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Governor, State of New York

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Minority Leader, New York State Assembly

Andrea Stewart-Cousins
Majority Leader, New York State Senate

Dear Statewide Elected Officials and Legislative Leaders:

We love New York State and we wish we were writing today to praise our state government for creating a new, independent ethics commission that could help restore the public trust in our state government so badly eroded by recurring high level scandals.

Sadly, we can't. The changes the Governor and the Legislature made to state ethics laws in the recent budget fall far short of what New York State obviously needs to stop the corruption, breach of trust, and abuse of power by our most important elected officials. We were rooting for our state government to succeed, to seize a historic moment with a new governor elevated through scandal. Unfortunately, the changes to ethics law passed in the budget fall so far short we would prefer they had not been enacted.

We will keep working for stronger ethics laws and independent ethics enforcement and want to highlight for our government officials and the public our concerns about the immediate and profound conflict of interest created by the new appointment process. We also include recommendations for new ethics laws that will serve as the building blocks for substantive future reforms.

The New Appointment Process Suffers from an Inherent, Profound, Conflict of Interest

We believe by far the biggest flaw in this latest effort at ethics reform is the new Commission's utter lack of independence.

We ask you as appointers to keep in mind that you will not be selecting a Public Service Commissioner who rules on electric rates or an MTA board member to manage a transportation system. You are selecting a Commissioner whose job it is to oversee your conduct and sanction you should that conduct fail to meet the requirements of the State Code of Ethics.

There is an obvious conflict between an elected official's duty to select a person who will enforce the law without fear or favor and their self-interest in avoiding or minimizing accountability should they violate the Code of Ethics. This conflict is extremely real and highlighted by the serious past breaches of trust in all of the offices you now represent.

As appointers, you may feel that because of your confidence in your own good character and rectitude, you are not subject to any debilitating conflict. That, however, is not how conflict of interest under the state's Code of Ethics works. The purpose of ethics laws is to promote public confidence in government, and an important test of whether a conflict of interest is to ask what a reasonable person would think. Would a reasonable person think it is a conflict of interest for elected officials to pick the people that enforce their compliance with ethics laws? If this reasonable person does perceive a conflict then that is not a potential conflict, but an actual conflict.

We think such an actual conflict plainly exists in the way the appointment process here has been structured. It is akin to having electric utility companies pick the members of the Public Service Commission. The companies could claim that they put the interests of customers first, but a reasonable person would not credit that. And a reasonable person will not credit that elected officials have put self-interest aside to appoint a person fully committed to robust ethics enforcement.

This conflict is exacerbated by the failure to ban appointing authorities from communicating *ex parte* with their appointees, as we had recommended. Commissioners may not disclose Commission information, but appointing authorities may tell their appointed Commissioner how they want them to vote on an ethics matter. This failure to ban all *ex parte* communications creates an appearance of political control on top of the appearance of conflict.

The post-appointment vetting role of the law school deans does nothing to mitigate these conflicts. We supported the Governor's original proposal to have the law school deans select the Commissioners. But under the new law, the deans are not selectors, but rather post-appointment vetters of appointees. They are limited to reviewing background and expertise; if the deans reject elected officials' appointees, which may take great fortitude, they simply get to appoint another.

Building Blocks for Meaningful Ethics Enforcement

There are plenty of things the Legislature should do to improve on the new ethics law. We recommend the Governor and Legislature take action in six areas: independence, transparency, nonpartisanship, discriminatory harassment, reporting misconduct, and removing preferential treatment of the legislature.

1. Independence. Securing independence is the cornerstone of effective, de-politicized ethics enforcement. When it became apparent that the Governor's proposal to have the Commissioners appointed by the State's 15 law school deans was not accepted by the Legislature, we proposed an alternative. We proposed that each of the statewide officials and legislative leaders would appoint one person meeting certain requirements of independence to a seven member selection committee which would solicit applications from the public and by majority vote select a five member Commission. This would assure that none of you made direct appointments, that any eligible member of the public could be considered for appointment without regard to political connection, and that all appointees had the support of a majority of the selection panel, not just one political figure.

We also proposed that Commissioners have to meet additional criteria of independence. They should not in the last three years have been state vendors or contractors, major campaign contributors to candidates for state office, and can not have served (or are serving) as local elected officials. These prohibitions should be added to the statute.

