

BEFORE THE HEARING SUBCOMMITTEE
OF THE INTERIM LEGISLATIVE ETHICS COMMITTEE

In re: Representative Carl Trujillo,

Respondent.

EMERGENCY MOTION TO ALLOW
RESPONDENT TO ISSUE SUBPOENAS AND
REQUEST FOR EXPEDITED CONSIDERATION

Respondent Representative Carl Trujillo, by and through undersigned counsel, respectfully moves the Committee to authorize Representative Trujillo to issue subpoenas to produce records and to compel the appearance of witnesses at the Formal Hearing (presently scheduled for December 3 and 4, 2018). Because Respondent has been provided very little time to conduct discovery in this proceeding, Respondent requests that the Hearing Sub-Committee appoint an Independent Hearing Officer to decide this Motion on an expedited basis so that, if it is granted, Representative Trujillo can issue subpoenas with sufficient time remaining to obtain and use the records to fairly defend himself .

ARGUMENT

The New Mexico Constitution provides that “[e]ach house may determine the rules of its procedure.” N.M. Const. art. IV, § 11. By statute, the New Mexico Legislature has authority to issue subpoenas “during any regular or special session

of the legislature” in order to “to compel the attendance of any witnesses or command the person to whom directed to produce any books, papers, documents or tangible items designated therein, at any investigation or hearing before the body issuing the subpoena.” N.M.S.A. § 2-1-10(A). A third party refusing to comply with a subpoena faces serious consequences: “Any person who shall refuse or neglect to comply with a subpoena, duly issued by the proper officer of the legislature, shall upon conviction be guilty of contempt of the legislature, and punished by a fine of not more than five hundred dollars (\$500) or by imprisonment in the county jail for not more than six months or by both such fine and imprisonment in the discretion of the judge.” N.M.S.A. § 2-1-10(D).

Effective January 15, 2018, the New Mexico Legislative Council adopted a new Anti-Harassment Policy. If a complaint is received outside of the session, the Legislature delegated its investigatory power to the Interim Legislative Ethics Committee (the “Committee”): “All matters arising in the interim pertaining to legislative ethics shall be referred to this special interim legislative ethics committee.” N.M.S.A. § 2-15-7(B). By statute, “the New Mexico legislative council shall develop procedures to carry out the provisions of this section, in accordance with the existing procedures in the house and senate rules.” N.M.S.A. § 2-15-9 (emphasis added). The Anti-Harassment Policy expressly states that: “Sections 2-15-7 through 2-15-12 NMSA 1978; Senate Rules 9-13-1 through 9-13-

6; House Rules 9-13-1 through 9-13-7; or Legislative Council Policy No. 16 shall apply to the process regarding complaints against legislators.”

House Rule 13 contains existing procedures for ethics investigations like this. In order to afford its members adequate due process, the House Rules expressly permit a Representative accused of misconduct to issue subpoenas: “At the formal hearing all parties shall have an opportunity to . . . subpoena witnesses and require the production of relevant evidence.” House Rule 9-13-5. The New Mexico Legislative Council was directed by statute to “develop procedures . . . in accordance with the existing procedures in the house . . . rules,” which expressly provides for the issuance of subpoenas. Legislative Council Policy 16(K) instead only vaguely states that “[a]t the formal hearing, all parties shall have an opportunity to be heard, to request the presence of witnesses and the production of relevant evidence and to cross- examine witnesses against them.”

“Requesting” the production of records and attendance of witnesses is materially different from issuing a subpoena that mandates production and attendance. A non-party’s failure to comply with a “request” has no consequences at all. A non-party’s failure to comply with a subpoena may result in contempt, a fine, or even jail. A Formal Hearing that only allows a Representative accused of misconduct to “request” records is fundamentally unfair. A Formal Hearing that

deprives Representative Trujillo of his right under House Rule 9-13-5 to issue subpoenas to non-parties deprives him of basis due process.

During the parties' discussions attempting to establish a pre-Hearing schedule, Respondent expressly requested that the Scheduling Order include language stating that:

a) Third Party Discovery. Either party may issue subpoena(s) requiring a person to (1) attend and give testimony; or (2) to produce and permit inspection, copying, testing or sampling of designated documents, electronically stored information or tangible things in the possession, custody or control of that person, at a time and place therein specified. The form of the subpoena shall be in substantially the same as that required for Rule 1-045 NMRA but modified for issuance by the Hearing Subcommittee. Rule 1-045's requirements shall apply to the issuance and enforcement of such subpoenas, except that this Hearing Subcommittee shall have sole authority to adjudicate and enforce subpoenas. Given the short timeframe between this scheduling order and the formal hearing date, the Hearing Subcommittee directs that all discovery shall be expedited, and thus any person responding to a subpoena must do so within seven (7) days of service. Any objection to a subpoena shall be made by motion and filed with the Hearing Subcommittee, and shall be decided following a preliminary hearing by either the Hearing Subcommittee or Hearing Officer sufficiently in advance of the formal hearing to allow the party seeking such information or testimony to obtain and consider use of it at the formal hearing.

Special Counsel objected to the inclusion of this language, and to the issuance of subpoenas generally, on grounds that the Interim Legislative Ethics Committee lacks the power to issue subpoenas.

First, the Legislature's delegation of its quasi-judicial power to investigate legislative ethics complaints to the Committee should extend, as a matter of law,

the same power to issue subpoenas as part of that investigation. The Committee should allow Representative Trujillo to exercise that subpoena power to defend himself. Respondent therefore requests that the Committee amend the Scheduling Order to include the above language.

Second, if the Committee determines that Respondent cannot issue subpoenas because the Committee scheduled the Formal Hearing outside of the regular session, the Committee cannot proceed without violating Representative Trujillo's due process rights under House Rule 9-13-5.

In short, the Committee should either grant Representative Trujillo subpoena power, or dismiss this action rather than deprive him of due process.

Respectfully submitted,

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

/s/Travis G. Jackson

Travis G. Jackson

Eric Loman

Counsel for Representative Carl Trujillo

201 Third St. N.W., Ste. 1500

Albuquerque, NM 87102

(505) 767-0577

(505) 242-9944 (fax)

travis@jacksonlomanlaw.com

eric@jacksonlomanlaw.com

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

Thomas M. Hnasko
Hinkle Shanor LLP
PO Box 2068
Santa Fe, NM 87504
thnasko@hinklelawfirm.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

JACKSON LOMAN STANFORD & DOWNEY, P.C.

By: /s/Travis G. Jackson
Travis G. Jackson