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and Fiscal Analysis**

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TO: Senator Michelle Fischbach

FROM: Thomas S. Bottern, Senate Counsel (651/296-3810) *TJB*

DATE: January 31, 2011

RE: Procedures Applicable to a Probable Cause Hearing Held by the Subcommittee on Ethical Conduct

Senators Pappas, Dibble, and Kelash have filed a complaint with the Subcommittee on Ethical Conduct under Senate Rule 55.3. The complaint was received by your office on January 27. You have requested a brief description of the procedures applicable to the hearing required under Senate Rule 55.4.

Under Senate Rule 55.4, the Subcommittee on Ethical Conduct is charged with holding a hearing within 30 days after receiving a complaint, and either:

- (1) making a finding of no probable cause;
- (2) voting to defer action until a certain time; or
- (3) proceeding with its investigation.

The purpose for a probable cause hearing is to determine whether, if the facts presented in the complaint are presumed to be true, the conduct described in the complaint is subject to discipline under Senate Rules. The subcommittee should also consider the probable value of evidence that will be provided to support or deny the complaint. If the subcommittee determines that there is no probable cause, the complaint must be dismissed. If the subcommittee makes a finding of probable cause, the subcommittee may determine how to proceed further regarding the complaint.

Each of the parties appearing at the proceeding has the right to appear with counsel. The complainants (or their attorney) must first present the complaint. Senator Newman (or his attorney) must then be given an opportunity to respond to the complaint. The probable cause hearing is not a judicial proceeding, and the subcommittee is not bound by the rules of evidence applicable to judicial proceedings.



At the hearing, each individual providing testimony to the committee should be sworn in so that all testimony is provided under oath. After the subcommittee has begun its work to determine whether there is probable cause, any member of the subcommittee may at any time move to conduct the preliminary inquiry in executive session, which may be ordered by a vote of three of the members of the subcommittee. The executive session is not subject to the open meeting requirements of Rules 12.1 to 12.3. The executive session must be limited to the discussion of matters relating to probable cause. After a finding of probable cause, all further proceedings by the subcommittee must be open to the public.

Each of the complainants must be provided an opportunity to present the complaint and then may in turn be questioned by members of the subcommittee and, following that, Senator Newman or his counsel.

After the complainants have finished their presentation and questions have been answered, Senator Newman should be given the opportunity to present his response. After his response is complete, questions from the subcommittee, and subsequently the complainants or their counsel are appropriate.

The subcommittee's discussion and the presentations should provide the subcommittee with assistance in determining the nature of the conduct that is at issue, whether that conduct would violate Senate Rules, and the evidence that will be provided to support the allegations.

After the complainants and Senator Newman have finished their presentations and the subcommittee has deliberated, it must take one of the three steps previously described. Again, the subcommittee may:

- (1) make a determination regarding probable cause;
- (2) vote to defer action until time; or
- (3) proceed with its investigation.

The Senate Rules provide additional guidance for further proceedings of the Subcommittee on Ethical Conduct and applicable standards of conduct. I have attached a copy of the Senate Rules 55 to 58 for your reference.

TBS/rdr
Enclosure

55. SUBCOMMITTEE ON ETHICAL CONDUCT

55.1 The Subcommittee on Committees shall appoint a Subcommittee on Ethical Conduct of the Committee on Rules and Administration consisting of four members, two from the majority group and two from the minority group.

55.2 The subcommittee shall serve in an advisory capacity to a member or employee upon written request and shall issue recommendations to the member or employee. A member may request the subcommittee to provide its advice on a potential conflict of interest to the member in private. If so requested, the subcommittee shall conduct its proceedings on the advisory opinion in private. The request, proceedings on the request, and any advice given by the subcommittee in response to the request must remain private. The member may not use an advisory opinion from the subcommittee as a defense to a complaint under this rule unless the opinion has been adopted by the subcommittee at a public meeting.

55.3 The subcommittee shall investigate a complaint by a member of the Senate in writing under oath received before adjournment sine die in the last year of a senate term or during a special session held after that time regarding improper conduct by a member or employee of the Senate. The subcommittee has the powers of a standing committee to issue subpoenas under Minnesota Statutes, section 3.153.

55.4 Within 30 days after receiving a complaint, the subcommittee must meet and either make a finding of no probable cause, vote to defer action until a certain time, or proceed with its investigation.

55.5 In order to determine whether there is probable cause to believe that improper conduct has occurred, the subcommittee may, by a vote of three of its members, conduct a preliminary inquiry in executive session to which the open meeting requirements of Rules 12.1 to 12.3 do not apply. The executive session may be ordered by a vote of three of its members whenever the subcommittee determines that matters relating to probable cause are likely to be discussed. The executive session must be limited to matters relating to probable cause. Upon a finding of probable cause, further proceedings on the complaint are open to the public.

55.6 The subcommittee may appoint special counsel to provide expert advice on how to conduct its proceedings. The subcommittee may appoint a suitable person to conduct the investigation and report findings of fact and recommendations for action to the subcommittee.

55.7 If, after investigation, the subcommittee finds the complaint substantiated by the evidence, it shall recommend to the Committee on Rules and Administration appropriate disciplinary action.

55.8 To minimize disruption of its public proceedings, the subcommittee may require that television coverage be pooled or be provided by Senate media services.

55.9 If criminal proceedings relating to the same conduct have begun, the subcommittee may defer its proceedings until the criminal proceedings have been completed.

55.10 The Senate intends that proceedings of the Subcommittee on Ethical Conduct not be admissible in any criminal proceeding.

56. STANDARDS OF ETHICAL CONDUCT

56.1 Members shall adhere to the highest standard of ethical conduct as embodied in the Minnesota Constitution, state law, and these rules.

56.2 A member shall not publish or distribute written material if the member knows or has reason to know that the material includes any statement that is false or clearly misleading, concerning a public policy issue or concerning the member's or another member's voting record or position on a public policy issue.

56.3 Improper conduct includes conduct that violates a rule or administrative policy of the Senate, that violates accepted norms of Senate behavior, that betrays the public trust, or that tends to bring the Senate into dishonor or disrepute.

57. CONFLICTS OF INTEREST

A member who in the discharge of senatorial duties would be required to take an action or make a decision that would substantially affect the member's financial interests or those of an associated business, unless the effect on the member is no greater than on others in the member's business classification, profession, or occupation, shall disclose the potential conflict of interest by following the procedure set forth in Minnesota Statutes, section 10A.07.

58. LOBBYISTS

58.1 A lobbyist shall not appear before a Senate committee pursuant to the lobbyist's employment unless the lobbyist is in compliance with the law requiring lobbyist registration, Minnesota Statutes, sections 10A.03 to 10A.06. A lobbyist, when appearing before a committee, shall disclose to the committee on whose behalf the lobbyist speaks and the purpose of the lobbyist's appearance.

58.2 A lobbyist shall not knowingly, either directly or through a third party, furnish false or misleading information or make a false or misleading statement that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees, subcommittees, or divisions.

58.3 The Subcommittee on Ethical Conduct shall investigate a complaint by a member of the Senate in writing under oath received before adjournment sine die in the last year of a Senate term or during a special session held after that time that a lobbyist has violated Rule 58.1 or 58.2. The investigatory procedures of Rule 55 apply, except as provided in this rule. The complaint and proceedings on the complaint are private until the subcommittee has found probable cause to believe that a violation of Rule 58.1 or 58.2 has occurred, unless they are made public by the lobbyist whose conduct is the subject of the complaint or by the vote of at least three members of the subcommittee.