



OKLAHOMA ETHICS COMMISSION

April 26, 2018

Via Hand-Delivery

Honorable Kevin Wallace
Appropriations & Budget Chair
Oklahoma House, Room 240
State Capitol Building

Chair Wallace,

I appreciate the opportunity to speak with you over the last couple of days, including meeting with me along with the budget team yesterday afternoon. As discussed, I appreciate the efforts of the legislature to avoid cuts to appropriations during FY 19. However, I have concerns about the appropriation amount and funding mechanism for the Ethics Commission provided in SB 1600, the general appropriations bill.

As set forth in its budget request, the Commission determines it needs closer to \$4.5 million dollars to fulfill its mission. The per capita investment of the State in the Ethics Commission is \$0.18 per person, which is significantly less and inadequate compared to similar ethics programs in comparably sized states where funding is at \$0.83 to \$1.26 per person.

As I explained yesterday, funding the commission sufficiently will result in the best way to ensure small problems stay small problems across both the State and Political Subdivisions of Oklahoma. The current system puts the Commission in a position where primarily it is only able to address problems at the point the problems become so significant that not only are Ethics Rules violated, but often the acts also constitute crimes. This was not the intent of the citizens of Oklahoma in creating the Commission, as the Commission was created to enact and enforce *civil* laws of ethical conduct. The anticipated funding level in 1991 was between \$600,000 and \$700,000 based on a percentage of political contributions. That same formula today would have the Commission funded well over \$3 million dollars for its constitutional responsibilities and does not include the expense for legislatively assigned programs for counties, municipalities, and school districts over which the Commission has jurisdiction.

At a minimum, a standstill budget for the Commission requires an amount sufficient to offset the ongoing hosting and maintenance costs of The Guardian System currently paid through fund 576. This would be an appropriation closer to \$800,000 than \$710,000. However, \$800,000 is not sufficient for the Commission to fulfill both its Constitutional duties as to state campaigns and state officers and employees, but also the legislatively assigned duties for the campaigns of political subdivisions.

Second, the funding mechanism for the Commission's appropriation in SB 1600, seeks to fund the Commission entirely through the Commission's revolving fund by moving an amount equal to the appropriation to a special cash fund and then appropriating to the agency through the special cash fund. The people of Oklahoma did not intend the Commission to be a self-funding agency. In adding article 29 to the state Constitution, the people require the legislature to appropriate the Commission sufficient funds to enable it to perform its responsibilities under the

law. Although we may disagree as to what a sufficient amount is, the source of those funds is required to be the general revenue fund (GRF)—not the Ethics Commission revolving fund. The language in Article 29 provides:

The Ethics Commission shall receive an annual appropriation by the Legislature sufficient to enable it to perform its duties as set forth in this Constitutional Amendment. Any funds appropriated to the Ethics Commission, *which remain unspent at the end of the fiscal year shall be returned to the general revenue fund.*¹ [emphasis added]

The word “returned” means “to give back to a place or person”. The Constitution is clear the appropriation must originate from the General Revenue Fund and not a special cash fund funded through a transfer from the Commission’s revolving fund.

Further, an appropriation from the GRF is required to be divided into 12 equal monthly allocations². A special cash fund makes all the funds available for expenditure July 1. While I appreciate how that may work to the benefit of the Commission, I am unable to ignore the Constitutional requirements. As an agency director, I cannot lawfully expend funds received through what I believe is an unlawful process.

As a reminder, the Commission has a constitutionally imposed annual appropriation with a fiscal year end lapse date on appropriated but unencumbered funds³, rather than a 30-month appropriation like other agencies. The Commission is unable to draw from prior year appropriations to minimize the impact of funding changes for the Commission. The Commission relies on its revolving fund to minimize the impact of the annual lapse in funds, including among other things, ensuring The Guardian System stays online, and, that the Commission has funds available to enforce its Rules.

The reasons for collection of fees by an agency are not merely informational but dictate how those funds may be used. The Commission does not assess fees for the purposes of funding the entire agency. When fees collected for one purpose are used for a different purpose, those fees become taxes that are not authorized by law.⁴ The Commission is legally unable to act as a tax collector—its only jurisdiction is to enforce its own properly enacted Rules and to enforce ethics laws for political subdivision officers and employees when legislation so directs.⁵

As I discussed yesterday, the raid of the revolving fund puts the Commission in a position where it is unable to enforce its Rules through any significant litigation and that possibility is not hypothetical. The Commission has a pending case where the statute of limitations will run before the end of the fiscal year. If the Commission moves forward with litigation, it will need to retain outside counsel. The suggestion that the Commission could spend its lump sum appropriation on running the agency and litigation and if it runs out of funds come to the legislature for a supplemental appropriation essentially puts the legislature, rather than the Commission, in the position of deciding whether the litigation is feasible. The legislature is

¹ Oklahoma Constitution, Article 29, §2

² Oklahoma Constitution, Article 10, §23 (9)

³ Oklahoma Constitution Article 29, § 2: The Ethics Commission shall receive an annual appropriation by the Legislature sufficient to enable it to perform its duties as set forth in this Constitutional Amendment. Any funds appropriated to the Ethics Commission, which remain unspent at the end of the fiscal year shall be returned to the general revenue fund

⁴ Fent v. State ex rel. Dept. of Human Services, 2010 OK 2, 236 P.3d 61

⁵ Article 29, §§ 4 and 6.

unable to put conditions on the Commission's decision to prosecute violations of its rules or how the enforcement occurs.⁶

Lastly, the Commission was established in the Constitution as an independent regulatory agency for a reason: to make laws to ensure fair campaigns and good government, and to enforce the laws it enacts without interference from the legislature or executive branches. Putting the Commission in a position to set out exactly how it will spend its appropriation before the legislature decides to appropriate the funds unconstitutionally infringes on the Commission's authority to run the agency, promulgate Rules, and enforce Rules as the Commission determines best.

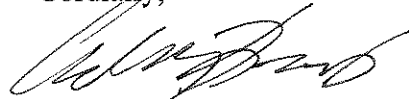
The timing of this unprecedented action towards the Commission is concerning. In the past year the Commission has promulgated new Rules, some at the request of candidates and state officers, and some generated entirely by the Commission. The major rules generated by the Commission are discontinuation of non-meal gifts to state officers or employees such as tickets to sporting events, concerts, etc., followed this year by a cooling off period to insulate State Government from conflicts of interest and self-dealing. These Rule changes apply to a relatively small percentage of state officers and employees but go far to preserve and build the trust of the public by removing concerns that the actions of state officers and employees are for any purpose other than to further the interests of the State.

The Commission enacted numerous other rule changes that facilitate candidate committee activity. These Rules allow unlimited candidate reimbursement from campaign accounts; use of surplus funds to make gifts to the state, any agency thereof, or political subdivisions; PAC contributions after the general election when the PAC contributed prior to the general election; and candidate committees to determine signatories on bank accounts other than the candidate or treasurer. The other changes primarily move or correct language within the rules to ensure the information is available where a committee would expect to find it and to ensure the information is correct.

As state officers, we have a duty and obligation to follow the Constitution and laws of Oklahoma, regardless of whether we agree with those laws. Without a solution to the language in SB 1600, the Commission most likely will have to seek legal remedies. This would result in unnecessary legal costs for the state and the costs associated with a special session.

I appreciate your time and hope we can work together for a solution. I anticipate that solution will be an amendment to SB 1600 or a trailer bill. As always, let me know if I can be of any assistance.

Cordially,



Ashley Kemp
Executive Director

⁶ Ethics Commission v. Cullison, 1993 OK 37, 850 P.2d 106