

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO. 1293 C.R. 2007
	:	Restricted Activities
vs.	:	65 Pa. C.S. § 1103 (a) (2cts)(F)
	:	Restricted Activities
STEVEN FIORELLO	:	65 Pa. C.S. § 1103 (d)(1ct)(M)
	:	Statement of Financial Interest
	:	65 Pa. C.S. § 1104 (a)(1ct)(M)

COMMONWEALTH'S MEMORANDUM OF LAW

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I. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND:

This case was initiated as a result of information received by the Investigative Division of the State Ethics Commission which in part alleged that Steven Fiorello (“Fiorello”, “Defendant”), in his position as the Chief Pharmacist/Director of Pharmacy for the Department of Welfare, Office of Mental Health, Substance and Abuse Services, violated various provisions of the Ethics Law. Specifically, Fiorello was alleged to have used the authority of his office by participating in actions of the Department of Welfare, (“DPW”) Pharmacy and Therapeutics Formulary Committee regarding the selection of drugs manufactured by Pfizer Pharmaceuticals and Janssen Pharmaceuticals at the time when Fiorello served as a compensated member of Pfizer Advisory Board and was also receiving honoraria from Janssen Pharmaceuticals. It was further alleged that Fiorello used his public office, in violation of the Ethics Law, to obtain honoraria from Janssen Pharmaceuticals through Comprehensive Neurosciences Incorporated; Pfizer Pharmaceuticals, through Innovative Medical Education Incorporated and Riverside Associates. In addition to the foregoing, the allegations that were the subject of the Ethics Commission’s (“Commission”) review included Fiorello’s violation of the Ethics Law through the receipt of prohibited honoraria for appearances, speeches, published works and presentations. It was further alleged that Fiorello failed to disclose, on Statements of Financial Interest, all sources of income in excess of \$1,300 for calendar years 1998 and 2000; income received from Pfizer Pharmaceuticals through Comprehensive Neurosciences Incorporated for calendar year 2002; and reimbursement for transportation, lodging and hospitality in connection with public service for calendar years 1998, 2000 and 2001 regarding payments made to him for such

activity by Janssen Pharmaceuticals and Pfizer Pharmaceuticals. Finally, Fiorello was also alleged to have used his public office, in violation of the Ethics Law, by receiving compensation as a paid speaker for a program sponsored by Riverside Associates, while at the same time being paid as a Commonwealth employee, and finally, for his receipt of financial compensation from Duquesne University for supervising pharmacy interns assigned to the Department of Welfare during his regular working hours, as Pharmacy Director for that Department.

A preliminary inquiry was initiated by the Investigative Division of the State Ethics Commission on March 28, 2003, and completed within 60 days. (Investigative Complaint/Admitted Findings Nos. 1-3). Subsequent thereto, on May 22, 2003, a full investigation was commenced and a letter so advising Fiorello of this, as well as the general nature of the allegations against him, were forwarded by first class certified mail, return receipt requested. (Investigative Complaint/Admitted Findings No. 4).

On July 29, 2003, and October 30, 2003, prior to the time within which the investigation was required by law to be completed, the Commission granted applications that had been made by the Commission's Executive Director to extend the timeframe for completion of the investigation. In this respect, the Commission granted two ninety day extensions respectively. (Investigative Complaint/Admitted Findings Nos. 5-8).

On May 11, 2004, the Investigative Division of the State Ethics Commission issued an amended notice of investigation to Defendant advising him that the allegation contained in the May 22, 2003, letter was being expanded. This notice was forwarded by certified mail. (Investigative Complaint/Admitted Findings No. 9). The Investigative Complaint was subsequently issued to Respondent on May 14, 2004. (Investigative Complaint/Admitted

Finding No. 11). Throughout the course of the proceedings in the instant matter, periodic notice letters were forwarded to Defendant advising him as to the general status of the investigation, in accordance with the provisions of the Ethics Law. (Investigative Complaint/Admitted Finding No. 10).

On or about May 21, 2004, Defendant, through counsel, requested and received an extension of the time within which his Answer to the Investigative Complaint was to be filed. On June 24, 2004, Defendant through counsel, requested an additional ninety days to file his Answer. The Investigative Division of the Commission objected to any extension in excess of thirty days and on June 28, 2004, the Commission granted a thirty day extension of timeframe within which Defendant's Answer was to be filed. Respondent's Answer to the Investigative Complaint was subsequently filed on August 9, 2004.

Thereafter, on August 19, 2004, a notice of hearing was issued by the Commission to the respective parties advising that hearing on the matter was fixed for November 16th through 19th inclusive. On several occasions prior to the conduct of the hearing, the parties in the instant matter exchanged discovery materials as well as witness lists. The hearing upon which the parties rely as a basis for the record before this Court were conducted on November 16th through 19th and December 2nd, 2004.

Upon submission of the case, Fiorello was found to have committed the violations of the ethics codes charged here,¹ by the standards applied by the Commission. That standard is by clear and convincing evidence. *Snyder v. State Ethics Commission*, 686 A.2d 843(Pa.

¹ Fiorello was found not to have committed certain violations of the Code of Ethics. Those unsubstantiated claims are not charged here.

Cmwlth.1996). Thereafter, the matter was referred to the Office of Attorney General for possible criminal prosecution.

The present charges were formally filed on November 1, 2006. Fiorello was released on his own recognizance. After several defense continuances, Defendant waived a preliminary hearing scheduled for March 19, 2007.

The matter is set for disposition by this court.²

B. FACTUAL BACKGROUND

Steven Fiorello was an employee of the Commonwealth of Pennsylvania, Department of Public Welfare since 1989. Originally, Defendant served as the Pharmacy Director at the Harrisburg State Hospital. He subsequently was appointed as the Pharmacy Director for the Office of Mental Health and Substance Abuse Services (OMHSAS). Respondent has served as the OMHSAS Pharmacy Director since at least April 29, 1998. (See Exhibit I.D.23, page 1). For a short period of time, Fiorello served both as the Chief Pharmacist for the Harrisburg State Hospital as well as OMHSAS Pharmacy Director. In his role as OMHSAS Pharmacy Director, Defendant was responsible for coordinating the state hospital pharmacy operations and the hospital's pharmacy directors. His responsibilities included formulary development, drug utilization, prospective and retrospective drug utilization reviews and outcomes-based drug management. He was responsible for the redesigning and maintenance of the Drug Utilization Reporting System (DURS). (See Exhibit I.D.1). In his position as the Chief Pharmacist for Harrisburg State Hospital, Fiorello was responsible for planning, organizing and supervising all pharmaceutical services at the Harrisburg State Hospital. His responsibilities, in this respect, include implementation of drug formulary planning as well as

² The intervening passage of time was occasioned by a defense request for ARD consideration or other defense continuances.

the requisition of inventories of drugs, chemicals and other pharmaceutical products. (*See* Exhibit I.D.2). As OMHSAS Pharmacy Director, Defendant was also charged with the responsibility of serving on the Pharmaceutical Therapeutics and Formulary Committee. In addition to being a member of that committee, Defendant also served as its Secretary or Chief Administrator. (*See* Exhibit I.D.23, page 1). The role of the DPW, OMHSAS Formulary Committee is to evaluate the clinical usage of drugs, to evaluate and develop policies for drug usage and manage the DPW, OMHSAS formulary. This included approving which drugs would be on the formulary. As Secretary to the committee, Fiorello was primarily charged with all of the administrative functions, including arranging for Formulary Committee meetings, keeping minutes of committee meetings, gathering information for utilization by the committee as well as conducting and preparing drug utilization evaluation studies to ensure that drugs were used appropriately, safely and efficiently. (N.T.213-215; 681;824-826).

Prior to serving as a Commonwealth employee, Fiorello worked as either a Retail Pharmacist or Dispensing Pharmacist in several pharmacies or private hospitals. Before being hired by DPW, he had no prior experience in the area of pharmacology as it related to mental disorders. (N.T.951-957; 1003).

In his position as Chief Pharmacist for the Harrisburg State Hospital and the OMHSAS Pharmacy Director, Defendant periodically would meet with sales representatives from various pharmaceutical companies who were interested in insuring that their drugs were utilized by the state hospital system. (N.T. 332;517). As a result, Defendant became acquainted with representatives from both Pfizer Pharmaceuticals Incorporated and Janssen Pharmaceuticals Incorporated. One of the individuals with whom Defendant became acquainted was Timothy Henning (“Henning”), a Clinical Education Consultant for Pfizer

Pharmaceuticals. During the course of conversations with Henning, Respondent discussed the Drug Utilization Reporting System that was operational in the state hospital system (N.T.732-734). Defendant advised Henning that this system was not working. As a result, Henning and Defendant discussed various ways in which Henning and Pfizer could assist the Formulary Committee in ensuring that the Drug Utilization Reporting System was operational. (N.T. 1012). Defendant introduced Henning to the Formulary Committee and Henning made a proposal in June 1998, to conduct an anti-depressant drug utilization review in the state mental hospital system. (N.T. 734-735). Defendant, in his position with OMHSAS and the Formulary Committee, was assigned the duty of working with Henning on this project. (See Exhibit I.D. 23, pages 13, 15-16; N.T. 825-828; 1013-1014). Henning and Defendant initiated the project and, in September of 1998, made a report back to the Formulary Committee on the preliminary results regarding this project and the utilization of the DURS. (See Exhibit I.D.23, page 21). Thereafter, Henning and Defendant continued to work on the project. (N.T. 739). Defendant was an active participant in every step of the project. (N.T.935). On March 25, 1999, Henning made a final presentation of the anti-depressant utilization study to the Formulary Committee. (See Exhibit I.D.23, page 32). That study had been placed in final form on March 22, 1999. (See Exhibit I.D. 31). The result of the drug utilization study prepared by Defendant and Henning provided an SSRI (anti-depressant) utilization data and pharmacoeconomic model that demonstrated how to maximize anti-depressant usage at the hospitals. Henning reported that the analysis results showed that several drugs were more costly while two drugs were less costly. One of the two drugs reported by Henning as being less costly was Zoloft, a drug manufactured by Pfizer Pharmaceuticals. One of the recommendations made by Henning and Defendant was to

consider preferred first line utilization for Zoloft. This would result in Zoloft being used as the first line of treatment for depression disorders in the state mental hospital system. (N.T. 23, page 32-33).

Approximately one month prior to making these recommendations to the Formulary Committee, Defendant had interviewed for a position of employment with Pfizer Pharmaceuticals in Atlanta, Georgia. Defendant never disclosed his interest in becoming a Pfizer employee prior to the time that he recommended using Pfizer's product as a first line treatment drug in the state hospital system. (N.T. 1024). Defendant also attended Pfizer Behavioral Healthcare Pharmacy Council meetings, the purpose of which was to develop marketing strategies for Zoloft. (See Exhibits I.D. 13, pages 1, 12, 15, 16; Exhibit I.D. 28; N.T. 541-545).

After the completion of the anti-depressant drug utilization study, Defendant and Henning traveled to Dublin, Ireland, in May 1999, in order to make a presentation of the study that they had conducted for the state hospital system. (N.T. 585-590). All of Defendant's expenses for travel to Dublin were paid for by Pfizer. During this event, Defendant made a presentation of the study that had been conducted on state time and in his state position. Defendant was paid an honorarium of \$1,000 for this presentation. (See Exhibit I.D. 13, pages 6, 8; N.T. 598, 750). Defendant had specifically been asked to attend this conference as a result of the study that had been conducted by he and Henning and because of the utilization of the Pfizer software by Defendant in his practice setting, the state hospital system. (N.T. 598).

In December 1999, Fiorello again traveled with Henning and Pamela Smith, another Continuing Educational Consultant from Pfizer Inc., to Orlando, Florida to attend the

American Society of Hospital Pharmacist Mid-Year Clinical Meeting. (N.T. 742-744). During this conference, Defendant and Henning again made a presentation of the study on anti-depressant utilization that had been conducted within the Pennsylvania State Hospital System. (N.T. 744-745; Exhibit I.D. 18, page 2-5). Statistical data and charts that were contained in this study were utilized to create a poster displaying the results, which was displayed as an exhibit throughout the conference. (N.T. 747-748). Fiorello was paid a \$1,000 honoraria for his presentation at this conference. (*See* Exhibit I.D. 15, page 2).

Again, in January 2000, Defendant presented the results of the anti-depressant study that he and Henning had conducted for the Commonwealth of Pennsylvania. This presentation was made by the Defendant and Pamela Smith at the Pfizer Behavioral Healthcare Pharmacy Advisory Council Meeting. During the presentation, Fiorello was specifically identified as Director of Pharmacy for OMHSAS. (N.T. 748-749; Exhibit I.D. 21, page 6). In addition to all of his travel expenses, lodging and hospitality, Defendant received a speaker fee of \$500 for presenting the study that he had conducted as a Commonwealth employee. (N.T. 608; Exhibit I.D. 13, page 20). Representatives of both Pfizer Inc. and Innovative Medical Education (IME), a third party contract vendor utilized by Pfizer to arrange conferences and educational meetings and through which payments were made to speakers, consistently identified all of the payments made to Defendant as honoraria for speeches, presentations or appearances. (N.T. 548, 591, 608). At all of the foregoing events, Fiorello was specifically identified in his public positions as either the Chief Pharmacist for the Harrisburg State Hospital or as Director of Pharmacy for OMHSAS. (*See* Exhibit I.D. 18, page 2; Exhibit I.D. 21, page 6; Exhibit I.D. 13, page 8). Defendant acknowledged, in writing and by verbal assertion, his receipt of the fees that were paid to him for presentations of the

study that had been conducted as a Commonwealth employee. (*See* Exhibit I.D. 15; N.T. 1029-1032).

Fiorello also served on a Pfizer Behavioral Healthcare Pharmacy Advisory Council in the years 1998, 2000 and 2001. The goals of this Advisory Council were to address recommendations for potential future educational programs; global issues about behavioral healthcare pharmacists were facing; various aspects of patient care that were impacted by settings of care; expert feedback on pharmaceutical marketing programs and capsulizing the exchange of ideas and information that takes place. (*See* Exhibit I.D. 28, page 1). The Pfizer Advisory Council, during the years which Defendant served thereon, was particularly interested in understanding the anti-depressant market. One of the main functions of the Advisory Council was to receive expert feedback on pharmaceutical marketing programs. The specific anti-depressant drug in which Pfizer was interested, was Zoloft. (N.T. 544-546; Exhibit I.D. 13, page 1). As a result, Fiorello participated with Pfizer in developing information specifically related to Pfizer's anticipated marketing of Zoloft. (*See* Exhibit I.D. 13, page 1). Fiorello was recommended to serve on the Advisory Council by two Pfizer Marketing Representatives, John Quinn and Paul Hoop. These individuals specifically recommended Fiorello for service because of his positions as the Chief Pharmacist for the Harrisburg State Hospital and as Director of Pharmacy for OMHSAS. (N.T. 474; 497). The Advisory Council representatives were interested in having Defendant serve on the council because of his expertise in the state hospital system particularly in relation to information regarding the transition of patients from inpatient to outpatient care. (N.T. 554). For each of the years that he served on both council, Defendant received a \$1,000 payment. Representatives of Pfizer Pharmaceutical indicated that these payment was in the nature of

honoraria. Honorariums were paid on behalf of Pfizer through IME to participants in the Advisory Council for their attendance at the meeting. (N.T. 542). Defendant was advised, prior to the time that he attended these meetings, that he would in fact be paid an honorarium. All participants were advised of such specifically in writing by representatives of Pfizer. (N.T. 548-550; Exhibit I.D. 28, page 1; Exhibit I.D. 21, pages 4,8,11). A payment of \$1,000 to Defendant was a standard fee that was paid to all participants at the Advisory Council meetings. (N.T. 549). Defendant himself acknowledged, on several occasions, in writing, that the fees that were paid to him by Pfizer for his attendance at the several Advisory Council meetings constituted honoraria. (*See* Exhibit I.D. 15, page 2; Exhibit I.D. 22, pages 1-2). In relation to Defendant's service on the Advisory Council meetings, at all times he used his official title as Director of Pharmacy Services for OMHSAS. (*See* Exhibit I.D. 22, page 3). Correspondence and payments were also addressed to Defendant utilizing his official title and office address. (*See* Exhibit I.D. 28, page 1; Exhibit I.D. 13, pages 13, 14, 15, 17, 21). Additionally, Defendant did not engage in any pharmaceutical trade or profession outside of his service with the Commonwealth other than working part-time as a Retail Pharmacist for several years. Defendant had no background or experience in pharmacology as it relates to mental disorders and had never served in such a position during the course of his career, except as a Commonwealth employee.

