



ADVISORY OPINION 19-02

Date: September 18, 2019

Decision by Commissioners:

Paula Jenkins-Massie, Sally Jensen, Robert Ralston, Kellie Tetrick and Charles Toliver

Question

Whether an elected County official may enter into a contract with an educational institution to receive payment for teaching a 4-part seminar series on subject matter which is related to his County position without violating the Ethics Code?

Conclusion

The County official may enter into a contract with an educational institution to receive payment for teaching a 4-part seminar series on a subject matter which is related to his County position without violating the Ethics Code so long as he carefully observes Ethics Code provisions, and avoids Ethics Code issues, including, but not limited to, using any County resources for this contractual work; representation of another's interests before County government; maintaining the confidentiality of non-public information known to him by virtue of his County office; and treating members of the public who do business with his office in an impartial manner regardless of their involvement with the educational institution involved.

Facts

An elected County official (the "Requester") has asked the Ethics Commission whether he will violate the Ethics Code if he enters into a contract with a local educational institution to teach a course for their students in its division of Professional and Continuing Studies. The Requester provided a copy of the unsigned contract to the Commission for its review in connection with the request for this opinion. The course will be taught during the spring or summer of 2020 and will consist of 4 classes, 3 hours each. The classes will be held in the evening, and not during after the Requester's County business hours. The educational institution will pay the Requester a set sum which, according to the contract, is calculated using an hourly rate for the number of hours the Requester will spend teaching the class, along with a couple of extra hours added into the sum to cover course preparation. The contract also states that the Requester will perform other tasks, as needed, which could require additional time on his part including: making himself available to students; returning graded assignments in a timely manner; attend faculty meetings and info sessions as requested; and obtain permission from any copyright owner necessary for content used in the class. The contract is silent on whether or how the Requester is compensated for any time he may spend performing those additional tasks.

The Requester has informed the Commission that the educational institution initiated the contact with him about teaching this seminar series. The Requester also informed the Commission that the educational institution is not using the Requester's name, any references to his official County position, or the name of the New Castle County government in its promotional materials and advertisements for the course. The seminar series will be advertised by the name of the course, only, in connection with its Professional and Continuing Education program offerings. In any promotion or informational materials about this seminar series, the Requester will be referred to by his name with post-nominal title, which indicates his graduate degree and professional status, but without any reference to his official County title. Due to the nature of the functions of his office and the nature of the educational institution, the Requester's office does not regulate the educational institution. The Requester has informed the Commission that, to his knowledge, the educational institution has no current business with his office, and he does not anticipate any interaction between his office and the educational institution.

Code and Prior Opinion:

Relevant Ethics Code Provisions and Case Law

In Section 2.03.102, the following relevant terms are defined by the Ethics Code, as follows:

Appearance of Impropriety means conduct which is prohibited by Section 2.03.104.A.

Authority of office or employment means the actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular County office or position of County employment.

Business means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

Business with which he or she is associated means any business in which the person is a director, officer, owner or employee; or a business in which a member of the person's immediate family is a director, officer, owner or has a financial interest.

Compensation means any money, thing of value or any other economic benefit of any kind or nature whatsoever conferred on or received by any person in return for services rendered or to be rendered by oneself or another.

Conflict or conflict of interest means conduct which is prohibited by Section 2.03.103.

Contract means an agreement or arrangement for the acquisition, use or disposal by the County of consulting or other services or of supplies, materials, equipment, land or other personal or real property. "Contract" shall not mean an agreement or arrangement between the County as one (1) party and a County official or County employee as the other party concerning his or her

expense, reimbursement, salary, wage, retirement or other benefit, tenure or other matters in consideration of his or her current public employment with the County.

County means New Castle County and including any County Department.

County official means any person elected or appointed to any County office, board, commission or the New Castle County Council Audit Committee provided, however, that for purposes of Sections 2.03.103.B.2, 2.03.103.C, and 2.03.104.C. "County official" does not include any member of a board or commission which operates solely in an advisory capacity, and whose members are not compensated, other than reimbursement for expenses.

