FOR PUBLICATION

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

In the Matter of: LI QUIRONG, and the DEPARTMENT OF LABOR, by and through GIL M. SAN NICOLAS, Secretary of Labor **Complainants/Appellees,** **vs.** **FENG HUA ENTER., INC., ET AL.,** **Respondents/Appellants.**	**Civil Action No. 09-0072E** **ORDER:** **DENYING APPELLEES' MOTION TO DISMISS**

THIS MATTER came on for hearing on May 14, 2009 at 1:30 p.m. in Courtroom 223A on Appellee Li's Motion to Dismiss and on Appellant Feng Hua's Motion for Stay. Appellee Department of Labor filed a separate motion concurring in part with Appellee Li's Motion to Dismiss. Counsel Joe Hill appeared on behalf of Appellee Li (hereinafter "Li"). Assistant Attorney General Eli Golob appeared on behalf of Appellee Department of Labor (hereinafter "DOL"). Counsel Robert Myers appeared on behalf of Appellant Feng Hua (hereinafter "Appellant"). Having considered the oral and written submissions of the parties and the applicable law, this Court is prepared to issue its ruling.

Li argues that Appellant's complaint must be dismissed because 1) Appellant failed to exhaust all administrative remedies, and 2) for failure to serve process.[1] DOL, by separate brief, concurs with Li

[1]Li also argues briefly, and only in passing, that the complaint should be dismissed because Appellant

that Appellant failed to exhaust his administrative but espouses slightly different arguments to support the claim.

Appellant's Motion to Stay has been decided by separate Order and is no longer before this Court. **For the reasons stated below, Li's Motion to Dismiss is hereby DENIED.**

I. DISCUSSION

Li's Motion to Dismiss is grounded in Commonwealth Rule of Civil Procedure 12(b)(1) and 12(b)(6), which allows for the dismissal of claims for which the recognized law provides no relief. A motion to dismiss is aimed solely at attacking the pleadings. All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. The Court in examining the pleadings will assume all *well-plead* facts are true and draw reasonable inferences to determine whether they support a legitimate cause of action. *Cepeda v. Hefner*, 3 N.M.I. 121, 127-28 (1992); *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990)*; Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998).

1. Exhaustion of Administrative Remedies

Courts are not free to assume judicial review authority over administrative agency action that has not been conferred on them by statute or the constitution. *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993). Parties who seek judicial review under the APA must first exhaust all intra-agency appeals expressly mandated either by statute or by the agency's regulations. *Rivera v. Guerrero*, 4 N.M.I. 79, 84 n.37 (1993). These exhaustion requirements create the jurisdictional prerequisites to

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failed to obtain the record and transcript prior to filing the complaint. No authority is cited and Li makes no argument beyond merely stating that the failure to do so is grounds for dismissal. As counsel is aware, the preparation and certification of the record takes place after the complaint is filed.

proceeding in court. *Id*. Generally, this Court cannot entertain a complaint for judicial review until all administrative remedies have been exhausted. *See, e.g., Rivera v. Guerrero,* 4 N.M.I. 79 (1993) (complaint dismissed for lack of subject matter jurisdiction because Petitioner failed to file timely appeal). Therefore, as to the claim that Appellant failed to exhaust all their administrative remedies, the motion is more appropriately brought pursuant to 12(b)(1) which provides for dismissal where subject matter jurisdiction is lacking.

Generally, judicial review of an agency decision requires that the Appellant first exhaust all intra-agency appeals expressly mandated by statute, contract, or by agency's regulations before seeking judicial relief. This principal is referred to as the exhaustion rule and allows the proper agency to apply its expertise to contested regulations and assures uniform interpretation and application of the regulations within agencies. *See, e.g., IGI Gen. Contractor & Dev. Inc., v. Public Sch. Sys*., No. 94-0647 (N.M.I. Super. Ct. July 7, 1997). However, the exhaustion rule is not always applicable and if the circumstances and equities of the case dictate otherwise, a party may not be required to exhaust all administrative remedies. *See, e.g., McGee v United States*, 402 U.S. 479 (1971) (a balancing of the competing interest determines the applicability of the exhaustion rule). Essentially, the doctrine is not to be applied inflexibly in all situations. *McGee*, 402 U.S. at 483 *citing McKart v. United States,* 395 U.S. 185 (1969). Further, exceptions to the exhaustion doctrine exist.

