

REVIEW OF THE POLITICAL SUBDIVISIONS ETHICS ACT

TO: MEMBERS OF THE OKLAHOMA ETHICS COMMISSION

FROM: REBECCA ADAMS, ETHICS COMMISSION GENERAL COUNSEL

DATE: OCTOBER 25, 2011

RE: REPORT ON THE REQUESTED REVIEW OF THE
POLITICAL SUBDIVISIONS ETHICS ACT, 51 O. S. 2011, §§ 301-325

THE FOLLOWING is a report on an agency review of the Political Subdivision Ethics Act ["PSEA" or "the Act"], requested by Commissioner Long. The purpose was to locate areas where provisions could be clarified, streamlined and updated, in addition to calling attention to case law developments which the code should reflect. The latter specifically pertain to the United States Supreme Court decision in *Citizens United v. Federal Election Commission* and *SpeechNow.org v. Federal Election Commission*, the companion case handed down by the United States Court of Appeals, District of Columbia Circuit. The report sets forth policy considerations, recommendations, a rationale and a benefit analysis on each of its six points. Should the Commission adopt any of the recommendations, they would then be referred to the Legislature, which alone may revise these statutes.

THE FOLLOWING is based upon the agency's experience with the PSEA, enacted in 1995 – and its statutory predecessor, the Oklahoma Ethics Commission Act ["the OECA"], enacted in 1986. The code was renamed the Oklahoma Council on Campaign Compliance and Ethical Standards Act in 1988, but was repealed in 1995 to accommodate the Constitutional Ethics Rules. These laws were then made to apply to Oklahoma's political subdivisions: the county, municipal and school board levels of government. The current Commission staff has worked with all three versions of this code.

I.
**THE PSEA SHOULD BE BROUGHT INTO COMPLIANCE WITH THE
HOLDINGS IN *CITIZENS UNITED v. FEC* AND *SPEECHNOW.ORG v. FEC*.**

POLICY CONSIDERATIONS

In 2010, the United States Supreme Court handed down a landmark decision in *Citizens United v. Federal Election Commission* [*"Citizens United"*], 130 S. Ct. 876, 558 U. S. 50, 175 L. Ed. 2d 753 (2010). The ruling has altered the law of campaign finance in this country. Its fundamental holding is that corporations must be permitted to access treasury funds for independent expenditures and electioneering communications. Since labor unions are incorporated entities, the holding extends to them, as well.

A subsequent decision of the United States Court of Appeals, Columbia Circuit is viewed as a companion case. *SpeechNow.org v. Federal Election Commission* [*"SpeechNow"*], 599 F.3d 686, 389 U.S. App. D. C. (2010) cert. denied, 2010], held that "SuperPACs" – those formed solely for the purpose of making independent expenditures or electioneering communications – may not be limited as to source or amount. Hence, there may be no regulation on who may contribute to those entities or in what amount.

Both cases leave open the possibility of disclosure. Corporations and SuperPACs could be required to report their contributors and expenditures. But, case law does not establish it. The Legislature would have to provide for disclosure by enacting specific statutes.

The PSEA is outside compliance with both decisions. It does not provide for, contemplate or define "independent expenditures" or "electioneering communications." Nor does it recognize the unique status of "SuperPACs." Moreover, it contains no pertinent disclosure provisions.

RECOMMENDATION

It would behoove our State to come into compliance with the holdings of *Citizens United* and *SpeechNow* and to do so quickly. The Institute For Justice has raised compliance issues with respect to the Constitutional Ethics Rules [*"the Ethics Rules"* or *"the Rules"*], Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 O.S. 2011, Ch. 62, App. The agency avoided litigation by meeting those concerns. But, the Commission has no jurisdiction over the PSEA. It may, however, request that the Legislature take this action.

The Legislature may also consider whether it would want to provide for the type of disclosure the cases permit. If so, it would need to draft those provisions into the Act. It would also need to include definitions necessary to comport with the current status of the law.

RATIONALE

Not only are these two decisions settled law, they govern core constitutional guarantees. The State runs the risk of chilling political speech each day that its statutes criminalize the use of corporate treasury funds for independent expenditures/electioneering communications, or regulate sources or amounts of contributions to SuperPACs.

