SENATE FINANCE COMMITTEE
April 4, 2022
1:38 p.m.

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CALL TO ORDER

Co-Chair Stedman called the Senate Finance Committee meeting to order at 1:38 p.m.

MEMBERS PRESENT

Senator Click Bishop, Co-Chair
Senator Bert Stedman, Co-Chair
Senator Donny Olson [via teleconference]
Senator Natasha von Imhof
Senator Bill Wielechowski
Senator David Wilson

MEMBERS ABSENT

Senator Lyman Hoffman

ALSO PRESENT

Megan Wallace, Director, Legislative Legal Services, Alaska State Legislature.

PRESENT VIA TELECONFERENCE

Cori Mills, Deputy Attorney General, Department of Law.

SUMMARY

REVIEW OF JUDGMENTS AND CLAIMS:
DEPARTMENT OF LAW
DIVISION OF LEGISLATIVE LEGAL

Co-Chair Stedman relayed that the committee would consider a review of judgments and claims and would consider a presentation by the Department of Law as well as hear testimony from the Legislative Legal Division. He thought the committee would hear about at least ten issues of concern.

^Review of Judgments and Claims:
Department of Law

Division of Legislative Legal

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CORI MILLS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF LAW (via teleconference), relayed that she would be providing a background and overview of the state's judgements and settlements. She would discuss the background of the Department of Law and common elements of the judgments and settlements. She referenced a spreadsheet document entitled "Judgments and Settlements of Significant Interest" (copy on file). She would briefly cover the listed items.

Ms. Mills wanted to offer context for the judgments and settlements, and she provided that the Department of Law handled thousands of cases at any given time that involved numerous claims against different state agencies or officials. Every year the supplemental budget had a section that included judgements and settlements, which signified settlements of court cases or prelitigation settlements as well as attorney fees from judgements and settlements reached in cases. She noted that amount listed in the supplemental appropriation was a fraction of the thousands of cases the department handled in any given year and represented cases without an existing fund source.

Ms. Mills detailed that the civil division had 1,352 active cases ranging in administrative litigation in the superior court, federal court, or the supreme court. She continued that some of the cases were affirmative cases, where the state was the plaintiff seeking damages or recovery. She cited that the Department of Law had recouped around $2 million in fraudulent Medicaid payments, $52 million in taxes, royalties and attorney fees in natural resource cases; and another $5.3 million in consumer protection cases.

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Ms. Mills continued her remarks and discussed cases where the state and one of its agencies or officers were named as a defendant in a case where damages, recovery fees, or attorney fees were sought against the state. She explained that in many of the cases where the state was a defendant, there was an existing funding source to pay for the judgement or settlement, the largest of which were the

state's tort lawsuits. She mentioned risk management, which had funds to pay for cases.

Ms. Mills identified that there were certain cases without a fund source, and the total amount for the judgements, settlements and attorney fees were put into the supplemental budget for payment in a timely manner without too much interest. She detailed that the amounts in the supplemental varied greatly from year to year depending upon the kind of case. She thought there was a three-year time horizon requested by the committee. She cited that in FY 20, the total for the supplemental budget was around $7 million, with the following year being $1.8 million, and the current amount was closer to $1.1 million.

Ms. Mills continued that many of the payments were court-ordered payments from judgements issued by a court. Additionally, some payments were settlements that may not have been court ordered but were a contract that the state had entered; any amount was subject to appropriation. She explained that most cases settled in advance and did not go to trial, which saved the state money and did not clog up the courts while allowing parties to move on more quickly. She emphasized that paying the settlements showed negotiation in good faith and ensured future success in settling matters out of court with other parties.

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Ms. Mills discussed attorney's fees and noted that Alaska had unique attorney's fees laws compared to other states. Alaska allowed for parties that won a lawsuit to get at least a portion of its attorney's fees, which was often 20 percent. She continued that there were some rules that could expand or contract the amount of attorney fees. She referenced AS 09.60.010, which allowed for full reasonable attorney fees for constitutional claims, with some exception. The state often could not get attorney fees because there was usually some constitutional claim.

