

WRITTEN TESTIMONY OF EVAN A. DAVIS
MANAGER, COMMITTEE TO REFORM THE STATE CONSTITUTION
JOINT LEGISLATIVE BUDGET HEARINGS
JANUARY 25, 2022

Thank you for this opportunity to comment on the Governor's proposed legislation to replace the Joint Commission on Public Ethics (JCOPE) with an independent and non-partisan body.

The Committee to Reform the State Constitution, of which I am the manager, strongly supports the constitutional amendment to replace JCOPE and the Legislative Ethics Commission (LEC) with a single body a majority of whose members would be appointed by the judiciary, i.e. by persons over whom the Commission would have no jurisdiction. These commissioners would have as their appointing authority persons whose judgment could not be tainted by the conflict of interest that arises when the regulated are appointing the watchdogs over themselves.

This Amendment's prime sponsors are Senator Liz Krueger and Assemblyman Robert Carroll. It currently has 55 co-sponsors in the Assembly and 41 in the Senate.

From our perspective, acting by way of statute rather than constitutional amendment has two drawbacks. Because many see the separate LEC as required by the Constitution's separation of powers provisions, the LEC cannot be done away with by statute notwithstanding the benefits of consistency that come from a single body. Second, it is probably the case that the judiciary can't be required to make appointments to a body regulating only the two other branches without a constitutional amendment.

Still, it is important to make progress and when reform has the support of the Governor, as is now the case, much can be accomplished by statute.

Below we assess the bill that the Governor has put forward in light of the its success in translating to a statute the most important reforms that motivated the constitutional amendment.

Suitable appointing authority

Grade B+

Instead of the Amendment's approach of a majority of appointments by non-regulated persons and a minority by the legislative leaders and the Governor, the Governor has proposed having the State's 15 law school deans act as the selection committee for all five commissioners. This is a big step forward provided that the deans themselves are not conflicted whether as registered lobbyists, candidates for office, party officials, recent state employees or persons providing paid legal services connected to state matters. The bill should be amended to add these disqualifications.

It is not clear whether giving the Governor and the Leaders no appointments is preferable to their having a minority of the appointments. The commission's authority with the persons it regulates will depend in part on its perceived legitimacy. It is hard, for example, to imagine the Commission on

Judicial Conduct being seen as legitimate by the judges it regulates without any appointments from the judiciary. The same may be true of the new commission.

If appointments by elected officials are allowed as a plan B, they should be joint appointments by the two Democratic Leaders, the two Republican Leaders and the three state-wide elected officials. Failure to agree on a joint appointment within 30 days would result in the random selection of one of the joint appointers to make the appointment. This creates a strong incentive to reach agreement. Joint appointment promotes independence because the link of relationship to a single person is broken. It also keeps the size of the commission within reasonable bounds.

Transparency

Grade C

Transparency is critical to a government ethics agency since public confidence in government is increased when the people can see for themselves that high ethical standards are being vigorously enforced. The Amendment provides that once a due process hearing is ordered on probable cause, the adjudicatory proceedings would be entirely public. The Governor has opted not to provide this transparency but to the contrary calls for a confidential due process arbitration proceeding. Ethics violations are not like business disputes or ordinary labor matters to be arbitrated in private but serious charges of ethical misconduct destructive of the public trust to be heard in public by duly appointed hearing officers.

There also needs to be transparency in the appointment process. Because the appointments are being made by private actors, there needs to be a way to confirm their seriousness of purpose and commitment to independence. This can be done if the selection committee, or a designated subset of the committee, interviews the finalists at a public meeting. The Governor, however, is proposing that all meetings of the selection committee be confidential.

The Amendment would have made the State's transparency laws applicable to the Legislature on a basis comparable to their applicability to the Executive. There is no question but that transparency promotes ethical behavior. The current exemption has no rational basis and this change is long overdue.

