FOR PUBLICATION

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

EDWARD M. DELEON GUERRERO, Plaintiff, vs. **DEPARTMENT OF PUBLIC LANDS, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**, **Defendant.**	**CIVIL ACTION NO. 06-0313(C)** **ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE; AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on October 23, 2006 at 1:30 p.m. in Courtroom 220A for a hearing on Plaintiff Edward M. Deleon Guerrero's motions to strike and for summary Judgment. Plaintiff appeared personally with counsel, Brien Sers Nicholas, Esq. Defendant appeared through Assistant Attorney General Gregory Baka. Having reviewed the pleadings and the record, this Court issued its oral ruling from the bench granting Plaintiff's motion to strike, but denying Plaintiff's motion for summary judgment. The Court now issues its written decision supporting its decision, in addition to those stated on the record.

I. Plaintiff's Request to Strike Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

Pursuant to the parties' stipulated request and this Court's order shortening time, the Court first considers plaintiff's duly noticed motion to strike the defendant's opposition to plaintiff's motion for

summary judgment for untimeliness. According to the Court's file in this action and as indicated in transaction records readily available from LexisNexis File & Serve, plaintiff Edward M. Deleon Guerrero e-filed with the court and e-served defendant Department of Public Lands through Assistant Attorney General Gregory Baka with his motion for summary judgment, notice of motion, and supporting memorandum and exhibits on August 23, 2006. The record also shows that an October 23, 2006 hearing date had been assigned to the notice of hearing on the same day. Plt's Reply, Ex. A. Pursuant to Com. R. Civ. P. 6(d)(1), therefore, defendant had nine working days within which to file and serve any opposition to plaintiff's motion. In this instance, defendant's opposition was due no later than September 6, 2006.

On September 12, 2006, without having received an opposition from the defendant, plaintiff faxed to the defendant a copy of the LexisNexis transaction record as well as a copy of the e-filed notice of hearing with the handwritten date and time included. Plt's Reply, Ex. B. Without a request for an extension of time or other relief, or indeed any reference to the untimeliness of its filing, defendant filed and served its opposition to plaintiff's motion for summary judgment on October 6, 2006, 31 days after it was served with plaintiff's motion, 22 days past the date its opposition was due, and 10 days before the hearing on the motion. Plaintiff filed and served the present motion to strike the opposition on the basis of untimeliness on October 10, 2006. On the same day, defendant filed an opposition to the plaintiff's motion to strike.

Defendant's opposition to the motion to strike is troubling. Defendant's counsel states that he only received a "telephonic notice" of the notice of hearing, which is inconsistent with the Court's record in this case. Counsel proffered no explanation for this discrepancy. At the hearing, defense counsel conceded that he received the e-filed motion and notice of motion on August 23rd, but stated that he never received the actual hearing date and time. He asserts that he never received a LexisNexis

File & Serve notice like Plaintiff's Exhibit A, which does contain the assigned judge as well as the calendared hearing date, time, and courtroom. As for the September 12th fax notice, he concedes that it was faxed to his office. However, because the fax was directed to a person other than himself, it was never delivered to him personally. Counsel further states that the Office of Attorney General is "overworked" and that counsel required additional time to obtain supporting declarations, including a declaration from the governor. It is argued that the plaintiff has not been prejudiced and that counsel's failures constitute "excusable neglect" under Com. R. Civ. P. 6(b)(2).

Defendant's reasons are inadequate and unpersuasive. Defendant made no attempt to obtain an enlargement of time within which to file its opposition nor did it request any other relief, such as permission to file copies of declarations supported by later-filed conforming originals. Defendant simply invokes Com. R. Civ. P. 6(b)(2) without specifically setting forth any reason why its conduct should be deemed "excusable neglect." *Lucky Development Co., Ltd. v. Tokai U.S.A., Inc.*, 2 N.M.I. 81, 84-85 (1991) ("The failure to comply with our rules, plus the lack of a valid reason for the failure, leads this Court to conclude that the opposition memorandum should be stricken."). The rules governing electronic court filing and service of process have been in place since January 12, 2006, and have been applicable to actions such as this one since April 24, 2006. (NMI S.Ct. General Order No. 2006-301). Under Rule 6.6(d), it provides:

> E-service is accomplished by use of the other party's or attorney's correct and current electronic mail address as registered with the Clerk's office. A "Notice of Electronic Filing" is generated automatically by the EFSP system upon completion of an electronic filing. The "Notice of Electronic Filing" when e-mailed to the e-mail addresses of record in the case acts as the proof of service.

