



WAIVER 20-02

Date: May 13, 2020

Decision By: Commissioners: Paula Jenkins-Massie, Robert Ralston, Johanna Bishop, Sally Jensen, Kellie Tetrick, Charles Toliver, IV

Question

Whether the waiver requested by the Public Works Department of the two-year post-employment restriction, found in Section 2.03.103.D of the *New Castle County Code*, should be waived in order that it may contract with a former County employee to perform inspections of stormwater management facilities to fill an opening while the normal hiring process is hampered by the restrictions related to the CoVid-19 pandemic?

Conclusion

Based upon the facts supplied, the waiver is granted under the conditions and terms set forth in this opinion. The undue hardship which the County will encounter without hiring the former employee on a temporary, contractual basis outweighs any potential unjust enrichment to the former employee. The Public Works Department (the Department or Requester) needs to overcome a gap in critical service while the County searches for permanent replacements to fill open inspector positions. Most hiring by the County has been suspended due to the state of emergency resulting from the CoVid-19 pandemic. The former employee who would be hired by contract to perform this work temporarily would receive less pay per hour than the current inspectors receive, and less than he received per hour when he left County employment. Such a contract will prevent cessation of important services with little or no net impact on the County's resources, and without unjust enrichment inuring to the benefit of the former employee.

Facts

The Requester contacted the Commission because of a serious problem the Department is experiencing due to the current restrictions which are in place because of the CoVid-19 pandemic. The Department normally has three (3) County employees to

perform inspections of the 2,400 stormwater management facilities in New Castle County, but now has only one (1) inspector to perform such work. These inspections are mandated by law and must be performed on a timely basis to maintain the functionality of the facilities and for the County to avoid the imposition of penalties by regulatory agencies. The County was in the process of finding suitable candidates for the open positions and held oral board interviews, but the process was suspended when all regular business practices in the State of Delaware suddenly became constrained by the declaration of a state of emergency due to the CoVid-19 pandemic. It is unclear when the County will be able to complete this hiring process, and then perform the necessary in-person training of the newly hired inspector(s). The declaration of a state of emergency, however, does not relieve the County of its obligations to perform the inspections of these facilities.

A short time ago, the Requester was contacted by a former County Public Works inspector who had moved out of state when he left County employment. He offered to return to the area to assist the County during this challenging time if the County needs his assistance with inspections. Because this former employee left County employment less than two (2) years ago, the Requester contacted the Commission to see whether, under the unusual circumstances presented, it could be granted a waiver of the 2-year post-employment restriction. When employed full-time by the County, the former employee performed the exact same work that he would be hired to do by contract now, and without the issuance of a waiver from the Commission of these codified restrictions, this contractual hiring would be in violation of the Ethics Code.

If the waiver is granted by the Commission, the Department would hire the former employee to perform inspections at an hourly rate no greater than \$20.00 per hour, plus mileage for his trips to perform the inspections at the current County reimbursement rate. Full-time Public Works inspectors are paid in the range of \$21.00 to \$28.00 per hour, and this former employee was near the top of that pay scale when he left County service. The Department is unsure when the hiring process to fill the open inspector positions will be completed, but the current plan is to hire the former employee for the remainder of spring and through the summer, if the waiver is granted. If the former employee is hired by the County at the hourly rate of \$20.00, plus mileage to and from inspection sites if made with a personal vehicle, for approximately fifteen (15) weeks, the cost to the County would be in the range of approximately \$12,000 to \$17,000, which sum is provided for in the Department's current and upcoming annual budgets.

Code or Prior Opinion:

New Castle County Code Sections

In this case, the subject employee would be performing duties similar to those for which he had been directly and materially responsible during the course of his County employment. Section 2.03.103.D of the *New Castle County Code* prohibits a person who has served as a County employee or County official from “represent[ing] or otherwise assisting any private enterprise on any matter involving the County for a period of two (2) years after termination of employment or official status with the County, if the person gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of official duties as a County employee or official. Nor shall any former County employee or County official disclose confidential information gained by reason of public position nor shall the person otherwise use such information for personal gain or benefit.”

Sections 2.03.105.A and B provide authority to the Commission to grant a waiver from the prohibition:

A. Notwithstanding the provisions of this Division, upon the written request of any County Department or of any individual who is or was a County employee or County official, the Commission may grant a waiver of the specific prohibitions governing post-employment restrictions if the Commission determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this Division or would result in an undue hardship on any current or former employee, official or County Department. Any such waiver may be granted only by written decision of the Commission. ...Any person who acts in good faith reliance upon any such waiver decision shall not be subject to discipline or other sanction hereunder with respect to the matters covered by the waiver decision provided there was a full disclosure to the Commission of all material facts necessary for the waiver decision.

