



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**STATE *ex rel.* JACOB R. CANDELARIA,
in his capacity as STATE SENATOR, and
GREGORY BACA, in his capacity as STATE SENATOR,**

Petitioners,

and

**JOSEPH K. CERVANTES, in his capacity
as STATE SENATOR, DANIEL IVEY-SOTO,
in his capacity as STATE SENATOR,
GEORGE K. MUNOZ, in his capacity as
STATE SENATOR, and GERALD ORTIZ Y
PINO, in his capacity as STATE SENATOR,**

Intervenors-Petitioners,

v.

Case No. S-1-SC-38996

**MICHELLE LUJAN GRISHAM, in her
capacity as GOVERNOR,**

Respondent,

and

**TIM EICHENBERG, in his capacity as
STATE TREASURER,**

Real Party in Interest.

**GOVERNOR MICHELLE LUJAN GRISHAM'S RESPONSE
TO MOTION FOR ORDER TO SHOW CAUSE**

COMES NOW Governor Michelle Lujan Grisham, through her counsel of record in this matter, and hereby respectfully submits this response in opposition to Senator Jacob Candelaria’s Motion for Order to Show Cause (“Motion”), filed on December 2, 2021. As grounds for this response, the Governor states as follows.

INTRODUCTION

In his haste to make a quick headline, Senator Candelaria ignored this Court’s clear rule requiring him to seek the Governor’s position on his Motion.¹ Had he complied, he would have learned that the \$269,059.81 payment at issue was obligated prior to this Court’s order, and that it was promptly replenished with additional safeguards put in place to prevent any further withdrawals so as to avoid even an appearance of impropriety. If Senator Candelaria wanted to have a genuine discussion about these issues, he could have contacted this Office. He did not. Nor did he contact anyone at DFA for clarification. Despite literally putting zero effort into resolving this issue, Senator Candelaria nevertheless baselessly told the Santa Fe New Mexican that the Administration was not open to “debate or discussion.”²

¹ Rule 12-309(C) NMRA categorically provides, “Prior to filing a motion, the moving party shall attempt to ascertain whether the motion will be opposed by any other party.” There is no exception for motions for orders to show cause, as intimated by Senator Candelaria. *See* Motion at ¶ 28.

² Daniel Chacon, *Despite ruling, administration still spending federal funds*, Santa Fe New Mexican (Dec. 2, 2021), https://www.santafenewmexican.com/news/local_news/despite-state-supreme-

Nothing could be further from the truth. On September 30, 2021, this Court denied Petitioners’ request to halt all spending of the American Rescue Plan Act (“ARPA”) funds, essentially permitting the Governor to continue spending the funds as needed. However, as previously noted, the Governor voluntarily ceased spending on new programs and initiatives out of respect for parties, the Court, and the important constitutional question at issue. The Governor also just called the Legislature into a special session this week to appropriate the ARPA funds so they could go to help New Mexicans.³ So, for Senator Candelaria to claim that the Governor or anyone in her Administration is now intentionally violating the Court’s order rings hollow. Sadly, it appears Senator Candelaria is less interested in the truth than having his name in the papers. But the reality is that the parties with knowledge of the issue communicated promptly and came to a full resolution, and so there is no occasion for intervention from the Court.

BACKGROUND

Petitioners brought the instant action to stop the Governor’s spending of the ARPA funds without legislative appropriation on September 18, 2021. *See*

court-ruling-lujan-grishams-administration-continues-to-spend-federal-funds/article_d8a7b50e-539d-11ec-9bec-0b735783ac95.html.

³ *See* Press Release, *Gov. Lujan Grisham to formally call Legislature into special session on redistricting*, Office of Governor Michelle Lujan Grisham (Dec. 2, 2021), <https://www.governor.state.nm.us/2021/12/02/gov-lujan-grisham-to-formally-call-legislature-into-special-session-on-redistricting/>.

Petitioners’ Verified Emergency Petition for Writ of Mandamus and Request for Stay on the Transfer of Additional Funds Out of the State’s American Recovery and Reinvestment Account (“Petition”), filed Sept. 18, 2021. Although the Court denied Petitioner’s preliminary request to stay any spending, it ultimately granted Petitioners’ request and issued a writ of mandamus on November 18, 2021, ordering the Governor “not to transfer, encumber, commit, expend, or appropriate any *additional* funds out of the State of New Mexico’s American Recovery Plan Act (ARPA) account in the State of New Mexico treasury absent legislative appropriation.” Writ of Mandamus (“Order”), filed Nov. 18, 2021 (emphasis added).

