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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. _____ **S-1-SC-40592**

STATE OF NEW MEXICO
ex rel. KARL REIFSTECK,
Director, Administrative Office of the Courts,

Petitioner,

v.

WAYNE PROPST, Secretary of Finance and Administration,

Respondent.

EMERGENCY VERIFIED PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Petitioner Karl Reifsteck, Director of the Administrative Office of the Courts ("AOC"), seeks a writ of mandamus requiring Respondent Wayne Propst, Secretary of Finance and Administration, to: (1) cease his unconstitutional interference with the Judiciary's authority over judicial employees and personnel policies; (2) return to processing judicial employee leave in accordance with this Court's order adopting a paid time off ("PTO") system for judicial employees; and (3) correct leave calculations the Department of Finance and Administration ("DFA") processed during the period it has refused to comply with that order.

Respondent is violating separation of powers the New Mexico Constitution requires by interfering with Petitioner's duty to implement the Court's order adopting PTO for judicial employees ("the PTO Order"). *See* N.M. Const. art. III, § 1. The Judiciary adopted that system to reduce expenses, reduce employee turnover, retain good employees, and improve recruitment with the goal of better serving the public. The PTO system achieves these goals within the budget the Legislature provides to the Judiciary. DFA's conduct violates decades of precedent holding that legislative or executive interference with judicial personnel matters, whether directly or indirectly, is unconstitutional. *Mowrer v. Rusk*, 1980-NMSC-113, ¶ 30, 95 N.M. 48.

A writ also is necessary to prevent Respondent from continuing DFA's persistence in exceeding the limits of its ministerial duties. The Legislature has not given Respondent or DFA approval authority over the Court and Petitioner's decisions related to judicial employees, and this is only the most recent example of DFA attempting to act outside its narrow role. *State ex rel. Lee v. Hartman*, 1961-NMSC-171, ¶¶ 23-28, 69 N.M. 419; *N.M. Educ. Ret. Bd. v. Romero*, 2024-NMCA-013, ¶ 18.

JURISDICTION

The Court has jurisdiction over this matter pursuant to Article VI, Section 3 of the New Mexico Constitution.

CIRCUMSTANCES JUSTIFYING DIRECT REVIEW BY THIS COURT

The petition satisfies the criteria for the Court to exercise jurisdiction and promptly issue a writ. "This Court has repeatedly recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action." *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272 (quoting *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562). The Court has been particularly willing to accept petitions seeking "to restrain one branch of government from unduly encroaching or interfering with the authority of another branch in violation of Article III, Section 1 of our state constitution." *Id.*; *see also Mowrer*, 1980-NMSC-113, ¶ 15 ("The parameters of the

separation of powers doctrine presents a recurring problem of great public interest."). That is the case here.

This dispute also satisfies each factor the Court traditionally considers in deciding whether to exercise its original mandamus jurisdiction. The case: (1) implicates fundamental constitutional questions of great public importance; (2) can be answered on the basis of virtually undisputed facts; and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal. *Sandel*, 1999-NMSC-019, ¶ 11.

First, ensuring each branch of government respects the limitations that Article III, Section 1 imposes is a matter of constitutional and public importance. *Mowrer*, 1980-NMSC-113, ¶ 15 ("[S]eparation of powers is at the very heart of the controversy raised in this case. The inherent and constitutional authority of the judiciary is challenged by the issues."). This dispute further implicates the power of "superintending control over all inferior courts" entrusted to the Court. *See* N.M. Const. art. VI, § 3. Lower courts are bound by this Court's orders, and directly resolving this case avoids requiring a lower court to rule on the constitutionality of a Supreme Court order.

Second, there is no dispute over the relevant facts:

1. The PTO Order requires Petitioner to provide judicial employees a unified PTO system.

2. Petitioner submitted all the necessary information for DFA to perform its ministerial role in processing and accounting for judicial employee leave in accordance with the PTO Order.

3. After complying for approximately 14 months with Petitioner's instructions regarding the calculation of leave for judicial employees, Respondent and DFA refused to continue doing so beginning in late June 2024. Respondent thus claims the authority to override the PTO Order and AOC's corresponding instructions.

Finally, direct and prompt resolution is necessary because Petitioner will remain unable to implement the Judiciary's PTO system while Respondent continues his obstruction. Respondent's unilateral actions continue disrupting judicial employees' expectations regarding their leave. Approximately 250 employees have retired or otherwise left the Judiciary since Respondent stopped implementing the PTO system in June 2024, and Respondent has deprived those employees and the Judiciary of the benefits of the PTO policy. By resolving the dispute now, the Court will provide certainty to every judicial employee in New Mexico.

PARTIES

1. Petitioner Karl Reifsteck is the Director of the AOC.

2. Respondent Wayne Propst is the Secretary of Finance and Administration, an executive branch official whose duties and powers are prescribed by statute. *See* NMSA 1978, § 9-6-1 through -21 (1977, as amended through 2024).

FACTS GIVING RISE TO THE PETITION

I. THE SUPREME COURT ADOPTED PTO TO MORE EFFICIENTLY MANAGE JUDICIARY RESOURCES.

To better recruit and retain employees with the skills to keep the justice system working for the people of New Mexico while exercising fiscal responsibility, this Court adopted PTO amendments to the New Mexico Judicial Branch Personnel Rules on March 23, 2023. *See* Admin. Order No. 23-8500-005. That order resulted from the Judiciary's close study of how best to structure leave for its employees within its appropriated budget. The Judiciary adopted the PTO system based on analysis showing that it saves 35-40% compared to the current leave system for executive branch employees while removing financial incentives that drive judicial employees to needlessly miss work.

The PTO system is straightforward. Rather than receiving leave divided into the separate categories of sick and annual leave, judicial employees receive "Paid Time Off" that accrues on a set schedule. NMJBPR §§ 5.14 (classified employees),

19.14 (at-will employees).[1] The PTO Order permits buyback of leave annually and at retirement based on corresponding schedules. *Id*. The Judiciary adopted this leave system for its employees because it decreases costs while incentivizing employees to continue working until they actually separate from service.[2]

The Judiciary has requested no additional appropriations from the Legislature as a result of the PTO Order. It designed the PTO system to operate within the Judiciary's existing budget, resulting in increased employee retention and productivity without additional cost. *See* Letter from K. Reifsteck to W. Propst at 3 (June 20, 2024) (Ex. 1).

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[1] Subsequent citations to the NMJBPR refer only to the provisions for classified employees; the at-will provisions are substantially similar.

[2] The change eliminates the incentive for employees to use an "earn and burn" approach to leave. The former system forced employees to choose between losing leave annually or taking more time away from work. Similarly, employees no longer have an incentive to burn leave balances with extended absences as they approach retirement. Such absences increase costs to the Judiciary in two ways. First, the Judiciary continues incurring the cost of benefit contributions in addition to the employee's salary. The State Personnel Office has reported that the cost of these additional expenses is 39.7% of the average state employee's pay. *See* New Mexico State Personnel Office Classified Service Pay Plan and Compensation Report, at 12 (2023), https://www.spo.state.nm.us/wp-content/uploads/2023-Compensation-Report-Final-rev12.11.23.pdf; Email from K. Reifsteck to W. Propst (June 25, 2024) (Ex. 2). Second, the Judiciary avoids choosing between having a position effectively vacant while a retiring employee uses accumulated leave or paying two employees simultaneously for the same position.

From May 2023 to late June 2024, Respondent processed leave for judicial employees consistent with the PTO Order. During that period of roughly 14 months, the policy functioned efficiently and within the Judiciary's existing budget.

II. RESPONDENT IS PREVENTING THE JUDICIARY FROM IMPLEMENTING PTO.

After the Court issued the PTO Order, Respondent expressed disagreement with the policy and complained that limitations of the State's SHARE computer system made it difficult to implement. *See* Letter from P. Schaefer to A. Pepin (Apr. 24, 2023) (Ex. 3). AOC offered to work with Respondent to help resolve and pay for any technical adjustments that need to be made in SHARE. Respondent did not accept the offer. Instead, Respondent turned to the New Mexico Attorney General for an opinion on the question.

The Attorney General issued an opinion expressing agreement with Respondent on June 13, 2024. *See* N.M. Att'y Gen., No. 24-07 (June 13, 2024) (Ex. 4). Though that opinion has no legal effect, Respondent has relied on it to unilaterally stop processing leave and cease negotiations with Petitioner to find a mutually acceptable resolution.

This petition follows to resolve the parties' dispute under the law.

GROUNDS FOR PETITION

I. THE LEGISLATURE APPROPRIATES MONEY FOR THE JUDICIARY TO INDEPENDENTLY ALLOCATE IN ADMINISTERING THE COURTS AND MANAGING JUDICIAL EMPLOYEES.

The Legislature has the authority to appropriate money to adequately fund the two other branches of government. From there, the Judiciary has the authority and responsibility to use its budget to administer the courts, manage its own personnel, and set its own policies. There is no room in this system for the Executive to tell the Judiciary how it may or may not use monies the Legislature appropriated for the courts.

A. Judicial Personnel Policies are Funded Through the Legislative Process.

Each year, the Supreme Court approves a "unified budget request" for the entire judicial branch, including capital outlay, recurring general fund, special, supplemental, deficiency, and other appropriation language requests. The Supreme Court builds the annual request internally, with each court or other operating entity within the Judiciary submitting an application and supporting documentation to a Supreme Court-appointed budget committee. That committee makes a formal recommendation for the Court to accept, reject, or modify. The Court then approves a unified budget for submission to the Legislature.

After considering the Court's proposed budget, the Legislature appropriates the Judiciary funds in broad categories in the General Appropriations Act (HB2). For example, the Legislature's 2024 budget for the Judiciary includes only a general appropriation for "operations." H.B. 2, 2024 Reg. Sess. at 6-20 (N.M. 2024), https://nmlegis.gov/Sessions/24%20Regular/final/HB0002.pdf. Employees of each court are paid from that court's operations budget. The budget for the AOC is divided into three categories: (a) personnel services and employee benefits, (b) contractual services, and (c) "other." *Id.* The Legislature otherwise provides separate appropriations for issues like statewide judiciary automation and special court services. *See id.*

This system retains the Legislature's full "power of the purse" to decide how much money to appropriate to the Judiciary each year. *See* N.M. Const. art. IV, § 30. Once the Legislature appropriates monies to the Judiciary, DFA's role overseeing disbursements of funds remains ministerial. *N.M. Educ. Ret. Bd. v. Romero*, 2024-NMCA-013, ¶ 18.

B. The Administration of Judicial Personnel Policies Rests with the Judiciary.

The Court adopts and implements personnel rules for judicial employees through the New Mexico Judicial Branch Personnel Rules. These rules are based on the Court's constitutional authority over the Judiciary. *See* NMJBPR § 1.04 ("The Supreme Court of the State of New Mexico is the superintending authority

for the Judicial Branch. The NMJBPR are adopted, amended, or repealed at the discretion of the Supreme Court."). They comprehensively govern employment matters within the Judiciary, such as compensation; recruitment, selection, and appointment; leave and holidays; performance, planning, development and evaluation; and discipline and grievances. *See generally* NMJBPR.

The Legislature specifically exempts itself and the Judiciary from the Personnel Act, NMSA 1978, § 10-9-4(I), (K) (2014). And where the Court has chosen to incorporate into its personnel rules all or part of general state employment statutes, it has done so expressly. *See, e.g.*, NMJBPR § 5.05(A) (allowing employees to take leave for donating an organ or bone marrow in accordance with NMSA 1978, § 24-28-3 (2007)); NMJBPR § 5.12 (allowing for military leave in accordance with federal and state statutes governing such leave); NMJBPR § 5.17 (providing voting leave for elections listed under the New Mexico Election Code).

