

**STATE OF NEW MEXICO
SXITH JUDICIAL DISTRICT COURT
COUNTY OF GRANT**

STATE OF NEW MEXICO ex rel.
RAÚL TORREZ, ATTORNEY GENERAL,

Plaintiff,

v.

No. _____

WESTERN NEW MEXICO UNIVERSITY BOARD OF REGENTS,
DR. MARY E. HOTVEDT, in her official capacity,
DR. LYNDON HAVILAND, in her official capacity,
TRENT JONES, in his official capacity,
DR. DANIEL H. LOPEZ, in his official capacity, and
DAL MOELLENBERG, in his official capacity,

Defendants.

**EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
AND APPLICATION FOR PRELIMINARY INJUNCTION**

The State of New Mexico, by and through Attorney General Raúl Torrez, and Pursuant to Rule 1-066 NMRA, files this emergency motion for a temporary restraining order and a preliminary injunction to prevent the Western New Mexico University (“Western” or the “University”) Board of Regents (“Board”) from distributing an \$1,909,788.00 severance payment (“Severance Payment”) of public funds to the departing President, Dr. Joseph Shepard, in violation of the Board’s fiduciary duty to the University and in violation of public policy, as well as occurring before the completion and issuance of the pending examination and audit, including one sought by Western itself shortly before agreeing to the Severance Payment. The Severance

Payment is currently required “by January 15, 2025” and so the State also requests an emergency TRO hearing prior to January 15, 2025, or an ex parte Order until a hearing can be set.

The Board, contrary to its fiduciary duty to the University, pledged public funds for a Severance Payment that is not supported by an employment contract, is not accompanied by legitimate consideration to the State, and is unconscionable as a violation of public policy and the public interest. The State seeks to prevent imminent and irreparable harm to the public fisc if the Severance Payment is not enjoined. *See* NMSA 1978, § 8-5-2(B), (J) (1975).

Defendants’ position on this Motion was requested by email to their legal counsel but no response received at the time of filing and so it is deemed opposed.

FACTUAL BACKGROUND

The Board and Dr. Shepard are currently under investigation for financial misconduct, with procurement violations having been documented. The investigation is being conducted on two different tracks. First, the New Mexico Office of the State Auditor (OSA) initiated an examination regarding allegations of improper procurement and travel expenditures by Western officials (“Examination”) and on December 7, 2023, the OSA Director of Special Investigations requested information from Western as part of that examination. *See* **December 7, 2023, letter from Shawn Beck attached as Exhibit 1.**

On December 12, 2023, Kelley Riddle, Western’s Vice President of Business Affairs, sent a letter to OSA indicating that the Board, Dr. Shepard, and the Administration of WNMU were requesting permission to obtain a special audit of all of President Shepard’s procurements and travel expenditures from fiscal year 2012 through fiscal year 2023 with MP Group. *See* **December**

12, 2023, letter from Kelley Riddle, attached as Exhibit 2. The OSA approved the self-directed audit but required WNMU to issue a request for proposal and engage in a bidding process before choosing an independent auditor from a list of auditors by OSA. The detailed, self-directed audit initiated at the request of the Board and Dr. Shepard (Special Audit) is separate and distinct from the limited examination initiated by OSA in response to complaints from the public. This Special Audit is still in the preliminary stages and is an entirely different process from the limited examination initiated by OSA. *See Affidavit of Shawn Beck at paragraph 10, dated January 2, 2025 and attached as Exhibit 3.*

On November 19, 2024, the OSA issued a Press Release with a Letter of Concern sent to the President of the Board of Regents, Dr. Mary Hotvedt. **See OSA Letter of Concern, dated November 29, 2024 and attached as Exhibit 4.** The Letter of Concern previewed and summarized the Examination of the University’s expenditures related to procurement and travel during the period of July 1, 2018, through June 30, 2023. The Letter of Concern explained that the President and Board had consistently failed to comply with established university policies related to travel and procurement expenses, including misuse of a procurement card (P-card) by Dr. Shepard. *Id.*, **at page 2.** The OSA attributed the resulting “waste of public funds and resources entrusted to the university” to the Board’s lack of oversight and management’s non-compliance with policies and procedures. *Id.* However, the final, detailed report of the Examination regarding noncompliance with university policies is also not yet complete or available. **Ex. 3, at paragraph 7.**

At the next Board meeting, on December 12, 2024, a number of public comments expressed alarm about the OSA Letter of Concern.¹ After the issuance of the Letter of Concern and the Dec. 12, 2024, meeting, the Regents called a special meeting for December 20, 2024.² At the special meeting, they announced that a “personnel committee” composed of Regent Lopez and Regent Moellenberg had negotiated a “separation agreement” with the help of WNMU’s counsel and Dr. Shepard’s counsel, John Anderson. The Regents then voted to terminate the existing employment agreement for the President that was entered into on October 1, 2022 (“Employment Agreement”). The Board also voted to approve a new “WNMU Separation and Faculty Appointment Agreement” with Dr. Shepard (“Separation Agreement”). The Separation Agreement included, in part, a new employment contract for Dr. Shepard as a remote but tenured faculty member with the School of Business with a base annual salary of \$200,000.00, an eight-month sabbatical with full pay, and the above referenced \$1,909,788.00 lump sum Severance Payment to be paid by January 15, 2024. ***See Separation and Faculty Appointment Agreement dated December 20, 2024, and attached as Exhibit 5.***

The Board terminated the existing five-year Employment Agreement by “mutual written agreement” pursuant to paragraph 5.1 of the Employment Agreement. **Ex. 5, at page 1.** Prior to terminating the existing Employment Agreement with Dr. Shepard, the Board did not publicly acknowledge, explain, or hold any discussion regarding the variety of other termination options

¹ A recording of the public portion of the December 12, 2024 meeting can be found at the following URL: <https://wnmu.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=93f8ace9-1802-46bd-82ed-b243016f5b4c>

² A recording of the public portion of the December 20, 2024 meeting can be found at the following URL: <https://wnmu.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=b73d10a7-79ad-4a4e-86a4-b24a017fb3e2>

found in the existing Employment Agreement much less explain their reasons for not exercising any of those options or for taking this action with audits pending.

The Employment Agreement covered various methods of employment separation, including resignation, termination for cause, and termination without cause in the best interests of the University. *See* **Employment Agreement for President Joseph Shepard, effective October 1, 2022, and attached as Exhibit 6.** Under Paragraph 5.2, Dr. Shepard could have resigned by providing at least six months' written notice absent a shorter mutually-agreed-upon period; Dr. Shepard in that situation would have been provided the status of emeritus unless good cause were shown. **Ex. 6, at page 4.** Paragraph 5.4 reserved the Board's right to terminate Dr. Shepard's employment for just cause in accordance with the Regent's manual and provided Dr. Shepard thirty days after such a termination to vacate the President's residence. **Ex. 6, at page 5.** In the absence of either resignation or just cause, the contract also contained a clause that was very favorable to Western in that it reserved the right of the Board to terminate the Employment Agreement at its sole discretion "for the best interests of the University." *Id.* In the case of a Board termination without cause under Paragraph 5.4, Dr. Shepard would have been entitled to his *base salary* for a period of one and a half years from the Board's vote (or, if less time, the remainder of the term of his Employment Agreement). *Id.* The existing Employment Agreement provided a base salary of \$365,000.00 plus annual salary increases. On December 20, 2024, the date of the termination of that agreement, Dr. Shepard's base salary was \$398,507.00.

Therefore, the absolute maximum that Western would have been legally obligated to pay Dr. Shepard if the Board terminated his Employment Agreement without cause was approximately

\$597,760.50 - assuming there was no resignation or just cause for termination (both of which would require no severance payment at all). Instead, the Board terminated the Employment Agreement with no explanation and agreed to pay Dr. Shepard more than three times that amount, \$1,909,788.00 of public funds, in exchange for a release of the University and Board from any liability “relating in any way to the Employment Agreement and/or Dr. Shepard’s service as President of the University except as expressly set forth in Section 1.6 below.” The difference between termination without cause in the Employment Agreement and the Separation Agreement was more than \$1.3 million. However, Dr. Shepard was not terminated; he read a letter aloud during the December 20, 2024, Board meeting, expressly stating that he resigned, a form of separation that would have merited no compensation under the Employment Agreement: “Therefore, I have come to the conclusion that the path forward for this university and our community is to remove myself from the equation and resign as president.” **Dr. Shepard Resignation Letter at page 6, attached as Exhibit 7.**

Board Chair Hotvedt announced on December 29, 2024, that the Board would hold a special meeting on January 7, 2025, to explain the contract. Instead, she and another Regent resigned effective January 1, 2025, and Western confirmed to the Albuquerque Journal that the remaining three Regents intend to step down.³ Members of the Board enjoy Constitutional protections that allow removal only in cases of “incompetence, neglect of duty or malfeasance in office” and only after notice and an opportunity to be heard. N.M. Const. Art. XII, § 13(E). The

³ According to https://www.abqjournal.com/news/article_0b706aa4-c703-11ef-899a-c32deaf76f84.html

New Mexico Supreme Court holds exclusive jurisdiction over any proceedings to remove members of a board of regents. *Id.*

INTRODUCTION

The State asks the court to grant a temporary restraining order that immediately and temporarily prohibits the Board from disbursing the \$1,909,788.00 Severance Payment of public funds by Western to Dr. Shepard until a full evidentiary hearing on a preliminary injunction can be held. Under the terms of the Separation Agreement, the Severance Payment is currently required “by January 15, 2025” and so the State also requests an emergency TRO hearing prior to January 15, 2025, or an ex parte Order until a hearing can be set. The limited examination by the OSA of expenditures related to procurement and travel by Western’s Board and management between 2018 and 2023 has already found “[s]everal instances of wasteful spending and improper use of university funds” and a failure by the Board and management to uphold their fiduciary duties to Western. **Ex. 4, at page X.** Further, that examination is of limited scope and not nearly as in-depth as the full forensic audit currently being conducted by an independent auditor at the Board and Dr. Shepard’s request and paid for with public funds appropriated to Western for the benefit of its students and the surrounding communities.

To be clear, the State is not asking the court to substitute the court’s judgment of the best interests of Western for that of Western’s fiduciaries. The State is also not asking the court to make any conclusive findings regarding waste or abuse of public funds. The State merely asks the court to recognize that evidence already indicates the existence of breaches of fiduciary duties by the Board that will likely lead to the setting aside of the entire Separation Agreement or at least the

Severance Payment. The Separation Agreement or Severance Payment clause may also be found either voidable or unenforceable due to lack of consideration, unconscionable terms, a lack of lawful purpose, against public policy, and violation of the anti-donation clause of the New Mexico Constitution.

The narrowly tailored equitable relief requested will protect the public from making the exorbitant payment from the Separation Agreement – the \$1,909,788.00 Severance Payment – before the conclusion of a complete investigation into waste or abuse of public funds. Absent Court intervention, the State will likely suffer the concrete harm of the waste of almost \$2 million dollars in public funds on top of the waste that has already been identified by the OSA. That payment, if made prior to the completion of the Special Audit, will likely be unrecoverable by the time that audit and any subsequent litigation based on its results are complete. If the Severance Payment is delayed, Dr. Shepard will still receive the benefit of all the other aspects of the Separation Agreement. In other words, Dr. Shepard will not go a single day without a generous salary from public funds. Therefore, there will be no damages he could later claim against the Board and/or Western if the full Special Audit reveals no additional problematic conduct by him or the Board. The State seeks nothing more than a delay to prevent the irreparable harm caused by the Board failing to exercise the loyalty and care required by their Constitutional authority as Regents and fiduciaries of Western.

LEGAL STANDARD

A temporary restraining order “is designed to restrain the defendant for a brief period, pending a hearing on an application for a preliminary injunction.” *Grisham v. Romero*, 2021-NMSC-009, ¶ 19, 483 P.3d 545, 553 (quoting 42 Am. Jur. 2d Injunctions § 8 (2020)). To obtain a TRO, a movant must show that “(1) the [movant] will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the [adversary]; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood [movant] will prevail on the merits.” *See LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314, 850 P.2d 1017 (applying the four factors to review the grant of a preliminary injunction); *see, e.g., Romer v. Green Point Sav. Bank*, 27 F.3d 12, 16 (2d Cir. 1994) (applying the same four factors to review the grant of a TRO). The temporary delay of a TRO will provide the court the benefit of full briefing prior to an evidentiary hearing on a preliminary injunction, allowing the parties and any potential intervenors the opportunity to create a clear record for appeal.

