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Re: Rules of Procedure for 4/28/2021 Hearing

Counsel,

I received this morning the “Rules of Procedure” the Committee has adopted for the hearing regarding the complaint filed against Representative Aaron von Ehlinger. We have identified the following problems with the Rules and formally object to the same:

1. As a threshold matter, there appears to be no authority under Idaho House Rule 45 or the other House Rules for the Committee to adopt substantive procedures for the hearing beyond and in conflict with those provided for within Rule 45, especially procedures which are designed and serve to prejudice Representative von Ehlinger. Rule 45(7) provides only that the Committee may “adopt rules of procedure for the orderly conduct of committee meetings, investigations and hearings, **which rules shall be consistent with [House Rule 45]**” [emphasis added]. Consequently, we object to each and every part of the Committee’s Rules of Procedure which do not pertain to the orderly conduct of the hearing and/or those which substantively deviate from the procedure outlined in House Rule 45.

2. There is no clear standard by which Representative von Ehlinger will be judged. The rules make reference to “conduct unbecoming,” a term which is not clearly defined. Ms. Hayes has asserted to me verbally that the issue is whether Representative von Ehlinger violated the Legislature’s “Respectful Workplace Policy.” However, when I have repeatedly asked her to cite the provision of the policy he supposedly violated, she makes only vague references to “trainings” which have been held, “consent,” and “power dynamics.” Amazingly, she has



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simultaneously asserted that “the issue isn’t consent,” because (1) she is aware the evidence does not demonstrate lack of consent and (2) the lack of ability to demonstrate what would be a crime is the precise reason the Committee jettisoned House Rule 45(5)’s requirement that a recommendation of expulsion be made only upon a finding beyond reasonable doubt that misconduct involves commission of a felony or use of public office for pecuniary gain. This sort of convoluted and ad hoc legal reasoning is typical of the entire process.

3. The people of the state of Idaho, through their elected representatives, have designated the process and the applicable standard by which the Committee may recommend the House expel a member pursuant to the Idaho Constitution, Article III, Section 11. That process and standard is outlined in House Rule 45(5): “...a recommendation for expulsion **shall only** be based upon a finding beyond reasonable doubt that misconduct involves **commission of a felony or use of public office for pecuniary gain...**” [emphasis added]. The constitutional power to expel a member for “good cause shown” is granted to the House as a body, not to any committee. There is no authority, constitutional or otherwise, for the Committee to adopt its own standards for recommending expulsion, in direct contravention of the Rules promulgated by the House.

4. Rule VII(B) allows the Chair, on consultation with yourselves, to “rule upon any question of admissibility or relevance of evidence, motion, procedure or any other matter...” This obviously contravenes centuries-old notions of fundamental fairness, which disfavor one acting as judge in his own case. Why would one expect the Chair to do anything other than rule in favor of evidence, motions, and procedure put forth by its own counsel and which favor its desired result, and rule the opposite in matters put forth by Representative von Ehlinger?

5. Rule VII(C) provides that, “The Committee may exact from a witness self-criminating testimony pursuant to Idaho Code Sec. 67-411.” I.C. § 67-411 provides that, “No statement made by any such witness on such examination before either house, or a committee, is competent evidence in any criminal proceeding against such witness; nor can such witness refuse to testify to any fact or to produce any paper...” Obviously, this state statute would have no bearing on any potential federal criminal proceedings, and thus it is unclear that Representative von Ehlinger or any other witness may be compelled to forego their rights under the Fifth Amendment of the United States Constitution.

6. Rule VIII requires Representative von Ehlinger provide a list of his witnesses and provide a brief statement as to the relevance of each witness’ anticipated testimony. The Committee has no similar requirement to support the relevance of the testimony of its witnesses. This is clearly for the reason that the Committee’s witnesses are presumed to give relevant testimony, which also offends traditional notions of fundamental fairness.



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7. Rule IX sets the deadline for the Committee’s counsel to provide us with all of the evidence in support of the complaint at 8 a.m. MDT on April 26, 2021. This evidence was requested on April 20, 2021. This gives Representative von Ehlinger and his counsel only 48 hours to review all such evidence and prepare a defense, as compared to the weeks of trial prep that go into a normal case. Ms. Hayes purports that herself and the committee have been working on this matter for months, and have had more than enough time to gather any evidence and turn it over to Representative von Ehlinger promptly.

8. Rule X purports to set the deadline for Representative von Ehlinger’s counsel to provide the Committee’s counsel with “all of the evidence in defense of the complaint” at 8 a.m. MDT on April 26, 2021. However, House Rule 45(4) provides only that, “The accused shall have a full and fair opportunity to obtain and review all of the evidence in support of the complaint.” There is no similar provision requiring the accused to turn over his evidence to the Committee. The language of Rule 45(4) is the result of a deliberate decision of the elected representatives of the people of the state of Idaho, and to the extent the Committee’s Rule X exceeds and contravenes Rule 45(4), Representative von Ehlinger objects to it and demands it be stricken pursuant to House Rule 45(7).

