

MINUTES OF THE SPECIAL MEETING
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Friday, September 30, 2016

The Arkansas Legislative Council met for a special meeting at 9:00 a.m., Friday, September 30, 2016 in Committee Room A of the Big Mac Building, Little Rock, Arkansas. Co-Chair David L. Branscum called the meeting to order and recognized a quorum of members present. The members present are listed on the sign-in sheets.

Co-Chair Branscum recognized Vice Co-Chair Terry Rice for comments. Vice Co-Chair Rice stated he wanted to make a statement regarding the reason for today's meeting. Senator Rice stated that in the September 23, 2016 regular meeting of the Legislative Council, he read the report of the Administrative Rules and Regulations Subcommittee because the subcommittee co-chairmen were not in attendance when the subcommittee report was due to be presented. Vice Co-Chair Rice stated that he is an ex officio member of all subcommittees, along with the other Legislative Council Co-Chairmen and Vice Co-Chairmen, and he was in attendance for the September 20, 2016 meeting of the subcommittee. Vice Co-Chair Rice stated that the report of that meeting was factual.

Vice Co-Chair Rice stated that during the subcommittee meeting, the subcommittee chairman stated the rule currently at issue was reviewed and, at some point afterward, he left the room. Vice Co-Chair Rice stated that the other Co-Chair assumed the chair for the rest of the subcommittee meeting and announced that those who had signed up to speak would be able to come before the subcommittee and speak at the end of the meeting because the mental health issue had been moved up on the agenda. Vice Co-Chair Rice commented that it could be said that there was not complete finality for those who were allowed to speak. Vice Co-Chair Rice stated his comments today are to ask that the members of this committee and the members of the subcommittees be mindful of the process so that there is not a need for a special meeting.

Vice Co-Chair Rice stated that he has checked and found that no objections were made at the time the subcommittee chairman stated that the rule was reviewed and that there was discussion later. Vice Co-Chair Rice stated that he was told that the Bureau of Legislative Research had not been contacted between the subcommittee meeting and the meeting of the full Legislative Council regarding any objections to what had occurred in the subcommittee meeting. Vice Co-Chair Rice stated that after he read the subcommittee report to the full Legislative Council at the September 23, 2016 meeting, there was an opportunity for objections to be raised, but he heard none and he made a motion to adopt the report. Vice Co-Chair Rice stated that the time for questions or to voice objections was when the report was presented to the Legislative Council and during the subcommittee meeting. Vice Co-Chair Rice stated his comments were to let the committee members know where they are today and that he supported the calling of the special meeting because there were many who thought there was confusion and a special meeting was needed. Vice Co-Chair Rice concluded his comments by thanking the Chair for his point of personal privilege.

Co-Chair Branscum recognized Representative Nate Bell who asked for clarification from staff regarding the correct process and timing for requesting a vote by division of the two chambers. Marty Garrity, Executive Secretary of the Legislative Council, was recognized and she explained that after a

motion is made and seconded, the Legislative Council Rules provide that a request for division of the chambers with a roll call vote can be made when three members raise their hand for this purpose.

Co-Chair Branscum recognized Senator John Cooper for a question. Senator Cooper commented that what has transpired up to this point was due to lack of some information and confusion about information being delivered. Senator Cooper asked that the committee hear from people in the audience before there is any vote. Co-Chair Branscum stated he respected his view, but it is the decision of himself, Co-Chair Sample, and Vice Co-Chair Rice that today's meeting be called for the purpose of expunging the vote whereby the report of the Rules and Regulations Subcommittee report was adopted, and that the proper time for discussion of subcommittee agenda items is during the subcommittee meeting. Co-Chair Branscum stated that, therefore, discussion during this meeting would be on the motion to expunge the vote.

Co-Chair Branscum recognized Senator John Cooper who made a motion to have discussion. Co-Chair Branscum stated that was a proper motion and asked Senator Cooper if it is correct that his motion is that the committee have discussion of the topic at hand before taking a vote on the motion to expunge the vote. Senator Cooper stated that was correct.

Co-Chair Branscum recognized Representative Nate Bell who asked for a point of order and asked if this discussion is not an agenda item, is two-thirds of the membership required to pass the motion. After consulting with staff, Co-Chair Branscum stated that since discussion is not on the agenda, a motion to suspend the rules would be needed to take up an item that is not on the agenda.

