



## **ADVISORY OPINION 23-05**

Date: January 10, 2024

Decision by Commissioners:

Johanna Bishop, Brandon Brice, Robert Hicks, Sally Jensen, Robert Ralston and Kellie Tetrick

### **Question**

Whether membership to the local Chamber of Commerce may be purchased by the County for County Council members and employees?

### **Conclusion**

Absent a good faith allegation or showing of an actual or potential appearance of impropriety or conflict of interest, the Ethics Commission has no authority over decisions regarding the use of the County Council's discretionary funds. If membership in the subject organization is purchased (and regardless of the source of the funds for such membership), the County official or employee involved must recuse themselves from participation in all County matters which involve the subject organization, and they must inform the public and County employees and officials of their involvement with the subject organization nonprofit association.

### **Facts**

A member of County Council, the requester, has asked the Ethics Commission whether the Ethics Code will be violated if the County pays for membership to the New Castle County Chamber of Commerce (the subject organization) for the co-chairs of the Economic Development Subcommittee and the legislative aides of such co-chairs. The annual cost of this membership would be Three Hundred Fifty Dollars (\$350). This amount, according to the Chamber of Commerce, would cover one to five full-time employees. This membership fee would be paid from the discretionary funds made available each year to County Council members by the County. County Council members' annual discretionary funds are used for a variety of functions, determined by each Council member, and voted on by Council as a body at meetings which are open to the public.

The Ethics Commission is created by the New Castle County Code and has only the authority conferred upon it by that Code. Unless there is an allegation of an Ethics Code violation, the Ethics Commission has been given no authority over policy decisions

regarding how and when County Council discretionary funds are used. For this reason, the Ethics Commission has no jurisdiction over a decision on whether County Council should use its funding to pay for memberships to the Chamber of Commerce.

Should County Council decide to pay for such memberships, care should be taken, of course, to avoid situations where the Ethics Commission has jurisdiction because the Ethics Code does apply. This can be accomplished by assuring that no appearance of impropriety or conflict of interest issues are created by membership in the subject organization. Ethics Code issues may be avoided by recusing from any matter which comes before County Council involving the Chamber of Commerce. Further, confidential information or non-public information learned through their work for County Council should not be shared or used in their dealings with the Chamber of Commerce. As the membership moves forward, consultation with the Ethics Commission is advisable if a matter arises which could be interpreted by the public as an appearance of impropriety or a conflict of interest.

#### **Code or Prior Opinion:**

Relevant provisions in the definition section of the Ethics Code, Section 2.03.102, include the following:

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

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

*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.

#### ***Code of Conduct Provisions***

Certain portions of the New Castle County Ethics Code are relevant to this opinion, including Sections 2.03.101.B; 2.03.103.A.1 and A.2; 2.03.104.A:

### **Sec. 2.03.101. - Purpose of Division.**

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D. 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.

### **Sec. 2.03.103. - Prohibitions relating to conflicts of interest.**

A. Restrictions on exercise of official authority.

1. No County employee or official knowingly or willfully shall use the authority of his or her office or employment or any confidential information received through his or her holding County office or employment for the personal or private benefit of himself or herself, a member of his or her immediate family or a business with which he or she is associated. This prohibition does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the County official or employee, a member of his or her immediate family or a business with which he or she or a member of his or her immediate family is associated. There will be a rebuttable presumption of a knowing or willful violation of this section if the action benefits the County official or employee, his or her spouse, or his or her dependent children (whether by blood or by law).

2. In any case where a person has a legal and/or statutory responsibility with respect to action or nonaction on any matter where the person has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person may exercise responsibility with respect to such matter, provided that promptly after becoming aware of such conflict of interest, the person files a written statement with the Commission fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person. If the matter is one in which the legal and/or statutory responsibility requires the person to vote upon the issue, the written statement filed with the Commission shall be read into the public record prior to the time the person's vote is cast. Any person choosing to abstain from voting on an issue where or she has a conflict shall state the reasons for his or her conflict on the record; an abstaining voter need not

file the written statement with the Commission required when acting on, rather than abstaining from, an issue involving a conflict.

