IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

FROILAN C. TENORIO **Plaintiff,** **v.** **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, et al.,** **Defendants.**	**Civil Action No. 00-002B** **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

¶1 At issue in this proceeding is the duty of the Commonwealth to defend public employees or fund their defense by private counsel for actions taken within the course and scope of their employment. Plaintiff, former Governor Froilan C. Tenorio, contends that under the Public Employee Legal Defense and Indemnification Act, ("PELDIA"),[1/] the Commonwealth must either represent him or pay for his legal defense by a private attorney. Seven years after it undertook his defense, however, the Commonwealth counters that it has no obligation either to defend or pay for a defense by a private attorney because Plaintiff failed to comply with statutory prerequisites requiring him to request a defense in writing.

¶2 This matter came before the court on May 31, 2001 on Plaintiff's motion for an order of substitution and for summary judgment. Following the hearing, the court took the matter under

[1/] 7 CMC § 2301 *et seq.*

submission. After consideration of the arguments at the hearing and a careful review of all papers submitted in support of and in opposition to the motion, the court now renders its written decision granting the motion for summary judgment and substituting Herbert Soll for Maya Kara as a party defendant in this case.

FACTS

¶3 The material facts giving rise to the motion are largely a matter of public record and are, in any event, undisputed. In September of 1994, Jeanne H. Rayphand filed a lawsuit against former Governor Froilan C. Tenorio and Maria D. Cabrera, then Director of Finance, challenging the allegedly illegal appropriation and expenditure of public funds. *See Rayphand v. Tenorio* Civil Action o. 94-912 (N.M.I. Super. Ct. Sept. 13, 1994) (Complaint) (hereinafter, the "*Rayphand* litigation"). In material part, the complaint alleged that because the legislature failed to pass a budget for the year 1994, the Governor had no authority to expend or reprogram public funds beyond those allocated to him by the fiscal year 1992 appropriation. The complaint also challenged several specific expenditures, among which numbered the expenditure of funds to maintain government liaison offices in Rota and Manila; an authorization of an expenditure of public funds so that the People of the CNMI could celebrate Liberation Day, a government holiday; payments made to Mitsubishi for generators sold to the CNMI; increases in judicial salaries; and donations into a scholarship fund. Although the caption on the complaint referred to Governor Tenorio in his official capacity, the prayer for relief sought damages from Froilan Tenorio personally, requiring him to repay to the Commonwealth all amounts illegally expended.

¶4 There is no dispute that neither Governor Tenorio nor the Director of Finance were ever personally served with process in this case. Reply at 2-3 and Exs. "B" and "D" thereto; Decl. of Loren Sutton, ¶ 5; Decl. of Robert B. Dunlap, ¶ 5. The complaint was, however, forwarded to the Attorney General's Office, and the Government entered an appearance in this case on behalf of all defendants. According to then Assistant Attorney General Loren Sutton, the Government filed an answer on behalf of Governor Tenorio and continued to represent him throughout the

proceedings.[2/] The Government never obtained conflict waivers, never sought to join the recipients of any of the allegedly illegal expenditures as parties to the proceeding, and never included any affirmative defenses personal to Governor Tenorio in his answer. Sutton Decl. at ¶5. According to former Assistant Attorney General Sutton, since the complaint named Governor Tenorio only in his official capacity, "there was no reason to file an answer on his behalf in his personal capacity and no reason to advise him regarding the manner in which he should seek a defense from the Government under the Public Employee Legal Defense and Indemnification Act of 1986." *Id.*; *see also* Declaration of then Acting Attorney General Robert B. Dunlap, dated April 1, 2001.[3/]

¶5 In late 1996 and early 1997, the parties filed motions for summary judgment. On June 10, 1997, the court entered summary judgment against Defendants and directed Governor Tenorio to make reparations to the people of the Commonwealth in the sum of $12,425,074. *See Rayphand v. Tenorio*, Civil Action No. 94-912 (Memorandum Decision and Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment). Following the entry of summary judgment, the Government filed a motion for reconsideration on behalf of Governor Tenorio, asserting, for the first time, a number of affirmative defenses that were purely personal to Mr. Tenorio. Reply, Ex. "F." Thus, there is no dispute that the Attorney General's Office undertook the representation of Governor and Mr. Tenorio in his official and personal capacities.

