



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION

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

**JOAQUIN S. TORRES & DIANA Q.
VERDEJO**

Plaintiffs,

vs.

MICHAEL ADA, ET. AL.,

Defendants.

CIVIL CASE NO. 10-0211

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER came for hearing on May 5, 2011 at 1:30 p.m. in Courtroom 223A for Defendants' Motion to Dismiss. Plaintiffs Joaquin S. Torres and Diana Q. Verdejo, (hereinafter "Plaintiffs") appeared *pro se*. Defendants Michael Ada, et. al., (hereinafter "Defendants") were represented by Assistant Attorney General, David Lochabay.

In the instant Motion, Defendants move to dismiss this lawsuit on two grounds arguing *first*, that they are not proper parties to this suit, and *second*, that Plaintiffs have failed to abide by NMI R. Civ. P. 8(a) in that they failed to plead a short and plain statement of their claim. Plaintiffs counter by arguing that Defendants have not stated a proper ground for their motion to dismiss and in any event, Plaintiffs have set forth sufficient factual allegations to state a legally cognizable claim.

After hearing oral arguments and reading over both parties' briefs, the Court is prepared to issue its ruling below. Pursuant to NMI R. Civ. P. 17(a) the Court substitutes the Commonwealth as the real party in interest, thereby dismissing all remaining individuals/government agencies. The Court further **GRANTS**

1 Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint without prejudice for the reasons stated
2 herein.

3
4 **II. BACKGROUND**

5 On August 16, 2010, Plaintiffs filed a First Amended Petition for Mandamus, Declaratory and
6 Injunctive Relief, and Other Relief (hereinafter "Complaint"). In their Complaint, Plaintiffs allege that in
7 2009 and 2010, they sought various public records from Defendants under the Open Government Act
8 (hereinafter "OGA"); however, Defendants failed to timely respond or release such records in violation of
9 the OGA. Plaintiffs claim that there are three issues before the Court: (1) whether Defendants must release
10 records requested by Plaintiffs; (2) whether Defendants failure to release the records violates the OGA; and
11 (3) whether as a result of that failure, Plaintiffs are entitled to costs and attorney's fees.

12 On September 7, 2010, Defendants filed a Motion to Dismiss and/or Strike Plaintiffs' First Amended
13 Complaint. Defendants argue that they are not the proper parties to the suit because a suit against a
14 government employee in his/her official capacity is a suit against the government. Defendants argue that
15 they should be dismissed from the suit and the Commonwealth should be substituted in their place. In
16 addition, Defendants contend that the Department of Commerce, Office of the Special Assistant for
17 Administration, Office of the Special Assistant for Personnel, Office of Personnel Management, and the Pre-
18 Selection Panel/Committee should all be dismissed and replaced by the Commonwealth because these
19 agencies don't have the power to sue or be sued. Finally, Defendants argue that Plaintiffs' First Amended
20 Complaint does not contain a short and plain statement of the claim and thus does not adhere to NMI R. Civ.
21 P. 8(a). As such, Defendants pray that this Court: (1) dismiss Defendants from this action and substitute
22 in their place the Commonwealth; and (2) strike or dismiss Plaintiffs' First Amended Complaint as being
23 in violation of Rule 12(f), and/or Rule 8(a) and/or (e) or strike ¶¶ 1, 10, 11, 12, 35, 46, 47, 48, 49, 50, 51,
24 52, 53, 54, 57, 58, 60 of the First Amended Complaint.

25 On September 20, 2010, Plaintiffs filed a Response in Opposition to Defendants' Motion to

1 Dismiss/Strike. In their Response, Plaintiffs argue: (1) *pro se* litigants' court submissions should be
2 construed liberally and held to less stringent standards than submission of lawyers; (2) the refusal of
3 Defendants in producing the records requested by Plaintiffs is a violation of the OGA; (3) all Defendants
4 are subject to the OGA; (4) Plaintiffs First Amended Complaint sets forth sufficient factual allegations to
5 state a legally cognizable claim; and (4) Defendants have not stated a proper ground for the motion to
6 dismiss. Plaintiffs request that Defendants' Motion to Dismiss/Strike be denied and Plaintiffs' Motion for
7 Summary Judgment be granted. However, if the Court grants Defendants' Motion to Dismiss, Plaintiffs
8 request that they be given an opportunity to amend their complaint.

