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STATE OF MISSISSIPPI  
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IN THE CHANCERY COURT OF LAFAYETTE COUNTY, MISSISSIPPI  
2020 DEC 28 PM 4:11

PAUL J. CAFFERA

PLAINTIFF

V.

CAUSE NO. CV 2020-573(W)

THE UNIVERSITY OF MISSISSIPPI

DEFENDANT

**THE UNIVERSITY'S CORRECTED MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

Plaintiff Paul Caffera, an employee of the University of Mississippi, received notice on October 13, 2020 of an allegation that he had violated the University's non-discrimination policy by creating a race-based hostile work environment for certain employees on campus. Caffera immediately decried the allegations as "retaliation" for the performance of his official duties and declined to participate in the investigation being conducted by the University's Office of Equal Opportunity and Regulatory Compliance under long-standing University policy. Instead, Caffera unilaterally hired a lawyer and filed his Complaint. Creating non-existent concerns and raising false alarms, he now asks this Court to disrupt an internal University investigation by immunizing him, sealing University records from the investigation, forcing the University to disclose a wide array of documents and information, and compelling the University to pay for the lawyer he hired. Contrary to Caffera's novel interpretation of the scope and authority of his position, the University's employment policies apply to him just as they apply to all University employees. The Court should reject any argument by Caffera otherwise and dismiss his Complaint.

**FACTUAL AND PROCEDURAL BACKGROUND**

The Mississippi Board of Trustees for State Institutions of Higher Learning (the "IHL Board"), a part of the State's executive branch, manages and controls the State's public

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universities under constitutional authority.<sup>1</sup> Both the Mississippi Constitution and the Mississippi Code authorize the IHL Board to establish rules and procedures governing its relationship with the employees of Mississippi's universities.<sup>2</sup> Pursuant to this authority, the IHL Board has delegated to the various chief executive officers of the State's universities the responsibility for administering employment matters at the respective universities.<sup>3</sup> In turn, the University adopts and implements policies and procedures governing its employees exercising its executive-branch powers.

The University, an equal opportunity employer under federal law, must comply with all applicable federal anti-discrimination mandates, including Title VII of the Civil Rights Act of 1964.<sup>4</sup> Title VII protects employees from illegal discrimination in the workplace, including the creation of a hostile work environment based on an employee's race.<sup>5</sup>

The University has adopted and implemented policies and procedures to ensure its compliance with Title VII and other applicable laws. For example, the University has adopted a Non-Discrimination and Sexual Harassment Policy and Complaint Procedure, which sets forth the "University's policy on non-discrimination and sexual harassment" and also provides "the procedure for filing complaints related to unlawful discrimination and harassment on the basis

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<sup>1</sup> MISS. CONSTITUTION §213-A; *see, e.g., Smith v. Univ. of Miss.*, 797 So.2d 956, 959 (Miss. 2001) (citing *Board of Trustees of State Institutions of Higher Learning v. Van Slyke*, 613 So.2d 872, 879 (Miss. 1993)).

<sup>2</sup> *See* Miss. Constitution §213-A and MISS. CODE ANN. §37-101-15(f).

<sup>3</sup> *See, e.g.,* IHL Policy 401.0102, 403.0202, 404.01, and 405.02, publicly available at <http://www.mississippi.edu/board/downloads/policiesandbylaws.pdf>. (Appendix 1 to this Brief). In ruling on a motion under Rule 12, the Court may consider both the plaintiff's allegations and documents attached to the complaint that are central to the plaintiff's claims. *See Breeden v. Buchanan*, 164 So.3d 1057, 1068 (Miss. Ct. App. 2015); *see also In re Miss. Rules of Evid.*, 2016 Miss. LEXIS 263, \*32 (Miss. 2016) ("The first kind of fact that can be judicially noticed is one that is commonly known in the jurisdiction in which the court sits . . . The second kind of fact susceptible to judicial notice is one readily ascertainable.").

<sup>4</sup> *See, e.g., Fulton v. Miss. St. Univ.*, 2018 U.S. Dist. LEXIS 15710, \*15 (N.D. Miss. Jan. 29, 2018).

<sup>5</sup> *See, e.g., Alvarado v. Shipley Donut Flour & Supply Co.*, 526 F. Supp. 2d 746, 751 (S.D. Tex. Nov. 30, 2007).

of race, color, gender, sex, pregnancy, sexual orientation, gender identity or expression, religion, national origin, citizenship, age, disability, veteran status, genetic information, or any other legally prohibited form of discrimination.”<sup>6</sup>

In furtherance of its delegated authority to develop employment policies, the University has charged its EORC Office with accepting and investigating complaints of harassment and/or discrimination under the University’s Non-Discrimination and Sexual Harassment Policy and Complaint Procedure.<sup>7</sup> “[E]mployees . . . who believe they have been discriminated against or harassed are entitled to seek relief through” EORC.<sup>8</sup>

The University does not exempt any employee from compliance with Title VII or with the University’s non-discrimination policy and complaint procedure. When investigating a complaint of discrimination, EORC may interview the complainant, the respondent, and witnesses who have potentially relevant information, along with reviewing documents and other evidence.<sup>9</sup> If EORC determines that harassment or discrimination has occurred, corrective action may be taken, which could include a reprimand, demotion, discharge, transfer or other appropriate actions as determined by the University’s administration.<sup>10</sup> Any corrective employment actions, however, are ultimately the decision of the employee’s supervisor and not EORC.<sup>11</sup> Additionally, the complainant or the person against whom the complaint is made

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<sup>6</sup> Univ. Non-Discrimination and Complaint Procedure Policy, Policy Number 10000632, publicly available at <https://eorc.olemiss.edu/>. (Appendix 2 to this Brief).

<sup>7</sup>*Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

may appeal the finding of the investigation and any resulting disciplinary action taken by submitting an appeal to the University's provost.<sup>12</sup>

The University has also established an Office of the Ombudsperson to provide informal dispute resolution services for its employees.<sup>13</sup> The Ombuds process is not only informal, it is voluntary. No employee may be compelled to participate. The ombuds is not a formal policymaker for the University and the charter emphasizes the significant restrictions on his or her ability to act in any formal representative capacity on behalf of the University. First, the ombudsperson "shall not make, change, or overrule University policy or administrative decisions."<sup>14</sup> Second, the office of the ombudsperson "does not replace, formal grievance processes, investigative systems, and appeals processes available by the University."<sup>15</sup> Likewise, the charter does not grant the ombuds authority to unilaterally ignore University and IHL Board policy. The University currently employs Caffera as the University ombuds.<sup>16</sup> In that role, he must comply with the University's employment policies and procedures, just as any other University employee.

