



WAIVER 20-03

Date: October 14, 2020

Decision By: Commissioners: Paula Jenkins-Massie, Robert Ralston, Johanna Bishop, Robert Hicks, Sally Jensen, Kellie Tetrick, Charles Toliver, IV

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 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 is hampered by the restrictions related to the COVID-19 pandemic?

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 former employee ("Former Employee") on a temporary, contractual basis for part-time employment outweighs any potential unjust enrichment to the Former Employee. The Community Services Department (the Department or Requester) needs to properly handle over \$6 million in CARES Act funding which involves unique circumstances and which is dependent upon deadlines being met as well as many other compliance issues. The Former Employee who would be hired by contract to perform this work temporarily would receive less pay per hour than they did upon retirement and would be hired only for the timespan during which they are needed to administer the CARES Act funding. Such a contract will facilitate the provision of increased services to the citizens of New Castle County, the need for which has been augmented by the challenges presented by a global pandemic. The granting of this waiver will have little or no net impact on the County's resources, as it will be funded by the CARES Act, and with little or no unjust enrichment inuring to the benefit of the Former Employee.

Facts

The Requester contacted the Commission because its Division of Community Development and Housing (the “Division”) recently received over \$6 million in funds per the CARES Act¹. In 2019, the Community Services Department provided services to almost 312,000 people.² More specifically, the Division “[p]rovides oversight for all housing programs such as inclusionary housing and all housing grants awarded to New Castle County including: Community Development Block Grant, Section 8 Housing Choice Vouchers Grant, the Neighborhood Stabilization Program Grant, and the Emergency Solutions Grant.”³ The challenges posed by the COVID-19 pandemic to many New Castle County residents heightens the need for funding to provide housing and many other critical services to low-to-moderate income New Castle County households which have been, are or will be impacted by COVID-19, above and beyond the needs which existed before the pandemic hit this region. The relatively small staff of the Division administers an annual allocation of over \$20 million from the federal government.⁴ The granting of the CARES Act funds presents a significant addition to the amount and nature of work which must be performed by the Division.

None of the pre-pandemic responsibilities of the County employees who work in the Division have lessened in 2020. And the need for additional staff to administer the CARES Act funds has come at a time when the County’s hiring processes, ability to train new employees, and ability to train current employees on new tasks have all been seriously hampered if health and safety protocols are to be properly observed. Beyond those real time challenges, because of the deadlines contained in the CARES Act which control the timeframes within which the funds are to be used, the Requester is not at liberty to wait until it is safe to return to the County’s normal hiring practices, nor can it wait to train someone new to do the work necessary to administer the CARES Act funding. If the funds are not administered properly as set forth in the many details of the funding documents and during the timeframes prescribed, the County runs the risk of losing this critically-needed funding. This reality has been observed by the framers of the CARES Act and it includes funds for the compensation for additional staff as needed to comply with CARES Act requirements. If this waiver is approved, the Division will compensate the Former Employee (who is proposed to perform this work for the Requester) with funds from the CARES Act.

As a consequence of the timing and the work place safety issues which are present, the Requester has found itself in a difficult position. But earlier this year, during May, and around the time when the Requester received its first allocation of CARES Act

¹ The CARES Act is the Coronavirus Aid, Relief, and Economic Security Act, signed into law on March 27, 2020.

² See FY2021 Budget Presentation of Community Services Department to County Council at 25.

³ Id. at 1.

⁴ Id. at 16.

funding, the Former Employee retired from County employment after over two decades of service from a high level management position in the Community Services Department. While the Former Employee may not have worked directly on CARES Act matters specifically, the Former Employee was involved in the management of fiscal operations for the Department and is very familiar with federal grants and how they are administered as that Former Employee spent many years working with various kinds of grant requirements.

If this waiver is not granted by the Commission, because the work which needs to be performed is temporary, the Department would need to hire someone by contract and, most likely, through an employment agency. And regardless of whether the County hires someone temporarily or asks someone currently working for the County to add a significant amount of work to their already full schedule, it is unclear how this person can be trained to do the work required under the CARES Act unless the County is lucky enough to be sent someone who is very familiar with the administration of federal grants. Given the growth status of the COVID-19 rates locally and around the world, and the funding which is being requested and offered by all levels of government and other funding entities, it is likely that people with skills in the administration of aid grants are probably in high demand at this time and may not be readily available for temporary hire by the County. And it would be irresponsible for the Requester to rely on chance given the funds which are at stake, the critical needs of County residents, and the deadlines which are connected to the use of the funds.

If this waiver request is granted by the Commission, the Requester intends hire the Former Employee on a contractual, part-time basis which will compensate the Former Employee not more than \$35.00 an hour, which is less than two-thirds of the hourly rate which the Former Employee was receiving at the time of retirement. The Requester anticipates needing the Former Employee to perform this part-time work for approximately 18 to 20 months, as the funds must be distributed before December 31, 2021. The Former Employee is ready to perform the requested work on the CARES Act funds and would not require any additional training to fulfill these tasks.

Code or Prior Opinion:

New Castle County Code Sections

In this case, the Former Employee could be performing duties similar to those for which they had been directly and materially responsible during the course of his County employment, but if they were, any such involvement was very short-lived. Nevertheless, 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.”

