

JUDICIAL TENURE COMMISSION

FY 2020 BUDGET REQUEST



HON. MONTE BURMEISTER, COMMISSION CHAIR

LYNN HELLAND, EXECUTIVE DIRECTOR

JUDICIAL TENURE COMMISSION PROPOSAL

PROBLEM: Lack of staff and an increasingly complex Judicial Tenure Commission (JTC) caseload have delayed resolution of important cases of judicial misconduct. Investigation of new complaints is postponed, and the public is losing faith in the integrity of the discipline process.

Increase in Complex Cases: While the number of grievances filed each year has remained relatively stable (about 550 cases), between 2015 and 2017 there was an 81 percent increase in the number of more complex cases that require more in-depth investigation, creating a substantial backlog of cases. The increase in investigations has persisted, though at a somewhat lower level, since 2017. Investigating the cases currently pending would consume the entire current staff for more than a full year.

Lack of Funding Aggravates Backlog: Inability to add staff and adequately compensate existing staff have compromised the JTC's ability to investigate and prosecute new cases.

Number of Formal Complaints Climb Dramatically: Historically, the roughly 550 grievances filed each year generate no more than two formal complaints (a detailed, charging document that reflects extensive investigation and research, typically followed by appointment of a special master and numerous hearings to develop the JTC recommendation to the Michigan Supreme Court). Staff expect five to seven of the current investigations to result in formal complaints. Such a volume of formal complaints would consume one staff attorney's full time for more than two entire years.

New Investigations at Risk: Without additional resources, the JTC will be unable to investigate and prosecute new allegations of judicial misconduct in an appropriate amount of time. Delay allows for misconduct to continue, potentially harming the public.

Delays Cause Public to Doubt Integrity of the Discipline Process: Ongoing delays in the investigation and prosecution of judicial misconduct are causing the public to lose faith in the integrity of the discipline process.

PROPOSAL: Provide additional staff resources to enhance the ability of the JTC to investigate judicial misconduct and hold judges accountable.

\$297,200 in ongoing funding to:

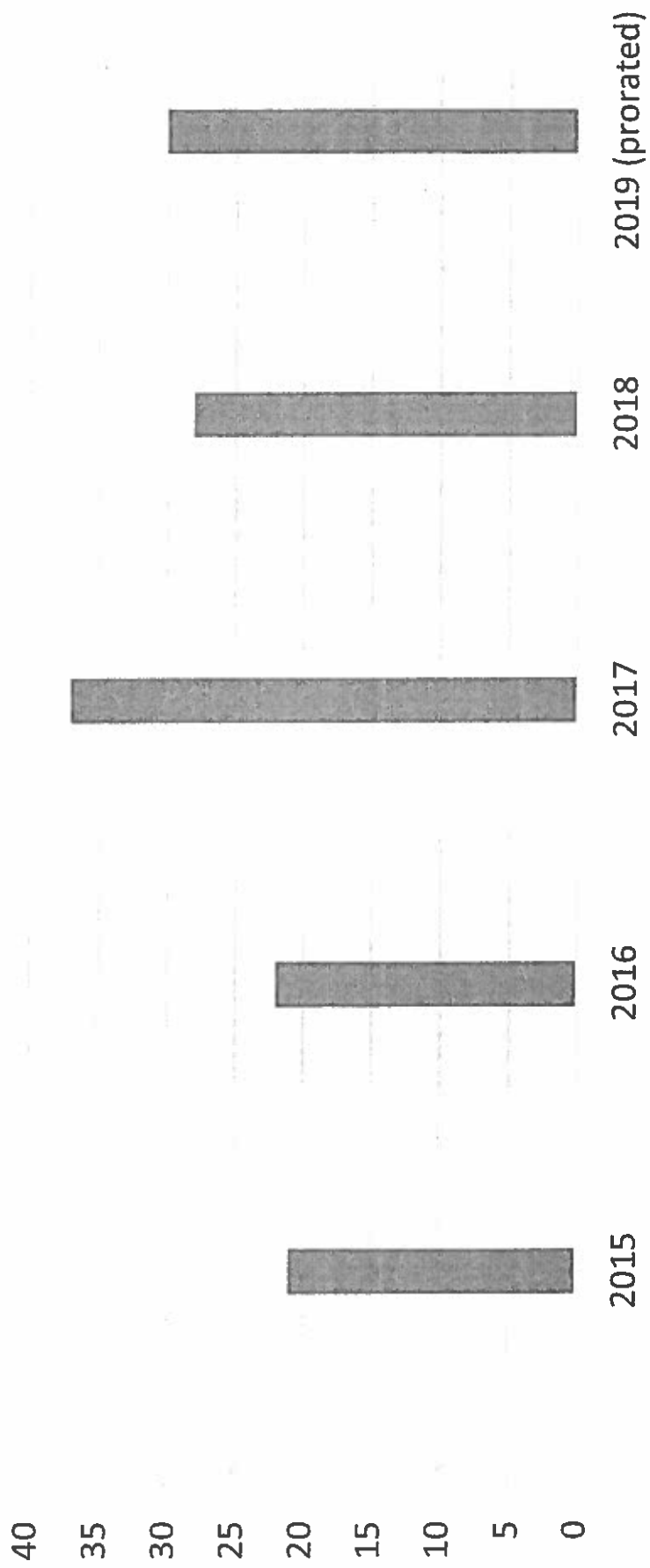
- Add one permanent staff attorney.
- Provide funding for contract staff attorney, special master, investigations, etc.