In the fall of 2020, EORC received a complaint alleging Caffera had violated University policy by contributing to a hostile work environment based on race and/or national origin and by abusing the powers of his ombuds position to pursue a personal grudge for a friend or intimate.<sup>17</sup> Gene Rowzee, the EORC Director, contacted Caffera by email seeking to meet

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<sup>12</sup> *Id.*

<sup>13</sup> See Ex. "A" to Pl.'s Compl. ("Office of the Ombudsperson Charter Agreement").

<sup>14</sup> See *id.* at 3.

<sup>15</sup> See *id.* at 4.

<sup>16</sup> Pl.'s Compl. p. 3.

<sup>17</sup> Compl. pp. 3-4; see also Ex. "F" to Pl.'s Compl., Transcript of Mtg. btwn G. Rowzee, P. Caffera, and G. Lewis p. 2. The "transcript" attached to Plaintiff's complaint is actually a typed summary of the meeting, presumably prepared by Caffera or his legal counsel rather than a court reporter. The University accepts the "transcript" in its present

regarding an ongoing personnel investigation.<sup>18</sup> Caffera immediately declined to participate in the investigation, asserting that, as ombuds he was precluded from participating in any formal investigative process.<sup>19</sup> Rowzee informed Caffera that the investigation concerned allegations about Caffera's personal conduct and that the meeting would provide Caffera an opportunity to present his side of the story, as well as to direct Rowzee to any additional witness or information pertinent to the investigation.<sup>20</sup> Caffera responded that he was "quite frankly shocked" to learn that anyone had lodged a complaint against him and dictated that he was "going to need to know the specifics of the allegations, and then consult with counsel for myself as well as for the Office of the Ombuds," before speaking further with Rowzee.<sup>21</sup>

Caffera further claimed that any allegations against him "smack[ed] of retaliation for performing his duties."<sup>22</sup> He quickly countered, without any knowledge of the underlying complaint, that the claims were "baseless" and "spurious."<sup>23</sup> Caffera argued that speaking with him before he "receive[d] those allegations in detail," knew "who [was] accusing [him] of what," and had an "opportunity to consult with counsel before participating in any investigative interview" was unfair and would "not be a legitimate investigatory process."<sup>24</sup>

Rowzee explained that the EORC office, as a matter of practice, does not share allegations by email in advance of meetings to discuss allegations with witnesses and/or

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form for purposes of this Rule 12 motion but reserves the right to contest the accuracy of such "transcript" based on the actual recording of the meeting.

<sup>18</sup> Ex. "D" to Pl.'s Compl. p. 8 (Oct. 13, 2020 Email from G. Rowzee to P. Caffera).

<sup>19</sup> *Id.* at p. 7.

<sup>20</sup> *Id.* at p. 6.

<sup>21</sup> *Id.* at p. 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

involved parties.<sup>25</sup> Instead, the Office personally discusses the allegations with the employee and then offers the employee the option to “continue the meeting, or postpone, or seek counsel, whatever, and that’s fine.”<sup>26</sup> Rowzee again asked Caffera to meet so that they could discuss the allegations and emphasized that Caffera could subsequently seek counsel or proceed as he saw fit after being informed of the allegations.<sup>27</sup> Rowzee explained that the EORC would continue the investigation without Caffera’s involvement if he decided not to participate.<sup>28</sup> Instead Caffera independently engaged personal legal counsel, after which he and his attorney agreed to meet with Rowzee about the allegations.<sup>29</sup>

At their initial meeting, Rowzee informed Caffera and his counsel of the basic allegations levied against Caffera.<sup>30</sup> Although Caffera spoke only through his counsel at that meeting, Rowzee again offered Caffera another opportunity for Caffera to share his side of the story.<sup>31</sup> Caffera’s counsel immediately asked if Caffera was being compelled to answer questions or provide information.<sup>32</sup> Rowzee emphasized that he was just asking Caffera to cooperate and that he did not know if any negative inference would be taken from his refusal to participate.<sup>33</sup>

Rowzee further informed Caffera’s counsel that he was not accessing email employee accounts and that he wanted to speak to all pertinent witnesses before determining whether

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<sup>25</sup> *Id.* at p. 1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Ex. “F” to Pl.’s Compl., Transcript of Mtg. btwn G. Rowzee, P. Caffera, and G. Lewis p. 2. Again, the “transcript” attached to Plaintiff’s complaint is actually a typed summary of the meeting, presumably prepared by Caffera or his legal counsel rather than a court reporter. The University accepts the “transcript” in its present form for purposes of this Rule 12 motion, but reserves the right to contest the accuracy of such “transcript” based on the actual recording of the meeting.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

reviewing any employees' email accounts would even be necessary or relevant to the investigation.<sup>34</sup> Caffera's counsel argued that accessing Caffera's email account would be "a big can of worms" because "his official email account has certain protections by virtue of his position as the Ombud . . . ."<sup>35</sup> The FAQ's published by the Ombuds Office, however, explicitly provide that emails are not confidential and that persons contacting the Office of Ombuds should not use email for such purposes, stating:<sup>36</sup>

### **How do I make an appointment to meet with the Ombuds?**

Call (662) 915-1537, e-mail [ombuds@olemiss.edu](mailto:ombuds@olemiss.edu), or stop by the Office of the Ombudsperson – at **318 Trent Lott Leadership Institute**. If you call the office, please do not leave any confidential information in voicemail. Likewise, it is important to know that e-mail is NOT a confidential method of communication. If you choose to contact the Ombuds through e-mail, please limit communications to scheduling appointments and refrain from providing other details about your inquiry or concern.

Despite the ongoing nature of the EORC process, Caffera now asks the Court to intervene in the University's personnel investigation under the guise of carrying out his employment duties and protecting information provided by other employees.<sup>37</sup> As revealed by his affirmative request for discovery, Caffera's real aim is to protect his own personal employment interests. Caffera's hurried request for judicial intervention is premature, barred by Mississippi's constitutional separation of powers, barred by the Mississippi Tort Claims Act, and without merit. The Court should dismiss his Complaint in its entirety.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> <https://web.archive.org/web/20200814142149/https://ombuds.olemiss.edu/f-a-q/>.

<sup>37</sup> Caffera, as master of his complaint, declines to include any allegations regarding his subsequent meeting Rowzee. With or without those facts, however, Caffera has not adequately stated any claim for relief.