BENEFIT ANALYSIS

The recommended course of action will:

- bring Oklahoma into compliance with the ruling of the highest Court in the land, with regard to *Citizens United*;
- permit the state to comply with *SpeechNow.org*, which legal experts believe is also controlling;
- remove Oklahoma from the path of law firms which go state-to-state suing jurisdictions outside compliance with the Courts' holdings in either or both of these cases;
- avoid other litigation; and
- permit the Legislature to enact laws providing for disclosure, so that both the public and those on the ballot are apprised of who is funding independent advertising in support of, or opposition to, candidates.

II.

THE PSEA DEFINITIONS SHOULD BE CONFORMED TO THOSE OF THE CONSTITUTIONAL ETHICS RULES, WITH SUFFICIENT MODIFICATION TO ACCOMMODATE THE POLITICAL SUBDIVISIONS

POLICY CONSIDERATIONS

As noted, the PSEA was drafted 25 years ago. It lacks significant definitions, like "independent expenditures" and "electioneering communications." These are necessary in order to conform to the current law of campaign finance.

Moreover, the Legislature has recently amended Section 314(F) of Title 51 to require electronic filing of all county and municipal candidates allowed to receive \$5,000.00 in contributions. These individuals must now report to the Ethics Commission the same information required by Section 257:10-1-14(a) of the Constitutional Ethics Rules. The statute affects candidates in Oklahoma City/Oklahoma County, Tulsa/Tulsa County and Cleveland County. Those campaign committees are now obligated to learn and abide by reporting requirements which, of necessity, include terms used in the Constitutional Rules.

RECOMMENDATION

Staff recommends that the Legislature strike from the PSEA all definitions found at Title 51, Section 302 and replace them with the entire set found in 257:1-1-2 of Constitutional Ethics Rules, with appropriate modification to accommodate use on the political subdivisions level.

RATIONALE

The PSEA definitions are out of date and inadequate. As written, they do not provide for compliance with *Citizens United*, *SpeechNow* and other decisions. Adopting the set from the

Constitutional Rules will bring the PSEA up to date with a single measure. And, it will aid compliance for those county and municipal candidates who must file according to the ethics rules.

BENEFIT ANALYSIS

Replacing the PSEA definitions with those of the Constitutional Ethics Rules will:

- bring the PSEA up to date with the past 25 years of campaign finance law in this country;
- permit Oklahoma's political subdivisions to specifically comply with the holdings in *Citizens United* and *SpeechNow.org*;
- remove language from the PSEA definitions which is inadequate and/or outside compliance with federal case law;
- systemize compliance between the state and subdivisions level, thereby aiding those county and municipal filers obligated to comply with the Constitutional Ethics Rules; and
- aid enforcement.

III.

THE PSEA ENFORCEMENT PROVISIONS SHOULD BE STREAMLINED TO AVOID REDUNDANCY, UNNECESSARY EXPENSE, CONFUSION AND LITIGATION, WHICH HAS BEEN PROMPTED BY THE CURRENT OVERLAP OF JURISDICTION BETWEEN THE ETHICS COMMISSION AND LOCAL DISTRICT ATTORNEY ON VIOLATIONS ENFORCED ON THE COUNTY LEVEL OF GOVERNMENT BY CRIMINAL PENALTIES

POLICY CONSIDERATIONS

Except for late fee assessments which are ministerial – and, hence, administrative in nature – the PSEA is enforced by misdemeanor penalties. These provide for confinement in the county jail for not more than six months, fine or both imprisonment and fine.

Penalties

Every person who knowingly and willfully violates any of the provisions of Section 24 through 30 [Sections 310 through 316 of Title 51] of this act shall, upon conviction, be guilty of a **misdemeanor** and shall be punished by the imposition of a fine of not more than One Thousand Dollars (\$1,000.00) or **by confinement in the county jail for not more than six (6) months, or by both such fine and imprisonment**. Such violations shall be prosecuted in the county in which said reports are required to be filed.

* * *

Staff submits that the Ethics Commission should play no part in criminal matters, which properly belong to the local district attorney. It is the latter who is the constitutionally-appointed authority to enforce this state's criminal penalties.