On November 29, 2021, Department of Finance and Administration (“DFA”) staff—who were under the impression the Order did not apply to previously obligated expenses due to denial of the stay and the emphasized language above—approved a payment of an October 25 invoice for \$269,059.81 from Carahsoft Technology Corporation (“Carahsoft”) for the provision of certain software and information technology services in connection with DFA’s federal grants management. *See* Affidavit of Secretary Deborah K. Romero, ¶¶ 5-7, attached as Exhibit A. The following day, the Treasurer’s counsel emailed undersigned counsel stating that she had learned that DFA had initiated the transfer of approximately \$269,000 out of the ARPA account. *See* Motion, Exhibit C at 1. Undersigned counsel and the Secretary of DFA immediately began looking into the issue. Exhibit A at ¶¶

8-9. The Secretary was initially informed by DFA staff that, while DFA issued a warrant to pay the contractor, the warrant was cancelled, and the money had not been taken out of the account.⁴ *Id.* at ¶ 9. The Secretary was also informed that DFA had some employees that were paid from the funds for which payroll had already processed. *Id.* at ¶ 12. Undersigned counsel relayed this information to the Treasurer's counsel on December 1 at 1:12 P.M. and noted that DFA would not pay the vendors with ARPA money and any money that left the account would promptly be restored in the interest of avoiding even an appearance of impropriety. *See* Motion, Exhibit C at 4.

The following morning, Deputy Treasurer Samuel Collins sent undersigned counsel and the Secretary an email asking what the plan was to correct the payroll payment of \$7,283.43, which had posted the previous day. *See* Motion, Exhibit D at 2-3. Collins also stated that the \$269,059.81 to Carahsoft had not yet been restored—indicating that the funds were, in fact, removed from the ARPA account. *Id.* The Secretary responded later that morning with a screenshot of the ARPA account ledger showing that the \$269,059.81 payment to Carahsoft had been restored earlier that morning, and informed Collins that DFA was placing a hold on the ARPA account so that no other activity will take place. *Id.* at 1. She also informed the

⁴ Unfortunately, this information was not accurate, as the warrant had, in fact, been sent out by DFA staff member without the Secretary's knowledge. *See* Exhibit A at ¶ 10.

Deputy Treasurer that she already had contacted the Treasurer to let him know that certain payroll expenses were going to post, but that the money would be restored as soon as possible.⁵ Exhibit A at ¶ 13.

Despite being aware of these communications, Senator Candelaria felt it necessary to file the instant Motion *hours later* without bothering to inquire as to whether the funds had been returned or whether there were any disputes requiring this Court's resolution. Senator Candelaria faults DFA and undersigned counsel for failing to immediately inform the Court of an issue that had already been resolved by the parties without dispute. Motion at ¶ 10. He also takes umbrage with undersigned counsel's comment that the Carahsoft payment may not have violated the Court's Order because the moneys were obligated prior to the Court's decision. *Id.* ¶ 13. Although the exhibits Senator Candelaria attached to his motion demonstrate that all issues have been straighten out, Senator Candelaria now seeks to hold the Governor and the Secretary in contempt and to have the Court impose unnecessary restrictions on the ARPA account. *Id.* at 9.

⁵ DFA was unable to preemptively stop the transfer of the \$7,283.43 that had already been processed, as its central payroll system does not allow any reversal of funds until DFA posts the payroll. Exhibit A at ¶ 14. However, DFA was able to stop a transfer of an additional \$6,894.81 in net pay associated with the payroll expense. *Id.* at ¶ 15. Together, these figures account for the \$14,178.24 in payroll expenses mentioned in paragraph 16 of the Motion. *Id.*

