



## **WAIVER 24-01**

**Date: February 7, 2024**

### **Decision By:**

Commissioners: Johanna Bishop, Brandon Brice, Robert Hicks, Sally Jensen, Robert Ralston, 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 retiring County employee to perform highly specialized duties in connection with the County's therapeutic riding program?

### **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 retiring employee on a temporary, contractual basis outweighs any potential unjust enrichment to the retiring employee. The Equestrian Program Supervisor recently retired from County service and the Community Services Department needs to overcome a gap in service created by the retirement while the County searches for a permanent replacement. The highly specialized nature of this position will make it very challenging for the County to find a qualified replacement within a critical timeframe, thus necessitating this waiver.

### **Facts**

The Community Services Department ("Requestor" or "Department") has asked the Ethics Commission to grant a waiver of the two-year post-employment restriction, found in Section 2.03.103.D of the New Castle County Code. On January 6, 2024, the County's Equestrian Program Supervisor gave her notice of intent to retire effective February 16, 2024. The position held by the current Equestrian Program Supervisor (the "retiring employee") is a singular position and the retiring employee has highly many specialized skills and qualifications which no other County employee possesses. Thus, asking other County employees to fill this gap in services is not a possibility.

The County has a memorandum of understanding (“MOU”) with the University of Delaware (“UD”) which establishes Carousel Park & Equestrian Center as the partnering Premier Accredited Center for UD’s equine therapeutic certificate program. Carousel Park provides the facilities and horses for all program-related activities. The MOU also requires a Certified Therapeutic Riding Instructor (“CTRI”) to serve as an instructor and administrator/facilitator. Thus, a CTRI from Carousel Park must provide classroom instruction at UD as well as on-site classroom and hands-on training at Carousel Park. The retiring employee is the only County employee with the requisite qualifications to perform these duties.

Further, Carousel Park holds a premier accreditation with the Professional Association of Therapeutic Horsemanship International (PATH International). The Carousel Park therapeutic riding program is currently preparing for its national recertification and site visit through the PATH International. The County must submit its application for recertification by June 2024 and the site visit for that recertification will take place sometime thereafter, as scheduled by PATH International. The participation of the retiring employee in this entire process is critical to its success. And the County must maintain its certification to perform its duties under the MOU with UD. Without the services and expertise of the retiring employee, the County could run the risk of violating the MOU with UD.

The Department would like to enter into a contract with the retiring employee so that she can continue to provide the services to the County that she has been performing as an employee, but that would violate the Ethics Code without a waiver from the Commission. The Department would like the contract to begin on February 19, 2024. It would cover the continuation of the MOU with UD; preparation, completion, and submission of all reporting documents for the PATH recertification process, including the site visit; as well as other duties related to the riding program. The retiring employee’s current hourly rate of pay is \$36.17; the Department would like to increase that rate of pay to \$40.00 per hour. The work under the contract is intended to be part-time, averaging about 10 hours per week. The Department believes that the contract will be needed for about six to eight months.

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

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

In this case, the subject employee would be performing the exact same duties for which she 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 W20-03, the Ethics Commission was asked whether a waiver requested by the Public Works Department should be waived so that it could legally contract with a former County employee to perform inspections of stormwater management facilities to fill an opening while the normal hiring process was hampered by the restrictions related to the CoVid-19 pandemic. The Commission decided that the waiver should be granted to overcome a gap in critical service while the County searched for permanent replacements to fill open inspector positions because the restrictions posed by the pandemic made it very difficult to fill positions which required hands-on, in-person training. Indeed, at the time, most hiring by the County had been suspended due to the state of emergency resulting from the CoVid-19 pandemic. The Commission granted the waiver and ruled that 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 prevented the 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.

Similarly, in W20-04, the Commission granted a waiver request so that the County could contract with a former County employee for part-time employment paid at an hourly rate to assist with the administration, compliance, and reporting responsibilities of CARES Act funding provided by the federal government to New Castle County while the normal hiring process was hampered by the restrictions related to the COVID-19 pandemic. The Community Services Department needed to properly handle over \$6 million in CARES Act funding on a time-restricted basis. Such a temporary contract facilitated the provision of increased services to the citizens of New Castle County, the need for which had been augmented by the challenges presented by a global pandemic. The granting of the waiver had little or no net impact on the County's resources, as it was funded by the CARES Act itself, and with little or no unjust enrichment inuring to the benefit of the former employee.

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 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 achieve certain goals by entering into a contract with the retiring employee, including (1) to prevent a failure on the part of the County to meet its obligations in the

MOU with UD, and (2) to attain its recertification with PATH International. The only person who possesses the experience and qualifications necessary to achieve these goals known to the County at this juncture is the retiring employee. The hiring of the retiring employee on a part-time basis averaging about ten hours a week at an hourly rate which is slightly more than her current rate of pay is acceptable under the circumstances. A period of six to eight months for the term of the contract is also reasonable.

### **Finding**

The facts presented by this waiver request present a good example to demonstrate why 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 for the reasons set forth in this opinion. A waiver of the two-year post-employment prohibition pursuant to the undue hardship standard is hereby GRANTED for a temporary contract with the retiring employee to perform the duties as presented in the request by the Department, on a part time basis averaging ten hours per week, for a term not to exceed eight (8) months from its commencement, and at a rate not to exceed \$40.00 per hour. Any deviations in the contract from those terms must be presented to the Commission for its additional consideration. The Commission has been assured that the County will move forward in its search to replace the retiring employee with due diligence.

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 CASTLE COUNTY ETHICS COMMISSION

ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2024.

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Dr. Johanna P. Bishop, Chairperson  
New Castle County Ethics Commission