¶6 In September or early October of 1999, however, the Attorney General's Office telephoned former Governor Tenorio to notify him that the Office of the Attorney General would no longer represent him in the *Rayphand* litigation. Reply at 4. At a meeting attended by Governor Pedro P. Tenorio, Assistant Attorney General David Sosebee, Assistant Attorney General Robert

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[2/] In addition to the answer filed on behalf of Governor Tenorio, the Government also filed an answer on behalf of Defendants Maria D. Cabrera and the Commonwealth Development Authority. At a hearing held on February 21, 1997, the court dismissed Defendant Maria D. Cabrera from the suit by agreement of the parties, granted summary judgment in favor of Defendant Commonwealth Development Authority, granted summary judgment in favor of Governor Tenorio as to the $6.2 million payment made to Mitsubishi Corporation, ruling that the payment presented a non-justiciable political question.

[3/] According to Mr. Dunlap, the litigation was never treated as a lawsuit against Froilan C. Tenorio in his personal capacity.

Goldberg, and the Lieutenant Governor's legal counsel one week later, Plaintiff learned that the Commonwealth would not pay for his private representation, either.

¶7 On October 7, 1999, the Attorney General's Office filed its Notice of Intent to substitute counsel in the *Rayphand* litigation. Motion at Ex. "C." On October 28, 1999, counsel for former Governor Tenorio, notified Maya Kara, then Attorney General, of his objections to the government's position and formally requested payment for the former governor's legal defense under the PELDIA, 7 CMC § 2301. *See* Ex. "E." On November 1, 1999, the Attorney General's Office filed a formal request in the *Rayphand* litigation to terminate its representation. Motion at Ex. "D." When the Attorney General's Office refused to file a response to Ms. Rayphand's petition for attorney's fees, former governor Tenorio filed a response *pro se*.

¶8 On December 22, 1999, former governor Tenorio notified the Attorney General's Office that because it had abandoned its representation of him and refused to respond to the application for attorney's fees, he could no longer risk having the Attorney General's Office as his counsel of record in the *Rayphand* litigation. Reply at 5. The next day, Plaintiff's current counsel substituted into the *Rayphand* litigation to represent Mr. Tenorio's personal interests. On January 3, 2000, Plaintiff filed the instant action seeking, among other things, a declaration that the CNMI government is required to pay for Mr. Tenorio's legal defense in the *Rayphand* litigation by a private attorney and an injunction requiring the Government to do so. On March 8, 2001, Froilan C. Tenorio filed his Notice of Appeal in the *Rayphand* litigation, appealing the court's denial of his motion for reconsideration. Motion, Ex. "F."

ISSUE

¶9 Whether the Office of the Attorney General, having affirmatively and unequivocally undertaken a defense of the former governor in Civil Action 94-912 without first requiring a written request, can now abandon his defense and/or refuse to pay for his legal defense by private counsel.

ANALYSIS

¶8 In 1986, the Legislature enacted the PELDIA to provide protection to government employees against the high cost of a legal defense and judgments for injuries arising out of actions occurring within the scope of their employment. *See* 7 CMC §2302. The statute not only requires the Commonwealth to pay any judgment entered against the employee for conduct arising out of his employment, but also to defend an employee who is sued for such conduct. *See* 7 CMC § 2503(a). At the Commonwealth's option, it must either pay for an employee's defense, either by an attorney accepted by the employee and the Attorney General or his designee, or defend the employee. 7 CMC § 2504(a). So long as the claim arises from acts occurring within the scope of his employment, the Commonwealth has an obligation to defend or pay for a defense, regardless of whether the employee is sued in his official capacity or individually. *See* 7 CMC §2304(a)(1).[4/]

¶9 The Government points out, however, that the PELDIA is not self-executing. To obtain a defense by a public entity or payment for a defense by a private attorney, a public employee must follow certain steps. First, the employee must lodge a request for the public entity to pay for his defense. See 7 CMC § 2304(a)(1). Second, the employee's actions cannot be a product of actual fraud, actual malice, or willful criminal misconduct. *Id.* at section 2304(a)(2). Third, the employee must reasonably cooperate in good faith in the defense of the claim. *Id*. at § 2304(a)(3). Finally, the statute requires the request required by section 2304(a)(1) to be made in writing, no more than five days before the answer in the case must be filed. *Id*. at § 2304(a)(4). If the employee "reasonably and in good faith" believed that the acts giving rise to the claim"occurred within the scope of his employment as an employee of the public entity," and the employee has satisfied the other statutory prerequisites, the statutory obligation is clear: the government must either provide a defense or pay for one by a private attorney. *Id*. at 2304(a)(1).

