

BEFORE THE HEARING SUBCOMMITTEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo,

Respondent.

EMERGENCY MOTION TO APPOINT
AN INDEPENDENT HEARING OFFICER AND
REQUEST FOR EXPEDITED CONSIDERATION

Respondent Representative Carl Trujillo, by and through undersigned counsel, respectfully move the Committee to appoint an independent hearing officer to preside over the formal hearing and pre-hearing matters, and states as follows:

Introduction

This Committee is tasked with conducting the first-ever formal hearing of a complaint made under the Legislature’s new anti-harassment policy. There will be many novel procedural and legal matters that must be decided prior to, during, and after the hearing, and the Committee will need unbiased, objective guidance. Special Counsel (Tom Hnasko and Tad Parrish) were originally appointed to “independently” investigate the complaint made by Laura Bonar against Representative Trujillo. Special Counsel has now been assigned to advocate for her remaining claims at the Formal Hearing– they will stand in the place of the

Charging Party. These dual roles already create a serious conflict of interest – they cannot also advise the Committee on how to conduct the formal hearing, how to consider and weigh evidence, and on the ultimate outcome.

Having taken on the position of advocating for one side over the other, Special Counsel cannot independently and objectively advise the Committee on the procedural and substantive matters that are certain to come before this Body. In order to assist the Committee, to maintain the appearance of fairness and impartiality, and to ensure that this case provides an effective and fair roadmap for future proceedings under the Policy, Representative Trujillo moves the Committee to appoint an independent hearing officer to preside over the proceedings. Representative Trujillo proposes that the Committee engage a former judge with experience on either the Judicial Standards Commission or New Mexico Disciplinary Board, or who otherwise has experience in presiding over ethical or disciplinary disputes.

Argument

The right to a fair and impartial tribunal has been described by our courts as a fundamental constitutional right. *See, e.g. Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041, ¶ 30, 309 P.3d 80, 86-87. This concept holds true in administrative hearings as well. While such “procedural matters as the rules of evidence not be adhered to by administrative agencies to the same degree as in a

court of law, the right to an impartial tribunal is held to the higher standard.” *Los Chavez Cmty. Ass’n v. Valencia Cty.*, 2012-NMCA-044, ¶ 22, 277 P.3d 475, 482. Due process requires a “neutral and detached judge in the first instance. The requirement of impartiality applies not only to judicial officers but also to private persons who serve as adjudicators. These principles are equally applicable to administrative proceedings.” *Id.* at ¶ 23, 483 (internal citations omitted).

To be sure, the various rules and policies governing this Committee provide for special counsel to be appointed for the investigation of a claim of sexual harassment¹, for the prosecution of a formal hearing on such charges², and to assist the Committee during the hearing³. However, there should be no assumption that it be the same Special Counsel operating in these different and inherently conflicted capacities. In fact, any fair proceeding would prohibit one attorney from attempting to wear all of these different and conflicting hats.

Having Special Counsel both advocate for the Charging Party and privately advise the Committee *ex parte* on legal questions that may favor the Charging Party is fundamentally unfair and already creates the appearance that this process is rigged from the outset. Having Special Counsel prosecute the Respondent and advise the Committee whether it should rule against Respondent’s claims and defenses, and to potentially punish him, is frankly outrageous. It is like having the

¹ Anti-Harassment Policy, dated January 15, 2018, p.4.

² Legislative Council Policy No. 16(J)(1).

³ N.M.S.A. § 2-15-11.

head coach referee the game. Undersigned counsel is aware of no accepted quasi-judicial proceeding in which a single attorney acts as both independent investigator, prosecutor, legal advisor to the fact-finder (jury), and legal advisor on punishment (a judge). Our justice systems recognize that these are separate functions that must remain objective and impartial. If the Committee wants the public to accept this inherently political process as a fair and objective adjudication of facts and law, the current structure must be changed.

Fortunately, in addition to its authority to hire Special Counsel, the Committee is also expressly authorized to appoint an independent hearing officer. See N.M.S.A. § 2-15-11. An independent hearing officer would be able to objectively and transparently hear pre-hearing matters, resolve discovery disputes that may arise, and independently advise the Committee on what evidence should and should not be introduced during the hearing, all without any appearance of impropriety.

In the interest of an efficient hearing, a hearing officer should have judicial experience. Representative Trujillo respectfully suggests the appointment of The Honorable James Hall as an independent hearing officer in this matter. Judge Hall is a retired judge from the First Judicial District. If he is unavailable, Representative Trujillo would propose retired judges The Honorable Bruce Black, The Honorable Sarah Singleton, or The Honorable Alan Torgerson. Respondent

requests that this Motion be expedited so that an Independent Hearing Officer can be appointed fairly in advance of any further proceedings.

In advance of filing the Motion, undersigned counsel requested that Special Counsel agree to put the following language in the Scheduling Order:

The Hearing Subcommittee may engage an independent Hearing Officer with judicial experience to decide such motions and any evidentiary questions in advance of the formal hearing, and to preside over evidentiary matters that may arise during the Formal Hearing.

Special Counsel would not agree to include such language. Having failed to obtain agreement on an independent hearing officer, Respondent files this Motion asking the Committee to order one so to reduce or eliminate existing questions of impartiality.

Conclusion

In this test case of the Anti-Harassment Policy's procedures, the Committee should set a precedent of fairness and impartiality. Having the same Special Counsel serve as prosecutor, charging party, and advising the Committee presents an unavoidable conflict. The Committee should appoint an independent hearing officer to preside over all pre-hearing matters and the formal hearing.

Respectfully submitted,

**JACKSON LOMAN STANFORD
& DOWNEY, P.C.**

/s/Eric Loman _____

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We hereby certify that a true and correct copy of the foregoing pleading was emailed this 4th day of October, 2018, to:

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By: /s/Travis G. Jackson
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