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Ms. Mills addressed the question of what items that could be coming in the near future. She was not sure of any cases that would be added in the current budget cycle but wanted to address items that could be on the horizon. She referenced a Department of Transportation and Public

Facilities (DOT) claim regarding a contractor in the Ketchikan area. She continued that DOT had terminated with a Juneau contractor for default. She anticipated that there would be additional damage proceedings in May because the administrative law judge had already determined that the contractor was wrongfully terminated. She mentioned a number of cases currently before the Alaska Supreme Court, which could possibly result in required payment of attorney's fees.

Ms. Mills referenced a case involving forward funding, in which the administration and the legislature were at odds. She mentioned a case involving an effective date clause, in which the administration and legislature were also at odds. She mentioned a case involving the Higher Education Fund. She mentioned a case involving unions, and a case about contamination and Flint Hills Resources Alaska. The state had won at the lower court in the Flint Hills case, but the decision had been appealed.

Ms. Mills relayed that she would begin to discuss specific cases listed on the spreadsheet. She referenced Item 1 on the spreadsheet, the Recall Dunleavy v. State of Alaska case, and relayed that the judgement amount was for attorney's fees and not damages. The case involved a recall petition filed with the Division of Elections, which denied the petition on statutory grounds. The superior court upheld the recall petition save for one item, and the supreme court upheld the superior court decision. The prevailing party sought attorney's fees, which was listed in the judgements and settlements accounts. She detailed that the current amount was for the supreme court, and the superior court fees were in the previous year's budget.

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Co-Chair Stedman asked for help interpreting the numerics of the cases Ms. Mills was describing.

Ms. Mills specified that the amount for the first case was $197,631, which accounted for the judgement amount plus interest. She noted that the chart also showed department attorney costs, which were listed in column 12 and showed $146,687 as the cost to defend the state in the action.

Senator von Imhof referenced Item 1, and thought the total cost was shown to be $344,000.

Ms. Mills answered "yes," and clarified that the cost in column 16 represented the amount that needed to be appropriated, and the total cost in column 17 was the judgement/settlement cost plus the cost to the department, which was paid from the operating budget.

Co-Chair Stedman asked about what "J and S" signified.

Ms. Mills clarified that J and S represented judgements and settlements, which was the part of the supplemental budget being discussed.

Co-Chair Stedman thought it was easier for the public to understand testimony when testifiers abstained from using acronyms.

Senator von Imhof looked at column 16, which showed the amount the legislature would be considering appropriating for the cost of the case.

Ms. Mills answered in the affirmative.

Senator von Imhof asked if there were criteria by which the state covered the costs for a state employee, such as in the executive branch, versus a case where the state would not cover the costs.

Ms. Mills answered "yes." She relayed that she would address the standards when she spoke to Item 5 through Item 7, which had to do with lawsuits in which the governor was named.

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Senator Wielechowski asked how many court cases there had been over the definition or certification of recalls in the state.

Ms. Mills stated that from a statewide perspective, the current case was only the second case for the supreme court. She thought the superior court had heard a handful of cases that dealt with recall.

Co-Chair Stedman asked if there had been two recall-related cases before the supreme court.

Ms. Mills answered affirmatively and noted that only one of the two cases had dealt with a state employee.

Ms. Mills addressed Item 2, the Vote Yes for Alaska's Fair Share v. Meyer case, which dealt with the Division of Elections. She explained that for purposes of ballot initiatives, the lieutenant governor would prepare a summary that went on the ballot as a description of the initiative. The sponsor for the ballot initiative relating to oil and gas taxes in 2020 had sued the lieutenant governor for the statement, and one sentence that had to do with the Public Records Act. Part of the ballot initiative had to do with the confidentiality of documents or making certain documents not confidential, and there had been a sentence in the summary about the Public Records Act applying. The court had found that the sentence should be stuck, but also allowed the lieutenant governor to institute at least a partial new sentence into the summary. The case went to the superior court and then the supreme court. The payments had to do with attorney's fees owed.

