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

BARBARA C. SANTOS, MARIANO ARRIOLA, BALBINA DLC TAISACAN, and LEILANI M. BASA-ALAM,	**Civil Action No. 09-0317**
Petitioners,	**ORDER OF REMAND TO RESPONDENTS FOR EXPEDITIOUS ACTION**
vs.	
NORTHERN MARIANA ISLANDS RETIREMENT FUND; and the NMIRF BOARD OF TRUSTEES,	
Respondent.	

I. INTRODUCTION

THIS MATTER came before the Court for a hearing on January 7, 2010 at 2:00 p.m. in Courtroom 223A. Jeanne H. Rayphand, Esq. represented Barbara C. Santos, et al. ("Petitioners") and James E. Hollman, Esq. represented Northen Mariana Islands Retirement Fund ("Respondent"). At the hearing the parties presented oral arguments regarding the Petition for Review. The Petition challenges the decision of the Northern Mariana Island Retirement Fund ("Fund") regarding disability retirement and the subsequent action taken by the Board of Trustees ("Board"). After considering the oral and written arguments of the parties the Court **REMANDS** the matter to the Respondents to take action consistent with this Order and to do so expeditiously.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners' dates of employment and membership in the Fund are as follows: Mariano Arriola on September 3, 1990, Balbina Taisacan on September 11, 1990, Barbara Santos on March 27, 2000 and Leilani Basa-Alam on May 1, 2002. Public Law ("PL") 6-17 was enacted on May 7, 1989 which, *inter alia*, set the requirements and benefit payments for disability retirement.

On December 5, 2003, the CNMI legislature enacted PL 13-60, which changed the requirements and annuity for disability retirement. Petitioners all submitted applications for disability retirement between November 2007 and October 2008. PL 16-19 was enacted on November 7, 2008 further changing the requirements and annuity payments for disability retirement.

On January 15, 2009, Petitioners Arriola, Taisacan and Santos, after submitting applications for disability, were informed they were required to comply with PL 16-19. Arriola and Santos eventually received letters indicating they were denied disability retirement. Taisacan's application has been neither approved nor denied. On June 17, 2009, Petitioner Basa-Alam's application for disability was approved in the amount of 50% of her salary.

Notice of Appeal to the Board was filed by the Petitioners as follows: Arriola on January 29, 2009, Santos on February 28, 2009, Taisacan on April 9, 2009 and Basa-Alam never filed an appeal. The Board issued a Notice of Briefing Schedule for Consolidation of Cases for each appeal filed and ordered a briefing schedule to be set. However, no briefing schedule was set by the Board, and no further action was taken by the Fund or the Board. Petitioners each followed up in July 2009 urging the Board to take immediate action but received no further communication from the Board.

On August 21, 2009, Petitioners joined their claims and filed a Petition for Judicial Review of agency action before this Court.

III. ISSUE FOR REVIEW

1. WHETHER PL 13-60 OR PL 16-19, WHICH AMENDED THE REQUIREMENTS FOR A CLAIMANT'S ELIGIBILITY TO DISABILITY PENSION AND LOWERED THE PERCENTAGE OF ANNUITY, ARE APPLICABLE RETROACTIVELY TO PETITIONERS.

IV. STANDARD OF REVIEW

The standard of review the Superior Court must apply when reviewing agency actions within the Administrative Procedure Act ("APA") is set forth in 1 CMC § 9112(f).[1] *Camacho v. Northern Marianas Retirement Fund*, 1 NMI 362 (1990). Section 9112(f) requires a reviewing court to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of an agency action. *Tenorio v. Superior Ct.*, 1 NMI 1 (1989). Specifically, § 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; (iii) In excess of statutory jurisdiction, authority, or limitations, or short of statutory rights; (iv) Without observance of procedure required by law; (v) Unsupported by substantial evidence in a case subject to 1 CMC §§ 9108 and 9109 or otherwise reviewed on the record of an agency hearing provided by statute or (vi) unwarranted by facts to the extent that the facts are subject to trial de novo by the reviewing court.