Financial interest means any interest representing more than five (5) percent of a corporation, partnership, sole proprietorship, firm, enterprise, franchise, organization, holding company, joint stock company, receivership, trust, or any legal entity organized for profit.

Governmental body means any department, authority, commission, committee, council, board, bureau, division, service, office, official, administration, legislative body, or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any department performing a governmental function.

Governmental body with which a County official or County employee is or has been associated means the governmental body within County government by which the County official or employee is or has been employed or by which the County official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Income means any money, thing of value or other pecuniary benefit received or to be received in return for, or as reimbursement for, services rendered or to be rendered. The term does not include gifts; governmentally mandated payments or benefits; retirement, pension or annuity payments funded totally by contributions of the County official or employee; or miscellaneous, incidental income of minor dependent children.

Private enterprise means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the federal, State or local government or of any department, authority or instrumentality of the federal, State or local government.

Reasonably foreseeable means an event which should be expected or anticipated based upon credible past and present facts known to a reasonable observer or participant at the time a decision is made or an action taken.

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.

Regulated by New Castle County means that an entity operating in New Castle County as a business or nonprofit organization requires approval from or regulation by New Castle County in order to lawfully conduct one or more business activities.

Regulation includes, but is not limited to, obtaining permits, registering residential rental property, or trade licensing, but does not include the payment of property taxes, sewer service charges, individual library use charges, park fees, animal licensing fees or other similar fees.

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which either 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.¹ 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.Supr. 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.

It is a violation of the New Castle County Ethics Code if a County official or employee uses his or her office or employment for his or her personal or private benefit, the benefit of a member of his or her immediate family, or a business with which he or she is associated.² The Ethics Code’s conduct rules in Section 2.03.104.A prohibit exercise of official authority which creates an appearance that the decisions or actions of a County official or employee are influenced by factors other than the merits of the matter for the decision. This prohibition exists because such conduct undermines public confidence in the impartiality of the individual or governmental body with which the employee or official is associated.

The Code recites special prohibitions on County officials concerning their involvement with outside interests which interact with the County government. Section 2.03.103.B.1 prohibits any County

¹ New Castle County Code Section 2.03.104.A states: “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.”

² New Castle County Code Section 2.03.103.A.1.

official or employee from “represent[ing] or otherwise assist[ing] any private enterprise with respect to any matter before the County Department with which the employee or official is associated by employment or appointment.” Further, Section 2.03.103.B.2 prohibits the official from representing or assisting any private enterprise with respect to any matter before the County. This restriction extends to non-profit organizations as well as private businesses or private concerns.³

Prior Commission Opinions

In Advisory Opinion 19-01, the Commission was asked whether a County plan examiner in the Land Use Department, who was also a registered architect in Delaware, could take on private contractual employment as an architect for clients outside of New Castle County without violating the Ethics Code. In that opinion, the Commission reviewed its prior opinions regarding outside employment and listed the factors which are considered in most of its opinions when determining whether a proposed outside employment passes muster under the Ethics Code. They include:

1. The nature and scope of the employee’s County position as it may relate to the proposed outside employment;
2. Whether the proposed business is regulated by the County;
3. Whether the work involved in the proposed outside employment is the same as, or similar to, the work performed by the employee for the County;
4. Whether County resources of any kind are likely to be used by the employee in the outside employment; and
5. Whether any conflicts exist and the methods to prevent or minimize potential conflicts.

When the Commission reviewed the answers to these questions in this Opinion, the Commission determined that the employee could perform the outside employment but only under certain circumstances to avoid Ethics Code violations. The Commission concluded that the County employee was required to very carefully observe Ethics Code issues which relate to outside employment, including, but not limited to, taking on contracts with persons or entities which are not regulated or serviced by New Castle County; conducting any such private work outside of County working hours only; not using any information gained through employment with the County; and keeping his supervisors informed of any and all such outside work, to prevent the creation of a situation which is in violation of the Ethics Code.

³ New Castle County Code Section 2.03.1.03.B.2, and 3. *Prohibitions relating to conflicts of interest.*

B. Restrictions on representing another’s interest before the County.

2. No County official may represent or otherwise assist any private enterprise with respect to any matter before the County. This prohibition is to be considered personal to the County official and is not, for purposes of the New Castle County Ethics Code inly, deemed to impact other members of a firm, business, or other employer by which the County official is employed.

