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Memo:

TO: Prairie Band Potawatomi Nation Ethics Commission

FROM: Jeffrey L. Heiman

RE: Scope of Powers

DATE: September 30, 2022

The Prairie Band Potawatomi Nation Ethics Commission (“the Commission”) has requested a written opinion analyzing the scope of the Commission’s powers to investigate and hear complaints arising under the Code of Ethics. Evidently, at a recent General Council meeting, questions were voiced as to the scope of the Commission’s powers to investigate and hear such complaints. Those questions seemingly focused on whom the Commission could investigate for ethics complaints. This memo will attempt to answer those questions and will start by reviewing the pertinent provisions of the Constitution.

Article IX, Section 1 of the Constitution established the Commission, and Section 4 enumerated the powers of the Commission. Section 4 provides:

“The Commission shall have the power: (i) **to investigate and hear complaints against Nation officials that may arise under the Code of Ethics**; (ii) to provide informal advice or written advisory opinions to nation officials to assist them in complying with the Code of Ethics; (iii) to issue rules and regulations implementing provisions of this Article and the Code of Ethics; (iv) to administer oaths and issue subpoenas to compel attendance and testimony of witnesses or production of documents; and (v) to recommend sanctions for violations of the Code of Ethics to the General Council, including but not limited to a recommendation that a Nation official be recalled used the regular recall process described in this constitution.” (Emphasis added).

In Section 3, the Constitution reiterates, “[t]he purpose of the Commission shall be: (i) to develop the Code of Ethics; (ii) to formulate rules and regulations implementing provisions of this Article and the Code of Ethics; and (iii) **to hear all complaints against nation officials arising under the Code of Ethics**.” (Emphasis added). The Constitution defines the term “officials” by stating, “[f]or purposes of this Article, ‘officials’ are officers elected or appointed under the terms of this constitution.”

Based on these provisions, the Constitution specifies that: (1) the Commission has the power to investigate and hear complaints against Nation officials; and (2) Nation officials are those officers elected or appointed under the terms of the Constitution. As such, the key question is who are officers elected or appointed under the terms of the Constitution?

Tribal Council Members clearly fit the definition and are an obvious answer. However, I do not believe Tribal Council Members are the only officials who were intended to be covered by the definition. The Constitution frequently uses the phrase “Tribal Council Members” when referring to that particular body and its members, and it even defines the phrase in Article VII, Section 5. Therefore, one could argue that, if the Constitution intended to limit the Commission’s powers to only Tribal Council Members, it could have easily used that phrase. But the Constitution did not use the phrase “Tribal Council Members” in this instance. Instead, it utilized broader language. Consequently, the text from the Constitution suggests that the Commission’s powers are not solely limited to the Tribal Council Members.

So, the issue is probably better phrased as who else besides the Tribal Council Members are officers elected or appointed under the terms of the Constitution? In consideration of that issue, the initial task here involves examining who are the other officers elected under the terms of the Constitution. This task is a little more straightforward as the Constitution only provides for the election of one other group of officers (besides the Tribal Council), and that group is the Commission. The Tribal Council Members and the members of the Commission both meet the definition of “officials” and are, thus, within the power of the Commission to investigate and hear complaints arising under the Code of Ethics.

The more difficult task is determining who are the officers that are appointed under the terms of the Constitution. A good starting point for this task would be to focus on the term “officer” and then examine whether there is an appointment under the terms of the Constitution. The term “officer” generally means “one who holds an office of trust, authority, or command”. See Merriam-Webster’s Dictionary. The legal definition of “officer” is strikingly similar, and it states:

“A person who holds an office of trust, authority, or command. In public affairs, the term refers especially to a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function. In corporate law, the term refers especially to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer.” See Black’s Law Dictionary.

Unfortunately, the Constitution does not discuss appointments in great detail. However, the Tribal Council’s power to make appointments is likely incidental to its enumerated powers to “regulate and conduct government administration and personnel management” and “recommend the establishment of independent government boards and commissions”. Additionally, the Tribal Council’s power to make appointments appears to be generally accepted. In fact, the Tribal Council’s Policy & Procedures specifically acknowledge that, “[t]he Tribal Council may appoint boards and committees to address specific policies or issues pursuant to the PBPN Constitution.” See Section 5.2 of the Prairie Band Potawatomi Tribal Council Policy & Procedures.

Based on the Tribal Council’s ability to appoint boards and committees, it is reasonable to conclude that officers serving on those boards and committees would fall under the Commission’s power. That conclusion is bolstered by the following definition from the Code of Ethics:

“Appointed Official – shall mean an official that is appointed to a board or committee by an elected tribal entity. Some examples are the Prairie Band Potawatomi Entertainment Corporation, Charitable Contributions Committee, Election Committee, and Enrollment Committee. This list is neither all inclusive nor exhaustive.” Code of Ethics, Section 4B.

The Code of Ethics was approved by the General Council on January 16, 2010—which was a little over two years after the Constitution was approved. Given that this definition was promulgated not long after approval of the Constitution and was ultimately approved by the General Council, it serves as an important and persuasive interpretation of what it means to be an appointed official.

In conclusion, it is my opinion that the Commission has the power to investigate and hear complaints against Nation officials. This would include Tribal Council Members, members of the Commission, and officers appointed to a board or committee by an elected tribal entity. Based on the definition of “Appointed Official” from the Code of Ethics, this would at least include the Prairie Band Potawatomi Entertainment Corporation, Charitable Contributions Committee, Election Committee, and Enrollment Committee.