

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

MALCOLM A. SMITH,
Plaintiff,

INDEX # 4912/09

-against-

PEDRO ESPADA, JR.,
Defendant.

-----X

AFFIRMATION OF FRANCIS GLUCHOWSKI, ESQ.

FRANCIS GLUCHOWSKI, an attorney duly admitted to practice in this State,
under penalties of perjury, deposes and affirms as follows:

1. My name is Francis Gluchowski, and I reside in the town of Slingerlands, New York.
2. I am an attorney in good standing, licensed to practice law in the State of New York.
3. I was continuously employed by the Legislature from April 1989 until December 30, 2008, when I retired from my duties with the Senate Majority Counsel Program Office. From January 1997 until my retirement I held the title of Legislative Counsel to the Majority.
4. While Legislative Counsel, I advised the Temporary President and the Majority Conference on the processes surrounding the legislative passage of bills and the adoption of resolutions, including those resolutions regarded as privileged.
5. The Rules of the Senate in effect on June 8, 2009, were substantially similar to the Senate Rules in place during my tenure with the Senate.

6. The Rules then in effect, (Rule VI, § 9), require resolutions to be filed in quadruplicate, furnished to the desk, and the Temporary President and Minority Leader. In practice, however, the resolutions would be served on the Senate Desk and then referred to the Senate Finance Committee. Upon service to the Journal Clerk, the Temporary President was deemed notified. The Rules did not specify any period of notice and therefore any resolution could be delivered to the Journal Clerk at the commencement of session and could be taken up the same day, although they would not be required to be taken up the same day.
7. The Rules as they were in effect June 8, 2009, further provide that certain resolutions are not in order. As an example, resolutions “supporting or condemning, or proposing or urging a change in Federal law which is not directly germane to the affairs, business, rights, benefits and obligations of New York State shall be out of order and shall not be reported...” (fmr. Rule VI, § 9 (b), renum. Rule VII, § 9 (b)).
8. A privileged resolution is one which for any one of a number of reasons is taken up immediately by the body. It may be one recalling bills from the assembly, or returning bills to the Assembly, which are expressly addressed in our Rules, or it may be one of extreme importance dealing with current events, which by necessity must be acted on quickly.
9. Additionally, Mason’s Manual of Legislative Procedure (NCSL, 2000), which is generally accepted as a valid source of parliamentary law, lists several types of

privileged questions and resolutions, among them those issues which deal with the organization of the body itself.¹

10. These items are considered privileged because they are granted precedence over other resolutions on the calendar. There is nothing in the Senate Rules or Mason's which requires the Temporary President or his designee to consent to the introduction of a privileged resolution or its presentation to the body. The Rules only require notice.
11. When an ordinary resolution was received by the Senate Finance Committee, it would be reviewed to ensure the content of the resolution was germane to the Senate business, and not a resolution out of order under Rule VII, § 9 (b). If Senate Finance staff had a question with respect to the Senate Rules and a resolution's comportment with the Rules, the resolution was referred to me for a determination.
12. Resolutions would generally be reviewed prior to the day's session, but could be reviewed at any time prior to taking them up on the floor. It was sometimes the case that the Floor Counsel would receive a resolution from a member (Majority or Minority) and review it prior to introduction with the Journal Clerk.

¹ Mason's Manual additionally defines Privileged Motions as 5 types of motions: 1) Call of the House 2) to reconsider 3) to adjourn 4) to recess and 5) questions of privilege. Of the Questions of Privilege, Mason's lists "Organization of the House." Therefore, contrary to what is contained in Plaintiff's Memorandum of Law, there is clear authority as to a leadership resolution being privileged. *See*, Mason's Manual § 187; § 220 et. seq. *citing, in part*, to The Clerk's Manual (albeit an earlier version, not available at present time).

13. From time to time, resolutions were deemed to be privileged by me so that they could bypass the ordinary committee process and be dealt with directly on the Floor. However, if a resolution was deemed to be inappropriate for the floor, it would be held in committee for further review. Sometimes the sponsor of the resolution would prefer to issue a proclamation rather than pursue the resolution. Other times, I would suggest language to cure any perceived problem in the resolution as it was originally drafted. But at no time was there a formal process whereby I, as a Senate staff, nor any Senate member, would consent that, or make a determination that, a given resolution was privileged.
14. It was, for example, custom and practice to allow a member, as a courtesy, to treat certain resolutions as if they were privileged because they required an urgency that the content of the resolution did not otherwise warrant. For example, a resolution commemorating a 50th Anniversary could be deemed privileged if a member requested it, in order that it could be presented to the couple on the date of their anniversary.
15. The Clerk's Manual is published pursuant to Legislative Law § 15 by the Clerk of the Assembly and the Secretary of the Senate. It was last updated in 1979. The manual codifies and explains both Senate and Assembly Rules, and the customs of both houses.
16. The Clerk's Manual defines "Privileged Questions" as those which "either by rule or by established parliamentary acceptance, [] are entitled to precedence over other questions, even though the latter are pending and still undecided." p. 138. "A matter that has been made a special order for a particular time is, in a

strict sense, privileged, in that it takes precedence over the pending business of the Senate when that time has arrived.” Privileged Questions include “questions concerning the rights and privileges of the House or its members.”

17. Plaintiff’s argument that to allow any Senator to bring any resolution to the floor of the Senate and claim privilege would lead to chaos is a bit inapt to the case at bar. In the normal course of events, a resolution would be brought up, which would be claimed to be privileged. The Chair would rule the motion out of order, if, in his judgment the resolution was not properly privileged, as the Presiding Officer did on June 8, 2009. *See*, Breslin Aff. ¶¶ 11, 16. The only aspect which is troubling to plaintiff about what happened on June 8, 2009 was that 32 Senators voted to overrule the judgment of the Presiding Officer, thus rendering his opinion moot. Plaintiff is not troubled by Senate practice, but by the will of the Majority in that it was contrary to his own will.
18. Plaintiff claims the process is that the Temporary President must *approve* of a resolution to name a new leader, and that no action could be valid unless it had the Leader’s tacit permission to go forward. This simply would never happen. A privileged resolution naming a new Temporary President was noticed to the Floor Counsel, simultaneous with the notice to the Journal Clerk, in complete harmony with the Rules.
19. Privileged resolutions need not be presented prior to session, and if Plaintiff was concerned about the content of the resolution due to lack of notice, it should not have been directed to be read.

20. The Presiding Officer, in this particular instance, directed the resolution be read prior to knowing the content of the resolution. While in Plaintiff's view, that may have been an error in judgment, it was not counter to the Rules, generally accepted parliamentary procedure, or custom and practice.

Dated: June 14, 2009

Albany, NY

Francis Gluchowski,
former Legislative Counsel to the Majority