Here, Appellant did not wait for a decision from the Secretary following his appeal although such a decision is normally required to satisfy the exhaustion rule. Appellant argues, however, that he filed the complaint for judicial review within the confines of Public Law 15-108 which provides that if the Secretary fails to issue a written decision within 30 days, then by operation of law, the Secretary confirms the decision of the hearing officer and is considered 'final action' for purposes of judicial review.

A. Public Law 15-108

A basic principle of construction is that language must be given its plain meaning. *Commonwealth Ports Auth. v. Hakubotan Saipan Enters, Inc.*, 2 N.M.I. 18 (1991). Legislative intent is to be discerned from a reading of the statute as a whole and not from a reading of isolated words. *Id*. When interpreting a statute, the objective is to ascertain and give effect to the intent of the legislature. *Id*. Further, where statutory provisions are capable of co-existence, it is the duty of courts to regard each as effective and provisions are only irreconcilable where there is a positive repugnancy between them or they cannot mutually coexist. *Estate of Faisao v. Tenorio*, 4 N.M.I. 260 (1995).

Public Law 15-108 (hereinafter "PL 15-108") repealed and re-enacted Division 4 of Title 3, 4 chapters 4-8 of the Commonweal Code and was effective on November 9, 2007. PL 15-108 §§ 3-4. Prior to the enactment of PL 15-108, the repealed statute, 4 CMC §4455(c), provided that "[u]pon completion of review the director shall confirm or modify the agency findings, order or decision in writing within 10 days. Any modification shall include supplemental findings. The director's decision shall constitute final action for purposes of judicial review." However, the law did not describe what resulted if the Director failed to issue an order within 10 days. The statute did define the written decision as 'final agency action' for judicial review purposes. Accordingly, pursuant to §4445(c), the director could *indefinitely* fail to issue an order and the aggrieved party would never have 'final action' from the agency and thereby be prevented from pursuing judicial review. Although the law directs that a decision be completed by the Secretary in 10 days, the ' what if its not' question is not addressed by the repealed statute.

However, the legislature addressed this lack of guidance with PL 15-108 which deals directly with this issue stating that where the Director fails to issue a decision within 30 days the failure to issue a decision is, for all practical purposes, an affirmation of the hearing officer's decision. The time limit was increased from 10 days to 30 days and the effect of not issuing a timely decision was detailed. Most importantly, pursuant to the new rule, the Secretary's failure to issue a decision gives rise to the

aggrieved party's right to file for judicial review. Specifically, the controlling provision states that:

> Upon completion of review, the Secretary shall confirm or modify the finding, decision, or order in writing as soon as practicable. Any modification shall include supplemental findings. The Secretary's decision shall constitute final action for purposes of judicial review. Failure by the Secretary to confirm or modify a finding, decision, or order within thirty (30) days *shall constitute confirmation of each of the findings, decisions, or orders of the hearing officer as the final action of the Secretary for purposes of judicial review.*

PL 15-108 § 4948 (c) (hereinafter "Section 4948") (emphasis added).

This statute is unambiguous. If the Secretary fails to confirm or modify the decision of the hearing officer, in writing, within 30 days, the lack of a decision is deemed to be a confirmation of the hearing officer's decision and is deemed final agency action for purposes of judicial review. Here, it is undisputed that the Secretary did not issue a written decision within 30 days and thereafter, Appellant filed for judicial review. Thus, according to the clear standards espoused in Section 4948, Appellant has exhausted their administrative remedies notwithstanding the fact that the Secretary issued no decision.

