

**MINUTES
of the
FIRST MEETING
of the
INVESTIGATORY SUBCOMMITTEE
of the
HOUSE RULES AND ORDER OF BUSINESS COMMITTEE**

**September 8, 2011
Room 309, State Capitol
Santa Fe**

The first meeting of the Investigatory Subcommittee of the House Rules and Order of Business Committee (HRC) was called to order by Representative Joseph Cervantes, co-chair, on September 8, 2011 at 8:40 a.m. in Room 309, State Capitol in Santa Fe.

Present

Rep. Joseph Cervantes, Co-Chair
Rep. Zachary J. Cook, Co-Chair
Rep. Eliseo Lee Alcon
Rep. Gail Chasey
Rep. Anna M. Crook
Rep. Larry A. Larrañaga
Rep. Al Park
Rep. Dennis J. Roch
Rep. Debbie A. Rodella
Rep. Don L. Tripp

Absent

Staff

Raúl E. Burciaga, Director, Legislative Council Service (LCS)
Douglas Carver, Staff Attorney, LCS
Leslie Porter, Research Assistant, LCS
Amy Jaeger, Majority Analyst
Dennis Hazlett, Majority Analyst
Ryan Gleason, Minority Analyst
Mary Rivera, Committee Secretary Supervisor
Jona Armijo, Committee Attendant Secretary
Jeanette Roybal, HRC Secretary

Handouts

Handouts are in the meeting file.

Thursday, September 8

Representative Cervantes opened the subcommittee meeting by welcoming the public and the press, thanking the legislative members for their participation in this important matter and asking staff members present to introduce themselves.

Representative Cook, on behalf of himself and his co-chair, Representative Cervantes, read an opening statement. In the opening statement, he stressed that while impeachment is a most serious matter with respect to the particular state officer being charged, it is also a serious test of the institutional integrity of the legislature, that is, whether that body is up to the task of undertaking the important investigative, charging and adjudicatory tasks associated with the constitutional obligation of impeachment and trial. Continuing, he said that it is critical, therefore, that the house and, if articles of impeachment are returned, the senate proceed in a bipartisan, deliberative fashion to fully, fairly and dispassionately consider and dispose of the matter. The legislature must also proceed as openly and transparently as possible, Representative Cook stated, so that it not only does substantial justice in the case but also so that the public perceives that the legislature has done so. Thus, he explained, every impeachment proceeding is inevitably a trial of both the public official whose conduct is being examined and the legislative institution conducting the proceeding, and that is something every member of the legislature must keep in mind.

Representative Cervantes opined that in his interpretation of the Constitution of New Mexico, it is the responsibility of the subcommittee to establish rules and procedures for the task at hand because little guidance is provided within the constitution. He suggested that the meeting be treated as an organizational meeting with regard to steps that need to be taken by the subcommittee.

Mr. Burciaga made a presentation to the subcommittee, accompanied by Mr. Carver. Mr. Burciaga informed the members of subcommittee that they, along with Ms. Porter, would be staffing the subcommittee and assisting with the investigation into whether or not impeachment proceedings are in order against the current commissioner from Public Regulation Commission (PRC) District 3. He mentioned that he was asked by the co-chairs to provide information about how the subcommittee may organize itself as it begins its task. The meeting location and times were established at 8:30 a.m. every Tuesday and Thursday in Room 309 for the duration of the special session. He said that an appropriation in the amount of \$1 million was included in House Bill 1 to provide for the expenses of any investigation or for the proceedings of an impeachment and trial, and he gave the current status of the bill. He explained that if the legislature adjourns prior to this subcommittee completing its work, the expectation is that the New Mexico Legislative Council will meet immediately after this special session to authorize the subcommittee to continue its work during the interim.

Concerning more significant issues that the subcommittee must consider, Mr. Burciaga cited Article 4, Section 6; Article 4, Section 35; and Article 4, Section 36 of the Constitution of New Mexico, noting that they offer only vague guidance on impeachment proceedings. Mr. Burciaga offered several questions and comments for the subcommittee to consider regarding the process of collecting evidence; the appropriate standard of proof at the impeachment stage; the meaning of the constitutional grounds for impeachment; the case law available; due process; public notice and access; proceedings in special, extraordinary or regular sessions; issues for impeachment consideration; and the hiring of outside counsel.

Members of the subcommittee inquired about and discussed the subpoena power of the subcommittee. Mr. Burciaga explained that under statute, there are two legislative bodies with the power to subpoena: the legislature itself and the Legislative Finance Committee (LFC). He raised potential conflicts with utilizing the subpoena power of the LFC, since the first stage of

the impeachment process is strictly a house process, while members of the senate, who would judge an impeachment trial, serve on the LFC. He stated that it is possible for a law to be created to provide this subcommittee with the power of subpoena, but that would require an amended proclamation to be issued by the governor.