The standard of review for an appeal alleging an arbitrary and capricious action is similar to the abuse of discretion standard. *In re Blankenship*, 3 NMI 209 ¶ 16 (1992). "A court will review an action or decision alleged to be arbitrary and capricious to determine whether the action was reasonable and based on information sufficient to support the decision at the time it was made." *Id.*

Factual determinations from administrative hearings are reviewed under the substantial evidence standard of review. 1 CMC § 9112(f)(2)(v); *see Limon v. Camacho*, 1996 MP 18 ¶ 22; *Barte v. Saipan Ice, Inc.*, 1997 MP 17. In applying the substantial evidence standard, a court must determine whether agency action was reasonable based on the information before the agency, however, the reviewing court is to uphold the agency determination even if supported by something less than the weight of evidence if the agency's conclusions are reasonable. *In re Hafadai Beach Hotel Extension*, 4 NMI 37, 44 (1993).

Issues of law arising from administrative hearings are reviewed *de novo*. *Tenorio v. Superior Court*, 1 NMI 4, 9 (1989).

In judicial review of agency action, a petitioner seeking an order setting aside an agency decision bears the burden of proof. *In re Hafadai Beach Hotel Extension*, 4 NMI at 45.

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[1] The APA is found in 1 CMC §§ 9110 *et seq.*

V. DISCUSSION

A. THRESHOLD ISSUES

Parties are generally required to exhaust all administrative remedies before pursuing an action in court. *See Rivera v. Guerrero*, 4 NMI 79, 84 n.37 (1993). The APA also requires final agency action before a party may appeal to the trial court. *Marianas Ins. Co. v. Commonwealth Ports Auth.*, 2007 MP 24 ¶ 15.

Both exhaustion and finality are jurisdictional prerequisites to judicial review and can be raised by the court *sua sponte*. *See Cody v. Northern Mariana Islands Retirement Fund*, 2011 MP 16 ¶ 10*; Marianas Ins. Co.*, 2007 MP 24 ¶ 27.

1. Exhaustion of Administrative Remedies

The doctrine of exhaustion of administrative remedies requires parties challenging agency actions and decisions to exhaust all administrative remedies before seeking judicial review. *See Cody*, 2011 MP 16 ¶ 11*; Marianas Ins. Co.*, 2007 MP 24 ¶ 12; *Myers v. Bethlehem Shipbldg*, 303 U.S. 41, 50-51 (1939). Parties need not exhaust every potential remedy available to them. Instead, parties must only exhaust "all intra-agency appeals expressly mandated either by statute or by the agency's regulations." *Cody*, 2011 MP 16 ¶ 12 *(*quoting *Rivera v. Guerrero*, 4 NMI 79, 84 n.37.)

Northern Mariana Islands Administrative Code section 110-10-501 provides that "any person aggrieved by a decision of the Administrator of the Retirement Fund shall appeal the decision to the Board by filing a written notice of appeal . . . ." NMIAC § 110-10-501; *see also Cody*, 2011 MP 16, fn. 12. "Thus, an appeal of the Administrator's decision to the Board and a subsequent decision ('initial intra-agency appeal') is an expressly mandated remedy that aggrieved Fund members are ordinarily required to exhaust." *Cody*, 2011 MP 16 ¶ 12.

Petitioners each filed written notice of appeal to the Board after a decision of the Fund Administrator in this case. The Board recognized the appeals of Santos and Arriola through its March 19, 2009 Notice of Briefing Schedule for Consolidation of Cases letter, but no briefing schedule was ever set. Pet'rs Ex. at pp. 37, 64. The notices of appeal filed by Taisacan and Basa-Alam were never acted on by the Board. On July 22, 2009, Petitioners each followed up with a letter to the Board urging immediate action.