**Sec. 2.03.104. - Code of conduct.**

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.

*Case Law and Commission Precedent*

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. 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.

In Advisory Opinion 17-09, the Ethics Commission determined that a County department could award discretionary grants or funds using a process which included an application process and a thorough review of each application by a small internal committee within that department, with the final decision resting with the department head, so long as actual or potential conflicts of interest are avoided through the recusal process. The Commission stated that 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 should consult with the Commission regarding that decision.

In Advisory Opinion 19-04, the Commission was asked whether the County, through the Public Works Department, could 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 was holding a County elective office without violating the Ethics Code. The Commission said yes, so long as the decision was not influenced in any way by the elected official, the elected official recused from any matter involving the conference and the nonprofit organization which developed the conference, and the funds paid by the County to the non-profit for the annual youth environmental conference were used in their entirety for that conference, only, and were not used by the non-profit for any other purpose. The Commission further stated that due care had to be exercised by every County official and employee involved to ensure that these conditions were met in the event that the County continued to be involved with that conference or anything related to the nonprofit.

In Advisory Opinion 10-11, a County employee sought advice from the Commission as to whether he may accept a position on the board of a nonprofit given that his department made recommendations on grants to members of a larger community which the nonprofit represented. In its opinion allowing the employee to serve on the board, the Commission noted that the "[b]oard's purpose is limited to making advisory operational recommendations regarding a division in the requester's department but those recommendations are not made to the department but to a separate County entity...which has discretion to support, change or ignore [the recommendations]." This service on the board, however, was conditioned upon the employee's recognition and knowledge that he must recuse himself from any matters which involved either the County or the nonprofit or any recommendations made to his department by the board.

In Advisory Opinion 15-09, the Commission was asked whether a County employee of the Department of Community Services could serve as an uncompensated member of a nonprofit that advocated on housing issues. While the Commission advised that the County employee may serve on the board of the nonprofit advocacy organization, it cautioned the employee against engaging in any conduct that was or could be perceived as a conflict of interest by recusing herself from any County process that involved the nonprofit and ensuring that both the County and the nonprofit were made aware of her requirement to recuse from any matter with potential conflict.

In Advisory Opinion 15-12, the requestor, an elected County official, asked the Commission whether he may serve on the advisory board of a local nonprofit heritage association. The Commission decided that, conditionally, the requestor may serve in that capacity, as long as he recused himself from participation in all County matters that

involved the nonprofit organization and that he took the steps necessary to inform the public and County employees and officials of his involvement with the nonprofit association.

### **Analysis**

Unless there is a complaint filed with the Ethics Commission regarding this matter, the Ethics Commission has no authority over the proposed use of discretionary funds to pay for memberships to the Chamber of Commerce. The Commission commends the requestor for recognizing the potential need for an opinion from the Ethics Commission in this matter. While the Commission has no authority over the use of Council discretionary funds, it is important to recognize the potential for public scrutiny over such expenses and transparency is a possible key to avoiding misunderstandings. Nothing in this opinion should be construed to mean that Ethics Code issues will not arise if these memberships are purchased with County funds. But, regardless of how the memberships are purchased, deliberate care would need to be exercised so that the Council members and employees involved recuse themselves from participation in all County matters which involve the subject organization, and they must take the steps necessary to inform the public, as well as County employees and officials, of their involvement with the subject organization whenever appropriate. This caution is especially relevant when, as in this instance, the activities of the subject organization include advocacy on behalf of its membership regarding governmental and other affairs.

### **Finding**

Under the facts presented, the Ethics Commission has no authority to opine about whether County Council should use its discretionary funds to pay for memberships to the New Castle County Chamber of Commerce for members of Council and its employees.

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 10<sup>TH</sup> DAY OF JANUARY 2023

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Dr. Johanna Bishop, Chairperson  
New Castle County Ethics Commission