



## **WAIVER 24-03**

**Date: July 10, 2024**

### **Decision By:**

Commissioners: Johanna Bishop, Robert Hicks, Sally Jensen, Robert Ralston, Charles Toliver and Allan Zaback

### **Question**

Whether the waiver requested by the Department of Community Services 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 Departmental payroll functions?

### **Conclusion**

The waiver is denied. The Commission finds that the position would require the retiree to perform duties for which she was materially responsible immediately prior to her proposed retirement and does not require specialized or complex skills unique to the retiring employee. The Department has not described any resulting undue hardship if it may not hire the retiree. The Commission finds that the grant of a waiver is not warranted in the absence of undue hardship as it would render the Code's two-year prohibition meaningless and weaken the public's confidence in the Department's hiring processes.

### **Facts**

An administrative aide (the "retiree") in the Department of Community Services has informed Departmental management that she intends to resign in September 2024. The retiree handles all aspects of the Department's payroll functions and is a highly valued County employee. In addition to processing payroll for over 150 full-time and 350 part-time employees, the retiree also handles attendance records, adjustments, severance payments, and auditing functions. The Department is in the process of looking for a replacement for the retiree but does not expect to have that position filled or adequately trained by the date of her retirement. The retiree is willing to continue to work for the County after her retirement on a contractual basis and the department does not expect that such an arrangement would be needed for more than four months. The Department

does not have another staff person who has the time or ability to absorb the functions performed by the retiree. Thus, they are asking for this waiver.

**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 W10-01, the Commission was asked to issue a waiver in similar circumstances. The requester asked for a waiver to hire by contract a retiring County employee to continue her work on a program which she created at the behest of her Department. The Commission denied the waiver request and found that the position would require the retiring employee to perform duties for which she was materially responsible immediately prior to her retirement. The job does not require specialized or complex skills unique to the retired employee. The Department did not identify any resulting hardship if it could not employ the retiree other than the issues which typically occur during the hiring process and transition for retiree replacement. The Commission found that granting the waiver as requested would negate the purpose of the two-year post-employment prohibition.

In Ethics Commission matter W12-01, an employee has notified his department that he intends to resign on a specific date in a few months. His County position included responsibility for, and oversight of, complex and very technical designs implemented by particular current vendors. Two of those vendors expressed interest in hiring him subsequent to his resignation and he expected to take a position with one of them. The employee understood that after retirement he was prohibited from working for either vendor on projects involving the County on which he gave an opinion, conducted an investigation, or otherwise was directly and materially responsible for such matter in the course of his former official duties. As a result of his pending retirement and his possible employment by one of the two firms who had made offers, his department had reassigned many of his duties to other employees. The department stated, however, that it had no other employee with the technical level of expertise to perform certain remaining tasks. The department stated that without the employee's unique expertise, it would not be able to comply with the completion deadline for a portion of the project. The Commission denied the waiver request and found that continued interaction by the employee with either vendor with which he was considering future employment would create an improper appearance and violate the Ethics Code. The waiver authority granted to the Commission

in the Ethics Code is specific and limited to situations involving the post-employment prohibition and the filing of a statement of financial interests. The Commission has no authority to grant a waiver of an appearance of impropriety.

### **Analysis**

An employment contract granted shortly after retirement or resignation on the basis of expediency, merely because an employee acquired some administrative 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 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 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.

In the waiver request at hand, such undue hardship does not exist. In this case, although the retiree is clearly a valued County employee, that position does not appear to require specialized or unique skills that are unavailable on the open market within a reasonable time. The granting of this waiver request is not warranted in these circumstances as it would eviscerate the purpose of the prohibition by weakening the public's confidence in the County's hiring practices.

### **Finding**

The Commission finds that the position would require the retiree to perform duties for which she was materially responsible immediately prior to her retirement and does not require specialized or complex skills unique to the retiring employee. The Commission

finds that a grant of a waiver is not warranted in the absence of undue hardship as it would render the Code's two-year prohibition meaningless and weaken the public's confidence in the County's hiring practices.

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 10<sup>TH</sup> DAY OF JULY 2024.

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Robert Hicks, Chairperson  
New Castle County Ethics Commission