Irreparable harm to the State can be avoided through narrowly tailored relief at an eventual hearing for a preliminary injunction. Specifically, the State asks that Western be temporarily enjoined from paying the Severance Payment described in the Separation Agreement *until the completion and finalization of a report for the special audit requested by Western and Dr. Shepard on December 12, 2023*. *See Penn v. San Juan Hosp. Inc.*, 528 F.2d 1181, 1185 (10th Cir.1975) (“The object of the preliminary injunction is to preserve the status quo pending the litigation of the merits. This is quite different from finally determining the cause itself.”). A preliminary injunction

does not determine the merits of the case, nor does it determine controverted facts. *See* 43 C.J.S. Injunctions § 5, at 745–46 (1978).

LEGAL AUTHORITY & ARGUMENT

The Board of Regents of Western enjoy complete control and power under the New Mexico Constitution to manage the University, including the power to negotiate contracts and spend Western’s public funds. However, that power is not boundless. When any public official entrusted with broad fiduciary authority acts outside that discretion or in contradiction with their fiduciary duties, their actions may be set-aside.

- 1. There is a substantial likelihood either the entire Separation Agreement or the Severance Payment clause will eventually be set aside as invalid because the Board breached their fiduciary duties to Western when negotiating and approving it or because they are void or unenforceable due to lack of consideration, nondisclosure of material facts, lack of lawful purpose, unconscionability, and against public policy.**

Western is a land grant institution under the New Mexico Constitution and state law. *See* N.M. Const. art. XII, §§ 11, 12; NMSA 1978, § 21-3-1 (1899). The New Mexico Constitution provides for schools, colleges, universities, and educational institutions, and those institutions are under the state's exclusive control. *See* N.M. Const. art. XII, § 3. The Regents for Western are given broad, nearly exclusive power to control and manage the university by the New Mexico Constitution. N.M. Const. art. XII, § 13(A) (as amended 2014); NMSA 1978, § 21-3-4 (1893) (providing for a board of regents for Western that controls and manages the university); NMSA 1978, § 21-3-7 (1899) (providing that the board of regents “shall have full and complete power and control over” their university). Control means “control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of

the school.” *Prince v. Board of Ed. of Central Consolidated*, 1975-NMSC-068, ¶ 21, 88 N.M. 548. Regents thus have complete power over their respective universities. *Pray v. Caballero*, No. CV 03-685 JB/LFG, 2003 WL 27384725, at *4 (D.N.M. Dec. 2, 2003).

- a. The Board of Regents breached multiple fiduciary duties when terminating the existing Employment Agreement and during the negotiation and approval of the new Separation Agreement.

Extremely broad power and authority over a public institution and the public funds invested in it are naturally coupled with expansive fiduciary duties. New Mexico courts “recognize that a fiduciary duty or confidential relationship can exist in a variety of contexts depending upon whether the relationship between the parties is one of trust and confidence.” *Moody v. Stribling*, 1999-NMCA-094, ¶ 17, 985 P.2d 1210. “A fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence.” *State ex rel. Udall v. Colonial Penn*, 1991-NMSC-048, ¶ 33 n.9, 112 N.M. 123 (quoted authority omitted).

Public officials, whether they are elected or appointed, enter into a relationship of trust and confidence with the public they serve and act on behalf of. Throughout the United States, public officers have been characterized as fiduciaries and trustees charged with honesty and fidelity in administration of their office and execution of their duties. *See Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952); *Marshall Impeachment Case*, 363 Pa. 326, 69 A.2d 619 (1949); *Williams v. State*, 83 Ariz. 34, 315 P.2d 981 (1957); *Jersey City v. Hague*, 18 N.J. 584, 115 A.2d 8 (1955); *In re Removal of Mesenbrink as Sheriff*, 211 Minn. 114, 300 N.W. 398 (1941); 67 C.J.S. Officers § 6 (“...public office can be properly described in terms of trust, duty, and public

benefit rather than contract, employment, ownership, or possession.”); 63C Am. Jur. 2d *Public Officers and Employees* § 237 (“Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest, and, when dealing with public property, must act with the utmost good faith, fidelity, and integrity.”)

In New Mexico, our Supreme Court has recognized fiduciary duty can generally be summarized as a duty of loyalty. *See In re Est. of McKim*, 1991-NMSC-019, ¶ 20, 111 N.M. 517522, 807 P.2d 215, 22. Since “[a] fiduciary is obliged ‘to act primarily for another's benefit in matters connected with such undertaking[,]’ [a] fiduciary breaches this duty by placing his interests above those of the beneficiary.” *Kueffer v. Kueffer*, 1990-NMSC-045, ¶ 12, 110 N.M. 10 (citations omitted). The fiduciary duties owed by directors, officers, and shareholders to a corporation have been articulated more expansively to include loyalty, good faith, inherent fairness, and the obligation not to profit at the expense of the corporation. *Walta v. Gallegos L. Firm, P.C.*, 2002-NMCA-015, ¶ 41, 131 N.M. 544 (citing *Dilaconi v. New Cal Corp.*, 1982-NMCA-064, ¶ 29, 97 N.M. 782).

New Mexico public officials, such as university regents and the executives they choose to empower, are entrusted by the public and the Legislature with enormous power and authority; their fiduciary duty is therefore correspondingly great in relation to the scope of fiduciary care and loyalty recognized for private, corporate actors or business partners. Therefore, the full scope of the fiduciary duties of public officials cannot be limited to undivided loyalty alone or to narrow criminal prohibitions not to embezzle public funds. For example, when discussing why a land grant Board member could not recover on a contract he entered into with the land grant for use of his

front-end loader despite honestly doing the work agreed to, the New Mexico Supreme Court looked to the New York Supreme Court's description in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928), of "the delicacy of the relationship" to illustrate why certain contracts by people in positions of trust are voided as "violative of public policy." *Armijo v. Cebolleta Land Grant*, 1987-NMSC-006, ¶ 8, 105 N.M. 324. In the *Meinhard* opinion, a jurist of a stature no less than Justice Cardozo explored the sanctity of fiduciary relationships:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.

Meinhard, 164 N.E.2d at 546.

Of course, under common law, violations of a fiduciary's duty of undivided loyalty also cannot be limited to actions where a fiduciary places their own personal financial interest above the public's interests. The New Jersey Supreme Court went to great lengths to describe just how high the bar of conduct is in the special fiduciary or trust relationship that public officials have with the public:

"[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve.... As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. ... They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves and discharge their duties, their actions are inimicable to and inconsistent with the public interest, and not only are they

individually deserving of censure and reproach but *the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties.*”

“These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.”

Driscoll v. Burlington-Bristol Bridge Co., 86 A.2d 201, 221 (N.J. 1951) (citations omitted and emphasis added).

Both the Western Board of Regents and President Shepard had a fiduciary duty to use University financial resources solely for the benefit of Western and not for their personal benefit. The OSA conducted a limited examination of Western finances designed to investigate allegations of waste, fraud, abuse, theft, non-compliance, or misappropriation of funds, or to quantify the extent of such losses. 2.2.2.7(S)(7) NMAC. While the final report from the Examination is not yet complete or available, the OSA’s letter provides detailed examples that establish a flagrant disregard of Western’s internal policies and procedures as well as a structuring of at least a portion of Dr. Shepard’s purchases in a manner that enabled both these policy violations and violations of the Procurement Code. **Ex. 4, at page 5-7.** According to the OSA, a portion of Western’s Regents directly breached their fiduciary duty to use Western funds solely for Western’s benefit when violating Western’s travel and procurement policies and procedures. And the entire Board breached their duty of oversight by allowing Dr. Shepard to do the same. Both these breaches

resulted in waste of public funds⁴ according to the summary of OSA’s limited examination. **Ex. 4, at page 2-3.**

While the Board has full power and control to enter into and terminate contracts, including employment and separation agreements, that authority must be exercised lawfully and certainly not arbitrarily. There is a substantial likelihood that the Board breached additional fiduciary duties of undivided loyalty, reason, and transparency while terminating the Employment Agreement and entering into a Separation Agreement that was exponentially more costly for Western than either the termination for cause option available to them or the resignation Dr. Shepard apparently offered. The following questions remain unanswered: Why was the Board in such a rush to agree to pay Dr. Shepard large quantities of public funds that Western was not obligated to pay? Why did the Board rush to complete the transaction on the Friday before the entire University shut down for their long Winter Break? Why did the Board prioritize Dr. Shepard’s personal finances above the prudent use of public funds appropriated for the benefit of Western, its students, and the surrounding communities? The only explanation offered so far is a letter from the Board Chair praising Dr. Shepard’s accomplishments, confirming that Dr. Shepard was the one who “asked to enter into this negotiation with the Board,” and describing Dr. Shepard’s willingness to accept more than \$1.9 million as “selflessly stepping down for the good of the university.” *See Chair Hotvedt’s letter dated December 20, 2024 and attached as Ex. 8.*

⁴ “Waste includes, but is not limited to, the act of using or expending resources carelessly, extravagantly, or to no purpose. Importantly, waste can include activities that do not include abuse. Rather waste relates primarily to mismanagement, inappropriate actions, and inadequate oversight. Waste does not necessarily involve fraud or illegal acts. However, waste may be an indication of internal control weakness, non-compliance, fraud, or illegal acts.” 2.2.2.7(W) NMAC.

The open portion of the Special meeting where the Board approved the Separation Agreement included no acknowledgment whatsoever of the variety of options available to the Board upon separation with Dr. Shepard, much less any discussion of the rationale for the major Severance Payment to Dr. Shepard. There was no explanation why the Chair of the Personnel Committee, Dr. Lyndon Haviland, did not participate in the negotiation of the Separation Agreement. Instead, Dr. Lopez explained that he and Regent Moellenberg “were asked to head a personnel committee for the purpose of deciding how best to proceed forward with a separation agreement with the President.” The only time Dr. Lopez even mentioned the protection of any fiduciary interests was in reference to the “indemnity clauses that were included” in the new Separation Agreement, incorrectly claiming “it also protects the University, the Regents, and protects President Shepard in his official capacity, now and into the future...” But the indemnity clause Dr. Lopez is referring to is found in paragraph 1.6 and solely benefits Dr. Shepard, with the University agreeing to defend, hold harmless, and pay for the cost of legal counsel of his choosing if any claims arise relating to actions Dr. Shepard took as President – an unknown future liability that could easily cost Western and the State many more millions of dollars. **Ex. 5, at page 3.** The votes on the termination and approval of the new agreement that followed were largely directed by Dr. Shepard. The only discussion by the Board was to clarify the exact wording of motions to ensure they were clear that the Employment Agreement was being terminated and the new Separation Agreement was being approved⁵.

⁵ <https://wnmu.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=b73d10a7-79ad-4a4e-86a4-b24a017fb3e2> at 5:40 – 9:30.

We do not yet know if the Board disregarded the favorable separations options already available in the Employment Agreement in favor of a new multimillion dollar payout to Dr. Shepard simply because he told them to, because they were afraid of details coming to light regarding the breadth of their breach of duty of oversight, or for some other reason. We do not yet know who participated in the closed session and whether privilege for that closed session was broken. What is clear is that Western and the public appear to have had no one advocating for their interests during the negotiation of Dr. Shepard's Separation Agreement. The Court need not speculate much less make a finding as to why the Board's actions were so arbitrary in order to find that the Board did not fulfill their duty of undivided loyalty to Western and the public.

It is yet to be seen whether the results of the Special Audit may reveal whether these actions were an indication of some deeper malfeasance. Until then, the court can find that the Board breached their fiduciary duties of reason, good faith, and inherent fairness by acting arbitrarily during the negotiation and approval of the new Separation Agreement such that there is a substantial likelihood that the Separation Agreement will eventually be set aside as violative of public policy.

- b. Even if the Separation Agreement is not set aside due to the Board's breaches of fiduciary duty, the contract or the Severance Payment clause will likely be found either void or unenforceable due to lack of consideration and unconscionability.

