

BEFORE THE HEARING SUBCOMMITTEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo.

CHARGING PARTY'S RESPONSE TO MOTION TO DISMISS

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") Motion to Dismiss ("the Motion").

Introduction

The New Mexico Legislature is an independent branch of government – vested with broad powers and serious duties by the New Mexico Constitution. Among those powers is the unfettered ability to create policies and procedures that ensure all members of the Legislature maintain ethical behaviors and to investigate and discipline members in any manner it sees fit in order to maintain the integrity of the legislative body. And the hallmark of this body's independence is that it is guided by its own judgment and procedure—the legislature is subordinate to no other branch of government.

Rep. Trujillo's Motion disregards these fundamental constitutional truths. Instead, Rep. Trujillo advances three willfully narrow and inapplicable arguments to support his position: (1) Dismissal is warranted because Ms. Bonar, a private citizen, did not keep her serious allegations confidential or file a sworn statement; (2) This proceeding amounts to an unfair retroactive application of a newly-enacted policy; and (3) That the principles embodied in statutes of limitations and the doctrine of laches require dismissal. *See* Motion 1-2.

Each of these arguments fails. As established below, Rep. Trujillo completely ignores the procedure for initiating investigations contained in Legislative Council Policy No. 16(H), which

does not require a sworn statement of any kind. Moreover, while the procedures for filing charges seeking discipline call for confidentiality until a finding of probable cause, there is no suggestion that the investigative subcommittee breached confidentiality prior to making the probable cause finding. Ms. Bonar, a private citizen, chose to make her allegations public. This decision does preclude the initiation of an investigation under Legislative Council Policy No. 16(H).

The most incredible argument made by Rep. Trujillo is that the newly-revised Anti-Harassment Policy cannot be applied retroactively, apparently arguing that prior to the 2018 procedural revisions, sexual harassment was not an ethical violation. The truth is that sexual harassment has been banned in the legislature during Rep. Trujillo's entire term of service. Finally, the Legislature's Anti-Harassment Policy contains no statute of limitations because the Legislature has chosen to ensure that egregious sexual harassment may be investigated and punished no matter the length of time between the improper actions and the investigation. Statutes of limitation are created by the Legislature, not guaranteed by the Constitution. And the Legislature can choose to not impose a such a limitation in policing its own members.

Argument

The Motion misapprehends the broad power of the Legislature to maintain the integrity of that body, it willfully ignores the alternative procedure available under Legislative Council Policy No. 16(H) for initiating ethics investigations during the interim, and it contravenes the applicable constitutional standards applicable to the Legislature's policies regarding ethical conduct. Accordingly, the Motion should be denied.

I. The Legislature is an Independent Branch of Government and is Not Bound by Court Precedent.

As a deeply-rooted principle of Anglo-American law, it is well-recognized that even “the humblest assembly of men” retains the inherent power to punish its own members for misconduct. *See* Joseph Story, *Commentaries on the Constitution of the United States* § 419. It would thus “be absurd to deprive the councils of the nation of a like authority.” *Id.* American courts have therefore uniformly held—from the time of the founding to the present day—that this inherent authority is a distinct *legislative* power, outside the domain of the courts or the executive. *See, e.g., Whitener v. McWatters*, 112 F.3d 740, 744 (4th Cir. 1997) (“[The power to discipline members] is the primary power by which legislative bodies preserve institutional integrity without compromising the principle that citizens may choose their representatives.”) (quotations omitted); *Berry v. Crawford*, 990 N.E.2d 410, 414 (Ind. Sup. Ct. 2013) (the General Assembly has exclusive power to discipline its members and its decisions are not subject to judicial review); *Commission on Ethics v. Hardy*, 125 Nev. 285, 287 (the power to discipline legislators for disorderly conduct belongs to the Legislature and accordingly cannot be completely delegated to a commission).

New Mexico is no exception to this tradition and has recognized the exclusive right of the Legislature to police its own members since territorial days. *See Chavez v. Luna*, 1889-NMSC-016, ¶ 6, 5 N.M. 183 (“General superintending control over inferior courts possessed by the district and supreme courts in this territory does not extend to the judicial action of the legislative houses in the cases where it has been deemed necessary to confer such powers upon them with a view to enable them to perfect their legislative houses and perform their legislative duties”); *see generally, Lyons v. Woods*, 1889-NMSC-028, 5 N.M. 327.