Ms. Mills continued to address Item 2. She looked at column 12, which showed the department's cost to be $71,428. She cited that column 16 showed the amount sought to be paid in the supplemental budget was $78,117. She thought the amount was for attorney's fees at the superior court level. She mentioned additional attorney's fees for the appellate and superior courts.

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Senator Wielechowski had read a September 18, 2020, Anchorage Daily News headline that claimed that there were more lawsuits filed against election officials during the first two years of Governor Dunleavy's term than were filed in all four years of the term of the previous governor. He asked if the information was accurate.

Ms. Mills was not familiar with how many cases there had been. She mentioned the Stand for Salmon initiative. She relayed that she would not be surprised, based on the fact that the last election was held during a pandemic. She thought there were at least five cases that were a direct result of the pandemic, and requests to change election rules. She knew there had been an uptick in elections litigation.

Senator Wielechowski understood that the sponsor of Vote Yes had contacted the Division of Elections to resolve concerns with the language, and the division had refused to work with the sponsor.

Ms. Mills believed there were discussions and asserted that ultimately there was a decision by the lieutenant governor with no requirement for the sponsor to be involved.

Senator Wielechowski thought the matter would be shown as a pattern going forward. He asked if it would be simpler to address concerns by working with the sponsor instead of costing the state $149,000.

Ms. Mills thought the matter was related to policy choices that had to be made and thought the state must ensure the summary was accurate. The court had held that one sentence needed to be struck, but the rest of the summary was fine.

Senator Wielechowski cited that the superior court judge had ruled that the lieutenant governor "tried to put his finger on the scales" of the election with the way he wrote the description. He asked if that was what the judge had said.

Ms. Mills believed that Senator Wielechowski had read wording from the Superior Court decision but was not sure it translated to how the supreme court categorized the language.

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Senator Wielechowski asked if the department or executive branch were willing to change policies and work with sponsors of initiatives in order to avoid costly litigation that required time, energy, and money.

Ms. Mills thought the decision was one for every administration to make. She was not familiar with what had happened in the past but did not know there was a policy in place and thought each new lieutenant governor and the division determined how it would deal with the issue.

Senator von Imhof thought when there was a ballot initiative or referendum there needed to be a certain number of signatures. She described initiative sponsors efforts in getting signatures, including language to

provide information to potential signers. She considered that if there was a change in the writing after collecting signatures, a sponsor would have to get new signatures. She thought that the change might have been a factor in the lawsuit.

Co-Chair Stedman was not sure whether Senator von Imhof's comments were accurate.

Ms. Mills believed the certification decision for the petition had happened pretty close to having two months for the sponsors of the initiative to gather signatures. She could not recall when the discussions happened versus when the booklets were printed, but all of it had to happen in an expedited fashion.

Senator Wielechowski thought the issues had to do with the way the summary was written on the ballot and did not have anything to do with the collecting of signatures.

Ms. Mills affirmed that the ultimate court case had been regarding the ballot summary and the same summary usually appeared on the petition. There was a petition summary that was required as well, and there had been slight changes between the summaries. Both of the summaries had initially been challenged, but ultimately the challenge came down to the ballot summary.

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Ms. Mills addressed Item 3, The Alaska Landmine LLC et al. v. Dunleavy et al. She noted that the document made note of the fiscal year on the side. The Alaska Landmine case involved a blogger that brought a complaint in the superior court that he was left out of press conferences, and it had violated his constitutional rights. The case had been settled fairly quickly, and Mr. Landfield had been allowed back into press conferences. The settlement covered Mr. Landfield's attorney's fees that had been spent to date on the case. She directed attention to column 12, which showed that the department's internal cost had been $54,000, while Mr. Landfield's attorney's fees and the amount in the settlement had been $65,789.

Co-Chair Stedman asked if the total cost to the state was $120,099.

Ms. Mills answered in the affirmative.