9 On September 28, 2010, Defendants filed a Reply to Plaintiffs Response. Defendants argue that:
10 (1) Plaintiffs are not regular *pro se* Plaintiffs; (2) Plaintiffs' actions are malicious in that the purpose of the
11 lawsuit is to vex or harass Defendants; (3) Plaintiffs requests are either objectionable or overbroad; and (4)
12 there is no legitimate purpose for Plaintiffs' request since the information is not for a matter of public
13 concern, but instead, is entirely self serving.

14
15 **III. DISCUSSION**

16 **(A) *Defendants' Motion to Substitute Named Defendants for the Commonwealth Is Granted.***

17 The OGA applies to any public agency of the Commonwealth which includes "[a]ny municipality
18 or political subdivision of the Commonwealth." 1 CMC § 9902(e)(2). Public agency liability may come
19 about through the actions of a public officer acting on behalf of a public agency. *See* 1 CMC § 9917(c).
20 In addition, the Court may impose a noncriminal fine of up to \$500 on the public officer who violates the
21 OGA, and a criminal penalty of up to one year imprisonment, a fine up to \$1,000, or both on a public officer
22 who knowingly or willingly violates the OGA. 1 CMC § 9917(c).

23
24 In the present action, Plaintiffs argue that the individual Defendants are properly named because they
25

1 are all public agency employees, named in their official capacities, who have custody over the public
2 records being sought. (Pl.s' Opp'n at 8.)

3
4 Alternatively, Defendants argue that the named individuals in this action can be dismissed and the
5 Commonwealth can be substituted in their stead. Defendants claim that because "imprisonment and fines
6 can attach to persons under this subsection, it is at least arguable that all of the named defendants and
7 perhaps all persons acting in concert with them . . . are entitled to independent counsel." (Def.s' Reply at
8 3.) Defendants claim that because there are only six lawyers in the civil division of the attorney general's
9 office, outside counsel would need to be employed which would be a great expense to the Commonwealth.
10 *id.* The Court agrees.

11
12 Public Law 15-22 amended the Government Liability Act; however, the same principles presented
13 in the findings and purpose section of that Act are directly on point to the case at hand. In the findings and
14 purpose section of said Act, the Legislature found that:

15 "Commonwealth employees are unnecessarily being sued in their individual
16 capacities for actions performed as employees in the Commonwealth, even
17 though the Commonwealth is liable for their actions and no individual
18 liability can attach to the employee. [] Because of conflict of interest rules of
19 the legal profession, private lawyers must frequently be hired to defend their
20 employees. This obligates the Commonwealth to spend considerable money
21 for employees' lawyers to perform legal tasks which are often duplicative of
22 those being performed by the Attorney General in defending the
23 Commonwealth in the same suit. Frequently, this can lead to excessive
24 litigation costs . . . [The] United States Congress passed amendments to the
25 Federal Tort Claims Act [which] provided, in relevant part, that federal
employees sued in their individual capacities were automatically dismissed
from lawsuits . . . [and] the government is simply substituted in as the proper
defendant if the government is not already in the case."

Moreover, NMI R. Civ. P. 17(a) provides in pertinent part:

Every action shall be prosecuted in the name of the real party in interest. []

1 No action shall be dismissed on the ground that it is not prosecuted in the
2 name of the real party in interest until a reasonable time has been allowed
3 after objection or ratification of commencement of the action by, or joinder
4 or substitution of, the real party in interest; and such ratification, joinder, or
substitution shall have the same effect as if the action and been commenced
in the name of the real party in interest.”

