

SENATE COMMITTEE ON SEXUAL HARASSMENT

April 5, 1993 Hearing Room 343 12:30 p.m. Tapes 8 - 9

MEMBERS PRESENT: Senator Tricia Smith, Chair Senator Brady Adams
Senator Neil Bryant Senator Jeannette Hamby

EXCUSED: Senator Karsten Rasmussen Senator Joan Dukes

STAFF PRESENT: Joan Van Almen, Committee Counsel Stasi Kitchen,
Committee Coordinator

MEASURES HEARD: ORGANIZATIONAL MEETING

[--- Unable To Translate Graphic ---]

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. [--- Unable To Translate Graphic ---]

TAPE 8, SIDE A

001 CHAIR SMITH: Meeting called to order at 12:30 p.m. April 5th. Senator Dukes and Senator Rasmussen are excused today.

006 CHAIR SMITH: Deadline for adopting rules is Wednesday, April 7, 1993. What I hope to do today is have counsel walk us through the rules you

see in your book and supporting documentation you see in there. Then as we run out of time, if you will take your book with you and study it, and try to develop any questions you might have. Ms. Van Almen is available to you today. We will return tomorrow at 8:00 a.m., and begin earnest work of adopting the rules. If necessary we can work until session tomorrow and if not done then, return at 5 p.m.

We have taken the advice and counsel of everyone we could think of who has some expertise in his area from our own legislative counsel and Ms. Beaufait who will be here in a couple of minutes, and is available to you if you have questions. The Attorney General's office has worked very closely with us on these rules. We have researched all the other states and the U.S. State Senate and House to determine what, if anything, there is available for us to use as a model from which to build upon. Senator Bryant submitted a copy of the rules of the States of Washington and Minnesota. Ms. Van Almen has spoken to individuals who work for those states in those areas about the specifics of how they implemented the rules as they have adopted them. What kind of experience they have had and she can share that with us. Basically what you will find in your book today is without a doubt the most comprehensive set of rules in investigating and dealing with sexual harassment of any legislative type body in the country that

we could find. Our counsel both the Attorney General and Legislative counsel have told us that we have very specific due process requirements, that we have a very specific charge under the Senate rule, and that we may not deviate from those. So you will see reflected in these rules all the basic tenants from which we had to operate. If there are any questions, please ask, although it is hoped that we can get through the "run through" of these rules today so that there is some sense of, from beginning to end this is how the proposed process would work. We can get to the detailed questions tomorrow when there is more time.

042 JOAN VAN ALMEN: The first thing in the section we are going to look at is the time line for processing of complaints. This is to give an

overview of time from the beginning of the charge until it would come before the full Senate. This is just something for guidance of the process. Phase II will be discussed today. This makes the transition from preliminary to full complaint. And then go through the special hearing rules needed to determine the actual hearing process and the rules applicable to that public hearing process.

052 CHAIR SMITH: The time frames we put on this chart and in these rules are somewhat arbitrary. We tried to figure out the number of days that

were as short as possible and gave an adequate amount of time to do what needed to be done within that time frame. There is one place where as considering these there is "wiggle" room to tighten the process up in terms of time. The law indicates that these things must be dealt with in a prompt fashion. It is in everyone's best interest to finish a complaint process as soon as possible. One place where we can create a shorter time frame than proposed is in the investigation itself. It is believed that a professional investigator can complete an investigation of a charge of this kind in two weeks rather than 30 days. The process may be shortened further if necessary. The reason for the days and times will become apparent as the rules are read. It is important to dispense with the claim as quickly as possible.

069 SEN ADAMS: Is it 64 days that meets the legal criteria?

072 CHAIR SMITH: The law says "prompt." If we can show that we are making every effort to dispense with the complaint as quickly as possible, then we meet this requirement.

076 JOAN VAN ALMEN: We will begin with the complaint procedure. Rule .07, investigative report. The presumption is that an investigative report is being looked at.

083 CHAIR SMITH: This looks at a process that is slightly different than we anticipated when we discussed the first part of this process last week. One of the questions was, When would a complaint go forward in a public process? How would that decision be made? And, who could make that

decision? We went back to the Senate rule on sexual harassment with counsel and tried to focus on what the function of the sexual harassment committee is. Then approach who can bring a complaint into that committee from that aspect. What is the function of the sexual harassment committee?

