**FOR PUBLICATION**

**IN THE SUPERIOR COURT**

**OF THE**

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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| **MICHAEL C. MALONE,**<br><br>**Plaintiff**<br><br>**vs.**<br><br>**THE NORTHERN MARIANA ISLANDS RETIREMENT FUND,**<br>**by and through its Fund Administrator Karl T. Reyes and its Board of Trustees,**<br><br>**Defendants.** | **Civil Action No. 06-0033**<br><br>**ORDER AFFIRMING NORTHERN MARIANA ISLANDS RETIREMENT FUND BOARD OF TRUSTEES' DECISION** |

## I. INTRODUCTION

THIS MATTER came before the court on May 31, 2007, at 1:30 p.m. for final hearing in courtroom 223A. Counsel Robert Tenorio Torres appeared on behalf of Plaintiff Michael C. Malone. Counsel Maya Kara appeared on behalf of Defendants The Northern Mariana Islands Retirement Fund (hereinafter referred to as "the Fund").

## II. BACKGROUND

¶1. Plaintiff Michael Malone (hereinafter referred to as "Malone") retired from employment with the Commonwealth Government on or about December 15, 2001, with 25 years or more of credited service. See Administrative Record ("AR") AR 1-6; see also, Exhibits A through D-1; Transcript of Record ("TR") at 10 of 13.

¶2. After retiring, Malone began receiving benefits. Moreover, Malone received a 30 percent bonus payment as part of his retirement package. In January 2002, however, Malone relinquished his retiree status and was employed for the Mayor of Saipan. Malone's terms of employment at the Mayor's Office were originally limited to a period of 60-days as permitted under N.M.I. Const. Art III, § 20(b). See TR 17 of 63; see also, AR 11 and 12.

¶3. Prior to the expiration of the 60-day employment period, Mayor Tudela wrote to Governor Juan N. Babauta requesting that Governor Babauta exempt Malone from the NMI restrictions on re-employment and obtain the concurrence of the Fund's Board of Trustees ("the Board"). AR-8.

¶4. On March 26, 2002, the Governor wrote to the Board stating that he was granting the Mayor's request and exempting Malone from re-employment restrictions. The Governor then requested the Board's favorable consideration in concurring with the grant of an exemption. AR-8 and 9.

¶5. On April 26, 2002, the Board met and granted the Governor's request for the reemployment exemption for Malone. AR-13.

¶6. On May 23, 2002, the Fund's Acting Administrator Mariano Taitano, who at all other times held

the position of Fund Benefits Manager, wrote to Governor Babauta advising that the Board voted to concur to the reemployment exemption for Malone in during its April 26th meeting. In his transmittal letter, Acting Fund Administrator Taitano informed the Governor that "[t]hese retirees [including Malone] may be re-employed and will have their pensions recalculated when they resume retirement status. Meanwhile, their pensions will be terminated during the period of reemployment." Malone was not officially copied on this communication. AR-14.

¶7. Notwithstanding Taitano's letter, the Fund never withheld or suspended Malone's retirement benefits following the 61st day of his re-employment by the Mayor's Office. Nor was Mr. Malone officially notified of the Fund's position that benefits should have been terminated until Mr. Reyes's letter in September 9, 2003. AR-23.

¶8. On May 30, 2002, in a letter addressed to Mayor Tudela, Juan L. Tenorio, Director of Personnel for the Office of Personnel Management (OPM) informed Mayor Tudela that he was unable to process Mayor Tudela's request for personnel action for the hire of Malone, citing 1 CMC, section 8402, which prohibited the re-employment of any member of the Retirement Fund who retired pursuant to the statute except in the specific cases provided in 1 CMC, section 8402. Director Tenorio followed up his letter to Mayor Tudela by requesting the Attorney General's office to issue a legal opinion regarding the re-employment of Malone. AR-15 and AR-16.

¶9. On August 13, 2002, Retirement Fund Administrator Karl Reyes informed Mayor Tudela in writing that the Board decided to rescind its earlier concurrence of Malone's re-employment exemption because of the restrictions on re-employment for those government employees retiring under 1 CMC, section 8402. AR-17.

¶10. Malone, however, continued to work with the Mayor without compensation and wait for a legal opinion from the Attorney General. AR-17.

¶11. On or about September 24, 2002, the Office of the Attorney General issued Op. Att'y Gen. 02-13 (2002) (published in Comm. Reg. Vol. 26, No. 2, at 21972-78 [February 23, 2004], yet disseminated shortly after its issuance). The Opinion addressed the question of whether Malone could be re-employed by the Mayor's office. The AG Opinion found that Malone could be re-employed because 1 CMC, section 8402 was repealed and that the exemption provided in 1 CMC, section 8392 prevailed. In its Opinion, however, the AG did not address the question of whether Malone could serve beyond the initial 60 days without forfeiting his retirement benefits as provided in section 8392(c). AR-37.

¶12. After Malone received the AG Opinion 02-13, he presented it to Mr. Taitano. Mr. Taitano, told Malone to continue to "keep doing" what he was doing and promised to show the AG Opinion to Fund legal counsel. Malone had received no salary from the Mayor's office from the 61st day following re-employment on March 14, 2002 until November of 2002 when the AGO opinion 02-013 issued. *See* Excerpt of Hearing Transcript at page 34 of 63, lines 6-23; and page 35 of 63 at lines 1-12.

¶13. On October 16, 2002, Mayor Tudela requested the Fund to reconsider, in light of AG Opinion 02-13, its earlier rescission of its concurrence to the Malone exemption. AR-18.

¶14. On October 29, 2002, Mayor Tudela requested that the governor expedite the personnel actions of Malone and several other individuals similarly situated in light of AG Opinion 02-13. AR-19.

¶15. On October 18, 2002, OPM approved Malone's hiring documents as a Special Advisor to the Office of the Mayor for an annual salary of $45,000. Malone's salary payments were thus reinstated. Exhibit D-4.

¶16. Almost one year following the approval of Malone's re-employment, on September 9, 2003, the Fund Administrator issued an Administrator Letter notifying Malone that 1 CMC § 8392(a) prohibited Malone from receiving retirement benefits while being employed or employed under a "consulting contract," and that the Fund intended to apply 1 CMC, section 8390 to collect overpayments; and, advised him of his right to appeal. AR 23 and 24.

