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March 3, 2015

15-04 – Conflict of Interest

Hearing and Decision By: *William F. Tobin, Jr., Chair**,** Mark Dunkle, Esq., Vice Chair; Commissioners: Lisa Lessner, Jeremy Anderson, Esq., Dr. Wilma Mishoe*

Dear Mr. McDowell,

Thank you for attending the Commission hearing on March 3, 2015. After careful consideration of the relevant facts and circumstances, the Commission decided the dual roles served by EastSide's board of directors and school leaders do not create a conflict of interest so long as the two schools maintain separate finances and FFA's board is expanded to allow members to recuse when conflicts of interest make participation inappropriate.

FACTS

You are the Chairman of the Board for EastSide Charter School (EastSide). EastSide has a total of 19 board members. In December 2014, your board was contacted by the Delaware Charter Schools Network and asked if members of EastSide's board, along with EastSide's school leader and finance director, would consider replacing the directors and board members of the Family Foundations Academy (FFA). FFA's co-directors were suddenly terminated after it was discovered they were allegedly using the school's money for personal use. As a consequence, FFA was under scrutiny by the Department of Education and told that unless the entire FFA board was replaced, the school would likely lose its charter. In response, you and three other members of EastSide's Board (Jocelyn Stewart, Tom Humphrey and Charles Toliver) along with other outstanding members of EastSide's leadership team graciously agreed to assist the school.

To memorialize the new relationship between EastSide and FFA, both parties entered into a Consulting Agreement which allows EastSide to collect monies from FFA to offset personnel costs related to the additional FFA duties. Dr. Lamont Browne, EastSide's leader, will serve as Executive Director for both schools and EastSide's Director of Finance, Nick Medaglio will also serve both schools. Other EastSide personnel may be asked to perform additional duties for FFA. You stated FFA will benefit from the agreement because the savings the school realized from the termination of the two co-directors will more than offset the monies paid to EastSide. EastSide will benefit by having FFA cover part of their personnel costs as well as being able to realize economies of scale. The agreement will expire at the end of the 2016 school year.

Both charter schools qualify as state agencies. *See* 29 Del. C. § 5804(11) and *Commission Op. 07-63.* Because they are both state agencies there may be a perception that the Code of Conduct does not apply to dealings between the two entities. However, unlike other provisions of the Code of Conduct, 29 Del. C. § 5805(a) and 29 Del. C. §

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5806(a) specifically omit reference to a "private enterprise," allowing for the possibility of inter-agency Code of Conduct violations.

You asked the Commission to consider whether the employees and board members who are, or will be, serving dual roles would be in violation of the State Code of Conduct.

APPLICATION OF THE FACTS TO THE LAW

A. Personal Jurisdiction

Charter schools are organized pursuant to Delaware Corporate Law. 14 Del. C. § 504(a). The managing entity is referred to as a Board of Directors rather than a School Board. 14 Del. C. § 504(b). "The board of directors of a charter school shall be deemed public agents authorized by a public school district… ." *Id.* However, the General Assembly made clear that despite their corporate structure "[a] charter school shall be considered a public school for all purposes." 14 Del. C. § 504(c). School board members fall within the definition of "State employee" and are subject to the State Code of Conduct. 29 Del. C. § 5804(12)(a)(3). As to the status of charter schools as state entities, the Commission has previously held that charter schools are subject to the Code of Conduct. *Commission Op. No. 07-63*.

B. In their official capacity, State employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

"A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). A financial interest[1] is considered a personal or private interest. 29 Del. C. § 5805(a)(2). However, a personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. *Commission Op. Nos. 00-04 and 00-18.*

Should a conflict exist, the Commission may consider whether you, other employees, or board members could remedy the conflict through recusal. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are "routinely cured through abstention or recusal on a specific matter." *People Ex. Rel. v. Claar,* Ill. App. 3d, 687 N.E. 2d 557 (1997) (*citing 56 Am. Jur. 2d Municipal Corporations § 172* (1971); *Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960). However, it also was recognized at common law that some conflicts cannot be cured by recusal when government officials hold dual positions, regardless of sector. *63C Am. Jur. 2d Public Officers and Employees § 62, et. seq*; *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers, 62 ALR 5th 67*. As a result, some courts held that when recusal from participating in decisions was not a sufficient remedy, one of the jobs must be relinquished. *People Ex. Rel. Teros v. Verbeck*, 506 N.E. 2d 464, 466 (Ill. App. 3 Dist. 1987). The courts referred to those situations as having a "clash of duties." *Id.*; *See also, O'Connor v. Calandrillo*, 285 A.2d 275

[1] "Financial interest" includes not only certain legal or equitable ownership interest through stock, but also if the person is associated with the enterprise and received income in excess of $5,000 for services as an employee, officer, director, trustee or independent contractor. 29 Del. C. § 5804(5).