Senator Wielechowski thought Ms. Mills had indicated the case was resolved quickly and cited that according to the court decision, Mr. Landfield enjoyed implicit press credentialing and access to the current governor's press conferences beginning January 23, 2019. The defendants then implicitly revoked Mr. Landfield's press credentials in October 2019 absent any explanation. The defendant initially indicated that the removal was an oversight, however the revocation was never remedied or rescinded. He recounted that Mr. Landfield had sent multiple emails for a year asking to for the oversight to be remedied, and his attorneys had sent letters.

Senator Wielechowski opined that the case appeared to have been an avoidable situation and thought the court had issued a harshly worded decision, which stated that the government's position was that plaintiffs were not entitled due process, because the government had not provided due process. The court went on to say that it was untenable to assume that a cornerstone of our nation's bill of rights could be so impotent that it could be extinguished by simple apathy or indifference.

Senator Wielechowski was curious as to why the administration had not simply resolved the case early on when there were emails being exchanged, and when attorneys were beginning to be involved. He questioned why the administration had not solved the issue when case law was so clear.

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Ms. Mills suggested that not all agreed that the case law was extremely clear and cited that there were cases on both sides of the issue. She clarified that her comments about the timing involved the period after the department had become involved. She noted that the administration had had a "no blogger" policy at press conferences and had determined it was willing to change the policy and settle the case.

Senator Wielechowski wanted to clarify that only after the plaintiff initiated the current litigation did the defendants articulate that it followed an unwritten "no blogger" policy.

Ms. Mills answered in the negative and thought there had been disagreements over whether Mr. Landfield had been informed of the policy. She asserted that the policy was followed by the communications office.

Senator Wielechowski cited that he had read directly from the judge's decision. He wondered why the administration did not appeal the case if the judge got it wrong.

Ms. Mills thought it was important to recall the procedural stance of where the case was. She recalled that there was a preliminary injunction in which facts were not argued. She thought that if the administration was willing to change its policy, it was preferrable to spending more on continuing with the case.

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Ms. Mills addressed Item 4, pertaining to the the Keren Lowell/ACLU demand letter. The item involved pre-litigation. She did not think litigation had been filed in the case, but there was a demand letter that had been served on the state alleging wrongful termination. She relayed that the matter pertained to an employee of the Alaska State Council on the Arts, who's position had been eliminated along with the entire council under the budget. When the council received money again after a change in the budget, the council was reinstated, and Ms. Lowell applied and was denied re-hire. She cited the department's cost of $27,300, and Ms. Lowell received $85,000 through the settlement.

Senator Wielechowski asked for the reason Ms. Lowell was not rehired to the council.

Ms. Mills thought the point would be debated by both sides and could not cite the full facts of the case.

Senator Wielechowski stated that according to his documents and those reported in the press, the executive director of the council said that Ms. Lowell was irreplaceable. There was a veto that eliminated the arts council, and all the employees were laid off. When the council was restored, it reached out to remaining staff for re-hire. He thought Ms. Lowell was specifically rejected by the governor's office

because of statements made on social media about the governor.

Ms. Mills thought Senator Wielechowski was accurately representing what was alleged by Ms. Lowell.

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Ms. Mills addressed Item 5, Parker v. Dunleavy, et al. She commented that she would take a moment to discuss the background of a group of cases. She noted that Items 5, 7, and 8 were in the same category and she would address the cases together before going back to address Item 6. The cases all pertained to the resignations of a range of employees (seemingly all partially exempt or exempt) that were requested at the beginning of the administration. The employees included Ms. Parker, an Office of Public Advocacy attorney and two individuals who both worked for the Alaska Psychiatric Institute (API).

Ms. Mills continued that Ms. Parker had been terminated for the same reasons as the two employees from API and that she did not turn in a resignation letter, or she thought the issue in the case may have been the wording of her resignation letter. She noted that outside counsel had represented the state in all the resignation cases. The outside counsel fees shown in column 12 were $213,859, and the total including the settlement was $339,407 for the Parker case.