As part of his service on the Advisory Council, Defendant also participated in the development of a CD Rom program entitled "Impacting Behavioral Healthcare: the Role of Pharmacy." (*See* Exhibit I.D. 28, page 1). For Fiorello's participation in the development of this published work, Fiorello received an honoraria of \$1,000. Fiorello specifically made note of his Commonwealth title so that it would be accurately reflected on Pfizer's paperwork

relating to this program. (*See* Exhibit I.D. 17; N.T. 1008-1009). The \$1,000 payment made to him in recognition of this published work was clearly identified in all of the paperwork and testimony as an honoraria. (*See* Exhibit I.D. 13, page 21; N.T. 610). Defendant also considered this payment to be an honoraria. (*See* Exhibit I.D. 15, page 2).

The final payment to Defendant from Pfizer Pharmaceuticals was in relation to his participation in pharmacoeconomic summit in LaJolla, California. Defendant was paid a \$1,000 honoraria for his participation in this economic summit which took place in May 2000. (N.T. 613). The representatives from IME who were involved in the payment of this fee to Defendant clearly indicated that it was a payment in recognition of his participation in the summit and constituted an honoraria. (N.T. 613).

In addition to the foregoing, Defendant also received a payment from Janssen Pharmaceuticals through a third party contract company, Comprehensive Neurosciences Incorporated, in recognition of a presentation that he made at a conference sponsored by the Pennsylvania Department of Corrections. The conference was conducted on April 17, 2002, and Defendant's presentation was entitled "A Study of Combination Anti-Psychotic Medication Usage." (*See* Exhibit I.D. 9). Defendant's presentation was made specifically in his position as Director of Pharmacy Services for OMHSAS and was done during the course of his normal Commonwealth workday. He was so identified by his official title on the conference program. (*See* Exhibit I.D. 9, page 2). The Department of Corrections Conference was primarily arranged through the efforts of Laurie Snyder, a Janssen Pharmaceutical employee, and the Medical Director for the Pennsylvania Department of Corrections, Dr. Frederick Maue. Defendant's participation in the program was recommended by Snyder because she was aware of the fact that Defendant had been working

with the Penn Map project for the Pennsylvania Department of Public Welfare and suggested a presentation on that project. (N.T. 372). A payment of \$2,000 to Defendant was made through Comprehensive Neurosciences. Defendant deposited this check into his personal bank account but later donated the funds in two separate personal checks of \$1,000 each to charities of his choice. Defendant also received honoraria for presentations that he made for an entity known as Riverside Associates P.C. This entity is operated by Dr. G. David Smith and was involved in the practice of psychology with a specialization in services to persons with disabilities and mental health problems. In June and November 2000, Riverside held two programs entitled "Psychopharmacology of Mental Disorders-An Introduction." These workshops focused on the used of psychotropic medications and treatment of major types of mental disorders. (See Exhibit I.D. 19, 20). Defendant was a presenter in both programs and was identified as the Director of Pharmacy for the Harrisburg State Hospital. For these presentations, Defendant received \$300 on each occasion. (N.T. 305; Exhibit I.D. 26). Defendant received the same rate that Riverside Associates paid to all other presenters. (N.T. 305). The payments were unrelated to the amount of time worked by Defendant. As part of his position with the Commonwealth of Pennsylvania, Defendant was specifically responsible for psychopharmacology of mental disorders, the same topic that he presented for Riverside Associates. Defendant had no experience in the field of psychopharmacology or the treatment of patients with mental disorders separate and apart from his position with the Commonwealth. On one of those days when Defendant made a presentation for Riverside, June 2, 2002, Defendant was also paid his full Commonwealth salary of \$268.50.

Duquesne University maintains an internship program with pharmacy students. These students are required to perform approximately 1,300 hours of practical experiences in various

settings, including that of a hospital environment. Commonwealth of Pennsylvania State Hospitals are typically used in the rotation, during a student's internship. Each student is assigned a preceptor to supervise and monitor the students' activities during the internship. Preceptors are compensated at a rate of \$400 per student, per semester for such supervision activities. Defendant served as a preceptor for students from Duquesne University School of Pharmacy since at least 1998. The students who have served under Defendant's guidance were assigned to the Harrisburg State Hospital where Defendant was the Chief Pharmacist or Director of Pharmacy for OMHSAS. Defendant served in a preceptor position during the academic years beginning in 2000 and continuing through 2003. As a result thereof, Defendant received three payments of \$800 in each of the academic years for which he served as a preceptor. The total amount paid to Defendant to supervise and monitor activities of the Duquesne University pharmacy students who were assigned to the Harrisburg State Hospital was \$2,400. Defendant supervised the activities of the pharmacy students during his normal workday as a Commonwealth employee. Although Defendant had the permission of his immediate supervisor, Steven Karp to act as a preceptor, Karp was never aware of Defendant receiving payment from Duquesne. Defendant made the decision to have payments from Duquesne University specifically directed to him at his home address. Although the option existed for Defendant to direct the payments to the Commonwealth of Pennsylvania, he chose to accept and retain the payments for himself.

During the course of his employment with the Commonwealth of Pennsylvania, Defendant solicited and received unrestricted educational grants from pharmaceutical companies, including Janssen Pharmaceuticals and Pfizer Pharmaceuticals. (N.T. 65072, 841). The funds so solicited and received were placed into an account that was established by

the Department of Public Welfare at All First Bank. (*See* Exhibit I.D. 10). The individual who was primarily responsible for the receipt of funds and subsequent transmission of these funds to the custodian of the account was Fiorello. (N.T. 841). Sometime during the Spring of 2001, Defendant discussed with representatives of Janssen, including Laurie Snyder, the possibility of obtaining an unrestricted educational grant in order to fund transportation and lodging for representatives of the Department of Public Welfare to travel to New Orleans for the purposes of participating in a conference and discussing, with representatives from Texas, the implementation in Pennsylvania of a program that was then being used in Texas. (N.T. 67-76). This program was called the T-Map program, the Pennsylvania version of which was called the Penn Map program. As a result of discussions with Laurie Snyder, Defendant applied for and received, on behalf of the Commonwealth of Pennsylvania, a \$4,000 unrestricted educational grant. Defendant's participation in this grant request was done as part of his official position as identified on the grant papers. (*See* Exhibit I.D. 11, page 28). The \$4,000 from Janssen was to be utilized for transportation, lodging and hospitality for Defendant and other representatives of the Department of Welfare to travel to New Orleans for participation in the conference and further discussions. (*See* Exhibit I.D.32). Defendant was aware of the fact that the funds received from Janssen were to be used for the purpose as a result of an email explaining such, a copy of which was forwarded to him. (*See* Exhibit I.D. 32; N.T. 843). Defendant and another DPW employee, Dr. Robert Davis, subsequently traveled to New Orleans to participate in the conference. (N.T. 231-233). Expenses for the travel emanated from the bank account into which the unrestricted educational grant from Janssen had been deposited. (*See* Exhibit I.D.10; N.T. 181-192). Defendant's travel to New Orleans was in connection with his public service and the department's interest in

implementing the Penn Map program. Janssen was also interested in implementing the T-Map program in Pennsylvania because it would result in utilization of Janssen Pharmaceutical products, especially the anti-depressant Risperdal, in the Pennsylvania State Hospital System. (N.T. 75). Defendant utilized \$1,132.89 of the Janssen grant to fund his travel. Defendant failed to list reimbursement of this transportation, lodging and hospitality on his Statement of Financial Interest for calendar year 2001. Defendant had attended the conference and received this reimbursement in May, 2001.

Defendant also received reimbursement in the amounts of \$688.35 and \$763.06 from Pfizer Pharmaceutical for his transportation, lodging and hospitality expenses in relation to his attendance at the 2001 and 1998 Pfizer Advisory Council meetings. Defendant failed to report this reimbursement on his Statement of Financial Interest for calendar years 2001 and 1998.

In addition to the foregoing, Fiorello failed to report on Statements of Financial Interests filed for the calendar year 2000, income that he received from Pfizer through IME in the amount of \$3,500, for his attendance at various Pfizer events for which he received honorarium. As noted in the calendar year 2002, Defendant received \$2,000 from Janssen Pharmaceuticals through Comprehensive Neurosciences for his presentation at a Pennsylvania Department of Corrections Conference. Defendant failed to report the receipt of that \$2,000; which was placed into his personal bank account, on his Statements of Financial Interest for calendar year 2002.

II. ARGUMENT

- A. DEFENDANT'S OVERT COURSE OF CONDUCT IN USING THE WORK PRODUCT AND STATUS OF HIS PUBLIC POSITION TO SECURE THE PAYMENT OF HONORARIA CONSTITUTES A VIOLATION OF THE ETHICS LAW.**

Defendant Fiorello, in a clear and unequivocal violation of the Ethics Law, accepted compensation in the form of honoraria to make three separate presentations of a study that he had conducted as a Commonwealth employee, on Commonwealth time and for which the Commonwealth had compensated him. Indeed, the private sale of this public employee's governmentally produced work product constitutes a rather egregious violations of the Ethics Law.

Not only did Defendant actually sell, for private compensation, his government produced work, he also used the title, offices and status of his public position in order to make speeches, appearances, presentations and published works directly related to the work he was performing as a public employee in order to secure additional payments of honoraria. This use of his public position, once again, constituted a violation of the Ethics Law. In no uncertain terms, Defendant's course of conduct was overt and conducted with the actual intent to secure a financial benefit totaling \$10,100.

The foregoing events which resulted in Defendant's windfall were the culmination of a course of conduct that was clearly intentional in nature. As the facts demonstrate, not only did Defendant use the authority of his public office to obtain a financial gain, such was done with knowledge and intent, as evidenced by his clear failure to disclose his receipt of such funds and his overt efforts to avoid or evade the disclosure thereof. Indeed, Respondent even went as far as denying that he had ever received such compensation when directly questioned about such. His course of conduct constituted a clear and knowing violation of the Ethics Law.

In this respect and in order to accurately review the facts of the instant matter, an analysis of the applicable provisions of the Ethics Law and decisions of the Commission in relation thereto is helpful and appropriate.

The Ethics Law provides in part as follows:

No public official or public employee shall engage in conduct that constitutes a conflict of interest.

65 P.S. § 1103(a)

Conflict of interest is defined as:

Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated.

65 P.S. § 1102

In Order for this Court to determine that a violation of the Ethics Law has been occasioned by any particular course of conduct, the Court must find, beyond a reasonable doubt from the evidence, that all of the elements noted above are present. These elements include: a use of the authority of office and a private pecuniary benefit, which is obtained, as in the instant case, for the public official or employee.

Insofar as a private pecuniary benefit is concerned, while there is no specific definition of such in the Ethics Law, clearly the payment of funds to a public official has been held to be such a private pecuniary benefit by both the Ethics Commission as well as the Commonwealth Court of Pennsylvania. *See Keller v. State Ethics Commission*, 860 A.2d659 (Pa.Cmwlt.2004); *Snyder v. State Ethics Commission*, 686 A.2d 843 (Pa.Cmwlt. 1996); *Commonwealth of Pennsylvania v. James Heistand*, 685 A2d 1026 (Pa. Super. 1996).

Supporting this analysis are the Rules of Statutory Construction which specifically provide that words and phrases must be construed according to the Rules of Grammar and according to their “common and approved usage.” 1 Pa.C.S.A.§1903(a).

The word **private** is defined as “intended for or restricted to the use of a particular person, group or class; or belonging to or concerning an individual person, company or interest.” *Webster’s Tenth New Collegiate Dictionary*, (1996). *Black’s Law Dictionary* further defines private as; “affecting or belonging to private individuals as distinct from the public generally.” (*See Black’s Law Dictionary*, Revised Fifth Edition, P. 1076).

Pecuniary is defined as “monetary, relating to money, financial, consisting of money or that which can be valued in money.” (*See El Paso, PASO Electric RY, CO v. Benjamin*, 202 S.W. 196 (998); *Black’s Law Dictionary*, Fifth Edition, page 1018).

And finally, **benefit** is defined as an “advantage, profit or privilege.” Specifically, a benefit includes a “pecuniary advantage” or “profit” gain or interest. (*See Bird v. Newcolumb*, 170 Va. 208, 196 S.E. 605 at 608). Indeed, judicial precedent throughout the country supports the analysis that the activities in the instant matter involved a “pecuniary benefit.”

A pecuniary benefit is such a benefit that can be reasonably estimated in money such as labor, services, advice and counsel. *General Motors Corp. v. Grizzle*, 642 S.W. 2d 837, 845 (U.S.D.C. Tex). The term includes not only money but anything that can be valued in money. *Krummert v. Commonwealth*, 43 S.E. 2d 831, 186 Pa. 581.

Also, for analogy purposes, a West Virginia public corruption statute specifically defines the term as follows:

“pecuniary benefit” means a benefit in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain. W.VA. Code 61-5A-2(8).

Without question, the actions engaged in by Defendant clearly related to a monetary or pecuniary/financial gain or profit under all possible definitions of the term. Next, the benefit that is received through the use of office must be for either the official, or a business with which the official is associated. Here, there is no question that Defendant personally secured the payments at issue.

The next element for determination is whether Fiorello's actions constitute a use of the authority of office.

Authority of office is defined as:

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

65 P.S. §1102

Once again, there have been few judicial interpretations specifically focusing on the foregoing term. In analyzing this provision of law, however, there are other statutes, laws, definitions and judicial decisions which are instructive to accord the Rules of Statutory Construction which require that words and phrases be construed according to their common and approved usage. With this in mind, the first consideration is the term "use."

In order to be a "use" of office there must be some action or effort on the part of the public official that occasions the prohibited financial benefit. Although use is not defined in the Ethics Law, it "require[s] action by public official that in some way facilitates" the receipt of the gain. *See McGuire v. State Ethics Commission*, 657 A.2d 1346 (Pa. Cmwlth. 1995).

