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*State of New Mexico*  
**LEGISLATIVE FINANCE COMMITTEE**

325 Don Gaspar, Suite 101 • Santa Fe, NM 87501  
Phone: (505) 986-4550 • Fax: (505) 986-4545

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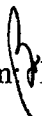
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September 8, 2010

**MEMORANDUM**

To: Representative Al Park, Co-Chair  
Senator Peter Wirth, Co-Chair  
Courts, Corrections and Justice Committee

From:  Brett F. Woods, Principal Analyst, LFC

**Subject: Review of Private Prison Contracts Penalty Assessment**

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As you are aware, Legislative Finance Committee (LFC) staff was asked by your committee to follow-up on testimony by the New Mexico Corrections Department (NMCD) regarding enforcement efforts with respect to its private prison contracts. LFC program evaluation staff was requested to assist in the analysis and to advise LFC budget staff of their findings in anticipation of the FY12 budget cycle. The LFC program evaluation staff analysis is forwarded herewith.

It should be noted that NMCD staff has reviewed a draft version of the LFC analysis and is in agreement that the general methodology used by LFC appears to be sound, although the department is still waiting to receive information directly from the private prisons as well as other information from NMCD staff for use in the department's analysis of the vacancies.

cc: Representative Luciano "Lucky" Varela, Chairman, LFC  
Senator John Arthur Smith, Vice-Chairman, LFC  
David Abbey, Director, LFC

BW/mt

# Memo

To: Brett F. Woods, Principal Analyst  
From: Lawrence Davis, Program Evaluator  
Charles Sallee, Deputy Director for Program Evaluation  
Legislative Finance Committee  
Date: September 7, 2010  
Re: NMCD – Staffing Vacancies

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**Background.** Legislative Finance Committee (LFC) staff was requested to follow-up on testimony by the New Mexico Corrections Department (NMCD) regarding enforcement efforts of its private prison contracts at a recent Court, Corrections and Justice Committee hearing. LFC program evaluation staff was requested to assist in the analysis to respond to this legislative request and to inform your budget analysis. This memo is to assist you in LFC staff response to the legislative request and for your budget analysis.

**Summary.** NMCD private prison contracts specify required staffing patterns of facilities, including penalties for facilities with vacant positions over 30-60 days (depending on the type of position) and not manning mandatory posts. NMCD has chosen not enforce financial penalties for staffing patterns at the private prisons, which is within the Secretary's discretion per the contract. However, based on LFC staff analysis of NMCD contract monitor reports it appears vacancy salary savings may have totaled almost \$5 million for positions open more than 30 days and unmanned posts. Private prisons also accrue savings from not having to pay benefits for vacant positions, which total an estimated \$1.1 million. Assuming these vacancy trends existed across facilities for the past four fiscal years (two fiscal years at NENMCF) an estimated \$22.7 million in salary and benefit vacancy savings accrued to the contractor, of which \$18.6 million was salaries and potentially eligible to be recovered if the department had chosen to enforce the contract. The contracts only allow for vacant salaries, not benefits, in the penalty calculations. Regardless of decisions to enforce penalties, it appears NMCD spends large sums of contract funding on vacant private prison staff positions.

Vacancy information and potential penalty amounts should be gathered and calculated by NMCD on a regular basis. However, NMCD does not regularly compile vacancy rates, contractor staff pays rates, contractor vacancy savings or review potential penalty amounts in its central office, but should do so immediately. The Secretary of NMCD has recently requested that one of its contractors (Geo Group) perform this analysis and provide other information to "defend my position" of not enforcing contract penalties (Attachment A). NMCD staff should have been performing this compilation to assist in decision making about whether the Secretary should enforce contractually required staffing patterns and associated penalties, or rationale for why not to enforce agreed upon contractual provisions. LFC staff has requested NMCD to now perform this function and report its results, including the specific rationale for not enforcing the contract.