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Ms. Mills continued to address Item 5, Item 7, and Item 8. She detailed that the two individuals from API had not turned in resignation letters. She discussed settlement amounts for the plaintiffs. She noted that in cases that had a state official named, in all of the cases it was not just the governor or chief of staff, but the state was named as well. There had been Section 1983 civil rights claims brought as well as good faith and fair dealing claims brought against the state. She discussed settlement of the Parker case. She discussed the cases with the API employers and explained that the motion for summary judgement was about whether the positions of the API doctors had been in the position of policy makers. She referenced the Pickering Test.

Ms. Mills continued that the summary judgement motion in the API case determined that the positions were not policy-maker positions. The second inquiry considered whether qualified immunity applied. The court had determined that qualified immunity did not apply to the positions. Shortly after the decision was issued, the state appealed the qualified immunity issue. The parties settled the case before damages and the good faith and fair dealing claim.

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Ms. Mills relayed that the questions that had arisen from the cases pertained to indemnification. She referenced a memo by former Attorney General Bruce Botelho, which had established long-standing departmental policy. She cited language from the memo that stated that in the event that a state employee was sued for damages in a civil action arising out of their employment with the state, the state will provide representation and indemnity for compensatory damages if the event or conduct for which the employee was being sued occurred in doing their job and their actions did not constitute willful misconduct, or gross negligence or recklessness.

Ms. Mills cited that the standard was used often and had been used with cases against commissioners, nurses, and correctional officers. The standard outlined in the memo was applied at the decision of the attorney general, along with the decision of whether an employee should be indemnified and represented by the state.

Ms. Mills pointed out that in cases in which the state was named, there had been a misconception that the state was not named in the lawsuit. There had been potential liability for the state in the cases. She had heard another common misconception that if the amount was not paid, the governor and former chief of staff would be held responsible.

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Senator Wielechowski referenced Section 1983 claims as mentioned by Ms. Mills and asked her to explain the rationale.

Senator Wielechowski asked why the federal government allowed Section 1983 claims for damages.

Ms. Mills informed that Section 1983 claims had to do with the deprivation of a civil right, primarily looking at some kind of constitutional right where a court determined the right was deprived by some action.

Senator Wielechowski referenced a decision by Judge Sedwick which cited that the doctrine of qualified immunity shields officials from civil liability so long as the conduct did not violate clearly established constitutional rights of which a reasonable person would have known. He asked if the department agreed with the statement.

Ms. Mills relayed that she was not the attorney on the case and was not comfortable citing the case law.

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Senator Wielechowski believed the judge's opinion reiterated the findings of the United States Supreme Court. He referenced the doctrine of qualified immunity, which protected officials. He cited that the court established that there was a right to sue clearly established if there was a clear foundation and existing precedent. The court went on to say (in the Blanford case) that the First Amendment violation was clearly established and would have been known to any reasonable government official. Further the court stated that it was beyond debate, based on supreme court precedent, that it was unconstitutional to require non-policy-making employees to signal a commitment to a political agenda in order to retain their jobs.

Senator Wielechowski continued that the court found there was no qualified immunity when a clear violation of a constitutional right had occurred. He cited a November 27, 2018, letter from ten legislators that indicated the requested resignations were a clear violation of constitutional rights. He asked if Ms. Mills recalled the letter and if the letter had been considered in determining whether the employees should be restored.

Ms. Mills reiterated that outside counsel was used for the cases, and she had not been the attorney of record nor had she reviewed the records. She only knew what the decisions held and what the appeal was about, and what the appeal points were. She did not have anything further to add.

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Senator von Imhof asked if the legislature had to appropriate $200,000 and $275,000 for the API doctors to be paid a settlement.

Ms. Mills cited that one doctor was paid $220,000 and one was paid $275,000.

Senator von Imhof asked if the doctors would receive anything if the legislature did not appropriate the money.

Ms. Mills answered "no."

Senator von Imhof pondered that the Department of Law settled with the doctors and pledged money it was not in control of. She considered that the department had passed the issue on to the legislature based on political decisions made by the governor.