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(N.J. Super.); *aff'd*., 296 A.2d 324, *cert. denied*, 299 A.2d 727, *cert. denied*, U.S. Sup. Ct. 412 U.S. 940; *Sector Enterprises, Inc. v. DiPalermo*, 779 F. Supp. 236 (ND. NY 1991). That common law rule applied whether the individual held two government posts or a government post and a second job in the private sector. *63C Am. Jur. 2d Public Officers and Employees § 62*. The *Verbeck* Court said banning dual positions under some situations "insures that there be the appearance as well as the actuality of impartiality and undivided loyalty." *Id*. (*citing Rogers*); *See also, O'Connor v. Calandrillo, supra*.

When asked whether it would be possible for the two schools to be in competition with one another for grant money or other resources, you responded that it could be possible that both schools would apply for grant money from the same source. However, you also indicated that both schools would continue to apply for grants in the ordinary course of business and neither school would be disadvantaged by the fact that the two schools share staff or board members. You did not identify any other areas in which a board member or employee serving both schools could be called upon to make decisions where their relationship with the other school could affect their professional judgment.

After considering your written submissions and your comments at the hearing, the Commission concluded the potential for conflicts of interest would be greatly reduced if the two schools maintained separate finances, notwithstanding the payment of personnel expenses in the current Cooperative Agreement. Of particular concern was the fact that if the schools' individual monies were co-mingled, neither board would be able to execute their fiduciary duties without considering the financial, or personal, interest one school has with the other. For those employees and board members who will serve dual roles, the ability to make independent decisions for each school would be complicated exponentially. The Delaware Court of Chancery has held "…there [is] 'no dilution' of the duty of loyalty when a director 'holds dual or multiple' fiduciary obligations. If the interests of the beneficiaries to whom the dual fiduciary owes duties are aligned, then there is no conflict. [citation omitted]. But if the interests of the beneficiaries diverge, the fiduciary faces an inherent conflict of interest". *In re Trados Inc. Shareholder Litigation,* 73 A.3d 17, 46-47 (Del. Ch. 2013) (*citing Weinberger v. UOP, Inc.*, 457 A.2d 701, 210 (Del. 1983). You stated at the hearing that long-term plans for FFA have not yet been decided. As a result it is impossible to say whether FFA and EastSide's interests will diverge. Additionally, mingling finances may make it more difficult for FFA's board to independently evaluate whether they want to continue the Cooperative Agreement when it expires at the end of the next school year or whether they want to maintain their independent status. Their decision should be free of conflicts of interest which may arise through joint financial ventures.

C. State employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23* and *97-42.* Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an

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official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

It is unlikely the Cooperative Agreement between the two schools would create an appearance of impropriety. The agreement evolved out of necessity rather than personal or financial gain and was in response to a gross violation of the public trust, misuse of taxpayer monies. In your letter you voiced a concern about 'double dipping' which may also be a concern shared by the public. The term 'double dipping' refers a state employee being paid for the same hour of work by two different government entities. 29 Del. C. § 5822(a). In your case, the employees and board members serving dual roles would not be paid by both schools they would be paid by EastSide who has restructured their contracts to account for the additional duties. Therefore, the 'double dipping' issue is moot.

The Commission considered the appearance of impropriety which may be created by the fact that a majority of FFA's board is made up of EastSide board members. EastSide has 19 members on their board. If the four members who are also serving on FFA's board were required to recuse, it would not affect EastSide's ability to conduct business. However, FFA's board only has six members. If the four EastSide board members serving on FFA's board were to recuse themselves from a vote, the board would not have the quorum required to take action. For example, if the FFA board wanted to terminate the cooperative agreement with EastSide, or vote to extend it, all four board members who are also on EastSide's board would need to recuse. That would FFA's board without the required quorum. The Commission recommends FFA's board include a greater number of members so that a quorum can be achieved without the participation of the EastSide board members when it is necessary for them to recuse.

CONCLUSION

The Commission decided the dual roles served by EastSide's board of directors and school leaders do not create a conflict of interest so long as the two schools maintain separate finances and FFA's board is expanded to allow members to recuse when conflicts of interest make participation inappropriate.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.
Chair

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