**Methodology.** General assumptions outlined within the staffing vacancy analysis are based on the limited information provided by the New Mexico Corrections Department (NMCD). Staffing information was received for all four private correctional facilities operated New Mexico. Information was received in monthly, bi-weekly and weekly contract monitor staffing summary reports, and were selected and compiled by NMCD. NMCD staff reviewed the data, methodology and calculations in this memorandum and did not dispute the figures and generally agreed with the methodology.

In the absence of pay rates for facility staff, LFC applied an average of Lea County Correctional Facility (LCCF) pay rates to Northeast New Mexico Correctional Facility (NENMCF - Clayton, NM) and Guadalupe County Correctional Facility (GCCF). Although there may be slight variation, this serves as a good estimate of realistic rates for other GEO correctional facilities. Staffing pay rates were requested and received for LCCF and New Mexico Women's Correctional Facility (NMWCF). In the past, NMCD has also requested this information but has been told that such information was proprietary.

Overall vacancy and unmanned mandatory post averages were calculated from information provided by NMCD. Below is a synopsis of the information provided by facility:

- LCCF – 11 monthly and three bi-weekly reports from fiscal years 2008 through 2010.
- NENMCF – 13 weekly reports from fiscal year 2009.
- GCCF – 20 bi-weekly reports from fiscal years 2008 through 2010.
- NMWCF – 22 monthly reports from fiscal years 2008 through 2010.

Vacancy and unmanned averages were then multiplied using the most conservative pay rates for custody and non-custody positions. For example, the majority of vacant custody positions are correctional officers; therefore a standard rate for GEO facilities (3 of 4) of \$13.24/hr. was used. These totals were then multiplied based on custody and non-custody daily work hours, which derives a “daily salary” rate which is used as the basis for estimated NMCD staffing penalties. Finally, an annual factor of 365 days is applied, which annualizes the daily rate. Note that an additional multiplier of 2 is used to calculate unmanned mandatory posts as outlined within contracts.

Potential savings were estimated from custody positions that remained vacant past 30 days. Non-custody positions must remain vacant for more than 60 consecutive days in order for the state to be eligible for a per diem credit. However, staffing reports only track positions that remain vacant over 30 days. Because the data demonstrated that non-custody positions often remain vacant throughout staffing reports, it can be assumed that these positions may be vacant for more than 60 days.

**Contract requirements.** NMCD is authorized to enforce staffing vacancy penalties based on the following clauses within GEO and CCA contracts.

- If any position in the staffing pattern other than correctional officer positions remains vacant for more than sixty (60) consecutive days, NMCD has the authority to reduce the per diem rate by an amount equal to one (1) day's salary for that position for each day it is vacant past 60 days.
- If more than ten (10) percent of the correctional officer positions set forth in the staffing pattern remain vacant for more than thirty (30) consecutive days, then NMCD has the authority to reduce the per diem rate by an amount equal to one (1) day's salary for each such correctional officer position (above the 10% vacancy rate) for each day it remains vacant past 30 days. NMCD also has the authority to deduct an additional ten (10) percent of the base salary for any correctional officer position vacancy (above the 10% vacancy rate) for each subsequent thirty (30) day period that the position remains vacant.
- If an essential/mandatory duty station or post is not actually manned on any shift for which it was so designated, NMCD has the authority to reduce the per diem rate by an amount equal to two (2) day's salary for that position for each shift that it was not actually manned.

In addition to staffing, NMCD has the authority to impose penalties for performance measures and liquidated damages, including non-compliance with standards that cause an inmate to be properly discharged or released.