Non-partisanship

Grade A

Currently everything about JCOPE is partisan. It is designed to have an equal number of members from each major political party even if that means that the Senate minority leader gets three appointees while the Senate majority leader gets only one. Current law also has a complex voting/veto procedure designed to assure that commissioners who belong to each major political party approve investigation or sanctions for members of their party.

All this is swept aside by the Governor's proposal. In this the proposal exceeds the Amendment which provided for an equal number of Democrats and Republicans on the commission.

While the Governor's approach is has benefits in terms of public perception, it may be that there is also a benefit in having representation of both major political parties on the commission. It reduces the risk of that a one-party commission will sweep under the rug matters embarrassing to that party. To this

end, a major political party/independent voter diversity preference could be added alongside the demographic diversity preference that is already included.

Financial Disclosure Statements

Grade B+

The Governor's bill requires the commission to review all financial disclosure and discuss any disclosed conflicts or potential conflicts with the filer. This is a good improvement but financial disclosure statements also need to be subject to random audit. Even if as few as 100 statements are audited annually, the risk of audit will help to motivate compliance. Random audits will also provide information about the reliability of financial disclosure statements generally.

All disclosure statements will be posted on the commission's website which is a plus provided they are posted in searchable form.

Discipline

Grade C

The power to discipline those who violate ethical rules is an important enforcement tool. The Governor's proposal provides for discipline ranging from warning to termination but is ambiguous as to whether the commission may order discipline of executive branch employees or merely recommend it. The commission as the enforcement body for the executive branch needs the power to order discipline directly. And there is no separation of powers problem if the commission is also empowered to recommend discipline of legislative officers and employees so long as the LEC has the final decision.

Ethical Duty to Report Misconduct

Grade D

The Amendment created an ethical duty to report known unethical behavior to the commission. Currently misconduct only has to be reported by the Executive Branch to the State Inspector General who in turn reports to the Secretary to the Governor. In the past the State Inspector General has been inappropriately protective of the Governor. The commission needs to have full and unconditional authority to enforce the ethics laws and accordingly all known ethics violations need to be reported to it, including those known to the State Inspector General and those known by legislators and legislative employees.

Discrimination Including Discriminatory Harassment.

Grade D

Currently sexual harassment that seeks sexual gratification from a subordinate is an abuse of power that clearly violates the State Code of Ethics. However other forms of discriminatory harassment and discrimination may not violate the Code even though the conduct should result in discipline including in many cases termination. The fully independent ethics commission should make these discipline decisions in all cases save only removal of elected officials. The commission is the entity most likely to make these decisions without fear or favor. Cases can be referred to the State Commission of Human Rights in the first instance for adjudication, and the state employer can take whatever discipline it

thinks warranted, but the commission should be able to then decide whether enough has been done. In the Executive Branch its determination would be final and in the Legislative Branch the basis for a public recommendation to the LEC. This reservation of authority approach is the one taken by the ethical rules that govern New York lawyers, which appear to have worked well.

Executive Director

Grade B

The effectiveness of an ethics agency obviously depends heavily on the quality and perceived impartiality of its executive director. The Governor's proposal goes out of its way to make clear that the executive director can be a recent state employee. This is a mistake. The public should not have to take the word of the recent state employee that he or she will not be partial to the colleagues with whom he or she has recently worked. Moreover allowing recent state employees to apply for the executive director position will frustrate the national searches that should be used to fill the position as some highly qualified people will not apply thinking that inside candidates have an unfair advantage.

The executive director also needs adequate authority to perform his or her job. The Governor's proposal rightly provides that decisions that require a vote of the commission cannot be delegated but wrongly requires a vote of the commission to subpoena documents or deposition testimony. It will hamstring the executive director not to have this authority without obtaining a commission vote.

In closing I want to thank the Governor for having made REAL ethics reform a priority. For the first time in my many decades of involvement with state government, one can finally see the light at the end of the tunnel.