

OPEN LETTER TO GOVERNOR SANDERS, ATTORNEY GENERAL GRIFFIN, MEMBERS OF THE
LEGISLATURE, AND ALL OTHER CONSTITUTIONAL BOARDS AND COMMISSIONS
FROM LEE WATSON, MEMBER – ARKANSAS BOARD OF CORRECTIONS

January 17, 2024

Dear Governor Sarah Sanders, Attorney General Tim Griffin, Senators Bart Hester, and Ben Gilmore, Representative Jimmy Gazaway, the Arkansas Higher Education Board, and all other constitutional board members of the Great State of Arkansas,

Collectively, the Arkansas Board of Corrections (Board) has been intimately aware of the pressing need to add beds to its existing facilities and to construct a new Department of Corrections facility for too many years. Unfortunately, despite requests for funding for such actions, the Board has been rebuffed by the Executive and Legislative branches with the most recent exception being when the Ouachita River Correctional Unit's renovations were completed in 2005, which added about 950 beds.

Because the Board has unique and longstanding insight into the needs of corrections in Arkansas, Benny Magness and the Board have wanted to meet with you since you were elected, and we would still like to meet with you to discuss how we can best address the bed shortage and implement your goal of opening a new facility as soon as possible. Even though we have our constitutional and policy disagreements, we are very much on the same team. We are not adversarial to you, and I would ask that we let the courts handle our legal business so we can focus on more productive topics.

For instance, you should be aware that the only reason the Board has not approved more beds than other than those added in April and November 2023 is the simple fact that doing so is unsafe. The Board has managed the Department pursuant to its constitutional authority under Amendment 33 while between the "rock" of the safe operating levels of its facilities and the "hard place" of the budgetary constraints placed on it by Arkansas's Executive and Legislative branches. We've done our best to make-do with what we have had to work with, and frankly, the Board has done an excellent job under the circumstances—we're not in serious litigation like Arizona, we haven't had multimillion dollar federal judgments against us like Arizona, and we are not under court-ordered federal supervision like Arizona.

THE BOARD IS NOT POLITICAL

Against this backdrop, I must object to what appears to be efforts to politicize a non-political board that was created for the specific reason and purpose of insulating constitutional boards like the Board of Corrections from politics. Today, you attack the Board of Corrections and seek to diminish its constitutional authority under Amendment 33. What happens tomorrow? Will you set your sights on the boards of higher education? The Arkansas Game and Fish Commission? The State Highway Commission? Nonprofits? Other bodies that are protected from inappropriate influence, whether by threats like you have made against the Board, threats by legislators to move the Board's responsibilities to another agency, or from the \$40,000 "financial incentive" you gave to Mr. Profiri which conveyed the message that he could ignore the Board and answer only to the Governor (which was also a violation of the Board's Constitutional authority)? Every member of a constitutional board or commission who pays fidelity to their oath to uphold the Constitution should be asking these questions.

For their benefit and yours, and particularly because the media catchphrases you've repeatedly made about the Board are inaccurate and disingenuous, I am compelled to communicate my perspective as a board member:

- "Political Games" – Chairman Magness and the Board have not and do not play "political games" or "engage in political stunts." We are not politicians. Our responsibility is the very serious obligation of managing the Department of Corrections in a manner consistent with the law (like you, we took oaths to uphold the Arkansas Constitution and the laws of the state of Arkansas), pursuing the best interests of all Arkansas citizens including the general public, our staff and officers, and the inmates, all while subject to the financial limitations imposed by you and the legislature. And while we are not politicians, every member of the Board was most recently appointed by a Republican governor. But the genius of Amendment 33 is to prevent overt political influence, and despite a member's personal political affiliation, we have a higher duty to uphold the Constitution. This is not a political game.
- "Catch and Release" – This statement is simply fiction. The Board simply has no "catch and release" role to play in the continuum of Arkansas's criminal justice system. We cannot release any prisoner. Period. That is the purview of the judicial system, the Parole Board, the Governor, and the legislature. The legislature and the courts determine how much time a convicted felon serves before they are eligible for parole. Parole eligibility can be modified only in accordance with laws passed by the Legislature which include the Emergency Powers Act as explained below. The Board of Corrections' role is the execution and compliance with those laws.
- "Tired policies" (or "Board Policies" per Sen. Gilmore) – What some have referred to as "tired policies" and what Senator Gilmore referred to as "Board policies" are actually statutes or "the law." As previously stated, the Board plays no role in "catching and releasing" criminals—the Board simply manages the corrections system in a manner that comports with the Eighth Amendment. It is unfathomable that a member of the legislature would chastise the Board for complying with (constitutional) laws that the General Assembly has enacted. We took an oath to uphold even those "tired" laws about which you complain. Until the legislature amends the law, your frustrations should be inwardly focused.
- "Bureaucrats" – The Board's members serve seven-year constitutional terms of office for no compensation beyond an \$85.00 per diem. We all have separate employment, and our service on the Board reflects a solemn commitment to public service. To call the Board's members "bureaucrats" disparages the time each member has devoted to the public's good. But like the University of Arkansas's Board of Trustees or a corporation's board of directors, the Board of Corrections is upper management. Our role is to manage the Secretary, Directors, and entire Department. As best we are able and relying heavily on the Secretary and Directors, we make certain the Department complies with applicable budgetary restrictions, professional standards, policies, regulations, laws, and the Constitution. I do not believe the exercise of caution when human lives are involved, or adherence to the Constitution, is bureaucratic "red tape." I don't think you really believe that either.
- "Power play" – The Board has no power to gain nor has it sought to gain any power. The Board's responsibility was created by Amendment 33 to the Arkansas Constitution. For more than 81 years, the Board has supervised the Secretary and the Directors. That