¶17. On October 6, 2003, Malone informed the Fund that he wished to appeal the adverse action and requested a hearing. AR-24.

¶18. Between October 2003 and December 2004, there ensued a series of continuances, re-scheduling and other delays, including changes of legal counsel by both parties, which precluded commencing a hearing on this matter until January 19, 2005. Throughout this interim period, Malone was not informed of the specific factual basis for the September 9, 2003 Administrator Letter or of the Fund's intent to assert N.M.I. Const. art III, § 20(b) and/or 1 CMC 8392 (c) as a legal basis for the September 9, 2003 Administrator Letter. AR 25 through AR 38.

¶19. On January 20, 2005, Malone tendered his resignation to the Mayor's Office effective that same day.

¶20. On January 29, 2005, the Administrator served an "Amended Notice re: Double Dipping" upon the Beneficiary, through legal counsel. In this amended notice, the Fund stated its position that

AG Opinion 04-03 directly applied to Mr. Malone's case in order to clarify the legal bases for which the Fund chose to act. AR-46.16. The Fund did not withhold or suspend the Malone's retirement benefits while an employee of the Mayor's Office.

¶21. On or about February 3, 2004, the Attorney General issued Op. Att'y Gen. 04-03 (2004), Comm. Reg. Vol. 26, No. 2, at 22080-98 (February 23, 2004), with respect to receipt of government contract funds concurrently with retirement benefits, i.e., "double dipping." AR-44. 13. On January 19, 2005, the administrative hearing on this matter was initiated, and reconvened on January 26 and 28, 2005, to address the issues of: (i) whether Malone was unlawfully receiving retirement benefits while also receiving a government salary; and, (ii) whether Malone was "employed" by the Commonwealth Government. At the hearing, the Fund raised section 8392(c) as supporting its action for recoupment.

¶22. On January 19, 2005, the Board held an administrative hearing to address whether Malone was employed by the Commonwealth government and if he was unlawfully receiving retirement benefits while also receiving a government salary.

¶23. At the hearing, the Fund argued for the first time that Malone was an employee rather than a consultant and, for the first time, raised section 8392(c) as a defense.

¶24. Despite Benefits Manager Mariano Taitano's written statement of the Fund's intent to suspend retirement benefits during re-employment, the Fund failed to notify Malone of a purported need to suspend payment of retirement benefits following the 61st day of re-employment, nor did the Fund ever suspend benefits before or after AG Opinion 02-13 issued.

¶25. The Fund held an administrative hearing in January, 2005 on the adverse action by the Fund Administrator. On or about July 1, 2005, the Administrative Hearing Officer James Hollman issued a recommended decision to the Board of Trustees.

¶26. In his July 1st decision, the Hearing Officer concluded that the Attorney General's Office, the Fund, the Mayor's Office, the Governor, the Board and CNMI government personnel had negligently led Malone to conclude that he could be re-employed, without sanction, as an early retiree. The Hearing Officer further concluded that, although Malone's receipt of retirement benefits while being employed by the Mayor's Office constituted double dipping, the Fund was equitably estopped from collecting overpayment of benefits, based on the theory of detrimental reliance. Specifically, the Hearing Officer estopped the Fund from recouping the amount of benefits improperly overpaid from the date of Mr. Malone's re-employment until February, 2004, the date of the issuance of AGO Legal Opinion 04-03, which, according to the Hearing Officer provided a comprehensive analysis of the double-dipping provisions in 1 CMC §8392 and sufficient notice to Malone of the state of CNMI law on double dipping. *See* Recommended Decision at 28-29.

¶27. Malone objected to the portion of the Hearing Officer's decision allowing the Fund to collect overpayments from February 23, 2004 (the date of AG Opinion 04-03) to January 20, 2005 (the date of Malone's resignation). Malone registered his Notice of Appeal on July 2, 2005.

¶28. On October 6, 2005, the Board scheduled oral argument on Malone's appeal.

¶29. Following a hearing on October 26, 2005 wherein the parties presented written and oral arguments to the Board of Trustees, the Board of Trustees met in Executive Session (closed to

the public), in violation of the Open Government Act, to discuss Malone's case in light of the Hearing Officer's recommended decision.

¶30. During Executive Session, the participating Board of Trustees, namely Trustees Oscar Camacho and Chairman Joseph Reyes sought for rejection or reversal of Mr. Hollman's recommended decision. See, Transcript of Executive Session, October 26, 2005 ("Executive Session Transcript") filed with the Court on December 19, 2006 at 2:18-22 and 3:8-17; see also, 16:14-20 (Trustees Camacho and Reyes indicating they are ready to make a decision) and 19:6-10.

¶31. In Executive Session, Oscar Camacho made a motion for reversal of the hearing officer's order "without any hearing." Executive Session Transcript at 2:19. Chairman Reyes took the view that while both parties had valid arguments, "the valid argument is our fiduciary responsibility is not just the money of the Fund here, but there's also a person that's receiving the benefits. . . . So there are so many procedures. Did we do it right? Did we play. . . do we have any decree of . . . at faults." Id. At 2:20-22.

¶32. The discussion during Executive Session revealed that the Board did not entirely focus on the objective merits of whether the Fund should be estopped from recouping overpayment of benefits to Malone, but also focused on maintaining their fiduciary responsibilities to the fiscal health of the Fund as trustees. *Id* at 7:5-20 (discussion between Trustee Rose Igitol and Chairman Karl Reyes regarding responsibilities as trustees). Vice Chair Camacho expressed his concern that even if someone at the Fund did "screw up," someone should take responsibility ...," but he did not want that entity or person to be the Fund (Tr. 8:6-9). The Vice Chair later observed that even though the Fund made a mistake (Tr. 11:9), Malone could file a suit against the administrator and Mr. Taitano, "but not against this Fund."

