

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

**September 13, 2011
Room 309, State Capitol**

The second 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 13, 2011 at 9:05 a.m. in Room 309, State Capitol.

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. Dennis J. Roch
Rep. Debbie A. Rodella
Rep. Don L. Tripp

Absent

Rep. Al Park

Staff

Raúl E. Burciaga, Director, Legislative Council Service (LCS)
Douglas Carver, Staff Attorney, LCS
Alise Rudio, 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.

Tuesday, September 13

Representative Cervantes summarized the progress that had been made toward retaining special counsel for the subcommittee. He said that initial contact has been made with several

people and that he and Representative Cook hope to have a recommendation for the subcommittee at the next meeting. He stated that the objective of today's meeting is to review the process for impeachment.

Mr. Burciaga reviewed the research questions for the LCS that were requested at the subcommittee's last meeting. He echoed the comments of Representative Cervantes concerning the selection of a special counsel. He suggested deferring the issues of subpoena power and the definition of the scope of the investigation until special counsel is retained. He noted that the charging language for the subcommittee had been placed in the notebooks as the subcommittee members had requested.

Ms. Rudio discussed the exclusion of members of the legislature from subcommittee meetings and the application of the Open Meetings Act to the impeachment process. She explained that she was only aware of two states, Arizona and Illinois, that have rules or laws that address procedures in a house impeachment or senate trial. She said that in 1988, Arizona adopted rules for a special house select committee that expressly provided that all committees must be open to the other members of the legislature, the press and the public. These rules did not address the attendance of other members of the legislature during the senate proceeding, she said, but did provide that all senators could go into a closed session at any point. Ms. Rudio said that the Illinois House of Representatives adopted rules for a special investigative committee, but those rules did not contain a prohibition on other members of the house or senate from attending the committee's meetings. She said the rules governing the trial in the senate did contain a prohibition on senators engaging in *ex parte* communications with members of the house. She added that in New Mexico, the rules and procedures adopted by the impeachment subcommittee in 2005 did not contain a rule governing the attendance of other members of the house or senate; however, it appears that there was an informal agreement that members would not attend.

Members of the subcommittee engaged in a discussion about the prohibition of *ex parte* communication between members of the legislature and the accused and about the extent of the involvement of members of the legislature in the proceedings of the impeachment subcommittee. Mr. Burciaga noted that in the prior impeachment proceeding of 2005, the rules of procedure that were adopted allowed the subcommittee to meet in executive session when deemed necessary.

Ms. Rudio discussed whether the Open Meetings Act applies to this subcommittee. She stated that the section of the Open Meetings Act that applies to the legislature requires all meetings of a quorum of the members of a standing committee or conference committee held for the purpose of taking any action within the authority of the committee or body to have open meetings and provide reasonable notice. There is an exception, however, for adjudicatory, quasi-judicial and ethics proceedings. She concluded that the impeachment proceeding would fall within this exception to the Open Meetings Act.

Subcommittee members discussed whether the charging language for the subcommittee addresses the totality of the behavior in question in these proceedings. Mr. Burciaga indicated that while the subcommittee would want to consult with the special counsel on this matter, the

word "malfeasance" in the Constitution of New Mexico is sufficiently broad to encompass the alleged misconduct.

Representative Cervantes summarized the discussion by noting that state statutes and rules do not address the proceedings; that there appears to be a desire among members of the subcommittee to allow members of the house to attend the proceedings; that although the subcommittee is not subject to the Open Meetings Act, it should still use the act as a guide, and it could enter into executive session when necessary; and that there should be no communication between members of the house or senate and any individuals directly involved in the impeachment proceedings. He said the subcommittee needs to give itself adequate time to complete the task at hand.

Members of the subcommittee expressed their desire to revisit these issues once special counsel is retained. Discussion continued regarding members of the legislature being allowed to attend the subcommittee meetings, whether there should be a ban on *ex parte* communication with the subject of the subcommittee's investigation and to whom that ban should extend. Members of the subcommittee requested clarification about the applicability of the Campaign Reporting Act and about official notification being sent to the public regulation commissioner in question. Mr. Burciaga stated that, following the practice of the last proceeding, formal notice would be sent once a special counsel is retained. He noted that as the proceedings to date had been public and the subject of extensive press coverage, the subject of the inquiry is probably aware of the subcommittee's actions.

Mr. Burciaga opened the discussion of the proposed rules of procedure for the subcommittee, working from a draft he had distributed to the subcommittee members that was based on the rules that had been adopted in the 2005 proceeding. At the direction of Representative Cervantes, each proposed rule was taken in turn for discussion and a vote. The discussion of the rules launched considerable discussion among members of the subcommittee.

Upon a motion made by Representative Roch, seconded by Representative Tripp, and with none opposed, Rule 1 was adopted as drafted. Rule 1 concerns notice of the subcommittee's meetings.

Upon a motion made by Representative Rodella, seconded by Representative Cervantes, and with none opposed, Rule 2 was adopted with the amendment of striking the sentence, "Only subcommittee members, an analyst for the majority, an analyst for the minority and designated Legislative Council Service staff may attend executive sessions.". Rule 2 concerns the subcommittee meeting in executive session.

Upon a motion made by Representative Roch, seconded by Representative Larrañaga, and with none opposed, Rule 3 was adopted with the amendment of striking the phrase "through the Legislative Finance Committee" from subsection (f). Rule 3 concerns the gathering and presentation of evidence in the investigation.

Upon a motion made by Representative Cook, seconded by Representative Crook, and with none opposed, Rule 4 was adopted as drafted. Rule 4 concerns advice to the subcommittee from the special counsel on articles of impeachment after the investigation is complete.

Deliberation ensued concerning Rules 5, 6 and 7 of the draft presented by Mr. Burciaga. Due to the lack of consensus among members of the subcommittee, the subcommittee requested LCS staff to conduct further research prior to adoption of those rules. Rule 5 concerns the standard of proof. Rule 6 concerns the process the subcommittee's final report should take through the legislature. Rule 7 concerns the presentation of any articles of impeachment to the house of representatives.

Adjournment

Representative Cervantes noted that the subcommittee would meet again at 9:00 a.m. on Thursday, September 15. There being no further business before the subcommittee, the subcommittee adjourned at 10:40 a.m.