supervision is foundational to the Board's ability to perform its constitutional duties. The General Assembly, at Mr. Profiri and the Governor's behest, enacted a law that diminished the Board's constitutional powers. That legislation is unconstitutional, and the Board simply seeks to restore constitutional peace to its operations. It is also wholly disingenuous to suggest that any members of the Board substantively opposed the Protect Arkansas Act. To the contrary, the only objections that 2 members of the Board made to the Protect Arkansas Act are the 2 provisions that a Pulaski County Circuit Judge has enjoined as likely unconstitutional. The challenged provisions of the Protect Arkansas Act are a small part of that sweeping law, and nothing in the Board's litigation otherwise impedes on the substantive implementation of that legislation. The Board is not engaged in any sort of "power play." If anything, the only power play here was the attempt to diminish the Board's constitutional power.

These political attacks illustrate why the people of Arkansas voted in 1942 to enact Amendment 33—to insulate special boards from political influence. The Governor, Attorney General, and legislators' comments above undermine the purpose and function of Amendment 33. To all constitutional board members who might read this letter, I invite you to join the Board of Corrections in defending Amendment 33.

ARKANSAS SHOULD NOT FOLLOW ARIZONA'S DISASTROUS MODEL

The Board's concerns about the safety of staff and inmates are sincere, and politics have no role to play in these sensitive, specialized deliberations. Once again, Arizona's example provides a good case study for comparison. A quick internet search of Arizona's corrections system should be a staggering and sobering opportunity for reflection. Arizona's approach—overcrowding facilities with inadequate staffing—has resulted in the loss of federal lawsuits, millions in judgments, and court ordered federal supervision of prisons.¹ And because that wasn't enough, Arizona's remedy to its corrections crisis was the creation of an oversight board where none had previously existed. That's the beauty of Amendment 33: we are the oversight board for the Arkansas Department of Corrections, and through our leadership, the Board has successfully worked to prevent Arizona-type disasters, both in saving lives and being a financial disaster for Arkansas. Arizona's mistakes illustrate the wisdom of Amendment 33 and the necessity of the Board to retain its independence.

COUNTY JAIL BACKLOG AND THE EMERGENCY POWERS ACT

The Board shares the concern felt across the state with the backlog of state prisoners in our county jails. This challenge has been around for decades. In 1987, this issue was ongoing and the General Assembly had an opportunity to address this issue head-on. Instead of passing appropriate

¹ For just a few examples, review the following links:

- <https://www.abc15.com/news/local-news/investigations/prison-doors/leaked-adcrr-prison-videos-show-brutal-assaults-security-failures>,
- <https://www.arnoldventures.org/stories/new-arizona-prison-oversight-brings-transparency-and-accountability>
- <https://www.nwaonline.com/news/2024/jan/11/arkansas-fired-prisons-chief-did-crazy-things-in/>

funding legislation necessary to increase the bed capacity of the Department in a safe manner and with adequate staffing, the General Assembly passed the Emergency Powers Act. This law provides that when inmate capacity exceeds 98%, those well-behaving inmates convicted of non-violent offenses can be considered first by the Department and then by the Board to have their parole eligibility date moved up. The Parole Board, not the Board of Corrections, then reviews those inmates to determine their eligibility for release. Both Boards are doing so in compliance with the laws passed by the Arkansas legislature as a pressure relief valve to Arkansas's ongoing prison overcrowding crisis. No one wants overcrowding, and the Board certainly does not want to rely on county jails or on the Emergency Powers Act as the solutions. But the fact remains that the Emergency Powers Act has been the only ongoing response to Arkansas's prison overcrowding for more than 35 years—as we all know, beds that have been added during this period have been insufficient in number to prevent the County Jail Backlog. This circumstance is not novel and its fault cannot be attributed to the Board or its policies—we are in this predicament due to the collective inaction by prior legislatures and administrations in addressing the needs of the Department. In Senator Gilmore's January 14, 2023, guest column in the Democrat Gazette he refers to the Emergency Powers Act as being "every bit as ominous as it sounds." Also, someone needs to educate Sen. Gilmore that the word "Act" means that it is a law created by the legislature of which he is a member. And, contrary to the Attorney General's remarks about the legislative process during the Governor's November 17, 2023, press conference, the Board has no role in passing legislation.

