

MINUTES OF REGULAR MEETING
of the
ETHICS COMMISSION
STATE OF OKLAHOMA
held
September 17, 2010

Call to Order

Upon notice with agenda being properly posted at the principal office at least twenty-four (24) hours previously and notice being filed at least ten (10) days in advance with the Office of the Secretary of State, a regular meeting of the Ethics Commission of the State of Oklahoma ["Commission"] was called to order on Friday, September 17, 2010, at 10:00 a.m. Chairwoman Jo Pettigrew ["Pettigrew"] presided over the meeting which was held at the State Capitol Building, Room 432A, 2300 North Lincoln Boulevard, Oklahoma City, Oklahoma.

Determination
of Quorum

Roll was called to determine the existence of a quorum for the transaction of business. Commissioners answering present were: Pettigrew, Bob McKinney ["McKinney"], Jim Loy ["Loy"], John Raley ["Raley"] and Karen Long ["Long"]. A quorum of qualified members was found to exist, and the business of the meeting went forward.

Commission staff members present were: Marilyn Hughes ["Hughes"], Executive Director; Rebecca Adams ["Adams"], General Counsel; Patti Bryant ["Bryant"], Principal Assistant; and R. Darey Roberts, Investigator. Observing all or part of the meeting were: Amy Alden, attorney, Dr. Rick Farmer and Arnella Karges, House Staff; Caroline Dennis, Senate staff; Julie Bisbee, *The Oklahoman*; Shawn Ashley, ECapitol.net; Lee Slater, attorney; Jacqueline Scott, *KTOK Radio*; Mark VanLandingham, Oklahoma City Chamber of Commerce; Clyde Muchmore, attorney, Crowe & Dunlevy; Jennifer Monies, State Chamber of Commerce; Joel Robison, Oklahoma Education Association and Yes on 744; Michael Kolene, Yes on 744; Lynn Howell, Common Cause Oklahoma; Charlene Shirey, citizen; Jeff Wilson and Pat McFerron, One Oklahoma Coalition; H.J. Reed, lobbyist; Lori Rasmussen and Pius Mburu, *OETA*; Jim McGoodwin, state employee; and Caroline Raley, Commissioner Raley's wife.

Public Comment on or
Request for Constitutional
Rule Amendments

The next item on the agenda was a public hearing consisting of taking testimony and comments, both oral and written, on amendments and/or modifications to the Constitutional Ethics Rules ["Rules"], Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 O.S. Supp. 2010, Ch. 62. App., with respect to new items introduced for discussion or those listed in the published document titled: *Rules of the Ethics Commission*,

Proposed Amendments and/or Drafts for 2011 Legislative Session for consideration at the September 17, 2010 Regular Meeting of the Ethics Commission.

Hughes on Proposed Rule
Amendment #5

Hughes spoke to Rule Amendment #5. The amendment, she said, would exempt from the current ban on PAC-to-PAC transfers contributions to a ballot measure committee. The ban would continue to apply, she confirmed, to transfers between other PACs but not to ballot measure committees. United States Supreme Court cases, she explained, would not uphold the rule as it was. First, the cases failed to recognize the potential for corruption in ballot measure issues as in candidate campaigns. Second, neither the source nor the amount of the contribution to a ballot measure committee could be limited.

A ban on transfers, Hughes advised, would be even more restrictive. Courts, she said, might allow for more disclosure but not a ban on PAC-to-ballot measure committee transfers.

Pettigrew's Opening
Statement for Hearing

The Chair thanked the staff and those attending for providing information about the issue. She made the following statement:

We have done a great deal of study and reading. We are on information-overload at this time, but that is good, because we have delved into this issue very thoroughly. I am sorry we are having to deal with this issue at the time we are. But, the task has come before us at the same time that we are dealing with a significant statewide issue of importance to everyone here. However, make no mistake about it, we are not here to take sides. We are not on one side or another of any political debate. The Ethics Commission must be outside the realm of politics. We don't know how we believe as individuals about these questions on the ballot. That is not important. What is important is our task to do what is lawful and to follow the Constitution of this state and the Constitution of the United States. We do often disagree on how to get there. But, that doesn't remove the fact that we all believe, and I think I speak for everyone on this Commission, we will do our very, very best to determine what is right. And, if we determine that our actions or our rules are out of compliance with the law or Supreme Court decisions, we will do what is necessary to bring ourselves into compliance. I think I speak for all when I say it is our obligation and our task to do just that. I will close with a comment by someone who did send us a lengthy letter about the issue. "These are complicated and technical constitutional issues that we consider today. And, we must act in a manner to be clear and be sure that we are

constitutionally protecting the political rights of all US and Oklahoma citizens.