The function of the sexual harassment committee is to investigate a charge and determine whether or not in the eyes of the committee there is a preponderance of evidence that leads one to believe that sexual harassment occurred. If that is the case, what disciplinary action should occur as a result of the violation of our rule that says, "Thou shalt not sexually harass." That is the function of the committee. The function of the committee, under the rule, is not to protect a person who has been harassed, to provide some sort of remedy to a person who has been harassed, or to in any way deal with the victim or the person bringing the charges situation. Under our rules it is very clear that this is not our function. Under the law it is also very clear that the employer, or appointing authority has that responsibility. Absent or regardless of what we do, that responsibility exists under the law, has always existed, and will continue to exist separate and apart from this committee. The committee's function and role is strictly to make a determination of whether or not harassment occurred, based upon the evidence presented to the committee, and if it did occur what sanctions or actions should be taken against the person who committed the act. What you see before you is a complaint procedure that reflects that knowledge.

It was my feeling that if the report indicates that there is a preponderance of evidence that harassment occurred, this committee has an obligation to investigate it under the Senate rule. So what you see before you is a complaint process that says, "If the investigative report indicates that harassment occurred, according to a preponderance of evidence, then the sexual harassment committee brings forward that charge into our committee process.

123 SEN ADAMS: That will mean then that we will have to go back to what we had previously decided with regard to the charges and make modifications specifically where the complainant (voice trailed off here and faded

without finishing).

128 CHAIR SMITH: There is one portion, and behind the tab you will see what we adopted before.

134 JOAN VAN ALMEN: Changes have been made already with regard to this issue and can be given out at the end.

137 CHAIR SMITH: On page 2b, it says, " If those requirements have been met, the process shall go forward." This is different from what we voted on the other day.

142 SEN ADAMS: Procedurally then, tomorrow one of the things that should be placed on the agenda is an amendment to those rules.

143 CHAIR SMITH: Tomorrow I would like to adopt the whole set of rules. Then any changes we make to what we adopted last week, will be

superseded with our motions.

147 JOAN VAN ALMEN: Upon receipt of the investigative report, the chair shall convene the committee within 2 working days to determine whether

the charge meets sufficient criteria to proceed to hearing for further investigation. The criteria of the committee shall consider is: a. The investigative report has found a preponderance of the evidence that a violation has occurred, b. there is reason to believe a violation has occurred.

182 CHAIR SMITH: The rules referred to are the rules we are reading.

185 JOAN VAN ALMEN: continues. That anticipates that committee members themselves may choose to subpoena witnesses. Continues reading Rules.

256 SEN. BRYANT: Asks if there would be complications in challenging one of the Members.

261 CHAIR SMITH: Replies there would be none.

266 JOAN VAN ALMEN: If one of the parties felt there was a set of facts that they may challenge, they could.

271 SEN. BRYANT: Or that one of us have been tainted in someway..I think for due process reason we need to allow for that opportunity.

279 JOAN VAN ALMEN: This puts the responsibility upon the members themselves. unless you can make a direct connection under very specific circumstances. If they do, they can be removed. I would like the

opportunity to research that more.

296 SEN. BRYANT: Gives specific example -- how would this be anticipated and mitigated?

303 CHAIR SMITH: We will research that before tomorrow morning about how to best handle that.

308 JOAN VAN ALMEN: Continues with review of proposed rules. -Take out "accused" and replace with "respondent."

TAPE 9, SIDE A

006 JOAN VAN ALMEN: Continues reading rules. Will delete the

first sentence from Rules description

008 CHAIR SMITH: The reason we are deleting the first sentence is that Senate rules are very specific about what are rules and purpose is.

013 JOAN VAN ALMEN: Continues review of Rules.

017 SEN. BRYANT: Asks what if chair makes a ruling and the majority of the committee thinks that the evidence is relevant.

019 CHAIR SMITH: Refers to rule 18.02.23, 3rd paragraph.

020 JOAN VAN ALMEN: Continues with discussion of proposed rules. .19 is the participation of counsel. Any witness who appears at the hearing may request not to be photographed at any hearing or give evidence or

testimony while the broadcasting reproduction or coverage of that hearing by radio, television, photography or other methods is occurring. At the request of any such witness who does not wish to be subjected to media coverage, subject to committee approval, the coverage shall be denied by covering lenses and turning off the microphones. The chair can punish a breach of order by anyone in attendance by an exclusion from the hearing. - .20 - Transcript provision.

049 CHAIR SMITH: This is different than the other committees which use a committee clerk, we felt there was a need for a certified court

reporter.

052 JOAN VAN ALMEN: Continues with review of rules. Committee reports, #5 -The possible variation of reports is described below. This is an

explanation of Subsection 4 of 18.02. This attempts to give all the possible scenarios that could flow from that provision of the rule concerning a report and it's variations for finding no violation - 1st paragraph - and the second portion, subsection 4, describes the three situations that can occur where the Senate may act to impose sanction.