C. The Legislature Confirmed the Court's Independent Authority to Manage the Judiciary and Its Employees Within Its Appropriated Budget in the Statute Creating the AOC.

In creating the AOC in 1959, the Legislature set up a system parallel to the Executive for the Court to manage and administer the Judiciary, including personnel matters. NMSA 1978, §§ 34-9-1 to -21 (1959, as amended through 2023). That Act specifies that the AOC "shall be supervised by a director who shall

be appointed and subject to removal by the supreme court of New Mexico." NMSA 1978, § 34-9-1 (1959). The director, in turn, is authorized to "appoint necessary employees, subject to the approval of the supreme court, who shall be subject to removal by him with the approval of the supreme court." NMSA 1978, § 34-9-2 (1959). The director is responsible for "supervis[ing] all matters relating to administration of the courts." NMSA 1978, § 34-9-3(A) (2019). The Legislature also conferred upon the director responsibility for the Judiciary's budget and fiscal matters by specifying that the director shall "deal with ***the problems of finance of those courts supported by legislative appropriation*** and be concerned with adequate but economical financing of each of these courts and the equitable distribution of available funds among them." NMSA 1978, § 34-9-3(D) (2019) (emphasis added). That includes specific responsibility to "receive, adjust and approve proposed budgets submitted by the[] courts prior to submission of the budgets to the state budget division of the department of finance and administration for inclusion in the executive budget." *Id*.

Next, subject to the Court's discretion, Petitioner must perform all duties necessary to "aid in the administration of justice and the administration and dispatch of the business of the courts." NMSA 1978, § 34-9-3(E) (2019). It is the AOC director who shall "apply for and receive, in the name of the administrative office of the courts, any public or private funds, including United States

government funds, available to carry out its programs, duties or services." NMSA 1978, § 34-9-3(G) (2019). The Legislature extended Petitioner's responsibilities to include administration of "the supreme court, the court of appeals, the district courts, the children's and family court divisions of the district courts, the probate courts and the magistrate courts." NMSA 1978, § 34-9-7 (1972).

In developing and administering its personnel policies, the Judiciary adheres to its appropriated budget and remains accountable to the Legislature through future appropriations. Beyond that, Article III, Section 1 reserves to the Judiciary—and the Judiciary alone—authority over how it spends appropriated funds to recruit and retain the employees on which New Mexicans depend to operate our justice system. Respondent has no substantive role in the system.

II. RESPONDENT IS INTERFERING WITH THE JUDICIAL BRANCH'S EXERCISE OF ITS CONSTITUTIONAL AUTHORITY TO REGULATE AND ADMINISTER POLICIES GOVERNING JUDICIAL PERSONNEL.

Article III, Section 1 of the New Mexico Constitution establishes separation of powers as a constitutional command:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1. This Court has clearly and consistently recognized that it "must give effect to Article III, Section 1, and will not be reluctant to intervene where one branch of government unduly encroaches or interferes with the authority of another branch." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 23, 125 N.M. 343 (citing *Clark*, 1995-NMSC-048, ¶ 32; *Mowrer*, 1980-NMSC-113, ¶ 28). While absolute separation of powers is not possible or desirable, the Court intervenes "when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions." *Id.* (citing *Clark*, 1995-NMSC-048, ¶ 34); *see also Clark*, 1995-NMSC-048, ¶ 34 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 433 (1977)). The ultimate standard is whether challenged conduct disrupts the proper balance between the executive, legislative, and judicial branches. *Clark*, 1995-NMSC-048, ¶ 34.

In *Mowrer*, the Court recognized that interference by other branches with the Judiciary's independent authority over judicial personnel fails that standard and is therefore unconstitutional. *See Mowrer*, 1980-NMSC-113, ¶¶ 32-33. The issue in *Mowrer* was whether city officials could apply general municipal employment laws and policies to municipal court staff. *Id.* ¶¶ 1-2. The Court held that Article III, Section 1 requires that the Judiciary's authority over personnel and budget decisions remain independent. *See id*. ¶ 34.

Mowrer established three principles that control this case. First, separation of powers requires that the Judiciary retain control of judicial employees with no direct or indirect interference from the executive or legislative branches. *Id.* ¶¶ 31-32. Second, "personnel directly employed by the courts cannot constitutionally be included in" general laws governing public employment. *Id.* Third, the Judiciary engages with the Legislature in determining judicial budgets, not the Executive. *Id.*

Mowrer necessarily limits Respondent's role to executing personnel decisions the Court, acting through Petitioner, makes independently within the limits of the Judiciary's appropriated funds. That decision established that the Executive has no authority to impose personnel rules on the Judiciary. Those matters fall within the inherent power of the Judiciary. *Id*. ¶ 32 ("The placement in [the executive branch] of control of the incidence of employment of personnel directly connected with the operation of the municipal court is improper as an invasion of the independence of the judiciary.") (quoting *Massie v. Brown*, 513 P.2d 1039, 1040 (Wash. 1973)); *see also Russillo v. Scarborough*, 935 F.2d 1167, 1173 (10th Cir. 1991) (rejecting proposed limitation on the Court's power of superintending control that would exclude administrative matters over personnel

because such matters "ultimately affect the progress of litigation in the court system as much as issues tied directly to specific cases").[3]

Article III, Section 1 and *Mowrer* leave no room for Respondent to attempt to usurp the Judiciary's use of its appropriated budget to make personnel decisions. In *Mowrer*, this Court recognized that the constitution does not permit Respondent to play any role over the Judiciary's budget. 1980-NMSC-113, ¶ 34. That is a matter between the legislative and judicial branches, with the executive branch's participation limited to the Governor approving or vetoing the state budget.

III. RESPONDENT IS CONTINUING DFA'S HISTORY OF IMPROPERLY TRANSFORMING MINISTERIAL RESPONSIBILITIES INTO SUBSTANTIVE CONTROL.

DFA's attempt to interfere with the leave policies for the judicial branch continues a pattern of DFA asserting substantive control over matters beyond its authority. As DFA has attempted to assume powers the Legislature has not granted to it, our courts have consistently brought the agency back to the ministerial responsibilities the Legislature assigned to it.

[3] Congress has chosen not to subject the federal judiciary to a wide variety of general federal employment laws in order to preserve the judiciary's independence, even when Congress has chosen to subject itself to such laws. *Dotson v. Griesa*, 398 F.3d 156, 173 (2d Cir. 2005) (explaining that Congress extended eleven labor laws to apply to federal legislative branch employees but decided not to do the same to the judiciary).

Just last year, the Court of Appeals held that the purpose of the statutes authorizing DFA to oversee the state's uniform accounting system only serve "the purpose of safeguarding funds from erroneous or unauthorized disbursements, not granting approval authority." *Romero*, 2024-NMCA-013, ¶ 3. In *Romero*, the Court of Appeals ruled that: (1) the then-DFA Secretary and the Department violated the constitution and New Mexico statutes by refusing to implement pay increases the New Mexico Educational Retirement Board ("ERB") adopted for its employees. *Id.* ¶ 3. *Romero* established that the ERB has no obligation to answer to DFA, or to submit for the Governor's approval, the amount the ERB sets for its employees' salaries. *Id.* Like here, ERB's independence is grounded in the New Mexico Constitution, which provides the ERB "the sole and exclusive fiduciary duty and responsibility for administration and investment of the trust fund." *Id*. ¶ 12. As it did in creating the AOC, the Legislature specified by statute that the ERB was entitled to hire employees, delegate administrative authority to those employees, and set their salaries. *Id*. ¶ 8 (citing NMSA 1978, § 22-11-10 (1967)). Such independence is essential:

> The amount set for salaries and fees is critical to the Board's ability to hire and retain highly qualified financial managers. Subjecting the Board to the fiscal restraints on the state budget, set by the governor and enforced by DFA, would, as the district court noted, authorize DFA and the governor to set the educational retirement system's salaries based on the interests of their broad constituency, in direct contradiction to the clearly expressed intent of the framers and the Legislature that these rates be set "for the sole and exclusive benefit of the members,

> retirees and other beneficiaries of [the retirement] system." N.M. Const. art. XX, § 22(A).

Id. ¶ 14. DFA chose not to seek this Court's review of that straightforward decision.

Romero followed on the heels of DFA's similar overreach interfering with compensation for the Superintendent of Insurance. In late 2021, a district court issued a writ of mandamus requiring DFA to pay the state Superintendent of Insurance in accordance with a statute setting pay and benefits for that office. Order on Alternative Writ of Mandamus in *Franchini v. N.M. Off. of Superintendent of Ins. and Dep't of Fin. & Admin.*, No. D-202-CV-2020-05552 (Aug. 24, 2021) (Ex. 5). The *Franchini* court recognized that DFA's argument for authority to set the Superintendent of Insurance's compensation "finds no support in the statutory language." Rather, the court held that:

> The Governor/DFA's role under law is to perform the ministerial act of verifying that the Superintendent's compensation: 1) is subject to legislative appropriation; 2) the amount is "established by the insurance nominating committee at the start of each term and annually thereafter;" and 3) that the compensation falls within the high and low of wages paid to executive level secretaries.

Id.

These problems with DFA exceeding its authority are not new. More than 60 years ago, this Court had to enforce the limits of DFA's authority in *State ex rel. Lee v. Hartman*, 1961-NMSC-171, ¶¶ 23-28, 69 N.M. 419. There, the Court held

that DFA lacked the power to reduce the budget of the Oil and Gas Accounting Commission to an amount less than the Legislature's appropriation. *Id.* ¶¶ 1, 4-6. In attempting to support its claim to that substantive authority, DFA relied on a statute requiring agencies to submit budgets to the budget division, and providing that those budgets are "subject to the approval" of the division and "subject to review and modification by the governor." *Id.* ¶¶ 23-24. The Court rejected DFA's contention that this provided authority to prevent an agency from expending the full amount of money the Legislature appropriated. *Id*. ¶¶ 24-28. The Court was unable to "find in the right given the department to approve budgets, an implied power to reduce them so as to provide for expenditure of less than amounts appropriated." *Id.* ¶¶ 26-27 (recognizing that even with executive agency budgets, DFA "cannot refuse approval without some basis, and if the budget as submitted is within the amounts appropriated and the items are proper, **[*DFA*] *is given no discretion except to approve them***.") (emphasis added) (citing *Makemson v. Dillon*, 1918-NMSC-040, ¶ 11, 24 N.M. 302).[4]

The outcome here is clearer still. In these prior cases, DFA's interference was at least limited to the executive branch. Now, the agency is arrogating

[4] As an administrative agency, DFA is a creature of statute and thus limited to the authority the Legislature provides it. *In re PNM Elec. Servs.*, 1998-NMSC-017, ¶ 10, 125 N.M. 302 ("Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute.").

approval authority for decisions by a co-equal branch of government. Article III, Section 1 forbids such Executive interference in the Judiciary's affairs. As *Mowrer* recognized, that proscription means the Executive cannot interfere with the Judiciary's personnel decisions. As *Hartman* recognized, DFA has no role dictating how legislative appropriations are spent. That is only more obvious when DFA reaches into the decisions a separate branch has made for its employees.

