

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

**September 22, 2011
Room 309, State Capitol**

The fifth 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 22, 2011 at 9:15 a.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

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

Copies of the handouts are available in the meeting file.

Thursday, September 22

Upon a motion made by Representative Rodella and seconded by Representative Crook, the minutes from the previous four meetings were adopted without objection. Mr. Burciaga also informed the subcommittee that the LCS would get a draft of the subcommittee's required report on its progress during the special session to the subcommittee members as soon as possible. He also indicated that he and the co-chairs of the subcommittee would speak with Representative

Nick L. Salazar, chair of the HRC, about the process to submit the proposed report to the HRC and then to the full house of representatives.

Mr. Burciaga reminded the members of the subcommittee that they had approved Rules 1 through 4 of the proposed rules of procedure, but had yet to adopt Rules 5, 6 and 7.

Members of the subcommittee began with proposed Rule 5, asking Robert Gorence, special counsel to the subcommittee, to give an explanation of the "clear evidence to warrant impeachment" standard that was used in 2005 and has been proposed as a standard of proof in these proceedings. Mr. Gorence recommended that the same standard be used because the nature of these proceedings calls for a standard that is somewhat less than "overwhelming evidence", which would be analogous to "beyond a reasonable doubt" used in criminal proceedings, and a "some evidence" standard that is analogous to the standard in civil proceedings. He noted that "clear evidence" relates back to the language in the Constitution of New Mexico referring to crimes, misdemeanors — which means, in this context, public misconduct — and malfeasance in office. After further discussion among members of the subcommittee, during which other wording was suggested, Mr. Gorence suggested that perhaps the language could be amended so that the standard read "credible evidence to warrant impeachment", as "credible" might be a less ambiguous term than "clear".

The subcommittee discussed the process for submitting potential articles of impeachment to the HRC and the full house of representatives and how this relates to proposed Rules 5 and 6. There was discussion regarding whether the language in Rule 5 needs to include the HRC and whether Rules 5 and 6 should be combined. Members of the subcommittee discussed what type of review of the subcommittee's work the HRC could undertake. Members of the subcommittee suggested that the HRC should review the subcommittee's work for process, but not for substance. Mr. Gorence recommended that Rules 5 and 6 be kept as separate rules, and he stated that although Rule 2, which had been approved at a prior meeting, allows for meeting in executive session, he does not anticipate presenting evidence to the subcommittee that would not be allowed to be presented in a trial in the senate, were these proceedings to lead to trial. Mr. Burciaga noted that in 2005, the confidentiality provisions had been included because it was anticipated that there would be confidential material provided to both the house of representatives and the senate. Mr. Gorence stressed that it is critical that the subcommittee's work be transparent and added that the idea of secret evidence would be anathema to the process. There was further discussion regarding the language for the standard of proof. Mr. Burciaga noted that including the HRC in the language of Rule 5 would imply that the HRC could conduct a new investigation. After further discussion, and with the concurrence of Mr. Gorence, a motion was made by Representative Roch, seconded by Representative Rodella, to adopt proposed Rule 5 as written, except to replace the word "clear" with "credible" so the question presented to the subcommittee and the house, and the standard of proof, would read "credible evidence to warrant impeachment". The motion was adopted without objection.

The subcommittee returned to consideration of proposed Rule 6, as amended by Mr. Burciaga. Members of the subcommittee questioned whether there is a need to include the language concerning presentation of evidence with due regard to confidential material. Mr. Gorence agreed that the language is not necessary. Representative Rodella made a motion, seconded by Representative Chasey, to amend proposed Rule 6 by striking the last sentence in

the proposed Rule 6, which reads, "The presentation shall include a summary of the supporting evidence with due regard for the nature of any evidence that was dealt with in a confidential manner to protect the integrity of other ongoing civil, criminal or administrative proceedings.". The motion was adopted without objection.

The subcommittee next discussed proposed Rule 7. Mr. Gorence recommended, given the discussion on Rule 6, striking the language at the end of the proposed rule. Upon a motion made by Representative Larrañaga, seconded by Representative Rodella, and with none opposed, proposed Rule 7 was adopted with the amendment of striking the language "recognizing that it may be necessary to make some evidence available to house members on a confidential basis to protect the integrity of the ongoing civil, criminal or administrative proceedings".

Representative Cervantes suggested hiring a court reporter to record the presentation of evidence so that members of the house of representatives could review a transcript if they desired. Mr. Gorence concurred, stating that there should be a transcript with exhibits clearly marked for review by members of the house of representatives. Mr. Burciaga noted that this had been done in the prior impeachment investigation. Representative Rodella made a motion, seconded by Representative Crook, to have a court reporter hired for the evidentiary hearing. The motion was adopted without objection.

