 organizations as well as private businesses or private concerns.¹⁶ 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.¹⁷ 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.¹⁸

Prior Commission Opinions

In Advisory Opinion 17-09, the Commission was asked whether a department in the County Administration may award discretionary grants or funds to certain organizations which have various relationships with officials and/or employees who work in that Department, and, if so, under what circumstances. In making this request for an advisory opinion, which was a novel question for the Commission, the Department provided the Commission with two specific scenarios which were currently before the Department:

(1) The Department head was on a board of a small organization which had requested a modest sum (\$1000) to support an event it was holding; and

(2) A management level Department employee was on a board of a non-profit organization which had received discretionary funds from the Department in past years and it hoped to receive discretionary funds again that year. The employee on the board

¹⁵ See New Castle County Code, Section 2.03.104.J.3, fn. 10.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

was a member long before becoming an employee in that Department. Further, the organization had the Department head appoint a (non-County employee) member to the board of the organization.

The Commission concluded that the Ethics Code allowed the Department to award discretionary grants or funds using a process which included 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, so long as actual or potential conflicts of interest were avoided through the recusal process. The Commission included the caution, however, that the conclusion reached in that advisory opinion was limited to the facts presented, and in the event that a conflict of interest or other issue arose in connection with the discretionary grant process which implicated the application of the Ethics Code, the Department was urged to contact the Commission regarding any such decision to obtain an advisory opinion on the specific issue, as the Department had in this instance.

In Advisory Opinion 96-07, the Commission was asked whether a County inspector, with building and construction code inspection responsibilities, could sell fund raising tickets to the contractors which the County regulated for nonprofit organizations and/or political candidates when the proceeds from the ticket sales went to the nonprofit organizations and/or political candidates and not to the County inspector. The Commission found that the appearance existed that, by purchasing the fundraising tickets to a cause which the County inspector favored, the contractor was necessarily ingratiating themselves in the favor of the County inspector. Thus, the appearance existed that the County Inspector was being or could have been influenced by the contractor's purchase of the tickets and not by the merits of the project being inspected and, accordingly, would or could make the results of inspections more favorable to the contractor, if the tickets were purchased and, less favorable, if the tickets were not purchased. The contractor also may have felt pressure to purchase the tickets for fear that failure to do so would have resulted in less favorable inspections. The fact that the proceeds from the tickets went to a nonprofit organization or a political campaign, and not into the pocket of the County inspector, does not remove the taint, particularly if the County inspector was directly soliciting the sale of the tickets. Although the Commission generally applauds and does not wish to stifle community activism, such as fund raising efforts for nonprofit organizations, where there is an appearance that a County employee's actions may be motivated by something other than the merits of the matter, then the activity in question cannot be allowed, despite any good intentions on the County employee's behalf, as it would undermine the integrity of County government.

In Advisory Opinion 92-01, a County employee involved in community, housing and development, who exercised some discretion in the administration of HUD funds with regard to a particular type of project, was permitted to serve on the Board of

Directors of a non-profit organization which could be an applicant for such funds. The Commission held that “a County employee involved in community, housing and development, who exercises discretion in the administration of HUD funds with regard to a particular project, may serve on the Board of Directors of a non-profit organization which may be an applicant for said funds. The employee, however, must exercise caution to ensure that they are aware of any potential areas which may result in appearances of impropriety, and recuse, when appropriate.”

In Advisory Opinion 92-02, the Commission stated that a “mere position on the board of directors of a nonprofit which is not regulated by or does not contract with the County does not create, in itself, an appearance of impropriety. ... However, where the employee or official's County position figures prominently in the person's status with the nonprofit, there is potential for an appearance to arise. This is particularly true when a private organization seeks regulation, contract, or benefit from the County or in fundraising. ...”

In Advisory Opinion 05-24, an elected official was permitted to become a board member of a nonprofit community agency which received a small County grant for certain of its community activities as well as County administered federal grant. Both grants were received pursuant to written applications and the federal grant was awarded and monitored subject to federal criteria. The official was required to recuse from policy making, sponsorship and voting on matters affecting the nonprofit's activity with the County. The Commission held that the totality of circumstances in that case showed that the official was able to recuse from involvement in those few occasions when matters concerning the nonprofit came before the County agency. In the instance of the federal community block grants, the County responsibility was largely non-discretionary. The application, criteria, and approvals were restricted by federal regulations. Recusal can be easily accomplished without damaging the public's confidence that the grant was properly administered. In the matter of the other small County sponsored grant, the requester's duty to oversee the conduct of the public's business had to be balanced against the public's confidence that the requester was conducting County business impartially. That latter interest superceded the former and mandated that the official recuse from grant matters. If the official fully recused as to both grants, a reasonable member of the public would not believe the board member's ability to carry out the County duties with integrity, impartiality, and competence was impaired and the appearance of impropriety would be dissipated.

