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For Publication

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

BERTHA LEON GUERRERO, and)
PATRICK LEON GUERRERO,)
)
Plaintiff,)
)
v.)
THE BOARD OF DIRECTORS OF THE)
MARIANAS PUBLIC LANDS)
AUTHORITY and THE MARIANAS)
PUBLIC LANDS AUTHORITY,)
)
Defendants.)
_____)

CIVIL ACTION NO. 03-0229

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

THIS MATTER was heard on August 20, 2003, on Defendants’ motion to dismiss and Plaintiffs’ cross motion for summary judgment. Appearing were Timothy H. Bellas for Plaintiffs and Edward C. Arriola for the Defendants. At the hearing, Defendants voluntarily withdrew their motion to dismiss, conceding that there were still contested issues of material fact. Therefore, the Court was left to consider only Plaintiffs’ motion for summary judgment on their Open Government Meetings and Records Act, 1 CMC §§ 9901, *et seq.*, (“Open Government Act”) claims. After carefully considering the pleadings and the arguments made during the hearing, the Court is prepared to rule.

Summary judgment should be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Com. R. Civ. P. 56(c). Plaintiffs, as the moving party, “bear[] the initial and the ultimate burden of establishing [] entitlement to summary judgment.” *Santos v. Santos*, 4 N.M.I. 206, 210. (1994). Once the moving party meets its initial burden, the non-moving party must introduce facts, in the form of affidavits or other evidence, to show that a genuine issue of material fact does exist. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990).

1 In making its determination, a court must “review the evidence and inferences in a light most favorable to
2 the nonmoving party.” *Id.* The Court will begin with a brief recitation of the facts.

3 **FACTUAL BACKGROUND**

4 1. On December 5, 2000, Public Law 12-33 was signed into law by then Governor Pedro P.
5 Tenorio. This law created the Office of Public Lands, headed by a Public Lands Administrator,
6 and the Board of Public Lands. Soon afterwards, Plaintiff Bertha Leon Guerrero was appointed
7 as the Administrator by the Board of Public Lands.

8 2. On November 13, 2001, Public Law 12-71 was signed into law by then Governor Pedro P.
9 Tenorio. This law amended PL 12-33 by establishing the Marianas Public Lands Authority
10 (“MPLA”), headed by a Commissioner, and a Board of Directors (“the Board”). Ms. Leon
11 Guerrero’s job title was changed from Administrator to Commissioner by personnel action on
12 November 30, 2001.

13 3. On November 14, 2002, a memorandum was signed by a majority of the Board. The
14 memorandum notified Ms. Leon Guerrero that her employment was being terminated effective
15 November 20, 2002. This memo was delivered to her on November 20, 2002.

16 4. On November 21, 2002, the Board published, in the *Marianas Variety*, a notice that a public
17 meeting of the Board would be held on November 26, 2002. The notice listed a total of 16 items
18 on the agenda, several of which had subparts. There was no mention of the termination of Ms.
19 Leon Guerrero.

20 5. On November 26, 2002, the Board held its meeting. During the meeting, the Board voted to add
21 an item to the agenda, to wit, ratifying the termination of Ms. Leon Guerrero. The termination was
22 then ratified.

23 6. Neither the Board, nor MPLA, nor any predecessor organizations, have ever published notice of
24 a schedule of time and place for conducting regular Board meetings in the Commonwealth Register.

25 **LEGAL CONCLUSIONS**

26 In this case, Plaintiffs have met their initial burden. They have filed a comprehensive brief and have
27 included, either in hard copy or by reference to documents attached to their complaint, proper evidentiary
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1 support for all of their claims. By contrast, Defendants did not file an opposition to Plaintiffs' cross-motion
2 for summary judgment and have provided no evidence to contradict that provided by Plaintiffs.¹ It seems
3 then, that Plaintiffs must prevail. However, the Court will give a brief description of each of the violations
4 of the Open Government Act alleged and its reasons for granting the Plaintiffs' summary judgment on those
5 issues.

6 **I. MPLA and the Board Violated the Open Government Act by Terminating Ms. Leon**
7 **Guerrero in a Non-Public Meeting.**

8 Under the provisions of 1 CMC § 9912(a)(4) of the Open Government Act, "final action . . .
9 discharging an employee . . . shall be taken in a meeting open to the public." A final action is "a collective
10 positive or negative decision, or an actual vote by a majority of the members of a governing body." 1
11 CMC § 9902(b). There is no dispute that Ms. Leon Guerrero's notice of termination was signed by a
12 majority of the Board on November 14, 2002, and that the same was delivered to her on November 20,
13 2002. It is also undisputed that neither of these events took place during a public meeting or pursuant to
14 any vote taken at a public meeting. The Board did attempt to legitimize the termination through a public
15 meeting held on November 26, 2002. This was too little and too late because the actual majority decision
16 to remove Ms. Leon Guerrero was made during private consultations and occurred no later than November
17 14, 2002. The memo of November 14 represents a "collective positive or negative decision" that was not
18 "taken in a meeting open to the public." 1 CMC §§ 9902(b) & 9912(a)(4). Therefore, the decision to
19 terminate Ms. Leon Guerrero was clearly made in violation of the Open Government Act. However, even
20 if the November 26, 2002, ratification of the termination of Ms. Leon Guerrero had been proper, the
21 ratification vote was itself inadequate, because the public was not properly notified of the intent to take such
22 a vote.