II. Legislative Council Policy No. 16(H) Provides the Appropriate Authority for this Investigation and Hearing.

With these principles in mind, the Legislature is free to adopt its own procedures for the investigation of any matter implicating ethical concern arising during the interim, including this matter. Rep. Trujillo attacks this investigative process by arguing that the entire investigation should be abandoned because (1) the appropriate procedures for filing a sexual harassment claim were not followed, and (2) the process has not been confidential. *See* Motion at 1-2. Both of these charges are misguided and based on a misreading of the applicable rules. In the first instance, Rep. Trujillo fails to recognize the alternative procedure for referring a sexual harassment claim for investigation as provided for in Legislative Policy No. 16(H). Second, this investigation has been conducted confidentially and professionally—that *Ms. Bonar* chose to make her allegations public is beyond the control of this subcommittee or the special counsel.

The Anti-Harassment Policy states that “Sections 2-15-7 through 2-15-12 NMSA 1978; ...House Rules 9-13-1 through 9-13-7; or *Legislative Policy No. 16* shall apply to the process regarding complaints against legislators.” (emphasis added) The House Rules, of course, do not apply during the interim—or the interim rules and policies would be superfluous. Section 2-15-9(D), Legislative Policy Nos. 16(F) and (H) are therefore the only provisions that govern the initiation of an ethics investigation during the interim. Section 2-15-9(D) and Legislative Policy No. 16(F) are nearly identical provisions: they both provide the mechanism by which a member of the legislature or public may, on their own, initiate an investigation: by filing a sworn statement with the legislative council. Legislative Policy No. 16(H), on the other hand, does not require a sworn statement but provides the “the speaker of the house of representatives...in conjunction with the appropriate majority and minority leaders, *may also refer any ethics matter* affecting a

member...which might require investigation to the interim legislative ethics committee.”¹
(emphasis added)

This procedure was followed in the instant case. Despite the absence of a formal complaint, the Speaker of the House, in conjunction with majority and minority caucus leaders and outside counsel, determined that the matters set forth in the “open letter” warranted a referral to the Interim Legislative Ethics Committee for Investigation. Thereafter, an investigative subcommittee of the Interim Legislative Ethics Committee convened and, with the recommendation of the Legislative Council Service, retained the undersigned as special legal counsel to the investigative subcommittee to investigate the matters set forth in Ms. Bonar’s “open letter.” Special Counsel initiated the investigation on or shortly after May 17, 2018.

A. No sworn statement is required to initiate a hearing

Rep. Trujillo’s argument – that all ethics investigations must be instigated by a sworn statement – is not only unavailing, it is contrary to the Legislature’s constitutional mandate. Where, as in this case, public accusations of sexual harassment are lodged against a legislator rather than filed confidentially, Legislative Council Policy No. 16(H) provides a mechanism to investigate matters that raise serious ethical concerns regarding a legislator’s conduct. Under Rep. Trujillo’s logic, only a sworn statement can initiate an investigation. Such a rule would be completely contrary to the independent duty all members of the legislature have to police the conduct of their colleagues—a duty implicit in the state constitution. *See* N.M. Const., Art. 4 §§ 7, 11. (“Each house shall be the judge of the election and qualification of its own members;” “Each

¹ These alternate tracks are also provided for in the House Rules, so that both avenues are open during the interim and when the House is in session, House Rule 9-13-2 provides: *In the alternative, the speaker, after consultation with the majority and minority floor leaders, may refer any matter which might require discipline to the attention of the chairman of the house rules and order of business committee. Notice of the referral shall be given to the member who may be charged.*

house may...punish its members for contempt...”); *see also Contempt*, Black’s Law Dictionary (10th ed. 2009) (providing definition of “contempt” as “Conduct that defies the...dignity of a...legislature.”).

Because Section 2-15-9(D) and Legislative Policy No. 16(F) require sworn statements “setting forth, with specificity, the facts alleged,” no legislator would be able to effectively carry out his or her constitutional duty unless he or she were an actual witness to the event. More to the point in sexual harassment cases, no conduct, no matter how egregious, could be investigated unless the victim filed a sworn complaint with the Legislative Council Service. Legislative Council Policy No. 16(H) provides an alternative process to investigate and punish sexual harassment even where the victim, for well-understood reasons, does not file a sworn complaint. Legislative Council Policy No. 16(H) preserves the possibility that House leadership, upon learning of potential harassment from other sources, can refer the matter to the investigative subcommittee in situations the leadership deems appropriate. The contrary position urged by Rep. Trujillo – that only a sworn statement can trigger an investigation into serious allegations of sexual harassment – is both irrational and unconstitutional.