3. This subsection shall not preclude any County employee or County official from appearing before the County or otherwise assisting any private enterprise with respect to any matter in the exercise of his or her official duties.

In Advisory Opinion 07-09, a County official, who was an attorney, requested guidance on whether she was permitted to engage in outside employment in matters in which the County was not a party and which would not come before the County as a plan, permit or application. The Commission determined that the attorney was permitted to pursue outside employment if the outside legal work had no nexus with the County, and the Commission cautioned the attorney that she must make the County Attorney aware of each specific representation so that matters pending before the law department, about which she may be unaware, could be reviewed for conflicting representation, disclosure of confidentiality, or appearance of impropriety purposes. Because the law department represents the whole of County government, the Commission reasoned that the attorney may not represent clients who had other business presented to or which was pending before the County in any unrelated matter. Further, the Commission stated that the employee must be careful not to use confidential information obtained in County employment for the benefit of her private clients.

In Advisory Opinion 11-07, the Commission was asked whether an employee who owns an outside business may secure financial services from institutions that contracted, or in the future may bid for business, with New Castle County. The Commission concluded that the employee owning the non-conflicting outside business was permitted to seek financial services from financial institutions that had, or in the future may bid for, financial services business with New Castle County, as long as the employee avoided using his senior status with his County department to secure financial services for the outside business. The Commission further prohibited the employee from entering into contracts with those institutions which created the appearance that he was using his County employment to secure unwarranted advancement for that business. The employee was required to disclose the fact and extent of his relationship to the selected institutions to his superiors and completely recuse from the exercise of County authority in relation to the institutions he selected and to his competitors.

In its analysis in that opinion, the Commission highlighted some of the Ethics Code issues involved with outside employment undertaken by County employees. The Commission stated:

That issue is only problematic here because of the senior level of authority the requester holds in his department, a department which has significant relationships with a variety of outside financial institutions.

The requester will have to disclose his employment with the County to the financial institutions but he must adopt stringent measures to avoid trading on his County status to advance the interests of the private business. He may not seek or accept any contracts or loans if a reasonable person would suspect that they bear any relationship to his level of County authority. He must be prepared to be transparent about his business relationships with the selected financial institution by keeping his superiors informed about both the existence and extent of them.

The requester is aware that he would violate the Ethics Code conflict rules if he performs official acts related to the financial institution he selects for his business. However, he may not understand that official conduct regarding the competitors of his business or his official conduct regarding the competitors of the selected financial institution will also come under scrutiny. Depending on the factual circumstances, recusal may be necessary in those circumstances as well since his conduct may create an appearance of partiality when the competitors are disadvantaged by his actions. In such situations, if he does not recuse, he must consult the Commission for clarification prior to performing official acts.

In Advisory Opinion 07-07, a County employee secured part-time employment with a business which used his professional services in projects primarily for the federal government. In that scenario, the outside employer did not seek or bid on work for the County and was not otherwise regulated by the County. The Commission reasoned that because the outside employer did not do any business with and was not regulated by New Castle County, the part-time employment did not violate the Ethics Code. The employee was further advised to make his supervisor aware that he had secured outside employment.

Analysis

The question of outside employment for County officials and employees is one which is raised quite often with the Commission. This is necessary because there are no provisions in the current Ethics Code which expressly prohibit outside employment of County officials or employees. As such, it may be permitted as long as there is no nexus between the official's County position and the proposed outside employment, and the Commission has provided advice to that effect. The goal of the Commission in rendering opinions on outside employment issues is to prevent harm to the trust of the public that County officials and employees are not using their respective County positions for personal gain, and to prevent or minimize conflicts or the appearance of conflicts. The conclusions reached by the Commission in each opinion turn on the application of the Ethics Code and its prior opinions to the facts presented in each individual scenario. As stated above, certain questions or factors are considered most often, including:

1. The nature and scope of the employee's County position as it may relate to the proposed outside employment;
2. Whether the proposed business is regulated by the County;
3. Whether the work involved in the proposed outside employment is the same as, or similar to, the work performed by the employee for the County;
4. Whether County resources of any kind are likely to be used by the employee in the outside employment; and

5. Whether any conflicts exist and the methods to prevent or minimize potential conflicts.

In this instance, the Requester is an elected County official whose office serves an essential function for New Castle County. His office handles extremely important matters to the people it serves, and the scope of the matters is specialized. The office of the Requester may deal with someone only once in that person's lifetime, but it also regularly services and deals with people repeatedly who handle the kinds of matters which are brought to the Requester's office. It is possible, therefore, that the Requester may interact in his official County capacity with people who are his students, employ his students, or work with his students. This could happen while the seminar series is taking place or sometime thereafter. The Requester will need to take reasonable measures to keep himself informed to determine whether such a circumstance arises and, if it does, he should consult with the Commission for guidance and/or recuse himself from involvement in official business with anyone who falls into any of those categories. In order to avoid an Ethics Code violation, the Requester must not engage in any conduct which may create the perception to the public that he is providing favorable or biased treatment in his County office to his students or persons associated with his students. While the likelihood of this kind of thing happening is relatively low, we live and work in a comparatively small region and the Requester's field is rather specialized, so it is a possibility which is reasonably foreseeable, under the circumstances.

The educational institution is a large organization which sometimes requires permission from the County to conduct its normal course of business, but it is not likely that the Requester's office will be one of the County offices involved in any such regulatory processes. If the unexpected situation happens where the educational institution has business to conduct with the Requester's office, the Requester should not handle any matter involving the educational institution and should immediately consult with the Ethics Commission for guidance to remain in compliance with the Ethics Code.

The work performed by the Requester's office is not performed by any other entity in New Castle County, including the educational institution. Additionally, to avoid Ethics Code violations, the work that the Requester will perform for the educational institution will not take place on County property and will not use any County resources because the Requester will perform the tasks for the educational institution only when he is not working for, or being paid to work by, the County. Also, the Requester must avoid using nonpublic information, which he possesses because of his County office, in any of his teaching or related interactions while he is performing his duties to the educational institution under the contract.

Further, the educational institution is not identifying the Requester as a County official in any of its materials promoting or describing the seminar series. The Requester did not initiate contact with the educational institution regarding this outside employment and did not use his official position to secure any form of personal gain which he may receive by teaching the seminar series for the educational institution.

Finding

The Requester will not violate the Ethics Code if he signs the contract with the educational institution to teach the seminar series, as presented to the Commission, and under the facts provided by the Requester to the Commission, so long as he does not use any County resources in this outside employment, he does not interact in an official capacity on County business with the educational institution, and he does not interact in his official capacity with his students in any manner which a reasonable person may perceive as favorable or biased. The Requester is encouraged to consult with the Ethics Commission as his contract work moves forward if any of the scenarios mentioned in the Analysis section, above, occur, so that potential Ethics Code violations may be avoided.

The Commission commends the Requester for seeking an advisory opinion from the Commission in this instance, and the following is not directed at the Requester. The Commission is aware that certain County employees, such as those working in Public Safety, must seek and receive permission from management before engaging in outside employment. Indeed, many governments require that of their employees across-the-board. For many years, the Commission has held the belief that implementing such a policy on a County-wide basis could be beneficial, and it continues to believe that the implementation of a system which regulates and monitors the outside employment of all County employees would enhance the public's trust in County government. The Commission's jurisdiction is clearly limited to the interpretation and application of the Ethics Code when it issues advisory opinions or handles complaints. The Commission, in most cases, is not able to determine the extent to which its opinions which permit outside employment are adhered to, and if they are, how those opinions may affect the flow of work, the execution of County business, and the cost to the taxpayer. The Commission is involved in ongoing discussions on this topic as requests for advisory opinions are presented, but, because of its limited jurisdiction, the Commission strongly believes that this is an issue which should be reviewed and addressed by policy makers and legislators.

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 18TH DAY OF SEPTEMBER 2019.

Paula Jenkins-Massie, Chairperson
New Castle County Ethics Commission

Decision: Unanimous