An exception to the exhaustion requirement exists where no time limits are in place for agency action and an agency can essentially bury claims through undue delay and such delay would cause undue prejudice to claimants. *See Cody*, 2011 MP 16 ¶¶ 11-17. Similar to *Cody*, the Board here did not act on Petitioners Notice of Appeal.[2]

Petitioners attempted to exhaust their claims at the administrative level by submitting their Notice of Appeal to the Board. However, inaction by the Board amounted to undue delay that prejudiced Petitioners. "[A]pplying the exhaustion requirement as a bar would facilitate the Fund's ability to use its indefinite timeframe to bury unfavorable claims in the administrative process and to stay the proceedings for an indefinite time." *Cody*, 2011 MP 16 ¶ 17. Therefore, the exhaustion requirement does not act as a bar to Petitioners' claims being brought forward here.

2. Final Agency Action

Final agency action or an applicable exception is the second jurisdictional prerequisite to appeal from agency action and a requirement prior to a review by this Court. *Cody*, 2011 MP 16 ¶¶ 18-22.

> The NMI APA provides for judicial review of final agency actions. *Marianas Ins. Co.*, 2007 MP 24 ¶ 15. (citing 1 CMC § 9112(d)). Under the NMI APA, an aggrieved party must seek judicial review within thirty days of a final agency action. *Id.* (citing 1 CMC § 9112(a)-(b)). Two requirements must be satisfied for an agency action to be considered final. *Id.* at ¶ 27. First, the action 'must mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature.' *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Second, the action 'must be one by which rights or obligations have been determined, or from which legal consequences will flow.' *Id.*

Cody, 2011 MP 16 ¶ 18.

Petitioners did not appeal from a final agency action when they brought forth this Petition for Review. The second finality requirement has not been met here because there was not a consummation of the agency's decision-making process. Petitioners appealed the decisions regarding their disability retirement as required by NMIAC § 110-10-505, and intra-agency appeal was still pending when they filed their Petition for Review with this Court. Because Petitioners did not appeal from a final agency action, an exception to the finality requirement must be met.

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[2] The time from filing the Notice of Appeal to filing the Petition for Review ranged from three to eight months for Petitioners.

Agency inaction may constitute a final action subject to judicial review when the agency inaction has the same impact upon the rights of the parties as a denial of relief. *Associacao Dos Industriais de Cordoaria e Redes v. United States*, 828 F. Supp. 978, 985 (Ct. Int'l Trade 1993); *see also Beyond Pesticides/Nat'l Coalition Against the Misuse of Pesticides v. Whitman*, 294 F. Supp. 2d 1, 20 (D.C. Cir. 2003). "Agencies cannot insulate their decisions from . . . judicial review simply by failing to take 'final action' . . . ." *Pac. Gas & Elec. v. Fed. Energy Regulatory Comm'n; In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1124 (9th Cir. 2001). The Board's inaction here amounted to a denial of relief to Petitioners. *See Cody*, 2011 MP 16 ¶¶ 20-22. The inaction was sufficiently final so as to make judicial review appropriate here.

B. RETROACTIVE APPLICATION OF THE LAW IS NOT APPROPRIATE AS TO PETITIONERS

Petitioners argue the retroactive application of PL 13-60 or PL 16-19, which amended the requirements for a claimant's eligibility to disability pension and lowered the percentage of annuity is improper.