Co-Chair Branscum recognized Senator Linda Chesterfield who commented that if the item is on the agenda, then it is not out of order to hear testimony, and a suspension of rules is not needed. Co-Chair Branscum clarified that a motion to expunge the vote is what is on the agenda and a discussion of that motion would be appropriate, but that discussion of the rule that was debated in the subcommittee meeting is not appropriate because the rule is not on the agenda.

Co-Chair Branscum stated that the motion on the floor is Senator Cooper's motion to have a discussion of the issue prior to the vote to expunge the vote. Co-Chair Branscum asked if there was a second and the motion was seconded. Co-Chair Branscum asked if there was discussion of the motion.

Co-Chair Branscum recognized Representative Mark Lowery who asked if the motion to expunge is debatable. Co-Chair Branscum responded that it was and then recognized Senator Joyce Elliott. Senator Elliott commented that she agrees that it is important to not revisit a subject every time there is a misunderstanding, but she also feels that it is difficult to move ahead when an agreement is not kept. Senator Elliott commented that discussion is crucial to the way this body works and the way this body works with the executive branch.

Co-Chair Branscum recognized Representative Hammer who asked if something of this nature had occurred before or was this the first time this has been undertaken. Co-Chair Branscum responded that this is not the first time that a special meeting of the Legislative Council had been convened, but this is the first time that the Legislative Council has considered the issue of expunging a vote on a rule.

Co-Chair Branscum recognized Representative Kim Hammer to speak against the motion. Representative Hammer stated that he would vote against the motion for discussion because this matter has been discussed for about two years in the Public Health Task Force and other committees, and there have been opportunities for this matter to be discussed, researched, and people to make

determinations. Representative Hammer stated there may be new material that becomes available, but a distinction should be made between some not getting their way and whether or not the process has been thorough, open, and transparent, and that everyone has had a chance to speak. Representative Hammer commented that he has heard the discussion at these meetings, and he feels the issue has been well discussed and it is time to move on. Representative Hammer stated that to set aside the rules and to set a precedent for what will be referred to for years to come by members sitting today and in the future, sets a dangerous precedent and allows the opportunity to change something at the last minute whether the purpose is because some did not get their way or because new information has become available. Representative Hammer concluded his comments by stating this matter has been discussed and it is time to move on and he will vote against the motion.

Co-Chair Branscum recognized Senator Linda Chesterfield who commented that she errs on the side of hearing from the people and agrees this matter has been discussed and people have been heard. Senator Chesterfield stated that it would not hurt to have limited discussion and that not hearing from the people is a disservice to the people. Senator Chesterfield stated she feels this is not petulance, but a difference of opinion, and that people profit when there is a full discussion regardless of the outcome. Senator Chesterfield concluded her comments by asking for a good vote on the motion.

Co-Chair Branscum recognized Senator John Cooper, who stated he hopes everyone knows he respects their opinions, but he does not feel that more information is a bad thing. Senator Cooper stated he is still hearing from legislators and the public, and although there have been a lot of hearings on the matter, there has been little public information and it is on one-side of the issue. Senator Cooper stated that people feel they have not had an opportunity to speak on the issue and concluded his comments by asking that the members vote to hear information.

Co-Chair Branscum recognized Senator Larry Teague, who stated the he wanted, in the interest of full disclosure, to inform members that he serves on the Southwest Arkansas Counseling and Mental Health board in Texarkana.

Co-Chair Branscum stated that he saw no other discussion and called for a voice vote on Senator John Cooper's motion to have a discussion on the issue, and the motion failed to pass.

Co-Chair Branscum stated that before the committee now is the motion to expunge the vote and asked if there is a motion.

Co-Chair Branscum recognized Representative Chris Richey who moved to expunge the vote whereby the motion to adopt the report of the September 20, 2016 meeting of the Administrative Rules and Regulations Subcommittee was passed. Co-Chair Branscum stated that this was a proper motion and asked if there was a second, and the motion was seconded.

Co-Chair Branscum recognized Representative Jon S. Eubanks who requested a division of the vote by roll call. Co-Chair Branscum asked for a show of hands in support of the request, and upon seeing three (3), he stated that the vote would be recorded.

Co-Chair Branscum stated that before discussion is undertaken on the motion, he has asked Marty Garrity to present to the committee the legal considerations of this action. Co-Chair Branscum then stated that a member must be signed-in in order to vote on the motion and that the alternate member cannot vote when a member is present and does not vote. Co-Chair Branscum recognized Marty Garrity.