The Severance Payment clause of the Separation Agreement does not contain adequate contract consideration. A legally enforceable contract requires evidence supporting the existence of "an offer, an acceptance, consideration, and mutual assent." *Heye*, 2003-NMCA-138, ¶ 9, 134 N.M. 558. "Consideration consists of a promise to do something that a party is under no legal

obligation to do or to forbear from doing something he has a legal right to do." *Id.* ¶ 12. A promise may be consideration for a promise if it is "lawful, definite and possible." *Bd. of Educ. v. James Hamilton Constr. Co.*, 1994 -NMCA- 168, ¶ 15, 891 P.2d 556.

Western secured Dr. Shepard's continued service as a faculty member in exchange for a generous salary, benefits, and an eight-month sabbatical. The Severance Payment clause of the Separation Agreement, on the other hand, expressly states: "In consideration for the release contained herein, the University shall make a one-time payment to Dr. Shepard in the amount of \$1,909,788.00 less applicable withholdings." But on closer examination, the release that Western and the Board "received" as consideration for the \$1,909,788.00 of public funds is subject to a broad indemnity clause in paragraph 1.6 where "the University agrees to defend, indemnify, and hold harmless Dr. Shepard against any claims arising out of or relating to any actions taken by Dr. Shepard in his capacity as President of the University" and requires the University to pay costs and fees associated with legal counsel of his choosing if any claim is made against him. This empty "release" from Dr. Shepard cannot serve as consideration for almost \$2 million of public funds. Dr. Shepard's agreement not to sue Western is also valueless because he has raised no allegations against Western or the Board that would justify legal action against them. When combined with Dr. Shepard's heavy-handed reference to defamation in the middle of his resignation speech during the December 20, 2024 open meeting of the Board (**Ex. 7, at page 2**), the release raises questions regarding whether Dr. Shepard was threatening legal action against the Board or others for questioning his expenditures. Consideration that lacks a lawful purpose must be voided.

The Severance Payment clause of the Separation Agreement is also so one-sided and counter to public policy that it cannot be enforced. Unconscionability prevents the enforcement of a contract but does not require a party to make any evidentiary showing beyond analysis of the face of the contract and how those terms will realistically play out for the parties. *Peavy by Peavy v. Skilled Healthcare Grp., Inc.*, 2020-NMSC-010, ¶ 10, 470 P.3d 218. The doctrine of contractual unconscionability can be analyzed from both procedural and substantive perspectives and the presence of both increases the likelihood of a court invalidating an agreement. *See Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 20, 144 N.M. 464 (striking down a substantively unconscionable arbitration clause as violative of New Mexico public policy) (citing to Joseph M. Perillo, 7 *Corbin on Contracts* § 29.4, at 388 (2002 ed.)). Substantive unconscionability relates to the content of the contract terms and analyzes “whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns.” *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 22, 146 N.M. 256. Procedural unconscionability analyzes the circumstances surrounding the formation of an agreement. *Id.* at ¶ 23.

The Severance Payment clause of the Separation Agreement is substantively unconscionable because the clause itself is shockingly one-sided as well as counter to public policy. In New Mexico, unfair and unreasonable one-sidedness renders a contract substantively unconscionable. *See, e.g., Dalton v. Santander Consumer USA, Inc.*, 2016-NMSC-035, ¶ 21, 385 P.3d 619 (“Gross unfairness is a bedrock principle of our unconscionability analysis.”); *State ex rel. King v. B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 32, 329 P.3d 658 (holding signature loan

contracts were substantively unconscionable because of their unfair and unreasonable interest rates). Lack of mutuality is a hallmark of one-sided agreements. *Peavy by Peavy v. Skilled Healthcare Grp., Inc.*, 2020-NMSC-010, ¶ 19, 470 P.3d 218 (“New Mexico cases have consistently found arbitration agreements to be one-sided when the agreements exclude the drafting party’s likeliest claims from arbitration while subjecting the non-drafting party’s likeliest claims to arbitration.”) (citing *New v. GameStop, Inc.*, 753 S.E.2d 62, 77 (W. Va. 2013) (recognizing that “in assessing substantive unconscionability, the paramount consideration is mutuality”)).

The Severance Payment is one-sided because the Board agreed to the more than \$1.9 million payment in exchange for a valueless release that was subject to an unlimited indemnity clause. *See supra* p. 18. The release was therefore nothing more than a fiction. Like contracts that limit one party to arbitration without limiting the other party’s remedies, Dr. Shepard received complete protection from the consequences of the known and widely-publicized allegations of internal policy and legal violations, at taxpayer expense, while Western received a promise that he would not sue the University. But Western had no need for that promise because the Board already held the right to terminate Dr. Shepard without cause. Indeed, the Board could not provide severance pay in the form of a gift without violating the anti-donation clause of the New Mexico Constitution, N.M. Const. art. IX, § 14. *See City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1148 (D.N.M. 2008) (noting that the anti-donation clause is not violated when the State receives “valuable consideration”); *see also Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32, 130 N.M. 794 (concluding that a severance payment did not violate the anti-donation clause when it was contained in an employment contract). Further, public officials and their employees who are

accused of the improper expenditures of public funds cannot be allowed to use the authority entrusted to them by the New Mexico Constitution to contract away liability after their actions come to light but before they are held accountable. Most public officials are immune from suits for money damages when they are acting in their official capacity. But to obligate the public to pay for a public employee's legal counsel and any possible liability without limitation, failing to carve out claims or liability due to malfeasance or even criminal acts could not be more counter to public policy.

If the Special Audit and any subsequent investigation or litigation reveal that the Board were completely derelict in the duties of oversight that they owed to Western or, worse, abdicated their fiduciary responsibilities to Dr. Shepard, then the idea that the Separation Agreement was created through a genuine arms-length negotiation is a fiction. In fact, if no one involved raised concerns for or promoted the interests of Western, then the "agreement" is effectively self-dealing by Dr. Shepard, writing himself a check directly from the public coffers. *See supra* pp. 15-16. Nothing could be more unconscionable and against public policy.

2. The State will suffer irreparable injury unless the injunction is granted because almost \$2 million of public funds will be expended without pending special audit results and the Severance Payment will not likely be recoverable once its disbursed, damaging public trust in the rule of law and public officials generally.

Irreparable injuries usually include those that cannot be remedied through any later award of money damages. *Amkco, Ltd., Co. v. Welborn*, 2001-NMSC-012, ¶ 11, 21 P.3d 24 (finding the damage caused by an encroachment of real property rights constituted irreparable harm); see also *O'Hagan v. United States*, 86 F.3d 776, 783 (8th Cir.1996) (holding that loss of interest in real

property is irreparable harm because real property is unique and monetary damages are not adequate compensation for loss). Here, the damage to public's trust requires the court to affirm that the law in New Mexico provides protection and legal remedies when public officials neglect their duties. Leaving reckless conduct by public officials unchecked will deprive the citizens of the fiduciary care they are entitled to when public officials are entrusted with overseeing public funds and resources.

Absent Court intervention, Western and the State will also likely suffer the concrete harm of the waste of almost \$2 million dollars in public funds on top of the waste that has already been identified by the OSA. The Severance Payment, if made prior to the completion of the Special Audit, will likely be unrecoverable by the time that audit and any subsequent litigation based on its results are complete. Further, given the Board's broad constitutional authority, there is little chance of holding Dr. Shepard personally liable to return funds once they're disbursed. These circumstances are analogous to situations where courts have granted carefully tailored injunctions to preserve a plaintiff's ability to receive an award of money damages at judgment. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984); *see also Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 206 (3d Cir. 1990) (holding that "the unsatisfiability of a money judgment can constitute irreparable injury"); *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989) (court allowed a preliminary injunction which required the defendant "to obtain court review and approval of non-ordinary-course-of-business transactions to prevent [the defendant], without court awareness, from further liquidating or distributing its assets."); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986) (noting

that a “preliminary injunction can be granted when it is necessary to protect the damages remedy”); *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980) (stating that even where a remedy is “limited to damages, an injunction may issue to protect that remedy”).

3. Any potential harm to the public outweighs any inconvenience to the Board associated with the temporary delay of the Severance Payment; the Separation Agreement will remain in effect and Dr. Shepard will still receive a salary.

The Board’s dereliction of their fiduciary duties to Western and the citizens of the State of New Mexico will cause the concrete and irreparable harm of the loss of almost \$2 million of public funds appropriated to Western University and irreparable damage to public trust if the Severance Payment is allowed to proceed. However, there is no harm in delaying the Severance Payment. The mere delay of such a sizable payment gives rise to no colorable claim for damages against the Board or Western, especially in light of the remainder of the Separation Agreement, which includes a generous tenured faculty position paying \$200,000 per year for five years to teach two remote classes a semester, paid benefits, and an eight-month paid sabbatical.

4. Delay of the Severance Payment will be in favor of the public's interest because it will reassure the public that those entrusted with a duty of loyalty to our state-funded educational institutions will not be allowed to irreparably waste public funds without appropriate investigations and due diligence.

Granting the injunction serves the public interest of preventing public officials from playing fast and loose with their own policies when spending public funds, much less with state laws and regulations like the Procurement Act or the Audit Act. The delay requested will also serve

as a caution to any other public official who may be tempted to neglect the undivided duty to loyalty and prioritize their self-interest over the public interest. Public officials cannot condone, much less enable, the people they hire to request public funds be spent on a special audit they claim will clear them of any allegations of wrong-doing and then seek to avoid any accountability by suddenly leaving their position of power with a hefty lump-sum payment of public funds when an indication appears that the results of an inquiry may be less than flattering. The inexplicable nature of the Board's termination of Dr. Shepard's existing Employment Agreement raises questions of whether they too are avoiding accountability and why. The relief requested by the State will allow the public to learn more details before more public funds are subjected to waste or misuse.

Delaying the exorbitant Severance Payment while the Special Audit runs its course will also encourage public servants throughout New Mexico to practice the great care warranted when spending public funds. Absent a clear and consistent message from the judiciary that every public official, elected or appointed, as well as their employees and managers, are required to follow their respective institution's internal financial policies, travel policies, and procurement law, the risk will remain that other public officials will engage in waste of public funds and other breaches of their fiduciary duties with impunity. Public servants cannot be allowed to breach the sacred trusts the law temporarily grants them during their service. No public servant should assume they can contract away their responsibilities, they are somehow above reproach, or they can behave as if their discretion is unlimited without fear of consequences and accountability.

Additionally, a grant of the State's requested TRO and limited injunctive relief will help avoid the citizens of Grant County seeking more drastic measures in response to this potential

waste of University funds in a particularly impoverished area of New Mexico⁶. Just one example of more costly avenues available to the public includes a grand jury investigation. The New Mexico Constitution mandates that a special grand jury be convened to investigate whenever a qualified petition is brought to the district court in that county and contains “sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct *or malfeasance of a public official...*” See N.M. Const. art. II, § 14 (providing that two hundred registered voters may petition the district court to convene a grand jury); *Dist. Ct. of Second Jud. Dist. v. McKenna*, 1994-NMSC-102, ¶ 9, 118 N.M. 402 (emphasis added). In fact, in analogous circumstances involving another educational institution, the New Mexico Supreme Court found that the following petition by registered voters in Bernalillo County requesting an investigation into the former Albuquerque Technical-Vocational Institute sufficiently stated conduct that was within the proper scope of inquiry rather than a witch hunt and ordered the district court to convene a grand jury despite the cost of time and money:

We the undersigned registered voters in the county of Bernalillo, hereby petition the judges(s) of the Second Judicial District Court, pursuant to Article II, Sec. 14 of the New Mexico State Constitution, to convene a grand jury to investigate allegations of malfeasance, misappropriation of public money, and any other illegal acts committed by any individual associated with or employed at any time by the Albuquerque Technical–Vocational Institute.

These allegations include, but are not limited to, the following: fraud, malfeasance, improper disbursement and handling of public funds, improper employment practices, destruction of public records to hide improper and questionable financial transactions from public view, authorizing T–VI personnel to make trips for personal reasons and reimbursing their expenses from T–VI funds, procurement of life insurance for select T–VI management that violates New Mexico anti-donation

⁶ According to the U.S. Census, the per capita income in Silver City is \$27,083 with 21.6% of the residents living below the poverty line. <https://www.census.gov/quickfacts/fact/table/silvercitytownnewmexico/PST045223>

statutes, concealment from the New Mexico Legislature of balances in accounts at fiscal year end, and illegal disposal of T–VI leased vehicles to accommodate T–VI management.