THE PSEA “MINI-TRIAL” REQUIREMENT

The “mini-trial,” provided for in paragraphs H - M of Section 307 of Title 51, is adopted from the OECA. It requires a hearing before a quorum of the Ethics Commissioners, who sit as a tribunal over matters enforced by misdemeanor penalties. This is a quasi-judicial proceeding with a specified level of formality.

Elements include that the rules of evidence apply. A hearing officer, capable of ruling on evidentiary matters, is necessary. The PSEA specifically requires that the officer be an attorney licensed to practice law in this state. Under the Act, the Commission may not select the hearing officer, however; that task falls to the Court Administrator. A court reporter is mandatory. That individual makes a record. The Executive Director or designee presents evidence to establish the violation(s). Cross-examination – and, presumably re-cross – along with argument, is assured.

If a majority concludes that a misdemeanor violation occurred, the Commissioners must make a specific finding of probable cause to believe that the respondent committed a knowing and willful violation of the cited provision, order the transcript transcribed and forward it to the “appropriate authority.” The Act defines the latter as “the district attorney of the county in which the violation occurred.”

The PSEA specifies that all proceedings are to be conducted in executive session. Records relating thereto are confidential and not open to public inspection. Should the Commission dismiss the matter, materials related to the investigation must be destroyed within six months, unless required for a criminal prosecution.¹

THE COMMISSION’S EXPERIENCE WITH THE “MINI-TRIAL”

During the eight years under the OECA, the Ethics Commission was twice drawn into high-profile litigation prompted by the “mini-trial” provision. One arose soon after law took effect. The other followed within about five years.

The first began on September 12, 1986, when the Republican Party general counsel filed with the newly-formed statutory Commission a complaint against the Democratic Party’s gubernatorial nominee, David Walters. The allegations pertained to private loans from contributors who had already “maxed out” to the campaign. The Commission held the requisite “mini-trial” on October 6th, following which it voted to refer the complaint to the Oklahoma County District Attorney.

¹The agency went through the procedure under the OECA in 1989. The nine members of the statutory Ethics Commission sat for two days as the Director presented evidence against a Northeast Oklahoma district attorney, who was represented throughout by his first assistant. The agency was obliged to pay for a hearing officer, court reporter and transcripts of the proceedings, in addition to witness fees and travel of its own members. Following a contentious proceeding, the outcome was a conciliation in which the respondent paid a \$200 fine. By law, the latter was deposited in the State General Revenue Fund.

Walters immediately sued the agency. He filed a Petition For Extraordinary Relief in Oklahoma County District Court seeking declaratory judgment on the grounds of procedural defects in the proceedings below and the constitutionality of the act's loan provisions. The district court stayed action on the Commission's referral pending a hearing. The latter was set for October 13th.

In the meantime, the Commission retained counsel and filed an Application To Assume Original Jurisdiction in the Oklahoma Supreme Court. The legal proceedings – initiated in the midst of a general election – were expensive, stressful and debilitating to the agency and the candidate alike. They extended over a course of twelve months. On October 27, 1987, the state high court handed down its decision. [See *David Walters v. Ethics Commission*, 746 P.2d 174 (1987)] An analysis of the outcome is beyond the scope of this report. Suffice it to say, the process which unfolded – where an unsuccessful defense at the “mini-trial” resulted in litigation against the Commission – could be repeated on the county level today, under the PSEA as currently written.²

The agency's next experience with the “mini-trial” involved then-Governor Walters, who became the target of a grand jury probe into illegal campaign activity during his second run for office. There, Walters argued that district court criminal proceedings could not go forward until his administrative “safeguards” were exhausted per the Ethics Commission “mini-trial.”

The agency was able to avoid a lawsuit that time, but sidestepping the defendant's argument required an 11th hour brief by Commission staff, which was included in a response by the Attorney General. Had Walters' criminal charges proceeded to trial – instead of a plea bargain – the agency would have been involved on the mini-trial issue, either at district court or on appeal.