¶33. During the Executive Session, Chairman Reyes also directed Fund Legal Counsel Joseph Camacho, who was present in Executive Session, to review the sealed administrative cases of Juan Torres; Antonio S. Reyes; and Isamu Abraham. Id. at 8:12-15. The Trustee Chairman referenced cases which were neither part of the Administrative Record nor findings of fact by the Hearing Officer. Moreover, during the Executive Session Chairman Reyes directed Fund Counsel Camacho to "review these cases" and Fund Counsel was to direct the Fund Administrator or Board Assistant to release those sealed files to Counsel Camacho. Executive Session Transcript at 19:10-22. The matter was then deferred to the next meeting.

¶34. When Trustee Igitol expressed her concern about the Fund's observance of procedure, Chairman Reyes stressed to Board Members that their first and foremost responsibility in this case was to make sure that the Fund remained secure. (Tr. 7:17-20). Furthermore, the Chairman's concern over potential Fund liability was so great that he did not want to rush into a decision (12:6-9). Vice Chair Camacho agreed, cautioning other Board Members that if the Board were to affirm the administrative Hearing Officer's order, it would be adverse to the Fund. (Tr. 12:22-24). At the close of the Session, the Chairman again stressed his desire to allow Fund counsel to review other sealed cases to assist the Board in its decision-making. The matter was then deferred to the next meeting. Tr. 19:9-18.

¶35. The Board resumed the meeting at 6:05 p.m.. Following the resumption of proceedings, Chairman Reyes indicated that Mr. Malone's decision had been deferred for further review.

¶36. At the November 25, 2005 meeting, the Fund continued its deliberations of Malone's appeal on the record and in the presence of Malone.

¶37. At the meeting, Vice Chair Camacho referenced a motion that he made in the prior Executive Session to reject the recommended decision of the Hearing Officer and to adopt the Proposed Findings of Fact and Conclusions of Law drafted by Fund counsel Maya Kara.

¶38. On December 27, 2005, the Board issued its Decision and Order: (1) rejecting the Administrative Hearing Officer's Recommended Decision of July 1, 2005, and (2) adopting and incorporating the Fund's Proposed Findings of Fact and Conclusions of Law dated May 23, 2005. The Board articulated no independent basis for rejecting the Hearing Officer's decision and adopting the Proposed Findings of Fact and Conclusions of Law drafted by Fund counsel. The Board further directed the Fund to take necessary and proper measures to recover any overpayments to Malone.

## III. STANDARD OF REVIEW

1 CMC § 9112(f) prescribes the standard of review the Superior Court must apply when reviewing agency actions within the Administrative Procedure Act. *Camacho v. Northern Marianas Retirement Fund*, 1 N.M.I. 362 (1990). In his administrative appeal, Malone asks this Court to set aside the Board's reversal of the Fund Hearing Officer's determination that the Fund was equitably estopped from recovering those retirement benefits paid to Malone while Malone was employed at the Office of the Saipan Mayor. Specifically, Malone relies on 1CMC § 9112(f)(2)(i), (ii), (iv) and (v) as the basis for his appeal.

Section 9112(f)(2), mandates that a court set aside agency action if it finds the action is found to be "(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (ii) contrary to constitutional right, power, privilege, or immunity..., (iv) without observance of procedure required by law or (vi) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 1 CMC § 9112(f)(2)(i), (v), (vi).

Although each of these grounds appears to call for a different type of review, only one standard is required for this Court's analysis: whether the Board's determination was supported by "substantial evidence." Under CNMI case authority an agency action is deemed arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem." *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993). However, the arbitrary and capricious standard is inappropriate when the agency has held a formal hearing where the parties were represented by counsel , and where evidence and witnesses were allowed, and cross-examination was permitted. *Dept. of Pub. Safety v. Office of the Civil Service Commission (Chong)*, No. 01-521E (N.M.I. Super. Ct. Sept. 12, 2002) (Order Setting Aside Oct. 4, 2001 Civil Service Comm. Decision and Order), *aff'd*, 2005 MP 6.

Here, Malone has failed to demonstrate that he was denied any of the indicia of formality required in *Chong* during his two administrative hearings. Moreover, this court has already concluded that if a Board's conclusion is supported by "substantial evidence," it could not be held "arbitrary and capricious." *In re Hafadai* ("In other words, as we found substantial evidence supporting the affirmance (sic) of the Board decision, it was not arbitrary and capricious").

Therefore, this Court will review the Board's treatment of Malone's appeal under the "substantial evidence" standard. Before reaching the merits of Malone's appeal, further explanation of the "substantial evidence" standard is required to determine the degree of deference accorded to the agency body whose actions are subject to review.

> In judicial review of review of agency action, the substantial evidence standard for a finding of fact means that the decision must be reasonable after consideration of the facts in the record opposing the agency position as well as supporting it and the reviewing court is to uphold the agency finding *even if supported by something less than the weight of evidence*....
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> In judicial review of agency action, questions of law under the substantial evidence or "reasonableness" standard are examined to determine if the agency's conclusions are reasonable based on the information package used by the agency in making the decision. *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993) (*emphasis added*).

Simply put, this Court must examine the Board's treatment of Malone's appeal to determine whether the result reached by the Board is reasonable in light of the available facts and applicable law.

However, as explained, *infra*[1], this Court will accord little deference to the Agency's findings of fact as implied by *In re Hafadai*, when examining its holdings. Moreover, the Court will review the proceedings of the Board to ensure that they complied with those due process rights afforded under the U.S. and CNMI Constitutions. Consequently, the Court will apply a modified version of the substantial evidence theory which will accord little deference to the Board's Findings of Fact and Conclusions of Law, and shall examine the entire record to dispose of the three issues raised by Malone's appeal:

(1) Whether the Board's treatment of Malone's appeal violated Malone's due process rights under the CNMI and U.S. Constitutions?

(2) Whether the Fund should be estopped from recouping unlawfully paid benefits to Malone based on the theory of equitable estoppel and detrimental reliance?

(3) Whether the Fund waived its right to seek recoupment of its unlawfully paid benefits to Malone?

For the reasons demonstrated below, the Court must answer each question in the negative.