Ms. Garrity introduced herself and stated she has been asked to present the issue of the ability of the Legislative Council to expunge a vote of an approved agency rule and the effect of expunging the vote after the rule has been filed. The presentation is summarized as follows:

- Article 5, Section 42 of the Arkansas Constitution, which was added under Amendment 92, provides, in part, that administrative rules promulgated by a state agency shall not become effective until reviewed and approved by the legislative committee charged by law with the review of administrative rules. Enacting legislation was passed in 2015, mostly now found in Arkansas Code Annotated § 10-3-309, that clarifies the process for the Legislative Council to approve or not approve a rule. Part of the Administrative Procedure Act, now found at Arkansas Code Annotated § 25-15-204, was also amended and provides that each rule adopted by an agency is effective ten (10) days after filing of the final rule with the Secretary of State.
- The rule at issue has an October 1 effective date; however, under this provision of law, the effective date is ten (10) days after the rule was filed. It is the understanding of staff, that the rule at issue was filed on Tuesday (September 27, 2016) and would be effective next Friday (October 7, 2016) according to the calculations used by the staff.
- Prior to the passage of Amendment 92 and the enacting legislation of 2015, the filing of the rule with the Secretary of State was deemed as substantial compliance; however, prior to that time, this legislative body only had the authority to review a rule under the separation of powers issue and did not have the power to approve a rule. With the passage of Amendment 92 and the enacting legislation, it is unclear at what point after a rule has been approved that the General Assembly can take any action to approve or not approve the same rule. It has been two years since the Constitutional Amendment was passed and this issue has not been litigated; and therefore, there is not a definitive answer.
- One argument is that the Legislative Council has authority to not approve a rule until the rule becomes effective, which is the practical effect of the expunging the vote. The expunging of a vote rescinds the action and, under Mason's Manual, also expresses strong disapproval of the previous action taken. In addition, until a rule becomes effective, the public is not expected to follow the rule and are unable to be harmed by enforcement of a rule that is not in effect.
- On the other side, the argument is that expunging of the approval vote by the Legislative Council does not, or cannot, effect the validity of the rule after the rule has been filed, and which is based upon the language found in the Constitution as well as the Separation-of-Powers argument. The Constitution provides that the General Assembly may provide by law that the rules promulgated by a state agency may not become effective until reviewed and approved.
- This agency approved the rule and then the agency took another separate action of filing the rule with the Secretary of State's office, and the executive agency has acted on the rule.
- The Administrative Procedure Act was amended to provide that unless the rule has been approved under Arkansas Code Annotated § 10-3-309, a state agency shall not file a final rule with the Secretary of State, which could appear to read that once approval is given,

the agency has authority to file the final rule.

- Part of the Administrative Procedure Act concerning the ten-days notice before the rule goes into effect, is really sending notice to the public. Thirty days are required prior to a final rule going into effect and it must be put out for public notice. Once this body approves a rule, ten-days notice has to be given to the public so that the public knows what to expect from an agency. In addition, under Arkansas Code Annotated § 10-3-309, the provisions in the Code do not contemplate any action being taken in Legislative Council after the approval of the rule.
- This has been likened to, or is similar to, when a bill is passed by the General Assembly with no effective date and has been sent to the Governor. At that point, the General Assembly can no longer un-enact the law by expunging the vote. It is upon the Governor to turn it back to the House and the Senate to expunge the vote. Once the bill has been transmitted to the Governor, the power of the General Assembly to change that provision of law, is to enact another law rather than by expunging the vote.

Ms. Garrity concluded her presentation by stating that she cannot state with certainty which of the arguments will work or if there are other arguments that would carry more weight with the court since this is a new issue.

Co-Chair Branscum stated that he has discussed this action with other legislators and that the question and decision before the committee today is whether the committee can expunge the vote since the rule at issue has already been filed with the Secretary of State. Co-Chair Branscum stated that he would now open the meeting to questions, and Ms. Garrity responded to questions from the committee members.

Co-Chair Branscum stated that he saw no other questions and called for a roll call vote on the motion by Representative Chris Richey to expunge the vote whereby the motion to adopt the report of the September 20, 2016 meeting of the Administrative Rules and Regulations Subcommittee was passed, beginning with the House members. The roll call vote of the House members was thirteen (13) yes votes and eleven (11) no votes and the motion failed. A roll call of the Senate members was not taken as the motion failed to receive sufficient votes from the House members to pass.

Adjournment

At 9:50 a.m., the meeting was adjourned as there was no further business to come before the Legislative Council.

Respectfully submitted,

ATTEST:

Representative David L. Branscum
Co-Chair, House

Marty Garrity
Executive Secretary