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**FOR PUBLICATION**

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

|  |   |                                      |
|--|---|--------------------------------------|
| <b>JESUS A. ARRIOLA</b>                          | ) | Civil Action No. 08-0302             |
|  | ) |                                      |
| <b>Petitioner,</b>                               | ) |                                      |
|  | ) | <b>RULING AND ORDER DENYING</b>      |
|  | ) | <b>PETITIONER’S WRIT OF MANDAMUS</b> |
| <b>v.</b>  | ) |                                      |
|  | ) |                                      |
| <b>MARK A. AGUON, in his official capacity</b>   | ) |                                      |
| <b>as Administrator and Chief Executive</b>      | ) |                                      |
| <b>Officer of the Board of Trustees for the</b>  | ) |                                      |
| <b>Northern Mariana Islands Retirement Fund,</b> | ) |                                      |
|  | ) |                                      |
| <b>Respondent.</b>                               | ) |                                      |
|  | ) |                                      |
|  | ) |                                      |

**I. INTRODUCTION**

THIS MATTER came for hearing on September 2, 2008 at 9:30 a.m. in Courtroom 223A. Counsel for Northern Marianas Protection and Advocacy Systems, Inc. (NMPASI), Jeanne Rayphand appeared on behalf of Mr. Arriola. Viola Alepuyo appeared on behalf of Respondent, Mark Aguon. The hearing was held pursuant to Petitioner’s request for a mandamus order instructing Mr. Aguon in his official capacity to immediately pay or cause to be paid to Mr. Arriola

1 the sum of 66 2/3% of the salary Mr. Arriola was receiving at the time of his disability and  
2 separation of service of the government, for the period commencing June 21, 2007, to present and  
3 continuing on the fifteenth and last day of each month pending final resolution of Mr. Arriola's  
4 claim for disability.

## 6 II. DISCUSSION

### 8 A. Mr. Aguon is Properly Named in this Case Because the Statutory Provision Explicitly 9 Authorizing the Board of Trustees of the Retirement Fund to Sue or Be Sued Fails to 10 Affirmatively Exclude the Administrator and CEO of the Retirement Fund from Being 11 Sued in his Official Capacity in a CNMI Court.

12 Before addressing the appropriateness of mandamus and the merits of Mr. Arriola's petition  
13 in this instance, the Court is obliged to deal with Respondent's argument that he cannot sue or be  
14 sued as a matter of law. Particularly, Respondent maintains that he cannot be sued because the  
15 statute vests the power to sue and be sued exclusively with the Board of Trustees. *See* 1 CMC §  
16 8315 (entitled "Board of Trustees: Powers and Duties," which states, in part that "the fund, through  
17 its trustees, has the following duties: (d) to sue or be sued in its corporate name."). Though this  
18 statute obviously entitles the Board of Trustees to sue or be sued in the corporate name of the  
19 Retirement Fund, its language does not affirmatively exclude an officer of the Retirement Fund  
20 from suing on behalf of or being sued in the officer's official capacity in order to compel official  
21 action by the Retirement Fund.

22 Moreover, though the Court acknowledges the merits of Respondent's citation of several  
23 federal decisions which require a state or state entity to consent to be sued in federal court by statute  
24 or otherwise under sovereign immunity analysis, however, the context is different here. *See*  
25 Respondent's citation to *McKay v. Boyd Const. Co. Inc.*, 769 F.2d 1084, 1087 (5th Cir. 1984)  
26 (holding that where a state entity must give its consent to be sued in federal court under 11th  
amendment sovereign immunity analysis, Mississippi required *express statutory authorization*  
before waiving the state's sovereign immunity, and that state statute only waived sovereign

1 immunity for the Mississippi State Highway Commission but not for the Mississippi State Highway  
2 Department, which was named in the suit); *Haines v. Metropolitan Govern. of Davidson County*, 32  
3 F.Supp.2d 991 (N..D.Tenn. 1998); *Maxwell v. Henry*, 814 F.Supp. 213, 215 (S.D. Tex. 1993) and  
4 etc.