The Court is not persuaded by Li's argument that the Employment Rules and Regulations (hereinafter "ERR") to PL 15-108 define "final agency action" contrary to Section 4948 and should be given great deference thus requiring the conclusion that there is not "final action" for judicial review purposes until the Secretary issues his decision. *See* Comp. Motion to Dismiss at 3-5. First, the ERR do not conflict with Section 4948. Each portion of the ERR cited by Li may be followed by the portion of Section 4948 which states that "the failure by the Secretary to confirm or modify a finding, decision, or order within thirty (30) days shall constitute confirmation of each of the findings, decisions, or orders of the hearing officer as the final action of the Secretary for purposes of judicial review" and the ERR remain logical and meaningful. Secondly, *even if the provisions were irreconcilable*, Li has not shown that the ERR's would be the controlling authority in this matter.

The Court is similarly not persuaded by Li's argument that in other cases on appeal before the Secretary, the Secretary has issued the decision after the 30 day limit proscribed in Section 4948 expired yet defined his decision as the 'final action' for purposes of judicial review. *See* Comp. Motion to Dismiss at 5-7. The Secretary's use of the language – 'final action'– within the text of his decisions, does not alter or amend the clear mandates of Section 4948.[2]

DOL argues that the statute, read as a whole, indicates that the Secretary is required to complete the appeal within thirty (30) days *after* completing his *review of the administrative case file.* DOL's argument hinges on the first sentence of subsection (c) which reads "[u]pon completion of review. . ." However, under this theory, the statute does nothing to conclusively fix an actual time limit under which the Secretary must act. Additionally, 'file review' is not defined and the parties have no knowledge of when the Secretary is actually done 'reviewing the file'. According to DOL's interpretation, the 'completion of review' has no verifiable end. Thus, the Secretary could 'review the file' for an indefinite period of time before the 30 day time limit began to ran making the time period requirement contained in subsection (c) inconsequential and superfluous. Further, when comparing Section 4948 with the repealed statute which it replaced, it seems evident that the legislature intended to more clearly dictate the consequences of the Secretary failing to timely issue a decision rather than intending to include a meaningless 30 day time limit.

B. Failure to Serve Process

Li argues that he was not served with a summons in accordance with Commonwealth Rule of

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[2]Li relies on U.S. Supreme Court cases to establish the definition of 'final' agency action reviewable by a court. However, Li does not argue that Section 4948 is unconstitutional or otherwise in violation of the U.S. Constitution. Thus, those cases need not be addressed because CNMI law establishes what constitutes final agency action in this matter.

Civil Procedure 4 and, therefore, the Court has no personal jurisdiction over Appellee Li. However, then Li argues that he is an indispensable party who was not included in this matter. Lastly, Li argues that DOL is an indispensable and necessary party in this matter and they have not been served or otherwise properly joined.

First, as to Appellee Li, he is a named party in this lawsuit. Li is listed in the caption and included in the complaint. However, Li is correct that he was not listed in the Complaint under the section "PARTIES". Notwithstanding this error, it is clear that Appellee Li is a joined and named party in this matter. Additionally, there is no rule which mandates that the parties in judicial review be served with a summons and Li was served with the Notice of Appeal on January 28, 2009.

Second, as to DOL, they are also a named party in this matter. Additionally, Li's claim that they were never served is incorrect. The file clearly indicates that on January 28, 2009, a copy of the Complaint was served upon DOL. Lastly, if DOL was not properly served, as a named party in this matter, they would be the appropriate party to raise the issue.

II. CONCLUSION

For the foregoing reasons, Appellee Li and Appellee DOL's joined Motion to Dismiss is hereby DENIED.

SO ORDERED this 3rd day of August, 2009.

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David A. Wiseman, Associate Judge