Next, the term "actual power" must be considered. Quite simply this means no more than **real** or **current** power or authority as opposed to that which is potential or speculative.³

³ See definition of actual, *Black's Law Dictionary*, revised 4th Edition, p 53; Webster's Tenth New Collegiate Dictionary (1996).

Finally, the power that is exercised by a public official under the foregoing definition must be power that is “provided for by law.” Although the Ethics Act does not provide any guidance in relation to that phrase, other Pennsylvania statutes specifically define the word law as “decisional and statutory law and rules and regulations having the force of law.” 23 Pa. C.S.A. §§7101; 7901.

Similarly, the term law has been held to include decisional law as well as other promulgations such as regulations and ordinances which clearly have the force of law. *See Commonwealth v. State Conference, State Police Lodges of FOP*, 513 Pa. 285, 520 A.2d 25 (1987); *Cugini v. Commonwealth Unemployment Compensation Board of Review*, 511 Pa. 264, 512 A.2d 1169 (1986); *New Castle v. Rearic*, 18 Pa. Super. 350 (1901). Once again, pursuant to the Rules of Statutory Construction as well as extant case law, the provisions of the Ethics Law are to be liberally construed.⁴ As such, the term law must be construed to include more than statutory provisions. *See e.g.: Gallen v. State Ethics Commission*, No. 1497 C.D. 2001 (Pa. Cmwlth. 2002).

Turning to the actual power provided to Defendant in his positions as Chief Pharmacist for the Harrisburg State Hospital and Director of Pharmacy for the Office of Mental Health and Substance Abuse Services, Pennsylvania statutory law specifically provides for the creation of the Department of Public Welfare and specifically outlines the duties and responsibilities of such a department. The Department of Public Welfare is created by statute and identified as one of the specific Commonwealth agencies through which the executive and administrative work of the Commonwealth would be performed. 71 P.S. §61.

⁴ The terms delineated in the Ethics Law must be given a liberal construction. Such is not only authorized in case law, *see Phillips v. SEC*, 470 A.2d 659 (Pa. Cmwlth. Ct. 1984), but by statute as well. (See 65 P.S. §401, ... Ethics Law is to be “liberally” construed; and Statutory Construction Act, ... “The General Assembly intends to favor the public interest as against any private interest.” 1 Pa.C.S.A. §1922 (5).

The Pennsylvania Administrative Code further provides that the heads of the various Commonwealth departments, including Public Welfare, may establish bureaus and divisions within their departments to carry out the proper conduct of the work thereof. 71 P.S. §72. In this respect, authorization is given by statute for the employment and compensation of Commonwealth employees to serve in various positions within each department as necessary to perform the work of that department. 71 P.S. §74. Pursuant to the Public Welfare Code, the Department of Public Welfare is specifically empowered to:

Administer and enforce the laws of this Commonwealth relative to mental health, the care, prevention, early recognition and treatment of mental illness, mental defects, epilepsy and inebriety, the licensing and regulation of institutions for the mentally ill, mentally defective and epileptic, the admission and commitment of patients to such institutions and the transfer, discharge, escape, interstate rendition and deportation of such patients.

62 P.S. §1111.1

Defendant's powers and duties in his positions both as the Chief Pharmacist for the Harrisburg State Hospital as well as the OMHSAS Pharmacy Director, emanate from the foregoing provisions. In this respect, the department created the Office of Mental Health and Substance Abuse Services as well as the Pharmacy Director for that office. The State Hospital system was created by statute under the jurisdiction of the Department of Public Welfare, including the Harrisburg State Hospital. 71 P.S. §62; 62 P.S. §301-317. The position of Chief Pharmacist was thereafter created in each hospital, pursuant to the authority the hospital vested in the Board of Trustees "[t]o appoint such officers and employees as may be necessary." 62 P.S. §316. Additionally, job descriptions were drafted, including Defendant's, which delineate specific powers and duties in aid of the statutory authorization to carry out the work of the Commonwealth of Pennsylvania and the Department of Public Welfare, specifically in relation to mental health issues. (See Exhibit I.D. Nos. 1 and 2).

Finally, the job descriptions of the OMHSAS Pharmacy Director and Chief Pharmacist for the Harrisburg State Hospital both describe the power and functions that are necessary for the performance of the duties and responsibilities that are unique to both of the positions mentioned. As such, there can be no question that the duties and responsibilities exercised by Defendant would constitute the use of the authority of office.

Interestingly, the Ethics Commission, which has previously evaluated these charges, has employed this same type of analysis in reviewing the term authority of office. In *Juliante*, Order No. 809 (issued July 16, 1991), the Commission noted that:

*A review of the term “authority of office” quoted above indicates the term extends to all of the tasks needed to perform the functions of a given position. The words, “authority of office or employment” mean the actual power provided by law which must be exercised, and the term “unique” applies to the duties and responsibilities of that position. Thus, the “authority of office or employment” is the actual power provided by law which must be exercised to perform the unique duties and responsibilities of any given position. The “actual power provided by law” encompasses every facet of that position. *Juliante*, Order No. 809 at p.16. (Emphasis added).*

Although not controlling, the prior findings of the Ethics Commission are instructive. In applying the foregoing definition to specific factual circumstances, the Ethics Commission has unquestionably determined that a public employee who takes the work product developed for the Commonwealth of Pennsylvania and subsequently markets that work product in a private capacity, violates the Ethics Law, as such constitutes a use of the authority of office for a private pecuniary benefit. See *Brocius*, Order No. 1151; *Hitchings*, Order No. 779, (reversed on other grounds, *Hitchings v. State Ethics Commission*, 607 A.2d 866 (Pa. Cmwlth. 1992))

The facts of record in the instant matter, without doubt, establish the requisite elements necessary to find a violation of the Ethics Law, as Defendant used the work product

and other attributes of his public office in order to obtain a private pecuniary benefit in the form of honoraria.

Turning to Defendant's sale of his governmentally produced work, the undisputed facts here show that Defendant and a Continuing Educational Consultant employed by Pfizer Pharmaceuticals, Timothy Henning, had been discussing various projects in which Henning could be of some assistance to Defendant, in either his position as Chief Pharmacist for OMHSAS or for the statewide Formulary Management Committee. Defendant was Henning's primary contact with the Formulary Committee. (N.T. 734). Defendant confirmed that he and Henning had talked about a number of projects that Henning could do. As part of this discussion, Defendant indicated to Henning that the Formulary Committee had a drug utilization reporting system that was not working and that they would like to show that it could work. (N.T. 1012-1013). As part of his duties and responsibilities as OMHSAS Pharmacy Director, Defendant was specifically responsible for the redesign and maintenance of the department's drug utilization reporting system. This was specifically identified as one of his major responsibilities. (*See Exhibit I.D.1, page 1*). Further, Defendant was responsible for the performance of various studies, gathering information to perform such studies and similar projects, both in his role as the OMHSAS Pharmacy Director and as the Secretary for the Formulary Committee. (N.T. 220-221;683;824).⁵

Based upon their discussions, Defendant introduced Henning to the Formulary Committee on June 24, 1998, and Henning, at that time, made a presentation to conduct an SSRI Utilization Review of the Disease Therapy in the state mental hospitals. (*See Exhibit*

⁵ Fiorello was clearly identified as the OMHSAS Pharmacy Director as early as April 29, 1998, during Formulary Committee meetings. (*See Exhibit I.D. 23, page 1*). In all subsequent Formulary Committee meetings, Fiorello was similarly identified in this position. (*See Exhibit I.D. 23, page 7, 14, 20 (reverse side), 21 (reverse side), 29*).

I.D. 23, page 13). Defendant was assigned as part of his public position to work with Henning on the project. Defendant was specifically indentified as the contact person on behalf of the Commonwealth of Pennsylvania. (See Exhibit I.D. 23, page 15). Thereafter, Henning and Defendant worked on the project and reported back to the committee on the preliminary results thereof on September 17, 1998. (See Exhibit I.D. 23, page 21). After this preliminary report, Defendant and Henning continued to work on the project and ultimately produced a final report in March of 1999. (N.T. 738-739). There is no question that Defendant played a major role in the completion of the project. (N.T. 740; 935). The final 17 page report was dated March 22, 1999, and was entitled, A Depression Utilization Review for the Pennsylvania State Hospital System: A Pharmacoeconomic Analysis (See Exhibit I.D. 31). On March 25, 1999, three days after the report was finalized in written form, Henning made a presentation thereof to the Formulary Committee at its quarterly meeting. (See Exhibit I.D. 23, page 32). The report, which had been prepared by Henning and Defendant, in his Commonwealth position, made five specific recommendations to the Formulary Committee. (See Exhibit I.D. 23, page 33).⁶

Defendant's role in the conduct of this study was clearly performed as part of his public position and within the duties and scope authorized for him by law pursuant to his job description. This was confirmed by the Defendant's then-supervisor, Dr. Steven Karp, the Medical Director for OMHSAS. He indicated in no uncertain terms that the function Defendant performed, together with Mr. Henning, in conducting this study, was part of his

⁶ Although the recommendations that were made by Henning and Defendant in the study are not pertinent to the purposes of the violation of the Ethics Law being delineated herein, it is important to note that one of these recommendations included considering "a preferred first line SSRI-Zoloft or Paxil." Such would involve utilizing either of these drugs as the preferred treatment for depression, eliminating Prozac and Luvox, the drugs then currently in greater use. Zoloft is manufactured by Pfizer. An analysis of this particular aspect of the report will be delineated in a subsequent section of this brief.

state job with the Formulary Committee. (N.T. 828). Less than two months after Defendant and Henning made the presentation of the anti-depressant study to the Formulary Committee, Defendant traveled to Dublin, Ireland, at Pfizer's request and expense, in order to participate in a Pfizer Outcomes Research Workshop. Defendant's role at this workshop, was to make a presentation of the anti-depressant study that was conducted by he and Henning for the Commonwealth of Pennsylvania. Arrangements for the conference were made by Pfizer Pharmaceutical employee, Delores Nobles-Knight. She clearly confirmed Defendant Fiorello's role in the program:

...the reason that we included Mr. Fiorello in this program was, we had developed a particular software application that allowed you to do some fairly complex economic modeling. And Mr. Fiorello had used that particular software application in his practice setting and so we wanted him to be able to speak to how he used that software in his practice setting at the workshop. (N.T. 597-598).

Defendant's "practice setting" was OMHSAS and the Formulary Committee. For his presentation, Defendant was paid an honorarium of \$1,000 in addition to actual expenses for his travel, transportation and lodging. (See Exhibit I.D. 13, pages 6,8; N.T.591).

In December 1999, Defendant along with Timothy Hennings and Pamela Smith, another Continuing Educational Consultant from Pfizer, attended the PSHP midyear clinical meetings in Orlando, Florida. During this conference, a presentation was made by Fiorello and Henning of the study entitled Anti-Depressant Outcomes in Multi-Hospital System. Pamela Smith moderated this presentation. A review of an abstract of the presentation that was in the materials presented during the conference clearly indicates that it was the same study that had been conducted by Defendant and Henning for the Formulary Committee which they had previously presented in Dublin. (See Exhibit I.D. 18, page 6; Exhibit I.D. 31,

page 3). In the conference materials, Defendant was identified as the Director of Pharmacy for the Harrisburg State Hospital. During his testimony before the Ethics Commission, Henning confirmed that the study that was presented in Orlando was the same study that he and Defendant had conducted for the Commonwealth of Pennsylvania. (N.T. 744-745). Defendant was paid honoraria in the amount of \$1,000 for his presentation during this conference.⁷

Finally, on January 28, 2000, Defendant again made a presentation of the anti-depressant outcome study during a Pfizer Behavioral Healthcare Pharmacy Advisory Council meeting. Defendant, in conjunction with Pamela Smith, presented the study which Timothy Henning identified as the work that he and Defendant had conducted for the Commonwealth of Pennsylvania. (N.T. 748-749). Defendant, who was identified on the program for this meeting in his official position as Director of Pharmacy for OMHSAS, was paid a \$500 speaker's fee for the presentation that he made on that date. (*See* Exhibit I.D. 13, page 20; N.T. 608).

Without question, the foregoing facts delineate a course of conduct whereby Defendant obtained compensation from private sources for work that had produced as a Commonwealth employee and for which he had already been paid. Such is a clear violation of the conflict of interest provision of the Ethics Law.⁸

⁷ Defendant, during his testimony before the Commission, stated that he was not sure whether he had actually received a payment for his participation in the Orlando study. (N.T.958). However, Defendant had acknowledged, in writing, prior to the date of the hearing that he had indeed received such a payment and he considered such honoraria. (*See* Exhibit I.D. 15, page 2). As a result of Defendant's clear admission, there is proof beyond a reasonable doubt that the honoraria payment was for his participation in this presentation.

⁸ The money that Defendant received for the presentations of a Commonwealth produced work, was also received in violation of the Pennsylvania Administrative Code. Pursuant to Section 215 of that code, no department employee receiving a fixed compensation may be paid for any extra services unless expressly authorized by the Commonwealth's Executive Board, prior to rendering those services. As a result, the payments to Defendant constituted compensation in violation of this provision. (71 P.S. §75.)

During his testimony, Defendant was constrained to admit that the study that he had performed with Timothy Henning was indeed done in his position as a public employee. He then attempted to assert that his reason for making the private presentation of the study was so that he could share invaluable information with other individuals in the field of Pharmacology. Defendant could not, however, justify why he accepted payment for the presentations of his public work and his reasoning completely collapsed during cross examination:

Q. And this was the study that you were tasked to do by the formulary committee or tasked to work on, should say, by the formulary committee in June of 1998, in the minutes we reviewed previously to that?

A. Yes.

Q. You were paid as a Commonwealth employee for the time you spent working on this in your position at the Harrisburg State Hospital; is that correct?

A. Yes.

Q. And as we have looked at your letter, it indicates that you were paid \$1,000 for the Orlando conference and---?

A. I'm not sure. I think I showed you where it was cut off. It's not clear that I was paid \$1,000.

Q. If you were paid \$1,000, could you have not said no to that money?

A. If I was paid for any kind of conference I could have said no.

Q. Let's go to Dublin then, because that's one I think we agree on.

A. Okay.

Q. You were paid \$1,000 by Pfizer, is that correct?

A. Yes.

Q. Mr. Henning testified, and I believe you confirmed, that that did involve the study as well; is that correct?

A. That's correct.

Q. The study that you were paid by the Commonwealth to perform?

* * *

Q. My question to you is, this is the study that resulted from the work you did for the Commonwealth, you and Mr. Henning.

A. Right.

Q. But Henning doesn't work for the Commonwealth, so he wasn't paid by the Commonwealth. But you were for the time that you spent on this; is that correct?

