FOR PUBLICATION

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

KAUTZ GLASS COMPANY, Plaintiff, vs. **CNMI PUBLIC SCHOOL SYSTEM**, Defendant.	**CIVIL ACTION NO. 05-0508C** **ORDER DENYING DEFENDANT'S COM.R.CIV. P. RULE 12(B)(6),(7) MOTION TO DISMISS FOR FAILURE TO JOIN OFFICE OF THE PUBLIC AUDITOR UNDER RULE 19**

I. Introduction

THIS MATTER came before the Court for a hearing on February 7, 2006, at 9:00 a.m. and 1:30 p.m. in courtroom 220A to consider Defendant CNMI Public School System's ("PSS") motion to dismiss. Plaintiff Kautz Glass Company was represented by Brien Sers Nicholas, Esq. Defendant PSS was represented by Karen M. Klaver, Esq. Having considered the arguments of counsel, the materials submitted and the applicable laws, the Court orally denied PSS's motion, and now issues its written decision with its reasoning to supplement the record.

II. Factual and Procedural Background

Plaintiff Kautz Glass, Co. ("Kautz Glass") filed this complaint for judicial review alleging three different grounds to have this Court set aside Defendant PSS's termination of its contract with Kautz Glass (i.e. PSS Contract No. 37478 OC), declare PSS's termination of the PSS Contract as illegal, and award Kautz Glass reasonable attorneys fees and costs. Plaintiff seeks these remedies by asking this Court to review the Office of

the Public Auditor's ("OPA") decision to uphold PSS's actions in this case and entering findings that would either compel PSS to take action unlawfully withheld or hold unlawful and set aside OPA's action, findings, and conclusions.

In January, 2005, PSS published an Invitation for Bid soliciting competitive sealed bids for the supply and installation of new typhoon shutters for various schools on Saipan, Tinian and Rota. Kautz Glass, along with four other interested bidders, including Carpet Masters, submitted their bids. On April 28, 2005, PSS entered into a contract with Kautz Glass, PSS Contract No. 37478-OC. On May 4, 2005 and May 12, 2005, PSS received protests from two of the losing bidders, Eyun Ji Corporation and Carpet Masters, respectively. Based on PSS's review of the record, PSS determined that Kautz Glass did not submit the lowest responsive bid, and proceeded to terminate the contract with Kautz Glass for the convenience of PSS. PSS notified Kautz Glass of this decision, as well as its decision to award the contract to Carpet Masters. Kautz Glass filed its "Notice of Protest" with PSS protesting the termination of their contract. PSS issued a final decision reaffirming its decision to terminate their contract with Kautz Glass. Pursuant to the PSS's Procurement Regulations, Kautz Glass filed its "Notice of Appeal" with OPA. OPA rendered a decision upholding PSS's decision to terminate the contract with Kautz Glass.

The three grounds on which Kautz Glass relies upon for its claim are (1) that the Office of the Public Auditor's (OPA) action in upholding PSS's decision to terminate its contract with Kautz Glass was arbitrary and capricious; (2) that OPA's actions were not in accordance with the laws of this case; and (3) that OPA's actions were contrary to the evidence of this case.

PSS responded with the present motion to dismiss pursuant to Com.R.Civ.P. Rule 12(b)(7) (failure to join a necessary party) based upon Kautz Glass' failure to name and serve the Public Auditor as a party. PSS expressly relies upon both subsections (a) and (b) of Rule 19 of the Commonwealth Rules of Civil Procedure in support of its motion and further argues that the failure to join the Public Auditor as a party results in Kautz Glass' failure to state a claim under Com.R.Civ.Proc. Rule 12(b)(6). Neither party has supplied any local authority specifically relevant to the issues raised by this motion.[1]

Jurisdiction is vested in this Court by N.M.I. Const. art. IV, § 2, and 1 CMC § 9112(b) ("Person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review ... in the Commonwealth Superior Court.")

