

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

**October 21, 2011
Room 309, State Capitol**

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The sixth 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 October 21, 2011 at 1:11 p.m. in Room 309 of the 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. Al Park
Rep. Dennis J. Roch
Rep. Debbie A. Rodella
Rep. Don L. Tripp

Absent

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Staff

Raúl E. Burciaga, Director, Legislative Council Service (LCS)
Douglas Carver, Staff Attorney, LCS
Leslie Porter, Research Assistant, LCS
Robert J. Gorence, Special Counsel

Handouts

Copies of all handouts are in the meeting file.

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Friday, October 21

Mr. Burciaga opened the meeting by reviewing the agenda, noting that the items being discussed were the only ones remaining to complete the subcommittee's work concerning the impeachment investigation of Public Regulation Commissioner Jerome D. Block, Jr.

Mr. Gorence reviewed the steps he had taken to conduct his investigation. He stated that while he had been able to get documents from the Office of the State Auditor and the Public Regulation Commission without too much difficulty, the attorney general had required a

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subpoena before he would release any substantial information. Mr. Gorence briefly reviewed the steps that had been taken to obtain the subpoena that was issued by the speaker of the house on behalf of the New Mexico House of Representatives and noted that the subpoena had been served on the Office of the Attorney General (OAG) on September 23, 2011, with a return date of September 28, 2011. Mr. Gorence received certain documents released pursuant to the subpoena on the afternoon of September 28, 2011. Much of the information was on compact discs, which he sent out to be copied. Mr. Gorence said he began his review of the material but stopped when he heard of the plea deal being negotiated between Commissioner Block and the attorney general in order not to incur more costs by the state in this matter.

Mr. Gorence informed the subcommittee that on October 14, 2011, he had been served with a *Petition for Protection* from the OAG. The petition was dated September 28, 2011 but was delayed in getting to Mr. Gorence as it had been sent to Mr. Gorence's old office address. The petition stated an objection to the production of certain documents requested by the house of representative's subpoena, but it did not list what documents were not being produced. Mr. Gorence stated that the petition claimed the following privileges for the documents it had not produced: 1) executive privilege; 2) law enforcement privilege; 3) work product privilege; and 4) attorney-client privilege. Mr. Gorence discussed the conversation he had with Assistant Attorney General Scott Fuqua. Mr. Gorence and Mr. Fuqua agreed that there was no need to litigate the issue, given Commissioner Block's resignation, and that they would work out language for a stipulated dismissal. Mr. Gorence noted, however, that the attorney general's resistance to the subpoena raised issues regarding the power of a legislative subpoena in the future, were one to be needed, particularly if the subject of a future impeachment investigation happened to be the attorney general or the governor. The attorney general's resistance to the subpoena, he explained, was an important separation of powers issue that raised fundamental questions. Mr. Gorence stated that he believed a stipulated dismissal should contain language that noted that the issues raised in the *Petition for Protection* were made moot by Commissioner Block's resignation and that the legislature was not conceding that the attorney general's arguments had merit.

Mr. Gorence concluded by noting that he will be returning the evidence in his possession to the LCS and that he had read the draft of the subcommittee's final report and concurred with its content.

Members of the subcommittee expressed astonishment that the OAG seemed to be reluctant to cooperate with the subcommittee's investigation and that the *Petition for Protection* had been filed. Representative Cervantes noted that he had invited Attorney General Gary King to appear before this meeting of the subcommittee in order to discuss the subpoena. Mr. Gorence stated that he felt that the privileges cited in the *Petition for Protection* would not withstand challenge and expressed surprise that *United States v. Nixon*, 418 U.S. 683 (1974), the key federal case on executive privilege, had not been cited in the *Petition for Protection*. He also expressed puzzlement that the *Petition for Protection* had been filed when the OAG knew a plea deal with Commissioner Block was near completion. Members of the subcommittee affirmed that they had