DISCUSSION

It should be noted at the outset that—contrary to Senator Candelaria’s assertions—it is less than clear whether the transfer of the Carahsoft payment violated the Order, as those funds were legally obligated prior to the Court’s decision. Because the Court denied the Petitioners’ initial request for a stay, DFA was under no legal obligation to stop committing funds until the Court issued its writ of mandamus on November 18, 2021. The writ specifically ordered the Governor “not to transfer, encumber, commit, expend, or appropriate any *additional* funds out of the State of New Mexico’s American Recovery Plan Act (ARPA) account in the State of New Mexico treasury absent legislative appropriation.” Order (emphasis added). Given the Court’s denial of the stay and the inclusion of the qualifier “additional” in its Order, DFA did not understand the Order to apply to any funds that have already been “transfer[red], encumber[ed], commit[ted], expend[ed], or appropriate[ed]” prior to November 18. *See* Exhibit A at ¶ 7. But regardless of the propriety of DFA’s interpretation, undersigned counsel and the Secretary took immediate action to reverse the payment out of an abundance of caution and respect for this Court’s Order—and to avoid any unnecessary disputes with Petitioners. *See generally id.* DFA also promptly reversed the payroll expenses that were mistakenly paid out of the account. *Id.* at ¶ 15. Further, DFA is actively monitoring the account and has taken steps to place a hold so no amounts can be transferred until the

Legislature appropriates them in the current special session.⁶ *Id.* at ¶¶ 17-18. Thus, there is no longer any possibility for funds to be mistakenly removed from the ARPA account.

CONCLUSION

For the foregoing reasons, there is no need for this Court to entertain Senator Candelaria's unnecessary request to hold anyone in contempt or place any additional restrictions on the ARPA account. *Concha v. Sanchez*, 2011-NMSC-031, ¶ 45, 150 N.M. 268, 258 P.3d 1060 (“A judge’s exercise of the contempt power must be tailored to the contemptuous conduct, exerting just enough judicial power to right the wrong; no more, no less.”); *Int’l Minerals & Chem. Corp. v. Local 177*, 1964-NMSC-098, ¶ 18, 74 N.M. 195, 392 P.2d 343 (“It should be kept in mind that the authority or power of contempt should be used cautiously and sparingly.”). The most important thing to the Governor is not who spends the ARPA money, but rather that it be distributed as soon as possible to New Mexicans in need—a process which is now underway with the special session. Accordingly, the Court should deny the Motion.

⁶ While Senator Candelaria faults DFA for not placing this hold sooner, *see* Motion at ¶ 22, he fails to understand it was no simple matter for DFA to put it in place. This required a significant amount of work in collaboration with the Department of Information Technology since the Court’s Order, as DFA had never been required to place blanket freeze on an account before. Exhibit A at ¶ 17.

Respectfully submitted,

/s/ Holly Agajanian

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, I filed the foregoing through the New Mexico electronic filing system, which caused all parties and counsel of record to be served by electronic means.

/s/ Holly Agajanian
Holly Agajanian

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AFFIDAVIT OF DEBORAH K. ROMERO

1. I am over the age of eighteen (18) years, I am of sound mind, and I am not otherwise disqualified from making this Affidavit. The matters stated below are based on my own personal knowledge.

2. I am currently the Cabinet Secretary for the New Mexico Department of Finance and Administration (“DFA”).

3. In my official capacity, I am responsible for DFA’s exercise of its statutory obligations, including its compliance with the Court’s grant of Petitioners’ petition for writ of mandamus in the above-captioned case.

4. I am able to testify as to DFA’s policies and procedures concerning disbursements of funds under its control, both before and after the Court granting Petitioners’ petition for writ of mandamus in the above-captioned case.

5. DFA received Invoice No. IN1052620 from Carahsoft Technology Corporation (“Carahsoft”) on or about October 25, 2021, for the provision of certain software and information technology services in connection with DFA’s federal grants management.

6. DFA staff approved payment of the invoice on or about November 29, 2021, by Voucher No. 22000789 in the amount of \$269,059.81 (“Voucher”). The funds were paid out of cash account 101800 in fund number 71940, which houses the ARPA funds at DFA.

7. DFA staff did not understand the Court's order to apply to moneys that were allocated prior to its entry such as the Carahsoft invoice. The fact that the Voucher was in the proper form and had adequate budget would have been sufficient for staff to approve the Voucher for payment.

8. On November 30, 2021, at approximately 3:32 P.M., L. Helen Bennett, counsel to the State Treasurer, emailed Holly Agajanian, counsel to the Governor, to ask why DFA had transferred approximately \$269,000 from "the ARPA funds." I was immediately informed of the e-mail.