## STANDARD OF LAW

A Rule 12(b)(1) motion challenges the plaintiff's complaint for lack of subject matter jurisdiction. A lack of subject matter jurisdiction robs the court of the power to hear the case. *Schmidt v. Catholic Diocese*, 18 So.3d 814, 831 (Miss. 2009). On the other hand, "[a] Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint," and the court's inquiry is "essentially limited to the content of the complaint." *State v. Bayer Corp.*, 32 So.3d 496, 502 (¶ 21) (Miss. 2010). A plaintiff's allegations "must be taken as true and the motion should not be granted unless it appears beyond reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.*, at 502 (¶ 21). However, "[d]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So.2d 427, 431 (¶ 6) (Miss. 2007). Moreover, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Id.*

## ARGUMENT AND ANALYSIS

### **1. Plaintiff's request for judicial intervention in an ongoing Executive Branch employment investigation violates Mississippi's constitutional separation of powers.**

Pursuant to the Mississippi Constitution, the powers of government are divided into three distinct branches of the legislative, executive and judicial, each of which is "confided to a separate magistracy." MISS. CONST. Art. 1 Section 1. Further, "no person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to the others." MISS. CONST. Art. 1 Section 2.

"Executive power is the power to administer and enforce the laws as enacted by the legislature and as interpreted by the courts." *Clark v. Bryant*, 253 So.3d 297, 302 (Miss. 2018)



(quoting *Alexander v. State*, 441 So.2d 1329, 1338 (Miss. 1983)). Not surprisingly, “execution is at the core of executive power.” *Id.* In carrying out those powers of execution, “[e]xecutive-branch agencies must follow statutes and, absent a declaration from the judicial branch regarding an interpretation of a statute, must decide what statutes mean.” *HWCC-Tunica, Inc. v. Miss. Dep’t of Rev.*, 296 So.3d 668, 677 (Miss. 2020) (quoting *King v. Miss. Military Dep’t.*, 245 So.3d 404, 407 (Miss. 2018)).

The role of the judiciary, on the other hand, is to “determine when the executive and legislative branches have overstepped their boundaries.” *Limbert v. Miss. Univ. for Women Alumnae Ass’n*, 998 So.2d 993, 997 (Miss. 2008). When “the interpretation of a statute comes before the courts,” the judicial branch may step fully into its constitutional role, which “provides for the courts and the courts alone, to interpret statutes.” *HWCC-Tunica, Inc. v. Miss. Dep’t of Rev.*, 296 So. 3d 668, 677 (Miss. 2020). Where, however, the court’s review is focused either on an agency’s fact-finding or the agency’s interpretation or implementation of its own rules and regulations, the court must afford great deference to the agency to ensure that it “maintain[s] the balance between the distinct branches of government.” *Id.* In those situations, the court must “afford great deference” to the executive agency and may “employ only a limited inquiry.” *Id.*

The University of Mississippi, like Mississippi’s other public universities, is considered part of the executive branch of state government. *Smith v. Univ. of Miss.*, 797 So.2d 956, 960 (Miss. 2001). Accordingly, the University is entitled to constitutional deference from the legislative and judicial branches when fulfilling its role as an executive branch agency.

In *Limbert*, the Mississippi University for Women Alumnae Association sued Mississippi University for Women, its president, and the IHL Board, claiming in part that the university president had violated IHL policy by terminating the University's affiliation agreement with the association. 998 So. 2d at 999. The chancery court agreed and ordered the university to re-affiliate with the association. *Id.* On appeal, the Mississippi Supreme Court found that the chancery court had violated the separation of powers doctrine by not affording deference to IHL's interpretation and implementation of its own policy, as well as the university president's actions taken pursuant to such authority. *Id.* According to the Supreme Court, the **"judicial branch should not engage in policy decisions, particularly in those areas delegated by constitution and by statute to the specific agency."** *Id.* (emphasis added).

Here, on October 13 the University's EORC office attempted to schedule a meeting with Caffera to discuss an ongoing personnel investigation. Caffera instructed that he was precluded from participating in any and all University investigations by virtue of his employment position. Upon clarification that the investigation involved allegations regarding Caffera's personal conduct, Caffera preemptively claimed that any such allegations were "spurious," "baseless," and "smacked of retaliation." Under the guise of protecting other employees, Caffera now asks this Court to intervene in the University's ongoing personnel investigation regarding allegations of his personal misconduct, a matter firmly delegated to the University's discretion.

As explained by the Supreme Court in *Limbert*, this Court cannot wade into the University's ongoing personnel investigation without violating Mississippi's constitutional separation of powers. The University's personnel investigation falls firmly within its powers of execution and

outside the scope of judicial review. Accordingly, the Court should abstain from intervening in the affairs of a co-equal governmental branch and deny Caffera's requested relief.

**2. Caffera's request for judicial intervention is not ripe for review.**

Under a related limitation on the judiciary, a party is generally required to exhaust available administrative remedies before seeking judicial review. *PERS v. Hawkins*, 781 So.2d 899, 906 (Miss. 2001). This "administrative exhaustion" requirement recognizes "that no one is entitled to judicial relief for a **supposed or threatened injury** until the prescribed administrative remedy has been exhausted." *Davis v. Barr*, 250 Miss. 54, 62 (Miss. 1963) (emphasis added). The primary purpose of the limitation is to avoid "premature interruption of the administrative process," and to better allow the administrative agency to develop a factual record, exercise its own discretion and expertise, and avoid hampering the efficiency of the administrative process through piecemeal judicial review. *See McKart v. United States*, 395 U.S. 185, 193 (1969).

In the employer-employee context, an employer's mere investigation into potential employee misconduct does not constitute an adverse employment action. *See Blanks v. Cmty. Hosp. of Brazosport*, 2015 U.S. Dist. LEXIS 21054, \*11 (S.D. Tex. 2015) ("regardless of her dissatisfaction, an investigation does not constitute actional adverse employment action . . ."). And while an employee may be entitled to certain procedural protections protecting his or her continued employment, those procedural safeguards do not extend to an employer's mere investigation of potential employee misconduct. *See, e.g., Brokaw v. Dallas Ind. Sch. Dist.*, 2008 U.S. Dist. LEXIS 70518, \*21 (N.D. Tex. Sept. 11, 2008); *see also Cleveland v. Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46, 105 S. Ct. 1487 (1985) (observing that a public employer can avoid due process concerns by suspending a public employee with pay); *see also Kermode v.*

*Univ. of Miss. Med. Cntr.*, 2011 U.S. Dist. LEXIS 105082, \*17 (S.D. Miss. Sept. 15, 2011)

(“Separation with pay is not the same as termination.”). In the case at hand, Caffera asks this Court to disrupt the University’s ongoing internal personnel investigation, which has not yet resulted even in any recommended employment action. However, no referee role exists for this Court in the University’s internal investigation.

