CITIZENS UNION
POSITION STATEMENT AND RECOMMENDATIONS
REGARDING VOTING PROCEDURES AND DISCLOSURE OF
JOINT COMMISSION ON PUBLIC ETHICS (JCOPE) DELIBERATIONS
MAY 2013

The Public Integrity Reform Act (PIRA) was signed into law by Governor Andrew Cuomo on August 15, 2011 with broad support in both the Assembly led by Speaker Sheldon Silver and the Senate led by Senator Dean Skelos. It instituted landmark reforms concerning ethics oversight and enforcement in state government that resulted in the creation of the first ever external panel authorized to oversee legislative ethics.

OVERVIEW and ANALYSIS

The establishment of the new ethics commission, the Joint Commission on Public Ethics (JCOPE), was hailed as an important step forward, providing greater oversight of ethical misconduct through a more independent commission, increased disclosure of lobbying activity and business relationships of public officials, and the forfeiture of pensions for future state elected officials and employees convicted of felonies related to their public office. Citizens Union over the past ten years offered incisive policy research and proposals that shaped the development of the legislation, and strongly supported the enactment of the PIRA, acknowledging that it reflected politically necessary compromises to achieve desired outcomes.

The recent scandal in Albany involving the Assembly's handling of sexual harassment by Assemblymember Vito Lopez showed that a more independent ethics watchdog for the first time ever successfully passed judgment on a sitting legislator and found serious fault and violation of law that led to his resignation. JCOPE's investigation of Lopez, detailed in its well documented report, also brought to public light important facts about the Assembly's internal handling of an ethics matter involving a legislator. The law and the process worked – up to a point.

Although demonstrating the value of a more independent watchdog for policing misconduct in Albany, this important test case also illustrates the deficiencies in the law regarding JCOPE's voting procedures and the need for additional transparency of its operations.

Citizens Union has concerns with the current voting structure of the 14-member JCOPE, which allows a minority of 3 votes, if they are representatives of the same party and branch of government as the person investigated, to block an investigation from moving forward (first stage) or the issuance of findings that there is a substantial basis to believe that violations have occurred (second stage).

Though JCOPE provided a full, public accounting of the facts of Lopez's harassment and misconduct, and the Assembly's mishandling of the matter, we do not know if a vote to launch a specific investigation into whether other members of the Assembly or Assembly staff violated applicable laws was considered and failed, or not considered at all.   However in reviewing the report and public statements made by various individuals including both JCOPE executive director Ellen Biben and Speaker Silver, it appears that JCOPE did not choose to investigate the Speaker or his staff's handling of the confidential settlement in the sexual harassment matter involving Lopez with the intent to assess whether there were violations of law by anyone other than Lopez. Citizens Union's critique that no assessment took place does not mean that we necessarily think a violation occurred but that the Assembly's handling of the matter should have been specifically reviewed to evaluate whether were violations of the public officers law by members or staff of the Assembly besides Lopez.

As there is no public disclosure of votes, the public cannot know whether JCOPE considered investigating any other subjects besides Lopez for violations of the public officers law. And that is a problem that needs to be fixed if the public is to have confidence in the independence of strong and needed ethics enforcement.

Citizens Union's four recommendations to address the deficiencies in the law are below, both concerning JCOPE's voting procedures, and the need for additional transparency of its operations.

<u>RECOMMENDATIONS</u>

<u>REFORM JCOPE'S VOTING PROCEDURES</u>

1. **Citizens Union supports eliminating the provision allowing three members of the same party and branch as the person being investigated to block an investigation or the issue findings. Instead, Citizens Union supports changing the voting structure to allow a supermajority of 9 of 14 members to approve an investigation or issue findings.**

    Given that, by law, JCOPE is composed of 7 members from each of the two major parties, this means that the votes of at least two members of the same party as the person being charged would be required in order for an action to move forward. Currently 8 of 14 members must approve, but because the law requires that when an investigation deals with a member or employee of the legislature at least half of the JCOPE commissioners appointed by the legislative leaders who belong to that member's or employee's party must also approve. As a result, three members can block those actions even if the other eleven (including the other four members from the party of the person being investigated) approve.

This change in JCOPE's voting rule would require legislative action. It should be noted that for legislators and legislative employees, the Legislative Ethics Commission (LEC) is the final arbiter regarding penalties, so should the LEC believe that a JCOPE report -- which can only require the LEC to consider its findings and cannot require it to act regarding a legislator or legislative staffer -- is unfair or politically motivated, it has the opportunity to disagree with JCOPE's assessment.

INCREASE TRANSPARENCY OF JCOPE'S OPERATIONS

2. **If the current voting structure remains in place, when a majority of 9 or more members of JCOPE votes to proceed with an investigation or to make a finding, but it is blocked because 3 members of the same party and branch as the person being investigated vote to stop an investigation from proceeding, JCOPE should disclose the vote tally and whether a full investigation was launched or a report issued. In so doing, the fact that a minority blocked the investigation or issuance of a report within seven days of taking the vote would be revealed.**

   JCOPE would not be required to disclose the names of the commissioners casting votes, only the aggregate vote. JCOPE's annual report also should note instances in which investigations were blocked by a minority of votes. The name of the person who was the subject of the vote would not be disclosed.

   These changes would require legislative action.

3. **When JCOPE approves issuing a substantial basis report, the vote tally should be made public within seven days of the vote, including the name of the person who is the subject of the report.** Under current law, if a substantial basis for a violation is found, the name of the subject is eventually disclosed to the public. This may occur as early as 45 days after the issuance of the report, though the legislature can request an extension for its review, which would result in a delay of another 45 days before disclosure to the public. This would require legislative action.

4. **JCOPE's annual report should include greater information regarding each case (identified by number only) in the annual report** that the commission is required to produce. Specifically, JCOPE's annual report should include the following:

   a. **The tally and result of each commission's vote to initiate a substantial basis investigation, excluding the name of the person who is the subject of an investigation;**

   b. **The tally of each commission's vote and result regarding whether there is a substantial basis for determining that a violation occurred along with the name of the person who is the subject of the investigation; and**

   c. Along with the status of the complaint (now required), **the category of time that the investigation has taken to date (3 months, 6 months, more than one year, etc) or that was required for completion** before a vote on issuing a substantial basis report occurred.