



## **WAIVER 22-02**

**Date: February 8, 2023**

### **Decision By:**

Commissioners: Robert Ralston, Johanna Bishop, Robert Hicks, Sally Jensen, Kellie Tetrack and Charles Toliver

### **Question**

Whether the waiver requested by the Community Services 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 continue administering the Neighborhood Stabilization program?

### **Conclusion**

The waiver request is granted but only if executed per the conditions set forth herein. If the Commission enforces the restriction in Section 2.03.103.D and denies the waiver request, the undue hardship to the people served by the County through the Neighborhood Stabilization program ("NSP") would exceed the personal benefit to the former employee.

### **Facts**

The Community Services Department has requested a waiver to allow the Department to hire a recently retired County employee to perform inspections and otherwise oversee the Neighborhood Stabilization Program ("NSP" or the "Program".) The NSP exists to create affordable homeownership and rental opportunities in New Castle County. The Program is run by New Castle County and is funded through federal and state grants. Through this Program, the County purchases foreclosed or abandoned homes, which are then rehabilitated. This way, neighborhoods can be more livable and home values do not decline. Ultimately, the homes rehabilitated through this

Program will be designated as homes available for people who qualify for the affordable homes per the Program income parameters.<sup>1</sup>

Due to attrition at unanticipated levels, the County does not have any employees who currently have the inspection skills, experience, and necessary licensing, which are required to oversee this Program and perform home inspections. Without a properly qualified employee to perform inspections and other duties, the County runs the risk of losing the federal and state funding for this Program. The County has begun the hiring process and has advertised to fill these housing rehabilitation specialist positions, but that process will take some time and, because of the skillset and licensing involved for this position, it is unclear when the County will be able to hire one or more qualified people. While the County searches for these new employees, it would like to hire the former County employee who used to perform these duties. This former employee left County employment in September 2022, which is less than the two years required by the Code before a former employee may be rehired to perform the same work which they had been doing.

To avoid losing the government funding for this Program and to continue to make this Program available to New Castle County residents, the Department has asked the Commission to issue a waiver for this purpose. The Department would like to hire by contract the former inspector on a temporary, part-time basis (twenty-five hours per week or less) at \$35.00 per hour<sup>2</sup>. The Department would like the waiver to continue for a year so that they can be assured that the Program remains available to the public as the County hires new inspectors, trains them, and makes sure that the new employees have the necessary licensing. The Department does not want to run the risk of losing the federal and state funding for this Program and if they do not get this waiver, that is a possibility.

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

#### ***New Castle County Code Sections***

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

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<sup>1</sup> More information about this Program, including the qualifying income parameters, can be found on the Department of Community Services page of the New Castle County website under federal housing programs. Or contact the Community Services Department at (302) 395-5698 for more information.

<sup>2</sup> The proposed hourly rate is about \$3.00 less than the hourly rate at which the former employee was being paid when they left County service.

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**

New Castle County Code Sections 2.03.103.D, and 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, the PIC 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. [Citations omitted].

Similarly, the Delaware legislature sought to insure public confidence in the integrity of government. 29 *Del.C.* §5802. It set a two-year "cooling off period" in areas where the former employee was "directly and materially responsible," etc. 29 *Del.C.* §5805(d). This limits the actual or perceived unfair advantage in subsequent dealings with a department or agency. Commission Op. No 97-18. 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. Commission Op. No 97-11. 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. Commission Op. 96-75.

In coming to 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 necessary to ameliorate the undue hardship to County government. The remuneration to the former employee must reflect arms' length dealing between the County and the former employee to avoid any appearance of favoritism.