A. Yes.

Q. And you were also paid \$500 to make a presentation of this study in New York, were you not?

- A. Yes.
Q. During the Behavioral Advisory Council meeting, were you not?
A. Yes.
Q. So you were paid privately to make presentations of work that you had performed in part as a Commonwealth employee; is that not correct?
A. Yes, that's correct. (N.T. 1029-1030)

* * *

- Q. Do you see any problems with that?
A. To the extent that this study was worth sharing to the American Association of Health System Pharmacists, to the extent that it was worth sharing because it was a good study, there was not a conflict there. It was worth sharing. Professionals share information within each other, and that's how we learn.
Q. Could you have share it for free?
A. Yes, I could have.
Q. This wasn't confidential, was it?
A. No, absolutely not. That's right. All state information is open to the public.
Q. So you didn't have to take the \$1,000---
A. Correct.
Q. --- for the Dublin trip? And you didn't have to take the \$500 for the New York speaking, the presentation?
A. That's correct.
Q. That's correct?
A. Yes.
Q. Thank you. You made the conscious decision to keep the money, did you not?
A. Yes. (N.T. 1031-1032).

* * *

- Q. Did you ever disclose to anyone at DPW that you had received \$1,500 for presenting results of this study on two occasions?
A. Not that I can recall. Is it possible to take a short break, five minutes?

* * *

I'm starting to lose concentration. (N.T. 1030-1031).

Separate and apart from the clear violations of the Ethics Law occasioned by Defendant's conduct, as delineated above, was Defendant's further use of office and his position as the Director of Pharmacy for OMHSAS to obtain additional honoraria from Pfizer Pharmaceuticals, Janssen Pharmaceuticals and Riverside Associates. Defendant's conduct in

relation to all of these entities, the fees he received and the purposes for which such fees were received are thoroughly delineated in a subsequent section of this brief. Generally speaking, however, Defendant received \$3,000 for participation in three Pfizer Behavioral Healthcare Pharmacy Councils; \$1,000 for participation in a Pharmacoeconomic Summit on Behavioral Healthcare and \$1,000 for participation in a program at the University of Kentucky entitled Impacting Behavioral Healthcare; the Role of Pharmacy. In addition to the foregoing, Defendant also received \$2,000 from Janssen Pharmaceuticals for participation in a Pennsylvania Department of Corrections Conference during which he made a presentation and \$600 from Riverside Associates for two presentations (\$300 each) on The Psychopharmacology of Mental Disorders. When combined with the previously delineated fees that he received from Pfizer Pharmaceuticals for the presentation of the study that he had performed for the Commonwealth of Pennsylvania, Defendant received a total of \$10,100 in honoraria through the use of his public office.

The record is replete with proof that the Defendant's acquisition of the additional honoraria was accomplished through the use of his public office.

Regarding his service on the Pfizer Behavioral Healthcare Pharmacy Advisory Councils, Defendant was only selected to participate on these councils as a result of his public service. This was testified to unequivocally by Paul Hoop and John Quinn, the Sales Representatives from Pfizer Pharmaceutical whose job it was to sell products to the Harrisburg State Hospital System and with whom Defendant dealt regularly in his public capacity. (N.T. 497, 574). The fact that Defendant's public position was the sole reason that he was selected to serve on the Advisory Council was also confirmed by Julie Fisher, the individual from Pfizer who was responsible for ensuring that the Advisory Councils were

operational. She testified clearly that Pfizer was interested in having Defendant on the council so that he could provide information regarding transition from inpatient to outpatient care, with emphasis on how care is decided on in the inpatient setting. (N.T. 554-555). Clearly Defendant's ability to provide this type of expertise was only a result of his public service. Even Defendant's supervisor, Dr. Steven Karp, testified that he considered Defendant's service on the Advisory Council as part of his state job and never knew he was receiving honoraria in relation thereto. (N.T. 843-844). Additionally, virtually all of the payments that were issued to Defendant and the supporting documentation regarding his service on the Advisory Council were addressed to him utilizing his official title and address. (See Exhibits I.D. 13, pages 13-15,17,20,21; Exhibit I.D. 14, page 3; Exhibit I.D. 28, page 1). Defendant's ability to obtain the honoraria that he did was based solely on his public position. But for his public position, Defendant would not have been able to realize the financial gains he did.

Similarly, in relation to Defendant's receipt of \$1,000 as honoraria for participating in the development of a published work, a CD Rom, such was also occasioned as a result of Defendant's public service. Clearly, the testimony proves that the honoraria Defendant received stemmed directly from his role on the Pfizer Advisory Councils. As noted, his service on those councils emanated from his public position. One of the projects produced by the Advisory Council was the published CD entitled Impacting Behavioral Healthcare, the Role of Pharmacy. It is clear that this published work was the direct result of the Behavioral Healthcare Advisory Council. (See Exhibit I.D.28, page 1). Defendant was also identified specifically through his official title and address, as a faculty member, in relation to this

published work. (See Exhibit I.D. 17, page 1; N.T. 1008-1009). The letter from IME makes clear that the honorarium was paid for his contribution to the development of the CD Rom.

Also, in relation to the programs that Defendant conducted for Riverside Associates, he was clearly identified using his Commonwealth title. (See Exhibit I.D. 19; Exhibit I.D. 20). The topic of the presentations that were made directly related to work that Defendant had done as a public employee in the Commonwealth of Pennsylvania. His role in discussions of psychopharmacology was clearly the result of work that he had done for the Commonwealth of Pennsylvania, as testified to by all of those individuals familiar with his work at the department. (N.T. 207-208; 684-685; 821-822). As such, not only did Defendant utilize his official title and the prestige of that title in order to generate the payment of honoraria, he also used the particularized expertise that he had developed in his Commonwealth position. Clearly, Defendant had no expertise or experience outside of his Commonwealth service in the area of psychopharmacology. (N.T. 952-956; 1003). Indeed, Defendant's presentations for which he was privately paid so closely related to the work that he was doing as a Commonwealth employee that such must be deemed as a matter of fact to have been a use of the authority of his public office. The Ethics Commission has reviewed similar situations where public officials sought to perform private services closely connected to their public functions. In relation to such, the Commission in *Miller*, Advice No. 85-530 noted:

If, in fact, the service you render in your public employment of the PUC is identical to and involves the exact research, analysis, and promotion which you will be privately marketing in the form of a publication, then a question of such a conflict may arise. This is so because in such a situation it would appear as though you would be utilizing your public employment to advance or prepare your manuscript. In such a situation it would be difficult to separate that

service which you were performing as a public employee and that which you were performing in aid of your authorship. Simon, 84-036.

Similarly, there can be no question that Defendant's presentation of information gleaned from his employment and so closely connected to his public position constituted a use of the authority of his office.

Defendant himself acknowledged that the use of his title in relation to such presentations was a factor of extreme significance:

Q. And it, once again, has your public position listed there as your title; is that correct?

A. Yes. That was important, yes.

Q. I'm sorry, I didn't hear that.

A. That was important that---

Q. That your public position be listed?

A. Yes,

(N.T. 1010-1011).

Finally, Defendant's presentation at the Department of Corrections Conference, for which Janssen Pharmaceuticals, through Comprehensive Neurosciences, paid him a total of \$2,000, was clearly given through the use of his public position. Everyone who testified, including Fiorello himself, acknowledged that the presentation he made was done in his position and as part of his role as a public employee. In this respect, Defendant's presentations specifically related to work that he had done as a Commonwealth employee in the implementation of the PennMaps program. At the Department of Corrections conference, he was specifically making a presentation in relation to this project. (*See* Exhibit I.D. 9, page 7). Additionally, Defendant himself acknowledged that the presentation he made at the Department of Corrections conference was done as part of his duties and responsibilities for the Department of Public Welfare. (N.T. 928-929). As such, there is no question that the

presentation made by Defendant as done through the use of authority of his public office. Any honoraria received as a result thereof would be a prohibited pecuniary benefit.

Unquestionably then, a review of all the pertinent facts of record clearly indicate that Fiorello utilized the authority of his public office in order to obtain a prohibited financial gain in the form of honoraria.

B. THE ACCEPTANCE OF PAYMENTS MADE IN RECOGNITION OF PUBLISHED WORKS, APPEARANCES, SPEECHES AND PRESENTATIONS BY A PUBLIC EMPLOYEE, SPECIFICALLY RELATED TO THAT EMPLOYEE'S PUBLIC POSITION CONSTITUTES HONORARIUM, THE RECEIPT OF WHICH IS PROHIBITED BY THE ETHICS LAW.

The instant matter clearly presents an issue that is directly dealt with by the very specific provisions of the Ethics Law. Indeed, Defendant's egregious conduct in the acceptance of prohibited honoraria is so blatant that little analysis need be devoted to this issue. In light of the fact, however, that there is no specific judicial precedent regarding the honoraria prohibition that is delineated in the Ethics Law, a review of that prohibition and prior Commission precedent on such issue will herein be addressed.⁹

The Ethics Law provides, in pertinent part, that:

Section 1103, Restricted activities.

- (d) Honorarium. -- No public official or public employee shall accept an honorarium.

65 Pa. C.S. §1103(d).

The Ethics Law further defines honorarium as follows:

Section 1102. Definitions.

⁹ This section of the Investigative Division's closing statement deals specifically with the direct prohibition of the receipt of honoraria by a public employee. As noted in a previous section of this brief, the same payments of honoraria to Defendant also resulted in separate violations of Section 1103(a) of the Ethics Law, as Defendant used the authority of his office to obtain such honoraria.

“Honorarium.” Payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are non-public occupational or professional in nature. The term does not include tokens presented or provided which are of de minimis economic impact.

65 Pa.C.S. §1102.

Although there is no judicial precedent specifically addressing this definition, guidance may be gleaned from prior decisions of the Pennsylvania State Ethics Commission, the legislative history of the Public Official and Employee Ethics Law as well as analogous judicial precedent.

In assessing whether a public official has received a prohibited honorarium, the definition of that term must be reviewed in order to determine if the specific action in which the public official engaged falls within the express language of that definition. Without question, it is clear that an honorarium would include any payment that is made in recognition of a **published work, appearance, presentation or speech**. Because there is no ambiguity as to this portion of the definition, it is unnecessary to review this specific phrase any further. The Rules of Statutory Construction clearly provide that when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded. 1 Pa.C.S.A. §1921(b). The definition, however, does contain one noted exception. If the payment is intended as consideration for the value of services which are **non public** occupational or professional in nature, then the payment would not constitute a prohibited honorarium. Once again, there is no ambiguity as to this exception. If the payment to the public official is related to activities that are not part of or related to the official’s public position but rather, involves non public or private occupational or professional services, then no violation of the Ethics Law would be occasioned.

Interestingly, the General Assembly of Pennsylvania, during the debate on the passage of the Ethics Law, specifically indicated in no uncertain terms what the exception for non public occupational or professional services was intended to cover:

Mr. REBER offered the following amendment No. A0320:

Amend Sec. 1 (Sec.2), page 7, line 9, by inserting after “services”

which are nonpublic occupational or professional in nature

On the question,
Will the House agree to the amendment?

The SPEAKER, The Chair recognizes the gentleman from Montgomery, Mr. Reber, on the amendment.

Mr. REBER. Thank you, Mr. Speaker.

Mr. Speaker, this amendment before us, 320, is a follow up amendment replacing an earlier one circulated, amendment A272. So you can discard A272. The reason I say that is, A272 was originally agreed to by the proponents of this legislation on the other side of the aisle, and then we conferred and felt we could even more strictly and narrowly tighten this. We redrafted the language, which I am now proposing in amendment 320.

* * *

Mr. Speaker, since we are now in essence outlawing, if you will, or making illegal the opportunity of taking honorariums, which I agree with—we should do away with that -- I want to make it specifically clear that an individual is not prohibited under the definition on page 7, starting on line 7, in the “honorarium” – definition section from taking the compensation or consideration for the value of services which are in fact nonpublic in his occupation or nonpublic in his profession. Therefore, the language in the amendment is adding after the word “services” on line 9, “...services which are nonpublic occupational or professional in nature.”

* * *

Similarly, I would not want to see a municipal supervisor or a municipal commissioner in Luzerne County who may be a stockbroker by profession being prohibited from taking remuneration for services he renders for a column he might write in his professional capacity for the Wilkes-Barre Times newspaper.

So in short, Mr. Speaker, I think if it is obvious that the profession and occupation, nonpublic in nature, is being carried out, that a person who does receive payment in recognition of those publications, those lectures, those speeches, etcetera, can in fact receive that remuneration.

House Legislative Journal 173D of The General Assembly No. 14 February 14, 1989, P. 259.

In reviewing whether an honorarium is prohibited under the provisions of the Ethics law, the Commission has outlined clear criteria to be applied. In *Baker*, Opinion No. 91-004, the Commission specifically noted the following in relation to determining whether a payment for a speaking engagement, published works, appearances or presentation is prohibited honorarium or allowable as a non public occupational or professional service:

The criteria to be applied would include but not be limited to the following: the private occupation of the public official/employee, the expertise of the public official/employee in the area, the history of activity in the occupation prior to public service, the purpose for the invitation, the capacity in which the public official/employee is invited, the subject of the speech, work or presentation, the group spoken to and the composition as to members or non-members of the group, the purpose for gathering the group, the amount of the fee relative to the services performed, the source of the invitation, the event at which the speech is given, the subject matter of the speech is given, the subject matter of the speech or published work as compared to the normal subject matter dealt with by the occupational/professional group and any other relevant factors.¹⁰

Baker, Opinion No. 91-004, page 4.

¹⁰ It should be noted that many of the criteria adopted by the Ethics Commission were criteria mentioned by the members of the General Assembly during the floor debate on the honoraria prohibition. When the drafter of that language responded to a question as to whether a particular factual circumstance would be permitted or prohibited, his response was "It was determinative upon the particular event that he is at, the capacity in which he is appearing, the manner in which he was invited, the purpose for which he was invited, the topic etcetera..." (See House Legislative Journal 173 D of the General Assembly No. 14, February 14, 1989, page 260).

As a result of the foregoing guidance, one must simply review the facts of a given situation in order to determine whether the payments made to a public employee were in recognition of a published work, appearance, speech or presentation or whether they were intended as consideration for the value of private services unrelated to his public position.

Reviewing the facts of the case at bar, there can be no question that the payments made to Fiorello constituted a prohibited honorarium. In this respect, Defendant received eleven payments in recognition of presentations, speeches, appearances or published works that were specifically related to his public position. (*See* Exhibit I.D. 38). None of these payments were consideration for the value of services rendered in a private capacity. A review of the facts of record in relation to these payments proves beyond a reasonable doubt that such payments constituted prohibited honoraria.

Defendant received three payments of \$1,000 each for participating in Pfizer Pharmaceuticals Behavioral Healthcare Pharmacy Advisory Council. The Pfizer Advisory Council met in November 1998, January 2000 and March 2001. In relation to these payments, there is no question that they were made in recognition of Defendant's **appearance** at the council meetings. There is also no question that Pfizer Pharmaceuticals specifically considered these payments honorarium. Such was noted in the literature that was specifically related to each of the council appearances. For example, the general information sheets that were forwarded to Defendant for each of the council meetings specifically noted that "In appreciation of your participation in the 1998 Pfizer Behavioral Healthcare Pharmacy Advisory Council, you will receive a \$1,000 honorarium..." (*See* Exhibit I.D. 21, pages 4,8,11). In addition to the foregoing, the invitation letters that were forwarded to Defendant for his participation in these council meetings likewise indicated that he would receive an

honorarium. (See Exhibit I.D. 28, page 1). Invitation letters of this type were forwarded for every year that Fiorello attended the advisory council meetings. (N.T. 561). This notice is forwarded to all participants, prior to the time that they attend the advisory council meetings, so that they were made aware in advance that an honorarium would be paid. (N.T. 548). The fact that the payment to the participants at the advisory council meetings, including Defendant, constituted an honorarium was acknowledged by virtually every witness who testified, including Defendant himself.