094 SEN. BRYANT: Back to Scope of Evidence - the reputation or opinion evidence about a complaints prior sexual behavior is not admissible

regardless of the party seeking to introduce the evidence. Thinks it should rely on the earlier statement as to whether or not it's relevant.

108 JOAN VAN ALMEN: We need to look at this further..this is taken from the Oregon rape shield statue...the reason being is since it

was not a

criminal investigation that is premised on the confrontation issue..
will look at that further.

117 SEN ADAMS: Would that exclude evidence if the complaint had a history of complaints that had not been substantiated.

124 JOAN VAN ALMEN: I need to research that further.

127 SEN ADAMS: Asks if it's okay to request no photographers.

131 CHAIR SMITH: Replies that we cannot bar the press but we can bar their cameras and microphones.

133 JOAN VAN ALMEN: included in back of book is a due process summary under the title Witness Info. in the context of an expulsion proceeding.

Calls attention to a memo written to legislative council under the legal council opinions. A letter directed to Mr. Clifford regarding legal issues - there are questions in an attempt to define the parameters of due process and determine when the matter got to the full Senate for a vote, whether or not these proceedings were sufficient to comport with the requirements that the courts had considered thereto.

195 CHAIR SMITH: Asks that books be gone through in correct order.

200 JOAN VAN ALMEN: States correct order of books and discusses Minnesota and Washington ethics rules as well as us Senate rules.

281 SEN. BRYANT: Asks if the Washington formal procedure is used only to other employees?

289 JOAN VAN ALMEN: It means they could not take formal disciplinary action against the member absent going through their own ethics provisions.

Neither one has ever gotten that far.

294 SEN. BRYANT: It was handled informally?

297 JOAN VAN ALMEN: The inference was that ...Min said they have only used their Senate ethics rule twice in 20 years. continues with notebooks.

313 CHAIR SMITH: With regard to confidentiality, would like the committee to adopt the conclusion of the investigative report should not be

confidential. If the conclusion is that there is a preponderance of evidence that harassment occurred then we will bring it forward so it will come forward in a public process. If the conclusion is that there

is not preponderance of evidence that this occurred, we felt that it was reasonable at that point, since no further action was being taken, that if any party to the charge wished to release conclusion, not facts

behind it but conclusion, that they should be allowed to do so . . .

won't see that in the confidentiality of the charge portion of our rule but believes it should be there.

333 SEN ADAMS: Asks if there will be some documentation regarding that issue to be considered.

336 CHAIR SMITH: Replies there will be.

340 SEN ADAMS: Asks if individual committee members will see that.

342 CHAIR SMITH: yes, they will be given a copy of the investigative report.

344 SEN ADAMS: Asks if individual Senate members besides the committee members will be able to see the investigative report.

350 CHAIR SMITH: No, only if they are a party to the complaint. The investigative report is only the tool to get us to this public process. Decisions must be based upon the record of the proceeding that is

instituted.

361 SEN ADAMS: Asks if that creates any problems for any other members of the Senate.

365 CHAIR SMITH: No, the burden is on the committee to create a record. The parties have a right to present evidence through this process, they have not had that ability up until this time.

375 JOAN VAN ALMEN: The goal is not to necessarily recreate the investigative report. What kind of information do you need to reach

said conclusion? That would be the importance of your doing because the complainant may not come forward in an affirmative way to present a

claim.

391 CHAIR SMITH: The witness list will be developed by the investigative report as will the stipulated facts, if any. The basis for those facts

would be the investigative report. Once the public hearing begins, from then on there is no need of it, we must develop a record ourselves.

TAPE 8, SIDE B

001 SEN ADAMS: that leads to a conclusion that if there is something in the report that may have influenced our decision but is not replicated in

the process that we may not consider that fact that was in the report.

006 CHAIR SMITH: If there is information within the report that a member wishes to explore, we would need to explore it in this public process

because that is the record that will be used for a decision.

010 SEN ADAMS: Asks if it is correct that if there was situation where there might be some significant testimony within the investigative

report and for whatever reason the person dies, refuses to cooperate,

doesn't go forward - and that is the cornerstone that the conclusion was built on we can't consider that to be a part of the evidence unless it's presented.