## IV. DISCUSSION

[1]As discussed in subsection A below, the Board's Findings of Fact and Conclusions of Law failed to address the question of equitable estoppel against the Fund. Rather the Proposed Findings of Fact and Conclusions of Law relied entirely on the Fund's double dipping argument for recoupment. Such failure to address the central theory upon which the Hearing Officer relied to estop the Fund from recouping overpayments to Malone before overturning the Hearing Officer's decision provides no basis for this Court to accord any deference on the factual basis and legal arguments for equitable estoppel.

**A. The Board's Hearing and Decision Comported with Plaintiff's Due Process Rights**

Malone asserts that the Retirement Fund Board's deprived him of his due process rights under the U.S. and CNMI Constitutions. Specifically, Malone claims that the Board made its determination against Malone based upon the Board's concerns about subjecting the Fund to liability rather than on an objective analysis of the law and the record before them. Moreover, Malone claims that the Board wilfully abdicated its responsibility to make its own decision by choosing to adopt findings of fact and conclusions of law drafted by Fund counsel Maya Kara instead of drafting its own findings of fact and conclusions of law.

In support of his claim, Malone proffered transcripts from closed board meetings which include discussions between board members about Malone's case. Indeed, transcripts from the executive session held during the October 26, 2005 Board meeting suggest that some of the board members expressed more concern over the fiscal welfare of the Fund instead of objectively discussing the merits of Malone's case. In particular, Vice Chairman Oscar Camacho made a motion for reversal of the hearing officer's order "without any hearing." Furthermore, Vice Chairman Camacho while expressing his concern that someone at the Fund erred, and that someone should be held responsible, he nevertheless was adamant that the Fund should not be harmed. Chairman Reyes echoed many of these sentiments during the executive session, however, Chairman Reyes's concerns over Fund liability were tempered by at least some awareness that the Fund had fiduciary responsibilities to its individual members:

> "[T]he valid argument is our fiduciary responsibility is not just the money of the Fund here, but there's also a person that's receiving the benefits . . . So there are so many procedures. Did we do it right? Did we play ... do we have any decree of ... at faults?"
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> Transcript at 2:20-22.

However, notwithstanding the Board Members' apparently conflicted approach toward adjudicating Malone's appeal, the Court cannot find that the proceedings deprived Malone of the due process he was owed. Constitutionally, in an administrative proceeding where a person's life, liberty or

property is at stake, N.M.I., Const. art. I, § 5 requires, at a minimum, that the person be accorded meaningful notice and an opportunity to a hearing, appropriate to the nature of the case. *Office of the Attorney General v. Rivera*, 3 N.M.I. 436 (1993); *Office of the Attorney General v. Deala*, 3 N.M.I. 110 (1992). The constitution thus prescribes that before a property interest can be removed from an individual, such individual is entitled to at the very least a notice and a hearing.

Malone offers no authority to demonstrate that the hearing and proceedings afforded by the Board fell short of the minimal due process safeguards afforded under the U.S. and CNMI Constitutions. Indeed, as the Fund has argued, the Board complied with those procedures governing an appeal to the Board from the decision of the Hearing officer. Under Fund regulations, "Any person aggrieved by a decision of the hearing officer may appeal the decision of the Board by filing a written notice of appeal . . .. Subject to the Board's discretion, the Board may: (1) Affirm the judgment of the hearing officer without further hearing; or (2) Reverse the judgment of the hearing officer without any further hearing; or (3) Hold a further hearing limited to specified legal and factual issues." *See NMIAC*, Title 110, at 1162 (formerly, Northern Mariana Islands Retirement Fund Administrative Rules and Regulations, § 7.03).

Here, after the Hearing Officer issued his recommended decision, Malone appealed, and the Board convened to address whether his case was properly decided through oral argument. Malone was already afforded a trial-like proceeding before the neutral Hearing Officer, and was then due, under Fund regulations, a review of the decision within the discretion of the Board. Each of these proceedings were afforded Malone, and each facially complied with Constitutional due process rights.

However, Malone appears to focus his complaint not on whether Malone was afforded the proper proceedings, but on whether Malone was denied an impartial review of the Hearing Officer's decision by a neutral factfinder. In essence, Malone complains that his due process rights were violated because the Board failed to articulate an independent basis for reversing the Hearing Officer's order, and instead adopted the Proposed Findings of Fact and Conclusions of Law as the basis for its reversal. In

claiming such, Malone argues that the Board abdicated its own responsibilities as a neutral decisionmaker in favor of adopting a legal opinion purely because it avoided subjecting the Fund to liability.

Although the hearing transcripts from the Executive Session portion of the October 26 Board meeting suggest that the Board shared a collective concern over the financial integrity of the Fund—so much so that it often appeared to overshadow the merits of Malone's individual appeal—the Court cannot find that it violated Malone's due process rights by relying on its legal counsel's Proposed Findings of Fact and Conclusions of Law to reach its decision. Malone argues that due process requires an impartial decisionmaker, however, Malone cites no authority which demands that the decisionmaker, in this case the Board, must refrain from examining the adverse effects of a decision against a particular party in order to maintain its propriety as a fair decisionmaker.

While Malone's biting portrayal of the Board's biases against exposing the Fund to liability—or at least setting a precedent contravening the Board's ability to recoup mistakenly distributed funds—is compelling, is insufficient to warrant reversal. The Executive Session offered a glimpse into the deliberations and debate which preceded the Board's adoption of legal counsel's Findings of Fact and Conclusions of Law, however, those deliberations did not constitute the Board's Findings of Fact and Conclusions of Law. Indeed the factual and legal principles expounded in the adopted Findings of Fact and Conclusions of Law were correct. Therefore, the Court will not subject the Board's deliberations to speculation and scrutiny because they were not incorporated into the Board's final body of work.

Nevertheless, because the Findings of Fact and Conclusions of Law failed to address each aspect of the Hearing Officer's decision and the facts appurtenant thereto, the Court will accord minimal deference to the basis for the Board's decision and make an independent finding. Specifically, the Board failed to address whether the Fund should be equitably estopped from recouping its unlawfully paid benefits to Malone. The Court will address this issue in detail in the subsection below.