RECOMMENDATION

Staff recommends that the Commission request the Legislature to amend Title 51, Section 303 – and any other applicable PSEA provisions³ – to limit the Ethics Commission's role to **administration of the Act on the county level** [including assessing and collecting late filing fees under 51 O.S. 2011, §317 (B)], while leaving **enforcement of the Act's misdemeanor provisions** to the local district attorney.

RATIONALE

This action would render the PSEA consistent throughout by treating the county level the same as the other two political subdivisions, where a “civil authority” [clerk of the municipality with respect to municipal matters and the clerk of the board of education on the school board level]

²The Commission has been thus far able to avoid the PSEA mini-trial because county races have not seen the kind of money – or public interest – as in Walters' two runs for governor. But, in a *post-Citizens United* world, that may well change. The recent Oklahoma City municipal elections were marked by an unprecedented influx of money – as is currently happening in Tulsa. It would be prudent to expect that, sooner or later, county races will follow suit.

³The latter would include, for instance, paragraph 7 under Section 305 of Title 51.

administers the Act, but plays no role in criminal enforcement. The latter, instead, falls directly to the local district attorney. SEE 51 O.S. 2011, §307

BENEFIT ANALYSIS

The following benefits would flow from streamlining the PSEA to limit the Commission to administrative functions – such as operating a repository on the county level, assisting filers with compliance, issuing ethics interpretations and collecting late fees – while leaving criminal penalty jurisdiction exclusively to prosecutors:

- it would bring the county level of government in line with the other two subdivisions, where **administration of the Act** is placed in a civil authority/agency, while **misdemeanor enforcement** rests with the local district attorney;
- it would avoid unwitting procedural errors by a civil agency which could impact subsequent criminal prosecution of PSEA misdemeanor violations;
- it would preclude two proceedings being simultaneously undertaken in separate forums and having a court of law determine which entity – the Ethics Commission or the district attorney – should proceed;
- it would avoid duplication of services which occurs when a respondent is afforded a Commission probable cause “mini-trial” before being charged by the district attorney for a misdemeanor offense;
- it would eliminate a redundancy which arises each time the Ethics Commission processes a PSEA misdemeanor violation, which is then re-processed by prosecutors at the district court;
- it would expedite the process by enabling the district attorney to proceed as he or she would with any other misdemeanor offense, assuring the right to speedy trial;
- it would preclude the argument, raised by Governor Walters, that criminal proceedings filed by the district attorney may not go forward absent a Commission “mini-trial;”
- it would forestall a district court lawsuit of the type filed against the Commission by candidate Walters subsequent to his unsuccessful defense of allegations at the “mini-trial;”
- instead of tasking the Ethics Commission with negotiations for a potential “conciliation agreement,” it would leave the local district attorney unhindered to pursue a plea bargain for one or more misdemeanor violations;
- it would place the processing of criminal charges where they rightfully belong, in the hands of trained prosecutors; and
- it would permit the district attorney to initiate misdemeanor prosecutions without a prior

determination of “probable cause” which, in Oklahoma, is normally reserved to felony prosecution via the preliminary hearing.

IV. THE PSEA SHOULD CLARIFY JURISDICTIONAL ISSUES BETWEEN THE COUNTY, MUNICIPAL AND SCHOOL BOARD SUBDIVISIONS

POLICY CONSIDERATIONS

The PSEA reflects certain omissions which raise jurisdictional issues between the subdivisions. An example is an apparent oversight in drafting at Section 307 (A) of Title 51.

After stating that “complaints alleging violations of the provisions of this act by persons, committees, candidates, public officials or public employees of **county** government **shall be filed with the Ethics Commission,**” the next sentence operates as an exclusion. It states: “The Commission shall not accept a complaint alleging a violation by a candidate for local office other than county office.”

The latter precludes acceptance by this body of complaints involving candidates from the municipal or school board levels of government. The intent was to limit the Commission’s PSEA authority to the county only. **But, the language neglects to include “committees” in the exclusion,** suggesting that the Commission would retain authority over such entities on the municipal and school board levels. The latter flies in the face of the following sentence – and the clear intent of the Act – which was meant to vest in the local district attorney all complaints arising at the local level other than the county subdivision. This provision affects jurisdiction and should be resolved.