**Vacancy Savings.** Vacancy salary savings may have totaled almost \$5 million for positions open more than 30 days and unmanned posts. NMCD private prison contracts require facilities to maintain adequate staffing levels with respect to the care and custody of NMCD inmates. Staffing patterns outline minimum staffing positions and designate mandatory and non-mandatory security posts. Each contract states that the contractor or county "shall at all times staff all essential employee positions (designated as "Mandatory") in strict accordance with the schedules on the approved staffing pattern." Savings figures only include savings from positions open for more than 30 days, including \$3.4 million for custody positions and \$811 thousand for vacant support service (non-custody) positions and about \$755 thousand for unmanned "mandatory posts." Vacancy rates run on average from 5.9 percent to 21 percent depending on positions and facility. In 2007, LFC's evaluation staff reported facilities had high vacancy rates, contract penalties were not enforced and the state did not benefit from vacancy savings<sup>1</sup>. If the facilities' operational quality is not hampered due to high vacancy rates, then the department may be paying for staff that isn't needed.

Private facilities also accumulate savings from vacant employee benefits. However, the department does not have the authority to recover these savings. If a conservative employee benefit package of 22 percent is applied to the potential annual savings from vacant staff

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<sup>1</sup> Corrections Department – Review of Facility Planning Efforts, May 23, 2007

positions (\$5 million \* 22%) could amount to almost \$1.1 million in additional savings. Benefit packages include paid time off, medical, dental, vision, 401k, insurance benefits etc; as well as social security, Medicare and unemployment taxes that are paid by the employer.

Assuming these vacancy trends existed across facilities for the past four fiscal years (two fiscal years at NENMCF) an estimated \$22.7 million in salary and benefit vacancy savings accrued to the contractor, of which \$18.6 million was salaries and potentially eligible to be recovered if the department had chosen to enforce the contract. The contracts only allow for vacant salaries, not benefits, in the penalty calculations.

**Potential Annual Savings from Vacant Staff Positions\***  
(in thousands)

Facility	Custody	Non-Custody	Unmanned Mandatory Posts	Total Annual Savings
Lea County CF	\$1,966.4	\$498.2	\$715.0	\$3,179.6
Northeast NMCF	\$504.1	\$26.7	\$37.8	\$568.6
Guadalupe County CCF	\$541.3	\$153.6	\$2.2	\$697.1
New Mexico Women's CF	\$350.6	\$132.2	\$ .3	\$483.1
<b>Subtotal for Staffing Vacancy</b>	<b>\$3,362.4</b>	<b>\$810.7</b>	<b>\$755.3</b>	<b>\$4,928.4</b>
Employer benefit savings at @ 22 percent	\$739.7	\$178.4	\$166.2	\$1,084.3
<b>Total</b>	<b>\$4,102.1</b>	<b>\$989.1</b>	<b>\$921.5</b>	<b>\$6,012.7</b>

Source: NMCD data and LFC analysis  
\*For positions open for more than 30 days and penalty provisions for unmanned mandatory posts.

**Average Number of Vacancies by Facility**

Facility	Custody			Non-Custody			Unmanned Mandatory Posts
	Overall	Above 30 Days	Overall Vacancy Rate	Overall	Above 30 Days	Overall Vacancy Rate	
Lea County CF	42.43	33.91	21.0%	20.23	20.11	17.4%	187.5
Northeast NMCF	13.77	8.69	11.3%	4.08	1.08	5.9%	2.29
Guadalupe CCF	19.35	9.33	15.6%	8.05	6.2	12.0%	0.27
NM Women's CF	11.36	6.05	13.4%	7.33	4.32	12.0%	0.14

Source: NMCE data and LFC analysis

This data analysis does not take into consideration over-time payments paid to staff because contract staffing requirements do not include any provisions for over-time and over-time data

was not provided to LFC. In addition, over-time work requirements contribute to staff fatigue, which creates individual safety issues for correctional staff and inmates.

**Staffing patterns and pay rates.** In order for NMCD to enforce staffing penalties, a staffing pattern must be agreed upon and approved by the county and NMCD. However, NENMCF, which began operations in August 2008, does not have an approved staffing pattern. Staffing patterns serve as the basis for penalty calculations and outline custody, non-custody, essential/mandatory and un-mandatory positions that apply to penalty language within the contract. Basically, NMCD may not have the authority to impose any staffing penalties upon NENMCF because an approved staffing pattern is nonexistent. LFC staff was notified on July 28, 2010 that NMCD is working on the implementation of an approved staffing pattern. Since, NMCD does not have position pay rates for three facilities, they cannot apply penalties outlined within the contracts.