[4/] When a public employee requests a defense, the statute further imposes a duty upon the government to advise the employee of any "potential conflict of interest between the defense of the public entity and the employee." 7 CMC §2302(b). The statute permits both parties to waive the potential conflict of interest. *Id.*

¶10 There is no dispute that the actions of which former Governor Tenorio was accused would otherwise require indemnification and payment for defense, given the absence of any findings by the court of fraud, actual malice, or willful criminal misconduct. *See Rayphand v. Tenorio*, Civil Action No. 94-912 (Memorandum Decision and Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment). Nor is there any dispute that the acts giving rise to the *Rayphand* litigation occurred within the scope of Plaintiff's employment as governor of the Commonwealth. The essence of this dispute, therefore, turns on the requirement of section 2304(a)(4) for a government employee desiring a defense and/or indemnification to make a request in writing. The parties agree that not until October of 1999 did Plaintiff ever make such a request, and the Government contends that Plaintiff's failure to comply with this statutory prerequisite renders his request for defense and indemnification futile. According to the Government, the language of 7 CMC § 2403 is clear and without ambiguity. Response at 2. The Government accordingly argues that the motion for summary judgment must be denied.

¶10 Plaintiff counters that the issue of whether a demand was made is irrelevant when, as here, he was never served with process[5/] and the Attorney General's Office has filed an answer and fully participated in the defense. Contrary to the reading of the PEDLIA urged by the Government, moreover, Plaintiff contends that the statute is ambiguous because it does not address a situation where the government actually undertakes a defense, but then, for whatever reason, refuses to continue its representation in the middle of the litigation. Plaintiff argues that notwithstanding the statutory language, it would be manifestly unjust under the circumstances to permit the Attorney General's Office, which represented Plaintiff in the *Rayphand* litigation, to deny him the opportunity to raise a private defense when the Attorney General's Office itself believed in 1994

[5/] Plaintiff disputes the obligation of any public employee to demand representation if he was never personally served with a lawsuit. According to Plaintiff, since there was no personal service, he was never required to file an answer. He argues, therefore, that he could not, in 1994, have complied with the statutory requirement to make a demand for representation in writing, since the five day statutory requirement only applies to the period of time pre-dating the filing of an answer.

that there was no reason for Plaintiff to file a request for representation. *See* Sutton Declaration, ¶5.

¶11 The court agrees. The objective of statutory interpretation is to ascertain and effectuate legislative intent. *See Govendo v. Micronesian Garment Mfg., Inc.,* 2 N.M.I. 270 (N.M.I. 1991). The Legislature is presumed to have meant what it said, and generally the plain meaning of the language governs the interpretation of the statute. *Commonwealth Ports Auth. v. Hakubotan Saipan Enter.,* Inc., 2 N.M.I. 212, 221 (1991). The language of a statute is not to be given a literal meaning, however, when doing so would result in absurd consequences which the Legislature did not intend. *See In re Estate of Rofag*, 2 N.M.I. 18, 29 (1991); *Bodell Construction Co. v. Trustees of Cal. State University* 62 Cal.App.4th 1508, 1515-1516, 73 Cal.Rptr.2d 450 (1998) (citations omitted.) Thus in construing a statute, courts also consider the effect of any proposed construction and interpret statutes in a manner that avoids unlikely, absurd, or strained consequences. *E.g., People v. Superior Court (Blanquel),* 85 Cal.App.4th 768, 102 Cal.Rptr.2d 429 (2000) (When the application of the plain meaning rule would lead to an absurd result or thwart the manifest will of the Legislature, the court is required to interpret the law in a manner which avoids the absurdity and is consistent with the legislative design); *Arizona v. Medrano Barraza*, 190 Ariz. 472, 474, 949 P.2d 561, 563 (App.1997) ("We presume the framers of the statute did not intend an absurd result and our construction must avoid such a consequence."). The "plain meaning" rule thus does not prevent a court from determining whether the literal meaning of a statute comports with its purpose. Legislative purpose will not be sacrificed to the literal construction of any part of a statute. *Bodell Construction Co.,* 62 Cal.App.4th at 1515-1516; *see also Island Aviation, Inc. v. Mariana Islands Airport Authority*, 1 CR 633 (D.N.M.I. 1983) (a statute must be applied in its present form unless doing so would result in "manifest injustice" or unless there is statutory direction or legislative history to the contrary; the court may look beyond the express language of the statute where the literal interpretation thwarts the purpose of the overall statutory scheme or leads to an absurd result).