**B. Malone is not Entitled to Assert Equitable Estoppel Against the Fund**

"The general rule is that estoppel is rarely applied against the government. However, estoppel may be invoked against the government in certain circumstances, such as where necessary to prevent manifest injustice." *Benavente v. Marianas Pub. Land Corp.*, 2000 MP 13. The CNMI Supreme Court's reluctance to find estoppel against the government reflects the United States Supreme Court's similar policy:

> When 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. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.
> *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984).

To determine whether the facts and circumstances warrant estopping the government, the CNMI Supreme Court adopted a two-element test:

> Estoppel is available when the actions of the government or its representative rise to a level of "affirmative misconduct," and the doctrine will not be invoked where it would defeat operation of policy adopted to protect the public.
> . . .
> Before the Government will be estopped two additional elements must be satisfied beyond those required for traditional estoppel. (Internal Cite Omitted). A "party seeking to raise estoppel against the government must establish 'affirmative misconduct going beyond mere negligence'; even then estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability."
> *Benavente* at ¶¶ 9-11, citing *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9t Cir. 1989) (Internal citation omitted).

Thus, Malone must not only demonstrate the elements of traditional estoppel[2], but he also must

[2]Under CNMI law a party asserting estoppel against a private party must prove the following: (1) that the party to be estopped was apprised of the facts; (2) that the party to be estopped intended that his conduct would be acted upon, or acted such that the party asserting the estoppel had a right to believe it

show that his reasonable reliance on the government to his detriment resulted from the government's affirmative misconduct, and that estopping the government would not so "defeat the operation of policy adopted to protect the public" such that the public's interest would suffer undue harm. *Id*.

1. Constitutional and Statutory Prohibition of Double Dipping

To examine Malone's estoppel claim in the proper perspective it is necessary to review the CNMI's legal framework on early retirement and double-dipping. The pertinent laws in the CNMI occupy a constitutional amendment and two statutes.

Article III, Section 20(b) of the CNMI constitution states the following:

> An employee who has acquired not less than twenty years of credible service under the Commonwealth retirement system shall be credited an additional five years and shall be eligible to retire. An employee who elects to retire under this provision *may not be reemployed by the Commonwealth government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year, except that the legislature may by law exempt reemployment of retirees as classroom teachers, doctors, nurses, and other medical professionals from this limitation, for reemployment not exceeding two (2) years*.

N.M.I. Const. Art. III, § 20(b).

This early retirement incentive reflects the policy adopted by the Constitutional Convention that it desired to downsize the number of people employed by the government by encouraging them to retire early and also ensure the influx of "younger personnel to assume more responsibilities." *See* Committee Recommendation No. 66 at 1 and 2. Moreover, to address the government's need to retain its healthcare workers and teachers, such professions were excepted from the general ban on "double-dipping" for a period of two years to encourage such professionals to consider re-employment. *See* Commission Comment, § 1. Thus, the CNMI Constitution provides that employees who opt to retire at the end of 20

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was so intended; (3) that the party seeking estoppel was ignorant of the true state of facts; and (4) that the party seeking estoppel relied upon the conduct to his injury. *See In re Blankenship*, 3 N.M.I. 209, 214 (1992).

years of government service may not be re-employed and receive their retirement pensions beyond 60 days in any given fiscal year. Such restriction was given limited exception to healthcare workers and teachers if enacted by the legislature.

The legislature did enact two separate sets of laws which expanded upon the provisions of article 20. First, the legislature enacted the public laws codified at 1 CMC, section 8392, entitled "Reemployment and Double Dipping," which, in effect, generally prohibited the re-employment of government retirees. Section 8392(b), however, allowed for the re-employment of retirees if the retiree's re-employment circumstances fit within a series of exceptions:

> (a) A person who has retired and received retirement benefits from the government of the Northern Mariana Islands shall not be employed by or under an employment or consulting contract with the government of the Northern Mariana Islands or its public corporations, boards or commissions unless the person is:
>
> (1) Appointed by the Governor to a position requiring the advice and consent of the Senate or House of Representatives or both.
>
> (2) Hired in a position for which professionals are not readily available in the local labor market, including, for example, teachers for the Public School System and the Northern Marianas College, attorneys for the offices of the Attorney General and Public Defender, nurses and doctors for the Commonwealth Health Center, audit staff for the office of the Public Auditor, and former elected officials.
>
> (3) Elected to public office.
>
> (4) A Title V employee under the federal Older Americans Act.
>
> . . .
>
> (5) *Specifically exempted by the Governor, with the concurrence of the Retirement Board*.

1 CMC § 8392(a) (*emphasis added*).

The second set of laws regarding retirement was codified under 1 CMC §§ 8401-8405. When in effect these laws enticed early retirement from government employment by offering a 30 percent bonus to those who elected to retire after 20 years of service. *See* 1 CMC § 8401. This incentive to retire was in addition to the full credit already given to those serving 20 years in article III, section 20(b) of the CNMI Constitution. However, those government employees who accepted to receive the 30 percent bonus were explicitly prohibited from re-employment unless the retiree's re-employment circumstances fit within a series of exceptions, similar, but notably distinct from the exceptions provided under 1 CMC

§ 8392(a):

> Notwithstanding any provision of the law to the contrary, any member of the Fund who retired pursuant to 1 CMC § 8401 is prohibited from government re-employment except as follows:
>
> (a) He or she is elected to public office;
>
> (b) He or she is appointed by the Governor to a position requiring the advice and consent of the Senate or both Houses of the Legislature, or by a Mayor to a position requiring confirmation by the municipal council;
>
> (c) He or she is appointed by the Governor as a special assistant to the Governor;
>
> (d) He or she is appointed by a board or commission to head an autonomous agency of the government;
>
> (e) He or she is hired as a teacher, nurse, doctor or attorney for the government.
>
> Any person covered by subsections (a) through (e) of this section shall repay any bonus paid pursuant to regulation established by the Board.
>
> 1 CMC § 8402.

A perfunctory comparison between sections 8392(a) and 8402 shows that those who elected to accept the 30 percent bonus as part of their early retirement could not be re-employed under the same conditions as offered by section 8392, namely, by consent of the governor and the retirement fund board. Sections 8401-8404 were repealed by Public Law 11-114, § 3, but not before Malone and other similarly situated government retirees had availed themselves of the 30 percent early retirement bonus.