III. Issue

Whether the Office of the Public Auditor, a purely adjudicatory agency in this case, is a necessary and indispensable party that must be a named respondent/defendant for the judicial review of its order pursuant to Com.R.Civ.P. Rule 19, such that Plaintiff's failure to join OPA warrants a dismissal of this case under Com.R.Civ.P. Rules 12(b)(6),(7) and 19(b).

IV. Analysis

Rule 12(b)(7) of the Commonwealth Rules of Civil Procedure requires the dismissal of a case for failure to join a party under Rule 19. Rule 19 addresses the joinder of persons needed for a just adjudication. Rule 19(a) mandates that a person "*who is subject to service of process*" and whose joinder will not deprive the court of jurisdiction over the subject matter of the action "*shall be joined*" as a party in the action

[1] PSS cited to two unpublished Superior Court decisions without indicating that the decisions were unpublished or otherwise complying with Com.R.Civ.P. Rule 83.2(b). Accordingly, this Court, pursuant to said rule, will not consider them as authority. *See* Com.R.Civ.P. Rule 83.2(b) ("[n]o authority will be considered by the court unless cited in compliance with this provision.")

if certain conditions are satisfied. Com.R.Civ.P. Rule 19(a) (emphasis added). ***If the person has not been so joined, the court shall order that the person be made a party****.... Id*. (emphasis added). Rule 19(b) then provides that if a person as described in subdivision (a)(1)-(2) hereof **cannot be made a party**, ***the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable***. Com.R.Civ.P. Rule 19(b) (emphasis added). In this case, the OPA is within this Court's personal jurisdiction because it is a CNMI government "agency" as defined by 1 CMC § 9101(b), and it is OPA's final decision that triggered Kautz Glass's right to petition for judicial review under the PSS's Procurement Regulations and the Commonwealth's Administrative Procedure Act ("APA"), 1 CMC § 9101 *et seq*. Therefore, OPA can be made a party if warranted under Rule 19(a), and this Court does not have to make a Rule 19(b) determination. Furthermore, Rule 19(b) clearly applies only if the person cannot be made a party. Accordingly, PSS's motion to dismiss for failure to join OPA under Rule 19(b) must be denied. However, this Court must still determine whether OPA is a necessary party under Rule 19(a).

In order to file suit under the APA, a party must be aggrieved by an agency action and that action must be a final agency action. 1 CMC § 9112(b). Other than identifying the proper petitioner or plaintiff, the CNMI's APA as well as the PSS Procurement Regulations are silent about who is a proper respondent or defendant. In federal cases, Rule 15 of the Federal Rule of Appellate Procedure applies to petitions for judicial review, and Rule 15(a) expressly provides that "[i]n each case the agency must be named respondent." The CNMI's Rules of Appellate Procedure do not have a similar language,

nor do the Commonwealth's Rules of Civil Procedure. In the absence of any local law on point, this Court turns to the common law. *See* 7 CMC § 3401.[2]

The U.S. Supreme Court addressed the issue of a proper respondent in a judicial review case in *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, Dep't of Labor*, 519 U.S. 248, 117 S.Ct. 796 (1997). In *Ingalls*, the Supreme Court found that in the absence of any clear language from the federal law at issue as to the proper party to appear as a respondent, it concluded that Rule 15(a) of the Federal Rules of Appellate Procedure applied, and then faced the question of which "agency" must be named as respondent. 117 S.Ct. at 805-806. That court rule, in pertinent part, provides that "[i]n each case the agency ***must be named respondent***." *Id*. at 806 (emphasis added). The question then turned to the question of which agency must be named as a respondent. *Id*. It found that "[w]hen the agency has a unitary structure—i.e. where a single entity wears the hats of adjudicator and litigator/enforcer," the answer is straightforward because there is only one agency that could be named. *Id*. It cited to the Federal Communications Commission (FCC) and National Labor Relations Board (NLRB) as examples. If, however, there is a "split-function regime" whereby the legislature "places adjudicatory authority outside the agency charged with administering and enforcing the statute," the answer is not straightforward, and the Court did not address that question. *Id* at 807. Instead, the Supreme Court recognized another "split-function regime" wherein only one agency, whose adjudicative and enforcement/litigation duties have been divided by Congress between two sub-

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[2] In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary .... 7 CMC § 3401.