Lynn Howell [“Howell”] on Proposed Rule Amendment #2

Howell, Chair of Common Cause Oklahoma [“CCO”], spoke to proposed Rule Amendment #2, proposed by CCO as a reaction to the *Citizens United* decision. He said that — given the Commission’s limited resources, the possibility of a lawsuit, the fact that there is no, or very little, legal precedent interpreting the *Citizens United* decision, and that corporations or labor unions might not make electioneering communication expenditures on judicial races — his board had authorized him to withdraw the proposed rule amendment.

Howell on Proposed Rule Amendment #3

Regarding proposed Rule Amendment #3, Howell noted that , as a reaction to the rule change that stated after three documented, good faith efforts to obtain a contributor statement, a committee would be excused from obtaining a contributor statement, CCO had suggested that the donation ought to be returned. Although, he said, it was pointed out at a previous meeting that information contained in the contributor statement – the person’s name, address, occupation and employer – was nonetheless required to be reported, CCO still felt the signature of the contributor, affirming that the money obtained had not been given by someone else, was very important. Howell stated CCO would continue to pursue its adoption.

Pat McFerron [“McFerron”], on Proposed Rule Amendment #5

McFerron, a political consultant and pollster, One Oklahoma Coalition, reviewed his understanding of the “time frame” for the amendment. In January 2010, he said, the *Citizens United* case was handed down, which he believed was the reason for proposed Rule Amendment Rule #5. The Ethics Commission then promoted the adoption and affirmation of a ban on out-of-state PAC- to-PAC transfers.

Two weeks ago, McFerron said, one of their donors was contacted by Ethics Commission staff to say that they were a PAC and that their state question donation was illegal and had to be refunded. All of these things happened after *Citizens United*. He said the public would see, as an unintended consequence of the proposed change, the Ethics Commission bowing to bullying and pressure from a large out-of-state organization with millions of dollars.

McFerron’s other concern was the message being sent – that the Commission would choose not to enforce a law. He encouraged the Commission to enforce the law as it was and let the court system determine what was constitutional. He asked that the Commission be

more of an enforcement agency and not a judicial one determining the constitutionality of a rule that it proposed, advocated for, sent through the legislative process just a few months ago, and enforced on One Oklahoma Coalition just two weeks ago.

Hughes ["Hughes"] on
Proposed Rule
Amendment #5

Hughes was recognized to respond to McFerron. *Citizens United*, she said, held that corporations could make independent expenditures and electioneering communications from their treasury funds. That case, she explained, did not change staff's advice in any way. When staff became aware that ballot measures were included in the ban on PAC-to-PAC transfers, she said, they examined the cases of *Bellotti* and *Berkeley* to determine whether the provision was enforceable.

Hughes said it was staff's advice both to the OPEA PAC and One Oklahoma Coalition, before any refund was made and before the Commission met, that the provision could not be enforced. She said the two cases happened in 1979 and 1981. They held that neither the source nor the amount of a contribution to a ballot measure committee could be limited. It was therefore the Commission staff's advice that, even though the existing Rule included a ballot measure committee in the definition of a PAC, a prohibition on PAC-to-PAC transfers could not be enforced. Hughes also explained staff's procedure to handle matters administratively if possible.

Clyde Muchmore
["Muchmore"] on Proposed
Rule Amendment #5

Muchmore, an attorney with Crowe & Dunlevy, said the only choice for the Commission was to follow what the United States Supreme Court had said. He pointed out that *Buckley v. Valeo* stood for the notion that the ability to speak in today's modern world involved the expenditure of money. In that way, people's speech was heard in the U.S. in the 21st century. The appearance, however, of a quid pro quo – that the donor was getting something in return – allowed limits on contributions to a candidate.

In 1978, in *First National Bank of Boston v. Bellotti*, the court said that both a corporate donor and a ballot measure committee recipient had the right to speak; therefore, the source of the contribution could not be limited.

In 1981, in *Citizens Against Rent Control v. Berkeley*, the City of Berkeley passed a law that limited contributions to a ballot committee to \$250. The U.S. Supreme Court said there could be no limit. The holding did not apply just to the people making the contribution. It went to the freedom of the ballot committee, not just to speak, but to associate. It

held that if an individual had the right to speak, it absolutely followed that individuals could band together in a ballot committee, which had the same right to speak as the individual. To limit the amount of money that a ballot committee could receive would be to restrict the rights of association of the people on the ballot committee.

The two freedoms, Muchmore said, overlap and blend together. As a result, there could be no limits on either the source or the amount of contributions to a ballot committee.

The only exception, Muchmore repeated, was that if it was a contribution to a candidate, due to the appearance of a quid pro quo – something in return – limits could be set on the amount of contributions. Since there was no appearance of impropriety if money in any amount were given to a ballot committee, Muchmore called for the Commission to make it clear that ballot committees – not just Yes on 744, but any ballot committee on the dozens of ballot issues that would be on the ballot in November – had the right to receive contributions in any amount from any source.