Com.E-Filing R. 6.6(b). This rule, therefore, deems an e-mailed Notice of Electronic Filing as proof of service. A close examination of the record, LexisNexis File & Serve Case History Search, shows that plaintiff's original transmission of the motion and a notice of hearing on August 23, 2006 was for "File

and Serve," and defendant was a recipient of the service**.** See also, Plt's Ex. A, p.2 and 3. The August 23, 2006 1:34 PM LexisNexis e-mail notice to plaintiff's counsel was followed by another LexisNexis e-mail notice to plaintiff's attorney at 19:49:02-0400, which indicates the assigned judge and calendared hearing date, time and courtroom. Plt's Ex. A, p.1. As a matter of course, under the File & Serve feature, defendant's attorney should also have received this follow-up e-mail notice. If a party or counsel chooses *not* to review the actual e-mail notice, it does not serve as a defense to claim lack of notice of the hearing date and time. A review of the "document history" of the same LexisNexis transaction number for plaintiff's "notice of hearing" still shows that a subsequent submission was issued by a clerk with the comment that the matter is calendared for the date and time herein. The Court is reluctant to excuse late filing based upon counsel's unfamiliarity with the process**.** Even without inquiry by defendant's counsel, any uncertainty would have been cured by plaintiff's courtesy transmission on September 12, 2006. Plt's Ex. B, p.1-3. In this case, defendant's opposition was filed and served 18 days *after* plaintiff's *second* notice to the defendant of the October 23, 2006 hearing date for plaintiff's motion. Defendant counsel's "press of business" rationalization falls flat in the face of the record.[1]

Of course, judicial policy favors determination of contested matters on their merits. The unexcused failure to even remotely comply with Com. R. Civ. P. 6(d)(1), however, prejudices both the plaintiff and the courts. *Estate of Felipe C. Mendiola v. Diego D. Mendiola*, 2 N.M.I. 233, 239 (1991). For these reasons, plaintiff's motion to strike defendant's opposition to plaintiff's motion for summary judgment is GRANTED.

[1] In the opposition to the motion to strike, defense counsel appears to be seeking a special exemption from the rules of procedure: "Filing motions for the enlargement of time for the filing of oppositions to motions that have not even been properly noticed for hearing would be counter-productive and only serve to make the [AGO's] backlog worse." (Def't Opp'n. to Mot. To Strike, at 2). The Court finds defense counsel's apparently unrepentant attitude disturbing; there can be no judicially-created exception to the rules of procedure in favor of busy government offices. *See, Pasquale v. Finch*, 418 F.2d 627, 630 (1st Cir. 1969); *also, Mawhinney v. Heckler*, 600 F.Supp. 783, 784 (D.Me. 1985).

II. Plaintiff's Motion for Summary Judgment.

1. Standard for Summary Judgment

Plaintiff Deleon Guerrero has moved for summary judgment pursuant to Com. R. Civ. P. 56(b). In *PAC United Corp., Ltd. (CNMI), v. Guam Concrete Builders*, 2002 MP 15, 6 N.M.I. 446, the Commonwealth Supreme Court articulated the standard for when summary judgment is appropriate as follows:

> The moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment by demonstrating the absence of a genuine issue of material fact in the record before the court. *See* Santos v. Santos, 4 N.M.I 206, 210 (1995) (*citing* Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1516 (1st Cir.1991)). A fact in contention is considered material only if its determination may affect the outcome of the case. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). After the moving party meets the initial burden, it falls to the non-moving party to show that a genuine issue of material fact is still in question. *See* Castro v. Hotel Nikko, Saipan, Inc., 4 N.M.I. 268, 272 (1995). A determination regarding the existence of genuine issues of material fact is made viewing the evidence in a light most favorable to the non-moving party. *See Estate of* Mendiola v. Mendiola, 2 N.M.I. 233, 240 (1991).

Id., 2002 MP 15, ¶ 24, 6 N.M.I. at 452.

The moving plaintiff must introduce evidence sufficient to establish an entitlement to recovery under every element of plaintiff's claim for relief. "If, and only if, the moving party meets his initial burden then the burden of production shifts to the non-moving party, who must produce just enough evidence to create a genuine fact issue." *In re Estate of Roberto*, 2002 MP 23, ¶ 18, n. 11, 6 N.M.I. 508, 513, n. 11 (2002).

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2. Plaintiff's Evidence Fails to Establish that He is Entitled to Judgment as a Matter of Law

Plaintiff's Complaint alleges that from October 8, 2004, he was employed as Commissioner by the former Marianas Public Land Authority ("MPLA") pursuant to a four-year employment contract executed by the MPLA Board of Directors ("Board"). Complaint ¶ 5,7; Answer ¶ 7-8. Plaintiff alleges that he was terminated by the Board without cause on February 22, 2006. Decl. of Edward M. Deleon Guerrero ("Declaration"), ¶ 4. According to Section 10(a) of his written Employment Contract, plaintiff is to be paid "a lump sum for the remaining duration of the Contract or twelve months, whichever period is longer" upon his termination "without cause." Declaration ¶ 3, Ex. A. In plaintiff's estimation, he is therefore due a payment of $252,000 under this section. *Id*. ¶ 6. Plaintiff alleges that defendant Department of Public Lands ("DPL"), as successor to the MPLA under PL 15-2, is in breach of the agreement by refusing to pay him any amount under this section of the Employment Contract. Defendant DPL filed an answer denying its obligation under the agreement, asserting *inter alia* that plaintiff's termination was ineffective as a violation of the Open Government Act (1 CMC §§ 9901, *et seq.*) and that the terms providing for a lump sum payment violate public policy.