B. This subcommittee has not breached the confidentiality of this matter—dismissal would be an inappropriate remedy

With respect to his argument concerning the lack of confidentiality this charge has received, Rep. Trujillo misconceives the nature of this investigation and disregards the confidentiality the investigative subcommittee and special counsel maintained during the investigation. This matter is an ethics investigation for the sake of maintaining the integrity of this chamber. This is not a civil lawsuit between Ms. Bonar and Rep. Trujillo. *Ms. Bonar* chose to make her allegations public. This choice was not directed, or in any way encouraged, by a member of the investigative subcommittee or the special counsel. Indeed, the investigative subcommittee

cannot constitutionally restrain Ms. Bonar from speaking publicly on this issue. *See Stilp v. Contino*, 613 F.3d 405, 415 (Third Cir. 2010) (Pennsylvania statute requiring complainant to keep ethics complaint confidential violated the First Amendment); *Connick v. Myers*, 461 U.S. 138, 148 (1983) (Bringing to light “actual or potential wrongdoing or breach of public trust” by elected officials is a matter of public concern enjoying strong First Amendment protection).

Thus, to dismiss this investigation would be to sanction the *Subcommittee* itself, which had no part in disclosing this matter to the public. The only public statement made by the Legislative Council Service was a press release confirming the existence of an investigation—this was done well *after* multiple media outlets had reported on the substance of the allegations. Moreover, while Rep. Trujillo correctly notes that the revised Anti-Harassment Policy contains a section titled, “Confidentiality,” but incorrectly asserts section “requires” confidentiality. *See Motion*, p. 4. Under the revised policy, confidentiality is not an absolute requirement; rather, confidentiality is maintained “to the extent possible” pursuant to other rules and policies. The investigative subcommittee maintained confidentiality “to the extent possible” without infringing on Ms. Bonar’s constitutional right to make her allegations public.

Irrespective of Ms. Bonar’s decision to publicize her allegations, that decision does not demand the extreme sanction of dismissal. *Newsome v. Farer*, 1985-NMSC-096, ¶ 29, 103 N.M. 415 (dismissal without prejudice is “reserved for extreme circumstances”). And it is a remedy that is generally reserved to deter outrageous abuse of process. *Id.* Here, the investigative subcommittee and special counsel have carefully complied with the confidentiality requirements laid out in the statute. There is no basis to penalize the interim investigative and hearing subcommittees and dismiss this appropriate legislative investigation and hearing based on the

victim's choice to publicize the allegations. *See Sandoval v. Martinez*, 1989-NMCA-042, ¶ 13, 109 N.M. 5 (“[D]ismissal, in general, constitutes a penalty.”).

III. Sexual Harassment Has Long Been Banned by Legislative Policy.

Rep. Trujillo's argument that the findings of probable cause are barred “as a matter of law,” or are “unlawful” because of statutes of limitations and the doctrine of laches is inapt. *See* Motion at 2. This subcommittee is completely empowered to seek the truth of these matters. As has already been discussed, the Legislature is an independent branch of government, vested with inherent, internal-policing powers. *See Chavez*, ¶ 6. Rules announced by the New Mexico Supreme Court, or limitations on civil actions, are simply not binding on proceedings in this body. *Id.* This distinction is not a mere technicality but the very embodiment of the separation of powers, the most fundamental of our constitutional principles. *See Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, ¶ 8, 111 N.M. 17 (describing the separation of powers as a “fundamental precept.”).

Moreover, Mr. Trujillo's argument that sexual harassment was not prohibited prior to the enactment of the 2018 revisions to the policy is without any merit. The Anti-Harassment Policy did not make sexual harassment repugnant and unethical *for the first time*. *See* No Harassment Policy (enacted May 2, 2008) (forbidding sexual harassment and defining verbal sexual harassment as “Demands for sexual favors, sexual innuendos, suggestive comments...”).

The present Anti-Harassment Policy was not the genesis of the Legislature's policy against harassment, but rather constituted revisions to the procedure for handling a claim. This revised policy simply clarified procedural questions—it did not affect any substantive right or condemn any behavior for the first time. *Compare* No Harassment Policy (May 2, 2008) (forbidding “Demands for sexual favors, sexual innuendos, suggestive comments...”) *with* Anti-Harassment

Policy (Jan. 15, 2018) (forbidding “demands for any type of sexual favor; repeated requests for a date; sexual innuendos; suggestive comments...”).

Rep. Trujillo’s arguments raising concerns about retroactive enforcement are thus misguided: a mere change in procedure does not raise any *ex post facto* issue. *See State v. Romero*, 2011-NMSC-013, ¶ 8, 150 N.M. 80 (“[D]ue process only extends to ex post facto situations that do not include procedural rules, even if the amendments disadvantage defendants.”); *Wilson v. New Mexico Lumber & Timber Company*, 1938-NMSC-040, ¶ 4, 42 N.M. 438 (“The general rule is that statutes, *except those dealing with remedial procedure*, are to be construed as prospective...”) (emphasis added).