A further issue is whether the Ethics Commission has jurisdiction to issue ethics interpretations arising from the municipal or school board levels. As written, the PSEA is sufficiently vague as to have required guidance on the issue from the Office of the Attorney General. The answer should, instead, be clear from the face of the Act. Specific language should be added to paragraph 6 of Section 305, Title 51 to make certain the Legislature’s intent.

RECOMMENDATION

Staff recommends that the Commission request the Legislature clarify that the Ethics Commission administers the PSEA with respect to candidates, candidate committees and other persons/committees on the county level of government only and specify whether the agency is to issue ethics interpretations arising on any subdivision level apart from that of the county.

RATIONALE

This course of action would resolve ambiguities. It would carry out the intent of the PSEA that the Commission’s jurisdiction is to be confined to the county level of government, but make clear that the Commission’s jurisdiction includes both candidates, candidate committees, and other persons – as well as other committees – supporting or opposing county candidates. It would also clarify the extent of the Commission’s duty to issue ethics interpretations.

BENEFIT ANALYSIS

Adopting such measures would:

- clarify the jurisdiction of the Ethics Commission vis à vis that of municipalities and school boards;
- resolve whether the agency's authority is limited to the county level of government, but – at that level – extends to all candidate, candidate committees and other committees/persons;
- bring the Ethics Commission's jurisdiction in line with the overall structure of the Act;
- avoid confusion;
- facilitate enforcement;
- clarify the extent of the Commission's duty to issue ethics interpretations; and
- preclude the potential of litigation to resolve these issues.

V.

THE PSEA SHOULD BE UPDATED TO REMOVE ANTIQUATED OR UNWORKABLE PROVISIONS

POLICY CONSIDERATIONS

The PSEA contains several measures which are out of date. Some are contrary to developments in case law. Others are cumbersome, or interfere with an orderly process of government. Still others present constitutional issues. The following fall within those categories.⁴

THE FRIVOLOUS COMPLAINT

A prominent feature of the PSEA is a penalty provision for filing "frivolous" complaints. It provides:

Frivolous complaints

It shall be unlawful to file a frivolous complaint with the Ethics Commission. A person shall be deemed to have filed a frivolous complaint if:

1. The person has submitted or has caused or conspired with the complainant to submit substantially the same complaint to the Commission within the preceding six (6) months;
2. To the best of his or her knowledge, the complaint is not accurate or is not well grounded in fact; or

⁴The first three of the cited provisions pertain to the PSEA complaint process, found at Section 307 of Title 51. Repealing the latter would resolve these issues.

3. The complaint is made for an improper purpose, including harassment of any person named in the complaint.

If the Commission upon a vote of a majority of the members serving determines that a frivolous complaint has been filed, it shall forward the complaint, along with any information it deems necessary, to the appropriate district attorney. Any person convicted of filing a frivolous complaint shall be guilty of a misdemeanor and shall be punished by a fine not exceeding Ten Thousand Dollars (\$10,000.00).

Title 51 O.S. 2011, § 308

Of interest is that this measure – along with that of disclosing confidential complaint material – carries the Act’s harshest penalty. Both are enforced by **misdemeanor conviction and a ten thousand dollar (\$10,000.00) fine**. By comparison, wrongful acts by officeholders/subdivision employees are typically punished by a misdemeanor conviction and a fine of **one thousand dollars (\$1,000.00)**. SEE Title 51 O.S. 2011, §317

Moreover, this section is clearly dated. The trend runs in the opposite direction. Governments now hesitate to punish “whistleblowers.” Jurisdictions across the country actually encourage the filing of complaints, even if not “accurate or well grounded in fact,” or “filed for an improper purpose” or if “a similar complaint has been filed within the past six months.”

Similarly, this language could well be in conflict with the letter and/or spirit of Oklahoma’s Whistleblower Act, 74 O.S. 2011, § 840-2.5. The latter clearly seeks to protect from retaliation those who report wrongful governmental activity.

Of more concern is the fact that criticizing one’s government, its officers and employees may, in a given case, qualify as political speech. The act of bringing such criticism in the form of a complaint may, in a given case, be protected. The provision therefore raises constitutional issues.