## **Analysis and Discussion of Prior Opinions:**

Obtaining a waiver of the post-employment restrictions in the Ethics Code is not merely a function of filing the necessary paperwork with the Ethics Commission. There is no right to the receipt of a waiver. A Commission-issued waiver of Ethics Code restrictions is akin to a permission slip to engage in conduct which, without the waiver, would be a violation of the law. Waivers of the post-employment restrictions should be granted only when the circumstances truly merit such action. An employment contract granted by the County to a former employee shortly after retirement or resignation on the basis of expediency, merely because an employee acquired special expertise in the course of paid County employment, is not enough of a basis to qualify for a waiver because the reasoning underlying the post-employment 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. When the circumstances warrant an exception to the law, however, a waiver may be issued by the Commission. Such waiver may contain conditions, and those conditions are mandatory. If the conditions are not all met, the conduct intended to be covered by the waiver could be rendered illegal and Ethics Code violations may occur.

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 workflow 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 retired 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., 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 waiver. In New Castle County Ethics Commission Waiver 22-01, the Ethics Commission was asked by the Executive office for a waiver of the two-year post-employment restriction to hire back by contract a former appointed County employee to continue administering the New Castle County

Scholarship Program. The employee charged with the task of handling that program left County employment in the middle of scholarship award process. The Commission granted a waiver, with restrictive conditions, reasoning that, on balance, the undue hardship to the County in enforcing the post-employment provision exceeded the personal benefit to the former employee. The work to be performed by the former employee was potentially life-changing for some County residents in wide-ranging and positive ways, and the issuance of the waiver would allow the program to continue uninterrupted.

In New Castle County Ethics Commission Waiver 14-01, 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 aspect 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 New Castle County Commission Waiver 11-01, 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.

And in New Castle County Waiver 17-01, a County department was attempting to evaluate the progress which had been made on a work plan which was created by the former employee when they were employed by the County in an appointed, full-time position. The department requested a waiver to hire by contract the former employee to complete that evaluation because achieving optimal and/or better efficiency and performance in that department was a critical need and a major objective of the County Administration. The Commission granted the waiver to the department to hire the former employee for those purposes at an hourly rate which was less than her employed rate,

for a period of two months, at anticipated cost of \$14,900. In granting the waiver, the Commission reasoned that the benefit to the County outweighed any potential benefit in enforcing the two-year prohibition in the Code. The former employee was better suited than anyone else to perform an evaluation of the status of the plan, as they had extensive knowledge of the evaluation program and practical experience in the administration of the evaluation.

Based upon the Commission's prior opinions and the facts as provided by the Community Services Department in this matter, the Commission is persuaded that a waiver should be granted to allow the former employee to continue oversight and inspection work in connection with the NSP on a temporary, part-time, contractual basis, under the conditions set forth below. The Commission notes the need for affordable housing in this County and, thus, the critical nature of the NSP which benefits some New Castle County residents directly and all residents indirectly. Further, the Commission does not want the County to lose the funding for this program which it receives from the federal and state governments. And the Commission is aware of the difficulty the County is having, along with almost all employers across the nation, as they try to find qualified people to replace those who have decided to leave employment for various reasons, especially since the pandemic began.

The waiver is granted but only as long as the following conditions are met: (1) an hourly rate not in excess of \$35.00; (2) the total hours per week not in excess of 25 hours over 4 days in the week; and (3) the waiver shall extinguish no later than February 28, 2024. In granting this waiver with these conditions, in addition to overseeing the NSP, it is anticipated that the former employee will train other County employees, existing or newly hired, so that others will be able to take over the responsibilities involved with the Program inspections, etc. A request to extend this waiver will not be granted absent good cause shown.

### **Finding**

With the conditions and limitations as set forth above, a waiver of the two-year post-employment prohibition pursuant to the undue hardship standard is GRANTED under the facts and circumstances presented by the Community Services Department in this request and Commission decision.

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. It is the expectation of the Commission that all County officials and employees conduct themselves in a manner which exceeds the minimum standards set forth in the Ethics Code.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION

ON THIS 8<sup>th</sup> DAY OF FEBRUARY, 2023.

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Robert Ralston, Chairperson  
New Castle County Ethics Commission

Decision: 6-0.