Moreover, section 8392, included a subsection which provided that "any person who elected to retire pursuant to the provisions of N.M.I. Const. art. III, § 20(b) may be employed by the Commonwealth for no more than 60 calendar days in any fiscal year without forfeiting any retirement benefits." 1 CMC § 8392(c). Lastly, the Fund is also bound by statute to recoup all funds overpaid to retirement fund beneficiaries:

> Whenever the administrator finds that more or less than the correct amount of benefits have been paid with respect to any individual, proper adjustment or recovery shall be made by appropriate adjustments to future payments to the member or any survivors, or from the estate of any recipient of benefits.
>
> 1 CMC § 8390.

It is against this statutory and constitutional backdrop that Malone retired after over 20 years of creditable service to the Commonwealth government, and then was re-employed by the Mayor's office. As the Hearing Officer originally concluded and with which the Court concurs, Malone, by opting to

retire after 20 years of government service, was statutorily and constitutionally prohibited from receiving retirement benefits if he was re-employed by the Commonwealth for more than 60 days in any given fiscal year. It is under this impression that the Court must examine the charges of affirmative misconduct which Malone alleges led him to mistakenly believe that he could be re-employed by the Mayor's Office and still receive his retirement benefits beyond the proscription under section 8392(c) and art. III, section 20(b) of the CNMI Constitution.

2. Affirmative Misconduct

Affirmative misconduct requires an affirmative representation or affirmative concealment of a material fact by the government, which goes beyond conventional negligence. *Benavente*, 2000 MP 13 at ¶12. Here, Malone asserts that the actions and omissions of various government agencies and bodies collectively constituted affirmative misconduct, to the extent that estoppel is warranted against the government. Specifically, Malone alleges the following events in concert established a set of circumstances which led Malone to erroneously believe he was eligible to accept retirement while rehired and to rely on that erroneous belief:

1. The Fund's continued payment of Malone's pension while he was re-employed by the Mayor's office beyond his initial 60 days of employment[3] without interruption.
2. The Governor's assent and support in exempting Malone from the general rehiring ban under 1 CMC section 8392 (and erroneously section 8402).
3. The Mayor's office's assent and support in excepting Malone from the general rehiring ban under 1 CMC section 8392.
4. The Attorney General Opinion number 02-0213, which Malone asserts endorsed his ability to double-dip.

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[3] 1 CMC § 8392(c). "Double-dipping" refers to the receipt of benefits and an employment salary at the same time.

5. Acting Fund Administrator and Full-time Fund Benefits Manager Mariano Taitano's oral representation to Malone, instructing Malone to "keep doing what [he was] doing," after Malone presented AG opinion 02-0213 to Taitano.

In essence, Malone asserts what the Hearing Officer found at the administrative level; that "the sum total of all the above agencies' and persons' actions, as they are related to the Beneficiary [Malone], negligently led him to conclude that he could be re-employed, without sanction, as an early retiree;" and that such reliance to his detriment should estop the Fund from recouping its erroneously paid benefits from Malone. *See* Administrative Order Recommended Decision, NMIRF Case No. 06-04 at p. 17. However, as the Fund presently asserts, the Hearing Officer failed to analyze whether estoppel could lie against the Fund under those elements of estoppel against a government as recognized by the binding authority in the CNMI. As shown, *supra*, the common law of this jurisdiction prescribes that the element of affirmative misconduct by the government must precede a finding of estoppel against the government. *Benavente* at ¶¶9-12. For the reasons shown below, the Court cannot find that the combined acts and omissions of the various government agencies equate to affirmative misconduct. Rather, it is evident that Malone misinterpreted the actions of the government as affirmatively advocating his retention of benefits while being fully employed, and through such misunderstandings never questioned his retention of benefits until the AGO published its 2004 opinion regarding double-dipping.

Although Malone insists in his brief that the matter of government misconduct must be examined holistically, i.e. the combined effect of several government actions, the matter cannot simply be treated with a broad stroke, with the details of each action left unsrcutinized. Therefore, the Court will examine each individual allegation of government misconduct separately and then look at the sum of those allegations, along with the alleged government omissions, to determine whether such affirmative misconduct as described in *Benavente* has occurred.

First, Malone asserts that the actions of the Mayor's office and the Governor's office misled

Malone into believing that he could be re-employed after retirement without penalty. However, Malone provides little meaningful evidence to demonstrate his allegation. Specifically, the Mayor's office simply requested Malone to return to service as a special advisor, and in furtherance of such action requested that the Governor exempt Malone the general prohibition from re-employment found in 1 CMC section 8392. Nowhere in the record, does it show that the Mayor or the Mayor's office, orally or in writing, advocated the position that Malone could be excepted also from the constitutional or statutory prohibitions against double dipping. Nor can Malone demonstrate that the Mayor's office concealed such facts from Malone in order to induce his re-employment.

Similarly, the Governor's office never, in its correspondence with the Mayor's Office, OPM, or the Attorney General's office, advocated the position that by exempting Malone from the prohibitions on re-employment, Malone would also be exempted from the constitutional and statutory prohibitions on double dipping. Specifically, the Governor granted the Mayor's request for an exemption under 1 CMC section 8392, subsection (a)(5), yet gave no indication that it had the power to exempt or was seeking exemption from the double dipping prohibitions on behalf of Malone.

Secondly, and most significantly, Malone argues that the Attorney General's opinion issued in 2002 "[confirmed] the propriety of Malone's receipt and retention of retirement benefits while employed by the Mayor." *See* Plaintiff's Opening Brief In Support of Setting Aside and Vacating Agency Order of December 27, 2005 at 17. Essentially, Malone claims that Attorney General Opinion 02-13 endorsed the erroneous legal position that Malone could be re-employed under the Mayor's office without being subject to the double-dipping prohibitions found in the CNMI constitution or statute. Malone's assertion is simply incorrect. AG Opinion 02-13, which was requested after OPM refused to process Malone's employment request, and after the Fund rescinded its original concurrence to the governor's exemption, never attempted to analyze or provide any opinion on whether Malone was subject to the prohibition on double dipping, nor was it asked to provide any such analysis.