9. Rule XI(E) provides that, “The Committee may accept and rely upon statements of individuals that appeared before the Committee during its confidential phase under House Rule 45(3).” To the extent this language is interpreted to mean that Representative von Ehlinger will be denied the ability to confront and cross-examine those who made such statements, Representative von Ehlinger objects to the Rule.

10. Rule XI(H) and (I) provide that the Chair may rule on objections to evidence in consultation with the Committee’s counsel, and rule on objection to evidence raised by the Committee’s counsel. Again, this offends notions of fundamental fairness to the extent it allows the Chair and the Committee to be the judge in their own case. House Rule 45(4) provides only that, “...the accused may raise objection to any evidence.” It does not provide similar authority to the Chair, Committee, or their counsel, and Representative von Ehlinger objects pursuant to House Rule 45(7).

11. Rule XI(J) provides that, “The Chair reserves the right to preclude or truncate any witness testimony that he deems inappropriate, immaterial, or irrelevant to the purposes of the hearing.” This “right” is not provided for in House Rule 45, and necessarily impairs the ability of Representative von Ehlinger to present an effective defense. He therefore objects to the same.

12. Rule XIII states that Representative von Ehlinger will be responsible for “fees and costs” to obtain a copy of the transcript of this public hearing. That transcript is a public record



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of the state of Idaho and should be available under the provisions of the Idaho Public Records Act.

13. Rule XIV provides that, “The Committee Chair, with the concurrence of at least two Committee members, may modify these rules prior to or during the public hearing without notice to adapt to the circumstances, provided that any modification is consistent with Rule 45 and other applicable rules of the House of Representatives and the Idaho Code.” House Rule 45(7), governing the adoption of rules of procedure for this hearing, does not allow such rules to be changed on the whim of the Committee, let alone during the public hearing. To change the rules during the hearing would be an egregious violation of fairness, due process, and justice.

In addition to the issues with the Committee’s Rules of Procedure identified above, we have identified additional issues which I have previously brought to your attention and remain to be addressed. The first concerns the participation of Representative Brent Crane in these proceedings. During the confidential stage of the investigation, Representative Crane stated to Representative von Ehlinger’s prior attorney, Scott McKay, words to the effect that Representative Crane has the votes to expel Representative von Ehlinger and intends to do so. When I first raised this issue, Ms. Hayes asserted that per the Idaho Rules of Evidence, statements “made during compromise negotiations” are “inadmissible.” However, per House Rule 45(4) and the Committee’s Rule VI, “formal rules of evidence are not applicable.” The Committee’s Rule VII(A) states that, “Any relevant evidence shall be admissible.” Moreover, Representative von Ehlinger is not, at this time, seeking to admit Representative Crane’s statement into the hearing, but is presenting it as evidence of Representative Crane’s expressed bias and the inappropriateness of his participation in these proceedings in any decision-making capacity. Further, the Committee’s asserting of a right to rely upon statements made in the confidential stage, while denying the same ability to Representative Ehlinger, is especially hypocritical. Your stated position of refusing to inform us of the hearing on this matter or allow us to appear to present argument is a perfect example of the double standard prevailing throughout this process.

Especially given House Rule 45(5)’s requirement that a recommendation of the Committee to expel a member requires “a finding beyond reasonable doubt that misconduct involves commission of a felony or use of public office for pecuniary gain,” Representative Crane’s statement is prima facie evidence that he has prejudged the matter prior to any public hearing and the presentation of all evidence. Even under the Committee’s purported (and invalid) “good cause shown” standard, Representative Crane’s participation is completely inappropriate. It is certainly relevant to Representative von Ehlinger’s defense and his right to a fair process, and any decision other than to disallow Representative Crane’s participation would demonstrate that this entire process is nothing but a witch hunt.

Additionally, during a phone call between Ms. Hayes and myself yesterday, Ms. Hayes indicated that she did not know whether or not the complainant would comply with the subpoena requested by Representative von Ehlinger “on the advice of her counsel.” When I inquired as to



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whether the complainant would be subject to contempt if she were to disregard the Committee's subpoena, Ms. Hayes stated that no discussion regarding contempt has been held. Yet, Representative von Ehlinger is expected to comply with all the procedures and dictates of the Committee and faces potential contempt if he fails to do so. If the complainant or any other person is not actually compelled to comply with a subpoena, this would represent a gross miscarriage of justice. We respectfully request the Committee immediately issue the subpoena(s) thus far proposed by Representative von Ehlinger's counsel and enforce them through its contempt powers.

In sum, the Committee's selective use, disregard, and interpretation of established rules and procedure so as to favor a predetermined outcome is something one might expect to see in a show trial put on by some third-world dictatorship, not by a committee of an American legislature. On behalf of Representative von Ehlinger and the people of Idaho who value fairness, due process, and justice, I respectfully urge the Committee to correct the abuses identified in this letter and provide a fair hearing to a legislator duly elected by his constituents to represent their interests in state government.

Very truly yours,
DINDINGER & KOHLER, PLLC

A handwritten signature in black ink, appearing to read 'Edward W. Dindinger', written over a horizontal line.

Edward W. Dindinger, Esq.
Partner