In fact, much of Caffera’s claimed “dispute” may not even be in dispute. The University’s investigation has not yet resulted in any findings or recommended personnel action against Caffera. Caffera has no idea if any even *recommended* adverse employment action will result from the University’s investigative process. Likewise, the University has not sought to access Caffera’s emails (though even he indicates that such documents are not confidential), and nothing supports his claim that urgent judicial review is necessary to prevent the disclosure of confidential information.

Finally, Caffera’s conclusory allegations do not support an assertion that this dispute arises out of the performance of his official duties, rather than his personal conduct. The University’s investigation of potential employee misconduct (including whether an employee’s personal conduct is or is not within the scope of that employee’s employment) turns on the University’s own policies and is within the University’s authority to determine. The Court should decline to hear Caffera’s perceived slights that he filed with the Court before the University has even been allowed to fully exercise its administrative powers.

**3. Caffera is not entitled to discovery during the University’s personnel investigation.**

A bill of discovery “is a viable equitable action and remedy in chancery court” that may be utilized “when there is no other remedy.” *Kuljis v. Winn-Dixie Montgomery LLC*, 214 So.3d

283, 285 (Miss. 2017). Accordingly, the action may be pursued where discovery itself is the “sole object and end of the bill,” but not where the discovery is incidental to another claim for relief. *Kuljis*, 214 So.3d at 286 (quoting *Graham v. Franks*, 220 So.3d 992, 995 (Miss. Ct. App. 2017)). Likewise, it cannot be used as a “precursor” to suit “where the discovery could be obtained in the suit itself.” *Butler Snow LLP v. Estate of Mayfield*, 281 So.3d 1214, 1219 (Miss. Ct. App. 2019) (citing *Kuljis v. Winn-Dixie Montgomery LLC*, 214 So.3d 283, 285 (Miss. 2017)).

In support of his novel request for discovery into the University’s ongoing personnel investigation, Caffera cites the Mississippi Supreme Court’s decision in *State Oil & Gas Board v. McGowan*, 542 So.2d 244, 245 (Miss. 1989). There, McGowan had a pending matter before the State Oil & Gas Board and wanted certain information from the board to prepare for a hearing on the merits. *Id.* at 245. The board denied his request for pre-hearing discovery, and McGowan filed a bill of discovery in chancery court. *Id.* On interlocutory appeal, the Mississippi Supreme Court confirmed the availability of the bill of discovery as a viable procedural mechanism **but held that McGowan could not use it to obtain his requested discovery because the board’s administrative rules did not authorize pre-hearing discovery.** *Id.* at 248; *see also Kuljis*, 214 So.3d at 283 (construing *McGowan*) (“Despite finding that the Bill of Discovery was an appropriate procedural device, the Court found that, because discovery was not permitted under the [administrative board’s] rules, it could not be sought by McGowan through a bill of discovery.”). According to the *McGowan* Court, the availability of discovery still turned on the board’s underlying procedures because McGowan was “subject to hearing under the rules and regulations of that Board.” *Id.* (“It is a rare day when we will reverse [an administrative agency]

for an action taken in the implementation and enforcement of its own procedural rules.”)  
(quoting *Delta Drilling Co. v. Cannette*, 489 So.2d 1378, 1380-81 (Miss. 1986)).

Here, Plaintiff has no pending hearing before an administrative board. The University merely sought to investigate whether Plaintiff engaged in misconduct prohibited under Title VII. Unlike the facts in *McGowan*, Caffera is involved in no administrative hearing and, in fact, may never face one. Moreover, Caffera does not seek discovery as the “sole object and end” of his complaint but seeks discovery in addition to declaratory and monetary relief. Thus, Caffera’s attempt to use a bill of discovery is procedurally improper here.

But even beyond the procedurally premature and muddled nature of Caffera’s request, the Supreme Court’s holding in *McGowan* only underscores that the bill of discovery mechanism cannot be used to obtain discovery where an administrative board’s procedures do not themselves provide for such discovery. The University’s Non-Discrimination in Employment Policy and Complaint Procedure does not provide for discovery (especially mid-investigation) for any University employee, and Caffera should not be granted special privileges. Caffera cannot end run the University’s policies and procedures by filing a bill of discovery. The Court’s holdings in *McGowan* and *Kuljis* make clear that Caffera is not entitled to discovery, particularly where the University’s EORC investigative process does not itself allow for such.

#### **4. Caffera is not entitled to an award of his attorneys’ fees.**

IHL Board Policy dictates the extent to which universities may retain and pay outside counsel. See IHL Board Policy 1102.01.<sup>38</sup> Every Mississippi public university must obtain the prior approval of the Office of the Attorney General and the IHL Board of Trustees before

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<sup>38</sup> Publicly available at <http://www.mississippi.edu/board/downloads/policiesandbylaws.pdf>. (Appendix 3).

retaining counsel. *Id.* As part of this process, the IHL and Office of the Attorney General will scrutinize the specific hourly rate to be paid the attorney and the maximum amount budgeted for the payment of attorney's fees. *Id.* The legal services agreement with outside counsel is also subject to prior review and approval. *Id.* Once approved, the agreement is executed by outside counsel, the university's institutional executive officer, and the Attorney General. *Id.*

The policy provides three limited exceptions to this procedure: (i) matters exclusively under the Mississippi Tort Claims Act, (ii) worker's compensation matters, and (iii) Ayers-related legal fees. *See* IHL Board Policy 1102.02. Matters involving outside counsel for a university ombudsman are not listed as an exemption under section 1102.1 and remain subject to the prior approval requirements of the policy. *Id.*

Thus, while the University's ombuds charter provides that "the Office of the Ombudsperson shall have access to independent legal counsel when necessary in order to fulfill the functions of the position," nothing exempts such potential retention from IHL's policies and procedures for the engagement of outside counsel. Here, Plaintiff unilaterally hired counsel to protect his own interests, and he cannot now charge the taxpayers of Mississippi with the bill.