AG Opinion 02-13, plainly addressed the question of whether Malone and other similarly

situated individuals could be re-employed at all in light of 1 CMC section 8402. Opinion 02-13 concluded in pertinent part that because 1 CMC section 8402 was repealed by public law, its prohibition on re-employment for those retirees who had accepted the 30 percent retirement bonus provided under section 8401 was null and void, and thus replaced by the provisions governing re-employment found in section 8392. *See* AG Opinion 02-13. Therefore, the opinion only concluded that Malone could be re-employed at the Mayor's Office with the governor's exemption and the Retirement Fund's consent as provided in section 8392(a)(5). The opinion never once broached the topic regarding the restriction on double-dipping found in article III, section 20(b) of the CNMI constitution or section 8392(c) of the CNMI code. It therefore never found that Malone could be re-employed without impairing his ability to receive his full pension during the time in which he received a full-time employment salary, nor did it find that Malone could be re-employed "without restriction" as both Malone and the Hearing Officer mistakenly claim.

Because AG Opinion 02-13 never addressed the question of double-dipping until it released its 2004 opinion, which definitively addressed double-dipping, Malone's claim that the AG Opinion was even an incremental component of the affirmative misconduct alleged by Malone is without merit. Moreover, it is apparent from examining the circumstances around the release of the AG's Opinion 02-13 that part of Malone's erroneous belief originated with Malone's own erroneous interpretation of an official opinion rather than the government's attempt to induce Malone to believe such information or to conceal the truth.

Malone additionally asserts that Fund Benefits Manager Taitano contributed to the affirmative misconduct of the government fortified his mistaken belief that he could be re-employed "without restriction" when Malone presented AG Opinion 02-13 to Taitano. In Malone's sworn testimony, Malone recalled notifying Taitano of AG Opinion 02-13 and testified that Taitano told him that he would present the opinion to the Fund's attorneys, and that Taitano told Malone to "keep doing what you are doing." The Fund has challenged the credibility of Malone's testimony, however, this was

addressed neither in the Hearing Officer's opinion nor the Findings of Fact and Conclusions of Law reversing that opinion and the Court will address it independently. Notwithstanding the contested accuracy of Malone's recollection, Taitano's statement is too vague in the given context to be accorded the weight of "affirmative misconduct." Moreover, courts have consistently treated erroneous statements by government officials cautiously when determining whether estoppel should lie against the government.

The ambiguity of Taitano's statement, and Malone's interpretation of it are apparent in light of the circumstances in which it was delivered. At the time Malone presented the AG opinion to Taitano, the only matter that was unequivocally at issue was the question of whether Malone could be re-employed at all after he retired. Malone proffered no evidence that at the time Taitano made the disputed statement, Taitano was aware of any issue about Malone double-dipping. Nor is it clear that Taitano was aware that Malone continued to receive his retirement benefits, while employed. Further, at the time of Taitano's comment, in September 2002, Malone was working *gratis* for the Mayor. Surely, if Taitano was aware that Malone was working without salary at the time Malone approached him, Taitano's instruction to maintain the status quo while the Fund's lawyer's examined the AG opinion was appropriate. At the very least, Taitano's statement in light of the circumstances could not be interpreted as instructing Malone that he was exempted from the double-dipping prohibition. Consequently, Taitano's statement, given its circumstantial context, and its ambiguity, does not independently amount to affirmative misconduct, nor does it reflect any exacerbation of prior government misfeasance.

Additionally, assuming *arguendo*, that Taitano's comment could be reasonably interpreted as instructing Malone that he was not subject to double-dipping prohibitions, most courts have not allowed such actions alone to support a claim of estoppel against the government. *See Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *Schweiker v. Hanson*, 450 U.S. 785, 788-789 (1981); *Lavin v. Marsh*, 644 F.2d 1378, 1383-84 (9th Cir. 1981).

Lastly, Malone asserts that the Fund's continued payment of Malone's pension while he was re-

employed by the Mayor's office, beyond his initial 60 days of employment, and without interruption constituted the affirmative misconduct required to establish an estoppel claim against the government. There is no dispute that the Fund's continued remittal of Malone's retirement benefits to him while Malone was re-employed with the Mayor's Office, receiving a salary, for a period of nearly three years, was contrary to law and negligent. However, as discussed, *supra*, a party seeking to assert estoppel against the government must demonstrate "affirmative misconduct beyond mere negligence." *Benavente*, 2000 MP 13 at ¶¶ 9-11.

Indeed, it appears that in the rare instances that courts have granted estoppel against the government when the government or a government official or agent acted negligently, such instances were limited to factual situations that included other intentional acts or misdeeds, or such an uneven playing field between the party seeking estoppel and the government, that a miscarriage of justice and fairness would occur should estoppel not lie. Thus, quite often, the element of affirmative misconduct is not hermetically sealed from that of manifest injustice, and the two elements create a sliding scale. *See Kramarevcky v. Department of Social and Health Services*, 122 Wash.2d 738, 863 P.2d 535 (1993) (Court granted estoppel against DSHS's recoupment of overpaid public assistance monies to a refugee from the former Soviet Union, who spoke little English and "relied exclusively on DSHS for advice regarding [his] eligibility for public assistance," when DSHS miscomputed Kramarevcky's earned income and overpaid Kramarevcky over a four month period.[4]); *Seward v. U.S. Dept. of Agriculture*, 229 F.Supp.2d 557 (S.D.Miss.2002) (Court granted estoppel against Farmers Home Administration (FmHA, a lending organization within the Department of Agriculture) from offsetting a delinquent loan balance against farm program payments due to Seward Farms when FmHA failed to include the

[4]*Kramarevcky* is also distinguishable from this case because the *Kramarevcky* court required no express showing of affirmative misconduct by the parties seeking estoppel against government agencies. By contrast, CNMI precedent requires a showing of affirmative misconduct.

delinquent note in the analysis for a buyout agreement, refused to release the Sewards from liability on the debt when such liability was assumed by an ex-partner of the Sewards without notifying the Sewards, failed to notify the Sewards of the delinquence of the note over a span of 16 years notwithstanding regulations explicitly requiring them to do so, and failed to secure a priority lien on the land securing the delinquent note during the bankruptcy proceedings against the Sewards' ex partner).