Finally, as already noted, state officials should be barred from communicating *ex parte* with Commissioners, directly or indirectly.

2. Transparency. Transparency is important so that the public can see for itself that the law is being faithfully enforced. The statute provides that if investigation reveals that a violation has probably occurred, then the respondent must be offered a due process hearing. The hearing is to be conducted in confidential arbitration. We had proposed that the due process hearing be open to the public and conducted by a judicial hearing officer. The New York Court of Appeals has ruled that administrative proceedings are presumptively open to the public absent compelling cause to close them, *Herald Company, Inc. v. Weisenberg*, 59 NY2d 378, 380 (1983). The exception to this rule embedded in the statute is not justified by any compelling cause. To the contrary, after probable cause has been found, trials and other adjudicatory proceedings are generally open to the public.

3. Nonpartisanship. Under the statute, the two majority leaders in the legislature each have two appointments and the Governor has three. This sends the unfortunate signal that the Commission is a political body whose composition is tied to the partisan outcome of elections. Ethics enforcement needs to be totally nonpartisan and not used for political purposes. This is most likely to happen if political advantage plays no role in the appointments. Each of the statewide officials and legislative leaders should appoint only one person to a selection committee, which then appoints a five member ethics commission, as we recommend above.

4. Discriminatory harassment enforcement. Because sexual harassment is often rooted in abuse of superior position, which is a clear violation of the state Code of Ethics, the former ethics Commission decided claims of sexual harassment. However, sexual harassment and other forms of discriminatory harassment and workplace discrimination are not necessarily caused by abuse of power but may rather be motivated by misogyny, racism, hostility to the disabled, homophobia or the like.

To assure the New York State government is a safe workplace for all, the new Commission must have full authority to sanction all forms of discriminatory harassment and discrimination. This

can be done by including a cross reference to the State's Human Rights Law in the statute. This is the approach taken in the rules of ethics for lawyers, which make discriminatory conduct a ground for disbarment.

5. Reporting misconduct. Section 55 of the Executive Law requires executive branch employees to report misconduct, including conflicts of interest and abuse of power, to the State Inspector General (IG). This is woefully inadequate because the IG reports to the Secretary to the Governor, is controlled by the Governor and lacks any semblance of independence. For example, the IG office was so intimidated by the former Governor that they failed to question him about how he learned that one of the Speaker's appointees to the former Commission had voted to launch an investigation into Joseph Percoco's alleged misuse of state resources.

Rather than directing whistleblowers to the IG, the ethical duty of state officers and employees in both branches of government should be to report misconduct to the Commission unless the conduct is believed to be criminal, in which case it can also be reported to prosecutorial authority. To this end, the state's code of ethics should include a duty to report misconduct. If the alleged misconduct does not fall within its jurisdiction, the Commission can refer the matter to other appropriate enforcement authority.

6. Preferential Treatment of the Legislature. To secure separation of powers, the statute continues the existing structure that the Commission investigates breaches in the legislative branch of government, reports its findings and conclusions to the Legislative Ethics Commission ("LEC") which then has the sole power to approve the Commission's conclusions of law and decide what sanction should be imposed. Continuing that structure does not mean that reforms comparable to those which have been or should be made to the Commission should not also be made for the LEC.

The statute does nothing in that regard. The LEC is even less independent than JCOPE because on top of all appointments being made by elected officials, two of its members are actually legislators. Under the statute, the Commission has 20 days to post its report concerning an executive branch officer or employee on its website whereas the LEC has 45 days. And while the Commission can recommend discipline from a warning all the way up to termination/impeachment in the case of an executive branch officer or employee, its report on a legislative branch officer or employee may not include any such recommendation. This invitation to inconsistent standards of discipline is not required by any separation of power concerns, since only a recommendation is involved.

Conclusion

The lack of a strong ethical culture in our state government and any unwillingness of those who lead that government to take entirely reasonable steps to address that problem is shameful. The result is a "What's in it for me?" attitude that wastes state resources and makes the state unattractive as a place to do business and raise a family. Government corruption, breach of trust and abuse of power are things that need to be nipped in the bud and it is the job of ethics enforcement to do just that. We ask our state government to do better and we commit to working to keep the still unfulfilled need for REAL ethics reform front and center.

Respectfully yours,

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Cc: New York State Law School Deans