Because the Board shares your concerns about the county jail backlog, I want to also respond to the Governor's December 21, 2023, letter in which she called for Mr. Profiri—who was on leave with pay at the time—to be reinstated so that he can "implement his plan without delay." The Governor also said that "Secretary Profiri outlined his plan of action." What is the plan? Can the Governor explain it? I cannot because if there ever was a plan, Mr. Profiri never shared one with the Board. I was at each meeting and I didn't hear him present a plan. All Mr. Profiri presented was a request to open additional beds with no supporting information. That is not a plan.

This leads to my next point. The Board's decision to terminate Mr. Profiri's employment was imperative because the relationship between Mr. Profiri and the Board became untenable and unworkable. If Mr. Profiri had a plan to add and/or reopen beds, he failed miserably at communicating that plan to the Board: he failed to timely request the matter to be added to the November Board meeting agenda (a letter from one of his staff was handed to the Board just before the meeting started), he was not present at the November Board meeting, he provided no written support for the request which should have included information about staffing, the facilities' infrastructure status/capability, and the budgetary impact. Despite this, and based on the Board's own historic knowledge and expertise, the Board suspended the rules and voted to add beds as requested at 2 of the 5 facilities. However, due to the lack of information from Mr. Profiri, the Board did not address the remaining 3 requests. At the December board meeting, Mr. Profiri made a request in the form of a list of the 3 facilities and bed numbers that were not voted on by the Board in November. Again Mr. Profiri failed to provide any supporting information (staffing, budget and facilities) for the Board to consider. When pressed for information, Mr. Profiri became very defensive, argumentative, and dismissive with the Board. When he was questioned about where staffing would come from to guard the additional prisoners at the Max Unit (which requires them to be trained correctional officers), Mr. Profiri rambled about pulling someone from laundry duty, someone from kitchen duty, and so on, without regard to whether they were certified or trained to serve as correctional officer. He did not say anything about meeting with wardens or anyone else. He gave the impression he'd given it very little thought.

Likewise, if Mr. Profiri had a plan or had taken any action to address your primary request of adding a new facility for the Department of Corrections, he failed at communicating any information about it to the Board. He kept us completely in the dark. I asked him directly more than once about what he was doing and how those efforts were coming. Mr. Profiri assured me that something "was in the works," but was evasive in providing any details or substantive information. If Mr. Profiri has provided any information to the Governor or legislature on this item, please share it with the Board so we can better perform our constitutional duties. But please do not mistake the Board's deliberate decision to terminate Mr. Profiri's employment as some form of political game. The Board understands the solemnity of its duties and we would not have taken that action if we did not believe that it was necessary to protect the Department of Corrections moving forward.

MOVING FORWARD

Moving forward, the Board, Department of Corrections, and Arkansas Community Corrections will continue doing everything in our power to safely add beds to our facilities to alleviate the county jail backup. But we need funding. We need to enhance our existing facilities to accommodate the expanding needs of the criminal justice system in Arkansas, and we need to be able to attract, recruit, train, and retain critical staff. And we need this funding quickly. While we will do our best to see that the largest facility possible can be built with the budget you authorized of \$470 million, I anticipate that building a new facility will take 4 to 5 years before it becomes operational. In the meantime, I see a storm on the horizon: the Protect Arkansas Act will start increasing the inmate population in our corrections facilities as soon as this year. We need a plan to accommodate what is anticipated as a substantial increase of inmates until the new facility is built. If the Governor is not inclined to assist the Board by approving Chairman Magness's request for auxiliary assistance by the Arkansas Guard, then that plan must include an interim funding measure.

Again, while the Board's political independence is a constitutional imperative, we are on the same team. While litigation can be unpleasant, the lawsuits should not distract us from working together on the issues with which we have broad agreement. We all agree that the county jail backup issue needs to be addressed, and I believe we can all appreciate how the Protect Arkansas Act has the potential to substantially exacerbate that problem before a new facility is built.

Accordingly, please consider this letter as an open invitation to all members of the General Assembly and the Governor's Office to join us at the table to create a viable plan. We look forward to meeting with you and charting the best path forward.

Sincerely,



Lee Watson, Board Member
Arkansas Board of Corrections