Ms. Mills understood Senator von Imhof's characterization of the events. She asserted that the state could have been liable for a greater amount and would have had to pay through a court order. The case ended up resulting in a settlement that was subject to appropriation, which did not obligate the legislature. She continued that along with all the historical precedent that she was aware of, the case came to an appropriate settlement to avoid further expense and unnecessary litigation on the issue.

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Co-Chair Stedman asked for help with understanding how common the situation was with previous governors or governors in other states coming up against qualified immunity.

Ms. Mills had not been able to do a review of other states. She thought someone in the other body had done a law search and had not found many occasions when the court found similarly to the case involving the governor and the API doctors. She considered past instances of challenges where a governor was named, and thought it was pretty common and she recalled two to three current cases.

Co-Chair Stedman understood that all governors got litigated. He asked how often the issue of qualified

immunity came up, and had it come up with other Alaska governors.

Ms. Mills was not aware of other cases where qualified immunity had been found not to apply.

Senator Wielechowski noted that particularly in the Blanford case, the governor and his chief of staff had been sued in their official capacity as well in their individual capacity. He thought it was rare that any public official was found to have violated a person's rights in their individual capacity, but that is what the court had found. He cited that the court said it was "beyond debate" that the action was so clearly political that the court took a rare decision to find the governor and chief of staff personally liable. The state was found not liable, and the governor and his chief of staff were found personally liable. The state had agreed to settle and pay the governor's and chief of staff's personal attorney's fees and personal liability for settlement of hundreds of thousands of dollars. He thought the matter was troubling to many Alaskans.

Ms. Mills wanted to point out that there were still claims of good faith and fair dealings that had not been discussed. She recommended that the committee talk to counsel for the ACLU, who would not make the same characterization as made by Senator Wielechowski.

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Ms. Mills addressed Item 6, ACLU et al. v. Dunleavy, which had related to a case involving a line-item veto of the Court System by the governor. She noted that there was a comment made in the veto form about the purpose of the veto related to a Planned Parenthood case, which the court had found to be improper. She explained that the case was not a damages case, but rather a declaratory relief case in which the court stated that the veto action was not proper. She detailed that the attorney's fees were about $88,000 to $89,000 for the department, and about the same amount for the opposing party in the case.

Co-Chair Stedman asked if the case was a fairly common item in the budget process since statehood, or if it was uncommon.

Ms. Mills was not familiar enough with the vetoes including when the court system had previously received a veto. She was not aware of a similar case.

Co-Chair Stedman could not recall other vetoes tied to actions by the courts.

Senator Wielechowski thought Co-Chair Stedman was correct and thought it was clear that the governor could not veto another branch because of not liking a decision it made. He mentioned separation of powers. He pondered how the governor was being advised on how the actions might be unconstitutional. He wondered if the governor was disregarding legal advice.

Ms. Mills commented that the reason there was attorney-client privilege was in order to have candid conversations between counsel and policymakers. She could not address the matter at a deeper level.

Senator Wielechowski shared concern over the fact that Ms. Mills could claim attorney-client privilege while the legislature had to pay the bill. He hoped there were some different policies in place, and he understood the governor had to get advice. He struggled over the fact that the administration could do whatever it wanted, and the legislature had to pay for it as the appropriating body.

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Ms. Mills addressed Item 9, Alaska State Legislature v. Dunleavy, et al, which involved the forward funding of education. She noted that the case was currently on appeal before the Alaska Supreme Court, and there were currently no attorney's fees to be paid. The superior court had found in favor of the legislature regarding the forward funding. She thought the case was fully briefed and was awaiting the court decision. The department's cost in the case was $76,470. She continued that no attorney's fees would be paid until the case was concluded and it was determined that there was an amount owed.

Co-Chair Stedman asked if the case was one in which the governor sued the legislature.

Ms. Mills affirmed that the governor could not sue the legislature. She recounted that the governor stated he did

not believe he could pay the education funding, and the legislature had appropriated the funding two years previously. The legislature had sued the governor and the administration shortly before, and an agreement was settled upon to make sure the monies could be paid out.