"agencies," both of which are under the umbrella of the same "overarching" agency. The *Ingalls* Court addressed this latter type of split-function regime only, and concluded that it is the overarching agency that is the "agency" for the purposes of Rule 15(a), since an order of the agency's designated adjudicator is in reality an order of the agency itself. *Id.* at 807. That overarching "agency" may then designate its enforcer/litigator as its voice before the courts of appeals. *Id*.

After *Ingalls* was decided, the District of Columbia Court of Appeals confronted the "split-regime" identified but not addressed in *Ingalls* wherein a purely adjudicatory body was in a different agency from the enforcement authority. *Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 88 (D.C. Ct. App. 1997). In *Francis*, the DC Court of Appeals held that even a purely adjudicatory agency must be named a respondent for court review of the agency's order. *Id*. at 93. This holding by the DC Court of Appeals is based on the mandate of court rules, not because of a finding that the purely adjudicatory agency is a necessary or indispensable party under Com.R.Civ.P. 19. In dicta, the *Francis* court stated that

> "it is important for the [adjudicatory agency] to be named respondent even though [it] is purely an adjudicatory agency. We have shown that court rules require this. As *Ingalls* says, without guidance from the governing statute itself it is appropriate to rely on court rules that specify who the responding party shall be—in this case the agency that issued the order under appeal."

Francis, 695 A.2d at 91. As the DC appellate court stated, "the [Supreme] Court expressly questions whether a purely adjudicatory agency has any "more interest or stake in defending its orders in the courts of appeal than does a district court." *Francis* at 91, citing *Ingalls*, 117 S.Ct. at 807.

Although the DC Court of Appeals concluded that even a purely adjudicatory agency must be named a respondent, the underlying reasoning is not present in this case and therefore the *Francis* decision is distinguishable. As previously stated, the Commonwealth's statute, regulations, and court rules are silent on whether an agency is required to be a named party. The only clear language comes from the APA, which requires the aggrieved party to be the plaintiff/petitioner. Rule 19 of the Civil Rules requires a different analysis from Rule 15 of the Appellate Rules. Rule 19(a) mandates that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be joined* as a party in the action if

> (1) in the person's absence, complete relief cannot be accorded among those already parties, or
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>> (i) as a practical matter impair or impede the person's ability to protect that interest or
>> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

In this case, this Court concludes that it can grant complete relief among those already parties in this case without OPA's joinder. Furthermore, OPA "does not have the kind of stake in the outcome of litigation that an enforcement agency responsible for implementing government policy has." *See Francis*, 695 A.2d at 92, *citing Ingalls*, 117 S.Ct. at 807. At most, OPA has an institutional interest in having its order defended and enforced, not ignored. *Id*. at 92. If OPA truly has an interest in upholding its decision in a judicial review case, the agency can always petition the court to intervene. Accordingly, this Court concludes that OPA, as a purely adjudicatory agency, is not so situated that a disposition in this case would impair or impede OPA's ability to protect its institutional interest, or leave the existing parties subject to inconsistent obligations based on OPA's possible claimed interest.

V. Conclusion

Based on the foregoing reasons, this Court concludes that the Office of the Public Auditor is not a necessary nor an indispensable party under Com.R.Civ.P. Rule 19. Accordingly, PSS's motion to dismiss for Plaintiff's failure to join OPA in this complaint for judicial review is hereby denied.

SO ORDERED this 8th day of February, 2006.

/s/
RAMONA V. MANGLONA, Associate Judge