The members of the subcommittee then discussed whether there is a present need to collect signatures on certificates to call the legislature into an extraordinary session, or whether the collection of signatures could wait until the investigation proceeded further. Mr. Burciaga distributed a revised version of the certificates to the members of the subcommittee, noting that he had revised the language in the certificates to reflect concerns raised at the prior meeting of the subcommittee. He noted that the Constitution of New Mexico dictates under what conditions an extraordinary session could be called, but that he had worked with the rest of the language on the certificate to make it clear that there was no prejudgment of the conclusion of the process. Subcommittee members asked for points of clarification regarding the certificates and some expressed concern about signing them prior to the work of the subcommittee being completed, expressing the concern that signing the certificates at this point might be considered prejudgment of the final result. Other members of the subcommittee expressed the opinion that the certificates were only being signed to allow the subcommittee to complete the work that is in its charge, which includes the necessity of reporting the results of its investigation to the house of representatives, regardless of the ultimate conclusion. Members of the subcommittee also expressed concern about who would submit the signed certificates to the governor, when they might be delivered and at whose direction. Members of the subcommittee suggested that language be added to require delivery of the signed certificates to the governor only upon direction of a majority vote of the subcommittee. Members of the subcommittee also suggested amending the proposed language so that it read that the legislature would "convene to receive and consider the report of the investigatory subcommittee", that the subcommittee would "report its findings and recommendations" and striking language regarding recommendation of articles of impeachment and a trial in the senate. Representative Roch made a motion, seconded by Representative Tripp, to adopt the language on the certificate with the amended language. The motion was adopted without objection.

A further motion was made to give the LCS the authority to begin circulating the certificates to gather the necessary signatures. The motion was adopted by a majority of the subcommittee, with Representative Rodella opposed and Representative Park not voting.

Mr. Gorence offered the subcommittee an update on his progress collecting evidence. He said that he had contacted the Public Regulation Commission (PRC) and the Office of the State Auditor and that he was in the process of obtaining documents from both agencies. He informed the subcommittee that the Office of the Attorney General told him that it possesses a large amount of pertinent information, including audio or video recordings, but that Attorney General Gary King requires a subpoena before he would release the material. A draft of the subpoena form was distributed to the members of the subcommittee for their review. Mr. Burciaga outlined the process that would be taken in the house of representatives to have the subpoena issued. Mr. Gorence informed the members of the subcommittee that there could be other subpoenas issued, but he would not be able to determine whether they might be necessary until he has the opportunity to finish reviewing the materials that had been provided by the Office of the State Auditor and the PRC. When asked whether it would be necessary to get information from any other body, Mr. Gorence noted that he would have a better sense of such a need after he had fully examined the evidence he had. Mr. Burciaga added that information on any payments that might have been made would have gone through the Department of Finance and Administration and would be public record, thus not requiring a subpoena.

Members of the subcommittee engaged in discussion about a formal name for the subcommittee. Representative Cervantes made a motion, seconded by Representative Tripp, to name the subcommittee the "Investigatory Subcommittee of the House Rules and Order of Business Committee". The motion was adopted without objection. Mr. Burciaga noted that the LCS would update the minutes and other documents already approved by the subcommittee to reflect the approved name.

Members of the subcommittee discussed the language in Section 2-1-10 NMSA 1978 regarding issuance of a subpoena by a house of the legislature and the mechanics of the subcommittee requesting a subpoena. Representative Cervantes noted that it is interesting that the New Mexico Legislature has never issued a subpoena before, while it is common to do so in Congress, and wondered whether the New Mexico Legislature should consider its subpoena power further. Representative Cervantes made a motion, seconded by Representative Tripp, for the subcommittee to request that Representative Salazar, chair of the HRC, make a motion on the floor of the house of representatives requesting that the house of representatives authorize the issuance of the subpoena. The motion was adopted without objection.

Mr. Gorence informed the subcommittee that he has attempted to contact the attorney of record for Jerome D. Block, Jr., but had not yet received a response. He stated that if he had not heard back from Mr. Block's attorney of record by the end of the day, he would contact the commissioner directly.

Members of the subcommittee discussed times for the subcommittee to reconvene after the special session. It was decided that the subcommittee would reconvene on October 21, 2011 at 1:30 p.m. for a half-day meeting to receive an update from Mr. Gorence on the progress of his

investigation, and would convene again on November 1, 2011 at 9:30 a.m. for Mr. Gorence to present evidence.

Adjournment

There being no further business before the subcommittee, the fifth meeting of the Investigatory Subcommittee of the HRC adjourned at 11:30 a.m.