Cook v. Smith, 1992-NMSC-041, ¶ 2, 114 N.M. 41.

By requesting only a temporary delay of any separation payment to Dr. Shepard, the State is seeking appropriately tailored relief that is necessary to prevent the risk of additional waste of public funds while avoiding future harm to Western or its Board of Regents.

REQUEST FOR RELIEF

THEREFORE, the State respectfully requests that the Court

- 1) Enter an emergency temporary restraining order prohibiting Western’s Board of Regents from disbursing the Severance Payment prior to full briefing and an evidentiary hearing on the merits of a preliminary injunction;
- 2) Grant a preliminary injunction delaying Western’s performance of the Severance Payment clause of the Separation Agreement with Dr. Shepard until the Special Audit requested by the Board and Dr. Shepard is complete and the report of its findings finalized; and
- 3) Grant such further equitable relief as the Court deems just and proper.

Respectfully Submitted:

RAÚL TORREZ

New Mexico Attorney General

By: /s/ Rose Bryan

Kathleen Rosemary Bryan

Assistant Attorney General

New Mexico Department of Justice

408 Galisteo Street

Santa Fe, NM 87501

(505) 490-4060

rbryan@nmdoj.gov

Attorney for the State of New Mexico

CERTIFICATE OF SERVICE

The following parties were served with this Emergency Motion for Temporary Restraining Order and Application for Preliminary Injunction on January 6, 2025, by email to their legal counsel as listed below:

M. Karen Kilgore
Cuddy & McCarthy, LLP
1701 Old Pecos Trail
Santa Fe, NM 87505
kkilgore@cuddymccarthy.com

Attorney for Defendants

/s/ Rose Bryan
Kathleen Rosemary Bryan



State of New Mexico Office of the State Auditor

EXHIBIT

1

December 7, 2023

Western New Mexico University
1000 W College Avenue
PO Box 680
Silver City, NM 88062-0680

Sent via Electronic Mail Only:

Kelley Riddle, Vice President of Business Affairs
Western New Mexico University
Email: kelley.riddle@wnmu.edu

Julia Morales, Vice President of
Compliance and Communications
Western New Mexico University
Email: Julie.Morales@wnmu.edu

RE: Request for information and documentation (SID 2024-12-04-128)

Dear Vice President Riddle and Vice President Morales,

The Office of the State Auditor ("OSA") is conducting an examination regarding concerns alleging potentially improper procurement and travel expenditures by Western New Mexico University ("University"). It has been reported that the University may have violated state procurement law and travel regulations by improperly procuring high end furniture for the University President's official residence, short-term rental of a residential dwelling located in Santa Fe, NM, as well significant international and domestic travel by University leadership.

As part of our fact-finding in this matter, the OSA is requesting the University provide the following information:

1. **All** purchasing/procurement documentation in the University's possession for all furniture purchases of furnishings made by/for the University President for the official University President residence, inclusive of University policies, memorandum, Board of Regents (Board) resolutions, Board approvals, Board meeting minutes, emails, written correspondence and any other guidance relied upon by the University specific to the purpose of the purchases/procurements; the complete purchase/procurement files for all such purchases/procurements, inclusive of all quotes, bids, or requests for proposals (RFPs) as applicable, and itemized invoices, payment receipts and source of funding with details on allowable use of funding source(s), for fiscal years 2018, 2019, 2020, 2021, 2022, and 2023.
2. **All** procurement/contracting documentation in the University's possession for the rental of any residential space or structure/house in Santa Fe, NM by the University for any reason,

Office of the State Auditor

Western New Mexico University

December 7, 2023

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inclusive of all University policies and Board resolutions, Board approvals, Board meeting minutes, emails, written correspondence, and any other guidance relied upon by the University specific to the purpose of the procurements/contracts; the complete procurement/contract files for all such purchases/procurements, inclusive of all quotes, bids, or requests for proposals (RFPs) as applicable, and itemized invoices, payment receipts and source of funding with details on allowable use of funding source(s), for fiscal years 2018, 2019, 2020, 2021, 2022, and 2023.

3. *All* documentation or other forms of justification in the University's possession regarding any and all international travel by University leadership and Board of Regents, inclusive of emails, invitations, letters or other forms of communication specific to the purpose of the travel, the total cost of the travel inclusive of all quotes, justifications for any upgrades or changes, and itineraries of official business to be conducted on behalf of the University for fiscal years 2018, 2019, 2020, 2021, 2022, and 2023.
4. *All* documentation or other forms of justification in the University's possession regarding any and all domestic travel by University leadership and Board of Regents, inclusive of emails, invitations, letters or other forms of communication specific to the purpose of the travel, the total cost of the travel inclusive of all quotes, justifications for any upgrades or changes, and itineraries of official business to be conducted on behalf of the University for fiscal years 2018, 2019, 2020, 2021, 2022, and 2023.
5. *Any* other documents or information relied upon by the University not included above, in making their determination to approve/disapprove the procurements/contracts and international and domestic travel expenditures by or for University leadership or Board of Regents on behalf of the University for fiscal years 2018, 2019, 2020, 2021, 2022, and 2023.

Please note, the above-listed items do not represent an exhaustive listing of all documentation in the University's possession the OSA may deem relevant for inspection as part of our inquiry. The OSA may make requests for further documentation regarding this matter.

The OSA undertakes this fact-finding pursuant to the New Mexico Audit Act, NMSA 1978, Section 12-6-3(C) and the New Mexico Audit Rule 2.2.2.15(A)(3) NMAC and 2.2.2.15(A)(6) NMAC (below):

NMSA 1978, Section 12-6-3 (C): Annual and special audits; financial examinations

In addition to the annual audit, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part.

2.2.2.15(A)(3) NMAC:

Reports of fraud, waste & abuse: Pursuant to the authority set forth Section 12-6-3 NMSA 1978, the state auditor may conduct initial fact-finding procedures in connection with reports of

Office of the State Auditor

Western New Mexico University

December 7, 2023

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financial fraud, waste and abuse in government made by agencies, IPAs, or members of the public. Reports may be made telephonically or in writing through the fraud hotline or website established by the state auditor for the confidential reporting of financial fraud, waste, and abuse in government. Reports may be made telephonically to the fraud hotline by calling 1-866-OSA-FRAUD (1-866- 672-3728) or reported in writing through the state auditor's website at www.saonm.org. Reports received or created by the state auditor are audit information and audit documentation in connection with the state auditor's statutory duty to examine and audit the financial affairs of every agency, or in connection with the state auditor's statutory discretion to audit the financial affairs and transactions of an agency in whole or in part.

2.2.2.15(A)(6) NMAC:

The OSA may make inquiries of agencies as part of the fact-finding process performed by the OSA's special investigations division. Agencies shall respond to the OSA inquiries within 15 calendar days of receipt or as soon as practicable under the circumstances with written notice to the OSA stating the basis for any delay. IPAs shall test compliance with this requirement and report noncompliance as a finding in the annual financial and compliance audit report.

Please provide electronic copies of the requested documents in accordance with the authority above by email by ***Friday, December 22, 2023***. Should you need additional time, please provide a written notice in accordance with 2.2.2.15(A)(6) NMAC above. Please reference SID case# 2024-12-04-128 in your response. Please let me know if you have any additional questions.

Respectfully,



Shawn P. Beck, CFE
Director, Special Investigations

cc: Christopher Hall, Deputy General Counsel, Office of the State Auditor
(Christopher.Hall@osa.state.nm.us)
Amy Baca, Purchasing Director, Western New Mexico University,
(Amy.Baca@wnmu.edu)



WNMU

Division of Business Affairs

Office of Vice President of Business Affairs

December 12, 2023

Special Investigations
New Mexico Office of the State Auditor
2540 Camino Edward Ortiz, Suite A
Santa Fe, NM 87507

Dear Auditor Joseph Maestas,

As per section 2.2.2.15 (C) NMAC, The Board of Regents of Western New Mexico University (WNMU), President Dr. Shepard, along with the Administration of WNMU are requesting your permission to obtain a special audit of all President Shepard's procurements and travel expenditures from fiscal year 2012 through fiscal year 2023 due to allegations of improper procurement and travel expenditures. WNMU recently completed the FY23 annual financial audit with MP Group, Inc, procured with approval of the New Mexico Office of the State Auditor.

MP Group has agreed to perform the special audit/agreed upon procedures and will provide an engagement letter, the cost of the audit will be no greater than \$15,000. With your approval WNMU will move forward with the audit. If approved, please provide us with the agreement template.

Sincerely,

Kelley Riddle
VP of Business Affairs

EXHIBIT

2

**STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE**

STATE OF NEW MEXICO ex rel. RAÚL TORREZ,
Attorney General, State of New Mexico,

Plaintiff,

v.

WESTERN NEW MEXICO UNIVERSITY BOARD OF REGENTS,
DR. MARY E. HOTVEDT, in her official capacity as a Regent,
DR. LYNDON HAVILAND, in her official capacity as a Regent,
TRENT JONES, in his official capacity as a Regent,
DR. DANIEL H. LOPEZ, in his official capacity as a Regent, and
DAL MOELLENBERG, in his official capacity as a Regent,

Defendants.

AFFIDAVIT OF SHAWN P. BECK

I, Shawn P. Beck, affirm and state under penalty of perjury of the laws of the State of New Mexico the following:

1. I am the Director of the Special Investigations Division at the New Mexico Office of State Auditor.
2. My professional training and qualifications include the completion of a master's in business administration from New Mexico Highlands University in 2016 and becoming a certified fraud examiner in 2014.
3. On December 7, 2023, pursuant to the New Mexico Audit Act, NMSA 1978, § 12-6-3(C) and the New Mexico Audit Rules 2.2.2.15(A)(3) NMAC and 2.2.2.15(A)(4) NMAC, I sent an initial request for information and documentation as part of the fact-finding phase of NMOSA-2024-12-04-128.

EXHIBIT

3

4. File number NMOSA-2024-12-04-128 is an examination (Examination) related to allegations of improper procurement and travel expenditures by officials at Western New Mexico University (Western) during the period of July 1, 2018, through June 30, 2023.

5. This examination included the granting of a request for an extension of time by Western to provide the documentation requested by OSA.

6. On November 18, 2024, the OSA sent a Letter of Concern to the President of the Board of Regents of Western providing a summary and preview of the findings of the Examination.

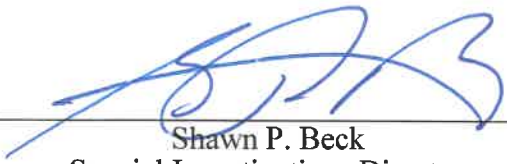
7. While the activities related to conducting the Examination are complete, the final report of the detailed findings of the Examination itself is not yet complete and so has not yet been released publicly.

8. On December 12, 2023, the Western Board of Regents (Regents), Dr. Joseph Shepard, and the “Administration of WNMU” requested permission from Auditor to obtain a special audit of all President Shepard’s procurements and travel expenditures from fiscal year 2012 through fiscal year 2023 pursuant to 2.2.2.15(C) NMAC.

9. On January 11, 2024, I sent Western additional requirements for engaging in an agency-initiated special audit (Special Audit) utilizing an approved independent public accountant (IPA).

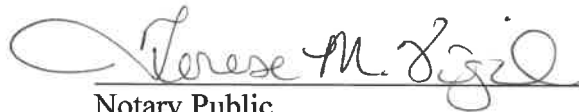
10. Western’s Special Audit with an IPA has begun but is not complete. In fact, it is still in the preliminary stages.

I affirm under penalty of perjury under the laws of the State of New Mexico that the foregoing statements are true and correct.


Shawn P. Beck
Special Investigations Director
NM Office of the State Auditor

STATE OF NEW MEXICO)
COUNTY OF Santa Fe)

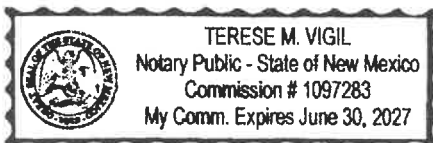
Subscribed and sworn before me by **Shawn P. Beck** on this 2nd day of January
_____, 2025.