Discussion ensued regarding possible cooperation with the Office of the Attorney General and the PRC and gathering information concerning the investigation through the federal Freedom of Information Act. Conversation took place concerning the applicability of information gathered about the commissioner in question for acts that took place during his campaign for his office, prior to being elected. Mr. Burciaga suggested that the subcommittee hire special counsel to gather information for the investigation that the subcommittee deems appropriate. A suggestion was made to ask the commissioner in question to testify to the subcommittee on a voluntary basis as an aspect of the investigation.

There was a discussion concerning the appropriateness of members of the house and senate attending the meetings of the subcommittee. It was noted that in the prior impeachment proceeding, leadership of both houses of the legislature encouraged members not to attend the meetings of the subcommittee that was investigating possible articles of impeachment. Members of the subcommittee discussed, without resolution, whether it would be preferable to have members of the legislature attend the subcommittee meetings.

Subcommittee members asked for clarification about the decision of an extraordinary session being the most appropriate vehicle for the task at hand. Mr. Burciaga stated that the legislature makes that decision. He said that in 2005, during the most recent impeachment proceedings, the legislature decided that a regular or a special session allowed for too many distractions, so an extraordinary session was called. This decision is made by the leadership in both houses, he said.

Members of the subcommittee emphasized the political nature of the proceedings, versus a civil or criminal proceeding, and noted that the subcommittee needs to allow the commissioner to defend himself and that due process must be afforded to him. Conversation arose about the potential of political proceedings turning into witch-hunts. Subcommittee members articulated their tasks: to determine the scope of the investigation; to hire an investigator versus special legal counsel; to establish a procedure for presentation of evidence; and to decide whether to offer the commissioner an opportunity to defend himself. Members also discussed various interpretations of the language of Article 4, Section 36 of the Constitution of New Mexico. A request was made for copies of the attorney general's investigations of the commissioner for questionable acts that took place prior to the commissioner's election to office.

Opposition was voiced to the hiring of an investigator versus a special counsel, and clarification was offered that special counsel hired in 2005 for the impeachment process had hired an investigator of his own. Mr. Burciaga stated that this subcommittee will develop a report to present to the HRC, and if the HRC adopts the terms of impeachment, the terms of impeachment will be brought forth to the full house of representatives, and if adopted by the house, the trial would ensue in the senate.

Support for hiring special counsel was expressed by members of the subcommittee.

Representative Cervantes noted the members of the subcommittee who participated in the impeachment process in 2005. He encouraged the subcommittee members to review the report from 2005 that has been provided to them. He expressed his pride in being part of an institution that conducted the previous impeachment process so expeditiously. He opined that the Constitution of New Mexico does not define the impeachment process. He offered his support in hiring special counsel so that the process is done in a diligent manner and so that the opportunity for challenges in court is limited. He suggested that the subcommittee acquire advice on how to define "malfeasance" for the purpose of the subcommittee.

Representative Cervantes also talked about public access to the subcommittee meetings. He explained that he and Co-Chair Cook feel it is appropriate to allow the media and video cameras to be present. He mentioned the exceptions to the Open Meetings Act in certain cases and said that the public will be involved as much as possible without violating the rights of the commissioner in question. He suggested the possibility of commencing a court process to establish the subcommittee's subpoena power. He also questioned the LFC's power to issue a blanket subpoena, thereby allowing the subcommittee to decide who the targets of the subpoenas will be. Representative Cervantes also considered appropriate statutory changes granting an entity subpoena power for future impeachment procedures. He requested a copy of the subcommittee's charging language to better understand the tasks with which the subcommittee has been charged. He stated that partisanship did not come into the process in 2005 and expressed the hope that it will not this time, either. Concerning a monetary cost-benefit analysis of the impeachment process, as raised by members of the subcommittee, Representative Cervantes reminded the members that it is important to recognize that this is a political process and that a monetary analysis is not always best. The public's confidence that its elected officials are above reproach is invaluable.

A subcommittee member requested that a notebook containing charging language and the handouts be compiled for each member of the subcommittee. A question was raised as to how the members of the house will be notified about established subcommittee attendance guidelines. Discussion ensued among the subcommittee members.

Upon a motion by Representative Chasey, seconded by Representative Roch, and a unanimous vote by the subcommittee members, the subcommittee authorized the co-chairs to meet with the LCS to hire a special counsel.

Members of the subcommittee talked of the legislature's ability to grant subpoena power to the speaker of the house, as granted in Section 2-1-10 NMSA 1978, and the use of this statute as a template. Discussion ensued between members of the subcommittee and Mr. Carver and Mr. Burciaga about the statute's applicability.

Adjournment

There being no further business before the subcommittee, upon motion, the subcommittee adjourned at 10:25 a.m.