¶12 In passing the PELDIA, the Legislature attempted to eliminate the concern of public employees that they could be held personally liable for a failure to use reasonable care in performing their jobs and thereby to encourage able persons to accept responsible employment in the public sector. *See* 7 CMC § 2502.[6/] In so doing, the Legislature apparently recognized that government receives an invaluable service from persons who are willing to devote their time and energy to the community. The policy underlying the statute dictates, therefore, that public employees be encouraged, rather than discouraged, to serve in government by holding them harmless from personal liability arising out of services performed on behalf of the Commonwealth. See 7 CMC §2302. Insisting on strict compliance with the written request requirement some seven years after the Commonwealth voluntarily and unequivocally undertook Plaintiff's defense would plainly frustrate the statutory objective of protecting public employees who act within the scope of their employment. More importantly, it would also permit the Commonwealth to avoid its clear duty to provide indemnification and a defense which, by its words and conduct, it plainly acknowledged it had the obligation to provide in the first place. In that there is no language in the PELDIA expressly prohibiting or otherwise restricting the government from waiving the five day notice requirement, on the facts of this case, the court therefore finds that the Commonwealth cannot retroactively impose the five day representation request provision on former governor Tenorio.

¶13 As an initial matter, the PELDIA's requirement to request a defense in writing does not even become significant until five days prior to the filing of an answer. When, as here, there was no personal service, there is no obligation to file an answer, and thus the duty to demand government representation arguably does not even arise. More importantly, where, as here, the Government undertakes a defense without first requiring a written request under the statute, it waives its right to demand strict compliance with the written request requirement of section 2304(a)(1).

[6/] In material part, section 2302 provides: "It is the purpose of this chapter to provide protection to government employees against the high cost of the legal defense and the judgments for injuries arising out of actions occurring within the scope of their employment."

¶14 "Waiver" is the intentional relinquishment or abandonment of a known right or privilege. *See Trinity Ventures v. Guerrero*, 1 N.M.I. 47 (1990). The doctrine of waiver focuses on the conduct of the party against whom waiver is asserted.[7/] It is not necessary for the party claiming waiver to prove an actual intent to waive,[8/] since waiver may be inferred from conduct or acts "putting one off his guard and leading him to believe that a right has been waived." *Gilman v. Butzloff,* 155 Fla. 888, 891, 22 So.2d 263, 265 (1945).[9/] So long as there is conduct which clearly and unequivocally demonstrates that the party against whom the doctrine is asserted intends to relinquish a contractual, statutory or even constitutional right, there is no need to show prejudice to the party claiming waiver as a result of such conduct. *See Brown v. State Farm Mutual Automobile Ins. Co.,* 776 S.W.2d 384 (Mo. 1989) (*en banc)*.

¶14 The government, by its conduct, may waive any right to which it is legally entitled, including notice. *See, e.g., Wall v. Palm Beach County,* 743 So.2d 44, 44-45 (Fla.App, 1999); *Castle Homes and Development Co., Inc. v. City of Brier,* 882 P. 2d 1172, 1180 (Wash.App. 1994). To constitute an implied waiver, however, the acts or conduct evidencing an intent to waive must be clear and unequivocal, since the court will not infer a waiver from doubtful or ambiguous factors. The party asserting waiver bears the burden of proving an intention to relinquish the right. *See U.S. Oil & Ref'g Co. v. Lee & Eastes Tank Lines, Inc.*, 16 P.3d 1278, 1281 (Wash.App.2001). Whether a waiver has occurred depends on the circumstances of each case. *See Trinity Ventures*, 1 N.M.I. at 62-63.

[7/] As has been said: "Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party." *See DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.,* 30 Cal.App.4th 54, 59, 35 Cal.Rptr.2d 515 (1994).

[8/] *See Attoe v. State Farm Mut. Auto. Ins. Co.,* 36 Wis.2d 539, 545, 153 N.W.2d 575 (1967).

[9/] Waiver has also been described as "where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistently with the existence of the right, or of his intentions to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." *Charlotte Harbor & N. Ry. Co. v. Burwell,* 56 Fla. 217, 229, 48 So. 213, 216 (1908). *See also King v. Snohomish County*, 21 P.3d 1151 (Wash. App. 2001).