Julie Fisher, one of the key individuals from Pfizer Pharmaceuticals, who was involved in the arrangements for the Pfizer Advisory Council meetings, clearly, without hesitation and unequivocally, stated that the payments made in relation to Defendant's participation in these meetings constituted an honorarium. (N.T. 543, 548-549, 553, 561). Interestingly, all participants in the advisory council were paid the same amount for their appearance. This is so regardless of their background, education, position or the amount of time that they may spend in relation to such service. Thus, the payments were not made in consideration of the amount of time or actual services rendered. (N.T.549).

Likewise, Sapana Panday, the Senior Program Director from Innovative Medical Education, the third party vendor utilized by Pfizer to actually make payments to presenters and participants at the advisory council meeting, identified the payments to Defendant for participation at the advisory council meetings as honoraria (N.T. 604, 608, 609).

Finally, Defendant himself clearly considered the payments that he received for his appearance at these advisory council meetings as honoraria. He specifically noted such in at least two written communications that he authored. In one such communication, he specifically noted "Attached is specific information regarding my participation in the

Behavioral Healthcare Advisory Council meetings in 1998, 2000 and 2001, for which I received honoraria of \$1,000.” (See Exhibit I.D. 15, page 2). On yet another occasion, Defendant noted in relation to these three advisory council meetings that “In each case I received an honorarium for \$1,000.” (See Exhibit I.D. 22, page 2).

In relation to the foregoing payments, it is equally clear that Defendant’s appearance at the Healthcare Advisory Council was specifically related to his position as the Chief Pharmacist for OMHSAS and not in conjunction with any private service or non public occupational or professional position. In this respect, it is worth noting that participation in the advisory council meeting is initiated by Pfizer Pharmaceuticals Sales Representatives who are allowed to nominate individuals to participate in such councils. (N.T. 473,493,546-547). Nominees’ names are then submitted to the individuals in charge of organizing the Advisory Healthcare Council at Pfizer headquarters. The nominees submitted by the Sales Representatives are given priority and are always selected. (N.T.547) Defendant Fiorello was specifically chosen because of his position as the Chief Pharmacist at the Harrisburg State Hospital and as Pharmacy Director for OMHSAS. John Quinn, one of the Pfizer Pharmaceuticals Sales Representatives who nominated Defendant specifically noted his reasons for doing so:

- Q. Is there anything that caused you to recommend Mr. Fiorello to serve on one of these advisory councils?
- A. I recommended him as a noted expert in the management of pharmacy and because of his expertise with the state psychiatric institution. (N.T. 574)

Likewise, Paul Hoop, Quinn’s Supervisor, also confirmed that Defendant’s nomination to serve on the advisory council was specifically related to his public position:

- Q. Do you recall what would have caused you and Mr. Quinn to nominate Mr. Fiorello to serve on the advisory council?

A. Probably his position as the Chief of Pharmacy at the flagship psychiatric institute for the State. (N.T. 497).

Finally, Julie Fisher, the Pfizer Pharmaceutical employee responsible for organizing the Behavioral Healthcare Advisory Council events, clearly indicated why Pfizer would be interested in having a public employee like Fiorello participate in council meetings:

Q. His position with the Commonwealth of Pennsylvania was either as the Chief Pharmacist of the Harrisburg State Hospital or as the Director of Pharmacy for the Pennsylvania Office of Mental Health and Substance Abuse Services, which covers the entire state hospital system. Would someone like that, with that title, be of interest to serve on the Advisory Council?

A. The value of someone with that title would be of significance for Pfizer because we do--- really want to understand the issues of the inpatient/outpatient care and treatments of mood disorders.

Q. So the reason you would be interested in him is because he is in the hospital system and would be able to give you the type of information regarding transfers from inpatient to outpatient care?

A. As well as how care is decided on the inpatient setting, but absolutely. (N.T. 554-555).

Even Defendant's supervisor, Dr. Steven Karp, considered Defendant's service on the Advisory Council to be part of his state job. (N.T. 844).

In addition to all of the foregoing, which clearly indicate that the payments made in recognition of Defendant's appearance at the Behavioral Healthcare Advisory Council meeting was related specifically to his public position, is the wealth of additional circumstances supporting this conclusion. In this respect, it is interesting to note that many of the payments, correspondence and other documents relating to his participation in such meetings were addressed to him utilizing his official public title and/or his Commonwealth of Pennsylvania address. (See Exhibit I.D. 13-15, 17,20,21; Exhibit I.D. 14, page 3; Exhibit I.D. 28, page 1). Indeed Defendant even went as far as signing his name and title to one of the documents relating to the Advisory Healthcare meetings identifying himself as "Pharmacy Director OMHSAS". (See Exhibit I.D. 13, page 15).

Based upon all of the foregoing, there can be no question that the payments to Defendant for his appearance at the Pfizer Behavioral Healthcare Advisory Council events constitute a prohibited honoraria, in violation of the Ethics Law.¹¹

Another three honorarium payments made to Defendant related to his presentation of a study that had been conducted by himself and Timothy Henning, Pfizer Continuing Educational Consultant. The nature of the study and Defendant's role in relation to the conduct of this study were delineated in a previous section of this brief. Defendant's presentation of the results of this study at three different events for which he received compensation, in addition to constituting a use of authority of office to obtain a private pecuniary benefit as heretofore noted, concurrently occasioned a violation of the Ethics Law honorarium prohibition. The evidence unequivocally shows that in December of 1999, Defendant, along with Henning and Pamela Smith, another Pfizer employee, participated in a panel presentation of the study "Anti-Depressant Outcomes in Multi Hospital Medical System." Defendant was specifically identified as participating in this project as a representative of the Harrisburg State Hospital. (See Exhibit I.D. 18, pages 2,5,6). Defendant was paid \$1,000 for his presentation of the anti-depressant study.¹² Defendant also received \$1,000 for his presentation of this same study in Dublin, Ireland in May of 1999. Timothy

¹¹ No evidence was introduced by Defendant to indicate that he engaged in any non public occupational or professional enterprises which would enable him to qualify for the previously noted exception to the definition of honoraria. Defendant's only occupation was his service as a Commonwealth employee. During cross examination of Defendant, it was clear that a review of his private employment history prior to the time that he became a Commonwealth employee evidenced no activity in the area of pharmacology as it related to mental disorders or mental institutions. Even Defendant clearly indicated that all of his experience in this area primarily resulted from his Commonwealth employment. (N.T 951-956, 1003-1004). Further, a review of Defendant's income tax returns shows that he engaged in no private or outside employment, profession or occupation other than the speaking engagements for which he received compensation that are outlined herein. As such, the evidence is overwhelmingly clear that other than his Commonwealth employment, Defendant engaged in no non public occupational or professional services.

¹² Although Defendant, during his testimony, apparently attempted to testify that he was not sure that he received a payment for his participation in the program in Orlando (N.T. 958), Fiorello acknowledged, in writing, that he had indeed received such payment. (See Exhibit I.D. 15, page 2).

Henning, the representative from Pfizer Pharmaceuticals who conducted the study with Defendant, clearly confirmed that both the Orlando and Dublin presentations related to the study that he and Defendant had conducted for the Commonwealth of Pennsylvania. (N.T. 743-745, 749-750). Specifically in relation to the presentation by Defendant in Dublin, the individuals at Pfizer considered the payment to him honoraria, as so clearly delineated during their testimony. In this respect, Delores Nobles-Knight, the Pfizer employee who was in charge of organizing the Dublin event, testified that the \$1,000 paid to Defendant was honoraria and that he was well aware of the fact that he was going to be paid same. (N.T. 590-591). In fact, Nobles-Knight specifically noted that Defendant would be paid \$1,000 in honoraria on a copy of a letter that Defendant had written to her specifically seeking reimbursement of expenses (*See Exhibit I.D. 13, page 8*).¹³ Pfizer subsequently issued a check in the amount of \$1,138 to Defendant covering his honorarium and expenses. (*See Exhibit I.D.13, page 6*).

Fiorello's presentations were not "non public, occupational or professional" in nature but were directly related to a study that he had conducted in his state position for which the Commonwealth had paid him. Further confirming the fact that Fiorello's presentation was specifically related to the study and his state position was Nobels-Knight's testimony indicating that, "We wanted him to be able to speak to how he used that software in his practice setting at the workshop." (N.T. 598).

Finally, Defendant's also received an additional \$500 from Pfizer for presenting the anti-depressant study on January 29, 2000, at one of the Pfizer Behavioral Healthcare Pharmacy Advisory Council meetings. (*See Exhibit I.D. 21, page 6*). Payment to Defendant

¹³ Interestingly, Defendant in the letter to Nobles-Knight, identified himself as the OMHSAS Pharmacy Director, in requesting his reimbursement.

of this \$500 was clearly and unequivocally labeled as “Speaker Fee.” (N.T. 608). This additional fee of \$500, which supplemented the \$1,000 he received for his mere appearance at the meeting discussed above, was a standard fee provided by Pfizer to individuals who actually made presentations at the council meetings. Both Julie Fisher and Sapana Panday testified that individuals who provided extra speaking services at such council meetings would, as a result, receive additional honorariums. (N.T. 549-550, 608). Timothy Henning also confirmed that the presentation made by Defendant at the Advisory Council meeting was a presentation of the **same study** that had been conducted by the Defendant and him for the Commonwealth of Pennsylvania. He also indicated that this was the same study that had been presented in Dublin and Orlando and that Pamela Smith, who is identified on the program agenda for the January 28th presentation, is the same individual who appeared with Henning and Defendant in Orlando. (N.T. 748-749). Defendant was constrained to admit this when confronted with the clear evidence thereof. (N.T. 1027-1031).¹⁴

Once again, a review of the foregoing leaves no doubt that the payments to Defendant Fiorello for his presentation of the study that had been conducted by he and Timothy Henning for the Commonwealth of Pennsylvania, constituted prohibited honoraria.

Next, on November 15, 2000, Defendant received, at his state offices, a \$1000 honorarium for participating in the development of a published work in the form of a CD Rom program entitled “Impacting Behavioral Healthcare: The Role of Pharmacy.” This published work was a result of Defendant’s participation in the Pfizer Pharmacy Behavioral

¹⁴ It is worthy of note that the study conducted by Defendant and Henning and subsequently presented to the Formulary Committee was the only time that a study was conducted in conjunction with representatives of a drug manufacturing company. (N.T. 1040-1041). Indeed, the Formulary Committee later specifically decided to “Not approve any cooperative study with a drug company,” in order to avoid potential drug company bias. (*See* Exhibit I.D. 23, page 63).

Advisory Healthcare Council meetings. (See Exhibit I.D. 28, page 1). Defendant's payment came, once again through Innovative Medical Education, the third party contractor utilized by Pfizer. (See Exhibit I.D. 13, page 21). Defendant acknowledged, in writing, that he indeed received \$1,000 for his role in this **published work**. He further acknowledged that he considered this an honorarium, in a written letter to an investigator for the State Ethics Commission, where he noted the following:

The advisory council was mainly educational in nature. As an example I have attached a copy of the CD program "Impacting Behavioral Healthcare: The Role of Pharmacy" which was a result of the advisory council activity. This was funded by a grant for the University of Kentucky, for which I received an honorarium of \$1,000 through Innovative Medical Education.

(See Exhibit I.D. 15, page 2).

Both representatives of Pfizer and Innovative Medical Education also considered this payment to Defendant as an honorarium.¹⁵ This was specifically noted in the letter to Defendant transmitting this payment to him. (See Exhibit I.D. 17, page 1; Exhibit I.D. 13, page 21, N.T. 610). As heretofore noted, Defendant's participation in the Advisory Healthcare Council events, which was related to the production of this published work, was the result of his service as the OMHSAS Pharmacy Director. IME's correspondence to Defendant regarding the publication of this CD Rom was addressed to Defendant at the Office of Mental Health and Substance Abuse. Defendant himself changed his title on the IME paperwork from Pharmacy Director to Director of Pharmacy Services. (See Exhibit I.D. 17, page 1; N.T. 1008-1009), Not only was IME's specific correspondence addressed to his public office, but Defendant was identified as a faculty member for the CD Rom specifically

¹⁵ The program was funded by a Pfizer Unrestricted Educational Grant to the University of Kentucky. (See Exhibit I.D. 17, page 1).

utilizing his title and position with the Commonwealth of Pennsylvania . (See Exhibit I.D. 17, page 4).

Payment to Defendant by Pfizer, through IME, of \$1,000 for this published work was clearly related to Defendant's public position and thus constituted a prohibited honorarium in violation of the Ethics Law.

The final prohibited honorarium that Defendant received from Pfizer Pharmaceuticals was paid to him on May 10, 2000. This payment was in the amount of \$1,000 and was paid for his participation in a pharmacoeconomic summit on behavioral healthcare that was held in LaJolla, California. Once again, Defendant's participation in this program was part of his service for Pfizer on their Advisory Healthcare Council because of his Commonwealth position and service, and in light of the fact that there was no evidence of any outside non public professional or occupational activities on Defendant's part, it was clear that this payment was a prohibited honorarium.

In addition to the payments made to Defendant by Pfizer Pharmaceuticals, there was an additional payment made by Janssen Pharmaceuticals, Incorporated in the amount of \$2,000, for Defendant's participation in a conference that was organized by the Pennsylvania Department of Corrections. This conference was held on April 17, 2002, and Defendant made a presentation during this conference entitled "A Study of Combination Anti Psychotic Medication Usage." (See Exhibit I.D.9). Defendant's presentation was made specifically in his position as the Director of Pharmacy Services for OMHSAS and was done during the course of his normal Commonwealth work day. He was also identified by his title on the conference program. (See Exhibit I.D.9, page 2). The Department of Corrections conference was primarily arranged through the efforts of Laurie Snyder, a Janssen Pharmaceutical employee, and the Medical Director for the Pennsylvania Department of Corrections, Dr. Frederick Maue. Snyder had specifically suggested Defendant's participation in the program because she was aware of the fact that he had been working with the PennMaps Project for the Pennsylvania Department of Welfare and suggested a presentation on that project as part of this conference. (N.T. 372) In relation to the payment of an honoraria

Q. But you knew an honoraria was being offered or was available?

A. Yes, Dan Hoffman did tell me that.

Q. And you directed--- and I forget the woman's name---someone at Comprehensive NeuroSciences to send that honoraria somewhere; is that correct?

