



ADVISORY OPINION 21-02

Date: May 12, 2021

Decision by Commissioners: Robert Ralston, Kellie Tetrick, Johanna Bishop, Robert Hicks, Sally Jensen, and Charles Toliver

Question

Whether a County employee who is an engineer in the Land Use Department may hold a part-time clerical job with a local engineering and surveying company without violating the Ethics Code?

Conclusion

The County employee must very carefully observe Ethics Code issues which relate to outside employment and discussed herein, including, but not limited to, handling any matter involving her outside employer as it interacts with the County for any reason, never conducting any work for the outside employer during County working hours, not using any information gained through employment with the County in the work performed for the outside employer, and keeping County supervisors informed of work performed for the outside employer which may have any connection to the County government, to prevent the creation of a situation which may be in violation of the Ethics Code.

Facts

A County employee (the “Requester”) is a recently hired engineer in the Land Use Department. Prior to employment with the County, the Requester had a full-time clerical position with a local company which provides professional land survey and engineering services in Delaware (the “Outside Employer”.) While working for the Outside Employer, the Requester performed administrative and clerical services only, and never performed any engineering services for the Outside Employer. Upon the Requester’s employment with the County, the Outside Employer and the Requester came to an agreement in which the Requester would keep working for the Outside Employer on a part-time basis performing the same clerical duties as the Requester performed when working full-time for the Outside Employer. Those duties primarily involve administrative matters such as drafting invoices for clients, reconciling and facilitating the billing of client accounts, and clerical functions of filing and scanning

documents. Upon consultation with the Requester's supervisor, the Requester has asked the Commission whether the Ethics Code will be violated if the Requester continues employment on a part-time basis with the Outside Employer given the Requester's position as a civil engineer¹ in the Land Use Department.

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

¹ Per the job classification of a New Castle County Civil Engineer I, the employee "performs civil engineering work in the field and office at the entrance professional level; does related work as required. ... Supervision and direction is [sic] provided by the Professional Engineers or managers who are responsible for achieving project or program goals." The minimum qualifications listed in the job classification include "graduation from an ... accredited engineering school with major work in civil engineering."

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 employee means any person who receives compensation as an employee of a County Department or County row office.

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 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.² 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

² 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.”

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.Super. 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.³ 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 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.⁴

³ New Castle County Code Section 2.03.103.A.1.

⁴ 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.

Prior Commission Opinions

In Advisory Opinion 92-07, the Commission was asked under what circumstances may a County inspector, that is, a County employee with building and construction code inspection responsibilities, undertake secondary employment in the construction industry? The Commission concluded that a County inspector may never inspect a structure which he constructed, or which was constructed by a business with which he is associated, as this would create a conflict of interest. Additionally, the Commission concluded that such an ethical problem could not be cured by having another County inspector inspect construction done by his fellow inspector or by a business with which his fellow inspector is associated, as this would create an appearance of impropriety. The Commission stated:

Therefore, the following restrictions must apply to all County inspectors:

A.) A County inspector must limit work done as an individual to construction which would not be subject to County inspection, either by virtue of the nature of the construction or its location outside the County's geographic jurisdiction.

B.) A County inspector must not be associated with a business which does any construction subject to County inspection.

In Advisory Opinion AO19-01, a County employee who is a plan examiner in the Land Use Department, and who is also a registered architect in Delaware, asked the ethics Commission whether they could take on private contractual employment as an architect for clients outside of New Castle County without violating the Ethics Code. The Commission decided that the County employee could accept outside architectural work so long as the employee informed the County supervisor about the outside work before such works began, the work was performed somewhere other than New Castle County, the work was done entirely during the County employee's non-paid, free time, and the employee affirmatively recuses from any County work which is or may be related to any person or entity which hires or hired the employee for outside work.

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 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 13-10, a County employee asked the Commission whether she may seek outside employment performing duties similar to those she performs for the County involving grant writing. The Commission concluded that the requester may not provide grant writing services to any entity if her department is potentially eligible for the same grant. The Commission further prohibited the requester from providing services to any entity which was affiliated with the County, sought or did business with the County, or was regulated by or was reasonably foreseen to be regulated by the County in the next three years. The requester's department's administrative prohibition regarding outside employment with the specific County affiliated nonprofit is in accord with the restrictions imposed by the Code and this opinion.

In Advisory Opinion 12-05, a County official asked the Commission whether he could become an administrative employee of an outside business that contracts with private associations to maintain real estate which may include structures inspected by the County department where he is employed. The Commission concluded that in order to avoid a violation of the Ethics Code, the requester may not become an employee of the outside business since a portion of its work is inspected by his Department.