Notary Public

Printed Name: Terese M. Vigil

My Commission Expires:

June 30, 2027





State of New Mexico Office of the State Auditor

FOR IMMEDIATE RELEASE (11.19.24)

Western New Mexico University Faces Financial Oversight Challenges

Santa Fe, NM –The Office of State Auditor, Special Investigations Division (SID) recently concluded its examination of allegations asserting that Western New Mexico University's engaged in the waste of public funds. Expenditures related to procurement and travel during the period of July 1, 2018, through June 30, 2023 ("the period"), including specific examples noted within the allegations, were examined. Several instances of wasteful spending and improper use of university funds were found during the investigation.

The OSA found that University management and Board failed to uphold their fiduciary responsibilities, by neglecting to adhere to the corresponding elements as established in the University's policies, procedures, and rules regarding travel, per diem, and procurement.

The OSA's examination included:

- \$214,261.91 worth of spending covering 402 instances of domestic and international travel and lodging for university staff and leadership found to be noncompliant with university policies and rules.
- \$149,264.08 worth of spending covering 91 instances of procurement and university credit cards (P-card by the University President including the procurement of high-end custom furnishings for the President's official residence which was also found to be non-compliant.
- Providing expense accounts and purchasing cards to a non-university employee.

These allegations were the focus of sensitive information provided by another state agency, discussed during university leadership testimony before State legislative bodies, publicized in media coverage, and included in constituent complaints filed with the OSA.

"Effective governance is crucial in setting the tone at the top, embracing accountability and transparency, and ensuring that all employees understand the importance of these controls and adhere to them diligently," said State Auditor Joseph Maestas. "Without strong and committed leadership to reinforce the internal control system, the university remains at significant risk for fraud, waste, and abuse."

State Auditor Joseph Maestas emphasized the importance of these measures: "Effective governance and robust internal controls are essential to prevent waste and abuse of public funds. WNMU's commitment to improving its financial oversight is a critical step in safeguarding taxpayer dollars and maintaining public trust."

Media Contact:

Dave Peña
Director of Policy
Office of the State Auditor
Phone: 505-396-0829
Email: david.pena@osa.nm.gov

###30###

EXHIBIT

4



State of New Mexico Office of the State Auditor

November 18, 2024

Western New Mexico University
1000 W. College Ave.
Silver City, NM 88061

Sent via Electronic Mail Only:

Dr. Mary E. Hotvedt, President, Board of Regents
Western New Mexico University
Email: maryhotvedt@aol.com

RE: Letter of Concern
Western New Mexico University Procurement and Travel Expenditures –
Waste of Public Resources

Dear President Hotvedt,

The Office of the State Auditor (“OSA”) has conducted a fact-finding examination into several allegations asserting that Western New Mexico University (“WNMU” or “the University”) engaged in the waste¹ of public funds through:

- excessive or extravagant domestic and international travel and lodging for the University staff, leadership, and governance,
- improper use of procurement and university credit cards (P-card), including the procuring of high-end custom furnishings for the University President’s official residence; and,
- providing expense accounts and purchasing cards to a non-University employee.

These allegations had been publicly reported in media accounts, discussed during university leadership testimony before State legislative bodies, and included in constituent complaints submitted to the OSA. Related information was also provided to the OSA by State oversight agencies.

The OSA’s examination was conducted by its Special Investigations Division (SID). SID examined the University’s expenditures related to procurement and travel during the period of July 1, 2018, through June 30, 2023 (“the period”), including specific examples noted within the allegations. Our examination reviewed the University’s travel and per diem processes and

¹ As defined in the Audit Rule Section 2.2.2.7W NMAC, “[w]aste includes, but is not limited to, the act of using or expending resources carelessly, extravagantly, or to no purpose. Importantly, waste can include activities that do not include abuse. Rather waste relates primarily to mismanagement, inappropriate actions, and inadequate oversight. Waste does not necessarily involve fraud or illegal acts. However, waste may be an indication of internal control weakness, non-compliance, fraud, or illegal acts.”

Office of the State Auditor

Western New Mexico University

November 18, 2024

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expenditures during the period and tested them for compliance with established internal controls designed to aid the University in complying with laws, regulations, and university policies, promoting accountability, and preventing fraud. Internal controls, when properly designed and implemented, help improve operational efficiency, ensure budgets are adhered to, policies are followed, and ensure proper governance.

Our examination of the travel and procurement expenditures found a concerning lack of compliance with established university policies during the period. (*See* Enclosure) Noncompliance with the provisions of university policy negatively impacts the effectiveness of any comprehensive and rigorous review and approval process the University's management and governing body might exercise over expenditures of public funds by the University for travel requests, travel reimbursements, and purchase card usage.

Our examination found that the travel requests and travel reimbursements provided by WNMU for the University President and members of the Board of Regents during the period, were consistently noncompliant with university policies. They were found to be lacking required documentation, were incomplete or erroneous, were prepared, signed, and submitted by someone other than the designated traveler, or exceeded approved reimbursement amounts, among other noncompliance. Our examination of the use of the University's credit card as part of the University President's and Board of Regents' travel during the period noted several transactions where disallowed items such as meals, alcohol, and hotel room service, were purchased. Further, our examination of travel documentation in instances of university staff and faculty travel identified similar noncompliance with university policies, as noted herein.

Our examination found that the use of a university credit card to purchase high-end custom furniture by the University President, was contrary to university policies regarding use of credit cards to purchase tangible goods of \$1500 or more, and the purchase of furniture with a value of \$1000 or higher requiring a purchase order or requisition. Further, it was found that exception to, or the deviation from university policy to allow these purchases, had not been approved by the Board of Regents.

The misuse of the P-card by the University's President identified as part of our examination, was contrary to both established university policy and the contractual agreement laid out in the President's employment contract with the University wherein contract language specifies he would, "...at all times faithfully, industriously, and with the best use of his experience, ability and talent, perform all of the duties required pursuant to the terms of this Employment Agreement and the University's official policies, and assigned by the Board...". Additionally, the University's leadership appears to be in violation of its own Code of Conduct, which in part states, "...employees of the University shall maintain the highest standards of business ethics in transactions with the University, the State, Federal, and local governments, and with the public...".

There is an appearance of management overreach and a lack of a strong “tone at the top”² at the University. Without the proper example being set by the University’s management and Board, which is fundamental to an effective internal control system, any disincentives for university employees to engage in inappropriate or extravagant travel spending, are limited or removed. Further, University management and Board failed to uphold their fiduciary responsibilities, by neglecting to adhere to the corresponding elements as established in the University’s policies, procedures, and rules regarding travel, per diem, and procurement.

The governing body’s lack of proper oversight and management’s non-compliance with policies and procedures, resulted in the waste of public funds and resources entrusted to the university. According to the Board of Regents Manual, “...management and control of the University are vested in the Regents...”. Further, “...all decisions and actions of the President must be in accordance with general policies approved by the Board of Regents and are subject to the right of the Board to intervene...”.

The OSA is encouraged that since these concerns were first publicly revealed, WNMU’s governing body and management have taken proactive steps to strengthen the University’s internal control structure as well as engage in an external forensic special audit to further review these and related issues.

Complacency or indifference to oversight not only exposes the University’s governing body and leadership to the threat of further waste, but it also opens the door for potential fraudulent acts to occur, each of which negatively impacts the university and its finances.

The OSA recommends that the University incorporate, if not having already done so, an internal review of cost disparities, cost control measures, and adequate documentation into its travel approval, travel reimbursement, and use of P-card processes, like those requirements necessary for any other expenditure of public funds for the purchase of goods or services. This will help address and limit any future potential waste of public funds by WNMU.

Finally, without strong and committed leadership to reinforce the internal control system, the university remains at significant risk for fraud, waste, and abuse. Effective governance is crucial in setting the tone at the top, embracing accountability and transparency, and ensuring that all employees understand the importance of these controls and adhere to them diligently. Without this, even the best policies and procedures may fail to prevent waste of public funds.

² As defined in the Government Audit Standards for Internal Control in the Federal Government Green Book, Section 1.03, “The oversight body and management lead by an example that demonstrates the organization’s values, philosophy, and operating style. The oversight body and management set the tone at the top and throughout the organization by their example, which is fundamental to an effective internal control system.” Section 1.05, “Tone at the top can be either a driver...or a barrier to internal control. Without a strong tone at the top to support an internal control system, the entity’s risk identification may be incomplete, risk responses may be inappropriate, control activities may not be appropriately designed or implemented, information and communication may falter, and results of monitoring may not be understood or acted upon to remediate deficiencies.”

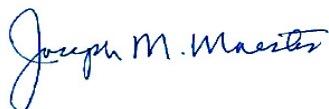
Office of the State Auditor

Western New Mexico University

November 18, 2024

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Sincerely,



Joseph M. Maestas, PE, CFE
New Mexico State Auditor

cc: Dr. Lyndon Haviland, Vice President, WNMU Board of Regents
(lyndon@sent.com)

Mr. Trent Jones, Student Regent, Secretary/Treasurer, WNMU Board of Regents
(tjones2@wnmu.edu)

Dr. Daniel H. Lopez, Member, WNMU Board of Regents
(dhdaniel801@gmail.com)

Mr. Dalva (Dal) Moellenberg, J.D., Member, WNMU Board of Regents
(DLM@gknet.com)

Dr. Joseph Shepard, President, WNMU (Joseph.Shepard@wnmu.edu)

Kelly Riddle, Vice President of Business Affairs, WNMU
(Kelley.Riddle@wnmu.edu)

Julia Morales, Vice President of Compliance and Communications, WNMU
(Julie.Morales@wnmu.edu)

Stephanie M. Rodriguez, Secretary, New Mexico Higher Education Department
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Peter Kovnat, General Counsel, New Mexico Higher Education Department
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Charles Sallee, Director, Legislative Finance Committee, (Charles.Sallee@nmlegis.gov)

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Shawn Beck, CFE, Special Investigations Director, OSA (Shawn.Beck@osa.nm.gov)

Enclosure: WNMU Noncompliance

File #: NMOSA-2024-12-04-128

WNMU Noncompliance

TRAVEL

As part of our examination, the OSA requested and analyzed all supporting documentation maintained by the university related to the university President's and the members of the University's Board of Regents ("Regents"), domestic and international travel during the period. WNMU provided the OSA with documentation for a total of 138 instances of travel by the university President equaling an expenditure of \$140,610.75, and documentation for a total of 264 instances of travel by the Regents equaling an expenditure of \$73,651.16, during the period. Examples of the university President's and Regent's travel found to be noncompliant with university policies and rules include the following observations:

- Travel was undertaken by the President *without* the proper travel request submission and subsequent oversight pre-approval by governance.
- Travel was undertaken by Regents *without* travel requests or submitted untimely and without justification for good cause.
- Travel requests for the President were either *not submitted* by the President for governance review/approval in a timely manner prior to travelling or were submitted *after* the travel began.
- Travel was undertaken by Regents utilizing *incomplete* and/or *unauthorized/unapproved* travel requests and travel vouchers.
- Travel vouchers for the President's travel were not submitted in a timely manner and were often submitted weeks or months *after* the travel ended.
- Travel undertaken by Regents where purchase orders were dated *after* travel dates and missing purchasing office approval.
- Travel reimbursements requested by the President or Regents and subsequently paid by the university, either *exceeded* the total amounts reflected in the respective purchase orders or *were not listed* on the purchase order.
- Travel undertaken by the President was *missing* required documentation for mileage and/or conference registrations.
- *Incomplete* or *incorrectly calculated* travel vouchers or vouchers *missing* documentation submitted by Regents for travel.
- Regent travel vouchers having *differing* travel dates than their associated travel requests and instances of hotel cancellations resulting in loss of refunds, justified without good cause.
- Travel requests *not* completed and submitted by appropriate requestor (university President) but delegated to another university employee.
- Travel undertaken by the university President, and paid for by the university, appearing to be *unrelated to official university business*. These included trips related to other non-educational organizations which the President is affiliated, such as the Finca Vigia Foundation, dedicated to saving author Ernest Hemingway's Cuban legacy, and for conferences and events where his spouse was a guest speaker such as the Simmons Leadership Conference, established for women's leadership and business.