Analysis

Our community is strengthened by citizen participation in local service organizations and nonprofits which strive to make New Castle County a desirable place to live, work, and/or visit. Nothing in this opinion should be construed to say that County

officials and employees should not be involved in such organizations. The Commission encourages involvement and personal investment in local community organizations by County employees and officials, but such involvement by County officials and employees must fall within the parameters of the Ethics Code. The Commission also believes that the reasonable person would agree that the health of the environment is of utmost importance to the interests of every County citizen, and that it is a reasonable use, therefore, of County resources to be applied, within legal bounds, to environmental issues.

The Ethics Code requires that every County official or employee, when presented with a situation where a real or perceived conflict of interest may be present, that County official or employee must do everything possible to remove themselves from the situation. If a County official or employee's actions or decision-making creates a conflict of interest, is the product of a conflict of interest, or creates what appears to a reasonable person to be a conflict of interest, the County employee or official may not perform that action without running the risk of violating the Ethics Code. Whenever questions arise on this topic, it is advisable for the County employee or official to consult the Ethics Commission, and the Commission commends the Requester for contacting the Commission for advice on this matter.

In the matter presented to the Commission in this request for an advisory opinion, there are, in effect, two questions. The first question is whether it violates the Ethics Code if the Department uses County funds to act as a sponsor and/or an exhibitor at the Conference. The reason that the first question could result in an Ethics Code violation is related to the facts presented in the second question.

With respect to the second question, the Ethics Code issue arises because the Elected Official runs the nonprofit which has organized the Conference, and the Ethics Code prohibits a County official or employee from representing a private interest before the County, and it prohibits a County official or employee from using the authority of the office held for personal gain or profit. Ethics Code violations are determined by the Commission when it concludes that the reasonable person, with knowledge of the relevant facts, would find the matter to be violative of the Ethic Code. In the facts presented to the Commission, here, the Elected Official provided information to the Department about the Conference with knowledge of the publicly available information about the County's involvement in environmental outreach programs including, to a certain extent, those which the County is required by law to hold. Before the Elected Official was elected, the official started the environmental nonprofit which has now created the Conference, and as the head of the nonprofit, the official was necessarily aware of the involvement of the County in various environmental programs because of the nature of the work which the nonprofit performed.

The Commission finds that the Elected Official, when informing the Department about the existence of this new Conference, was not soliciting funds from the County for the nonprofit or the Conference. Rather, the official provided information about the Conference and has not been involved in any of the decision-making process about whether the County would participate in the Conference. The facts reflect that the Conference will be well-attended and has the support of, and has received donations from, many public and private entities, and will be a success regardless of County involvement. Further, the Elected Official has not used the County elective position held on any information about the nonprofit or the Conference. Additionally, the Elected Official, when informing the Department about the Conference, disclosed to them that the nonprofit which created the Conference is run by the official. Finally, the Elected Official enthusiastically supported the decision to request an advisory opinion from the Ethics Commission before the Department moved forward on the matter.

The Requester, and the Department, has asked the Ethics Commission for its opinion before it becoming involved in, and before spending any County funds on, the Conference because of its concern over the potential for the appearance of impropriety of being involved in a program which is tied to the Elected Official from whom they learned about the program. The facts demonstrate that if the Requester and/or the Department had learned about the program some other way, they would have decided, without hesitation, to become part of the program because it fits so well into their goal of outreach to community youth on environmental issues. Here, the fact that the Elected Official is involved with the nonprofit which organized the Conference is not an inducement to County participation, but, rather, it has functioned in an opposite manner. The connection of the Elected Official to the Conference has served as a potential preventative from County participation in a program which, otherwise, would have received the Department's immediate positive response. And with the condition placed upon the funds by the Commission that they are used solely for the annual youth conference, and are not used by the no-profit for any other purpose, any actual or perceived appearance that the County funds will benefit the Elected Official in any personal manner are reduced or negated.

Finding

Our environment is a top priority. Reaching out to the community, including especially its youth, about environmental responsibility, and the County's role in environmental matters, is of critical importance to the health and welfare of the citizens of New Castle County. Under the facts and circumstances presented, the Department may be a sponsor and/or exhibitor at the Conference so long as they do not allow the involvement of the Elected Official to have any impact on their decision to be involved, or the level at which they will be involved. This will require that the Elected Official completely recuse from any part of the County's involvement in the Conference. This

recusal must be total and comprehensive and means that the Elected Official must not be involved to any other extent with County participation and/or County decision-making about such participation with the Conference, including the providing of any further information about it. No discussion whatsoever between the Elected Official and any County official, employee, or representative may take place regarding the Conference or the nonprofit which created the Conference. Additionally, and importantly, the funds paid by the County to the non-profit for the annual youth environmental conference must be used in their entirety for that conference, only, and may not be used by the non-profit for any other purpose. The Requester, the Department, and the Elected Official are encouraged to consult with the Ethics Commission in the future if any related or similar issues arise which are not expressly discussed and resolved in this opinion.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION ON THIS
16th DAY OF JANUARY 2020.

Paula Jenkins-Massie, Chairperson
New Castle County Ethics Commission

Decision: Unanimous