012 JOAN VAN ALMEN: Before you decide that the essence of the investigative report was to get you to a certain point and what the parameters were,

consider the matter of confidentiality. What you are left with is in

this process, that you don't have in other sorts of processes, is

necessarily if that remains confidential the use of that report for

purpose that you state or like in civil cases when depositions are taken and they say didn't you say on such and such a date ____ and you use

that to impeach the witness or to prove any consistency, or whatever

legal reason they want to use if for. The way it is written right now

the investigative report does not contemplate a use for those purposes

or any other purpose. You can consider that and the up sides and down

sides.

027 SEN ADAMS: The concern is for colleagues that if it does go to the full Senate they need to be able to make an informed decision, they are going to be very dependent upon the committee to provide information to them. They should not be in a position of privileged information that they

don't have available to them to make a decision.

035 CHAIR SMITH: Whatever we do, it is very important to remember that our decision needs to be based completely upon the record that we built

through our public process and if the situation just described occurs

then you're stuck with what is in the record. We do not want to drag in any extraneous information. 044 SEN ADAMS: Doesn't want to be on the Floor making a decision based on information that is not available to my colleagues. Does not want to

have that extra edge.

048 CHAIR SMITH: Does not want that either. There are two points that need to be in the rules 1. a member may not discuss the facts of any charge

that may come before it or is before it outside of the committee process so that it is clearly stated that a member of this committee may not compromise the whole process by discussing it. 2. the committee will base its decisions upon the record of the proceeding so that it is clearly stated in the rule that is the information being used for this complaint.

059 JOAN VAN ALMEN: Would caution the committee, when you make your findings and you talk about facts there are certain things you can

consider, i.e. credibility issues that go to how you make your findings of fact, that you are not stuck with something if you are going to get down to credibility determinations and demeanor and look at beliefs of what kind of testimony - who you believe vs. who you don't believe. Those other things effect how you make your findings a fact that will comprise your record.

070 SEN. BRYANT: Asks about deliberation -- if we do it as a jury where we go in private and discuss the issues and then come out and announce a

verdict or that we have our discussion, all of it out in public.

074 BEAUFIT: In Legislative Counsel, we interpret the constitutional provision to say the discussions of the committee are public, so that

means the deliberations are public. This occurred in the context of a discipline or dismissal of a committee employee, we advised the committee that discussion had to occur in public if it was to be a committee-wide deliberation or discussion on the issue. There is no executive session exemption for legislature or a legislative committee that there is for an executive branch agency.

087 CHAIR SMITH: Asks if there are any further questions for counsel. Hearing none, Asks Van Almen to continue review of Rules. 089 JOAN VAN ALMEN: Continues with Rule review. -Discusses Investigator criteria.

097 SEN ADAMS: Asks if there could be a problem if we use only

investigators within the state government.

101 CHAIR SMITH: This was the first list - we intend to included both private individuals as well as public so there will be a complete list

of anyone who might have the expertise we need. There was some discussion regarding whether or not an executive agency employee could investigate a legislative employee and it was determined that they could within this context. Will be building on this list all the time.

112 BEAUFAIT: It was our view that in most of the instances that those qualified within the executive branch run into the separation of powers doctrine - the definition is: anybody exercising a function in one shall not do something public in the other. It is possible that if you are at a low enough level, you don't exercise a function that is recognized by the constitution. But when you deal with people who would be of the

level you would want as investigators, i.e. an assistant Attorney General, there is not much question but that they exercise an official function in one branch of government. The problem is finding people who are qualified without running into that conflict.

125 CHAIR SMITH: We will continue to look into this question because we have conflicting advise. It is not the responsibility of the committee

to appoint the investigator.

132 JOAN VAN ALMEN: Continues reading Rules pertaining to investigator.

230 SEN ADAMS: Gives example scenario regarding investigators. In effect, there would be three sets of people who could ask questions of

witnesses, ourselves and either of the others. Would they sit with the witness, Committee or elsewhere?

240 CHAIR SMITH: We do not have a room set up properly for this kind of hearing process and we need to think about that should we ever look like we are going to come into a hearing.

246 SEN ADAMS: Asks if the complainant and respondent have the right to ask questions.

252 JOAN VAN ALMEN: Reads rule regarding Order of Testimony.

298 CHAIR SMITH: There is nothing in the rule that speaks to this at this point -- recommends that nothing is put in there. Doesn't see this as a problem. Not interested in limiting rights of any member of the

committee to ask whatever question.

318 SEN ADAMS: Asks about order of testimony regarding cross examination of witness by the respondent.

325 CHAIR SMITH: We already state that respondent has the right to be represented by counsel.

331 JOAN VAN ALMEN: it's just the right of the respondent.

333 CHAIR SMITH: No further questions? adjourns at 2:50 p.m.