9. After learning of the e-mail, I immediately directed Financial Control Division staff to investigate the transfer mentioned therein. Staff identified that there had been a warrant issued to pay the Voucher. However, I was initially told by staff that the money had not been taken out of the account because the warrant was still in our possession and had been cancelled. This information was communicated to Ms. Bennett by Counsel for the Governor on December 1, 2021, at 1:13 P.M.

10. On December 2, 2021, I was informed by staff that the Voucher had, in fact, been paid via an ACH transfer initiated by the system. However, the funds were restored to cash account 101900 later that morning through the action of a journal entry which also moved the associated expense to another funding source.

11. On the morning of December 2, I informed State Treasurer Eichenberg that DFA had restored the funds associated with journal entry via a voicemail. I also

sent Deputy State Treasurer Collins another email on December 2, at 11:48 A.M. with a screenshot showing the restored Voucher funds in cash account 101900, contrary to the statement in paragraph 18 of Petitioners' motion that the State Treasurer's Office was "unable to confirm that these funds have actually been returned to the ARPA suspense account."

12. In addition to the Carahsoft payment, through a review of the payroll process that took place on December 1, 2021, it was noted that a payroll entry for services already rendered for federal administration staff was slated to process against the account for payroll costs of pay date December 3, 2021. Later that day, a voucher in the amount of \$7,283.43 ("Payroll Expense") posted as an account payable to cash account 101800, another account within the ARPA fund, which is fund number 71940.

13. On December 2 at 7:50 A.M., Deputy State Treasurer Samuel K. Collins, Jr. emailed me, asking to correct the Payroll Expense transaction, among other things. I replied at 10:24 A.M., in relevant part, as follows:

DFA staff advised members of your staff and I left a voice message for [the State Treasurer] advising him that we knew this expense was going to hit the fund and that we would take action to reverse it. The transaction had to post first. Now that it has posted the adjustment will be made as soon as possible. This is the last transaction affecting this fund.

14. My statement that "we knew this expense was going to hit the fund" refers only to the Payroll Expense, not the Voucher, contrary to the implication in paragraph 21 of Petitioners' motion. The Central Payroll system administered by DFA

does not allow any reversal of funds until DFA posts the payroll advices. DFA had to post the Payroll Expense before it could do anything to reverse it, contrary to the argument in paragraph 23 of Petitioners' motion that DFA should have or could have taken other action concerning the Payroll Expense. State payroll is a sophisticated system controlled by an automatic process to eliminate human error and ensure statutory compliance. Payroll is processed in three steps: accounting, payout and reporting. The first two steps in the process are systematic based on inputs by each individual agency. The reporting step is where things like this are corrected or adjusted if payouts are posted to the wrong place. If something were to be changed mid-way through the process, the integrity of the data would be compromised since it would not reconcile or balance to the original inputs.

15. As of the date of this affidavit, DFA has reversed the Payroll Expense and restored it to cash account 101800. The Payroll Expense represents taxes and benefits that must be paid before employees receive their paychecks. DFA was able to stop the withdrawal of an additional \$6,894.81 in net pay associated with the Payroll Expense that would have been processed on December 3. This \$6,894.81 and the \$7,283.43 Payroll Expense comprise the \$14,178.24 in payroll expenses mentioned in paragraph 16 of Senator Candelaria's Motion. There have been no other payroll expenses associated with the ARPA account.

16. On December 2, at 11:48 A.M., I informed Deputy State Treasurer Collins that DFA would be placing a hold on the account so no further activity would take place.

17. Prior to the Court's November 18 order in this case, I am not aware of an instance in which DFA needed to issue a blanket freeze or hold on any account under its control. Accordingly, DFA has not had a mechanism to do so quickly, as suggested by paragraphs 21 and 22 of Petitioners' motion. In the days since the Court's order granting Petitioners' writ and particularly after November 30, DFA has collaborated with the Department of Information Technology ("DOIT") to implement such a process.

18. DFA staff will actively monitor the affected accounts to ensure that no additional expenditures are processed.

19. I have not received any inquiries about this matter from the Petitioners, either directly or through my attorney. Had they requested clarification or more information, I would have happily provided it.

Further, Affiant sayeth not.


Deborah K. Romero