THE GAG ORDER

The PSEA carries a provision which prohibits the complainant – and others – from disclosing matters pertaining to the fact of filing – and/or contents of – a complaint. It reads:

Complaints

* * *

D. No person shall disclose the contents of a complaint, his or her intention to file a complaint, the fact that a complaint has been filed or his or her knowledge of another person’s intention to file a complaint; provided, the respondent may disclose the entire contents of a complaint and any related materials at any time in the proceedings. . .

* * *

51 O.S. 2011, §307(D)

Under the Constitutional Rules, the Commission was sued on a similar provision. Upon consultation with the Office of Attorney General, the agency deleted this language.

In a free society, it is a serious matter to silence anyone's voice. That is particularly true when the speech involves a governmental function. The latter includes oversight of campaigns for elective office and/or ethical conduct of government officers/employees. It applies to political subdivisions just as it does to all other levels of government.

THE MORATORIUM ON FILING COMPLAINTS

The PSEA also imposes a moratorium on the filing of a complaint. It prevents either a citizen or the Ethics Commission from taking action for a period extending throughout the entire campaign of a given county candidate/officeholder or employee.

* * *

No complaint alleging any violation of the provisions of Section 24 through 31 of this act by a candidate or by any person in connection with a campaign for county office may be filed with, received by or initiated by the Commission during the period beginning on the first day of the period for filing declarations of candidacy for the office and ending on the day after certification of the results of the election at which the office is filled.

* * *

51 O.S. 2011, §307(D)

Moratoria, in general, are disfavored since they, too, have the effect of silencing speech – albeit temporarily. As such, the provision presents constitutional issues.

The moratorium raises other issues. Case law over the past two decades indicates a trend to elevate the public's right to know about allegations of public wrongdoing above the interest of the candidate/officeholder. The foregoing provisions, by contrast, are clearly balanced in favor of the privacy of the accused.

ENFORCING THE FILING OF A FINANCIAL DISCLOSURE STATEMENT BY CRIMINAL PENALTY, RATHER THAN FINE

The PSEA, at Title 51, Section 322(A), criminalizes the failure to timely file a Financial Disclosure Statement [“Form F-1”]. It also punishes the providing of false information or knowingly omitting required information.

Failure to file financial disclosure statement – Penalties

* * *

A. Any person who fails to file a Financial Disclosure Statement required in the Political Subdivisions Ethics Act, who knowingly gives false information in the Financial Disclosure Statement or who knowingly omits required information from the Financial Disclosure Statement shall be guilty of a misdemeanor. Each violation shall be a separate offense.

* * *

51 O. S. 2011, § 322

Under the Constitutional Ethics Rules, this type enforcement is a ministerial function. Late-filing at the state level is handled by assessment, as opposed to prosecution. The appropriateness of criminal sanctions for this infraction is questionable. Not only can it be thought of as draconian, the cost of criminal proceedings should be considered. It is far more economical – and efficient – to address these matters administratively.

Whether knowingly providing false information – or omitting required information – should be enforced by criminal sanction is a different question. It is one which the Legislature must decide.

MANDATORY SUSPENSION OF A STATE OFFICER/EMPLOYEE PENDING FILING OF THE FINANCIAL DISCLOSURE STATEMENT

Paragraph B of this same provision suspends a filer from performing his or her duties of office pending the filing of a Statement of Financial Disclosure [“Form F-1”]. It provides:

Failure to file financial disclosure statement – Penalties

* * *

- B. In addition to any penalty imposed pursuant to the provisions of Subsection A of this section, the person shall not be permitted to perform the duties conferred upon him by law until the statement is properly filed.
Id.

This law directly impacts the orderly process of government. Suspension from office of an elected or appointed officer – or government employee – is not workable. It creates a gap in government operations. It also seems disproportionate. It furthermore raises constitutional issues concerning whether the Legislature has authority to suspend from office a duly-elected officeholder.

MANDATORY ETHICS INTERPRETATIONS AND ANNUAL PUBLICATION

Paragraph (A)(6) of Title 51, Section 305 makes ethics interpretations mandatory. It provides:

Powers and responsibilities of the Commission

- A. The Ethics Commission shall:

* * *

6. Issue ethics interpretations pertaining to the provisions of the Political Subdivisions Ethics Act when requested by any person or committee under the jurisdiction of the Commission and publish its ethics interpretations annually; . . .

