



ADVISORY OPINION 24-01

Date: May 8, 2024

Decision by Commissioners:

Johanna Bishop, Robert Hicks, Sally Jensen, and Robert Ralston

Question

Whether the Ethics Code prohibits the appointment of spouses on the same County board?

Conclusion

The Ethics Code does not permit the spouse of a County board member to serve on the same County board.

Facts

A chair of a County board, the Requester, asked the Ethics Commission if it would violate the Ethics Code if their spouse was appointed to serve on the same County board. The board which the Requester chairs is comprised of nine (9) members and the County is in search of qualified people to serve on that board. The board handles specialized matters, and its decisions can have significant impacts on County citizens. Members of this County board are compensated for their time per the law. Persons aggrieved by the decisions rendered by this County board can appeal the decisions to a Delaware court.

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 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.

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.

Analysis

While the Ethics Code does not expressly prohibit the appointment of spouses to the same County board, one purpose of the Ethics Code which is clear is to attempt to prevent conflicts which may arise when family members serve New Castle County, including spouses. The number of possible conflicts which may arise when two spouses both serve on the same County board is without limit. It could be that the Requester’s spouse would be a perfect person to serve on the board which the Requester chairs and this opinion is not intended to disparage the abilities or motives of either spouse in any way. Regardless of their respective talents and abilities, the Ethics Commission simply cannot approve the appointment of two spouses to the same County board given the overwhelming potential for the appearance of impropriety and/or conflict.

Finding

The Ethics Commission finds that the Ethics Code does not allow for the appointment of spouses to the same County board.

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 MAY 2024.

Dr. Johanna Bishop, Chairperson
New Castle County Ethics Commission

Decision: 4-0, unanimous