Moreover, Caffera is an employee of the University, not an independent institution of higher learning, and he likewise cannot unilaterally dictate University policy. *See, e.g.,* Ombuds Agr. p. 3 ("The Office shall not make, change, or overrule University policy or administrative decisions."). The very agreement he relies upon for the creation of the Ombuds' powers is not entered into with the Office of the Ombuds, or someone acting on its purported independent behalf, but the University's former Chancellor and General Counsel. Accordingly, Caffera lacks the unilateral and unchecked ability to retain his own counsel without approval from the

University. The University retains the ultimate authority to determine if independent counsel should be appointed to provide assistance to the Office of the Ombuds, and to dictate who shall fulfill such obligations if necessary. Caffera's request for attorneys' fees lacks merit.

**5. The Mississippi Tort Claims Act bars Caffera's request for monetary relief.**

Caffera asks the Court for a "declaratory judgment" to declare the University's obligations under the ombuds agreement "specifically in regard to the University's obligation to pay his attorney's fees." Compl. p. 10. He further requests that the Court **"specifically find that the University is obligated to pay [his] attorney's fees and costs in conjunction with the University's investigation and this action."** *Id.* at p. 13.

The Mississippi Tort Claims Act ("MTCA") provides the exclusive civil remedy against a governmental entity which give rise to any suit for money damages. *City of Jackson v. Sutton*, 797 So.2d 977, 980 (Miss. 2001) ¶ 9; Miss. Code Ann. § 11-46-7(1). The MTCA applies not only to pure tort claims against a governmental entity, but to implied contract and quasi-contract claims as well. Miss. Code Ann. § 11-46-3(1); *Idom v. Natchez-Adams Sch. Dist.*, 115 F. Supp. 3d 792, 805 (S.D. Miss. Jul. 14, 2015); *Weible v. Univ. of S. Miss.*, 89 So.3d 51, 60 (Miss. Ct. App. 2011) ¶ 25 (implied contract issues subject to MTCA). And "[w]hile there is a provision for making a claim against a government entity and its employees outside of the Tort Claims Act, it is limited to declaratory actions and **not intended for claims involving damages.**" *Sutton*, 797 So.2d at 980 (emphasis added). Regardless of how the plaintiff frames his or her claim, "almost invariably suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages' since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."



*Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (*cleaned up*) (quoting *Bowen v. Mass.*, 487 U.S. 879, 918 (1988) (Scalia, J. dissenting); *see also Briggs & Stratton Corp. v. Smith*, 845 So.2d 1045, 1049 (Miss. 2003) (“the substance of the action . . . should be controlling on the issue, not its form or label.”).

Before filing a claim under the MTCA, a claimant must give written pre-suit notice within one year of the alleged tortious, wrongful or otherwise actionable conduct on which the action is premised. MISS. CODE ANN. 11-46-11(2)-(3). Failure to comply with the mandatory notice provision is fatal to the suit. *See Conrad v. Holder*, 825 So.2d 16, 19 (Miss. 2002).

Here, Caffera’s request for a declaratory judgment declaring that he is entitled to attorneys’ fees he has already incurred is tantamount to a claim for money damages. Caffera is not even a party to the purported “contract” he seeks to enforce, so his claim is either an implied contract or quasi-contract claim. Caffera failed to file a tort claims notice before filing his complaint. This Court should dismiss his claim for attorneys’ fees under the MTCA.

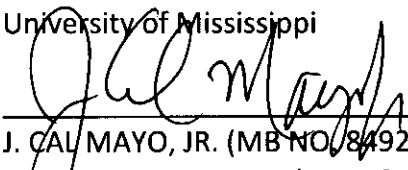
### **CONCLUSION**

The Court should decline to interject itself into the business of overseeing an ongoing personnel investigation in a separate branch of government, a matter firmly entrusted to the University under its executive branch powers. Caffera asks this Court to violate Mississippi’s constitutional separation of powers doctrine and to consider a matter that is not even ripe for review, is unsupported by any actual legal theory, and is barred by the MTCA. The Court should dismiss his Complaint in its entirety.

THIS, the 23<sup>rd</sup> day of December 2020.

Respectfully submitted,

University of Mississippi



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J. CAL MAYO, JR. (MB NO. 8492)

J. ANDREW MAULDIN (MB NO. 104227)

*Attorneys for Defendant*

Of Counsel:

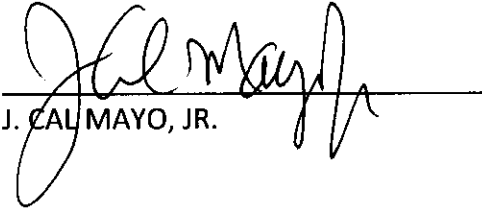
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### **CERTIFICATE OF SERVICE**

I, J. Cal Mayo, Jr., one of the attorneys for Defendants, do certify that I have this date delivered by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document, to the following:

Goodloe T. Lewis, Esq.  
Hickman, Goza & Spragins, PLLC  
P.O. Drawer 668  
Oxford, MS 38655

THIS, the 23rd day of December, 2020.

  
J. CAL MAYO, JR.

# Policies and Bylaws

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Amended Through September 17, 2020

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MISSISSIPPI BOARD OF TRUSTEES OF STATE  
INSTITUTIONS OF HIGHER LEARNING

| 3825 Ridgewood Road, Jackson MS 39211 | 601 432 6198 |

APPENDIX "I"

**IHL Board of Trustees**  
***Policies & Bylaws***

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**IHL Board of Trustees**  
***Policies & Bylaws***

**SECTION 400 - FACULTY AND STAFF**

**401           TENURED AND NON-TENURED EMPLOYEES OF INSTITUTIONS OF  
HIGHER LEARNING IN MISSISSIPPI**

**401.01       AUTHORIZATION FOR EMPLOYMENT**

By statute, the Board has the power and authority to contract with all deans, professors, and other members of the teaching staff and all administrative employees of said institutions for a term not exceeding four years. Although the law does not empower the Board to contract for indefinite periods, its bylaws provide that "It shall be the policy of the Board to elect all officials for a definite tenure of service and to re-elect during the period of satisfactory service." The Board also empowers the executive heads of the institutions to "adopt policies of continuing employment for the purpose of making nominations for the teaching positions." All amendments, revisions, additions and reductions to employee contracts are subject to approval by the Board.

(BT Minutes, 3/91; 2/98)

**401.0101     *STATUTE APPLICABLE***

The Board shall have the power and authority to elect heads of the various institutions of higher learning and to contract with all deans, professors, and other members of the teaching staff and all administrative employees of said institutions for a term of not exceeding four years. The Board shall have the power and authority to terminate any such contract at any time for malfeasance, inefficiency, or contumacious conduct, but never for political reasons. It shall be the policy of the Board to permit the executive head of each institution to nominate for election by the Board all subordinate employees of the institution over which he presides. It shall be the policy of the Board to elect all officials for a definite tenure of service and to reelect during the period of satisfactory service. The Board shall have the power to make any adjustments it thinks necessary between the various departments and schools of any institution or between the different institutions.