¶15 In clearly and unequivocally undertaking Plaintiff's defense for more than five years without first insisting upon written notice (which, according to the Sutton and Dunlap Declarations, the AGO did not even consider necessary at the time this case began), the Commonwealth has unmistakably evidenced its intention to waive its right to insist upon compliance with the five day written request requirement. The Government's conduct is not unlike that of a private insurer which, for whatever reason, elects to proceed with a defense without regard to or in contravention of the written requirements of a policy. *See, e.g., Goffe v. National Surety Co.,* 321 Mo. 140, 9 S.W.2d 929, 938 (1928). At issue in *Goffe* was a bond that required all claims to be made within three months of the bond's expiration. Notwithstanding the clear contract language, the insured filed a claim after the expiration of the three-month period. The court held that where the bonding company undertook to investigate the claim, the company "waived such defense by failing to disclaim liability on that ground by undertaking to investigate the claim and by putting plaintiff to the trouble and expense of making proof of loss, after it had knowledge of such defense." *Id. Goffe* thus stands for the proposition that an insurer waives its contractual right to deny coverage on the basis of the insured's failure to file a claim within the time requirements of the insurance contract when it undertakes to investigate a claim in a manner contrary to the terms of that contract. It is the insurer's unequivocal conduct, knowingly contrary to the claim provisions of its contract, that betrays the insurer's purpose to relinquish its right to rely on the contractual language. *See also Mistele v. Ogle,* 293 S.W.2d 330, 334 (Mo.1956) ("It is defending an action with *knowledge* of noncoverage under a policy of liability insurance without a non-waiver or reservation of rights agreement that precludes the insurer from subsequently setting up the fact and defense.") (Emphasis in original).

¶16 A number of courts have, in addition, concluded that neglecting to insist upon a right may constitute a waiver when "the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question." *See, e.g., Wausau Ins. Cos. v. Van Biene,* 847 P.2d 584, 589 (Alaska 1993). Whereas waiver does not necessarily imply that one has been misled to his prejudice or into an altered position, an

estoppel always involves this element. *See, e.g., D.E.M. v. Allickson,* 555 N.W.2d 596 (N.D.1996) (distinguishing between waiver and estoppel, applying estoppel and requiring prejudicial reliance). In contrast to waiver, estoppel is the doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. *See, e.g., Stovall v. Sally Salmon Seafood,* 306 Or 25, 33, 757 P.2d 410 (1988). The distinction between estoppel and waiver is slight, yet unlike waiver, essential to estoppel is a reliance on the words or conduct of a party that causes a detrimental change in position for the party so relying. *Id.*

¶17 The doctrine of equitable estoppel or "estoppel in pais" rests on fundamental notions of conscience, equity and fair dealing. *See Fullerton Union High School District v. Riles,* 139 Cal.App.3d 369, 378, 188 Cal.Rptr. 897, 902 (1983); *City of Long Beach v. Mansell,* 3 Cal.3d 462 at 488, 91 Cal.Rptr. 23, 476 P.2d 423. Thus to invoke the doctrine, Plaintiff must prove: (1) an admission, statement, or act inconsistent with a later claim; (2) reasonable reliance on the admission, statement, or act; and (3) injury if the government were allowed to contradict or repudiate the admission, statement, or act. *See In re Blankenship*, 3 N.M.I 211, 214 (1992); *Aquino v. Tinian Cockfighting Bd.,* 3 N.M.I 284 (1992). Because equitable estoppel against the government is not favored, a party asserting estoppel against the government must also demonstrate some affirmative misconduct going beyond mere negligence. *See Morgan v. Heckler,* 779 F.2d 544, 545 (9th Cir.1985). Second, the party claiming estoppel must also show that the doctrine is necessary to prevent a manifest injustice and that the exercise of government functions will not be impaired. *See In re Blankenship*, 3 N.M.I at 214-215 (estoppel may be applied against the government to prevent manifest injustice; it will not be applied, however, "where it would defeat effective operation of a policy adopted to protect the public"); *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1008-1009 (9th Cir.1986); *Kramarevcky v. Dep't of Soc. & Health Servs.,* 122 Wash.2d 738, 743, 863 P.2d 535 (1993).[10/]

[10/] When estoppel is sought against a governmental body, additional considerations are often said to arise, because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *See Heckler v. Community Health*

¶18 Finally, as with the doctrine of waiver, the existence of estoppel is generally a question for the trier of fact. *See House v. California,* 119 Cal.App.3d 861, 877, 174 Cal.Rptr. 279, 289 (1981). When, as here, the facts are not disputed, and only one inference can be drawn from the evidence, the question of estoppel, like the existence of waiver, becomes one of law. *Driscoll v. City of Los Angeles,* 67 Cal.2d 297, 305, 61 Cal.Rptr. 661, 666, 431 P.2d 245, 250 (1967); *accord, Shamrock Development Company v. City of Concord,* 656 F.2d 1380, 1386 (9th Cir.1981).