A. Sexual harassment is an ethical violation

Additionally, at all times Rep. Trujillo served in this body his conduct was governed by myriad ethical rules, as outlined in the *New Mexico Legislative Ethics Guide*. Such rules include the admonishment that “Members shall conduct themselves in a manner that justifies the confidence placed in them by the people and maintain the integrity of, and discharge ethically the high responsibilities of, public service.” (Subsection B of Section 10-16-3 NMSA 1978, Senate Rule 26-1(A), House Rule 26-1(A)); and “Members shall treat their government positions as public trusts and use the powers and resources of their offices only to advance the public interest.” (Subsection A of Section 10-16-3 NMSA 1978). Ms. Bonar’s allegations, if proven, constitute a grave breach of these rules and others: sexual harassment is unethical. *See, e.g., In re Miera*, 426 N.W.2d 850, 858-59 (Minn. 1988) (sexual harassment by a judge is an ethical violation); *In re Seraphim*, 97 Wis. 2d 485, 510, 294 N.W.2d 485, 499 (1980) (sexual harassment is a violation of judicial code of ethics).

IV. The Anti-Harassment Policy is Not Subject to any Statute of Limitations

With respect to his statute of limitations defense, Rep. Trujillo at least concedes that the policy itself contains no such limitation. *See* Motion at 11. This fact should end the discussion – the Legislature is the body that enacts limitations for causes of action, and the Legislature specifically decided not to include such a period of limitation in its Anti-Harassment Policy. A statute of limitation is just that, a statute, not a Constitutional guarantee. Rep. Trujillo, however, urges the subcommittee to apply non-applicable statutes of limitations to avoid answering these charges, arguing that the claims “are untimely by any standard found in the law.” Motion at 11. This claim is flatly untrue.

A. Periods of limitation are entirely for the legislature to decide—they are not imposed by courts

In explaining the nature of a statute of limitations, the New Mexico Supreme Court has explained that “such statutes are measures of public policy only. They are entirely subject to the will of the Legislature, and may be changed or repealed...” *State v. Morales*, 2010-NMSC-026, ¶ 10, 148 N.M. 305. Thus, it is permissible, and even desirable, to have different periods of limitation—or none at all—under different statutes or for different causes of action. *See Padilla v. Montano*, 1993-NMCA-127, ¶ 31, 116 N.M. 398 (discussing how application of different periods of limitation advance different public policies). The mere fact that a tort action is subject to a four-year limitation, or that claims of sexual harassment under the New Mexico Human Rights Act must be made within a prescribed time period, have no bearing on whether the hearing subcommittee may proceed under its policy proscribing sexual harassment no matter when it occurs.

B. Rep. Trujillo fails to recognize the policies that argue against the application of a statute of limitations

Additionally, Rep. Trujillo’s argument citing “the important policies served by statutes of limitations” is misplaced. Motion at 11. He fails to recognize the countervailing policies supporting a hearing in this case, rather than summary dismissal. It is well-established in New Mexico that “the law favors the right of action rather than the right of limitation.” *Macias v. Jaramillo*, ¶ 31, 129 N.M. 578 citing *Sanchez v. Candeleria*, 1890-NMSC-004, *Gaston v. Hartzell*, 1976-NMCA-041, ¶ 22, 89 N.M. 217. Adjudication on the merits is strongly favored. *See Gengler v. Phelps*, 1976-NMCA-114, ¶ 20, 89 N.M. 793.

Moreover, as the Legislature has recently reaffirmed, it is a matter of great concern that the state’s lawmaking body is free of the corrosive effects of sexual harassment. Contrary to Rep. Trujillo’s assertion that the revised Anti-Harassment Policy was “intended” to deal with allegations of harassment “immediately” after the harassment occurs, the Anti-Harassment Policy was intended to prevent harassment and punish sexual harassment whenever it occurred. The Legislature’s commitment to ensuring the integrity of the body is reflected in the conspicuous choice to *not* require that allegations of sexual harassment be brought within any time period after the behavior. The formal hearing in this matter is appropriate and corresponds to the commitment to prevent and punish sexual harassment.

CONCLUSION

For all the reasons stated above, Rep. Trujillo’s Motion to Dismiss should be denied. This Subcommittee is vested with the full power to conduct a public hearing in this matter; it may lawfully proceed—and should.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I caused a true and correct copy of *Charging Party's Response to Motion to Dismiss* to be served via electronic communication on the following:

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