Rather than confront the decisions uniformly recognizing DFA's limited role, Respondent has relied on the Attorney General's opinion to justify his effort to effectively veto the Judiciary's PTO system. This Court gives such opinions "such weight only as [the Court] deem[s] they merit and no more." *City of Santa Rosa v. Jaramillo*, 1973-NMSC-119, ¶ 12, 85 N.M. 747. Here, the Attorney General's opinion provides no justification for depriving the Judiciary of independent authority over its personnel for the first time since *Mowrer* was decided. That opinion likewise fails to identify any basis for DFA to assume for itself the power to block implementation of the PTO Order.

In fact, the fundamental problems with Respondent's position are embedded in the question he asked the Attorney General to answer: "May the Department of Finance and Administration (DFA) implement amendments to the New Mexico Judicial Branch Personnel Rules that change rules for accruing sick and annual leave consistent with its statutory responsibility for the state's uniform accounting

system and with state laws governing payouts to employees for unused leave?" N.M. Att'y Gen., No. 24-07. Neither of the statutory sources of authority Respondent identified authorizes his conduct here.

Romero directly rejects Respondent's first claimed basis for authority. The "statutory responsibility for the state's uniform accounting system" that Respondent referenced in seeking the Attorney General opinion refers to the same statutes that the Court of Appeals already recognized are ministerial and carry no approval authority. *Romero*, 2024-NMCA-013, ¶ 18. If DFA believed that conclusion was wrong, it needed to seek further review by this Court in *Romero*. It did not, and *Romero* is correct. The Attorney General opinion does not address *Romero* at all, nor does it identify a valid basis for Respondent to take the actions he has taken. The Legislature has not given DFA or Respondent a roving commission to sit in judgment of substantive decisions regarding the expenditure of state funds appropriated to a co-equal branch of government. DFA's role regarding leave and other Judiciary personnel matters is to implement the instructions it receives from Petitioner.

The Attorney General opinion likewise is mistaken in relying on Sections 10-7-10 and 10-7-11 to opine that the Legislature intended to control the Judiciary's decisions regarding employee leave or authorized Respondent to unilaterally seek to force his interpretation of those statutes onto another branch of

government. Those statutes address calculating unused sick leave for which employees who receive such leave can be compensated. The Court has not granted sick leave, so there is no accumulated sick leave for judicial employees that would fall under those statutes, even if they purported to control the Judiciary in contravention of *Mowrer* (which they do not). In addition, the Public Employee Caregiver Leave Act of 2019 Act reflects the Legislature's policy directive to preserve discretion for public employers to independently decide whether to grant sick leave, declaring that "[n]othing in this section shall require a state agency or public school to provide sick leave to its employees." NMSA 1978, § 10-16H-3(C) (2019). The Judiciary has taken a different approach, as it is entitled to do.

Respondent nevertheless insists that portions of judicial employees' PTO must be converted to sick leave. The most obvious explanation for this intransigence is technical rather than substantive—the state's SHARE system does not currently accommodate tracking PTO rather than "sick leave" and "annual leave." But a software limitation does not permit Respondent to reject the substantive policy determination of a co-equal branch, and Respondent has ignored Petitioner's offers to discuss how to address any technical concerns in a manner that does not leave DFA bearing the cost of the change to the SHARE system. Sections 10-7-10 and 10-7-11 neither apply to leave under the PTO Order nor grant

DFA authority to unilaterally enforce its interpretation of those statutes against the Judiciary.

DFA is once again acting outside any power the Legislature has granted to it. This time, DFA is encroaching upon the authority of a separate branch of government in violation of Article III, Section 1 of the state constitution. As it did in *Hartman*, this Court should confirm the limits of DFA's statutory role and clearly hold that Respondent cannot continue allowing the agency to overstep those limits.

IV. RESPONDENT'S ACTIONS DEPART FROM LONGSTANDING RECOGNITION THAT EMPLOYEES IN DIFFERENT BRANCHES OF STATE GOVERNMENT RECEIVE DIFFERENT BENEFITS.

Respondent's interference with the Court's adoption and implementation of the PTO system is also inconsistent with the history of the state's three branches of government implementing distinct employment and personnel leave rules. *Taylor*, 1998-NMSC-015, ¶ 32 ("We also believe that the past practices of the New Mexico Legislature and Executive are instructive on these issues.").

Each branch had different leave policies for employees before the Judiciary adopted the PTO system. Indeed, Respondent and his predecessors at DFA have long processed different leave benefits between the co-equal branches of government. Examples of these differences include:

- The Court has allowed employees to donate annual leave on a substantially more restrictive basis than the Executive permits since at least 2010. *Compare* NMJBPR § 5.05 *with* 1.7.7.9 NMAC.
- Executive employees accrue different rates of annual leave per pay period than judicial employees. For example, Executive employees with 15 or more years of service accrue 6.15 hours of annual leave while judicial employees with 14 or more years of service accrued 7.39 hours of annual leave before the adoption of PTO. *See* 1.7.7.8(A)(5) NMAC; NMJBPR § 5.04(L).
- Executive employees accrue two days of personal leave per year while the Court granted judicial employees one day per year before the adoption of PTO. *See* 1.7.7.17(A) NMAC; NMJBPR § 5.16(A).
- The Governor ordered that, effective January 1, 2020, Executive employees were entitled to paid parental leave. *See* Exec. Order 2019-036 (Dec. 31, 2019). Judicial employees received no parallel benefit until the Court adopted its own rules for paid parental leave more than a year later. *See* NMJBPR § 5.15. The Legislature later adopted its own, distinct parental leave policy in 2022. *See* Legis. Council Serv. Leave Policy (rev. May 1, 2024), Appx. A (Ex. 6) (setting out Paid Leave Policy adopted Oct. 11, 2022),

https://www.nmlegis.gov/Publications/handbook/Parental%20Leave%20Policy%20rev.10.10.22.pdf. No statute supports paid parental leave for any branch of government, but Respondents have processed such leave without objection pursuant to the policies each branch adopted.

- Executive branch employees are eligible for up to five days of administrative leave without special approval. 1.7.7.14 NMAC. Within the Judiciary, the Administrative Authority (Chief Judge of a district court) may grant up to 10 days of administrative leave and up to 25 days during a pending disciplinary matter. The Chief Justice may grant administrative with pay "for any period." NMJBPR § 5.03.
- Each branch independently sets holidays for its personnel. *See, e.g.*, NMJBPR § 5.12.
- The Legislative Council Service pays out leave balances to its retiring employees up to 480 hours, far more than the executive branch's 240-hour limit. Legis. Council Serv. Leave Policy (rev. May 1, 2024), 2 (Ex. 6).
- Legislative Council Service employees accrue leave at a rate higher than Executive employees. *Id*. at 1.

- District Attorney employees are eligible for lump-sum increases under the District Attorneys Compensation Plan. 11.9.2.4 NMAC. Lump sum increases are not available to judicial employees. These lump sum increases have no specific statutory authorization.

Until Respondent unilaterally stopped implementing the PTO Order pursuant to the AOC's guidance, neither he nor his predecessors at DFA claimed the authority to refuse to process payments pursuant to leave policies and practices for employees across the three branches of government, even with leave that is not specifically authorized by statute. Within the Executive, Respondent is still allowing annual leave, voting leave, parental leave, educational leave, and personal leave days, and other forms of leave that the Legislature did not authorize by statute.

The Executive also grants sick leave even though there is neither a legislative mandate for public employers to award sick leave nor a statute specifying the accrual rates for such leave. The 2019 Public Employer Caregiver Leave Act instead specifies that sick leave is determined by agency rules. NMSA 1978, § 10-16H-2(A) (2019) (defining "eligible employee" to mean "an individual who is an officer or employee of the state or of a public school and who, in accordance with the policies of the state agency or public school employing the officer or employee, is eligible to accrue sick leave"). The decision whether to

grant sick leave is, again, a matter the Legislature left to the discretion of each state agency and public school district. NMSA 1978, § 10-16H-3(C) (2019).

The Attorney General's opinion does not address these different leave policies or inconsistent caps upon accumulated leave or payout amounts. Instead, it emphasizes the purported need for uniformity among state employees where none exists. With these divergent policies between the three branches of government, there is no principled justification for Respondent to block the PTO Order alone. DFA's claimed insistence on uniformity across each branch of government instead is new and uniquely directed at the Judiciary.

V. THE MOST NATURAL READING OF THE RELEVANT STATUTES AVOIDS CONSTITUTIONAL DEFECTS.

Giving the New Mexico statutes relevant to this case their plain meaning also avoids any constitutional problems with those laws. *See Adobe Whitewater Club of New Mexico v. New Mexico State Game Comm'n*, 2022-NMSC-020, ¶ 36 ("It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions.") (quoting *Lovelace Med. Ctr. v. Mendez,* 1991-NMC-002, ¶ 12, 111 N.M. 336), *cert. denied sub nom. Chama Troutstalkers, LLC v. Adobe Whitewater Club of New Mexico*, 143 S. Ct. 980 (2023).

The Legislature appropriates money to fund the Judiciary but leaves it to the Court to spend that money to best serve the Judiciary's interests. H.B. 2, 2024 Reg.

Sess. at 6-20 (N.M. 2024), https://nmlegis.gov/Sessions/24%20Regular/final/HB0002.pdf. In creating the AOC, the Legislature recognized that Petitioner and other AOC staff would assist the Court in doing so by granting Petitioner authority over "matters relating to administration of the courts" and the Judiciary's "problems of finance . . . supported by legislative appropriation." NMSA 1978, § 34-9-3 (2019). The personnel statutes on which DFA relies, most specifically Sections 10-7-10 and 10-7-11, do not purport to apply to the Judiciary, and those statutes are inapplicable anyway because the PTO Order does not grant judicial employees sick leave. Respondent, in turn, is acting outside any statutory authority the Legislature gave him or DFA. In fact, the Court of Appeals already recognized that the primary statute on which DFA relies (and the only statute that comes close to addressing this issue) imposes a ministerial responsibility with no discretionary approval authority. *Romero*, 2024-NMCA-013, ¶ 18.

CONCLUSION

Respondent is violating fundamental separation of powers principles and an order of this Court by intruding into the Judiciary's personnel decisions. At the same time, he is causing DFA to again act outside any authority the Legislature has granted to it. That is preventing Petitioner from implementing the PTO system. The result has been uncertainty for every employee of the Judiciary regarding the benefits they are entitled to receive, and upended expectations for the hundreds of

employees who retired or separated from service to the Judiciary since Respondent unilaterally stopped complying with the PTO Order. Respondent's actions justify immediate consideration by this Court, and Petitioner asks that the Court issue a writ of mandamus without delay requiring Respondent to come in line with the constitutional and statutory limitations on DFA's statutory authority.

Respectfully submitted,

PEIFER, HANSON, MULLINS, & BAKER P.A.

By: */s/ Mark T. Baker*
Mark T. Baker
Matthew E. Jackson
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Attorneys for Petitioner

RULE 12-504(H) NMRA STATEMENT OF COMPLIANCE

The body of this Petition uses a proportionally spaced typeface (Times New Roman), contains 5948 words, as counted by Microsoft Word and thus complies with the limitations of Rule 12-504(G)(3) NMRA.

VERIFICATION

I, Karl Reifsteck, Director of the Administrative Office of the Courts, verify under penalty of perjury that I have read this petition, and the statements contained in the petition are true and correct to the best of my knowledge, information, and belief.