None of the outstanding circumstances present in the above cited cases exist here. Although it is clear that the Fund negligently remitted Malone's pension to Malone while he was re-employed, none of Malone's claims of other government misconduct actually establish that the Fund or other government agents perpetuated a reasonable belief that Malone could retain the retirement payments contrary to the constitutional and statutory double dipping prohibitions. Moreover, none of the facts in the record indicate that Malone was in such dependence on the Fund for guidance that the presumption of knowledge of the law should not apply to him. Malone objects to holding the maxim that one is presumed to know the law because the Fund, by acting contrary to constitutional and statutory restrictions, demonstrated its own ignorance of the law. However, Malone offers no authority to support his argument. Indeed the maxim that ignorance of the law is no excuse is particularly relevant in this case. The CNMI prohibition against double dipping has been given constitutional status. It is therefore not unreasonable to presume that Malone---a government employee, with experience serving the CNMI legislature and other political posts, exceeding twenty years—should be at least familiar enough with the laws against double-dipping, and therefore should have made some direct inquiry into the propriety of retaining his benefits while re-employed with the Mayor's office.

As discussed above, Malone has failed to demonstrate any government misfeasance other than negligence in erroneously paying him retirement benefits while he was employed with the Mayor's office. Consequently, Malone has failed to demonstrate the affirmative misconduct required to estop the Fund from recouping its erroneously paid benefits.

3. Manifest Injustice and Public Policy

The Second crucial element that must be established to estop the government is that a serious injustice would result if the government is not estopped and that granting estoppel would not so defeat the operation of policy adopted to protect the public, that the public would suffer undue harm as a result. *Benavente* at ¶9. Thus, two sub-elements must be examined here: 1) whether Malone would suffer manifest injustice if the government is allowed to recoup its improperly paid benefits, and 2) whether estoppel would so undermine the policy underlying the double dipping prohibition that the public would suffer undue harm.

Here, it is obvious that Malone will suffer financial hardship and inconvenience as a result of the Fund's recoupment. However, by law, the Fund is limited to recoup its overpayments only by offsetting them against future pension payments at a rate no higher than "50 percent of any benefit to be paid in any benefit period." *See* 1 CMC § 8390(a) and (b). This limitation will, at the very least, mollify the financial ramifications of having to reimburse the Fund for overpayment of benefits.

By contrast, if the Court were to prevent the Fund from recouping its mistakenly distributed assets, the Court would not only undermine the Fund's ability to recoup its coffers after making mistakes, but it would also undermine an unequivocal constitutional provision against double dipping in the CNMI. In order to hold a constitutional mandate virtually ineffective through the principles of equitable estoppel, Malone would have to proffer facts far more egregious than the Fund's own negligence in improperly remitting him benefits during his period of re-employment. Malone has failed to do so here.

By finding such, the Court in no way intends to trivialize the patent mismanagement which led to Malone's erroneous receipt of benefits, or the serious inconvenience caused to Malone as a result. To be sure, the Fund's own inability to detect its own errors within such a period of time is worthy of public censure and examination to ensure that its methods are reformed to prevent future occurrences. Indeed, the Court hopes that after this experience, the Retirement Fund audits its records to determine if it has made other similar mistakes in the past and enforces the constitutional and statutory mandates to recoup

all monies distributed in contravention to the constitutional double dipping restrictions.

4. Traditional Elements of Estoppel

Because Malone has failed to demonstrate the elements required to establish a claim of estoppel against the government, the Court will not examine the traditional elements of estoppel.

**C. Waiver**

In addition to pleading estoppel, Malone pleaded that the doctrine of Waiver should now prevent the Fund from recouping its erroneous payments of retirement benefits to Malone because the Fund failed to "tell Malone to stop working upon penalty of losing and repaying retirement benefits," and the governor exempted Malone's position under 1 CMC, section 8392. Malone's interpretation of waiver in this context, however, misses the mark.

> Waiver is usually defined as `the voluntary and intentional relinquishment of a known right' and may be either express or implied. Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing.
> *Trinity Ventures v. Guerrero*, 1 N.M.I. 54, 62-62 (1990) *quoting Udevco, Inc. v. Wagner*, 678 P.2d 679, 682 (Nev. 1984) (Internal cites omitted).

Furthermore, the doctrine of waiver focuses more on the intent of the party purported to have waived a right to determine if that party expressly or impliedly intended to waive a right. *See Tenorio v. CNMI*, Civil Action No. 00-002B (N.M.I. Super. Ct. June 7, 2001) (Order Granting Motion for Summary Judgment).

Here, Malone asserts that the Fund impliedly waived its right to recoupment against Malone by failing to cease payment of retirement benefits to Malone and for its failure to assert recoupment measures at an earlier time. However, Malone provides no evidence demonstrating that the Fund was ever aware that it was unlawfully remitting benefits to Malone during his tenure of re-employment. Rather, the Fund's actions suggest that they alerted Malone of their intent to pursue recoupment of erroneously paid benefits once the Fund discovered the error.

Moreover, Malone has cited no authority supporting the contention that a government can ever waive enforcement of its own laws merely by failing to assert them immediately after a law is violated. Should such a policy be hoisted upon the government, its ability to enforce the law would surely be curtailed. Rather, a government will demonstrate its intent to relinquish a right to pursue enforcement of its own laws by legislating a statute of limitations, which prevents actions to enforce a law once a prescribed period of time has passed. Here, no such legislative intent to relinquish the right of recoupment is evident by the inclusion of a statute of limitations on actions seeking recoupment for overpaid benefits. *See* 1 CMC § 8390.

Consequently, mere delay in enforcement cannot, without further evidence of an intent to relinquish the duty or right to enforce, establish waiver. Malone's argument, therefore, must fail.

## III. CONCLUSION

For the foregoing reasons, the Court hereby finds that there was substantial evidence for the Board to reverse the Hearing Officer's decision and to order the recoupment of improperly distributed benefits from Malone. Consequently, the Court AFFIRMS the Fund's decision below.

**So ORDERED** this 4th day of December, 2007.

/s/

David A. Wiseman, Associate Judge