23 **II. The Board's November 26, 2002, Meeting Ratifying the Termination was Improperly**
24 **Noticed and So Violated the Open Government Act.**

25 A central part of the Open Government Act is the requirement that the public be given notice of

27 ¹ Some argument and documentary evidence was submitted after the hearing by Defendants. Plaintiffs reacted
28 by a filing a motion to strike this material and a motion for sanctions. In keeping with its general policy of not accepting
late filings, the Court granted these motions.

1 both the time and date of government meetings and the matters to be discussed or decided. Under the
2 statute, there are two types of public meetings, regular and special, and each type has different notice
3 requirements. *See* 1 CMC §§ 9909-9911. If “regular” meetings are to be held, “a schedule of the time and
4 place of such meetings” must be filed in the Commonwealth Register. 1 CMC § 9909. If a “special”
5 meeting is to be held, notice must be delivered personally or by mail to each member of the governing body,
6 as well as to interested members of the news media, at least 24 hours before such a meeting is held. 1
7 CMC § 9911. In either case, the agency must publish an “agenda which lists all of the items to be
8 considered at the forthcoming meeting, and the date, time, and place of the meeting. Where possible, such
9 notice shall appear in at least one newspaper of general circulation in the Commonwealth.” 1 CMC §
10 9910(a).

11 The November 26, 2002, meeting in this case was clearly a “special” meeting. Neither the Board
12 nor MPLA has ever published a meeting schedule in the Commonwealth Register and it appears that it does
13 not hold meetings on any particular schedule. The Board did publish a notice of the November 26 meeting
14 on November 21 in the *Marianas Variety*, a newspaper of general circulation in the CNMI. This notice
15 included a lengthy agenda, but did not mention anything about the termination of Ms. Leon Guerrero.
16 Instead, the Board voted during the meeting to add Ms. Leon Guerrero’s termination to the agenda and
17 then ratified it. The Board contends that this addition to the agenda was proper under 1 CMC § 9910(b),
18 which allows a governing body to change the agenda by a “recorded vote of the majority of the members.”
19 Indeed, the Board may add items to the agenda by majority vote. However, taking final action on such
20 an addition is another matter. The rule governing special meetings, like the November 26 meeting,
21 specifically prohibit “final disposition” of any matter not on the agenda. 1 CMC § 9911. For the reasons
22 discussed in Section I, above, the vote to ratify Ms. Leon Guerrero’s termination is a final disposition.
23 Therefore, the Board violated Section 9911 of the Open Government Act when it took this vote without
24 giving notice to the public that the vote would occur.

25 **III. MPLA Did Not Comply With the Open Government Act Concerning Public Records.**

26 On March 27, 2003, Plaintiff Patrick Leon Guerrero made a written request for a number of
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1 records kept by MPLA.² This request was made under 1 CMC § 9917(a), which is a portion of the Open
2 Government Act allowing any interested person to view and copy public records.³ Unless the records
3 requested qualify for one of the exceptions described in §§ 9917(a) and 9918, these records must be
4 produced within 10 days of the request. 1 CMC § 9917(a). In response to the request, MPLA sent a
5 letter to Mr. Leon Guerrero stating that a number of the requested records were protected under 1 CMC
6 § 9918(a)(7), which exempts certain internal documents from the requirements of § 9917(a).⁴ However,
7 this letter did not identify the number or nature of the documents withheld or state with any specificity the
8 reason they were withheld.

9 Such vague denials are simply inadequate. Section 9118(d) requires any agency refusing a request
10 to produce a public record to “include a statement of the specific exemption authorizing the withholding of
11 the record (or part thereof) and a brief explanation of how the exemption applies to the record withheld.”
12 1 CMC § 9118(d). This must be done by specifically, by individually identifying the documents being
13 withheld and stating specifically why each is being withheld. The Supreme Court of the State of
14 Washington, interpreting statutory language identical to 1 CMC § 9918(d),⁵ deemed such general denials
15 “silent withholding” and noted that silent withholding can hinder the ability of courts to review the decision
16 to deny access. *Progressive Animal Welfare Soc’y v. University of Wash.*, 884 P.2d 592, 607 (Wash.
17 1994). Therefore, that court required that any record withheld in its entirety must be specifically identified.
18 *Id* at 607-08. At a minimum, this “should include the type of record, its date and number of pages, and,
19 unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying
20 particular records without disclosing protected content.” *Id* at 608 n.18. This standard seems sufficient
21 and so this Court will adopt it. There can be no question that MPLA entirely failed to meet this standard
22 and thus has violated Section 9118(d) of the Open Government Act.