Section 2.03.105.A gives the Commission the authority to grant a waiver from the prohibition:

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.

Section 2.03.105.C sets forth whether the records of a waiver request are confidential or public:

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 similar to the post-employment prohibition and waiver authority granted to the Delaware Public Integrity Commission (“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 W20-02, the requester asked the Commission whether the two-year post-employment restriction could be waived so that it could 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 granted the waiver and found that the County was attempting to prevent a failure of the inspection process of stormwater management facilities during the times of the year which would present increased demands on those facilities. Undue hardship to the County existed without the granting of the waiver because these inspections were not simply desirable, they were mandated by law. If the County failed to perform those necessary inspections, stormwater management problems would be unnecessarily created throughout the county which could result in the imposition of financial penalties against the County by the regulating agencies. The Commission determined that if the waiver was not granted, essential services upon which County citizens rely would not be provided. Additionally, the Commission found that the requester had no control over the declaration of a state of emergency due to the COVID-19 pandemic and the fact that it interfered with the County's normal hiring processes. The Commission approved a waiver for the hiring of the former inspector at a rate which was less than the hourly rate paid to fulltime County employee inspectors, plus mileage to and from inspection sites if a personal vehicle was used, for a period of fifteen weeks.

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 Ethics Commission matter 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 normally not qualify for a waiver because the reason for the prohibition in the statute would be undermined. 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.

The Ethics Code contemplates the need for exceptions to this rule, however, and it provide that a waiver request may be granted if the "undue hardship" to the County standard is satisfied even if a former employee capitalizes on knowledge gained through public employment for the County. "Undue hardship" has been defined by the PIC as "excessive hardship". This phrase means more than ordinary hardship to 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.⁵ Additionally, waivers on the basis of cost or continuity can give the appearance 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 it would also weaken the 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 undue hardship to the County has been shown to exist, however, the Commission has granted applications for waivers. Especially relevant is the Commission's recent waiver opinion in W20-02 in which it granted a waiver so that the County could hire a former employee to perform work which is technical and specialized, and which did not lend itself to training someone new to perform the job while observing the social distancing requirements for safety during this pandemic. Additionally, if the County could not find someone to perform the work, on a temporary basis, the consequences to the County would be very costly and the welfare of the residents of New Castle County could be jeopardized. Under those conditions, the granting of a waiver for the temporary re-employment of a former employee who was trained in that line of work was warranted.

⁵ See, e.g., PIC Commission Op. 97-41.

Similarly, in the waiver request at hand, such undue hardship exists. The Requester is attempting to prevent the loss of over \$6 million in federal grant funds which are critically needed by many New Castle County citizens experiencing hardship due to the pandemic. The COVID-19 pandemic has presented additional challenges to everyone and the County government is attempting to provide help to people in need through the administration the CARES Act funds. The current employees of the Division already have full schedules with work which exists separate and apart from matters presented by the pandemic. Normal hiring and training processes are severely hampered by the safety protocols for the workplace during the pandemic. The Division must use the CARES Act funds as required by law and by certain deadlines, or the County will lose those funds. For the persons who will be helped by the provision of CARES Act funding, the stakes are extremely high. The administration, compliance, and reporting requirements of federal grants is very complicated and is a highly specialized undertaking, especially when deadlines and reporting requirements vary within the Act and they are interspersed among all of the many types of funding, where one deadline attaches to certain portions of the granted funds, while other deadlines attach to other types of funding, all within the same Act. When the clock is ticking and the stakes are this high, coupled with the practical inability to hire someone new and train them to do this kind of technical work, it is prudent for the Division to find someone who has experience in meeting compliance requirements of federal grants and the many deadlines involved. Further, the Former Employee will be paid for this work out of CARES Act funds. It is reasonable, therefore, under the circumstances presented to the Commission in this request, that the Division has asked the Commission for a waiver so that the Former Employee may be temporarily hired to perform this work as discussed herein.

Finding

The facts in this waiver request present a good example which justifies the existence of a provision in the Ethics Code for a waiver of the two-year post-employment restriction. Although such waivers are not favored, the granting of this waiver is justified. A waiver of the two-year post-employment prohibition pursuant to the undue hardship standard is GRANTED for part-time employment of the Former Employee for a period not to exceed twenty (20) months from its commencement, and at a rate not to exceed \$35.00 per hour, to be paid out of CARES Act funds, as presented by the Department in its waiver request.

If the Requester finds that it needs additional or different conditions which are not specifically granted in this waiver opinion, the Department must consult with the Ethics Commission again regarding any additional or continued needs. The Commission commends the Requester for finding a solution to a very real problem and for consulting the Ethics Commission before acting on this matter. The COVID-19 pandemic has presented County officials, County employees, and County residents with highly unusual

circumstances and an uncertain present and future. This situation has required creative diligence to complete tasks and duties which may have been deemed routine just a few months ago. The citizens of New Castle County can be reassured, by this example, that the public servants employed by their County government are committed to remaining within the parameters of the Ethics Code while providing quality service to County citizens even during a global pandemic.

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 14TH DAY OF OCTOBER 2020.

Paula Jenkins-Massie, Chairperson
New Castle County Ethics Commission

Decision: Granted.

Yea: Jenkins-Massie, Ralston, Jensen, Toliver.

Nay: Bishop, Hicks.

Abstain: Tetrick.