5 Here, by contrast, Mr. Arriola is not attempting to sue a state or state entity in federal court.  
6 Consequently, eleventh amendment restrictions on suing a state with sovereign immunity in federal  
7 court are inapplicable. Thus, the Court’s only concern here is whether the administrator has the  
8 power through his position to act in the manner requested by Petitioner. Because there is no statute  
9 expressly prohibiting the Administrator and CEO of the Retirement Fund from being sued in his  
10 official capacity, the Court will not dismiss this petition.

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12 **B. Mandamus Is Not Appropriate**

13 Though Respondents raise numerous defenses to Mr. Arriola’s petition, only two issues  
14 demand immediate resolution at this juncture: 1) whether mandamus is appropriate; and 2) whether  
15 the Retirement Fund is required to pay an applicant estimated disability benefits pending official  
16 determination of eligibility by the Retirement Fund Board of Trustees?<sup>1</sup>

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19 <sup>1</sup>For the sake of creating a thorough record of the Court’s ruling, the Court by not addressing  
20 the Respondent’s “administrative exhaustion,” rejects Respondent’s argument that in pursuing  
21 immediate interim payments pending final resolution by the Board of Trustees of his eligibility via  
22 petition for a writ of mandamus Mr. Arriola is somehow circumventing the exhaustion requirement  
23 typically required of administrative appeals. The Court agrees with Mr. Arriola that forcing him to  
24 wait patiently for the Board to conclude its process over his eligibility before he can collect interim  
25 payments that he claims he is due before any board determination is made would deprive him of a  
26 right of payment guaranteed by statute and perhaps his only means of self-sustenance. To obtusely

1 “It is generally accepted that an action in mandamus is proper to compel administrative  
2 agencies to exercise the powers entrusted to them, to perform ministerial acts and to enforce their  
3 rules and regulations.” *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 286-287 (1991).  
4 Given the extraordinary nature of mandamus relief, it is rarely granted, and only granted if the  
5 petitioner establishes the following elements:

6 1) a clear legal right to the relief sought;  
7 2) a legal duty on the part of the respondent to do the thing which the  
8 petitioner seeks to compel ; and  
9 3) the absence of another adequate remedy  
10 *Elm’s, Inc. v. Nielsen*, Civil Action No. 01-0054B, slip op. at 5, ¶ 10 (Super.Ct. Nov. 29,  
11 2001)(Order on Motion for Summary Judgment). Accordingly, whether mandamus is appropriate  
12 depends heavily on the existence of a clear legal right to the relief sought, or an examination of the  
13 legal merits for the action sought.

14 Here, Petitioner plainly seeks an order from this Court instructing Respondent to pay interim  
15 semimonthly disability payments to Mr. Arriola until the Board of Trustees has determined whether  
16 Mr. Arriola is entitled to disability pension. Thus, the only question to be answered is whether Mr.  
17 Arriola is entitled to semimonthly disability payments pending Board review and approval or  
18 disapproval of his application? According to statute,

19 [s]emiannual annuity payments to *eligible* members shall commence on  
20 the first regular payment date immediately following the effective date  
21 of retirement or disability, ... Said payments shall commence  
22 notwithstanding the fact that the Board of Trustees shall not have passed  
23 the application or authorized the expenditure thereof, in which events the  
24 payments shall be made for an amount estimated to be payable.  
25 1 CMC § 8384(b) (*emphasis added*). From the plain language of the statute, it is evident that  
26 *eligible* members are indeed entitled to receive immediate disability payments once the member’s  
disability becomes effective pending Board resolution of the member’s application for disability.

However, the remaining question left unanswered is whether Mr. Arriola is an *eligible* member who

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insist upon strict adherence to an exhaustion doctrine when it is evident that any further delay to  
resolving this issue may irreparably harm Mr. Arriola is not the intention of the exhaustion doctrine.