Plaintiff's motion for summary judgment is supported by three attached exhibits: (a) Exhibit "A" purports to be a copy of plaintiff Deleon Guerrero's Contract of Employment with the Board with the appropriate signatures; (b) Exhibit "B" is a copy of a signed memorandum to the plaintiff from four members of the Board, dated February 7, 2006, informing him of his termination "pursuant to paragraph 10 of your employment contract with the Board," and; (c) a copy of a partially-processed "Request for Personnel Action" dated February 8, 2006, requesting plaintiff's termination "without cause." Plaintiff concurrently offers his own declaration verifying that these are true and correct copies of the documents in question.

The evidence submitted in support of the motion is not sufficient to demonstrate that the plaintiff is entitled to the relief demanded in his complaint. Specifically, plaintiff has not produced evidence to show that there was an effective occurrence of the condition, i.e., his legally valid termination by the Board, that would give rise to the defendant's duty to comply with Section 10 of the written agreement. RESTATEMENT (SECOND) OF CONTRACTS § 225. Because the agreement in question is with a public board, its enforceability cannot be determined from its four corners. *Benavente v. Marianas Public Land Corporation*, 2000 MP 13, ¶ 32, 6 N.M.I. 136, 143 (2000) ("[I]n dealing with a government agency, it is the applicable rules and regulations that determine the point at which a contract is enforceable."). In particular, Public Law 12-33, § 3 (Section 103(e)), as amended by Public Law 12-71 §2(b), requires the Board to make final hiring and termination decisions by an "affirmative vote of the majority," and Public Law 8-41 ("Open Government Act," *codified at* 1 CMC §§ 9901 *et seq.*) further requires that final employment decisions be taken at a noticed public meeting. 1 CMC § 9912(a)(4). Plaintiff's evidence does not include the foundation that these necessary events occurred and, in fact, tends to support the inference that they did not.[2]

Nowhere in the totality of their written filings before the Court have either party drawn this Court's attention to the history of employment contract litigation between the predecessors to the Board of Public Lands and prior Commissioners to the Boards, both in the Commonwealth Superior Court and in the federal district court, even though these actions have produced published court decisions directly impacting issues currently in controversy between the parties. As announced at the hearing on this matter, this Court takes cognizance of the following decisions: *(Bertha) Leon Guerrero v. Marianas*

[2] At the hearing on the present motion for summary judgment, plaintiff orally represented to the Court that plaintiff's employment agreement with the Board was duly adopted at an open meeting in accordance with the applicable statutes and regulations, and that plaintiff will provide the court with this public record. Based on defendant's admission in its Answer that plaintiff was employed as the Commissioner of MPLA, the Court accepted said representation and ordered that plaintiff file such evidence no later than November 7, 2006.

Pub. Land Authority, Civ. No. 03-0229 (Order Granting Plaintiff's Motion for Summary Judgment) (Lizama, A.J.) (Sept. 30, 2003) (failure to comply with the Open Government Act resulted in an illegal termination of plaintiff's employment contract); *(Henry) Hofschneider v. Ana Demapan-Castro*, D. N. Mar. I., Case No. CV-04-0022 (Order on Motion to Dismiss) (Munson, C.J.) (April 11, 2005); and*(Henry) Hofschneider v. Ana Demapan-Castro*, Civ. No. 04-0523 (Order Following Oral Ruling Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment…*Etc*.) (Govendo, A.J.) (August 19, 2005). At a minimum, the opinions expressed in these decisions concur that any rights under a written contract of employment between the Board and its Commissioner are dependant upon the Board's strict compliance with its statutory authority. This Court finds the reasoning of these decisions to be persuasive with respect to the enforceability of any rights arising from plaintiff's written agreement with the Board.

In particular, the trial court in *Hofschneider v. Demapan-Castro* found a violation of the Open Government Act ("OGA") because the record did not reflect that a public hearing was held. *Hofschneider, C.A. 04-0523B*, at p. 7. The same court found that the OGA was violated when plaintiff's contract was terminated by an internal memo rather than at a public board meeting because a termination is indeed a "final action" which falls within the scope of the OGA. *Id*. The facts of this case is similarly situated. Plaintiff has not produced any evidence of a public hearing wherein a majority of the the board voted to terminate his employment contract "without cause." Accordingly, this Court finds that Plaintiff's evidence in support of summary judgment does not show that he was effectively terminated from his position and plaintiff therefore has not supported a critical element of his cause of action for breach of contract.

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III. Conclusion.

For the reasons stated above, Plaintiff Deleon Guerrero's motion to strike Defendant's Opposition to Plaintiff's Motion for Summary Judgment is GRANTED. Plaintiff's motion for summary judgment is DENIED. This matter is hereby set for a scheduling conference in courtroom 220A at 1:30 p.m. on November 7, 2006.

IT IS SO ORDERED this 26th day of October, 2006.

/s/_____
RAMONA V. MANGLONA, Associate Judge