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Oregon Legislature
Members of the Conduct Committee

Re: Rebuttal to Final Report/Investigation regarding Rep, Hernandez

Greetings:

I am writing to respond to the final Report concerning the Rule 27 investigation of Representative Diego Hernandez. This investigative process has been flawed from the beginning. Rep. Hernandez has not been allowed to present important evidence in the investigation. Rep. Hernandez's testimony, despite being supported by abundant evidence, has been ignored. Although the investigation has dragged on for many months, somehow there was a need to rush a report out without allowing Rep. Hernandez to respond to new allegations.

Process

On May 5, 2020, Rep. Hernandez was notified of a LBPR 27 ("Rule 27") investigation. The notice contained the names of two individuals, Subjects 1 and 2, who were named by mandatory reports [REDACTED]. Under Rule 27, the investigation was supposed to be concluded "promptly" and in no more than 84 days. The time may be extended after "advance notice" to Rep. Hernandez, which was **never provided**. The draft report was issued on December 23, 232 days later. We were given 7 days to respond.

We were not notified of any new subjects until December, seven months after the investigation started. In the Report Subject 4 was labeled as a mandatory report, which should have required this immediate follow up according to the Rule:

- (e) The independent investigator shall promptly:
 - (A) Deliver a copy of the conduct complaint to the person accused of engaging in behavior prohibited by this rule, who shall thereafter be the respondent.

This was never done; as you can see by the attached emails, our efforts to obtain this information was characterized by the investigator as “tedious.”

Under HCR221 14B(c) it states that “The independent investigator shall keep the complainant and the respondent apprised of the investigation timeline and the status of the investigation at the outset of an investigation, on a regular basis thereafter and upon request of the complainant or respondent.” We made several requests for timelines and updates to the investigators; we were ignored and we were never given a timeline, nor the status of the investigation.

Rep. Hernandez was interviewed for hours on August 19th, 2020. On December 17, 2020, for the first time in this process, Ms. Ryan informed Rep. Hernandez’s attorney that there were two new subjects that she was investigating. She asked whether she could interview Rep. Hernandez again concerning these new subjects. By email on December 17-18, Rep. Hernandez’s attorney requested any documents that related to these new subjects, and particularly “any documents that have caused these new investigations to be initiated.” Rule 27 requires that the respondent be notified of who and what he is being accused of. Ms. Ryan refused that request, calling the attempt to honor Rep. Hernandez’s rights under Rule 27 and due process “tedious.”

Rep. Hernandez wanted an opportunity to interview again and provide additional information once he had full knowledge of the new allegations, but that was refused. Right in the middle of Rep. Hernandez’s attempts to obtain the documents regarding the new allegations, Ms. Ryan issued her draft report on December 23 after 5:00pm. It is clear that the report was already drafted and the request to interview Rep. Hernandez was a sham.

The Confidential Report focuses on three women whom Rep. Hernandez dated in 2017 and 2019. The Report is seriously flawed in a number of ways.

- The Report does not make clear that none of these women filed a complaint; [REDACTED]
- The Report notes that additional time was needed for the investigation. Legislative rules require reports be completed in 84 days. This report required 9 months.
- The Report does not make clear that these three women were not legislative employees and were not subject to legislative rules at the time of the alleged conduct – much of which was over four years ago, when Rule 27 was narrower in scope.
- None of the evidence was submitted under penalty of perjury as would be required in legislative rules had the “complainants” complained directly.
- The Report fails to note the salient detail that two of these women [REDACTED] with the obvious potential for bias and collusion.
- The Report fails to note that in several cases, intimate relations continued after the so-called “break-up” of the relationship.
- The Report states that Rep. Hernandez refused to meet with investigators. This is completely untrue.

- The Report concludes that these women perceived a level of undue pressure from Rep. Hernandez because of his status as a legislator, despite the fact that each of the relationships here preceded Rep. Hernandez's election to the Legislature. The Report completely fails to provide proper context for how Rep. Hernandez knew these people, and what the nature of the relationships were long before he ran for political office. The Report fails to consider that these same women may have perceived more pressure to complain or cooperate from [REDACTED]

One of the challenges of this process is anonymity. While the rights of complainants should be respected, the process denies two basic rights that have always been associated with any fair administration of justice. The first is the right to question one's accusers. Without the ability to question the accuser, and obtain evidence from them, the process is skewed. The respondent is dependent on the fairness and impartiality of the investigator. But if the investigator doesn't obtain the evidence, or ignores evidence, then the process is flawed, as the respondent is unable to obtain the evidence and question witnesses. The second issue is anonymity itself. The respondent is forced to defend himself, and potentially lose his Legislative seat and associated benefits, while the complainant (who may not have even complained) is cloaked in anonymity, free to have their accusations vetted by a sympathetic investigator but not a process designed to insure a fair outcome.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- The investigation was allowed to drag on for months in a failed attempt to identify new subjects or witnesses. Rather than be concluded promptly, the investigation was delayed through the 2020 election cycle.

Below/attached/linked are specific documents containing relevant emails and rebuttals to many of the assertions in the Report. I apologize for the length of this document but so much evidence has been ignored that it is necessary to complete the record. Please let me know if there are any questions or requests for any additional evidence.

Sincerely,

LAFKY & LAFKY

s/Kevin T. Lafky

Kevin T. Lafky

cc: client