

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

**September 15, 2011
Room 309, State Capitol**

The third meeting of the Investigatory Subcommittee of the House Rules and Order of Business Committee (HRC) was called to order by Representative Zachary J. Cook, co-chair, on September 15, 2011 at 9:05 a.m. in Room 309 of the State Capitol.

Present

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. Joseph Cervantes, Co-Chair
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 Supervisor
Jeanette Roybal, HRC Secretary

Handouts

Handouts are in the meeting file.

Thursday, September 15

Mr. Burciaga stated that upon the request of the subcommittee's co-chairs, Paul Kennedy, special counsel to the 2005 HRC subcommittee, will testify regarding the impeachment process used in 2005 for the state treasurer. Mr. Burciaga distributed copies of the newest version of the

proposed rules of procedure, reminding the subcommittee that Rules 1 through 4 have been adopted while Rules 5, 6 and 7 will be considered at a later date.

Mr. Kennedy provided insight into the impeachment process in 2005. He said that 2005 was the first time in New Mexico history that the legislature was faced with the impeachment of a public official. He stated that New Mexico does not have detailed instructions on how an impeachment is to be conducted, and, thus, it was left to the subcommittee to determine what processes to use. Mr. Kennedy explained that his responsibility in 2005 was to act as special counsel and to gather and present evidence, not to act as special prosecutor. He added that it was the subcommittee's task to weigh the validity of the evidence presented and to determine whether the evidence was enough to merit articles of impeachment. Mr. Kennedy stated that toward the end of the 2005 investigation, the subcommittee solicited his opinions on the evidence and engaged with expert witnesses, who testified to the overall impact of the state treasurer's actions and on the possible effect that those actions might have had on the state's credit rating. He said that in 2005, there was significant pressure to be thorough and to come to a decision relatively quickly due to the potential impact on multimillion-dollar state investments and the risks to state finances. He added that in 2005, the vast majority of the evidence was in the possession of two federal agencies, the Federal Bureau of Investigation and the United States Attorney's Office, which could have made gathering evidence difficult because it would not have been possible to subpoena the federal agencies to hand over evidence that they had obtained. In contrast, as the present investigation is purely a state investigation, it is more likely that there would be fewer barriers to cooperation with the subcommittee.

Mr. Kennedy also discussed how, in 2005, the state treasurer, although invited to testify under oath, refused to participate in the process. Mr. Kennedy recommended that the current subcommittee deliberate as to what degree it will permit the subject of this investigation and his counsel to participate in the subcommittee's proceedings. He suggested allowing the subject of the investigation to participate if he so chooses by giving a deposition under oath. He also suggested that the subcommittee consider allowing the subject of the investigation's counsel to participate if his counsel is willing to participate fairly.

Mr. Kennedy cautioned that the subcommittee's proceedings should not be allowed to develop into an adversarial trial; the role of the house of representatives is more analogous to a grand jury. He also advised the subcommittee on the level of proof it might wish to have in this investigation, noting that in 2005 the standard of proof was, "There is clear evidence to warrant impeachment.". The subcommittee in 2005 would have had to vote on each article of impeachment, deciding whether an individual article was proven by this standard. He clarified that the standard means that the evidence must be clear but not beyond a reasonable doubt, and that, in essence, the standard requires that the evidence be sufficiently clear so that subcommittee members could forward the articles in good conscience to the full house of representatives for consideration.

Mr. Kennedy also highlighted the subcommittee's lack of subpoena power. He explained that this did not affect the investigation in 2005, but the situation might be different in the current

case, depending on the level of cooperation received from other state agencies and whether the Legislative Finance Committee's subpoena power would be available.

Members of the subcommittee expressed concern that some of the comments made by Mr. Kennedy seemed to be recommendations to the subcommittee, but he had only been asked to testify about what had occurred in 2005, and he had not been hired as the subcommittee's special counsel. Clarification was made that Mr. Kennedy is testifying about what took place during the impeachment proceedings in 2005 and that for informational purposes, he was contrasting differences between the prior proceeding and the current one. Members of the subcommittee requested that the right be reserved to consult with the special counsel, once hired, on the same matters as Mr. Kennedy discussed.

Subcommittee members had a number of questions for Mr. Kennedy, including a request for clarification about aid from the Attorney General's Office; how New Mexico case law addresses impeachment proceedings; whether the proceedings are subject to judicial review; and if subcommittee members are subject to personal lawsuits for their actions on the subcommittee. In response, Mr. Kennedy replied that the attorney general is a separate constitutional officer with separate responsibilities. He stated that if the attorney general were moving toward a presentation to a grand jury, the attorney general would be bound by some confidentiality restrictions. Mr. Kennedy explained, however, that if the attorney general could not overtly assist the subcommittee's work, the attorney general should be able to work with the special counsel and point the special counsel in the right direction. Mr. Kennedy emphasized that his comments were speculative. He reminded the subcommittee that impeachment is a political decision that is grounded on a legal basis, not a criminal or civil proceeding. He stated that the decision to impeach an elected official is significant as it involves overturning a decision of the people. He said that judicial intervention into impeachment proceedings is highly unlikely, and he explained that legislators are immune to acts taken in their legislative capacity.

Upon further questioning, Mr. Kennedy explained that the subject of this investigation would have the right to defend himself in the trial portion of these proceedings, if they get that far, in the senate. He also stated that the special counsel could become the counsel in the senate trial, but the procedure envisioned in 2005 was that the house of representatives would appoint representatives in the role of prosecutors in the senate, and those representatives would decide who might work as the staff attorney or special prosecutor.

Representative Cook thanked Mr. Kennedy for his prior service and for the information he provided to the subcommittee. He asked that the subcommittee please remember that Mr. Kennedy's comments were speculative and that the subcommittee should keep an open mind as to how it wishes to proceed in the current matter. He suggested the subcommittee recess and stated that the co-chairs move forward with the selection of a special counsel.

Mr. Burciaga made a concluding comment, in response to a question, that LCS staff is still researching the parliamentary mechanism for transmitting a full report of the subcommittee to the full house of representatives.

Adjournment

There being no further business before the subcommittee, the third meeting of the subcommittee adjourned at 9:45 a.m.