KARL REIFSTECK

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of September 2024, the foregoing was filed electronically through the Odyssey File & Serve System and served via hand delivery as follows:

Wayne Propst, Secretary of Finance and Administration
Department of Finance and Administration
407 Galisteo Street
Santa Fe, NM 87501

Raúl Torrez, Attorney General
New Mexico Department of Justice
408 Galisteo Street
Santa Fe, NM 87501

PEIFER, HANSON, MULLINS & BAKER P.A.

By: */s/ Mark T. Baker*
Mark T. Baker

Administrative Office of the Courts

Supreme Court of New Mexico

Arthur W. Pepin, Director
Karl W. Reifsteck, Director

202 E. Marcy Street
Santa Fe, NM 87501
(505) 827-4800
(505) 827-4824 (fax)

June 20, 2024

Secretary Wayne Propst
407 Galisteo St.
Santa Fe, NM 87501

Attorney General Raul Torrez
408 Galisteo St.
Santa Fe, NM 87501

via first class mail and email to: wayne.propst@dfa.nm.gov; rtorrez@nmdoj.gov

RE: Judicial Branch response to the AG Opinion Dated June 13, 2024, and DFA letter dated June 18, 2024.

Dear Secretary Propst, Attorney General Torrez;

The Judicial Branch has reviewed an Attorney General opinion letter (AG opinion) dated June 13, 2024 and a letter from the Department of Finance and Administration (DFA letter) dated June 18, 2024. Each address the New Mexico Judicial Branch's adoption of Paid Time Off (PTO) for Judicial Branch employees. PTO has been in force for over one year. The AG opinion concludes that PTO is not permitted under current statute. The DFA letter informs that DFA will not comply with the Judicial Branch's personnel rules and payments submitted pursuant to those rules.

Your collective assessment of the law in regards to employee leave in the three branches of New Mexico state government is factually incorrect and legally inadequate. This assessment ignores the constitutional structure of our state government, current statutes, and current practices. The Judicial Branch will continue to follow our Supreme Court-ordered personnel rules, and submit leave payouts pursuant to those rules.

The conclusion of the AG opinion ignores the state constitutional grant of authority to the Supreme Court to administer the Judicial Branch. It also ignores the statutory grant of authority to the Administrative Office of the Courts to supervise all matters pertaining to the courts and to mandate uniform practices among the courts.

Existing Leave Policies

Leave policies without statutory authorization are a longstanding feature of state government. DFA has acknowledged and honored varying leave practices across the three branches of government. For example, the Executive Branch currently grants annual leave, voting leave,

EXHIBIT 1

parental leave, educational leave, and personal leave days, among other forms of leave. None of these varieties of leave are authorized by statute. The Executive also grants sick leave, though there is no legislative mandate for public employers to award sick leave, nor does any statute provide leave accrual rates. Instead, these multiple types of leave are created through powers granted by our constitution to each branch of state government, or pursuant to delegated legislative authority from other statutes. The Judiciary enjoys these same constitutional and statutory authorities to manage our branch of government.

The AG opinion asserts that PTO creates a disparity among state employees. However, the AG opinion ignores past and existing disparities among leave types in the branches of government. When Governor Lujan Grisham issued an executive order on January 1, 2020 creating parental leave, she gave 20,000 Executive Branch employees a new entitlement to twelve weeks of paid leave that employees of the other branches did not enjoy. Yet DFA did not interfere with the Governor's Executive Order because it was "unauthorized by statute," or because it created multiple classes of benefits for state employees. Rather, DFA recognized the sound policy backing the action, and the inherent authority of the Executive to manage her branch of government. We in the Judicial Branch are entitled to the same deference and treatment in crafting our personnel rules.

For decades, employees of the Legislative, Executive, and Judicial branches have accrued leave at different rates without objection. Additionally, the Executive Branch has provided its employees with two personal leave days each calendar year, a benefit that employees of the Legislature and Judiciary do not enjoy. Again, this disparity in favor of Executive Branch employees drew no criticism from either the Attorney General or DFA.

The AG opinion argues that because PTO may be used for absences due to illness, that PTO should be considered "sick leave" and subject of the sick leave buy back restrictions of NMSA 1987 §10-7-10. This analysis ignores that the Executive Branch permits its employees to use annual leave to cover absences due to illness, yet permits annual leave payouts at 100% of the employee's rate of pay. This practice would be contrary to NMSA 1987 §10-7-10 under the AG opinion's analysis. However, your agencies each plainly believe that because the leave is not awarded as "sick leave" the statutory stricture does not apply to annual leave payouts.

In addition, the federal Family Medical Leave Act (FMLA) mandates that employers permit their employees to use any accumulated leave for authorized absences covered by the Act. DFA regularly pays out Executive Branch employees for this annual leave used as sick leave without complaint and has done so for many years. Consistent with the FMLA, the Judicial Branch Personnel rules permit the use of PTO for sick leave. DFA must continue to treat Judicial Branch PTO payouts the same as Executive Branch annual leave payouts for this reason.

The Legislature's sound practices also greatly differ from the practices you purport to enforce and require the Judiciary to follow. However, you permit these legislative procedures and process payments under their practices in a timely manner. Legislative employees do not account for their leave in DFA's system. Rather, the Legislature issues instructions to DFA for employee leave payouts upon employee separation or retirement. These legislative payouts exceed the limits the AG opinion professes are mandated by "legislative intent." However, DFA simply

processes the payment when the Legislature certifies the amount is correct. This deference is proper and due to a co-equal branch of government.

PTO Has No Fiscal Impact

The AG opinion alleges that PTO has "significant financial impact" on the state budget. However, this assertion ignores that no Judicial Branch agency has requested or received any additional funding to implement PTO. Courts have managed PTO for over a year without impacting their fiscal bottom line, and will continue to do so. Any perceived fiscal impact is a matter for the Legislature. In addition, DFA has complied with the Judiciary's PTO rules since May of 2023 without requesting additional funding. Curiously, neither the Attorney General's office nor DFA felt compelled to object to costs related to the Governor's implementation of twelve weeks paid parental leave for a workforce ten times larger than the judiciary. Again, the Governor as head of the Executive Branch has the authority to implement new leave polices, just as the Judicial Branch does.

PTO is Sound Policy

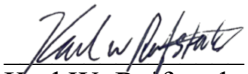
PTO was adopted by the Supreme Court in May 2023 after much deliberation and input to better manage leave earned by Judicial Branch employees, achieve greater employee productivity, improve recruitment and retention of employees, reduce costs from employee turnover, and improve employee morale. PTO reduces costs overall, and did not require any increased appropriations for the courts.

PTO is a set of rules that accounts for all earned leave time in one bucket, without breaking leave into annual leave, sick leave, personal leave day, and any number of other categories. Adoption of this practice is growing in private and public employment, resulting in increased employee satisfaction and productivity. The Supreme Court found that the leave structure previously in place failed to achieve these benefits.

Judicial Branch is Committed to Current Policy

The Judicial Branch has the authority to issue its own personnel rules and policies. DFA must make payments issued pursuant to these policies. Should DFA continue to maintain its position that it will not issue payment upon verified instructions from authorized Judicial Branch employees, the Judiciary will take steps to enforce our personnel rules and assert our authority as a co-equal branch of government.

Sincerely,



Karl W. Reifsteck

Cc: Gov. Lujan Grisham, Pres. Pro Tem. Stewart, Speaker Martinez, Sen. Wirth, Sen. Baca, Rep. Chasey, Rep. Montoya, Holly Agajanian, Raul Burciaga, James Grayson, Mark Melhoff

---------- Forwarded message ---------
From: **Karl Reifsteck** <aockwr@nmcourts.gov>
Date: Tue, Jun 25, 2024 at 5:01 PM
Subject: Re: [EXTERNAL] Response to recent letters from your offices
To: Propst, Wayne, DFA <wayne.propst@dfa.nm.gov>
Cc: rtorrez@nmdoj.gov <rtorrez@nmdoj.gov>, Stewart, Mimi <mimi.stewart@nmlegis.gov>, Martinez, Javier <javier.martinez@nmlegis.gov>, Wirth, Peter <peter.wirth@nmlegis.gov>, greg.baca@nmlegis.gov <greg.baca@nmlegis.gov>, Chasey, Gail <gail@gailchasey.com>, Montoya, Rod <roddmontoya@gmail.com>, Agajanian, Holly, GOV <Holly.Agajanian@exec.nm.gov>, raul.burciaga@nmlegis.gov <raul.burciaga@nmlegis.gov>, jgrayson@nmag.gov <jgrayson@nmag.gov>, Melhoff, Mark S, DFA <MarkS.Melhoff@dfa.nm.gov>, Lange, Dylan, SPO <dylan.lange@spo.nm.gov>, Charles.Sallee <Charles.Sallee@nmlegis.gov>, Schaefer, Patrick, DFA <Patrick.Schaefer1@dfa.nm.gov>, Ward, Renee, DFA <Renee.Ward@dfa.nm.gov>, George Munoz <george.munoz@nmlegis.gov>, Small, Nathan P. <nathan.small@nmlegis.gov>

Mr. Secretary,

Please understand that the New Mexico Judicial Branch Personnel Rules, adopted by Supreme Court Order, are the current law that applies to leave payouts for judicial branch employees. The Judicial Branch adopted this policy as a more cost-effective manner to manage employee leave. We will be happy to meet and discuss possible options with you. We are also interested in discussing how DFA is re-calculating the reduced payments it is providing instead of the PTO payments submitted by the Judiciary.

As you know, an opinion by the Attorney General has no legal effect. The statutes have not changed since DFA began processing PTO payments in May 2023. We ask that DFA continue the process that has been in place since May 2023 as we work with you to address your concerns about PTO. Maintaining the process that existed prior to the AG's opinion letter would mitigate the sudden, significant disruption to employees who are retiring or separating with a good faith expectation that PTO would apply to them as it has to other employees over the past year plus.

I would like to highlight the efficiency of the PTO approach. Current Executive Branch rules only allow an employee to receive a payout of up to 240 hours of annual leave, and sick leave over 600 hours at 50% of their pay. This encourages the "earn and burn" approach to leave that we have all seen in state government for many years. As a result, state employees have often been absent, though on approved leave. The highest performing employees, however, take less leave, and receive little or no benefit from it, either losing annual leave hours over 240 or getting paid 50% of their hourly rate for sick leave over 600 hours.

This approach also has the inefficient effect of encouraging long-time employees to take many hours of extended leave leading up to retirement. Employees taking leave cost the state employer PERA, Retiree Health Care, and insurance contributions in addition to the employee's salary. The State Personnel Office says that the cost of these additional expenses is 39.6% of the average state employee's pay. The employee on leave is also paid for state holidays, and continues to accrue leave, further extending their absence. Finally, the retiring employee's state agency either must do without the work the position is supposed to carry out due to the extended leave, or further increase costs by paying for an additional person to perform the duties while the soon-to-retire employee burns their leave. This system is inefficient and costly to taxpayers.

A PTO payout however, avoids these additional costs. The retiree is paid a lump sum for their accumulated excess leave, and the state is relieved of paying for the additional benefits including PERA, RHC, and insurance, an approximate 39.6% savings over the DFA-preferred approach. In addition, the employer is able to hire a replacement employee in a more orderly manner, greatly reducing the need for overlapping terms of service. PTO also provides large labor savings by avoiding lengthy terminal absences.

Judicial Branch agencies have not requested any additional appropriations to implement PTO, rather we are managing our costs within the appropriations the Legislature has provided.