Mental Health Provider (MHP) pay rates vary highly from other non-custody pay rates and were not included within the commingled non-custody average. The pay rate for a MHP is approximately \$21.63/hr. If an MHP position remains vacant this position can generate vacancy savings of \$45 thousand per year. For example, LCCF's average vacancy rate for MHPs is 4.4 percent, which generates approximately \$196.9 thousand in vacancy savings. LCCF stated that they rely on an outside agency to provide mental health services at a rate of \$70 per hour.

**Penalty enforcement.** No penalties have been assessed to any facility. The Secretary of NMCD has discretion whether or not to impose penalties for excessive staffing vacancies. Vacancy information and potential penalty amounts should be gathered and calculated by NMCD on a regular basis. However, NMCD does not regularly compile vacancy rates, contractor staff pays rates, contractor vacancy savings or review potential penalty amounts in its central office, but should do so immediately. NMCD staff should have been performing this compilation to assist in decision making about whether the Secretary should enforce contractually required staffing patterns and associated penalties, or rationale for why not to enforce agreed upon contractual provisions. LFC staff has requested NMCD to now perform this function and report its results.

The figures in this memo do provide a basis for considering whether the state should in the future continue to pay large sums for unfilled vacant positions. However, lack of sufficient clarity in contract language, monitoring, and contractor data makes precisely determining potential *penalty* amounts difficult. The figures used in this memo may prove conservative, or not, depending on actual pay rates of staff and further analysis and negotiations with contractors over potential penalty amounts. There will likely be disagreement that certain vacancy savings should be subject to the penalty provisions of the contractor or not.

Correctional Medical Services was assessed a \$40 thousand penalty in December 2007 for not operating on-site dialysis services.

**Contractor sponsored trips and parties.** NMCD provided information regarding trips or retirement parties paid for by contractors (Attachment B). NMCD also disclosed one instance of the GEO paying travel cost for the Secretary Williams in the amount of \$773.12 to actively participate in the training session held from May 19<sup>th</sup> through 22<sup>nd</sup> at Charlotte, North Carolina. According to NMCD this was in compliance with state law.

The letter also indicated that the GEO Group did sponsor a retirement dinner on May 26, 2010 for Mr. Donald Dorsey at a total cost of \$1,296.95. NMCD claims that the Gift Act does not apply because no one employee attending the dinner received a gift of anywhere near the \$250 per employee limitation set by the Act.

In addition, NMCD indicated that since it does not have a contract directly with GEO, "it is questionable whether or not GEO is a restricted donor as defined by the Act." NMCD has entered into intergovernmental agreements with local government to house state inmates, who have contracts with private prisons. As a result NMCD does not have a direct contract with private prisons but does negotiate its contract terms and prices with the private prison operators, raising questions about whether the Gift Act should apply in this unique circumstance or not.

### **Recommendations.**

- While we recognize the value of private prison contracts, it is understood that the department has oversight and contractual responsibility to protect the state's fiduciary interests and maintain the safety of New Mexico inmate's population. Accordingly, the department should reduce private prison funding for FY11 and FY12, using this and its own forthcoming analysis as a basis for reduction.
- NMCD should compile an actual staffing vacancy for last four fiscal years and provide that information along with actual pay rates to the LFC to determine specific penalty amounts. Furthermore the department should recover such penalties for the past four fiscal years and revert any recovered funds to the state general fund.
- NMCD should reevaluate the methodology used for applying staffing penalties, or restructure the contracts to assume minimum vacancies and withhold a portion of the total per diem as incentive pay for meeting certain staffing levels.
- Additional language for assessing penalties for employer benefit savings should be included within private prison contracts.