B. Any application for a waiver, any proceedings and any decision with respect thereto shall be maintained confidential by the Commission provided that:

1. Public disclosure shall be made by the Commission upon the written request of the applicant;
2. The Commission may make such public disclosure as it determines is required in connection with the prosecution of any violation of this Division;
3. The Commission shall report to appropriate Federal and State authorities substantial evidence of any criminal violation which may come to its attention; and

4. In the event that a waiver is granted, the waiver decision and the record of all proceedings thereto shall be open to public inspection.

State Ethics Code Interpretations

County Code Section 2.03.103.D and Section 2.03.105.A and B are substantially identical to the post-employment prohibition and waiver authority granted to the Delaware Public Integrity Commission (hereinafter “PIC”) recited in the Delaware Code at Title 29, chapter 58. Because the County Ethics Code is required to be at least as strict as the State Code, interpretations by the PIC are informative. See, 29 *Del.C.* §5802(4). The PIC has discussed the post-employment provisions several times. In PIC Ethics Bulletin 007, issued May 22, 1998, that Commission described the State law and made reference to similar federal government provisions:

[L]ike other conflict of interest statutes, post-employment provisions are meant to insure public confidence in the integrity of the government. It is said public confidence in government has been weakened by a widespread conviction that government official use their office for personal gain, particularly after leaving the government. There is a sense that a “revolving door” exists between industry and the government [which] leads to a suspicion that personal profit was the motivation. There also is public concern that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. Reflecting that concern, post-employment laws set a “cooling off period” in certain areas which the ex-employee dealt with while working at the agency.

Similarly, the Delaware legislature sought to insure public confidence in the integrity of government. It set a two-year “cooling off period” in areas where the former employee was “directly and materially responsible,” etc. This limits the actual or perceived unfair advantage in subsequent dealings with a department or agency. ... Thus, this Commission has held that Delaware’s post-employment provision is an attempt to eliminate concerns that when a State employee moves from State employment to private employment that they do not use their former State position to get a “leg-up” on others in the private sector who also seek to deal with the government. ... Additionally, it is to avoid the risk that after a State employee moves to the private sector that they will not exercise undue influence on their former colleagues. See 29 *Del.C.* §5802.

As it reaches a decision about a waiver, the Commission also must scrutinize the conditions of the post-employment contract to see if the contract comports with the

goal of preventing unjust enrichment of the former employee and promoting the public confidence in the integrity of County government. Compensation must be reasonable for obtaining information acquired through former employment and the contract period must be limited to only that period of time necessary to ameliorate the undue hardship to the Department. The remuneration to the employee must reflect arms' length dealing between the Department and the former employee to avoid any appearance of favoritism.

In Ethics Commission matter W11-01, the Commission granted a waiver where the department wanted to hire by contract a manager who had recently retired. The retiree had been responsible for implementing all of the medical and voluntary benefits, including pension benefits, for approximately 1450 employees and 1200 retirees. This employee had also been responsible for the Department budget closeout occurring at the time, the fiscal year start up, and financial reporting processes as well as heading up modifications to the County's pension plans pursuant to recently enacted ordinances. The department did not believe it could timely recruit and train a new employee to execute the retiring employee's duties without severe disruption to the pension program and its beneficiaries. It requested a 9-month window in which to contract with the retiring employee for her services in performing many of the tasks for which she was previously responsible. The department expected to require services from the retiree on a part time basis and proposed an hourly rate pegged at 80 to 85% of her former hourly salary, which gave the Commission pause. Due to the nature of the hardship facing the County at the time, however, the Commission granted the waiver.

In Ethics Commission matter W14-01, the Commission granted a waiver of the 2-year prohibition. In that matter, a County Row Office requested a waiver of the two-year post-employment restriction in order to contract with a retired employee to perform certain of his former County duties on an on-call basis for a period of one year. In that case, the Office stated that there were no adequate internal or external resources for the required services other than the retiree. He possessed unique and exclusive knowledge about the system that he created. Other employees used his system, but he had been the sole architect to sustain its existence. Thus, the retiree was the only source for training the new hire to maintain the system. If the post-employment prohibition was enforced, the hardship for the Office and the public which relies on its services would have exceeded the perceived personal benefit to the retired employee, as long as he received only a moderate rate for his services.

Importantly, the Commission went on to state, however:

The Commission is always concerned when a County employee's retirement triggers a need for additional contract costs benefitting a retiree as a consultant. It believes that responsible management includes cross

training for critical positions, especially when a known event is reasonably certain in the relatively near future. Of course, if an agency has a very small staff, cross training may be impossible despite responsible management. That appears to be the case in this situation since the Agency staff consists of only five persons. The Commission notes that the Agency has successfully sought funds to hire an additional person to manage this critical function in order to prevent a reoccurrence of this problem in the future.