The AG opinion's reasoning dangerously infringes on the right of each branch of state government to regulate itself and its employees. As we pointed out in our letter last week, the Governor created twelve weeks of paid parental leave by executive order in 2020 without legislative approval. The legislative branch pays out its employees for more than 240 hours upon separation from employment. There are many other differences in the employee leave policies among the three branches. Each branch is, and should be able to manage its own employees.

Please remember that no statute requires any state agency to award sick leave, annual leave, or most of the other types of leave granted by state government. In particular, the Public Employer Caregiver Leave Act, passed in 2019, specifically states, "[n]othing in this section shall require a state agency or public school to provide sick leave to its employees" NMSA 1978 § 10-16H-3(C).

Again, we are happy to talk with you about possible solutions, and ask that you maintain the status quo of the last 14 months. Please let us know by July 10, 2024, whether DFA will continue the status quo of making payouts according to the Judicial Branch Personnel Rules, as we will explore other legal options at that time.

Sincerely,

One attachment • Scanned by Gmail

[Attachment was Karl's letter of June 20, 2024 to Secretary Propst and AG Torrez]

State of New Mexico
Department of Finance & Administration
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www.nmdfa.state.nm.us

Michelle Lujan Grisham
GOVERNOR

Wayne Propst
Cabinet Secretary

TO: Arthur Pepin, Director, Administrative Office of the Courts; Celina Jones, General Counsel, Administrative Office of the Courts

FROM: Patrick Schaefer, General Counsel, Department of Finance and Administration; Mark Melhoff, Acting Financial Control Division Director

THROUGH: Wayne Propst, Cabinet Secretary, Department of Finance and Administration

CC: Peter Mantos, Cabinet Secretary, Department of Information Technology, Teresa Padilla, Director, State Personnel Office

DATE: April 24, 2023

RE: Transition to a Paid Time Off (PTO) Personnel Benefits System

First, DFA takes no position as to the merits of a Paid Time Off (PTO) personnel benefits system for employees of the Judiciary.

However, as noted in previous communications on this matter, while respecting the independence of the Judicial branch of government regarding certain personnel matters, it is the opinion of DFA that the implementation of a PTO personnel benefits system in lieu of annual and sick leave is not permissible under current law and that the Administrative Office of the Courts (AOC) should seek legislative remedy if it wishes to proceed with implementing PTO. It may be of benefit to consult with Legislative Council Service.

Even if we were to accept, for the sake of argument, that a PTO scheme is allowed, its implementation will result in a series of administrative, financial, and regulatory complications for the State of New Mexico, as well as for employees of the Judiciary and non-Judiciary agencies. These potential complications need to be fully reviewed and resolved.

For example, there is likely to be significant confusion and possible negative impact to employees who transfer between a PTO system and the system applicable to non-Judiciary employees because it is unclear, at best, how PTO hours would convert or apply in a non-Judiciary agency. Equally of concern is that the SHARE system is not currently configured to properly track and account for PTO and any effort to modify that system should be done deliberatively with appropriate testing and verification. Such a deliberative process has not been done here and cannot be done by May 13.

EXHIBIT
3

The Financial Control Division (FCD) reiterates the following concerns:

- The lack of a system designed to accept and manage PTO accounting.
- The current inability of SHARE to administer a PTO system.
- The difficulty of liquidation or conversion of PTO when leaving the Judiciary or transferring to other branches of state government;
- The lack of planning for budgeting for PTO liquidation and Governmental Accounting Standards Board (GASB 101) considerations and the lack of communication to public employees about the potential consequences of transition between two very different systems.
- Lack of detail on PTO accrual dates and other administrative issues.
- The potential for state employee claims for unfair treatment regarding benefits accounting when shifting between PTO and non-PTO systems.

We regret that we cannot provide a more favorable analysis of AOC's proposed conversion to a PTO scheme at this time.

New Mexico Department of Justice

June 13, 2024

OPINION

OF

RAÚL TORREZ

Attorney General

Opinion No. 2024-07

By: James Grayson
Chief Deputy Attorney General

To: Wayne Propst, Cabinet Secretary
Department of Finance and Administration

Re: Opinion Request – Changes to Sick and Annual Leave for Judicial Branch Employees

Question: May the Department of Finance and Administration (DFA) implement amendments to the New Mexico Judicial Branch Personnel Rules that change rules for accruing sick and annual leave consistent with its statutory responsibility for the state's uniform accounting system and with state laws governing payouts to employees for unused leave?

Answer: No. The judiciary's new policies, particularly the payouts authorized thereunder, cannot be reconciled with the public policy determinations and explicit payout restrictions imposed by the Legislature with respect to payouts to all state employees for unused leave. Accordingly, DFA may not permissibly implement the judiciary's new policies under existing law.

Background

In 2023, the New Mexico Supreme Court issued an order adopting changes recommended by the Administrative Office of the Courts (AOC) to provisions of the New Mexico Judicial Branch Personnel (NMJBP) Rules governing the accrual of annual and sick leave. *See In re Approval of Amendments to the N.M. Jud. Branch Pers. Rules Part I for Emps. & Part II for At Will Emps.*, No. 23-8500-005 (Mar. 10, 2023) (available at www.nmcourts.gov). The new rules provide that, effective May 13, 2023, judicial employees' sick leave and annual leave are combined "into one leave type called paid time off or PTO." NMJBP Rule, Part I (for classified employees), § 5.14; NMJBP Rule, Part II (for at-will employees), § 19.14.

EXHIBIT 4

Accrued PTO "may be used for personal or medical reasons." NMJBP Rule, Part I, Glossary of Terms. The rules allow employees to buy back accrued unused PTO in excess of 600 hours and require that employees who retire be compensated for accrued unused PTO hours based on time worked in the judicial branch. NMJBP Rule, Part I, § 5.14(T), (U); NMJBP Rule, Part II, § 19.14(T), (U).

DFA raises several concerns about whether NMJBP Rules for PTO are consistent with DFA's statutory responsibilities to maintain a uniform statewide accounting system network and to oversee financial accounting by all state departments and agencies. DFA additionally contends that the NMJBP Rules for paying out accumulated PTO may be contrary to Financial Control Division (FCD) rules governing the payment of wages and salaries, as well as state statutes providing explicit restrictions on payouts to state employees for accumulated unused sick leave. *See* NMSA 1978, §§ 10-7-10 (1984), 10-7-11 (1983).

Analysis

The judiciary may, as a general matter, adopt personnel rules for its employees. *See Mowrer v. Rusk*, 1980-NMSC-113, ¶¶ 31–32, 95 N.M. 48 (concluding that "the judiciary must, as a matter of constitutional law, directly control court personnel"); *Aguilar v. City Comm'n of City of Hobbs*, 1997-NMCA-045, ¶ 8, 123 N.M. 333 (explaining that controlling personnel and administrative matters are among the judiciary's inherent powers). However, the judiciary's authority in this realm is not without limits. As with all branches of government, the actions of the judiciary cannot unduly interfere with or encroach on the authority of another branch of government. *See* N.M. Const. art. III, § 1 (dividing the powers of state government into the legislative, executive, and judicial branches and precluding one branch from "exercis[ing] any powers properly belonging to either of the others").

Based on our review of applicable law, it is the Department of Justice's opinion that the judiciary's PTO policies, particularly the payouts authorized thereunder, conflict with public policy determinations and financial restrictions imposed by the Legislature. Because such matters are within the province of the Legislature, we conclude that the judiciary's PTO policies lack authorization under existing law.

Creating law and establishing public policy are functions of the Legislature. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343 ("We have said that only the legislative branch is constitutionally established to create substantive law" and that "[i]t is the particular domain of the [L]egislature, as the voice of the people, to make public policy."). The Legislature also has the "exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government." *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 14, 120 N.M. 820 (internal quotation marks and citations omitted); *see also Joseph E. Montoya & Assocs. v. State*, 1985-NMSC-074, ¶ 8, 103 N.M. 224 ("[T]he Legislature intended DFA to have significant control over the expenditure of public monies.").

Relevant to the judiciary's new PTO policies, the Legislature has imposed specific financial restrictions on payouts to all state employees for unused sick leave, limiting both the number of

hours and the rate at which employees may be compensated. Specifically, Section 10-7-10 provides:

> An employee of the state who has accumulated six hundred hours of unused sick leave shall be entitled to be paid for additional unused sick leave at a rate equal to fifty percent of his hourly wage multiplied by the number of hours of unused sick leave over six hundred hours, not to exceed one hundred twenty hours of such sick leave in any one fiscal year.

In addition, pursuant to Section 10-7-11:

> Immediately prior to retirement from state service, an employee of the state who has accumulated six hundred hours of unused sick leave shall be entitled to be paid for additional unused sick leave at a rate equal to fifty percent of his hourly wage multiplied by the number of hours of unused sick leave over six hundred hours, not to exceed four hundred hours of such sick leave.

The payouts permitted under the judiciary's PTO policies are substantially different than payouts authorized pursuant to the above-described statutory scheme. Although the PTO policies address payouts made under the same circumstances as payouts pursuant to the foregoing statutes, the payout structure of the judicial policies results in much higher payouts, exceeding both the maximum percentage of hourly wages and allowable hours that are statutorily authorized for sick leave payouts.

In departing from Section 10-7-10, the judiciary's policies permit judicial employees who have accumulated more than six hundred hours of unused PTO to "buy back" the unused leave in excess of six hundred hours at the employee's *full* hourly rate of pay. The maximum number of hours for which a judicial employee may receive compensation increases over the next several years, authorizing compensation for up to four hundred hours per annum of such leave by fiscal year 2027 and thereafter. *See* NMJBP Rule, Part I, § 5.14(T); NMJBP Rule, Part II, § 19.14(T).

Concerning retiring employees, the judicial policies permit employees to be compensated for unused PTO at the employee's full hourly rate of pay and provide compensation for unused leave based on time employed in the judiciary, up to a maximum of eight hundred hours. *See* NMJBP Rule, Part I, § 5.14(U); NMJBP Rule, Part II, § 19.14(U). Retiring employees are compensated for *all* unused PTO up to the service-based hourly caps, rather than receiving a payout for only leave in excess of six hundred hours as in Section 10-7-11.

Because the judiciary's PTO policy permits greater payouts than are authorized by statute, the payout structure established by the judiciary's PTO policy conflicts with Sections 10-7-10 and -11. These statutes reflect a legislative policy choice to restrict payouts to state employees for unused sick leave and a limitation on the use of public funds for payouts.

We also find no support for the position that the statutes addressing sick leave payouts can be disregarded merely because the leave offered by the judiciary is not called "sick leave." Instead, the sick leave payout restrictions are implicated here because use for medical reasons is an

expressly designated purpose of PTO and the Legislature has expressed an intent to limit payouts for such leave. Sick leave is not defined in Sections 10-7-10 or -11. Elsewhere in Chapter 10, however, sick leave is defined as "a leave of absence from employment for which a state agency or public school pays an eligible employee due to illness or injury or to receive care from a licensed or certified health professional." NMSA 1978, § 10-16H-2(C) (2019). The Legislature has also described sick leave as leave that may be used for illness, injury, or medical care. *See* NMSA 1978, § 50-17-3(C) (2021). These definitions suggest that the Legislature considered "sick leave" within the meaning of Sections 10-7-10 and -11 to mean leave that can be taken for illness or other medical purposes.