Senator Wielechowski was concerned about the policy ramifications if the administration were to win the case. He recounted that there were two different issues in the case. The legislature had passed a $30 million one-time appropriation outside the funding formula for education, and the governor simply refused the pay the funds out. He emphasized that the governor could not simply refuse to pay something the legislature had appropriated. He listed the second issue of the forward funding of education. He thought if the governor prevailed in the case, such a judgement would eviscerate the capital budget process. He discussed the ongoing nature of capital project funding. He thought winning the case would indicate atrocious public policy.

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Senator von Imhof considered Item 9 and read that the department had spent $76,000 in department funds, after which the court held up the defense of the legislature as legitimate.

Ms. Mills stated that the superior court had held that the legislature was in the right, and the matter was on appeal. She did not want the public to have misconceptions about capital projects and clarified that the case had been about an appropriation that was made on revenue that did not exist at the time. She furthered that capital project involved funds for the next fiscal year, rather than money that would be available in a different fiscal year in the future.

Co-Chair Stedman asked the director of Legislative Legal Services to come to the table. He referenced Item 5 through Item 8, which dealt with litigation against the governor himself. He pointed out the question of the difference between being represented as the governor by the Department of Law versus as a private citizen. He referenced an issue with former Governor Sarah Palin known as "Trooper-gate" [a case involving the possibly illegal July 2008 dismissal of the Department of Public Safety commissioner] in which the

governor's employees were responsible for dealing with the legal issues themselves rather than having the department to act as counsel. He pondered the ability of the attorney general in deciding on the administration's involvement in cases, and whether the treasury was vulnerable to the current and future attorney general's decisions on the matter.

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MEGAN WALLACE, DIRECTOR, LEGISLATIVE LEGAL SERVICES, ALASKA STATE LEGISLATURE, addressed the department's discretion in whether to represent the governor, and deferred back to Ms. Mills to consider what analysis was done to determine whether or not the department would provide representation at public expense. She summarized that if the federal court decision was the end of the case, there would be no question that it was not appropriate for the state to provide the cost to satisfy the judgement based on the court's decision with respect to the qualified immunity, and the court's decision that the governor was not protected with qualified immunity. She continued that as Ms. Mills articulated, the case was under appeal and there was not a final decision on the merits by the 9th circuit or the Supreme Court of the United States.

Ms. Wallace affirmed that the attorney general had pretty wide discretion by statute to decide whether or not it was appropriate to settle a case on behalf of the state. She mentioned the unprecedented nature of a case in which the governor was not protected by qualified immunity. She was not prepared to say it had not happened in other states but acknowledged that it was a rare circumstance. She pondered the unique question of whether it was appropriate that the state was willing to settle a lawsuit in which a federal court only stated there was personal liability for the governor and the former chief of staff. She thought there was an open public question of whether use of state funds to resolve the matter was appropriate.

Ms. Wallace acknowledged a risk of the use of funds being challenged, but thought it was not unprecedented for governments to cover judgements and settlements in other cases where qualified immunity had been deemed to not shield a government employee. It was her understanding that the cases were more common with police officers and other peace officers. She thought given the uniqueness and

unprecedented nature of the case relating to the governor, there was some risk of challenge if the money was appropriated. She thought that the real policy decision for the legislature was due to the fact that if the legislature did not appropriate the funds, the plaintiffs in the suit would not be compensated as agreed upon by the state.

Co-Chair Bishop understood that Ms. Mills had indicated that in the cases relating to the API doctors, the plaintiffs agreed to the terms of the settlement knowing that the funds were subject to appropriation.

Ms. Mills affirmed that the settlement document clearly made the payment amount subject to appropriation.

Co-Chair Stedman asked Ms. Wallace to address Item 9, and the litigation dealing with appropriation. He recalled that the governor was going to sue the legislature, and he thought it was not possible.