* * *

51 O.S. 2011, §305

The statute does not comport with the Constitutional Rules, which makes this duty a matter of discretion.

Powers and responsibilities of Commission

* * *

- (h) **Ethics interpretations.** The Commission may in its discretion and where appropriate, issue ethics interpretations . . .

* * *

Section 257:1-1-6

Nor does the PSEA requirement agree with the agency’s grant of authority under Article 29, which specifies that the Commission “may” respond.

Ethics Interpretations

Ethics Interpretations. The Ethics Commission may respond, pursuant to its rule, to questions of specific individuals seeking an interpretation of the Commission rules governing ethical conduct for campaigns, state officers, or state employees. . .

OKLA. CONST., Art. 29, §5

The agency is sometimes asked to intervene – per ethics interpretation – in matters in which it should not speak. Examples are when a question is the subject of litigation, investigation or legislation. The Commission’s use of discretion in these areas is the better practice. The PSEA should recognize the latter and conform Section 305(A)(6) to provide for discretionary issuance of ethics interpretations.

Further, the annual publication language of this statute is outmoded and should be deleted. Ethics interpretations are now published upon issuance and are disseminated per the agency webpage.

MANDATORY EDUCATION PROGRAMS

At Section 305(9) of Title 51, the PSEA makes mandatory upon the Commission the initiation and continuation of programs to educate officials, employees and citizens of political subdivisions of this state on matters of ethics and governmental service. Given the agency’s resources, staff submits that this duty should be discretionary as has been done on the state level.

REQUIREMENT OF NOTIFICATION OF LATE FILERS BY CERTIFIED MAIL

The PSEA, at Section 309 of Title 51, requires the Ethics Commission to send “late letters” by certified mail. Because of the staff time and expense, the Act should be modified to permit transmittal by regular post or per electronic means.

This would be a cost-saving measure. Additionally, such transmittal is becoming the acceptable practice in government and industry alike.

THE PSEA CAMPAIGN REPORTING FORMS SHOULD BE DELETED FROM THE ACT IN ORDER TO SIMPLIFY REVISIONS

At Sections 311(B), 313(B) 314(C) and 321(B) of Title 51, the PSEA contains various filing forms. This is unnecessary, since the statutes themselves describe what information is required.

Of greater concern is the fact that amending the forms requires an act of the Legislature. The latter represents a time-consuming and difficult process. The better approach would be to leave intact the language describing what must be reported, but remove the forms.

RECOMMENDATION

Staff recommends the listed provisions of the PSEA – and any other applicable language – be amended as described. All conflicting provisions should be repealed.

RATIONALE

Much has changed – both in the law and in governmental practices – since adoption of the PSEA. The cited provisions are problematic. They should be addressed as described.

BENEFIT ANALYSIS

Revising the PSEA to accommodate the cited issues will:

- remove out-of-date provisions from the PSEA;
- bring the Act into conformity with trends and developments in state and federal case law;
- assure guarantees of free speech;
- protect subdivisions against litigation on constitutional issues;
- encourage, rather than discourage, reporting of perceived wrongful conduct relating to campaigns and/or governmental operations of political subdivisions;
- realign the current imbalance between the public's right to know alleged wrongdoing and privacy protections of the accused;
- decriminalize late filing of financial disclosure statements by providing, instead, for administrative enforcement per late fee assessments already provided for in Title 74, O. S. 2011, §4256(C);
- remove cumbersome or unworkable provisions, allowing for a more orderly operation of government;
- make the issuance of ethics interpretations discretionary, rather than mandatory, so that the Commission is not compelled to speak in an area where to do so would be inappropriate;
- make the institution and continuance of education programs on ethics and government discretionary, rather than mandatory, so that the Commission is not compelled to divert resources to this end, but may do so where it deems appropriate;
- remove outmoded language calling for annual publication of ethics interpretations, which are now published upon issuance;
- institute the cost-saving measure of permitting notices of late filing by regular mail or electronic means, which are in keeping with modern standards in government and industry;
- provide political subdivisions with a modern and orderly operation by discontinuing the suspension of officers and employees for failure to timely make financial disclosure;

- avoid constitutional issues inherent in suspending the duties of a democratically-elected holder of public office; and
- remove from the statutes the filing forms, so that changes will not require the cumbersome process of seeking legislative amendments.