- A. Yes, to my church.
- Q. You did not tell them, don't send any honoraria, did you?
- A. No, I didn't.
- Q. When the check came to you, you didn't send the check back, did you?
- A. No. That was one of my options.
- Q. You deposited the check into your personal bank account when you got it, did you not?
- A. Yes.
- Q. And then you decided where you were going to make that money to, did you not?
- A. I deposited the check and then on the same day I wrote two checks---
- Q. Did you donate the money---
- A. ---to charity.
- Q. I'm sorry. Did you donate the money in the name of Janssen?
- A. No.
- Q. Did you donate the money in the name of Comprehensive NeuroSciences?
- A. Of course not.
- Q. The money was donated on your personal check; is that correct?
- A. That's correct.
- Q. And you did control, to some extent, the actual distribution of that money because you could have said, don't send it at all, I decline?
- A. Well, okay, I guess I could have done that, but I didn't. (N.T. 998-1000).

As a result of the foregoing, it is clear that the actual payment of \$2,000 to Defendant, which was deposited into his personal bank account constituted a payment in recognition of a speech or presentation and thus was a prohibited honoraria. The fact that he subsequently donated this money to charity does not negate the fact that the payment and its acceptance were prohibited by law.

Interestingly, the Ethics Commission has, in the past, reviewed the issue of whether it would be appropriate to donate otherwise prohibited honorarium to charities.¹⁶ In *Richardson*,² Opinion No. 93-006, the Commission was faced with the issue of whether officials from State System of Higher Education could designate the charitable donation of honoraria which was offered to them for speaking engagements. As heretofore noted,

¹⁶ Clearly, construction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or over overturned except for cogent reasons. See *Spicer v. Department of Public Welfare*, 428 A.2d 1008 (Pa. Cmwlt. Ct. 1981); *Chappell v. Pennsylvania Public Utility Commission*, 425 A.2d 873 (Pa.Cmwlt. Ct. 1981).

honoraria is specifically prohibited under the Public Official and Employees Ethics Law. 65 Pa. C.S. §1103(d). Noting that the Ethics Law would specifically prohibit the receipt of such honoraria, the Commission interpreted the Ethics Law to hold that designation of payment of the honoraria to a charitable cause would also be prohibited thereby. In so ruling, the Commission specifically noted legislative debate on the issue of such donations. Specifically the Commission in *Richardson* noted as follows:

“Concerns such as the above were raised during the legislative debate on the honoraria issue regarding a proposed amendment which would have allowed an exception if the honoraria were given to charity. As noted above, after various member of the General Assembly raised concerns, the amendment was withdrawn.

We are mindful of the fact that these public employees are seeking to decline the honoraria so that the payments would be paid to worthy causes consisting of institutional endowment funds or system wide foundation. However, the General Assembly enacted the law which we must administer within the statutory limitations. We may not create an exception which does not exist by statute. Lastly, there is not any room for interpretation in this instance since we are confronted with the above legislative debate. Such action reflects a legislative intent not to allow the contemplated activity.”

Richardson, Opinion No. 93-006.

As can be seen from the foregoing administrative interpretations of the Ethics Law prohibitions and whether otherwise prohibited financial gains may be donated to appropriate charities, such has indeed been reviewed by the Commission.¹⁷

There is, of course, additional support for the prior Commission opinions.

¹⁷ The Commission’s prior administrative interpretations carry substantial weight in the current analysis, as the Commission does have an obligation to render consistent opinions. *See Lehigh Valley Farmers v. Block* 640 F. Supp.1497 Aff’d, 829 F.2d 29 409 (3rd Cir. 1986), *Standard Fire Insurance Company v. Insurance Department*, 611 A.2d 356 (Pa. Cmwlt. 1992).

The General Assembly's discussion regarding the issue of whether the charitable donation of an otherwise prohibited financial gain (honoraria) is instructive in this Court's review of the case at bar.

The honorarium prohibition was contained in one of the first drafts of the Ethics Law. During the course of the legislature's consideration on the House floor of the honorarium prohibition, an amendment was proffered which would permit the designation of a specific charity to which the otherwise prohibited honorarium could be donated. This issue then became the subject of an extensive legislative debate:

Mr. D.R. Wright: I understand that you are amending this so that one could accept an honorarium but give it to charity rather than given to the public official.

* * *

Mr. O'Donnell: What I am doing, my amendment has one purpose and one effect only, and that is to permit, to clarify it so that the prohibition on honorarium will not extend to a situation in which a public official or employee appears and, by virtue of their appearance, a contribution is made to a charitable organization. That is the whole thing. So if you agree to speak in front of the Boy Scouts, and they give you a \$500 gift for being there, that is an honorarium. If you agree to speak in front of an organization and they give a gift to the Boy Scouts because you came and spoke, that would be permitted under my amendment.

Mr. McHale: Mr. Speaker, if this chamber does in fact adopt your amendment and a payment is made from a contributor to a charity, does the public official serve as a conduit for that payment or must the money go directly from the contributor to the charity? As an example, would your amendment authorize an elected official to give a speech to a trade association,

accept a payment for \$500 for that speech, and 3 days later go to the Heart Association and make a contribution of \$500? Does it come in one hand and out the other, or in the alternative, does it merely authorize a direct payment, not through the elected official but immediately to the charity?

Mr. O'Donnell: I did not hear the second hypothetical, but the answer is, it has to go directly?

Mr. McHale: The answer is, it must go directly?

Mr. O'Donnell: Directly.

Mr. McHale: Mr. Speaker, may I speak on the amendment?

The Speaker: The gentleman indicates that he wishes to be recognized on the amendment and is in order at this time.

Mr. McHale: Mr. Speaker, if this amendment authorized the elected official to personally serve as a conduit for such a contribution to a charity, I would have concerns with regard to its content. In effect, it would authorize a form of campaigning, a form of electioneering. But so long as the payment goes directly from the contributor to the charity, I have no objection to this amendment, and I would urge its passage.

The Speaker: The gentleman from Dauphin, Mr. Piccola, indicates that he wants to be recognized on the amendment and it is recognized.

Mr. Piccola: Mr. Speaker, would the maker of the amendment consent to interrogation.

The Speaker: The gentleman indicates that he will, You may proceed.

Mr. Piccola: Mr. Speaker, I do not see anywhere in the amendment where the limitation on payment is one to a charity. Would you explain how that is limited to a payment to a charity.

Mr. O'Donnell: That question was just raised with me privately, Mr. Speaker, and I am almost inclined to reverse the question now. Let me answer broadly, if I may, first. The attempt of the amendment was to clarify the definition of "honorarium" so it would be clear that people would be able to appear as long as they did not personally benefit. Now, I did not use the word "charitable" because I have myself appeared in front of groups, not taken honorarium, and had the money given to sports associations or whatever, and I am sure if I put the word "charity", and the answer would be, a 501(c)(3) organization.

I cannot draft it any more tightly. If there is a concern in the House that the kind of legal expertise that has been focused on these issues this afternoon will now be turned to a manipulation of this language in such a way that someone other than the member, and yet, other than a charity, might be the beneficiary of that, I mean, if that-Let me just reverse it and abuse the parliamentary process and ask if that is the gentleman's sense. Is that the concern underlying?

Mr. Piccola: I think the gentleman is out of order, but that satisfies my inquiry, and in response to the majority leader, that is my concern. I do not claim to be a great legal expert, but that occurred to me that this would permit an honorarium to be paid to any entity other than the public official or the public employee, and that seems to me to create a lot of possible ways to get around the intent to prohibit honorariums to be paid.

I do not disagree with the gentleman's intent in permitting the payment to go to a charity, but I think we create a whole lot of other options under this amendment, and for that reason I would oppose it.

House Legislative Journal 173D of the General Assembly No. 14, February 14, 1989, 256-258

As a result of the serious questions that were raised by the various members of the General Assembly, the amendment was withdrawn and, as such, the Ethics Law was

eventually passed without the authorization for a public official to donate or designate the donation of otherwise prohibited funds to charitable cause.

The various issues that are currently before this Court, including the fact that the official himself acts as a conduit for the funds, or otherwise uses his own judgment as to what is or is not a charitable cause, all became focal issues for the Legislature in relation to this issue. As such, the General Assembly saw fit not to permit a public official to engage in such arbitrary decision making.

This exact rationale was recently affirmed by the Commonwealth Court of Pennsylvania in *Keller v. State Ethics Commission*, 860A.2d 659 (Pa. Cmwlth. 2004). In *Keller*, the Commonwealth Court of Pennsylvania upheld a State Ethics Commission order which had found that a Borough Mayor violated Ethics Law when he collected fees for performing marriage ceremonies, in his position as Borough Mayor, and subsequently deposited said fees into his personal bank account. The violation of the Ethics Law was found even though the Mayor subsequently donated all of the charged fees to various charities. In upholding the decision of the State Ethics Commission, the Commonwealth Court specifically noted that:

Once again this Court must agree with the Commission. The parties stipulated that Keller accepted the money, made deposits into his own personal bank account and determined when, where, how much, and to whom the money went. There is no factual dispute. Based on the stipulations, the findings are supported by substantial evidence. The Commission did not err when it determined that Keller realized a private pecuniary benefit. He treated the amount received as his own money. Although Keller ultimately gave away the money, he still obtained more than \$16,000 in a four year period. Albeit that it was “donated,” it was still for his personal use through the exercise of the authority of his office.

860 A.2d at 665.

The case at bar is remarkably similar to the factual pattern that existed in *Keller*. Here, as in *Keller*, Defendant received payment that was otherwise prohibited by law. Although he ultimately donated this \$2,000 to charity, the fact that he accepted the payment, deposited such into a personal bank account, as did *Keller*, and subsequently made the decision as to who received such funds, resulted in a violation of the Ethics Law. As in *Keller*, “He treated the amount he received as his own money.” *Keller v. State Ethics Commission*, 860 A.2d 659,665 (Pa. Cmwlth 2004).

In addition to the honoraria that was received by Defendant from the drug manufacturers, he additionally received honoraria for presentations that he made for an entity known as Riverside Associates, P.C. Riverside Associates, which is operated by Dr. G. David Smith, was an entity involved in the practice of psychology specializing in service to persons with disabilities and mental health problems. In June and November of 2000, Riverside held two programs entitled “Psychopharmacology of Mental Disorders- An Introduction.” These workshops focused on the use of psychotropic medications and the treatment of major types of mental disorders. (*See* Exhibit I.D. 19, 20). The programs entailed an overview of the types of medications that are used to treat mental disorders. (N.T. 303). Fiorello was identified as the presenter on both of the programs and as the Director of Pharmacy for the Harrisburg State Hospital. At the time of the presentations, Fiorello also served s the Chief Pharmacist for OMHSAS. For his presentation, Fiorello received \$300 on each occasion. (N.T. 305; Exhibit I.D. 26). The payments made by Riverside Associates to Fiorello were specifically for and in recognition of his presentations. For his presentations, Fiorello received the same rate that Smith paid to all other presenters. (N.T. 305) These

payments were unrelated to the amount of time worked by Fiorello and simply constituted a flat honorarium paid to all speakers. Of course, Fiorello's presentation during these programs was unrelated to any non public occupational or professional services. (See Footnote No. 11). Indeed, every witness who testified regarding Fiorello's work for the Commonwealth of Pennsylvania specifically indicated that part of his job involved the Psychopharmacology of Mental Disorders, the same topic he presented. Dr. Robert Davis, Defendant's most recent supervisor, specifically testified that:

Q. I was curious about a word maybe you can help me out with, if I can find it. Bear with me a minute. Psychopharmacology.

A. Yes.

Q. What is that?

A. The term refers to the medications that are used for psychiatric purposes. That would be drugs for anxiety, drugs for depression, drugs for psychosis, mood-stabilizing drugs.

Q. And in his position, would Mr. Fiorello have dealt with psychopharmacology? Excuse me, it takes me time to get that word.

A. yes, but also pharmacology in general in the State Hospital system.

Q. What is psychopharmacology of mental disorder? What is that? Is that different than just psychopharmacology?

A. If you put the two together, that would be like a study of the science of use of pharmaceutical agents and their treatment of mental disorders.

Q. Would he have played any role in that kind of activity in his position with DPW?

A. Yes, in the sense of he would do our---one of our responsibilities is to ensure quality improvements in the State Hospital system.

Q. So Mr. Fiorello, as part of his position as OMHSAS Pharmacy Director, would play a role in that kind of activity that I just mentioned?

A. To some extent, yes. (N.T. 207-208).

Another of Defendant's former supervisors, Dr. Steven Karp, not only confirmed Dr. Davis' assessment but also advised that psychopharmacology of mental disorders was one of Defendant's major responsibilities in his position.

Q. You were the supervisor of Mr. Fiorello; correct?

- A. Yes.
- Q. During your term of office?
- A. Yes.
- Q. Would he have been involved to any degree in his job with the state in that field, psychopharmacology?
- A. Sure.
- Q. Psychopharmacology of mental disorders, is that a separate term, if you would, as opposed to just psychopharmacology?
- A. Pharmacology would relate to mental---it would be doing psychopharmacology in the realm of mental disorders.
- Q. So would Mr. Fiorello, in his state job in the Department of Public Welfare, have been involved with psychopharmacology of mental disorders?
- A. Yes.
- Q. Would it be safe to assume that as the Director of Pharmacy for OMHSAS, that's what we've been calling it actually, as the Director of Pharmacy for OMHSAS, the psychopharmacology of mental disorders would have been the primary area of work for him?
- A. Yes. (N.T. 821-822).

Finally, Dr. David Lawrence, Chairman of the Formulary Committee, and another individual familiar with Defendant's duties and responsibilities also delineated his role in this area:

- Q. Well, let me ask my question more broadly than that. If you know, did Mr. Fiorello serve any role whatsoever in relation to the psychopharmacology of mental disorders, any role whatsoever?
- A. Yes. (N.T. 684-685).

Clearly, then, based upon the foregoing testimony, there can be no question that Defendant's presentation specifically related to his duties and responsibilities in his public position and not some private enterprise in which he was engaging.¹⁸ As heretofore noted Defendant himself specifically indicated that outside of his duties and responsibilities as a Commonwealth employee, he had no experience in the field of psychopharmacology or the treatment of patients with mental disorders. Such experience was garnered solely through his

¹⁸ During the course of Dr. Smith's testimony, substantial effort was made to show that Riverside Associates was engaged as a business enterprise in the presentation of workshops and seminars. This fact, however, does not impact upon the fact that payment to Defendant was specifically made in recognition of a speech or presentation that was specifically related to his public position.

public position.¹⁹ Once again, the payments to Defendant similar to the payments that he had received from the pharmaceutical companies constituted prohibited honoraria.

In all, Defendant received a total of \$10,100 in prohibited honoraria.