STATE OF NEW MEXICO  
CORRECTIONS DEPARTMENT

Central Office Administration: 4337 State Road 14, Santa Fe, New Mexico 87508  
Post Office Box 27116, Santa Fe, NM 87502-0116  
Main Number (505) 827-8600 Fax (505) 827-8533  
[www.corrections.state.nm.us](http://www.corrections.state.nm.us)

Bill Richardson, Governor  
Diane Denish, Lt. Governor

Joe R. Williams  
Secretary of Corrections (505) 827-8884  
Jolene M. Gonzales  
Deputy Secretary of Administration (505)  
827-8667



Administrative Services (505) 827-8601  
Adult Prisons (505) 827-8767  
Corrections Industries (505) 827-8597  
General Counsel (505) 827-8698  
Information Technology (505) 827-8713  
Probation and Parole (505) 827-8830  
Reentry & Prison Reform (505) 827-8509  
Training Academy (505) 827-8900

August 26, 2010

Wayne Calabrese, President and Chief Operating Officer  
John Hurley, Senior Vice President, and President, U.S. Corrections  
James Black, Western Region Vice President  
Kyle Schiller, Western Region Director of Business Management  
GEO Group, Western Region Office  
6100 Center Drive, Suite 825  
Los Angeles, CA 90045

Dear Sirs:

In order to obtain more accurate staffing data, I am requesting the following information so that the Department may fully respond to the LFC. The Department understands your general position that information regarding your staff's pay is proprietary. However, it is difficult for the Department to come up with a methodology to substantiate the LFC's information, or to contest the LFC's conclusions, without actual pay rates. I would also point out to you that the vacancy penalty provisions in the private prison contracts contemplate that GEO will voluntarily and in good faith provide salary information on vacant positions at the Department's request. Otherwise, the Department would be forced to guess or speculate what the specific position's salary was in order to calculate any contractually authorized penalty. Such speculation on the Department's part could easily be higher than the actual salary, and this would obviously be to the detriment of GEO. To be clear, I am not saying that the Department has plans to invoke the vacancy penalty provisions of the contracts. However, in light of this fact that the contracts do reasonably appear to contemplate that GEO will comply with the Department's requests for salary information, I would ask you to reconsider your position that salary information is proprietary.

With that in mind, please consider releasing the following information to me as soon as possible so that the Department may respond to the LFC's request:



Page 2  
Geo Group  
August 26, 2010

- Staffing vacancies as related to the penalty provisions of the private prison contracts for **fiscal years ending June 30, 2007, 2008, 2009 and 2010**. This data should include actual pay rates for each position and associated employee benefits.
- Amounts of overtime for mandatory and non-mandatory positions and which positions were covered with overtime for the relevant time frame.

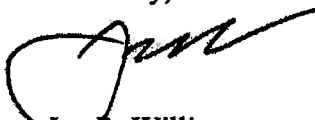
For the purpose of my presentation to the interim committees I would like to have the following information. This information could help me defend my position.

- Amount of gross receipts taxes and property taxes paid by GEO regarding the relevant private prisons within the above bolded relevant time frame.
- Any NMCD monitoring reports that you may have on file for the relevant time frame.
- Cost of transporting inmates on NMCD's behalf for the relevant time frame.
- Any community projects, donations to schools, public works projects or any contributions during the relevant time frame that show a benefit to the quality of life for the citizens of New Mexico.
- Any other costs or expenses incurred by GEO in New Mexico during the relevant time frame that you believe constitute a benefit to the State or the citizens of New Mexico.

I would also appreciate it if you would also include the methodology you used to come up with your numbers (calculating the potential amounts of vacancy paybacks for the relevant time frame) so that the Department may compare it to those of the LFC and the Department.