Miss. Code Ann., Section 37-101-15(F), as amended.  
(See Section 201.0605 and Section 301.04, D.)  
(BT Minutes, 3/91; 2/98)

## **IHL Board of Trustees**

### ***Policies & Bylaws***

#### **401.0102      *DELEGATION OF AUTHORITY***

Acting under appropriate statutory authority, the Board of Trustees hereby empowers the Commissioner and the Institutional Executive Officers of the several institutions to make all appointments and promotions of faculty and staff except as otherwise noted below:

- a. Board approval shall be required for creation, appointment, elimination, or significant modification of the position of Vice Chancellor, Provost, Vice President, Dean, or Associate/Assistant Provost, Vice President or Vice Chancellor who supervises Deans.
- b. Board approval shall be required for the award of tenure, the final, involuntary separation of an employee to be effective during the term of an employment contract, and where applicable creation, elimination, or modification of categories of appointments as approved by the Board.
- c. Acceptance of the resignation of an employee with a written contract on behalf of the Board may be made by the Commissioner for the System Office and the Institutional Executive Officers of the several institutions.
- d. In accordance with Miss. Code. Ann., § 37-101-7, as amended, the Board delegates to the Commissioner the authority to approve the quarterly reports of employment from the several institutions.

(BT Minutes, 3/91; 7/98; 6/2005, 8/2005; 3/2008)

#### **401.0103      *SALARIES AND COMPENSATION***

The Commissioner, after consultation with the Institutional Executive Officers, shall annually develop guidelines for the award of salary increases which shall be approved by the Board.

With respect to additional compensation for additional service, the Institutional Executive Officers are hereby empowered to grant and expend institutional funds for additional service. Each institution shall prepare an annual report of additional compensation for additional service and compensation in excess of \$1,000 from outside employment approved pursuant to Section 801.07 for those employees whose appointment is required to be approved by the Board pursuant to Section 401.0102a. The report shall be submitted to the Board by August 1 for the preceding fiscal year. This report shall include but not be limited to employee name, original contract amount, amount of additional compensation paid, amount of compensation from outside employment, and total compensation for the reporting year. With respect to outside employment

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Board the full report of the grievance/tenure committee concerning the matter appealed.

The individual allegedly aggrieved will be allowed to submit a written statement of his grievance to the Commissioner within a thirty (30) day period following notification of the decision of the Institutional Executive Officer. No persons will appear personally before the Board unless invited.

If review is allowed by the Board, only the record developed at the institution will be reviewed. Review by the Board is not a matter of right, but is within the sound discretion of the Board. Review by the Board, if granted, is only on the record made at the lower level. No new evidence may be submitted on appeal.

2. Review of Appeal by the Board:

The Board, upon receipt of such an appeal, shall review the records of the institutional committee's hearing and all documentation relative to the personnel decision. The Board reserves the right to correct an omission or other inaccuracy in the record submitted upon suggestion by either party or upon its own motion. The Board shall then determine the following:

- a. If the institutional due process procedures were followed;  
and/or
- b. If the decision was arbitrary or capricious.

The Board, after reviewing the written argument and documentary evidence, shall affirm the decision of the Institutional Executive Officer or make another decision which shall be final and binding.

(BT Minutes, 3/91; 2/98)

**403.02 OTHER FACULTY GRIEVANCES AND APPEALS**

**403.0201 GRIEVANCE DEFINED**

A grievance is defined as the claim of an individual employee that there has been a violation, misinterpretation or misapplication of a rule, policy or procedure in relation to personnel policies, including working hours, working conditions, leaves, promotions and other conditions of employment.

(BT Minutes, 3/91; 2/98)



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**403.0202      *APPEALS TO THE BOARD CONCERNING GRIEVANCES***

Grievances are not appealable to the Board. The decision of the Institutional Executive Officer is final and binding.

(BT Minutes, 3/91; 2/98)

**403.03            *TENURE OF INSTITUTIONAL EXECUTIVE OFFICERS***

Institutional Executive Officers, upon appointment, will be concurrently appointed to the faculty in his/her discipline at the rank of full professor. After successful completion of five (5) years of service as Institutional Executive Officer, the incumbent may be tenured as a full professor in the designated department at the discretion of the Board. Tenure shall carry the usual rights and privileges as specified in Board and institutional policy. In the event that the Institutional Executive Officer resigns and elects to remain with the institution, the salary as a professor shall be determined based upon the appropriate consideration of teaching, research, public service and salary conditions in the discipline. After ten (10) or more years of satisfactory service as an Institutional Executive Officer or as the Commissioner, he/she may be appointed to a Board

Distinguished Professorship per section 301.0801 (G) Duties of the Institutional Executive Officers.

(BT Minutes, 3/91; 2/98; 3/2008)

**404                *NON-TENURE TRACK FACULTY***

**404.01           *NON-TENURE TRACK DEFINED***

Universities are authorized to establish faculty positions designated as non-tenure track positions. Universities may enter into renewable contracts, for periods up to four years in length, with non-tenure track faculty members in three separate categories - research, teaching, and service - based on the mission and needs of the institution. Each institution employing non-tenure track faculty will have a formal system of annual evaluations to assess each such faculty member's performance. Renewal of contracts is not guaranteed and will be determined by the institution on the basis of the faculty member's performance, availability of funding, and institutional priorities.

Individuals employed in non-tenure track positions have no expectation of continuing employment beyond the expiration of their contracts and shall not be eligible for consideration for the award of tenure. Individuals in non-tenure

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track positions may not have their status converted to tenure track positions. However, they are eligible to apply for tenure track positions.

(BT Minutes, 3/91; 2/98; 2/2005)

**404.02 NOTICE OF NON-RENEWAL OR TERMINATION OF NON-TENURE TRACK PERSONNEL**

1. Notice of intention not to renew non-tenure track personnel shall be furnished in writing thirty (30) days prior to the expiration date of the contract. Notice of non-Renewal of employees with written contracts, other than those covered in § 403.0102, is 30 days.
2. Lack of Funds - Notice of termination of non-tenure track personnel prior to expiration of the contract due to a lack of funds shall be furnished in writing thirty (30) days prior to the termination.