Reviewing all the foregoing instances where Defendant received payment in recognition of the various speeches, presentations, appearances and published works, in light of criteria established by the Commission in the *Baker* Opinion No. 91-004, it is remarkably clear that each and every payment constituted a prohibited honorarium. Although Defendant was indeed a pharmacist, the history of his activity in the occupation, prior to his public service indicates absolutely no specialization in the field of pharmacology of mental disorders. Defendant was never employed in that area, never served in that area and had no expertise in that area. Additionally, the purpose for the invitation to him, in each situation, was clearly related to his position or the study that he had performed as a Commonwealth employee, which was the operative factor generating the invitation to him, in each situation. His desirability was clearly related to his position of public employment. In each instance, it was either his title, his expertise in his public position or the study that he had performed as a Commonwealth employee, which was the operative factor generating the invitation to participate in the various programs. As noted, in each situation, he was invited to speak and/or was identified as either the Chief Pharmacist for the Harrisburg State Hospital or the Director of Pharmacy of OMHSAS. In each situation, the subject matter of his speech, work or presentation was related to psychopharmacology of mental disorders or the treatment of mental disorders through anti-depressants. Finally, the fees for the presentations were

¹⁹ It is worthy of note that the programs that were organized by Riverside Associates, in which Defendant participated and for which he was compensated, were in part funded by the Commonwealth of Pennsylvania and specifically Defendant's own department, including the Offices of Mental Health. (See Exhibits I.D. 19, 20; N.T. 3080309).

unrelated to the nature of the project, the amount of work performed, the hours allocated to the project or the level of his competence. The fee in each situation was a flat standard fee paid to every speaker regardless of their background, expertise or time commitment. Accordingly, there is proof beyond a reasonable doubt that Defendant received prohibited honoraria.

C. DEFENDANT'S CONTINUED EFFORTS TO CONCEAL HIS RECEIPT OF PROHIBITED HONORARIA IS EVIDENCE THAT HIS ACTIONS WERE INTENTIONAL.

Defendant, throughout the course of his efforts to receive honoraria, overtly attempted to conceal his actions. Defendant's concerted efforts at deception and evasion are clear evidence of his consciousness of guilt. *See Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982).

There is no question that Defendant was well aware of the fact that he should not be receiving honoraria in his public position. Many of the witnesses who testified, even those who are not Commonwealth employees, were aware of the honoraria prohibition. Laurie Snyder, a Representative from Janssen, was clearly aware of the fact that Defendant should not have received honoraria and went to great lengths in order to ensure that he did not. (N.T. 85). Dr. Robert Davis, Defendant's most recent supervisor, was also aware of the fact that honoraria was prohibited. (N.T. 267-268). More importantly, Defendant's prior supervisor, Dr. Steven Karp, told Defendant that he should not be accepting any honoraria. (N.T. 843-844). Disregarding this clear warning, Defendant, knowing that honoraria were prohibited, continued to accept the payments from drug manufacturing companies who were doing business with the Commonwealth of Pennsylvania. He did so over the course of several years.

Defendant was not only aware of the Ethics Law and its application to his conduct, as a result of clear warnings that had been given to him by his immediate supervisors, Dr. Karp and others, he also had received specific instructions regarding the application of the Ethics Law when he began his employment in 1989. All DPW employees are required to go through an orientation process when they begin their employment with that department. Defendant attended such an orientation program. Part of that orientation program involved a review of the DPW internal code of conduct requirements, conflict of interest rules, supplementary employment restrictions and the specific provisions of the Ethics Law. (N.T. 275-279). In fact, Defendant signed a statement indicating that he in fact had received the foregoing information, including instruction on the Ethics Law. (*See* Exhibit I.D. 5).

The fact that Defendant knew that he should not be accepting these payments was further evidenced by his actual efforts to avoid detection. Defendant never reported that he had indeed been paid honoraria during the course of his Commonwealth service, on Statements of Financial Interests that he filed with the Department of Welfare. (Exhibit I.D. 3; N.T. 967-972). Defendant's excuse that he did not believe he had to report these payments because they did not reach a certain threshold completely failed when he was confronted with his other efforts to conceal his payments.²⁰ In this respect, Defendant also did not report payments on his Code of Conduct Forms that were required to be filed with the Department of Public Welfare. (Exhibit I.D. 33). These forms do not require a threshold amount and thus Defendant would have been obliged to report any payment received outside of his Commonwealth income. Regardless of such, Defendant continuously failed to list the

²⁰ Defendant's reasoning that the payments did not reach the reportable threshold was contradicted by the facts which prove that for calendar year 2000, Defendant received payments totaling \$3,500, well over the \$1,300 threshold. (*See* Exhibit I.D.39).

payments he had been receiving from the drug manufacturing companies in his effort to avoid discovery.

Defendant, during his testimony, claimed that he was ignorant of the Rules of Conduct that were in effect at the Department of Public Welfare, even though he had received specific instructions on such. His assertion is both self-serving and unworthy of belief. This is especially evident in light of his conduct regarding payments for intern supervision, detailed later in this brief. (*See* Exhibit I.D. 5; N.T. 976).

In addition to the foregoing, Defendant failed to file a Supplementary Employment Request Form as required by the Department of Public Welfare indicating that he had been receiving compensation from the drug manufacturing companies, as well as from Riverside Associates. Such a form, was required under the Department of Public Welfare's Supplementary Employment Request Requirements. (N.T. 406-407; Exhibit I.D. 34).

These regulations applied uniformly to all DPW employees and required submission by Defendant even if he was not being compensated for his activities. (N.T. 407). DPW compares Supplementary Employment Request Forms to Statements of Financial Interest and, as a result, had Defendant filled out the form or reported the income on one of the financial statements, his activity would have been detected. Therefore, once he failed to report his income on the Statement of Financial Interest, he could not report his supplementary employment for fear of being detected. (N.T. 415-416). Defendant, of course, was well aware of the fact that he was required to submit the Supplementary Employment Request Form.²¹ This nowhere better evidenced than by the fact that he had previously reported income when working as a Retail Pharmacist in 1991. As such, Defendant was clearly aware

²¹ The standards of conduct for DPW employees required all employees to obtain approval for all outside activities, including serving as a consultant or receiving honoraria. (*See* Exhibit I.D. 34).

of the existence of reporting requirements.²² In reality, Defendant eventually submitted a Supplemental Employment Request Form because one of his supervisors, Gerald Radke, began to ask serious questions about the interactions between the pharmaceutical companies and employees of DPW. Although Defendant attempted to deny this during his testimony (N.T. 989), when confronted with prior statements, he was constrained to admit that such was the real reason he eventually filed his Supplemental Employment Request. (N.T. 991). Defendant's conflicting statements on this and other issues are overwhelming proof of the true intent behind his machinations: avoidance of discovery of his inappropriate conduct.

Eventually, Defendant's misconduct in accepting prohibited honoraria began to surface at work. As noted previously, one of Defendant's prior supervisors, Gerald Radke, initiated the questioning regarding the activities of Defendant and others in the Department of Welfare and their interactions with the pharmaceutical companies. This conduct became the subject of an investigation of the Executive Branch's Office of Inspector General. Defendant became one of the individuals who was the focus of that investigation. As part of the investigation, Defendant's receipt of payments from the pharmaceutical companies was clearly a question of interest. Representatives from the Office of Inspector General questioned Defendant about the known instances where he received payments of prohibited honoraria. These instances included Defendant's service on the Pfizer Behavioral Healthcare Pharmacy Council as well as the receipt of payments from Janssen and Riverside Associates.

²² When confronted with his prior actions reporting supplemental employment, Defendant testified that he did so because the employment was in a retail facility. He indicated that he did not believe the same standards applied to serving as a Consultant, even though the standard of conduct specifically delineates this. (N.T. 994-995). Defendant's credibility, however, is highly suspect, as he conjured up various excuses when confronted with his many prior statements. For example, although Defendant testified that the reason he failed to report his receipt of honoraria as income on the noted forms and for supplemental employment request purposes, was that he did not believe it was employment; on other occasions, he filed written statements indicating that the reason he filed the form later was because he believed he had to do so because of the change in his position of employment to a statewide position where he considered that there might be a potential for conflict of interest. (*See* Exhibit 15, page 1).

The Inspector General's Office, however, was unaware of other instances where Defendant had received similar honoraria, including the payments to him for his presentations in Orlando and Dublin. Even though Defendant was well aware of the fact that his receipt of honoraria was being questioned, he continued to hide whatever he could from the Office of Inspector General.

Q. My question is, when you were interviewed by the Office of Inspector General, did you reveal to them anything regarding the Orlando conference that we talked about today?

A. No. Apparently he never asked.

Q. And you never volunteered it?

A. I didn't think I was required to volunteer information.

Q. You never revealed or volunteered to the Inspector General's investigators anything regarding the Dublin conference, did you?

A. No.

Q. You never revealed to the Office of Inspector General anything regarding the pharmo-economic conference in California?

A. No. (N.T. 1027).

Defendant's statement that he would not volunteer any information not already known is indeed telling as to his motives and intent.²³

Finally, when confronted with questions as to whether he had supplemental employment with any drug company or subsidiary of a drug company, he adamantly denied any such connection. (*See* Exhibit I.D. 29, page 2). Thomas Orr and George Kopchick, employees of the Department of Public Welfare, specifically posed such questions to Defendant during an interview. Both testified that Defendant made outright denials of any such payments from, or connections to, drug companies. (N.T. 439-440; 148-149).

A review of the foregoing clearly indicates the Defendant, on numerous occasions, overtly attempted to deny or conceal his relationship to the aforementioned drug companies

²³ Representatives of the Inspector General's Office also questioned Defendant as to whether or not he had donated any of the other honoraria that he had received in relation to his service on the Pfizer Behavioral Advisory Council. When questioned by these investigators, Defendant refused to provide "a straight answer" to the question. In their words, "He just wouldn't give an answer." (N.T. 342).

and the fact that he had been receiving payments therefrom. Defendant was clearly aware that this conduct was inappropriate and his ongoing efforts to conceal his activities is evidence of the intentional nature of his conduct. As such, this Court has been provided with sufficient documentary and testimonial evidence to find beyond a reasonable doubt that Defendant's violations of the Ethics Law were committed with knowledge and intent.

D. **DEFENDANT'S PARTICIPATION AS SECRETARY AND MEMBER OF THE FORMULARY COMMITTEE IN THE RECOMMENDATION OF THE APPROVAL OF PRODUCTS MANUFACTURED BY A COMPANY THAT WAS PAYING HIM PROHIBITED HONORARIA CONSTITUTES A VIOLATION OF THE ETHICS LAW.**

As already noted, one of Defendant's main functions as both Secretary to and a member of the Formulary Committee, was to conduct drug utilization studies for presentation to the Formulary Committee. As also previously noted, Defendant participated with Timothy Henning, a Continuing Educational Consultant from Pfizer, in conducting a study that was performed for the Formulary Committee. Defendant's role in the preparation of that study was fully delineated in a prior section of this brief. Upon conclusion of the study, Defendant and Henning made specific recommendations to the Formulary Committee. One of those recommendations was to "Consider a preferred first line SSRI-Zoloft or Paxil." Zoloft is a drug manufactured by Pfizer Pharmaceutical. This recommendation was specifically made, in part, by Defendant in his role as Secretary to the Formulary Committee on March 25, 1999. The report specifically determined that switching to these drugs would save money for the state hospital pharmacy system. (*See* Exhibit I.D. 31, page 8). Choosing Zoloft as a preferred first line of treatment would result in consideration of that particular drug as preferable over others. (N.T. 224, 74-741, 823). Without question, based upon the foregoing, it is clear that Defendant did participate in the actions relating to recommendations that would result, if

accepted, in the more frequent utilization of a Pfizer Pharmaceutical product. At the time that Defendant had made this recommendation to the Formulary Committee, he had previously sought employment with Pfizer Pharmaceuticals. (N.T. 1024).

Although Defendant was ultimately unsuccessful in his attempt to gain employment with Pfizer, he had been paid \$1,000 in November 1998 (prior to the time this recommendation was made), by Pfizer Pharmaceutical, for his participation in an Advisory Council meeting. This meeting was specifically directed at developing marketing strategies for Zoloft. (See Exhibit I.D. 13, page 1). Thereafter Defendant, in his role as a Commonwealth employee, continued to make presentations of this study recommending the utilization of Zoloft as a preferred first line treatment while at the same time accepting compensation from Pfizer Pharmaceutical in the form of honoraria. These facts establish beyond a reasonable doubt that Defendant was being paid by Pfizer to assist in developing marketing strategies for Zoloft, while simultaneously recommending the use of Zoloft in the Commonwealth Pharmacy System, over which he had supervision. Clearly, Defendant's acceptance of such fees under these circumstances constitutes a violation of the Ethics Law.²⁴

E. DEFENDANT'S FAILURE TO REPORT INCOME AND REIMBURSEMENT FOR TRANSPORTATION, LODGING AND HOSPITALITY RECEIVED FROM DRUG MANUFACTURING COMPANIES,WHO WERE VENDORS OF DEFENDANT'S GOVERNMENTAL BODY, CONSTITUTES AN INTENTIONAL VIOLATION OF THE ETHICS LAW.

²⁴ The payment to Defendant by Pfizer, at a time when he was making recommendations regarding a Pfizer product, was not the only time that a payment was made by that company in close proximity to actions taken by the Formulary Committee. On March 20, 2001, the Formulary Committee voted to place Geodon, a product manufactured by Pfizer, on a non formulary status and to establish guidelines for its usage in the state hospital system. (See Exhibit I.D. 23, page 66). One day later, on March 21, 2001, Pfizer issued a payment of \$1,000 to Defendant for participation in an Advisory Healthcare Council meeting. (See Exhibit I.D.3, page 17). Similarly, on September 24, 2001, Pfizer issued an Unrestricted Educational Grant in the amount of \$3,000 to the Department of Public Welfare, Office of Mental Health and Substance Abuse Services. (See Exhibit I.D. 12, page 11). The next day on September 25, 2001, the Formulary Committee voted to add Geodon to Commonwealth Formulary. (See Exhibit I.D. 23, page 72).

The General Assembly of Pennsylvania has declared that public office is a public trust and that individuals serving in public office violate that trust when they attempt to realize personal financial gain through the holding of their public positions. In this respect, the purpose of the Ethics Law has been clearly delineated and further provides that:

In order to strengthen the faith and confidence of the people of this Commonwealth in their government, the legislature further declares that the people have a right to be assured that the financial interests of holders of or nominees or candidates for public office do not conflict with public office do not conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this chapter shall be liberally construed to promote complete financial disclosure as specified in this chapter.

65 Pa.C.S.§1101.1(a).

To accomplish this end, the General Assembly of Pennsylvania has required that all individuals serving in public office and in positions of public employment must file disclosure statements delineating certain aspects of their personal financial interests for every year that they hold such office or employment. 65 Pa.C.S.§1104(a). Defendant, in his positions as the Chief Pharmacist for the Harrisburg State Hospital as well as Pharmacy Director for OMHSAS, was required to file Statements of Financial Interest with the Pennsylvania Department of Public Welfare. (*See* Exhibit I.D.3).

The Ethics Law further provides for specific content of such disclosure statements. Information required to be disclosed includes:

Section 1105. Statement of Financial Interests.

(b) Required information.—The statement shall include the following information for the prior calendar year with regard to the person required to file the statement.

(5) The name and address of any direct or indirect source of income totaling in the aggregate \$1,300 or more. However, this provision shall not be

construed to require the divulgence of confidential information protected by statute or existing professional codes of ethics or common law privileges.

(7) The name and address of the source and the amount of any payment for or reimbursement of actual expenses for transportation and lodging or hospitality received in connection with public office or employment where such actual expenses for transportation and lodging or hospitality exceed \$650.00 in the course of a single occurrence. This paragraph shall not apply to expenses reimbursed by governmental body, or to expenses reimbursed by an organization or association of public officials or employees of political subdivisions which the public official or employee serves in an official capacity.