Thank you in advance for your consideration of this request. Please understand that any information that you provide will be used to try to contest or correct the LFC's calculations and position, and in a manner that I believe will be to the benefit of the Department, GEO, and the citizens of New Mexico.

Sincerely,



Joe R. Williams  
Secretary

STATE OF NEW MEXICO

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Information Technology	(505) 827-8713
Probation and Parole	(505) 827-8830
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July 14, 2010

Brett Woods, Ph.D.  
Principal Analyst  
New Mexico Legislative Finance Committee  
325 Don Gaspar, Suite 101  
Santa Fe, New Mexico 87501

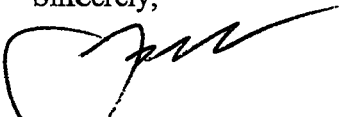
Dear Mr. Woods:

In response to your request for information regarding whether contractors were paying for trips or retirement parties of NMCD employees; GEO group did sponsor a retirement dinner on May 26, 2010 for Donald Dorsey. The total contribution was \$1,296.95. Such a sponsorship was in compliance with the Gift Act because no one employee attending the dinner received a gift (food) of anywhere near the \$250 per employee limitation set by the Act. Further, since NMCD does not have a contract with GEO, it is questionable whether or not GEO is a restricted donor as defined by the Act. The \$250 per employee limitation set forth in the Act only applies to gifts received from or given by restricted donors.

Furthermore, I did travel to Charlotte, North Carolina from May 19<sup>th</sup> through the 22<sup>nd</sup>, 2010 for training which was paid for by the GEO group. The total cost for my airfare was \$350.30 and the cost of my hotel room was \$290.82, shuttle ground transportation was \$132.00. My active participation in this training, including being a presenter at the training, benefited the Department by giving it an opportunity to exchange perspectives with private correctional leaders and other state correctional leaders on ways to reduce costs to state government. Please see attached invitation to participate in the conference from GEO Group Inc.

New Mexico Corrections Department General Counsel Jim Brewster reviewed and approved this travel request before it was submitted. He specified that there was absolutely no violation of the Governmental Conduct Act by me participating in the training. In fact, Section 10-16-4.1 of the Act clearly authorizes my meals, lodging and actual travel expenses incurred in attending and presenting at the training to be paid by GEO. I never would have attended this training if I thought that doing so would have violated the law in any way.

Sincerely,

  
Joe R. Williams

Attachment

March 22, 2010

Secretary Williams,

The GEO Group, Inc. Eastern Region cordially requests your presence at its Annual Warden/Business Manager Conference in Charlotte, NC. The conference dates are May 17 – 21, 2010. On Thursday, May 20<sup>th</sup>, I would like for you to join Commissioner Ed Buss, Indiana Department of Corrections to host a round table “From the Client Perspective” discussion with the 40 conference participants. This is a unique opportunity for private correctional leaders and clients representatives to exchange perspectives which could result in cost benefits to state governments.

This conference supports training funds for travel and lodging, unfortunately we will not be paying presenters an honorarium due to budget restraints. It is our position that your participation in this conference will engage our leaders to identify promising practices to capture the most efficient methods to saving money by developing and deploying ingenious processes and systems. Likewise, we hope to share with you activities and techniques we utilize to potentially reduce the cost within your jurisdiction while enhancing correctional effectiveness.

This collaboration will produce an enhanced understanding of the potential opportunities and challenges we collectively share. Through the collective application of creative thinking, yet to be discovered solutions will be found. This type of innovation will produce the efficiencies essential to meeting tomorrow’s correctional needs.

Thank you for your consideration. If your schedule can accommodate this request, please advise.

**David Donahue**  
VICE PRESIDENT

**The GEO Group, Inc.®**  
13777 Ballantyne Corporate Place, Suite 200  
Charlotte, North Carolina 28277

Tel: 704 543 3400 • Fax: 704 543 3416  
[ddonahue@geogroup.com](mailto:ddonahue@geogroup.com)  
[www.geogroup.com](http://www.geogroup.com)