Because one of the expressly designated uses of PTO is absence from work for medical reasons, PTO may reasonably be categorized as sick leave under Sections 10-7-10 and -11. Additional characteristics of PTO, such as including leave previously designated as sick leave, designating some PTO hours as "sick leave" in the SHARE system, and converting up to six hundred hours of sick leave earned from employment in another branch of government to PTO for employees transferring into the judiciary, *see* NMJBP Rule, Part I, § 5.14; NMJBP Rule, Part II, § 19.14, provide additional support for the conclusion that PTO is bound by New Mexico law governing sick leave. PTO thus implicates the restrictions imposed by Sections 10-7-10 and -11. Further, even without regard to whether the PTO qualifies as sick leave under the statutes, Sections 10-7-10 and -11 indicate a legislative intent to limit employee buy back and retirement payouts to the circumstances and manner described in the statutes.

The "guiding principle" of statutory interpretation "is to give effect to the intent of the Legislature." *Grisham v. Romero*, 2021-NMSC-009, ¶ 23. Based on the foregoing discussion, we believe the Legislature's intent in enacting Sections 10-7-10 and -11 was to impose limitations on using public funds to pay state employees for unused leave that has been designated for use when such employees are sick or seek medical care. Because PTO may be used for medical reasons, the distinct, more expansive payouts permitted under the judiciary's PTO policies frustrate the intent of the Legislature. The Legislature's intent may not be circumvented merely by using a different designation; such interpretation would render Sections 10-7-10 and -11 meaningless in the context of leave within the judiciary. *Cf. City of Deming v. Deming Firefighters Loc. 4521*, 2007-NMCA-069, ¶ 23, 141 N.M. 686 ("We . . . do not give effect to legislative intent by reading a statute in a way that would render it meaningless.").

Our analysis is buttressed by consideration of the significant financial impact presented by the judiciary's PTO policies. Without question, the payouts permitted under the new policies will have a significant financial impact. As explained above, judicial employees are compensated for unused PTO in higher amounts and at a greater rate than what is permitted under Sections 10-7-10 and -11. As well, there are no limits to the number of PTO hours a judicial employee may carry forward annually or accrue overall. *See* NMJBP Rule, Part I, § 5.14(A), (F); NMJBP Rule, Part II, § 19.14(A), (F). The judicial branch has over two thousand employees throughout the state, and a PTO payout to even a single judicial employee can amount to a significant expenditure of public funds.[1]

[1] For example, pursuant to Section 10-7-11, a retiring employee who makes $30 an hour and has 800 hours of unused sick leave would be eligible to receive compensation for 200 of those hours,

As the branch possessing the "exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government[,]" *Schwartz*, 1995-NMSC-080, ¶ 14 (internal quotation marks and citations omitted), "[t]he Legislature . . . is certainly concerned with matters which would have a significant financial impact upon or require significant future appropriations of State funds," *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 1, 86 N.M. 359; *see also El Castillo Ret. Residences v. Martinez*, 2017-NMSC-026, ¶ 25 (explaining that "statute[s] must be interpreted and applied in harmony with constitutionally imposed limitations").

Indeed, the Legislature recognizes that some personnel policies may have significant financial impacts and require legislative approval. *See* NMSA 1978, § 10-9-7 (1984) (prohibiting the state personnel office from "promulgating or filing . . . rules, policies or plans which have significant financial impact"). As well, New Mexico courts have been reluctant to interpret legislative provisions in a manner that contradicts legislatively-imposed financial restrictions. *See, e.g., Butkus v. Pub. Emps. Ret. Ass'n*, 2024-NMCA-041, ¶ 19 (declining to interpret a statute in a manner that would significantly increase retirement benefits because it was contrary to the Legislature's intent), *cert. denied* (S-1-SC-40288, Apr. 22, 2024); *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 34, 122 N.M. 401 (discussing a legislative limit on attorney fees in workers' compensation cases and explaining that, "under the limitation imposed by the state constitutional separation of powers, courts may not inquire into the wisdom of statutory policy or substitute their views regarding the design of workers' compensation legislation").

The corollary to this significant financial impact for a single branch of government is that the judiciary's PTO policy creates vast inequity in state employee benefits. By having a leave system that differs from the annual leave and sick leave structure used by all other state agencies and by allowing for potentially far greater payouts than those of other agencies, the PTO policy essentially establishes two classes of state employees. Judicial employees have greater flexibility in their leave and potentially greater compensation for leave benefits than other state employees. Sections 10-7-10 and -11, however, apply broadly to an "employee of the state." These provisions thus establish a uniform payout scheme that signals a legislative intent to adopt a fair system of leave payouts by treating all state employees equally. *See also* NMSA 1978, § 6-5-2.1(F) (2003) (instructing FCD to "prescribe, develop, operate and maintain a uniform statewide accounting system network"); NMSA 1978, § 6-5-1(H) (2003) (defining "statewide accounting system network" to mean the "central accounting system, the central payroll system, the central treasury system and all other financial accounting systems operated by state agencies as one system through manual or automated interfaces"). The PTO policy injects inequity into leave payouts and thereby frustrates this legislative intent.

Although "the absolute separation of governmental functions is neither desirable nor realistic[,]" one branch of government may not "unduly interfere[] with or encroach[] on the authority or within the province of a coordinate branch of government." *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031, ¶ 14 (internal quotation marks and citations omitted). For the reasons addressed

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at half their hourly rate, for a payout of $3,000. Under the judiciary's policies, a retiring employee who has 20 years of service, makes $30 an hour, and has 800 hours of unused PTO would receive compensation for all of those hours, at their full hourly rate, for a payout of $24,000.

herein, it is our opinion that the judiciary's PTO policies, and particularly the payouts authorized under the policies, cannot be reconciled with the public policy and explicit payout restrictions imposed by the Legislature in Sections 10-7-10 and -11. *Cf. Taylor*, 1998-NMSC-015, ¶ 48 ("The New Mexico Constitution requires that the Legislature first have the opportunity to debate and vote on core policy changes[.]"); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 33, 120 N.M. 562 (explaining that the actions of another branch of government cannot "conflict with or infringe upon what is the essence of legislative authority—the making of law"). Absent a statutory change, we are of the opinion that New Mexico law precludes implementation of the judiciary's PTO policies as currently written.

Beyond potential legal obstacles, DFA has identified numerous administrative, financial, and regulatory complications arising from implementation of the judiciary's PTO policies. Such programmatic concerns arising from DFA's implementation of the judiciary's new rules implicate policy matters that are beyond the scope of this opinion. *See* NMSA 1978, § 8-5-2(D) (1975) (explaining that attorney general opinions address questions of law).

Conclusion

It is the opinion of the New Mexico Department of Justice that DFA may not permissibly implement the judiciary's PTO policies under existing law.

You have requested an opinion on this question presented to our office. The request and the opinion provided herein will be published on our website and made available to the general public. Please note that this opinion is a public document and is not protected by the attorney-client privilege.

RAÚL TORREZ
ATTORNEY GENERAL

/s/ James Grayson
James Grayson
Chief Deputy Attorney General

FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
8/24/2021 1:32 PM
CLERK OF THE COURT
Gena Lopez

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

JOHN FRANCHINI,

Petitioner,

v. D-202-CV-2020-05552

NM OFFICE OF SUPERINTENDENT OF INSURANCE, NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION.

Respondents.

ORDER ON ALTRNATIVE WRIT OF MANDUMUS; AND ORDER DENYING MOTION TO SET ASIDE ALTERNATIVE WRIT OF MANDAMUS

THIS MATTER came before the Court on the Alternative Writ of Mandumus (filed March 12, 2021) and on Respondents' Motion to Set Aside Alternative Writ of Mandamus and Response thereto, having considered these pleadings and argument presented at the hearing of August 4, 2021, and being otherwise fully apprised of the premises, the Court hereby FINDS and CONCLUDES, as follows:

1. The Court has jurisdiction over the parties and the subject matter of this proceeding.
2. Petitioner filed a Petition for Writ of Mandamus on October 2, 2020, which named the New Mexico Office of Superintendent of Insurance as a Respondent ("OSI"); Petition certifies that the Verified Petition for Alternative Writ of Mandamus was served on OSI and the N.M. Attorney General's Office by U.S. Mail on October 2, 2020, which is consistent with NMRA Rule 1-004 (E)(3) (mail service) and 1-004 (H) (political subdivision of State).
3. On December 8, 2020, an Amended Petition was filed naming the N.M. Department of Finance and Administration ("DFA") as an additional party; this Amended Petition was

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served electronically on Respondents' counsel through the District Court's Odyssey File & Serve system and by again mailing a copy by U.S. mail and/or electronic mail to Scott Hatcher, The Hatcher Law Group, P.A., counsel for Respondents.

4. The Hatcher Law Group, P.A., entered its appearance on behalf of Respondents on December 9, 2020. Entry of Appearance filed Dec. 9, 2020.
5. The hearing on Verified Petition for Alternative Writ of Mandamus was set to be heard on December 14, 2020, but after Respondent's counsel entry of appearance on behalf of OSI and DFA, the parties agreed to vacate the December 10, 2020, hearing.
6. The proposed order vacating the hearing was agreed to by the parties; it provided that the hearing on the case should be reset as soon as practicable after January 14, 2021; however, the order did not modify any requirement for the Respondent to timely answer the Petition.
7. After some delay without answering the Petition, the Court proceeded to issue the Alternative Writ of Mandamus on March 12, 2021; this Writ was served on the Respondents through the District Court's Odyssey File & Serve system.
8. The Alternative Writ of Mandamus required Respondents to "Comply with the mandatory non-discretionary duty to pay Petitioner wages and benefits to which he was entitled but not paid…", and pay $59,748.29, plus interest, etc., "Or, in the alternative, Respondents show cause within 20 (twenty) days of the entry of this Alternative Writ of Mandamus as to why you should not do so."
9. Respondents did not file a timely answer or show cause to the Alternative Writ of Mandamus within 20 days, as ordered. *See* NMSA 44-2-9 ("On the return day of the alternative writ, or such further day as the court allows, the party on whom the writ is

served may show cause by answer; made in the same manner as an answer to a complaint in a civil action.").

10. Instead of answering, the parties agreed to an Order Extending Time for Respondents to Show Cause in Response to the Court's Alternative Writ of Mandamus, filed March 30, 2021; this Order extended the time for filing a statement to show cause to May 3, 2021.
11. On May 3, 2021, defendants filed a "Motion to Set Aside" the Alternative Writ of Mandamus, instead of an answer to the alternative writ under Section 44-2-9. *See* NMSA 44-2-11 ("No other pleading or written allegation is allowed other than the writ and answer....").
12. The defendant must file an "answer" to a complaint in order to avoid defaulting on the claim, or as Black's Law Dictionary explains it: "A pleading by which defendant endeavors to resist the plaintiff's demand by an allegation of facts, either denying allegations of plaintiff's complaint or confessing them and alleging new matter in avoidance, which defendant alleges should prevent recovery on the facts alleged by plaintiff." BLACK'S LAW DICTIONARY, at 84 (Fifth Edition 1979).
13. The difficulty with filing a Motion to Set Aside is that it is not a pleading that is authorized to be filed under Writ of Mandamus process; normally, motions contemplate the allowance of responses and relies under the N.M. Rules of Civil Procedure.
14. Answers are normally concise statements in which the defendant admits or denies particular allegations of the petition, and then states affirmative defenses; motions, on the other hand, may or may not meet the substance of the complaint in a manner that allows the court to determine which facts are admitted and which are denied.

15. Such pleadings are not allowed under Section 44-2-11; they unduly complicate writ practice, waste judicial resources, and are subject to being entirely stricken from the record.