65 Pa. C.S. §1105(b)(4)(5)(7).

A review of the Statements of Financial Interests filed by Defendant, in light of other evidence of record, reveals clear and unchallenged failures to report sources of income and reimbursement for transportation, lodging and hospitality that he had received. The magnitude of Defendant's reporting violations are enhanced by the fact that the sources of this unreported income and expense reimbursement were drug manufacturing companies doing business with the Pennsylvania Department of Public Welfare, State Hospital System, where Defendant served as Pharmacy Director. Not only were these companies vendors for Defendant's governmental body, Defendant had clear duties and responsibilities in his public position for taking official action in relation to the Commonwealth's dealings with the same drug companies that were making payments to him. The receipt of funds by a public employee from contract vendors doing business with that employee's governmental body presents a text book example of the exact type of disclosure that is targeted under the Ethics Law. Defendant's failure to disclose these sources of income and reimbursement was a clear evasion of the reporting requirements intended to conceal Defendant's conflict of interest. In this respect, one need only review the facts of record to establish the unquestionable violations of the Ethics Law and Defendant's true motivation for his failure to report.

In relation to his failure to report sources of income on his Statement of Financial Interests for calendar year 2000 (filed April 23, 2001), Defendant failed to report any direct or indirect sources of income. (See Exhibit I.D. 3, page 3). This included his failure to report not only his employment by the Commonwealth of Pennsylvania, as required by law, but also Innovative Medical Education Incorporated (“IME”), the third party contractor for Pfizer Pharmaceutical. Defendant had received \$3,500 from IME in calendar year 2000. This was confirmed not only by reviewing the checks that were actually issued to Defendant by IME but also from a review of a 1099 non employee income form that was forwarded to Defendant for tax purposes. (See Exhibit I.D. 13, pages 13,20,,21; Exhibit I.D.8, page 2; Exhibit I.D. 36, page 24).

Interestingly, Defendant failed to list this source of income, which was clearly in excess of \$1,300.00 on his Statement of Financial Interests, even though he had claimed this source of income on his tax returns for that year which were dated April 15, 2000. (See Exhibit I.D.36, page 17).²⁵ Defendant’s Statement of Financial Interests was filed a mere eight days after he filed his tax returns. He therefore had all available information necessary to accurately complete the form yet chose not to do so.²⁶

When specifically confronted on cross examination with his filing deficiency, the fact that he had filed his tax returns a mere eight days prior to the filing of the Statement of Financial Interests and had all of the information available to him, Defendant was simply

²⁵ Initially, there was some confusion as to Defendant’s 2000 Statement of Financial Interest. Defendant had two forms for calendar year 2001. One form was dated April 23, 2001, and the second was dated April 12, 2002. There is no form that specifically indicates that it was for calendar year 2000. On cross examination, Defendant admitted that the form dated April 23, 2001, would have been for calendar year 2000. (N.T. 969-970).

²⁶ Defendant also failed to report to the Commonwealth of Pennsylvania as a source of income. This would have been clearly required under the reporting requirements of the Ethics Law. See *Benninghoff*, Opinion No. 04-005; *In Re Nomination Petition of Kerry Benninghoff*, 852 A.2d 1182 (Pa.2004).

unable to provide any answer as to why he had not filed a complete and correct Statement of Financial Interests:

Q. Okay. And so why did you not report IME paid to you \$3,500 in calendar year 2000?

A. I have no answer for that.

Q. You had the information available to you, did you not?

A. Yes, I did. (N.T. 970-971).

Not only did Defendant fail to report all the above source of income on his 2000 Statement of Financial Interest, he similarly failed to report funds that he had received from Janssen Pharmaceutical, through Comprehensive Neurosciences, in the amount of \$2,000 on his Statement of Financial Interest for calendar year 2002. (*See Exhibit I.D.4, page 5*). Janssen Pharmaceutical paid Defendant \$2,000 in relation to a presentation he made in his public position. This money was paid to Defendant from Janssen through Comprehensive Neurosciences Incorporated. Defendant did in fact report this \$2,000 as income on an amended tax return but never filed a Statement of Financial Interests indicating the receipt of these funds. And, as in the previously described situation, Janssen was a vendor for the Department of Public Welfare, whose drugs were approved by the Formulary Committee and utilized in the state hospital pharmacies, over which Defendant had control.

Defendant, as previously noted, went to great lengths to hide his association with the pharmaceutical companies. He failed to file Supplementary Employment Requests Forms as required by the Department of Public Welfare Standards of Conduct. Additionally, when questioned about his connection to the pharmaceutical companies and whether he had received payments from these companies, Defendant flatly denied such. Clearly, based upon all of the foregoing, this Court now has sufficient evidence to determine beyond a reasonable doubt Defendant's failure to report income, as heretofore delineated, constituted an intentional violation of the filing requirements.

In addition to Defendant's failure to report income on several Statements of Financial Interests, he similarly failed to report reimbursement for transportation, lodging and hospitality in connection with his public service. In 1998, Defendant received reimbursement for expenses for transportation and lodging from Pfizer Pharmaceutical through IME Inc., for his attendance at the 1998 Advisory Council Meeting. The total amount of reimbursement for these expenses was \$763.06. This amount was clearly above the reporting threshold. Defendant however, failed to disclose reimbursement of these expenses. Similarly, in 2001, Defendant again received reimbursement for transportation, lodging and hospitality in the amount of \$688.35 from Pfizer Pharmaceutical, through IME Inc., for attendance at the 2001 Advisory Council Meeting. Again, he failed to report this on his Statement of Financial Interests for calendar year 2001. Defendant's attendance at both of these Advisory Council meetings, as previously argued, was clearly in connection with his public service. The facts and circumstances leading to that conclusion will not be reiterated here. There is no question, however, that the payment of expenses for both of these events should have been reported on Statements of Financial Interests.²⁷

Likewise, for calendar year 2001, Defendant received reimbursement from Janssen Pharmaceutical of \$1,132.89 for transportation, hospitality and lodging. These fees were reimbursed to Defendant by Janssen Pharmaceutical through the form of an unrestricted grant, which was provided to the Department of Public Welfare, placed in a special bank account and then utilized to defray the costs of Defendant's transportation, on two separate occasion, to New Orleans. Defendant's trips were clearly in relation to his role as a state employee and in connection with the Commonwealth of Pennsylvania's research and actions regarding the

²⁷ In addition to attending the meeting and receiving reimbursement for his actual transportation and lodging, Defendant also admitted that he was provided with tickets to a Broadway Show, as well as meals, while attending these meetings. (N.T. 1050).

implementation of the T-Map program in Pennsylvania. (N.T. 72-73; 231-233). Defendant was at all times aware of the fact that his reimbursement was being paid through Janssen Pharmaceutical yet failed to report such on his Statements of Financial Interest. (N.T.843, 980-981).

Based upon a review of all of the facts of record, it is clear that Defendant's failure to report payments in the noted categories that he received from pharmaceutical companies was clearly intentional conduct. Defendant's duties and responsibilities as the Chief Pharmacist at the Harrisburg State Hospital and as Director of Pharmacy for OMHSAS placed him in a position to exert influence over decisions that were made both by the Department of Public Welfare and the Formulary Committee in relation to all matters regarding the utilization of drugs in the hospital system. Indeed, Defendant specifically advised investigators from the Office of Inspector General that he was the "Point Man" for the Formulary Committee and that he was in a "position to influence" drugs selected by the Formulary Committee. (N.T. 332). He further advised that representatives from the various pharmaceutical companies had to visit him to "ensure access of their drugs to the state system." (N.T.332). Defendant's receipt of income, in the form of honoraria, as well as reimbursement for lodging, transportation, hospitality and entertainment, from the same pharmaceutical companies who sought access to the state system over which he had control, clearly presented the type of conflict of interest that the disclosure requirements were intended to prevent. An individual of Defendant's position, background and education clearly could recognize the issues presented by the situation in which he voluntarily placed himself. As such, this Court should have no difficulty in finding that Defendant's failure to report the various gratuities and

payments that he received from these pharmaceutical companies was an intentional violation of the Ethics Law.

F. RESPONDENT VIOLATED THE ETHICS LAW WHEN HE PLACED PHARMACY STUDENTS FROM DUQUESNE UNIVERSITY AS DEPARTMENT OF PUBLIC WELFARE INTERNS, AND THEREAFTER ACTED AS A COMPENSATED PRECEPTOR FOR SUCH INTERNS ON COMMONWEALTH TIME.

The facts of record in relation to Defendant's service as a preceptor for interns from Duquesne University's School of Pharmacy, who were placed with the Department of Public Welfare, are uncontested. Defendant's role and use of his public office to place these pharmacy students as DPW interns and his subsequent role in acting as a compensated preceptor for monitoring the activities of such interns on Commonwealth time, in a Commonwealth institution, clearly constitutes a use of public employment in violation of the Ethics Law.

Duquesne University maintains an internship program for pharmacy students. These students are required to perform approximately 1,300 hours of practical experience in various settings, including that of a hospital environment. Commonwealth of Pennsylvania State Hospitals are typically used in the selective rotation, during a student's internship. Each student is assigned to a preceptor for monitoring the students' activities during the internship. As noted, the preceptor serves as a supervisor for the student while in the work environment. Preceptors are compensated by Duquesne at a rate of \$400 per student, per semester for such supervision activities. Defendant has served as a preceptor for students from Duquesne University School of Pharmacy since at least 1998. The students who have served under Defendant's guidance were assigned to the Harrisburg State Hospital where Defendant served as a Chief Pharmacist or the Director of Pharmacy for OMHSAS. Defendant served in a

preceptor position during the academic years beginning in 2000 and continuing through the end of 2003. As a result thereof, Defendant received three separate payments of \$800 in each of the academic years for which he served as a preceptor. The total amount paid to the Defendant to supervise and monitor the activities of the Duquesne University pharmacy students who were assigned to the Harrisburg State Hospital was \$2,400. Defendant supervised the activities of the pharmacy student during his normal workday as a Commonwealth employee. Although Defendant had the permission of his immediate supervisor, Steven Karp, to continue to act as a preceptor after he began his service as OMHSAS Pharmacy Director, Defendant never informed Karp that he was being compensated as a preceptor and Karp was unaware of it. Defendant failed to submit a Supplemental Employment Request for serving as a preceptor, even though such was required under Department of Public Welfare Standards of Conduct Regulations. Defendant made the decision to have payments from Duquesne University sent directly to him at his home address. Although the option existed for Defendant to direct the payments to the Commonwealth of Pennsylvania, he chose to accept and retain the payments for himself.

The foregoing facts were admitted and uncontested before the Ethics Commission.²⁸

Based upon the foregoing, there is no question that Defendant has utilized the authority of his public position to obtain a private pecuniary benefit. As heretofore noted, a use of the authority of office would encompass all aspects of Defendant's position. As Chief Pharmacist for Harrisburg State Hospital and Director of Pharmacy for OMHSAS, Defendant controlled virtually all aspects of the pharmacy operations. As a result, he was in a position to accept students from Duquesne University for placement as DPW pharmacy interns. Indeed,

²⁸ Findings that have been averred and admitted in the administrative pleadings constitute facts of record which cannot be contested. See *Bartholomew v. State Ethics Commission*, 795 A.2d 1073 (Pa. Cmwlth. 2002).

one of the Defendant's main functions, as outlined in his job description as OMHSAS Pharmacy Director, was to coordinate the state hospital pharmacy operation and supervise the hospital pharmacy directors. Further, Defendant was authorized to provide on-sight education and training programs. (See Exhibit I.D.1, pages 1-4). AS Chief Pharmacist for the Harrisburg State Hospital, Defendant served in a similar supervisory position specifically in relation to that specific institution. (See Exhibit I.D. 2). As a result of his duties and responsibilities as delineated in these job descriptions, Defendant was clearly in a position to place pharmacy students as interns within the Department of Public Welfare. Such authority emanated specifically from his duties and responsibilities as heretofore delineated and as authorized by law. (See analysis in Section A, *supra*.) It is clear that Defendant utilized the authority of his position in order to place Duquesne University Students as interns in the DPW Hospital System. As a result of this use of office, Defendant was paid a total of \$2,400 over a period of three academic years. As heretofore noted, payment of money constitutes a pecuniary benefit. There is also no doubt that Defendant's acceptance of this pecuniary benefit was private in nature. He specifically directed that funds be paid to him and mailed to his home address. He opted not to have those funds turned over to the Commonwealth of Pennsylvania, even though this was possible.²⁹ These funds were subsequently deposited into his personal bank account. (See Exhibit I.D. 8, pages 4, 10). In addition to the foregoing, Defendant acted as a privately compensated preceptor during his normal Commonwealth work hours. He utilized the facilities of the Commonwealth of Pennsylvania in order to effectuate his role as a preceptor. The utilization of Commonwealth facilities in such a

²⁹ This action of a continuing nature over several years, designed to conceal his prohibited activities speaks volumes about Fiorello's own perception of his misdeeds.

fashion is clearly in violation of the Ethics Law. (*See Heck*, Order No. 1251, *Habay*, Order No. 1313).

Based upon the foregoing, this Court should find beyond a reasonable doubt that Defendant violated the Ethics Law when he used the authority of his public office to place pharmacy school students as interns with the Department of Welfare and receive compensation as a result thereof.

III. CONCLUSION

In light of the stipulated testimony and evidence, together with the foregoing reasons and arguments, the Commonwealth respectfully submits that it has proven beyond a reasonable doubt that, between 1998 and 2003, Defendant Fiorello committed the offenses of:

Count 1 : Restricted activities – 65 Pa.C.S. § 1103(a) for engaging in conduct that constituted a conflict of interest while he was a public employee of the Commonwealth of Pennsylvania, did serve as a consultant and speaker at events sponsored by Pfizer Pharmaceuticals, Janssen Pharmaceuticals and Riverside Associates between November 1998 and May 2003, lecturing about a study he performed as a state employee and received monetary compensation for his personal use from those pharmaceutical companies or their contracted affiliates, a felony.

Count 2 : Restricted activities – 65 Pa.C.S. § 1103(a) for engaging in conduct that constitutes a conflict of interest while he was a public employee of the Commonwealth of Pennsylvania, as a part of his duties, did act as a preceptor to six separate Duquesne University School of Pharmacy students and did take compensation for the supervision and keep the funds for his personal use, a felony.

Count 3 : Restricted activities – 65 Pa.C.S.§ 1103(d) for accepting honorariums while he was a public employee of the Commonwealth of Pennsylvania, a misdemeanor.

Count 4 : Statement of financial interests required – 65 Pa.C.S.§ 1104 (a) for failing to disclose direct or indirect income from all totaling in the aggregate \$1300 or more, gifts in the aggregate of \$250 or more and/or transportation, lodging or hospitality exceeding \$650 on annual required statements of financial interests as required by 65 Pa.C.S.§ 1105, while he was a public employee of the Commonwealth of Pennsylvania, a misdemeanor.

WHEREFORE, the Commonwealth respectfully requests that this Court adjudge Defendant guilty of Counts 1-3, Restricted activities and Count 4, Statement of financial interests required.

Respectfully submitted,

/s/

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