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- International travel taken by the university President and/or Regents *lacking any documentation* articulating the business need, purpose, justification, or authority for the travel.
- *Travel upgrades* for seating and amenities on international and domestic travel taken by the university President and/or Regents *lacking any documentation* articulating the business need or purpose justification or authority for the upgrades.
- Lodging upgrades and meal expenditures on international and domestic travel taken by the university President and/or Regents *lacking any documentation* articulating the business need or purpose justification or authority for the upgrades.

The OSA also included as part of its examination, a complaint to review travel documentation for university staff and faculty attending out-of-state programs at the Ritz Carlton Leadership Center in Rancho Mirage, California. According to our review, the university spent a total of \$25,578.26 for university staff to travel to, and attend in person, “A Culture of Excellence-Building Success from Within”, a program designed to share The Ritz-Carlton’s, “best practices on how to activate and sustain a culture where valued and empowered employees own the customer experience”, and “Brand Differentiating Service-Delivering an Elevated Experience”, where attendees “learn(d) how our (The Ritz-Carlton) time-tested methodologies foster a culture of personalized service and genuine care”.

SID noted as part of their examination, this travel expenditure could have been reduced or eliminated, as both programs were also available virtually from the vendor, at a potentially lower price point than the on-site cost, and without the need for out-of-state travel.

Examples of university staff and faculty travel which were found to be noncompliant with university policies and rules include the following observations:

- Travel vouchers were either *not properly approved* or *did not demonstrate* the proper approvals.
- Travel vouchers were either *missing* or *were not provided* by the university.
- Travel requests and travel vouchers *were not submitted* in a timely manner after travel had ended.
- Travel undertaken where required mileage documentation was *missing*.
- Travel undertaken where documentation of conference registrations was *missing*.

PROCUREMENT

Based on the concerns previously noted, the OSA also examined procurement and use of purchase cards (P-card) by the university President and Regents during the period.

The OSA requested all documentation related to specific high end furniture purchases as well as reviewing related P-card purchases made during the above noted instances of travel made by the President. WNMU provided the OSA with documentation for a total of 91 instances of P-card use by the university President equaling a total expenditure of \$149,264.08, during that time.

Examples of university procurement and use of purchase cards which were found to be noncompliant university policies and rules include the following observations:

- The procurement of high-end customized furniture for the university President’s official residence was in contradiction of established university policies regarding use of credit cards to purchase tangible goods of \$1500 or more, and the purchase of furniture with a

value of \$1000 or higher requiring a purchase order or requisition. The furniture was purchased utilizing a P-card issued to the President, and at least one purchase, totaling over \$17,000, was verbally approved by the Chief Procurement Officer on the same day of the purchase, without a required purchase order or requisition in place as required by university policy. It was noted that any exception to, or the deviation from university policy to allow these purchases, had not been approved by the Board of Regents. Further, it was noted that two additional purchases were made from the same vendor for additional furniture the month following the initial purchase again without a required purchase order or requisition in place. The total \$24,740 combined purchase cost for the furniture exceeded the University's small purchase \$20,000 threshold requiring three identical written quotes from three different vendors. The structuring of related purchases in this manner, gives rise to the appearance these purchases were conducted separately to not require the University President to obtain three written quotes for the furniture as required by university policy. Such structuring would further be in violation of the Procurement Code, §13-1-28 through §13-1-199 NMSA 1978.

- Several instances where P-card transactions included the purchase of alcohol, food or room service during the university President's travel. The university's P-card agreement disallows the purchase of these items, as such purchases are paid for using public monies. However, it was noted in our examination that the university sought and was subsequently reimbursed for the disallowed purchases with private funds by the university's Foundation. By allowing these transactions to occur in this manner, the University appears to have affirmatively disregarded its policy and allowed the initial use of public university funds rather than private foundation funds for the purchase of goods or services unallowed per the P-card agreement.
- A P-card was issued to, and used by, the President's spouse who is a non-employee of the university. The University's purchasing card holder agreement applies to university employees, requires approval of their supervisor, and any violation of the agreement references sanctions which can only be enforced on university employees.

**WESTERN NEW MEXICO UNIVERSITY
SEPARATION AND FACULTY APPOINTMENT AGREEMENT**

This Separation and Faculty Appointment Agreement (the “Agreement”) is entered into and effective as of the date of signing by the last signatory hereto (the “Effective Date”), between Joseph Shepard, Ph.D. (“Dr. Shepard”) and Western New Mexico University, a New Mexico public institution of higher education (the “University”), acting through its governing body, the Western New Mexico University Board of Regents (the “Board”). Each party to this agreement may be referred to as a “Party” and the parties collectively shall be referred to as the “Parties.” This Agreement supersedes all other agreements, oral or written, between the University and Dr. Shepard.

WHEREAS, on October 1, 2022, Dr. Shepard and the University entered into an Employment Agreement (the “Employment Agreement”) pursuant to which Dr. Shepard agreed to serve as President of the University through June 30, 2027, on the terms specified therein;

WHEREAS, Dr. Shepard has capably discharged his duties as President consistent with the Employment Agreement;

WHEREAS, pursuant to Section 5.1 of the Employment Agreement, the Employment Agreement may be terminated by mutual written agreement of the parties thereto;

WHEREAS, pursuant to Section 5.1 of the Employment Agreement, Dr. Shepard and the University now mutually desire to terminate the Employment Agreement on the terms set forth herein;

WHEREAS, the Parties nonetheless desire that Dr. Shepard continue his service to the University in a capacity as a tenured faculty member on the terms set forth herein;

The University and Dr. Shepard therefore agree as follows:

EXHIBIT 5

Section 1: Termination and Severance

1.1 **Employment.** The Employment Agreement, and the Parties' respective rights and obligations thereunder, shall terminate as of January 15, 2025.

1.2 **Residence.** Notwithstanding anything to the contrary contained in Section 5.1 of the Employment Agreement, the University agrees that Dr. Shepard shall vacate the official residence located at 500 W. College Ave, Silver City, New Mexico no later than February 15, 2025.

1.3 **Severance Payment.** In consideration for the release contained herein, the University shall make a one-time payment to Dr. Shepard in the amount of \$1,909,788.00 less applicable withholdings. Such amount shall be paid by January 15, 2025.

1.4 **University Release.** In consideration of the release set forth in Section 1.5 below, the University on behalf of itself, the Board of Regents, and their respective successors, assigns, agents, representatives, fiduciaries, employees, insurance carriers, attorneys, and each of their heirs, beneficiaries, successors and assigns, do hereby irrevocably release and forever discharge Dr. Shepard and his insurance carriers, attorneys, insureds, and each of their heirs, beneficiaries, successors, and assigns from any and all liability, as well as all other actions, causes of action, claims and demands, liabilities, obligations, promises, agreements, damages, costs, attorneys' fees, expenses, and compensation, whether known or unknown, contingent or matured, joint, several or individual, sounding in statute, contract, tort or otherwise, existing or arising on or before January 15, 2025, other than those promises, obligations, and agreements expressly set forth herein, relating in any way to the Employment Agreement and/or Dr. Shepard's service as President of the University.

1.5 **Dr. Shepard Release.** In consideration for the payment described in Section 1.3 above, Dr. Shepard, on behalf of himself, his heirs, attorneys, insurance carriers, beneficiaries,

fiduciaries, successors, and assigns, does hereby irrevocably release and forever discharge the University, its Board of Regents, and their respective fiduciaries, attorneys, insurance carriers, successors and assigns, from any and all liability, as well as all other actions, causes of action, claims and demands, liabilities, obligations, promises, agreements, damages, costs, attorneys' fees, expenses, and compensation, whether known or unknown, contingent or matured, joint, several or individual, sounding in statute, contract, tort, or otherwise, existing or arising on or before January 15, 2025, other than those promises, obligations, and agreements expressly set forth herein, relating in any way to the Employment Agreement and/or Dr. Shepard's service as President of the University except as expressly set forth in Section 1.6 below.

1.6 Indemnity. The University agrees to defend, indemnify, and hold harmless Dr. Shepard against any claims arising out of or relating to any actions taken by Dr. Shepard in his capacity as President of the University. In the event of a claim for which Dr. Shepard seeks defense and/or indemnity pursuant to this Section, Dr. Shepard shall give notice of such claim to the University within 60 days of service of such claim upon Dr. Shepard. In the event of a claim for which Dr. Shepard is entitled to defense under this subsection, Dr. Shepard shall be entitled to representation by the counsel of his choosing, and the University shall pay all reasonable costs and fees associated with such counsel's representation of Dr. Shepard.

1.7 Non-Disparagement. Following execution of this Agreement, neither Party shall issue any public statement that may reasonably be construed as disparaging to the other Party relating to in any way to conduct occurring prior to January 15, 2025.

1.8 Title of President Emeritus. At all times following termination of Dr. Shepard's employment as President of the University, Dr. Shepard shall be entitled to use the title "President

Emeritus.” In any publication or statement referring to Dr. Shepard by title, the University shall include the title “President Emeritus.”

Section 2: Employment as Tenured Faculty Member

2.1 **Employment.** The University hereby offers to Dr. Shepard, and Dr. Shepard hereby accepts, employment at the University as a tenured faculty member with the rank of full professor in the School of Business with all rights and privileges attendant thereto as further set forth in the Western New Mexico University faculty handbook. Dr. Shepard’s employment as a tenured faculty member shall be effective immediately upon termination of the Employment Agreement as described in Section 1.1 above.

2.2 **Term of Employment.** Dr. Shepard’s appointment as a tenured faculty member shall be effective for a period of no less than five years from the date on which Dr. Shepard assumes status as a tenured faculty member according to the terms of this Agreement. Any employment beyond that five-year period will be based on the results of a post tenure review to be conducted after the initial five-year period in accordance with the faculty handbook.

2.3 **Base Salary.** Dr. Shepard’s annual base salary as a tenured professor shall be \$200,000. Dr. Shepard’s annual base salary shall increase by the same average rate as salaries of the faculty as a whole have increased over the prior year and any increase shall be effective on the same date as any faculty salary increase is effective.

2.4 **Insurance, Retirement and other Benefits.** During his service as a tenured faculty member Dr. Shepard will be entitled to all normal and customary fringe benefits extended to university faculty, including but not limited to, sick leave, retirement, medical, dental, life insurance, workers compensation, and the right to participate in all optional insurance and retirement programs. The University shall pay 90% of the premium for the customary family health insurance. Further, Dr. Shepard shall pay 100% of the employee portion of the standard

retirement contribution and the University shall contribute 100% of the University portion of the standard retirement contribution.

2.5 Remote Status: In connection with his employment as a tenured faculty member, Dr. Shepard shall be allowed to be a remote faculty member teaching two courses per semester (Fall and Spring) beginning in the Fall semester of 2025. The subject matter of those courses shall be agreed upon between Dr. Shepard and the Vice President of Academic Affairs or his/her designee.

2.6 Sabbatical. To provide the necessary time to prepare for his teaching responsibilities, Dr. Shepard shall be entitled to an eight-month sabbatical at full faculty compensation beginning January 15, 2025.

Section 3: Miscellaneous Provisions

3.1 Merger. This Agreement contains the complete agreement between the Parties and shall supersede all other agreements between the Parties. The Parties stipulate that neither of them has made any representation with respect to the subject matter of this Agreement except such representations as are specifically set forth herein.

3.2 Venue for Enforcement Action. This Agreement shall be deemed to have been executed in, and shall be subject to, governed by, and enforced pursuant to the laws of, the State of New Mexico, without regard to conflicts of laws. Any action to enforce the terms of this Agreement may be brought only in the Sixth Judicial District Court, State of New Mexico or an appropriate federal court in the State of New Mexico. All Parties hereby submit to the exercise of personal jurisdiction by that Court for purposes of any such action. The prevailing party in any action to enforce the terms of this Agreement shall be entitled to an award of reasonable attorneys' fees and costs.

3.3 Modification. This Agreement may be modified or amended only in a writing signed by the Parties.

3.4 Non-Assignable. This Agreement is not assignable, but shall be binding upon the heirs, administrators, personal representatives, successors and assigns of both parties.

3.5 Severability. If any provision of this Agreement is held invalid, illegal, or unenforceable for any reason, the remainder of this Agreement shall remain in full force and effect.