Raley/Muchmore
Discussion

Raley asked if Muchmore would agree that the issue before the Commission was not the ban on PAC-to-PAC transfers, but only a ban on transfers from a PAC to a ballot measure committee which should not be curtailed or impeded to allow free access on an issue campaign as opposed to an individual candidate's campaign. Muchmore said that was exactly the distinction that the U.S. Supreme Court had made and affirmed over and over and over again.

Raley said the answer was resoundingly clear from the U.S. Supreme Court that the Commission could do nothing to get in the way of contributions that were made for the purpose of an issue or ballot measure committees.

Jeff Wilson ["Wilson"] on
Proposed Rule Amendment
#5

Wilson, on behalf of One Oklahoma Coalition ["OCC"], said it was clear that, when OPEA was contacted by Commission staff, it was a "come into compliance" call. Hughes had made it clear from the Rule definition of a PAC that the intent was to ban PAC-to-PAC transfers to ballot measure committees. It was their understanding that OCC was a PAC and needed to come into compliance with the law. Their concern was that, so close to the election, a discrepancy in the existing law could create a tidal shift in the outcome of the election.

Wilson said it put OCC on an uneven footing with Yes on 744 when one contributor did not have the existing rule enforced. In a campaign of this nature, he claimed, even a donation for ballot measure committees as small as \$15,000 made a significant impact, especially against \$3,000,000 from an out-of-state committee. He felt it had endangered OCC's ability to participate in the election on state question 744 in a free and fair way. Wilson asked for equal enforcement and no change in the rule.

Commission Discussion on
Proposed Rule Amendment
#5

Raley said that, within the next couple of hours, all their concerns, questions and misunderstandings would be resolved. Muchmore, he said, clearly defined what the issue was. The Chair stated the Commission was not involved in a political matter. They would follow whatever the law was. The only issue was whether to apply the constitutional mandate to the rule. After that, the rule would speak for itself.

Wilson

Wilson said the Commission would be making a defacto choice to make a political decision with consequences to this election cycle.

Action on Proposed Rule
Amendment #5

Raley moved to adopt proposed Rule Amendment #5 and, in due course, to submit it to the Legislature for consideration as to whether or not it should become effective July 1, 2011. Loy seconded the motion. Discussion followed.

Pettigrew on Ability to
Modify Proposed Rule
Amendment #5

The Chair stated, and staff agreed, that the Commission would retain the option to adjust the language to the rule.

Long on Proposed Rule
Amendment #5

Long clarified that the only change to the rule related in its entirety to its effect on ballot measure committees. She complimented McFerron and Wilson since, when they were contacted, they did the right thing. They were told that there was a law. They were told that they were in violation of the law. And, they took prompt action to correct what they were told was wrongful, if not illegal, conduct by returning the money. The Commission, she said, owed a lot to OCC because they brought front and center a rule that had been this Commission's since at least 2009 on a PAC-to-PAC contribution ban.

But, Long stated, it had been clarified over the last few weeks that a ballot measure committee was not exempted from the original rule as it should have been. While the Commission could not change that, it could now "make it right" by clarifying why contributions may be made and received from that point forward.

On behalf of the Commission, Long apologized to One Oklahoma Coalition for what was clearly a mistake. She thought the rule change removing limits on ballot measure-based contributions was important so that as ballot measure committees continued forward, there would be no doubt that the Commission would honor the law – in fact the highest law of the land.

Roll was called for the vote. The motion passed unanimously.

Consideration of
Resolution and Adoption of
Substitute Motion

Raley moved the adoption of the resolution as included on the agenda. Loy seconded the motion.

Long stated she was concerned about potential misunderstandings in the resolution. She submitted wording for a substitute motion in lieu of a resolution to the effect, “that the Commission, through its staff, decline to enforce any existing Rule 257:10-1-2 prohibition against transfers from a political action committee to a ballot measure committee, until such time as the legislature takes action on any new rule, related to political action committee contributions to ballot measure committees, promulgated by the Commission.”

Raley accepted the substitute motion. Loy seconded the motion as amended. Hughes said staff supported the motion and had no objections.

Roll was called for the purpose of the vote. The motion passed unanimously.

Consideration and
Discussion on Whether to
Review Definitions of
“Associated” and
“Substantial Financial
Interest”

The next item of business was consideration of and discussion on whether to review the definitions of “associated” and “substantial financial interest”, found in Rules’ Section 257:1-1-2, to determine if the amounts and percentages were “fair” and “reasonable” in light of today’s economy.