5 NMI R. Civ. P. 17(a).

6 Here, five Commonwealth employees are named Defendants in this action. All are being sued in
7 their official capacities. A suit against a government employee in his/her official capacity is a suit against
8 the government. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Ngiraingas v. Sanchez*, 495
9 U.S. 182, 192 (1990); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992); *American Policyholders Ins.*
10 *Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1260 (1st Cir. 1993). If the Court were to force each of the
11 named individuals, acting in their official capacities, to hire separate attorneys to defend themselves, this
12 would be a complete waste of judicial resources because the real party in interest is ultimately, the
13 Commonwealth.
14

15 Even though 1 CMC § 9917(c) provides that liability may come about through the actions of a public
16 officer acting on behalf of a public agency, there is no private right of action against said employee -
17 Defendants can only be sued in their official capacities. Accordingly, Defendants, in their individual
18 capacities, are hereby dismissed from this action and the Commonwealth, the real party in interest, is
19 substituted in their place.
20

21 In addition, Plaintiffs named the Department of Commerce, Office of the Special Assistant for
22 Administration, Office of the Special Assistant for Personnel, Office of Personnel Management, and the Pre-
23 Selection Panel/Committee as Defendants.
24

25 The Department of Commerce is a line agency of the executive branch of government and does not

1 have the power to sue and be sued. The offices of the Special Assistant for Administration, Special Assistant
2 for Personnel, and Personnel Management are offices within the governor’s office and do not have the
3 power to sue and be sued. The Pre-Selection Panel/Committee was a panel or committee established within
4 the executive branch of government to review employment applications from persons desiring employment
5 to take the 2010 U.S. census may or may not have the power to sue or be sued. Regardless, the proper party
6 to this action is the Commonwealth, which shall be substituted in as the real party in interest for the reasons
7 stated above.
8

9 **(B) Defendants’ Motion to Dismiss is Granted Without Prejudice.**

10 Defendants contend that ¶¶ 1, 10, 11, 12, 35, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, and 60 of the
11 First Amended Complaint should be stricken. (Def.s’ Mot. at 4). Defendants further argue that Plaintiffs’
12 Complaint is “confusing and contains many paragraphs which are not susceptible to answer in the format
13 provided by the rules, i.e., by admitting or denying factual allegations.”¹ *id.*

14
15 NMI R. Civ. P. 12(f) provides in pertinent part that “upon motion by a party . . . the court may order
16 stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” “Immaterial’
17 matter is that which has no essential or important relationship to the claim for relief or the defenses being
18 pleaded.” 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1382, at 706-07 (1990).
19 “ ‘ Impertinent’ matter consists of statements that do not pertain, and are not necessary, to the issues in
20 question.” *Id.* at 711. When a complaint does not comply with Rule 8(a)(2)’s requirements of conciseness
21 and simplicity, the court has the power, on its own initiative or in response to a motion by the defendant,
22

23
24 ¹ If Defendants believe that certain paragraphs in the Complaint are ambiguous in that they cannot reasonably be
25 required to frame a responsive pleading thereto, NMI R. Civ. P. 12(e) provides the proper form of relief.

1 to strike any portions that are redundant or immaterial. NMI R. Civ. P. 12(f).

2 After reviewing the First Amended Complaint, the Court agrees with Defendants that a number of
3 the above cited paragraphs fail to satisfy NMI R. Civ. P. 8(a) which requires a “short and plain statement
4 of the claim showing that the pleader is entitled to relief.” The Complaint fails to satisfy NMI R. Civ. P.
5 8(e) which requires each averment of a pleading to be “simple, concise, and direct.” A number of
6 paragraphs in the Complaint include redundant material, conclusory allegations, argument, and/or citations
7 to case law. Generally, the Court would strike said paragraphs for failing to adhere to the Rules; however,
8 because Plaintiffs are *pro se*, the Court will instead dismiss the Complaint and allow Plaintiffs one more
9 opportunity to file a Second Amended Complaint to comply with this Court’s Order.²
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12
13 **V. CONCLUSION**

14 Based on the foregoing, Defendants’ Motion to Dismiss is hereby **GRANTED**; however, Plaintiffs
15 are granted leave to amend their Complaint in compliance with this Court’s Order, and if they choose to do
16 so, it shall be filed on or before August 1, 2011.
17

18 **SO ORDERED this 19th day of July, 2011.**

19
20 _____ / s / _____

21 **David A. Wiseman, Associate Judge**

22
23 _____
24 ² Rule 8(e) may serve as a basis for dismissal independent of Rule 12(b)(6). See *McHenry v. Renne, et. al.*, 84 F.3d
25 1172, 1179 (9th Cir. 1996).