3.6 Investigation and Acknowledgement of Legal Advice. The Parties each represent and warrant that they have, either through themselves or their respective attorneys, investigated to their full satisfaction all facts and allegations related to this Agreement. All Parties individually warrant and represent that they have read and understand this Agreement, that they have consulted with and received the advice of legal counsel concerning the terms and effect of this Agreement, and that they are fully satisfied with their legal representation in connection with the decision to enter into this Agreement.

3.7 Waiver. No provisions of this Agreement may be waived unless in a writing signed by the Party or Parties whose rights are thereby waived. Waiver of any one provision of this Agreement shall not be deemed to be a waiver of any other provision herein.

3.8 Modification of Agreement. No modification of this Agreement or of any covenant, condition or limitation herein shall be valid unless in writing and duly executed by the Party to be charged therewith. The Parties further agree that provisions of this Section may not be waived except as herein provided.

3.9 Entry Is a Free and Voluntary Act. Each of the Parties hereby acknowledge and represent that they have fully and carefully read this Agreement and that each is executing the

same as a free and voluntary act. Each of the Parties, individually, represents and warrants that he or she is competent to understand, receive legal advice as needed, and enter into this Agreement.

3.10 Equal Participation in Drafting. This Agreement shall be construed without regard to the drafter and shall be construed as though the Parties participated equally in the drafting.

3.11 Interest in Matter. Each Party represents and warrants that no other person or entity has any interest in the matters released herein, and that he has not assigned or transferred or purported to assign or transfer to any other person or entity all or any portion of the matters released herein.

3.12 Parties' Authority to Enter into Agreement. Each Party hereby represents and warrants that they have the right, power, legal capacity, and authority to enter into and satisfy the terms of this Agreement, and that no further approval or consent of any person or entity is necessary to enter into and satisfy the terms hereof.

3.13 Authorization to Execute Agreement. The Parties represent and warrant that the undersigned individual representatives are fully authorized to execute this Agreement and to give the releases and other promises contained herein on behalf of each of the respective Parties.

3.14 Binding Effect. This Agreement shall be binding upon and inure to the benefit of each of the Parties hereto and their respective predecessors-in-interest, successors-in-interest, assigns, heirs, executors, past and present owners, officers, directors, agents, employees, attorneys, administrators, principals, representatives, insurers, partners (of any kind), joint ventures, trusts, trustors, trustees, beneficiaries, and all others who may take any interest in the matters herein.

3.15 Execution in Counterparts. This Agreement may be executed in counterparts, and by facsimile or electronic signatures, each of which shall be deemed to be an original signature and all of which, together, shall be deemed to be one and the same original instrument.

3.16 Regents' Approval. This Agreement is subject to approval by the Board and shall only become effective upon ratification by the Board at an open, public meeting.

3.17 Section Titles and Captions Are for Convenience and Reference Only. The section titles and captions contained in this Agreement are inserted only as a matter of convenience and for reference, and shall in no way be construed to interpret, define, limit, or extend the meaning, scope, and/or intent of this Agreement or any of its terms and/or provisions.

3.18 Recitals. The Recitals set forth above are hereby incorporated in and made a part of this Agreement by this reference.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in counterparts on the dates indicated below:

WESTERN NEW MEXICO UNIVERSITY

By

Mary E. Hotvedt, Ph.D.
Chairman, Board of Regents

Date:

12/20/2024

Accepted:

Joseph Shepard, Ph.D.
President

Date:

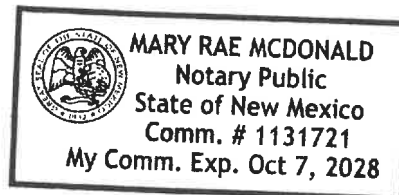
Dec 20, 2024

State of New Mexico
County of Grant

The foregoing instrument was acknowledged
before me 20 day of December, 2024

Mary Rae McDonald
Your Name Here, Notary Public

My Commission Expires 10/07/2028



**WESTERN NEW MEXICO UNIVERSITY
EMPLOYMENT AGREEMENT
FOR PRESIDENT JOSEPH SHEPARD**

This Employment Agreement is entered effective on October 1, 2022, between Joseph Shepard, Ph.D. ("Dr. Shepard" or "President") and Western New Mexico University, a New Mexico public institution of higher education (the "University"), acting through its governing body, the Western New Mexico University Board of Regents (the "Board"). This Agreement supersedes all other Agreements between the University and Dr. Shepard.

1. Employment. Effective October 1, 2022, the Board hereby extends the Agreement of Dr. Shepard as President of the University, and Dr. Shepard hereby accepts such continued employment. Dr. Shepard shall be the chief executive officer of the University and shall be responsible for administering and leading the University and implementing the rules, regulations, policies and directives of the Board and applicable law. Dr. Shepard agrees that he will at all times faithfully, industriously, and with the best use of his experience, ability and talent, perform all of the duties required pursuant to the terms of this Employment Agreement and the University's official policies, and as assigned by the Board. Dr. Shepard is expected to devote his time, attention, and energy to the business of the University and shall not, during the term of this Employment Agreement, engage in any other business or professional activity, whether or not for profit or compensation, without the prior written permission of the Board (except for reasonable service on boards of professional educational entities). The University shall furnish Dr. Shepard with all reasonable and necessary support to fulfill his duties, including, but not limited to, a private office, administrative support, and a mobile phone.

2. Term of Employment. The term of this Agreement is for the period commencing October 1, 2022, and expiring June 30, 2027, subject, however, to earlier termination as provided

in this Employment Agreement. On or before June 30, 2026, the Board, shall notify Dr. Shepard whether it will offer to extend this Employment Agreement beyond June 30, 2027, provided that no failure to timely give such notice will be construed to extend the term of this Agreement.

3. Compensation.

3.1. Base Salary. President's annual Base Salary effective October 1, 2022, shall be \$365,000. President's annual Base Salary shall increase by the same average rate as salaries of the faculty as a whole have increased over the prior year and any increase shall be effective on the same date as any faculty salary increase is effective.

3.2. Retention incentive: The Board shall provide the President a retention incentive as follows:

Annual \$50,000 upon the satisfactory (overall meets expectations) annual performance evaluation conducted by the Board of Regents for the completion of each fiscal year (FY) beginning with FY 2022-23 and subsequent fiscal years throughout the duration of this contract. The President shall be evaluated by no later than September 30 of each year for the previous fiscal year. If no evaluation is performed, the annual performance will default to that of "meets expectations" and be viewed as a satisfactory annual performance for the previous fiscal year.

3.3. President's Residence. The University shall provide President with an official residence at 500 W. College Avenue, Silver City, in which President is required to reside and conduct University meetings and events. The residence will be maintained (including utilities) and insured at University expense, except for

damage and expense caused by the gross negligence of the President, his family or personal guests for which he is responsible. Insurance for the residence shall extend to personal items owned by the President and maintained in the residence.

3.4.Insurance, Retirement and other Benefits. In addition to those benefits specified in this Employment Agreement, the President will be entitled to all normal and customary fringe benefits extended to University staff, including but not limited to, sick leave, retirement, medical, dental, life insurance, workers compensation, and the right to participate in all optional insurance and retirement programs. The University shall pay 100% of the premium for the customary family health insurance. Further, the University shall pay 100% of the employee portion of the standard retirement contribution and 100% of the University portion. So long as the President elects the alternative retirement plan, the University shall also make contributions in accordance with NMSA §22-11-49(B). The President shall earn annual leave at a rate of 16 hours per month or 192 hours per year. The President's annual leave balance may not exceed 160 hours per fiscal year.

3.5.Annuity. The University shall make a special annuity payment for the President at the rate of \$8,000 per month to the currently existing account set up for that purpose or any substitute account as directed by the President.

3.6.Automobile. In recognition of the fact that the President's duties require automobile travel in an around the State of New Mexico and the Southwest United States, and in lieu of providing the President a University owned vehicle, the University shall pay the President a private vehicle allowance of \$2,000 per month.

- 3.7. Life Insurance: The University shall purchase a whole life insurance policy for the President, with a coverage amount that may be procured at a cost not to exceed a \$2,000 monthly premium during the term of this Agreement. Should the President elect a coverage that requires a premium greater than this premium amount, then the President is personally responsible for any difference above the University's obligation. Should life insurance coverage not be obtainable for the President, the University shall remit to the President the monthly amount of \$2,000 in lieu of said life insurance policy.
4. Entertainment and Travel Expenses. The reasonable costs of all official and reasonable entertainment and travel by the President will be reimbursed or paid by the University in accordance with state law and University policy, provided that the President shall not be twice reimbursed for the same expenses reimbursed pursuant to other provisions of this Agreement. These expenses shall be audited annually.
5. Termination. This Employment Agreement may be terminated by:
- 5.1. Mutual written agreement of the parties. Dr. Shepard shall vacate the official Residence on the effective date of the written agreement unless a variance is granted by the Board beyond that date.
- 5.2. Resignation or retirement by Dr. Shepard. Dr. Shepard may resign his employment by providing at least six (6) months' written notice of his resignation, unless a lesser period of notice is mutually agreed upon. Dr. Shepard shall vacate the official Residence on the effective date of his resignation. Unless good cause is shown, upon resignation or retirement, Dr. Shepard shall be provided the status of emeritus with all rights and privileges thereto.

- 5.3. Death of Dr. Shepard. In the event of Dr. Shepard's death, his dependents shall have ninety (90) days from the date of his death to vacate the President's Residence.
- 5.4. Termination for Just Cause. The Board may terminate Dr. Shepard's employment for just cause in accordance with the Board of Regents Manual. Dr. Shepard shall vacate the President's Residence within thirty (30) days of the date of his termination pursuant to this paragraph.
- 5.5. Termination at the request of the Board. The Board shall have the right to terminate this Employment Agreement in its discretion for the best interests of the University. To do so, the Chairman of the Board shall provide Dr. Shepard thirty (30) days' notice of a meeting of the Board at which such termination will be considered. In the event of such termination, Dr. Shepard will continue to receive the Base Salary provided for in Paragraph 3.1 for the balance of the Term of this Agreement, or a period of one and a half (1.5) years from the Board's vote, whichever is less, or the equivalent amount in a lump sum payment, less any applicable withholding, at the University's option. Dr. Shepard shall vacate the official Residence within thirty (30) days of the date of his termination pursuant to this paragraph.
- 5.6. Disability. If the Board determines that Dr. Shepard may be disabled due to accident, mental or physical illness, or for any reason becomes incapable of performing the requirements of this Employment Agreement, the Board shall have the right to require Dr. Shepard to submit to a medical examination, either physical or mental, by a physician licensed to practice medicine, selected by the Board at University expense. If the Board determines in the manner stated above and at its discretion that Dr. Shepard is disabled and cannot perform the requirements of this

Employment Agreement, this Employment Agreement shall terminate at a date specified by the Board. In such event, Dr. Shepard will continue to receive the compensation and medical and dental insurance benefits provided for in this Agreement for a period of six (6) months or the equivalent amount in a lump sum payment, less any applicable withholding, at the University's option. In the event of Dr. Shepard's disability, he or his dependents shall have ninety (90) days from the date of the Board's determination of his disability to vacate the official Residence.

6. Merger. This Employment Agreement, including any attachments and appendices hereto, contains the complete agreement concerning the employment arrangement between the parties and shall supersede all other agreements between the parties. The parties stipulate that neither of them has made any representation with respect to the subject matter of this Employment Agreement except such representations as are specifically set forth herein and each of the parties acknowledges that it has relied on its own judgment in entering into this Employment Agreement.

7. Modification of Agreement. No waiver or modification of this Employment Agreement or of any covenant, condition or limitation herein shall be valid unless in writing and duly executed by the party to be charged therewith. The parties further agree that provisions of this paragraph may not be waived except as herein provided.

8. Waiver of Breach. No waiver by either party of any rights under this Employment Agreement will be valid unless set forth in a writing signed by that party. The failure of either party to insist upon strict performance of this Employment Agreement shall not be construed as a waiver of any of the party's other rights under the Employment Agreement.