In Ethics Commission matter W16-03, this Commission granted a waiver of the 2-year post-employment restriction when the Community Services Department asked whether a waiver could be granted for a contract with a retired employee to perform certain of his former County duties for a very limited duration. The Commission stated, in granting the waiver, that the Department was attempting to ameliorate the work load of a burdened section which had lost two of its ten employees within a short period. The section performed vital functions for customers of the Department and handled financial accounting of grant funds. The hiring of the retiree, who was paid at a reasonable hourly rate not exceeding the rate paid in County employment, for a short contract duration satisfied the conditions in the Ethics Code for the granting of a waiver.

Analysis

An employment contract granted shortly after retirement or resignation on the basis of expediency, merely because an employee acquired special expertise in the course of paid County employment, would not qualify for a waiver because the reasoning underlying the prohibition would be contravened. Such a contract would create an impression of unjust enrichment to a former employee who capitalizes, for private benefit, on knowledge acquired in a public position to the disadvantage of competitors for the position.

Even if a former employee capitalizes on such knowledge, however, a waiver request may be granted if the "undue hardship" to the County standard is satisfied. "Undue hardship" has been defined by the PIC as "excessive hardship". This phrase means more than ordinary hardship for the County. Ordinary hardship encompasses any loss of a productive, long-term employee which affects continuity and work flow in a government agency. As noted by the PIC, undue or excessive hardship is not created simply because it would be cheaper or easier to hire a former employee. In a number of opinions, the PIC found that if waivers were granted on grounds of cheaper cost or continuity, a former employee would always have a "leg up" and be at a competitive advantage over other vendors and the post-employment bar would be meaningless. See, e.g., PIC Commission Op. 97-41. Additionally, waivers on the basis of cost or

continuity raise the specter of favoritism and unfair dealing. Justifying a contract on such grounds would have the net effect of not only defeating the legislative purpose of the two year cooling off period but also weakening public confidence by creating the impression that government encourages its officials and employees to trade upon their offices for future personal gain at the taxpayer's expense.

When, however, undue hardship to the County has been shown to exist, the Commission has granted applications for waivers. In New Castle County Commission W14-01, the department stated that the retiree possessed unique and exclusive knowledge about the system he created. Thus, the retiree was the only source of consultation for the successor as to how to process certain financial aspects of grant funds. If the post-employment prohibition had been enforced, the hardship for the department and the public which relies on its services would have exceeded the perceived personal benefit to the retired employee, especially if he received only a moderate rate for his services.

In the waiver request at hand, such undue hardship exists. The Department is attempting to prevent a failure of the inspection process of stormwater management facilities during the times of the year which present increased demands on such facilities. Additionally, these inspections are not just desirable, they are mandated by law. The failure of the County to perform these necessary inspections could result in stormwater management problems throughout the county and it could also result in the imposition of financial penalties against the County by the regulating agencies. Without the granting of this waiver, essential services for County employees and County citizens may not be provided. Moreover, the Department had no control over the declaration of a state of emergency due to the CoVid-19 pandemic which interfered with the hiring processes but will have no effect on the weather patterns and the maintenance of stormwater management facilities. The hiring of the former inspector at a rate of \$20.00 per hour, plus mileage to and from inspection sites if made with a personal vehicle, for fifteen weeks, in this instance, satisfies the conditions in the Ethics Code for the granting of a waiver.

Finding

The facts in this request present an example of the reason that the Ethics Code provides for a waiver of the two-year post-employment restriction. While such waivers are not favored, in this instance, the granting of a waiver is justified. A waiver of the two-year post-employment prohibition pursuant to the undue hardship standard is GRANTED for a period not to exceed fifteen (15) weeks from its commencement, at a rate not to exceed \$20.00 per hour, plus mileage to and from inspection sites if made with a personal vehicle, as presented by the Department in its request. The Commission emphasizes, however, that the granting of this waiver must not be interpreted as

permission for the County government to refrain from doing its part to move forward as quickly as the circumstances allow to finalize the hiring process of permanent, full-time inspectors. Should the Requester need conditions which are not specifically granted in this waiver opinion, the Department must consult with the Ethics Commission again regarding any additional or continued needs along these same lines. The Commission commends the Requester who acted quickly on this matter and moved forward on finding a solution to a very real problem in the correct manner. The CoVid-19 pandemic has presented County officials and employees with highly unusual circumstances and an uncertain present and future. In many instances, this has required creative diligence to complete tasks and duties which may have been deemed routine just a few short months ago. The citizens of New Castle County can be reassured, by this example, that the public servants employed by their County government are committed to remaining within the parameters of the Ethics Code while providing quality service to County citizens notwithstanding the challenges presented by this pandemic.

In rendering this 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 CASTE COUNTY ETHICS COMMISSION ON THIS 13TH DAY
OF MAY 2020.

Paula Jenkins-Massie, Chairperson
New Castle County Ethics Commission

Decision: 6-0-1 (Hicks, recusing)