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Ms. Wallace noted that the Alaska Constitution specifically prohibited the governor from filing suit against the legislature. She thought there could be confusion because there were multiple lawsuits pending relating to disputes between the legislature and the governor. She referenced Item 9, which correctly described the forward funding matter that was currently pending before the Alaska Supreme Court. There was a second matter also pending before the Alaska Supreme Court, the Taylor v. Legislative Affairs Agency case, which was initiated by the attorney general against the Legislative Affairs Agency in the summer of 2021 with respect to a dispute between the legislature and the governor over the effective dates of the operating budget.

Ms. Wallace recounted that when the budget was originally passed by the legislature, it had failed to get the votes sufficient to approve the special effective dates of the budget. She continued that there was some dispute between the branches of government in terms of the options the governor had to keep the state open without an effective operating budget. She cited that despite the clear constitutional restriction, the attorney general had filed suit against the administrative agency of the legislature to attempt to litigate the substance of the claims. The

legislature hired outside council to represent the Legislative Affairs Agency. She thought there might be some mix-up on the spreadsheet with regard to departmental cost. She noted that column 9 seemed to reflect the departmental cost for the legislature in retaining outside counsel in the second matter, in which the Legislative Affairs Agency had a ruling in its favor from the superior court, which held that under the constitution the lawsuit was prohibited.

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Ms. Mills addressed Item 10, which involved the Power Cost Equalization (PCE) Fund litigation, which was brought by the Alaska Federation of Natives (AFN) against the state the previous summer. There was no settlement or damages amount, but an amount listed for attorney's fees. The case involved whether the PCE Fund was subject to the sweep of the CBR. The court determined that half the plaintiff's argument was correct, which had to do with whether the PCE Fund was in the General Fund or not. The court found that it was not in the General Fund, and the state decided not to appeal the case. The department costs were $49,685. She apologized that the case was left of the spreadsheet. The amount for the attorney fees was $84,217, which represented 60 percent of the amount sought by the plaintiffs. The judge had determined the plaintiffs should not be awarded the full fees and reduced the amount to 60 percent.

Co-Chair Stedman thought there were concerns that multiple administrations had always viewed the PCE Fund as non-sweepable, and the there was a political change with the current governor and his first OMB director who deemed the fund as sweepable and removed the funds. He referenced money spent on the matter for what he considered merely a political re-definition. He thought some of the members of the legislature found it concerning that some of the new legal opinions were costing time and thousands of dollars while providing nothing but confusion. He thought there was some advantage that the PCE Fund was now settled, but it was not yet certain whether the Statutory Budget Reserve (SBR) was subject to the sweep. He referenced language produced by the Department of Law as to the different opinions on the matter.

3:08:04 PM

Senator Wielechowski was curious if the department considered the issue of the PCE Fund to be resolved, considering that there was a superior court decision that was not appealed to the supreme court.

Ms. Mills noted that although the state had to adhere to the superior court decision regarding the PCE Fund, the decision was not binding. She did not think there would be a differing determination on the issue from the Alaska Supreme Court, but it could occur in the future and the administration or executive branch would have to adhere to the decision. She mentioned the Higher Education Investment Fund, which she considered a different case and dealt with the availability of the appropriation and not whether it was in the General Fund.

Senator Wielechowski clarified that because the decision was not appealed to the supreme court, the decisions on the PCE Fund and other decisions the court made that were not appealed were not binding.

Ms. Mills concurred.

Senator von Imhof asked why there was a superior court.

Co-Chair Stedman thought there was not sufficient time to discuss Senator von Imhof's question. He emphasized that the monetary total for the ten cases being discussed was $2.1 million, and cited concerns in the legislature.

Senator Olson asked if the $2.1 billion could be pulled out of the governor's budget.

Co-Chair Stedman relayed that the governor's budget was being considered in the Senate Finance Budget Subcommittee and the subcommittee may not want to discuss the matter.

Senator Olson wondered if the funds had ever come from the governor's budget in the past to settle similar issues to the judgements and claims being discussed.

Co-Chair Stedman thanked the testifiers. He discussed the agenda for the following day.

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ADJOURNMENT
3:12:22 PM

The meeting was adjourned at 3:12 p.m.