16. Nevertheless, in the interest of justice, the Court will endeavor to review the substance of the Motion to Set Aside the Writ, response and reply, and consider whether they suffice to inform the court as to the Respondents' answer to the petitioner's allegations.

I. RESPONDENTS HAD A MANDATORY NON-DISCRETIONARY DUTY TO PAY WAGES AND BENEFITS PER SECTION 59A-2-2 (D)

17. With regard to the Writ's language, the responsive pleading (i.e., the motion to set aside Writ) does not appear to controvert that Petitioner is an individual and a resident of Bernalillo County, New Mexico, and that he served as New Mexico's Superintendent of Insurance from approximately 2010 to 2019. *See* Writ of Mandamus, ¶1.

18. Neither does OSI appear to dispute that OSI is a constitutionally created agency of the State of New Mexico, N.M. Const., art. XI, §20, and the DFA provides fiscal oversight to New Mexico agencies; Respondents also do not dispute that Scott Hatcher entered his appearance on their behalf as counsel on December 9, 2020. *See* Writ of Mandamus, ¶2.

19. The Motion to Set Aside the Writ disputes that at all times relevant to the petition, OSI employed Petitioner to serve as the Superintendent of Insurance, and that DFA administered Petitioner's annual compensation. *See* Writ of Mandamus, ¶3.

20. Respondents dispute whether "Respondent had a mandatory non-discretionary duty to pay Petitioner the wages and benefits to which he was statutorily entitled pursuant to NMSA 1978, Section 59A-2-2(D)." *See* Writ of Mandamus, ¶4.

21. Section 59A-2-2 (D) provides that "The superintendent's annual compensation shall be subject to legislative appropriation and established by the insurance nominating committee at the start of each term and annually thereafter. The superintendent's annual compensation

shall be no lower than that of the lowest-compensated cabinet secretary and no higher than that of the highest-compensated cabinet secretary."

22. Section 59A-2-2 (D) is mandatory in its terms, using the word "shall" in each of its two sentences. Although the compensation is subject to legislative appropriation, the insurance nominating committee is empowered to "establish" the Superintendent's annual compensation; no language is contained in this phrase that grants DFA or the Governor any discretion to set the annual compensation, as argued by Respondents in this case.

23. Section 10-9-5 (A), NMRA 1978, gives DFA a role in developing "an exempt salaries plan for the governor's approval. The plan shall specify salary ranges for the following public employee positions of the executive branch of government: ... (3) heads of agencies or departments appointed by the respective boards and commissions of the agencies...."

24. The fact that DFA is authorized to establish "an exempt salaries plan" for "public employee positions of the executive branch of government" does not necessarily mean that DFA and the Governor have complete discretion to set the salary of a separate, independently established officer, i.e., the Superintendent of Insurance, who receives his authority under the N.M. Constitution and whose compensation is specifically addressed under Section 59A-2-2 (D). *See* N.M. Const., art. XI, §20.

25. The Superintendent of Insurance does not come within the discretion of the Executive Branch to such an extent that the office is subject to salary plan established under Section 10-9-5 (A).

26. The N.M. Constitution establishes the Superintendent of Insurance's position (*see* N.M. Const., art. XI, §20), and Section 59A-2-2 (D) specifically addresses the parameters of the

Superintendent's compensation; neither provision grants or implies any kind of executive control over the Superintendent's compensation, as Respondents assert.

27. The obligation of DFA and the Governor to make a general salary plan for Executive Branch employees does not mean that the Superintendent of Insurance is necessarily subject to that plan where a separate, more specific compensation scheme has been legislatively established for this particular office. *See* NMSA 1978, §59A-2-2.

II. DFA HAS LIMITED ROLE IN PAYING THE SUPERINTENDENT OF INSURANCE COMPENSATION, SUBJECT TO SECTION 59A-2-2 (D)

28. Under Section 59A-2-2 (D) the DFA/Governor have an administrative obligation to pay compensation to the Superintendent of Insurance, but the question arises whether the office is under the Governor's general discretion with regard to compensation; it is not.

29. The Superintendent of Insurance has an unusual, hybrid governmental position under our constitutional scheme because the office is not, strictly speaking, a part of the executive branch such as might subject it to the Governor's and DFA discretionary control.

30. The Governor can neither appoint, remove, nor set the compensation rate for the Superintendent of Insurance.

31. The Superintendent of Insurance is appointed by the insurance nominating committee, which determines his or her compensation; and only the nominating committee may remove the Superintendent. NMSA 1978, §59A-2-2 (A through E); *see* §59A-2-2.1 (Insurance nominating committee, etc.).

32. The Governor/DFA's role under law is to perform the ministerial act of verifying that the Superintendent's compensation: 1) is subject to legislative appropriation; 2) the amount is "established by the insurance nominating committee at the start of each term and annually

thereafter;" and 3) that the compensation falls within the high and low of wages paid to executive level secretaries.

33. In this case, we may dispense with the first, legislative appropriation condition because Respondents do not suggest the insufficiency of legislative appropriation for the years in question to pay the statutorily required compensation; as a result, legislative appropriate is not an issue here.

34. Respondents rather assert they have complete discretion to set the Superintendent's compensation, but this view finds no support in the statutory language.

35. The statutory scheme contemplates that DFA is limited to confirming:

    a. FIRST, the existence of a legislative appropriation to pay the Superintendent;

    b. SECOND, that the rate is established by the insurance nominating committee; and

    c. THIRD, that the Superintendent of Insurance's compensation falls within the maximum and minimum amounts that should be paid: "The superintendent's annual compensation shall be no lower than that of the lowest-compensated cabinet secretary and no higher than that of the highest-compensated cabinet secretary." NMSA 1978, §59A-2-2 (D).

36. As applied in this case, this statutory scheme gives DFA the ministerial task of verifying the foregoing limitations, and then paying the required compensation.

37. Based on these limitations, the parties shall, within 20 days from entry of this order, present evidence and argument as to the relevant cabinet secretaries' compensation in the Executive Branch during the relevant years, so that the Court may determine the high and low of the Superintendent of Insurance's compensation ("high/low parameter").

38. In providing this argument and/or affidavit information to the Court, the parties may also submit an explanation as to how these figures bear on the Superintendent of Insurance's compensation in this case and the amount of any deficiencies that may be due.

39. The nominating committee's discretion to set the rate of compensation is then subject to the forgoing broad limitation; if the rate set by the insurance nominating committee comes within the foregoing high/low parameter, then Respondents shall pay Petitioner the appropriate compensation set by the nominating committee.

40. If the compensation rate set by the nominating committee is more or less than the high/low parameters, then the Superintendent of Insurance's compensation shall be adjusted to fall within the high/low parameters.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the present Alternative Writ of Mandamus filed herein on March 12, 2021, finding that Respondent had a mandatory non-discretionary duty to pay Petitioner the wages and benefits to which he was statutorily entitled pursuant to NMSA 1978, Section 59A-2-2(D), shall be SUSTAINED, except to the extent modified herein;

PROVIDED THAT, within 20 days from entry of this order, the parties shall present evidence and argument as to the salaries of all cabinet secretaries in the Executive Branch and the amount of compensation set by the nominating committee in each year during the relevant period, so that the Court may confirm the high/low parameter for the Superintendent's compensation in each year, and then calculate any deficiency that may be owed to Petitioner for these years.

VICTOR S. LOPEZ, JUDGE
Second Judicial District, Div. XXVII

LEGISLATIVE COUNCIL SERVICE
LEAVE POLICY[1]

ANNUAL LEAVE[2]

- Full- and part-time year-round employees shall accrue annual leave based on an employee's total years of service, including prior service in any branch of New Mexico state government, based on contribution to the Public Employees Retirement Association, but not including service with institutions of higher education, public school districts, charter schools or local governments.

- Annual leave shall accrue from the first day of employment at the following rates:

Accruals		
Years of Service	Hours per month	Days per year
Less than 11	12	18
Between 11 and 15	14	21
More than 15	16	24

- Annual leave must be accrued before it is used unless approved by the Legislative Council Service (LCS) director.

- Annual leave may be used in lieu of sick leave.

- Annual leave may be taken in two-hour, half-day or full-day increments, but any unused time during those increments cannot be saved for later use.

- Approval of requests for annual leave is subject to the needs and appropriate coverage of departments, as determined by an employee's supervisor.

- In a supervisor's absence, an assistant director, a human resources (HR) supervisor or the director can approve requested leave.

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[1] LCS policies are applicable to the offices of the House and Senate chief clerks pursuant to Legislative Council Policy No. 14 and to leadership staff pursuant to Legislative Council Policy No. 21. This LCS Leave Policy is effective April 1, 2023.

[2] The leave system uses the term "vacation", but for purposes of this policy, "annual leave" means "vacation".

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- Annual leave should be requested by an employee and approval should be obtained in advance. When not possible, the employee is responsible for notifying the employee's immediate supervisor and another supervisor or the front desk by 9:00 a.m. on the day of the absence. The annual leave request must be recorded in the leave system as soon as possible.

- Annual leave requests for the 10 days prior to or any days during a legislative session must be approved by the immediate supervisor and director.

- Annual leave of an employee transferring from another legislative, executive or judicial agency may be accepted, but the amount of accrued annual or sick leave accepted is at the discretion of the director based on recommendations of the LCS chief financial officer and HR specialist. The amount of leave transferred to and accepted by another agency is at the discretion of the other agency.

- The estate of an employee who dies while employed by the LCS will be compensated at no more than 480 hours (60 days) of the employee's accrued annual leave at the hourly rate at the time of death.

- Annual leave at separation, i.e., termination, transfer or resignation, will be paid at no more than 240 hours (30 days) at the hourly rate at time of separation. Up to 480 hours (60 days) may be paid at retirement at the full hourly rate at time of separation.

- All accrued annual leave may be carried forward after the last pay period of each calendar year. However, payout at separation is limited to 240 hours (30 days) and at retirement to 480 hours (60 days).

- As of April 1, 2023, all staff are subject to the payout maximums at separation. For staff with an annual leave balance in excess of 360 hours (45 days) as of March 31, 2023, those staff will be paid for those hours not to exceed the balance as of that date, to be paid out at the amounts in the table below until that excess balance is exhausted. If retirement is sought before eligible balances are paid, that amount may be paid out in excess of the below increments. Qualifying payouts are subject to budget availability, and the amount paid on the first full pay period in June in any fiscal year may be reduced if funding is unavailable, with the exception of retirement.[3]

- Leave in lieu of or in addition to payout is subject to the approval of an employee's supervisor and the director and is limited to 80 hours (10 days) if transferring to another state agency, 160 hours (20 days) if separating from the LCS and 240 hours (30 days) upon retirement. No additional annual or sick leave will be awarded or accrued while on leave in lieu of payout.

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[3] Each year during the month of May, the assistant director for administration or the HR specialist will consult with each individual that has an annual leave balance in excess of 360 hours (45 days) as of March 31, 2023 to advise of payout requirements.

- Annual payout by fiscal year for qualifying balances:

Annual Leave Balances in Excess of 360 Hours at March 31, 2023		
Years of Service at March 31, 2023	Hours per fiscal year	Days per fiscal year
Less than 11	120	15
Between 11 and 15	240	30
More than 15	360	45

DONATION OF ANNUAL LEAVE

- An employee may request annual leave donations from LCS employees for the employee's use; provided that the requesting employee provides a document certified by a health care provider that describes the nature, severity and anticipated duration of an emergency medical condition of the employee and includes a statement that the employee is unable to work all or a portion of the employee's work hours.[4] Supporting documentation for leave donation requests shall be kept confidential to the extent permitted by state or federal law.