\$122,500 in ongoing funding to provide pay increases for attorney positions.

RESULTS:

- ✓ Current prosecutions can be resolved more quickly.
- ✓ New investigations can move forward promptly.
- ✓ Public can be assured that judicial misconduct will be promptly investigated and judges held accountable for their actions.

Judicial Tenure Commission Opened Investigations



Memorandum

To: House Appropriations Subcommittee on the Judiciary
Hon. Tommy Brann, Chair

From: Lynn Helland
Executive Director, Judicial Tenure Commission

Re: Judicial Tenure Commission caseload increase & impact on case resolution

Date: April 9, 2019

This memo describes the Judicial Tenure Commission's recent caseload increase, and how long I anticipate it would take to resolve our current caseload given our current resources. This memo relies on data for the years 2015 through the present. It would take additional research to develop data for years preceding 2015.

The total number of grievances the Judicial Tenure Commission receives each year is pretty stable; in the vicinity of 550-600. What has changed since the beginning of 2017 is that the Commission has had a significant increase in the number and complexity of the case that require full investigation; i.e., those that cannot be dismissed summarily.

From 2015 through 2018 the Commission averaged about 28 grievances per year that required full investigation. Though 28 was the average, the distribution was quite uneven: about 21 full investigations were opened in 2015, about 22 in 2016, about 38 in 2017, and 27 in 2018.¹ Three months into 2019 the Commission has already opened six investigations with two more that appear likely to be opened. If the current pace continues, I anticipate about 30 investigations opened in 2019.

¹ These numbers are a close approximation. The Commission database does not explicitly indicate whether a case was resolved through summary dismissal or after an investigation. I was able to get totals that are close to accurate by inferring from the database and by cross-referencing with such logs as have been maintained by the staff attorneys.

Please note that the numbers in this memo differ slightly from comparable numbers in the Commission's budget proposal; the numbers in this memo are updated.

I began with the Commission in early 2017, so have no personal memory of the situation before then. My understanding is that even in 2015 and 2016, when significantly fewer investigations were opened, there was a perception among the public and judiciary that the Commission took excessively long to resolve investigations. The very large increase in cases, beginning in 2017 and continuing to the present, means very significant investigations have gone unattended for as much as two years while the staff has worked on older, complex, cases.

To understand the Commission's resource need it is necessary to know not only how many investigations we have but also how long investigations take to resolve. Please note that it is impossible to estimate the length of any investigation with any precision, because there are too many unknowable variables in every case. To create a reasonably reliable estimate I used the attorney time required by some recent investigations to approximate the time likely required to resolve our current investigations.

