

BEFORE THE HEARING SUBCOMMITTEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo.

**CHARGING PARTY’S RESPONSE TO EMERGENCY MOTION
TO ALLOW RESPONDENT TO ISSUE SUBPOENAS
AND REQUEST FOR EXPEDITED CONSIDERATION**

As special legal counsel duly authorized to assist the investigative subcommittee and act as the charging party at the formal hearing in this matter, the undersigned submits this response to Representative Carl Trujillo’s (“Rep. Trujillo”) Emergency Motion to Allow Respondent to Issue Subpoenas (“the Motion”). Because the hearing subcommittee is without authority to issue subpoenas, the motion must be denied.

ARGUMENT

I. The Interim Ethics Hearing Subcommittee Does Not Have the Authority to Issue Subpoenas.

As Rep. Trujillo acknowledges, the procedures for ethics investigations when the House is in session differ from the procedures applicable during the interim. While the Legislature is in session, proceedings are governed by House Rule 13. During the interim, when the Legislature is not in session, proceedings are governed by Legislative Council Policy No. 16(K). *Id.* The difference is that the former grants the accused subpoena power, while the latter only allows the accused “to request the presence of witnesses...” *Id.* This fundamental difference recognizes that Legislature had limited the issuance of subpoenas to “during any regular or special session” and only upon request of a standing committee of either chamber. *See* NMSA 1978, § 2-1-10(A). That same statute also requires “approval by a majority vote of the elected members of the house of which such a committee is a part...” *Id.*

The Legislative Council cannot eliminate by policy directive or rule the statutory requirement of a majority vote of the members of the respective chamber for the issuance of subpoenas by the Legislature. Nor can a standing committee of either house request issuance of a subpoena because standing committees do not exist in the interim. Rep. Trujillo's Motion fails to recognize these statutory limitations on the power to issue subpoenas. As the statute makes clear, the interim hearing subcommittee cannot authorize the issuance of subpoenas; subpoenas may be issued by the Legislature only when a standing committee makes such a request during a regular or special session of the legislature *and* a majority vote of the chamber approves that request.

II. Rep. Trujillo's Invocation of the House Rules is Misplaced.

As a matter of New Mexico constitutional law, the rules of the House do not apply in the interim because the New Mexico Legislature cannot operate outside of the designated constitutional timeframes, except as specifically allowed by the Constitution. *See* N.M. Const. 4, §§ 5, 6. The Constitution establishes the time and length of legislative sessions, beginning "annually at 12 noon on the third Tuesday of January," lasting 60 days in odd numbered years and 30 days in even numbered years. Consequently, the House of Representatives, its standing and procedural committees, and its rules do not exist outside the confines of the constitutionally-mandated time and length of a legislative session.

Because the House rules are not applicable during the interim, the Legislature specifically created the Interim Legislative Ethics Committee to address matters which arise during the interim. The statute states, "[a]ll matters arising in the interim pertaining to legislative ethics shall be referred to this special interim legislative ethics committee." NMSA 1978, § 2-15-7(B). Thus, once the Legislature adjourns, it no longer functions as a political body, and the rules, policies and procedures governing the business of the body during the session no longer apply. During the

interim, the Legislative Council is vested with authority to conduct legislative affairs and is bound by all applicable interim rules. Those rules include Legislative Council Policy No. 16. As a result, the anti-harassment policy refers both to the rules and policies applicable while the Legislature is in session (House Rule 13), and those applicable during the interim (Legislative Council Policy No. 16). Because of the statutory constraints, The Legislative Council correctly incorporates the absence of a subpoena power in Legislative Policy 16(K).

III. The Absence of the Subpoena Power Does Not Create a Due Process Concern.

The statutorily-mandated differences between the House Rule 13 and Legislative Policy 16(K) do not create due process concerns. Rep. Trujillo points only to the lack of the subpoena power to argue that he will not receive due process. *See* Motion at 5. This claim is unsupported. Legislative Policy 16(K) grants a multitude of due process protections: (1) the right to a hearing; (2) the right to be represented by counsel; (3) the right to request the production of evidence; (4) and the right to confront adverse witnesses.

These procedural safeguards afford significant due process of law during the interim. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (“The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances. The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.”) (internal quotations omitted); *State ex rel. Children, Youth & Families Dep’t v. Mafin M.*, 2003–NMSC–015, ¶ 18, 133 N.M. 827 (The essence of due process is notice and “an opportunity to be heard at a meaningful time and in a meaningful manner.”).¹

¹ There has been no suggestion that Rep. Trujillo has not received adequate notice.

There is simply no authority to suggest that due process requires an accused to have the subpoena power in a non-criminal hearing. *See, e.g., DeLong v. Hampton*, 422 F.2d 21, 25 (3d. Cir. 1970) (“No case has been cited holding that this lack of subpoena power denies due process, and we have found none.”); *Rubio v. Hampton*, 384 F.Supp. 218, 222 (C.D. Cal. 1974) (the absence of the subpoena power is not a due process violation).

Moreover, Rep. Trujillo’s claimed harm from not having subpoena power is illusory. Rep. Trujillo has not identified a single witness or piece of evidence that he has not been able to secure. The Scheduling Order in this case affords Rep. Trujillo the right to substantial discovery—including depositions of potential witnesses. *See* Scheduling Order at 2. In fact, special counsel have arranged for the appearances of all witnesses whose depositions Rep. Trujillo has requested. Under the Scheduling Order, witnesses failing to appear or cooperate are subject to sanctions. *Id.* The procedures provided by the hearing committee under the Scheduling Order comport with, and even exceed, standard due process requirements.

CONCLUSION

The interim hearing subcommittee cannot issue subpoenas because there is no standing committee to request issuance of a subpoena and there can be no majority vote approving issuance of a subpoena during the interim. Accordingly, Legislative Council Policy No. 16 correctly provides the procedural safeguard of requesting that a witness attend a hearing in lieu of a subpoena. The procedures afforded under Legislative Council Policy No. 16 afford adequate due process and comport with the law. For these reasons, this Motion should be denied.

Respectfully submitted,

HINKLE SHANOR LLP

/s/ Thomas M. Hnasko

Thomas M. Hnasko
Post Office Box 2068
Santa Fe, NM 87504-2068
(505) 982-4554
thnasko@hinklelawfirm.com

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

Theresa W. Parrish
Post Office Box 1888
Albuquerque, NM 87102
(505) 765-5900
tparrish@rodey.com

Counsel for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I caused a true and correct copy of *Charging Party's Response to Emergency Motion to Allow Respondent to Issue Subpoenas and Request for Expedited Consideration* to be served via electronic communication on the following:

Travis G. Jackson
Jackson Loman Stanford Downey, P.C.
201 3rd Street, Suite 1500
Post Office Box 1607
Albuquerque, NM 87103-1607
travis@jacksonlomanlaw.com

Hearing Subcommittee of the Interim
Legislative Ethics Committee
c/o Raul Burciaga, Director
Legislative Council Service
State Capitol Building, 4th Floor
Santa Fe, NM 87503
raul.burciaga@nmlegis.gov

/s/ Thomas M. Hnasko

Thomas M. Hnasko