acted properly in issuing the subpoena, a common and uncontroversial legal tool that is supervised by judges; noted that it was in the interests of the state's taxpayers that the investigation be conducted expeditiously; and stated that they were pleased that the subpoena did not have to be litigated, saving the taxpayers that expense. Members of the subcommittee also wondered who the attorney for the legislature would be if the attorney general were fighting a legislative subpoena. Members of the subcommittee also wondered what documents were not being produced by the attorney general and discussed whether it would be possible to get a list of the documents for which privilege had been claimed. Mr. Gorence said that a privilege list had not been provided. Mr. Gorence noted that a constitutional battle over the subpoena would have been expensive and expressed his frustration in dealing with the OAG in this matter, adding that the OAG had not been cooperative in the slightest. Members of the subcommittee noted that Mr. Gorence was named as the defendant in the *Petition for Protection*, which Mr. Gorence indicated was likely a typographical error. Mr. Gorence also noted that his address was correct in the New Mexico Bar Association's records, so he did not understand why the OAG had sent the *Petition for Protection* to his old address. Members of the subcommittee discussed whether it would be possible to press a court case against the OAG in this matter. Mr. Gorence explained that any case would probably be dismissed as moot given that Commissioner Block had resigned and the subcommittee no longer required the information that the attorney general was withholding.

Members of the subcommittee also inquired whether the records that had been produced would be part of the record that will be forwarded to the full HRC and the house of representatives. Mr. Burciaga stated that the LCS will retain custody of all of the items that had been produced and that everything would be made available for inspection by the public on request in the LCS offices or library.

A motion was made by Representative Park, seconded by Representative Roch, to give Mr. Gorence the authority to arrange a stipulated dismissal of the *Petition for Protection* and to give the co-chairs of the subcommittee the authority to review and approve the language of the stipulated dismissal. The motion was adopted without objection.

Mr. Burciaga informed the subcommittee that a draft of the subcommittee's final report had been provided for its review and comment. He stated that the final report would be presented by the subcommittee to the full HRC and then to the house of representatives. He explained that the final report would include the minutes from this meeting of the subcommittee and the resolution of the stipulated dismissal of the *Petition for Protection*. Mr. Carver added that the committee that had investigated the state treasurer in 2005 had not presented its final report until February 7, 2006, three weeks into the regular legislative session. He also noted that while the final report for this subcommittee was drafted using the prior final report as a model, there were substantive differences, not least because these proceedings had minutes as a record for future reference, which was not the case in 2005. Members of the subcommittee inquired whether the subcommittee would meet again during the regular session to approve the report. Mr. Burciaga stated that this would be the case. Members of the subcommittee also inquired whether a special

meeting of the HRC would be required. Mr. Burciaga indicated that a special meeting would not be necessary.

Mr. Burciaga reviewed a memorandum that had been prepared for internal use by the LCS discussing issues that had arisen in this impeachment investigation and the impeachment investigation in 2005. The memorandum includes recommendations for legislative action or possible changes to the impeachment process, were another impeachment investigation necessary in the future. The issues covered were: 1) the type of committee that should be convened to handle an impeachment investigation; 2) Inspection of Public Records Act (IPRA) requests during impeachment investigations (Mr. Burciaga noted that there had been an IPRA request for videos of Commissioner Block; the videos were provided without waiving the LCS's rights under the IPRA); 3) how subpoenas were issued, as current law only allowed legislative subpoenas to be issued when the legislature is in session; 4) whether the subcommittee would be able to require witnesses to take an oath; 5) how the current law on perjury and contempt would apply in impeachment proceedings; 6) the application of the Open Meetings Act to an impeachment investigatory subcommittee; 7) how attendance of members of the legislature who are not members of the investigatory subcommittee should be handled; and 8) the possibility of court challenges to the impeachment process. Members of the subcommittee briefly discussed how the subpoena question might be handled. It was requested that the LCS include the memorandum as an addendum to the final report.

Representative Cervantes noted the importance of the impeachment investigation in the resolution of the matters concerning Commissioner Block; thanked the speaker of the house, Representative Ben Lujan, for beginning the investigatory process and for appointing him as a co-chair; and thanked the members of the subcommittee for their service on the subcommittee. Representative Cook also thanked the speaker of the house for appointing him as a co-chair, thanked the members of the subcommittee for their service and thanked Mr. Gorence and the LCS for their work. Representative Cervantes noted that the subcommittee had come in well under the \$1 million budgeted for the impeachment investigation, and he requested that the LCS report the final fees and costs.

Speaker Lujan, who attended this meeting of the subcommittee, thanked the co-chairs, the subcommittee, Mr. Gorence and the LCS for their work on behalf of the residents of the state, noting that serving on the subcommittee was not always easy or glamorous and involved a great deal of work on a serious issue.

Adjournment

There being no further business before the subcommittee, the sixth meeting of the Investigatory Subcommittee of the HRC adjourned at 2:10 p.m.