On the high end, our most complex investigations take nine months to a year or more of one attorney FTE. On the low end, a very rare investigation that consists merely of reviewing a limited number of readily obtainable documents and asking the respondent judge a limited number of questions might take only a day or two of an attorney FTE. The majority of the investigations the Commission typically opens in a year take weeks to several months, but less than a year, of an attorney FTE.

The Commission currently has 21 open investigations, with probably two more in the near future, that will take substantial attorney time to investigate and resolve. My best estimate is that it will take about 20-30 months of an attorney FTE to bring these investigations to their conclusion. The staff spends about one attorney FTE per year on grievances that result in summary dismissal. In other words, if all three staff attorneys were to work on nothing other than summary dismissals and the investigations already open, I estimate it would take an entire year to complete the investigations that are currently in the hopper even if the Commission did not authorize any new investigations during that time.

My projection, that even if nothing new comes in it would take a year to resolve the currently active investigations and the new summary dismissals, does not include the substantial time it takes to prosecute any formal complaints that result from those investigations. It is as hazardous to predict which cases will result in formal complaints as it is to predict how long an investigation will take, because

it is difficult to know what an investigation will disclose and the judge under investigation always has the option of short circuiting the process by consenting to a sanction before a formal complaint is issued. That said, I expect between five and seven of the currently open investigations to result in recommended sanctions that will need to be achieved through formal complaints.²

In addition to the likely future formal complaints, the Commission has two formal complaints currently open: Formal Complaint 99 (Hon. Theresa Brennan), which has yet to be litigated in the Supreme Court, and Formal Complaint 100 (Hon. Byron Konschuh), that was just filed.

It is very labor-intensive to prosecute a formal complaint, typically requiring several months of work by one or two attorneys. Formal Complaint 99 will take at least two months of additional attorney FTE work to litigate before the Supreme Court. Formal Complaint 100 is complex and will be vigorously contested, so will almost certainly take at least six to nine months of attorney FTE to resolve. Three of the investigations that are most likely to result in contested formal complaints will also be complex. None of the others are simple. I think it is reasonable to project that it will take well over two years of one attorney FTE to take the pending complaints, plus the pending investigations that are most likely to result in formal complaints, from the filing of each formal complaint to the conclusion of proceedings before the Supreme Court.

In sum, my low-end estimate is that the Commission's entire three FTE attorney staff would be fully occupied for at least the next two calendar years with resolving the investigations and formal complaints that are already open or soon will be, even if no new full investigations are authorized during that time.

² Five to seven formal complaints in the not-so-distant future is a lot, given that we have typically have 0-2 formal complaints in a year. There are two reasons we currently have so many pending investigations that are likely to result in formal complaints: 1) we have had a large increase in the number of cases of apparently sanction-worthy misconduct for which the Commission has opened investigations in the past two years; and 2) the Commission staff has worked on some slow and difficult investigations over the past two years while simultaneously trying to stay as current as possible with new investigations, with the consequence that after a lull in formal complaints there are likely to be several within a relatively compressed time.

Members of the Judicial Tenure Commission

1 Court of Appeals judge, selected by Court of Appeals judges.

Incumbent: Hon. Karen Fort Hood (Commission secretary; Wayne County)

1 circuit court judge, selected by circuit court judges.

Incumbent: Hon. Jon H. Hulsing (Ottawa County)

1 probate court judge, selected by probate judges.

Incumbent: Hon. Monte J. Burmeister (Commission chair; Grayling)

1 district court judge, selected by district court judges.

Incumbent: Hon. Pablo Cortes (Wyoming)

1 “at large” judge, selected by members of the State Bar.

Incumbent: Hon. Brian R. Sullivan (Wayne County)

2 lawyers, selected by members of the State Bar.

Incumbents: Thomas J. Ryan, Esq. (Commission vice-chair)

James W. Burdick, Esq.

2 lay members, appointed by the governor.

Incumbents: Ari Adler

Melissa J. Spickler