Howell was recognized to update the Commission. He said he and Denny had met several times on the issue, but both had been busy, so they did not have a final recommendation. They hoped to have something by the October meeting.

Approval of Minutes

The next item on the agenda was consideration of and discussion on whether to adopt the Minutes [both open and closed sessions] of the regular meeting held August 20, 2010, and the special meeting held September 3, 2010.

The Chair asked if there were any changes or corrections to the minutes. Loy asked on page 5 of the open meeting, paragraph 3, that "would be" be changed to "might well be". Hughes asked that "Lee Denney" be changed to "Rick Denny". Long asked that, in the minutes of the special meeting, page 4, "impertinent" be changed to "improvident".

Loy moved to approve all three sets of minutes with corrections. Long seconded the motion. The motion was withdrawn since McKinney was not in attendance at the special meeting.

McKinney moved to adopt the minutes of the August 20, 2010 regular meeting, both open and closed, as corrected. Long seconded the motion. Roll was called for the purpose of the vote. The motion passed unanimously.

Loy moved adoption of the minutes for the special meeting of September 3, 2010. Long seconded the motion. Roll was called for the purpose of the vote. The motion passed, four yeases, with McKinney abstaining.

Ratification of
Expenditures

Loy noted that the budget was on target and moved to ratify agency expenditures, as disclosed, for the period of August 1 through and including August 31, 2010. Raley seconded the motion. Roll was called for the purpose of the vote. The motion passed unanimously.

FY-2012 Budget Request
and Strategic Plan

Hughes invited members to review and submit any changes to the Strategic Plan, due by October 1. Discussion was held on the Strategic Plan, the FY-2012 Budget Request and hiring the Business Manager.

Administrative Report

Discussion was held on a proposed letter pertaining to late fee assessments. It was reported that these would be sent first class once the budget request was submitted. Further discussion was held on the possibility of the State Treasurer's office providing collection services.

Discussion was then held on proposed letters to lobbyists and recipients of things of value which exceeded the limit for the previous calendar year. There were no objections to the drafts.

Closed/Executive Session
for Consideration of the
Confidential Matters Set
Forth on the Agenda

The next item of business was a proposed closed/executive session, authorized and required by Title 25 O.S. 2001, Section 307(B)(1), (4) and (7); Constitutional Ethics Rules [supra], Sections 257:1-

1-6(h), (i), (j), (k) and (l); 257:30-1-2, 30-1-3, 30-1-4, 30-1-5 and 30-1-6;
OAR 258:25-1-4.

The General Counsel stated the items set forth at this place on the agenda were made confidential by law. She further gave her advice that disclosure of the items listed for the executive session would seriously impair the ability of the Commission to process claims or conduct pending investigations, litigation or proceedings in the public interest. She therefore advised that the Commission go into closed session for the limited purposes of considering the cited matters.

Loy moved the Commission go into closed session. McKinney seconded the motion. Roll was called for the vote. The motion passed unanimously.

Open Session/Action on
Same

When completed, the "closed session" sign was removed, and observers returned to the room. McKinney moved that the Commission go back into open session. Raley seconded the motion. Roll was called for the vote. The motion passed unanimously.

Action on Informations

McKinney moved that IV-2009-009 be dismissed; that CV-2010-002 be dismissed; that IU-2010-006 be continued; that IU-2010-007 be tabled; and that no action be taken on IV-2010-009. Roll was called for the vote. The motion passed unanimously.

McKinney referred to Adams for the motion on IV-2010-008. He moved, per Adams' statement, that the Commission find a reasonable basis to believe that one or more rule violations had occurred, that the respondent may have committed the same, that the county where the alleged violations occurred had been ascertained, that the Commission authorize an investigation into the matter and that subpoenas be authorized as necessary. Raley seconded the motion. Roll was called for the vote. The motion passed unanimously.

New Business

There was no new business. Hughes announced that the next meeting has been scheduled for Monday, October 18.

Rule Amendments per
Citizens United

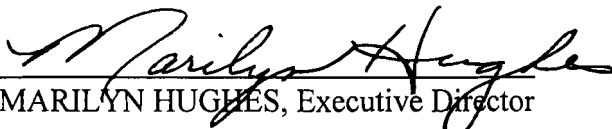
McKinney requested that amendments be drafted to accommodate rule changes necessitated by the findings in the United States Supreme Court case of *FEC v Citizens United*. Discussion followed.

Election of New Chair and
Vice Chair in October


The Chair reminded everyone that the October meeting was the time to elect a new Chair and Vice Chair.

Adjournment

McKinney moved to adjourn. Long seconded the motion. Roll was called for the vote. The motion passed unanimously.


MARILYN HUGHES, Executive Director

Approved on Behalf of the Commission:


JO PETTIGREW, Chair

PB/pb