(BT Minutes, 3/91; 2/98)

**405 GRIEVANCE PROCEDURE FOR NON-FACULTY POSITIONS**

**405.01 GRIEVANCE DEFINED**

A grievance is defined as the claim of an individual employee that there has been a violation, misinterpretation or misapplication of a rule, policy or procedure in relation to personnel policies, including working hours, working conditions, leaves, promotions and other conditions of employment.

(BT Minutes, 3/91; 2/98)

**405.02 APPEALS**

If all previous steps have not led to a satisfactory settlement of a problem, the Chief Personnel Officer will place it before the university grievance committee. The committee's purpose is to review the problem thoroughly and make a decision which is appealable to the Institutional Executive Officer. Upon completion of the hearing, the committee will have five (5) working days in which to make a decision. The decision will be promptly communicated within five (5) working days to the employee and the administration in writing. The decision of the committee will be subject to review by the Institutional Executive Officer. The decision of the Institutional Executive Officer shall be final.

(BT Minutes 3/91; 2/98)

## The University of Mississippi

### **Non-Discrimination and Sexual Harassment Policy and Complaint Procedure**

**Summary/Purpose:** The purpose of this policy is to provide the University's policy on non-discrimination and sexual harassment, and to provide the procedure for filing complaints related to unlawful discrimination and harassment on the basis of race, color, gender, sex, pregnancy, sexual orientation, gender identity or expression, religion, national origin, citizenship, age, disability, veteran status, genetic information, or any other legally prohibited form of discrimination. This Policy is implemented and enforced in compliance with applicable law including: Title VII of the Civil Rights Act of 1964; Title VI of the Education Amendments of 1972; the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act; the relevant provisions of the Violence Against Women Reauthorization Act of 2013; and other applicable federal and state laws.

This policy protects all members of the University community. However, the procedures below for complaints of harassment and discrimination are only applicable to **faculty and staff** whose reported conduct falls outside of the University's Title IX policies and procedures. Procedures for complaints against **students** shall be governed by the University's Title IX policy, the Interpersonal Violence and Sexual Misconduct Policy, or other relevant policies under the governance of the University's Office of Conflict Resolution and Student Conduct.

The University of Mississippi does not unlawfully discriminate on the basis of race, color, gender, sex, pregnancy, sexual orientation, gender identity or expression, religion, national origin, citizenship, age, disability, veteran status, or genetic information. Employees, students, applicants for admission or employment, or other participants in University of Mississippi programs or activities who believe they have been discriminated against or harassed are entitled to seek relief through the University of Mississippi's Office of Equal Opportunity and Regulatory Compliance (hereinafter "EORC").

#### **I. Sexual Harassment**

Sexual harassment under this policy includes unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature when: (1) Submission to or rejection of such conduct is either an explicit term or condition of, or is used as the basis of decision affecting an individual's employment or advancement in employment, evaluation of academic work or advancement in an academic program or basis for any participation in any aspect of a University program or activity (**quid pro quo**); and/or (2) Such conduct has the purpose of interfering with an individual's access to the University or an individual work environment or are so objectively offensive, pervasive or severe that they effectively deny the victim access to the University of Mississippi's resources and opportunities (**hostile**

environment).

University employees must report any allegation of sexual harassment or discrimination on the basis of sex to EORC immediately. Employees who must report under this policy include all University faculty and staff, except those who work or volunteer in Violence Intervention and Prevention Services, U Matter, and those with statutory privilege, including but not limited to those providing counseling or health care services through the University Center, Student Health Services, and/or Psychological Services Center.

## **II. Other Forms of Harassment or Discrimination**

If any employees or students believe they have been subjected to harassment or discrimination on the basis of race, color, gender, sex, pregnancy, sexual orientation, gender identity or expression, religion, national origin, citizenship, age, disability, veteran status, genetic information, or any other legally prohibited form of discrimination, or otherwise need to make a report under this policy, they should immediately contact EORC at 120 Lester Hall, 662-915-7735, [eeo@olemiss.edu](mailto:eeo@olemiss.edu).

## **III. Retaliation**

Retaliatory action is prohibited against any person acting in good faith who makes a report of discrimination or assists in the investigation of a report of discrimination. However, persons who knowingly bring false allegations may be subject to disciplinary action.

## **IV. Confidentiality**

EORC will handle matters with as much confidentiality as permitted by law. Information regarding reports of harassment and investigations of complaints may be protected from disclosure by the Family Education Rights and Privacy Act (FERPA), Mississippi Code Section 25-1-100, and other applicable state and federal laws.

## **V. Formal Complaints of Harassment and Discrimination**

Anyone may make a report of harassment and discrimination at any time. However, unlike a report, **Formal Complaints** requesting investigation or other action by EORC should be submitted in writing within 180 days of the alleged discriminatory act. At the discretion of EORC, Formal Complaints that are not reduced to writing or that fall outside the specified 180 day time limit may be investigated. EORC may also conduct investigations as part of its regulatory compliance function which do not arise from Formal Complaints of discrimination or harassment. Formal Complaints may be submitted in writing to Equal Opportunity and Regulatory Compliance (EORC), 120 Lester Hall, 662-915-7735, [eeo@olemiss.edu](mailto:eeo@olemiss.edu). Formal Complaint investigations may be conducted using the following guidelines:

- **Informal Resolution or Mediation:** EORC may contact the complainant to ascertain whether the complainant would prefer to resolve the matter informally or through mediation. Mediation is a process in which a neutral third party assists the complainant and the respondent to voluntarily and jointly reconcile their differences. If there is no informal resolution or no successful mediation, EORC may begin a formal investigation.

- **Formal Investigation:** If the parties do not elect to pursue informal resolution, mediation, or the attempt at mediation does not successfully result in a resolution, EORC may conduct a formal investigation. The formal investigation may include the following (as well as other actions deemed appropriate by EORC): interviewing the complainant, the respondent, and witnesses who may have relevant information; submitting questions to or taking statements from parties or witnesses; and reviewing documents and other evidence.
- **Findings:** If it is determined that harassment or discrimination has occurred, corrective action may be taken. Depending upon the circumstances, this corrective action may include a reprimand, demotion, discharge, conduct charges, transfer, or other appropriate actions as determined by University administration.

If the complaint is against a member of the faculty, upon the conclusion of the investigation EORC may present findings and recommendations to the appropriate Dean for input concerning possible remedial action, if any. The employee's Department Chair and/or other appropriate person(s) may be consulted and may be a part of the decision-making process. If written findings and recommendations are presented, the complainant and the person against whom the complaint is made may be notified in writing by EORC.

