



Office of General Counsel

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The Hon. Lydia E. York, CPA
Auditor of Accounts
State of Delaware
Townsend Building
401 Federal Street
Third Floor
Dover, DE 19901
Via electronic mail

September 6, 2024

Re: Management's Response to Draft Report of Audit Findings Nos. 3 and 4
– University of Delaware

Dear Auditor York,

I write on behalf of the University of Delaware regarding the 2019 – 2022 Dual Employment Audit being performed by Belfint, Lyons & Shuman at your direction. Thank you for providing a draft copy of the Report of Audit (“Report”) and meeting with University representatives on August 27. This letter in its entirety constitutes Management’s Response and should be included in full in the final Report.

Executive Summary

This letter responds to the draft Dual Employment Audit by the Auditor of Accounts. To be clear: The University of Delaware is not subject to the Dual Employment Law, and the audit findings as to it are improper and misplaced. As provided in 29 *Del. C.* § 5822, the Dual Employment Law applies only to a State agency or its subdivisions. The Auditor’s Office has agreed in the past in writing, and again in a recent meeting, that the University is not a State agency. At that same meeting, the Auditor’s Office also conceded that Finding 4 was inappropriate. However, that finding was included in the final Report.

Unlike audits required by law and consistent with the University's Charter, no scope of audit, agreed procedures, or MOU was presented by the Auditor's Office. Nor did the University agree to cooperate, other than to provide readily-available information. Most importantly, the Report assumes, without legal analysis, that the University is subject to this Dual Employment Law. Not so. By its own terms, the statute does not apply to the University. Moreover, the University's Charter prohibits such an audit.

The Auditor's Office has ignored our several requests for a written response to these points, and instead demanded a prompt response from the University so the Auditor's Office could release this report on its own accelerated timeline.

Analysis

As stated at our August 27, 2024 meeting, the University disagrees with the legal analysis underlying Findings Nos. 3 and 4 ("Findings"). While we heard from your outside audit firm, it is reasonable to expect that the legal conclusions which underpin the Findings (or any audit for that matter) would be provided by legal counsel rather than CPAs. In any event, those legal conclusions are incorrect.

The central theme – and singular error – of the Findings is the assumption that the University must comply with the Dual Employment Law, *29 Del. C. § 5822*, which imposes certain salary limitations on State employees who also serve as elected or appointed State officials. By its own terms, the Dual Employment Law does not apply to the University and its employees. Moreover, the University's Charter precludes its application to the University.

The Dual Employment Law does not apply to the University. As noted in the Findings, the Dual Employment Law applies to "[a]ny person employed by the State, or by any political subdivision of the State ... who also serves in an elected or paid appointed position in state government." *See, § 5822(a)*. The University is not "the State," and our courts have held that the University is not a "political subdivision of the State." *See Delaware Building & Construction Trades Council, AFL-CIO v. The University of Delaware, et. al.*, 2016 WL 3703113 (Del. Super. Ct. July 1, 2016) (the University is not a "subdivision of the State" for purposes of another part of Title 29, the Prevailing Wage Law).

Nor does the University meet the Dual Employment Law's definition of "State Agency:" "any office, department, board, commission, committee, court, school

district, board of education and all public bodies existing by virtue of an act of the General Assembly or of the Constitution of the State... ." Note the absence of the word "university" in that lengthy definition that expressly includes other educational entities. And, while the University's Charter was an "act of the General Assembly," so too were all corporations established at that time. That legislative act did not create a "public body." If the University were a "public body," it would not have been necessary for Delaware's FOIA to declare that the University is a public body only with respect to meetings of the full Board or records reflecting how the University spends that portion of its budget funded with State appropriations. *See, 29 Del. C. § 10002(1).*

Other portions of Title 29 also exclude the University from definitions of "State Agency." *See, 29 Del. C. § 6902(1):* "Agency" shall include Delaware Technical and Community College and the Delaware State University ***but shall not include ... the University of Delaware ...***" (Emphasis added). Indeed, your Office has previously recognized that the University is not a "State Agency" under Title 29. On March 2, 2020, your Office entered into a Memorandum of Understanding with the University which provides, among other things, that the "University is not a state agency under the definition in *29 Del. C. § 6902(1) ...*."

The application of the Dual Employment Law to the University would violate its Charter. Delaware's courts disfavor interpretations of one statute that creates conflict with another. *Turnbull v. Fink, 668 A.2d 1370, 1377 (Del. 1995)* ("Where possible, a court will attempt to harmonize two potentially conflicting statutes dealing with the same subject.").

Although the University's Charter is different from other statutes appearing in our Delaware Code,¹ this fundamental rule of statutory interpretation nevertheless applies. Therefore, the Dual Employment Law may not be interpreted in a way that collides with the University's Charter. The Charter provides:

Notwithstanding any provisions appearing elsewhere in the laws of this State which might suggest or provide the contrary, the entire control and management of the affairs of the University, which is conferred upon the Board of Trustees by the foregoing paragraph, shall

¹ The University's Charter constitutes a contract between the University's Trustees and the State. As such, the United States Constitution prohibits amendments to the Charter without the University's consent. *See, Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).*

be construed, in the area of fiscal and revenue matters, as including, but not as being limited to, the following powers and duties:

...

All authority with respect to salaries and compensatory payments or benefits, as well as other terms of employment, of any and all University personnel, and individual salaries or salary increases or other benefits do not have to be reported or justified to any official or agency of the State *University Charter, § 5106(b)(1)*.

The restrictions imposed, and inquiries required, by the Dual Employment Law directly conflict with this Charter provision, and any interpretation of the law that seeks to apply it to the University is incorrect and inconsistent with the General Assembly's grant of authority to the Trustees as expressed by the Charter.

Moreover, the Charter provides that the State Auditor may not:

audit, question or inquire into the receipt, handling or expenditure of any funds coming to the University from any source other than a state appropriation *University Charter, § 5109*.

The Findings make no mention of State appropriated funds, and even if they did, the reach of § 5109 of the University Charter would limit the scope of any audit to the mere notation that there were University employees paid with State funds. The limited authority given to the Auditor under this provision does not include the power to investigate compliance with laws that do not apply to the University.

The University Policy is not a matter for enforcement by State Officials.

As one might expect, given the involvement of University personnel in Delaware's civic affairs, University employees occasionally seek elected office. The University neither encourages nor discourages that activity. As the Findings point out, the University has, over the years, fashioned a policy dealing with such activity. That policy has been amended from time to time and the continuing development and application of that policy is a matter of importance to the University. However, with all due respect, the University suggests that the policy's enforcement is a matter for the University rather than the State.

The recommendation included in the Findings suggest that "the University work with the Office of Auditor of Accounts and the Public Integrity Commission to develop such policies" as are suggested in the Report. With respect, the University declines to accept that recommendation as it is based on a false legal

premise. Instead, the University will continue to give due consideration to issues arising when its faculty and other employees seek and hold public office – not because such consideration is required by State law, but rather because the issues associated with the holding of public office by University employees are important and complex.

In closing, we ask that the Findings be removed from the Report as they are based on erroneous legal conclusions and presume to report on matters outside the reach of the State Auditor, namely investigating compliance with laws that do not apply to the University and assessing the University's enforcement of its own policies. In the event the Findings remain in the Report, the University must advise all interested parties that, contrary to the Report's improper application of Delaware Law, the Dual Employment Law does not apply to the University.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Daniela Ivancikova', written in a cursive style.

Daniela Ivancikova