Analysis

The Ethics Code does not expressly prohibit outside employment of County officials or employees, and it may be permitted as long as there is no nexus between the employee's County position and the proposed outside employment. The Commission has issued many opinions over the years regarding the propriety of various outside employment situations. The goal of the Commission in rendering opinions on outside employment issues is to prevent the harm to the public trust if an appearance is created that incorrectly gives the public the impression that County officials and employees are using their respective County positions for personal gain. An additional goal is to prevent or minimize conflicts or the appearance of conflicts. The conclusions reached by the Commission turn on the application of the Ethics Code and its prior opinions to the facts presented in each individual scenario. Certain questions or factors, however, are considered most often in outside employment matters, 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 are in place.

An application of the above-listed factors to this matter is instructive. While nature and scope of the Requester's County position apply to some of the work performed by employees of the Outside Employer, the Requester has never performed those functions for the Outside Employer when working for them full-time, and the part-time employment will similarly not include any engineering functions. The Outside Employer is regulated by the County only to the extent that it requires County approvals to perform some of the services it offers to its clients and the Requester is not involved in any of those potentially regulated functions. For those reasons, the work involved in the proposed outside employment is not the same as the work the requester performs for the County. The nature and scope of the clerical work which the Requester will perform for the Outside Employer on a part-time basis are unlikely to involve County resources. With respect to actual or potential conflicts, the Requester is aware that the Ethics Code prohibits the Requester from engaging in any engineering work for the Outside Employer. The Requester is further aware that the Ethics Code prevents the Requester from reviewing or working on any matter which is handled by or presented to the County by the Outside Employer for any reason whatsoever. Further, the requester's supervisor is also aware of these Ethics Code requirements and restrictions. Additionally, the requester understands that a County employee is not permitted to work for an outside employer during County working hours, may never use any information gained through employment with the County in the work performed for the outside employer, and must keep County supervisors informed of work performed for the outside employer which may have any connection to the County government.

Importantly, the Requester must determine whether any matter the Requester handles for the County, now and in the future, involves the Outside Employer before the Requester may perform any work on that matter. At any point, if the Outside Employer becomes involved in a matter being handled by the Requester, the Requester must immediately recuse from handling that matter, and the Requester must inform the supervisor and recuse from any involvement in that matter. Additionally, the Requester may not handle any matter for the Outside Employer which involves New Castle County government, and the Requester must inform the Outside Employer of that fact. Any failure to strictly adhere to any of the requirements set forth in this opinion will create a serious risk of an Ethics Code violation. Ongoing diligence on the part of the Requester and, at the very least, the supervisor, will be necessary for adherence to the Commission's decision.

Finding

The Requester may work part-time for the Outside Employer as described in this opinion so long as the requester avoids actual or potential conflicts through recusal, does not perform any work for the Outside Employer during County working hours, performs only administrative or clerical tasks for the outside employer which are not similar to the work performed for the County, never uses any information learned through work for the County for any purpose other than assigned County duties, and keeps the supervisor informed of any potential or actual conflicts.

In issuing this opinion, the Commission strongly cautions the Requester to contact the Commission without delay if any of the circumstances change from those which are discussed in this opinion, including, but not limited to, an increase in the interaction between the Land Use Department and the Outside Employer; a modification in the Requester's County job duties which causes interaction with the Outside Employer; a modification in the Requester's Outside Employer duties which causes interaction with County business; and/or, especially, if the Outside Employer becomes a County vendor or does work the County in any capacity. The conclusions reached in this opinion may no longer be applicable to the situation if there are any changes to the facts upon which this opinion is based, and the Requester should consult with the Ethics Commission immediately if any factor discussed herein is modified. Additionally, the requester is cautioned, in further attempt to avoid any appearance of impropriety, disclose any information learned through the work performed for the County to anyone associated with the Outside Employer, even in passing. The Requester must create and maintain, at all times, a clear demarcation between the life and all that involves as a County employee from any activity connected with the Outside Employer.

The Requester was correct to ask the Commission for an advisory opinion on this matter and the Commission commends and thanks the Requester's supervisor for recommending that the Requester contact the Commission. The Commission's jurisdiction is limited to the interpretation and application of the Ethics Code when it issues advisory opinions or handles complaints. The Commission, however, is not able to determine how its opinions may affect the flow of work and execution of County business. This practice involving outside employment by approval of the Ethics Commission on a case-by-case basis has resulted in varied and potentially inconsistent outcomes, the success of which depend entirely on the integrity of the persons involved. 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 County-wide policy could be beneficial, and it continues to believe that the implementation by management of a system which regulates and monitors the outside

employment of all County employees would result in more consistent outcomes and, thus, could enhance the public's trust in the impartiality of the business conducted by County government.

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 12TH DAY OF MAY 2021.

Robert W. Ralston, Chairperson
New Castle County Ethics Commission

Decision: 6-0