- Employees may donate annual leave to another employee experiencing a medical emergency if the employees are in the same agency or, with the approval of the respective directors or chief clerks, in other agencies within the legislative branch.

- Employees may donate annual leave to another employee up to an amount that ensures that the donating employee retains at least 10 full days of the donating employee's accrued annual leave.

- The LCS shall transfer donated leave to the leave account of the requesting employee by converting the dollar value of the donor's leave based on the donor's hourly rate of base pay to hours of leave based on the recipient's hourly rate of base pay.

- The recipient of donated leave shall not use such leave until all accrued annual, sick, compensatory and personal leave has been exhausted.

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[4] The LCS shall maintain the following documentation:

a. the name, position, title and hourly rate of base pay of the proposed leave recipient;

b. a licensed health care provider's description of the nature, severity and anticipated duration of the emergency involved, which has been provided by the recipient employee or legally authorized representative, and a statement that the recipient is unable to work all or a portion of the recipient employee's work hours; and

c. any other information that the employing agency may reasonably require.

- Donated leave shall revert to the employee who donated the leave on a prorated basis when the medical emergency of the recipient ends or the employee separates from the agency.

SICK LEAVE

- Full-time employees earn sick leave at the rate of eight hours (or one day) per month of employment. Part-time employees earn sick leave at a prorated rate.

- Sick leave may be used for personal health care purposes or to care for an immediate family member (spouse, child, parents or domestic partner) who is sick. Sick leave may also be used to attend funeral or memorial services for immediate family members. The director may authorize the use of sick leave for the death, medical treatment or illness of other members of the employee's family.

- Sick leave must be accrued before it is used unless otherwise approved by the director.

- Sick leave may be taken in two-hour, half-day or full-day increments, but any unused time during those increments cannot be saved for later use.

- Whenever possible, sick leave should be requested by an employee and approved in advance. When not possible, an employee is responsible for notifying the employee's immediate supervisor and another supervisor or the front desk by 9:00 a.m. on the day of the absence. The sick leave request must be recorded in the leave system as soon as possible. Sick leave may not be used in lieu of annual leave.

- There is no limit to the amount of sick leave that a staff member may accrue.

- Employees may receive payment for accumulated sick leave in excess of certain amounts pursuant to Sections **10-7-10** and **10-7-11** NMSA 1978.

PERSONAL LEAVE

- Personal leave will be awarded for all full-time employees at the rate of two days per calendar year. Personal days are prorated for part-time employees. Personal leave must be used within the calendar year earned and does not carry over from one calendar year to the next.

- Personal leave must be requested by an employee and approved in advance by the employee's supervisor or the director and may only be taken in one-day increments.

- Personal leave may not be transferred to another employee.

- Unused personal leave shall not be paid to an employee upon separation or retirement.

MARTIN LUTHER KING, JR. DAY

- The State Capitol is open every year on Martin Luther King, Jr. Day, a state and federal holiday. Staff must work that day because it is usually the day before session. Staff may take the day off any time after session but no later than December 31 of the same year, in a one-day increment.

ADMINISTRATIVE LEAVE

- Administrative leave may be given at the discretion of the director.

COMPENSATORY (COMP) LEAVE

- Comp leave is provided at the discretion of the director. An employee's supervisor may authorize comp leave for interim committee travel on Sundays or holidays.

- Similar to annual leave, comp leave:
  - must be accrued before it is used unless approved by the director;
  - may be used in lieu of sick leave;
  - may be taken in two-hour, half-day or full-day increments;
  - is subject to the needs and appropriate coverage of a department as determined by an employee's supervisor; and
  - may be approved by an assistant director, the HR specialist or the director in the supervisor's absence.

- Comp leave does not carry over to the next calendar year. An exception may be made for comp leave awarded late in the year due to a special session.

- Unused comp leave shall not be paid to an employee on termination of employment.

LEAVE WITHOUT PAY

- Leave without pay may be granted at the discretion of the director. The director may require all applicable accrued leave to be used before leave without pay is granted.

- An employee shall not accrue annual or sick leave while on leave without pay.

ABSENT WITHOUT LEAVE

- An employee who fails to appear for work without authorized leave, or appears at work in violation of other HR policies, shall be considered to be absent without leave.

- An employee shall not be paid for any period of absence without leave and shall not accrue annual or sick leave.

FAMILY AND MEDICAL LEAVE[5]

- In addition to other leave provided, eligible employees are entitled to leave in accordance with the federal Family and Medical Leave Act of 1993 (FMLA).

- An employee who has been employed for at least 12 months (which need not be consecutive) and who has worked, as defined by the federal Fair Labor Standards Act of 1938, at least 1,250 hours during the 12-month period immediately preceding the start of FMLA leave is an eligible employee. In addition, employment in the legislative branch, exempt service or judicial branch shall count as employed for purposes of this policy.

- An eligible employee is entitled to a total of 12 weeks of unpaid FMLA leave in a 12-month period for the birth and care of a newborn child of the employee within one year of the birth; the placement with the employee of a child for adoption or foster care and the care of the newly placed child within one year of placement[6]; the care of the employee's child, parent, spouse or domestic partner who has a serious health condition; and the employee's own serious health condition that makes the employee unable to perform the essential functions of the employee's job; or any other qualifying exigency arising out of the fact that the spouse, domestic partner, son, daughter or parent of the employee is on covered active duty or has been notified of an impending call or order to covered active-duty status, as defined in the FMLA regulations, including issues resulting from short-notice deployment; military events and related activities; child care and school activities for the military member's child; financial and legal arrangements to address the military member's absence while on covered active duty; counseling; spending time with the military member while on short-term leave; post-deployment activities; care of the military member's parent who is incapable of self-care; and other activities in accordance with the FMLA regulations. The 12-month period is calculated forward from the date an employee's first FMLA leave begins.

- An eligible employee who is the spouse, domestic partner, son, daughter, parent or next of kin of a covered service member with a serious illness or injury sustained in the line of duty on active duty is entitled to up to 26 weeks of unpaid FMLA leave in a single 12-month period to care for the service member. This military caregiver leave is available during a single 12-month period during which an eligible employee is entitled to a combined total of 26 weeks of all types of FMLA leave. The 12-month period is calculated forward from the date an employee's first FMLA leave begins.

- An employee may elect, or an agency may require an employee, to substitute any of the employee's accrued annual leave, accrued sick leave, personal leave day, accrued comp time or donated leave for any part of unpaid FMLA leave. If a paid holiday occurs within a week of FMLA leave, the holiday is counted toward the FMLA entitlement. However, if an

[5] *See also* Parental Leave Policy in Appendix A: Parental Leave.

[6] *See* Appendix A: Parental Leave.

employee is using FMLA in increments of less than one week, the holiday does not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

- Employees shall accrue annual and sick leave while on unpaid FMLA leave.

- The LCS shall post the required FMLA notices, maintain the required employee records and implement agency policies in accordance with the FMLA. All medical records and correspondence relating to employees and/or their families shall be considered confidential.

- Disputes over the administration of this rule shall be forwarded to the director for resolution.

- As a condition for restoring an employee whose own serious health condition required FMLA leave, an agency may require the employee to provide certification from the employee's health care provider that the employee is able to resume work. The fitness-for-duty certification may only pertain to the specific health condition that required FMLA leave.

VOTING LEAVE

- An employee may use up to two hours to vote between the opening and closing of the voting polls; provided that this shall not apply if the employee's work day begins more than two hours after the opening of the polls or if the work day ends more than three hours before the closing of the polls. See Section **1-12-42** NMSA 1978.

JURY DUTY

- Employees shall be entitled to leave with pay for serving on a grand or petit jury during regularly scheduled work hours. Fees received by a juror, excluding reimbursement for travel, shall be remitted to LCS.

ADDITIONAL INFORMATION

- Documentation for use of sick leave, FMLA leave or parental leave may be required.

- Abuse or violation of the leave policy is subject to disciplinary action.

- Because of the nature of the work of the LCS, employees are asked to provide at least 14 days' notice for resignation and at least 30 days' notice for retirement. The respective number of days' notice must take into account the employee's desired last day in the office. This is not only helpful but also necessary for payroll, accounting, planning, replacement, transition, exit interview and work load purposes.

APPENDIX A

PARENTAL LEAVE

PARENTAL LEAVE FOR LEGISLATIVE EMPLOYEES (As adopted by the New Mexico Legislative Council on October 11, 2022)

1. It shall be the policy of each legislative agency to provide the equivalent of sixty (60) workdays or 480 hours of parental leave per birth or adoption event per twelve-month period that begins on the date of the birth, or thirty (30) workdays or 240 hours for non-respite foster care placement of a child per twelve-month period that begins on the date of the child placement. If the birth, adoption or non-respite foster care placement involves multiple-child births, adoptions or placements, the twelve-month period begins with the birth, adoption or placement of the first child. Additionally, an employee is eligible for sixty (60) workdays or 480 hours of parental leave for a stepchild if the stepchild is a minor child, the employee is the stepchild's stepparent and the stepchild lives in the employee's household at least fifty percent of the time in a calendar year or if the employee is a grandparent who is raising a grandchild that is a minor child. The purpose of this policy will be to promote activities related to the bonding, care, and well-being of newborn(s) and newly adopted or newly placed foster child(ren). Paid parental leave shall be paid based upon the eligible employee's base salary (excluding temporary increases of pay, such as temporary promotion increases, temporary recruitment differentials, temporary retention differentials, or temporary salary increases) determined by the employee's regularly scheduled work hours.

2. An eligible employee, as used in the agency's policy, means an employee who has worked for the legislative agency as a regular full-time employee for 12 consecutive months prior to the start of paid parental leave. Paid parental leave may not be donated and any such leave not utilized within the twelve-month period explained below shall be forfeited. Domestic partners are eligible for paid parental leave when children join their household via birth, adoption or non-respite foster care placement of a child. If both parents, including a domestic partner of a parent, are eligible employees, each parent or partner is eligible to receive paid parental leave under this policy.

3. Eligible employees may take paid parental leave only during the first twelve (12) months following the birth or adoption of a child. Eligible Employees may utilize up to sixty (60) workdays or 480 hours of parental leave per birth or adoption event per twelve-month period that begins on the date of the birth or adoption, or thirty (30) workdays or 240 hours for non-respite foster care placement of a child per twelve-month period that begins on the date of the child placement. Employees utilizing paid parental leave shall continue to accrue vacation and sick leave in accordance with agency policy during the period of parental leave. If an official holiday occurs during the eligible employee's paid parental leave, the eligible employee will receive holiday pay in lieu of paid parental leave, provided the eligible employee is in pay status the day before and the day after the official holiday.

4. Paid parental leave shall run concurrently with leave under the federal Family Medical Leave Act (FMLA) as applicable.

5. Eligible employees cannot receive short-term disability benefits and paid parental leave benefits at the same time.

6. Eligible employees shall notify their employer at least thirty (30) days in advance of their intention to use paid parental leave so that the employer may secure backfill coverage as necessary. When thirty (30) days' notice is not possible, the employee must provide this notice as soon as practicable.

7. Eligible employees may make arrangements with their supervisor for a flexible schedule within the twelve-month period following the birth, adoption or a non-respite foster care placement of a child.

8. This policy shall be reviewed by the legislative agency at least every two years following the effective date.

Legislative Council Service
Leave Policy

This is to acknowledge that I have received a copy of the Leave Policy effective May 1, 2024.

_____
Print name

_____ _____
Signature Date