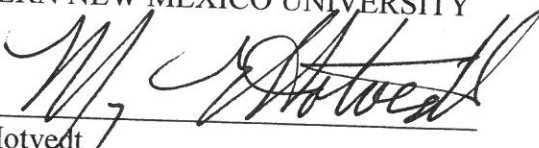
9. Non-Assignable. This Employment Agreement is not assignable, but shall be binding upon the heirs, administrators, personal representatives, successors and assigns of both parties.

10. Severability. The terms of this Employment Agreement are severable such that if any term or provision is held by a court of competent jurisdiction to be invalid, illegal or unenforceable, the remainder of the provisions shall continue to be valid and enforceable.

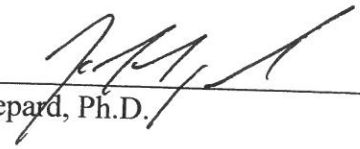
11. Governing Law. This Employment Agreement is governed by and to be construed in accordance with the laws of the State of New Mexico by a court of competent jurisdiction in the State of New Mexico and Dr. Shepard consents to personal jurisdiction over Dr. Shepard by the courts in the State of New Mexico.

12. Regent's Approval. This Employment Agreement is subject to approval by the Board and shall only become effective upon ratification by the Board at an open, public meeting.

WESTERN NEW MEXICO UNIVERSITY

By 
Mary Hotvedt
Chairman, Board of Regents

Date: 29/9/22

Accepted: 
Joseph Shepard, Ph.D.
President

Date: 29 sept 2022



FROM THE PRESIDENT'S DESK

Preface

Before I give my Resignation Letter, I wish to clarify a few things

“A lie is halfway round the world before the truth has got its boots on...”

I wish to share only facts:

- **Fact:** There is no \$27,000 couch. The university bought one couch at \$4,500, and two at \$5,500 each. These were for the president's home and not for me.
- **Fact:** All major trips that I have taken were shared with the Board. International trips had full Board involvement. I have never taken a luxury trip on the university's dime. All trips for the university involve agendas, invitations and meetings throughout the trip.
- **Fact:** I have never taken a \$25,000 helicopter ride. In fact, I have never taken a helicopter ride that the university paid for.
- **Fact:** All flowers for my daughter's wedding were purchased by me. All items for my daughter's wedding were purchased or rented and paid for by me and my wife personally.
- **Fact:** I have never written a single check to myself via the Foundation or the university.
- **Fact:** All checks written to me from the Foundation were reimbursements for university and foundation purchases that have complete documentation and oversight.
- **Fact:** My wife never “profited handsomely” or otherwise.
- **Fact:** My wife's p-card was approved by then Board chair Jerry Walz and had oversight and approvals separate from me.
- **Fact:** My wife bought items exclusively for the university and never for herself or me
- **Fact:** There has never been any purchase of wine for \$800 a bottle from Greece or anywhere else.



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- **Fact:** The State auditor has never shared his specific findings with the university nor has he had any conversations with us to understand any contextual issues - nor has there been any due process afforded to us. We know only what was in his letter of concern, but do not know any further details.

Definition -

Defame: to harm the reputation of by communicating false statements about:
to harm the reputation of by libel or slander

And that's a **FACT!**

Resignation Letter

Across the country the average tenure of a university president is a little more than five years. When I came to Western New Mexico University in 2011 the prediction was I would leave within three years. To be fair I had in mind staying up to five years. The University was in a precarious position. The weeds around campus were growing faster than enrollment and the financial outlook was falling quicker than a Peregrin falcon headed for a kill. State funding had plateaued or was declining. Buildings were deteriorating, gas lines were rupturing, and the swimming pool leakage had been creating waterfalls in a nearby building. Faculty and staff morale was low. Town and gown relationships were in shambles with the citizens referring to the University as the citadel on the hill with a moat around it to keep out the people. A new president faced with these conditions could certainly justify looking for more promising and stable opportunities, but I saw the wonderful potential instead of the obvious faults.

On July 1, 2024, I began my fourteenth year as president of Western New Mexico University. During this time, I had multiple opportunities to move into another presidency. Given the conditions that confronted me in 2011, why did I choose to stay? In short, I fell in love with the area, the community, and the University—the faculty, staff, and especially the students—with a vision of what we could accomplish together. On the personal side, my two children of Mexican heritage and my affinity for Mexico after teaching there in my first



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years out of college tied me even closer to the idea of leading a Hispanic Serving Institution. Furthermore, influenced by my upbringing, I have always felt that my vocation was to help improve the lives of others. WNMU's open access admissions, an open door to a high percentage of first-generation students who would not have a chance for higher education except for Western, offered me the opportunity to meet that purpose. With the support of a dedicated Board of Regents and a cadre of campus leaders, I decided to take on the challenge as best I could to transform this institution.

Over those initial years, we cut and revamped the budget by reductions up to 25%, reduced faculty and staff, prioritized programs, embarked on beautifying the campus, revitalized infrastructure, upgraded our athletic and recreation facilities, built new residence halls, began to bridge that moat to welcome the community with a first-rate slate of cultural affairs programs, and overall laid the groundwork for a more effective and prosperous future. It was through this process that I discovered the amazing quality and dedication of faculty and staff. Faculty Senate presidents like Virginia Huegel, Tres Camacho, Andy Hernandez, Emma Bailey, Scott Fritz, Sue McFeaters, Scott Smith, and Phil Schoenberg engaged in the tough but fair leadership of shared governance. Staff Senate presidents including Matthew Lara, Margaret Soucy, Dean Foster, Michael Acosta, Adele Springer and Bart Brown provided proactive support. Abandoning the previous need to use reserve funds for operating expenses, we turned the budget around by keen oversight and discipline from our business office leaders like Kelley Riddle, Cynthia Martinez and Amy Baca. Additionally, the leadership of Jack Crocker, Isaac Brundage, Julie Morales, Magdaleno Manzanarez, Betsy Miller, Scott Noble and Mary Rae McDonald exemplified excellence and have helped make this university great. I am humbled by the positive changes we achieved together.

Today, our enrollment has climbed to over 3,500 students. Our academic programs have moved into top tier national ranking, with Social Work, Business, Education, and Early Childhood consistently being recognized, including being the New Mexico Center of Excellence for Early Childhood Education. Because of our Applied Liberal Arts and Sciences (ALAS) curriculum, the State Legislature designated us the Applied Liberal Arts and Sciences University of New Mexico. Our innovative Nursing program is



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meeting the critical health needs of our area and state, the most recent cohort of graduates scoring a 100% pass rate on the state exam compared with a pass rate in the upper 60% a few short years ago. Our Expressive Arts Department's McCray Gallery has become a mecca for professional and student art exhibitions and our world class Mariachi Plata de WNMU proudly spreads our Hispanic focus and heritage as the only collegiate championship ensemble in New Mexico. We have responded to area and state workforce needs by expanding our Career and Technical Education offerings such as welding, construction, plumbing, pharmacy tech, phlebotomy, and certified nurse assistants. My early commitment to reconnect with the community has exceeded my hopes as the University has become the cultural center of the region. Local and area residents fill Light Hall and the Fine Arts Center Theater for our cultural affairs concerts and lectures. Fiesta Latina has grown into a major international event drawing participants and crowds to further embrace our Hispanic heritage. The Western Institute of Lifelong Learning is thriving on our campus with its enthusiastic group of volunteers providing rich opportunities for intellectual participation for the community and the University. Our students now have access to healthy meals furnished free through our food security program. The WNMU Foundation assets have increased by nearly 400%. We are fiscally stronger than we have ever been with our reserves being maintained at 20% or higher of the budget.

I point out these transformative accomplishments to give credit to what WE have done—faculty, staff, and community. But what I am most proud of is what we have done for our students. At every graduation ceremony I witness a fundamental educational process of generational change that touches me deeply. I ask how many are first in their family to go to college? Over 60% raise their hands. I ask how many have children? Over 50% raise their hands. These students are working moms and dads that must attend part time and who take longer to graduate but have persevered through life pressures not to drop out. So many of these students, including the traditional ones just out of high school, would not have access to obtaining a college degree if it were not for WNMU. Another group of students I take pride in helping is our international students, those recruited for our athletic teams as well as those who yearn for an American education. Not only does it change their lives, but their presence enriches the cross-cultural understanding for all our students.



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For me, it's an honor to be a small part of this success. More than anything it's the students who reaffirm everyday my desire and vocation to make a difference in lives that may be less fortunate than mine.

Of course, not everyone always agrees with my decisions and efforts. We are a university after all, and it is common practice that a president must deal with legitimate questions and multiple points of view among highly educated colleagues with various academic and self-interests. I accept these conditions and know that civil and reasonable pushbacks are a basic way to move forward. Usually, that five-year average tenure of university presidents is created not by internal conflicts and disagreements but by external forces that turn toxic.

I love being president of Western New Mexico University, I love our university more, but I love my wife greater than both. Over the last year and a half, Valerie and I have been smeared with lies, innuendos, and direct attacks on our integrity, ethics, honesty, and truthfulness. This is the second time in my wife's life that she has suffered unfairly as a result of her husband speaking truth to power. Her previous husband, Joe Wilson, appointed a United States Ambassador, challenged the Bush administration about lying to the American people regarding the Iraq war. Not only did they use the media to bash him as a malicious liar, but they also further demonized him by outing his wife, one of our country's own CIA spies, callously endangering her life and the lives of her cultivated contacts. Twenty years later Valerie is again in the uninvited spotlight and fair game.

I am extremely grateful for the continuing strong, unanimous support of our Regents, five remarkable, experienced, and independent leaders who volunteer their time and talent to ensure the university maintains the highest standards of quality and fiscal stability and management. All but the student Regent hold terminal degrees with one being a distinguished lawyer and the other three holding doctorates. Their integrity is unquestionable. Their dedication to the truth - unwavering. I also greatly appreciate the sizeable support for me from a silent majority in the community.



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Thirteen years ago, I fell in love with this university and the community that embraced me and gave me a home. In the process I promised to always put our students first. To do so, I must now take a different path to protect from further harm the institution that has been my obsession and my wife who is the center of my life. Therefore, I have come to the conclusion that the path forward for this university and our community is to remove myself from the equation and resign as president.

Obviously, this is not an easy decision. I envisioned many more years leading this great institution. I expect some form of the attack will continue as the retaliation against me and the Board will go unabated. But I hope calmer, more reasonable voices prevail and refocus the conversation on how we can continue to transform and create generational change in the lives of our students. I leave my post not in defeat but with a deep understanding that it is the right thing to do to advance that which I love dearly. To all of you who have supported me, thank you. Know that we will be okay. To those of you who are against me, I hope you someday find peace. My choice is to move beyond the toxic and back to the center of compassion. As I transition into President Emeritus and return to the faculty, I do so with deep pride in our accomplishments, knowing I have made a significant difference in what the institution has become and, I hope, instilled a vision for what it can be. I have been blessed to be the president of Western New Mexico University. May God keep friend and foe in the palm of His hand.

Go Mustangs,

Joseph Shepard, Ph.D.

President, Western New Mexico University

December 20,2024

Dear Members of the Western New Mexico University Community:

On behalf of the WNMU Board of Regents, I am sadly informing you that the Board has entered into a mutual agreement with President Joseph Shepard to terminate his contract, effective January 15, 2025.

In taking this mutual action, we want to acknowledge our deep gratitude to Dr. Shepard for his excellent leadership of our university over thirteen years. Under his tenure, our programs have grown in so many areas. Town and community relations have flourished. Our now-beautiful campus is approaching carbon neutrality. We are the New Mexico Center for Excellence in Early Childhood Education. Our programs in social work, business, and nursing have won national awards. We have MOUs with many institutions both in our state and internationally. The list of accomplishments is much longer than this.

We must note that our decision to work out a mutual agreement in no way is meant to reflect negatively on Dr. Shepard and his work as our President. In his own letter, Dr. Shepard explains why he asked to enter into this negotiation with the Board. He is selflessly stepping down for the good of the university in the face of the ongoing issues. We understand his reasons and hope that this action will allow the university community to move ahead with its important mission of educating our current and future students.

Dr. Shepard and his wife, Valerie Plame, deserve our admiration and so many good wishes. Please join us in expressing our appreciation of Dr. Shepard as we make this painful transition.

Sincerely,



Mary E. Hotvedt, PhD

Chair, WNMU Board of Regents

EXHIBIT

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