¶19 Regardless of whether the doctrine of waiver or estoppel applies, in this case, the outcome under either doctrine is the same. The Commonwealth has admitted that there was no need to advise Plaintiff on whether or how he should seek a defense from the Government under the PELDIA, since, for whatever reason, the Attorney General's Office believed that Plaintiff was being sued in his official capacity. *See* Sutton Declaration.[11/] Without regard to the statutory demand requirement, therefore, Government willingly and deliberately undertook the defense of the former governor and prosecuted that defense for five years until a judgment was entered against Plaintiff personally. Plaintiff is not a lawyer, and, unlike the Government, there is no evidence that he knew of or even read the PELDIA, or was otherwise aware of the requirements necessary to request a defense. Significantly, the Government admits that it never advised Plaintiff on whether or how he should seek a defense under the PELDIA in the first place, nor did it advise him of any potential conflict of interest that would have alerted him to the fact that he should have hired private counsel, joined other parties, and/or raised, in a timely manner, defenses personal to him at the outset of the lawsuit. Given these facts, the court finds that

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Services, 467 U.S. 51, 60 (1984). It has been held, therefore, that a party seeking to estop the government must prove the existence of not only the traditional elements of estoppel, but also (1) "affirmative misconduct" on the part of governmental officials, and (2) a factual context in which the absence of equitable relief would be unconscionable. *See Mukherjee v. INS,* 793 F.2d 1006, 1008-1009 (9th Cir.1986).

[11/] In its Motion for Reconsideration filed in the *Rayphand* litigation, the Government admitted that Plaintiff and then Lt. Governor Borja relied on the advice of the Attorney General's Office in engaging in many of the transactions challenged by Ms. Rayphand in the lawsuit. *See* Motion for Reconsideration, attached as Ex. "E" to Reply at 16-18 ("Governor Tenorio and Acting Governor Borja relied on appropriate legal advice in connection with the expenditures at issue in this lawsuit").

Plaintiff would be severely prejudiced, were the Commonwealth allowed to insist on strict compliance with the PELDIA at this juncture.

¶20 The Government has represented Plaintiff in his official capacity since the inception of the *Rayphand* litigation. Following the court's order granting summary judgment, the Government undertook representation of Plaintiff personally, as well. Were this court to permit the Government to impose the five day representation request retroactively, the Commonwealth could, as it did in this case, ignore and encourage noncompliance with some statutory prerequisite, avoid its obligation to advise a public employee of any potential conflict of interest, and deprive the government employee of the opportunity to join other parties or otherwise prepare a defense. Were this court to permit the Government to insist upon the five day representation request retroactively, it would allow the Government arbitrarily and capriciously to avoid an obligation it deliberately and unequivocally undertook, and do so without fear of any consequences. Under the undisputed facts of this case, it would be manifestly unjust and contrary to the purposes of the PEDLIA to permit the Government to abandon its representation of Mr. Tenorio and then oppose his request for payment of private attorney's fees on grounds it never had the obligation to defend him in the first place. The Motion for Summary Judgment is, accordingly, GRANTED.

¶19 IT IS THEREFORE ORDERED:

A. In that Defendants have no opposition to the entry of an order substituting Herbert D. Soll as the Attorney General in place of Maya B. Kara, pursuant to Com. R. Civ. P. 17(a), Herbert D. Soll, the current Attorney General for the Commonwealth of the Northern Mariana Islands, shall be substituted in for Maya Kara.

B. The Commonwealth is hereby directed to pay for Plaintiff's legal defense by a private attorney in the *Rayphand* litigation, including, but not limited to, any and all reasonable attorney's fees, costs, and expenses incurred in the prosecution or defense of any subsequent appeal, and proceedings following the appeal, should the cause be remanded to the Superior Court for further proceedings.

C. Plaintiff is further awarded all costs, expenses, and reasonable attorney's fees incurred in the prosecution of this motion. Within ten (10) days of the issuance of this Order, Plaintiff shall file a statement of fees and costs and expenses incurred in the prosecution of this motion and serve copies upon the Government, following which the Government shall have seven (7) days within which to file a response. Following the receipt of all documentation, the court will hold a hearing, if necessary prior to issuing a ruling including actual fees and costs.

So ORDERED this 7th day of June, 2001.

/s/
TIMOTHY H. BELLAS, ASSOCIATE JUDGE