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² A copy of the request is attached to Plaintiffs’ complaint as Exhibit E.

³ “‘Public record’ means any record which a public agency is required by law to keep or which it is necessary to keep in discharge of duties imposed by law.” 1 CMC § 9902(f).

⁴ A copy of MPLA’s response is attached to Plaintiffs’ complaint as Exhibit F.

⁵ See WASH. REV. CODE § 42.17.310(4) (2003).

1 **IV. Remedies**

2 Having determined that Plaintiffs must prevail on all issues related to the Open Government Act,
3 the Court must consider what to do next. The legal and factual issues settled by this order comprise all of
4 those necessary to prevail on the first two causes of action in the complaint. (The first alleges that MPLA
5 and the Board violated the Open Government Act in terminating Ms. Leon Guerrero. The second alleges
6 that MPLA violated the Open Government Act in failing to properly respond to Mr. Leon Guerrero's
7 request for public records.) This would seem to entitle Plaintiffs to at least some of the relief requested in
8 their complaint. Specifically, they have asked that the Court require the Board to reinstate Ms. Leon
9 Guerrero, compel the Board and MPLA to comply with the Open Government Act, including those
10 provisions dealing with public records, and award them their costs.

11 However, only some of these are actually statutory remedies. Specifically, this Court must, under
12 1 CMC § 9916(b)(2), order MPLA to comply with requests for public documents. This Court also must,
13 under 1 CMC § 9915(b), award Plaintiffs "all costs, including reasonable attorney fees" incurred in
14 prosecution of the Open Government Act claims. On the other hand, a general order that the Board
15 comply with the Open Government Act or an order reinstating Ms. Leon Guerrero are not statutorily
16 provided remedies, but are rather general equitable relief. As to the former, the Court believes that a
17 general injunction to "obey the law" is unnecessary because the Board, like any other agency of the
18 government, is already required to follow the law and the Court does not believe that the Board requires
19 constant judicial supervision to do so. As to the latter, the Court believes that reinstating Ms. Leon
20 Guerrero would be inadvisable at this time, particularly because she would be at least nominally the head
21 of an agency that she is currently suing. The Court, therefore, will take no action on the reinstatement
22 request at this time.

23 **CONCLUSION**

24 For the reasons stated in Sections I and II above, Plaintiff Bertha Leon Guerrero's motion for
25 Summary Judgment on the legality of her termination under the Open Government Act, comprising the first
26 Cause of Action in the complaint, is GRANTED and the Court FINDS IN FAVOR OF PLAINTIFF
27 BERTHA LEON GUERRERO.

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1 For the reasons stated in Section III above, Plaintiff Patrick Leon Guerrero's motion for summary
2 judgment on the legality of MPLA's response to Mr. Leon's Guerrero's request for public records under
3 the Open Government Act, comprising the second Cause of Action in the complaint, is GRANTED and
4 the Court FINDS IN FAVOR OF PLAINTIFF PATRICK LEON GUERRERO.

5 IT IS HEREBY ORDERED that, by 5:00 p.m. on Friday Oct. 10, 2003, MPLA shall make
6 available to Mr. Leon Guerrero, or his representative, for inspection and copying all the documents
7 requested in his letter of March 27, 2003 to which he is legally entitled.

8 IT IS HEREBY ORDERED that each document withheld under 1 CMC §§ 9117(a) and 9118
9 shall be individually identified and a specific reason given for withholding it, in accordance with the Court's
10 ruling in Section III above.

11 In accordance with 1 CMC § 9915(b), MPLA IS HEREBY ORDERED to pay Plaintiffs'
12 reasonable costs, including attorney fees, accrued in the prosecution of the Open Government Act claims.
13 Plaintiffs SHALL therefore, within 30 days of the date of this order, provide MPLA and the Court with the
14 specific amount of fees and costs requested and an itemized accounting of how this amount was calculated.
15 Within 30 days of receipt of the above request, MPLA SHALL either pay that amount to Plaintiffs or, if
16 it has good faith reason to doubt the reasonableness of the fees and costs requested, move for a hearing
17 on the issue.

18 SO ORDERED this 30th day of September 2003.

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/s/
JUAN T. LIZAMA, Associate Judge