**VI.
THE PSEA SHOULD BE AMENDED TO ADDRESS PROVISIONS WHICH
ARE CONTRADICTORY OR INCONSISTENT**

POLICY CONSIDERATIONS

The PSEA contains provisions which are contradictory or inconsistent. The following are examples which should be addressed.

POWERS AND RESPONSIBILITIES OF THE COMMISSION NEED TO BE HARMONIZED

Paragraph 1 of Section 305(A) of Title 51 is inconsistent with paragraph 4 of that provision. The first specifies that the Ethics Commission shall serve as the official repository for financial disclosure statements, campaign contributions and expenditure reports and such other documents filed by candidates or candidate committees for county office, as well as those filed by public officials and employees.

A. The Ethics Commission shall:

- !. Serve as the official repository for financial disclosure statement, campaign contributions and expenditures reports and such other documents filed by candidates and committees for county office and public officials and public employees of county government as pertain to its duties;

* * *

51 O. S. 2011, § 305

Absent from this language is any mention of political action committees or other persons making independent expenditures or electioneering communications.

Paragraph (A)(4) of the same provision, however, requires the Commission to make available to the public filings made by PACs.

* * *

- 4. Make campaign contributions and expenditures reports, political action committees' registrations and financial disclosure statements filed with it available during regular business hours to the public . . .

* * *

Id.

This is an obvious omission, which renders Section 305 inconsistent on its face. Making the two paragraphs harmonize requires that paragraph (A)(1) include political action committees or other persons/committees supporting or opposing candidates or issues on the county level of government.

THE PSEA SHOULD BE AMENDED TO BE CONSISTENT THROUGHOUT ON THE AMOUNT OF THE FILING THRESHOLD

The PSEA contains a discrepancy with respect to the amount of campaign activity which activates committee registration. Title 51, Section 310 sets that figure at Two Hundred Dollars (\$200.00).

Reports of contributions from candidates and committees

* * *

B. Every candidate or candidate committee for county office and every committee, except for committees supporting or opposing municipal or school board candidates, which receives a contribution which exceeds Two Hundred Dollars (\$200.00) in a campaign shall file reports with the Ethics Commission. Every candidate or candidate committee for local office other than county office shall file reports with the clerk of the appropriate political subdivision.

* * *

This is in conflict with Section 325 of Title 51, where the figure is set at \$500.00

Exemptions from compliance with act

A. Notwithstanding any other provision of the Political Subdivisions Ethics Act, no candidate or committee shall be required to file any reports, statements, registrations or other documents pursuant to the Political Subdivisions Ethics Act until such time as the candidate or committee accepts contributions or makes expenditures exceeding Five Hundred Dollars (\$500.00) in the aggregate during a campaign, for candidates or candidate committees, or during a calendar year for other committees.

* * *

Since the wording in Section 325 states the Legislature's intent to set the figure at the higher level, the PSEA should amend to \$500.00 the threshold set forth in Section 310(B).

RECOMMENDATION

Staff recommends that the inconsistent language cited in this section be amended to harmonize and/or be consistent throughout.

RATIONALE

Amending the cited language as described will provide clarity, which will aid compliance and enforcement alike.

BENEFIT ANALYSIS

Amending the cited provisions will:

- clarify the extent of the Commission's repository function;
- eliminate confusion as to where PACs formed on the various subdivision levels of government register and report; and
- make plain the threshold amount at which those committees required to file on any of the subdivision levels trigger the obligation to register.

CONCLUSION

Staff recommends the Commission consider the matters set forth in this report. We are happy to add others or, should the Commission wish, exclude any of the material.

Once the report is finalized, members may wish to adopt it and direct that it be shared with the Legislature, and/or that amendatory language drafted. As noted, it is that body alone, which may revise the PSEA.

-FINIS-

RLA/ra