1 is entitled to receive such immediate interim payments. Ordinarily, the term *eligible* describes a  
2 situation where someone, by operation of law or otherwise, qualifies to receive a benefit. *See*  
3 BLACK'S LAW DICTIONARY, 559 (8th ed. 1999). Because the plain language of section 8384(b)  
4 offers no guidance on the eligibility of a member, the Court must look to the statutory scheme as a  
5 whole to interpret what conditions are required for a member to qualify to receive the benefit of  
6 interim payments of disability while the member's application is pending approval or disapproval  
7 from the Board of Trustees.

8           A member shall be considered totally and permanently disabled after the  
9           board receives written certification by at least *two licensed and*  
10           *practicing physicians and a vocational rehabilitation counselor,*  
11           preferably one with a master's degree selected by the board, that the  
12           member is permanently disabled for the further performance of the  
13           duties of any assigned position in the service of the government.  
14           1 CMC § 8347(a), as amended by Public Law 13-60, § 6(c) (effective date December 5,  
15           2003)(*emphasis added*). Although, this subsection does not by its own description define an  
16           *eligible member*, the language indicated that a member would not be eligible to receive disability  
17           benefits without having obtained certification of disability from two qualified physicians and one  
18           vocational rehabilitation counselor.

19           Moreover, by interpreting subsection 8347(a) as a prerequisite to obtaining interim  
20           payments, the Court gives effect to the practical policy of requiring some threshold eligibility  
21           before a member can become eligible to receive interim disability payments before the Board has  
22           reached its decision on the merits of a member's application. Simply put, if the Board was required  
23           to pay interim payments to all members who submitted incomplete applications, i.e., those  
24           applications without certifications of disability by physicians or otherwise, it would invite abuse,  
25           fraud, and waste, because any member regardless of the merits of his or her application could  
26           receive interim payments without regard to the actual merits of his or her application. The Court  
27           can not encourage such a situation.<sup>2</sup>

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<sup>2</sup>The Court will also note, however, that the current subsection 8347(a) differs substantially  
from the law as it existed when Mr. Arriola became a member. Specifically, the current statute

1 Here, because Mr. Arriola has been unable to obtain certification of his disability from a  
2 vocational rehabilitation counselor and that he has failed to establish that he has a clear legal right  
3 to the relief sought, mandamus is not appropriate and is consequently DENIED. The Court  
4 recognizes, however, Mr. Arriola's dire situation, and therefore, urges the Retirement Fund to act  
5 with all due urgency to approve or disapprove his disability application without further delay.

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7 **III. CONCLUSION**

8 For the foregoing reasons, Petitioners' writ of mandamus is hereby DENIED  
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15 added the requirement that disability applicants obtain certification from a vocational rehabilitation  
16 counselor before being considered by the Board. Mr. Arriola's dilemma, here, arises principally  
17 because there is apparently no qualified vocational rehabilitation counselor on island to perform the  
18 necessary certification of Mr. Arriola's application. Thus, the legislature has unwittingly created a  
19 situation where an applicant for disability cannot possibly qualify. Given the constitutionally  
20 recognized contractual relationship between Retirement Fund Members and the Retirement Fund  
21 via article III, section 20, this Sisyphean task required of member disability applicants under  
22 subsection 8347(a) may be unconstitutional. Notwithstanding the Court's concern that subsection  
23 8347I(a) may deviate from a constitutionally mandated contract between Retirement Fund Member  
24 and the Fund, the Court will not direct an officer through its mandamus powers to follow its  
25 interpretation of the CNMI constitution. Should Mr. Arriola wish to challenge the constitutionality  
26 of subsection 8347(a), he may do so through the administrative appeal process.

1 **SO ORDERED** this 18<sup>th</sup> day of September 2008.

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/s/  
David A. Wiseman, Associate Judge

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