For complaints against all other University employees, upon the conclusion of the investigation EORC may present findings and recommendations to the appropriate Vice Chancellor for input concerning possible remedial action, if any. The department head responsible and/or other appropriate person(s) may also be consulted and may be a part of the decision-making process. If written findings and recommendations are presented, the complainant and the person against whom the complaint is made may be notified in writing by EORC.

- **Appeal:** The complainant or the person against whom the complaint is made under this policy may appeal the findings of the investigation and any disciplinary action taken by submitting an appeal, in writing, to the Provost. Such an appeal must be made within five (5) business days of the receipt of the notice of findings and recommendations from EORC. The Provost's decision is final.

# Policies and Bylaws

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Amended Through September 17, 2020

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MISSISSIPPI BOARD OF TRUSTEES OF STATE  
INSTITUTIONS OF HIGHER LEARNING

| 3825 Ridgewood Road, Jackson MS 39211 | 601 432 6198 |

APPENDIX "3"

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showing date of receipt and the name of the person receiving same. These documents should be immediately forwarded to the Universities Division of the Office of the Attorney General or to the IHL Office of Risk Management.

IHL personnel should consult with the Universities Division of the Office of the Attorney General or University Counsel with regard to civil actions that are not described herein or in instances in which service of process is attempted by mail.

(BT Minutes, 7/2003)

#### **1102 RETENTION AND PAYMENT OF OUTSIDE COUNSEL<sup>1</sup>**

##### **1102.01 RETENTION OF OUTSIDE COUNSEL**

- A. **Request for Outside Counsel.** A request for outside counsel may be submitted by the University to the Attorney General through the Attorney General's Universities Division. The request should include (1) the name and address of the attorney requested, (2) a brief description of the services to be provided, (3) the maximum hourly rate to be paid, and (4) the maximum amount budgeted for payment by the University in the current and succeeding fiscal years.
- B. **Approval by the Attorney General.** Upon receipt of the request, a determination will be made as to whether the matters at issue should be handled by the Attorney General's staff, University Counsel, or outside counsel. If it is determined that the matter should be handled by outside counsel, the Attorney General may approve the outside counsel requested or may approve other outside counsel.

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<sup>1</sup> Please note that these procedures do not apply to matters falling exclusively within the Mississippi Tort Claims Act. Assignments under the Mississippi Tort Claims Act are made by the IHL Risk Manager from the list of approved attorneys. Tort claims invoices are submitted directly to the third-party claims administrator and are paid in accordance with the IHL Tort Claims Plan.

Please note that these procedures do not apply to workers' compensation matters. Assignments for workers' compensation matters are made by the Attorney General by way of request from the IHL Risk Manager and the third-party claims administrator. Workers' Compensation invoices are submitted directly to the third-party claims administrator. The invoices are paid in accordance with the IHL Workers' Compensation Plan.

Please note that these procedures do not apply to Ayers-related legal fees. Ayers-related legal fees will continue to be submitted for Board approval following approval by the Attorney General.



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- C. **Approval by the Commissioner/IHL Board of Trustees.** Following approval by the Attorney General, the University should prepare and submit an agenda item to the IHL Board of Trustees through the Commissioner for approval. Board approval includes approval of hiring the outside counsel and approval of paying the outside counsel. The agenda item shall include the specific hourly rate to be paid to the attorney(s) for which approval is requested, as well as the maximum amount budgeted for payment to the attorney/firm in the current and succeeding fiscal years.
- D. **Contract for Legal Services.** Following approval by the Attorney General and the IHL Board of Trustees, a contract for legal services will be forwarded by the Attorney General's Universities Division to the Institutional Executive Officer, outside counsel, and the Attorney General for execution. Following execution, fully executed originals will be returned to the Institutional Executive Officer, outside counsel, and the Attorney General. The agreement will be used to review and approve legal fees and expenses payable thereunder.

(BT Minutes, 9/2000; 9/2005)

**1102.02      PAYMENT OF OUTSIDE COUNSEL**

- A. **Submission of Invoice.** Following receipt and approval of an invoice by the University, the invoice, with approval noted, should be forwarded to the Attorney General's Universities Division.
- B. **Approval of Invoice.** The invoice will be reviewed and compared to the contract authorizing the services and fees. Upon approval by the Attorney General, the invoice will be forwarded to the Attorney General's Universities Division. The Attorney General's Universities Division will forward an approval letter to the University.
- C. The Attorney General's Universities Division will report to the IHL Board of Trustees, through the Legal Committee, the outside counsel fees and expenses approved during the previous month.
- D. The Board hereby authorizes the Commissioner, on the Board's behalf, to approve an increase in the Board approved maximum amount budgeted for payment to outside counsel, by up to 25%, not to exceed a total contract amount of \$250,000.00, and subject to approval by the Attorney General's Office, in the event the original Board approved maximum amount for

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payment is subsequently determined by the Commissioner to be insufficient to complete legal representation. Any increase in the maximum amount budgeted for payment which would exceed 25% of the amount already approved by the Board or cause the total contract amount to exceed \$250,000.00 requires Board approval.

(BT Minutes, 9/2000; 9/2005)

**1102.03      RETENTION AND PAYMENT OF OUTSIDE COUNSEL: EDUCATIONAL BUILDING CORPORATIONS**

- A. **Request for Outside Counsel - Educational Building Corporations.** A request for outside counsel to assist and advise educational building corporations should be submitted by a University in the same manner as provided in Section 1102.01. If outside counsel is intended to serve as bond counsel for the issuance of bonds, the proposed maximum fee payable to bond counsel must be disclosed at the time the request is made.
- B. **Payment of Outside Counsel - Educational Building Corporations.** Payment of fees to outside counsel relating to bond issues must be specifically approved by the Attorney General and the IHL Board of Trustees prior to disbursement. Payment of other fees to outside counsel may be made in accordance with Section 1102.02.

(BT Minutes, 3/2001)

**1102.04      EMERGENCY APPROVAL OF OUTSIDE COUNSEL IN BETWEEN BOARD MEETINGS**

The Chair of the Board's Legal Committee is delegated the authority to act on behalf of the Board in between Board meetings as to the approval of requests to hire outside counsel when such requests require immediate attention prior to the next Board meeting. Any such institutional request for interim approval is to be forwarded to the Commissioner's office with an explanation of the emergency nature of the request. The Commissioner and Board's staff shall then review same and make a recommendation to the Chair of the Legal Committee for his/her consideration. Any interim approvals of outside counsel approved by the Chair of the Legal Committee shall be reported to the Board as an information item at the following Board meeting.

(BT Minutes, 6/2013)