At the time Petitioners joined the Fund PL 6-17 was in effect. PL 6-17 provided with regards to eligibility:

> A member shall be considered totally and permanently disabled after the Board receives ***written certification by at least two licensed and practicing physicians selected by the Board that the member is totally and permanently disabled*** for the further performance of the duties of any assigned position in the service of the government. If, upon consideration of the reports of the physicians and any other evidence presented to the Board by the member or others interested therein, the Board finds the member to be totally and permanently disabled, it shall grant the member a disability retirement annuity upon written certification that the member has been separated from the service of the employer because of total disability of such nature as to reasonably prevent further service for the employer, and as a consequence is not entitled to compensation from the government. (emphasis added)

PL 6-17 further provides:

> Any member who becomes totally and permanently disabled. for service from an occupational cause shall receive an annuity equal to ***66 - 2/3 percent*** of the salary such member was receiving at the time the disability was incurred. Such annuity shall continue until the member reaches 62 years of age. (emphasis added)

Two subsequent changes were made to these provisions by PL 13-60 (December 5, 2003) and PL 16-19 (November 7, 2008). PL 13-60 changed the requirement for disability to "written

certification by at least two licensed and practicing physicians and a vocational rehabilitation counselor preferably one with a master's degree selected by the board that the member is totally and permanently disabled . . .” and also reduced the annuity equity to 50 percent. PL 16-19 further amended the requirement for disability to “written certification by at least two licensed and practicing physicians selected by the board, at least one of whom is a specialist in the area of the disability being evaluated, that the member is totally and permanently disabled . . . .”

Petitioners were Fund members while PL 6-17 was in effect. The Fund, however, applied PL 16-19 for Petitioners Santos, Arriola, and Taisacan in denying their disability retirement. Petitioner Basa-Alam was approved for disability retirement but at an annuity rate of 50 percent (the rate as amended in PL 13-60) was awarded. The subject of this Petition for Review deals with the applicability of these laws and their amendments to Petitioners regarding their applications for disability retirement.

The Commonwealth Supreme Court recently decided the case of *Cody v. Northern Mariana Islands Retirement Fund*, 2011 MP 16. The *Cody* case addressed the issue before this court on review of whether PL 13-60 or PL 16-19 are applicable retroactively to Petitioners. *Cody* instructs that, “[i]n the Commonwealth, persons acquire an accrued or vested right to disability retirement benefits by virtue of their membership in the Fund.” *Cody*, 2011 MP 16 ¶ 33 (*citing Mallette v. Arlington County Emples, Supp. Ret. Sys. II*, 91 F.3d 630, 636 (4th Cir. 1996)). Therefore, the law applicable to Petitioners shall be the law in effect when they became members in the Fund. Thus, as to Petitioners, the provisions of PL 6-17 are applicable for their disability applications and equity annuity percentage.

C. AN ELIGIBILITY DETERMINATION MUST BE MADE BY RESPONDENTS

Respondents assert that as to Petitioners Santos, Arriola, and Taisacan they have not met the requirement of 1 CMC § 8347(a) of “[certifying] that the member has been separated from the service of the employer because of total disability of such nature as to reasonably prevent further service for the employer.”

Section 8347(a) states:

> ***If, upon consideration of the reports of the physicians and any other evidence presented to the Board by the member or others interested therein, the Board finds the member to be totally and permanently disabled,*** it shall

> grant the member a disability retirement annuity upon written certification that the member has been separated from the service of the employer because of total disability of such nature as to reasonably prevent further service for the employer . . . . (emphasis added)

Section 8347(a) lists specific threshold requirements that must be certified to the Board prior to a finding of disability. The language of the statute provides for consideration by the Board of such certifications and "any other evidence presented." 1 CMC § 8347(a).

The Board has a fiduciary duty to the Fund members. *McKee v. Bd. of Trs.*, 367 Ill. App. 3d 538, 545-546 (Ill. App. Ct. 4th Dist. 2006). "[F]actual disputes cannot be resolved by a mechanical counting of certificates but must depend on findings made by the board." *Id.* It is consistent with the Board's fiduciary duties to consider each application for its merits so as to award disability pension only where warranted. This necessarily requires an inquiry into the facts surrounding the disability application. .

The Board alleges that Petitioners Santos and Arriola have not submitted any factual disputes. Pet'rs Ex. at pp. 37, 64. A factual determination, however, has not been made in accordance with the applicable law under PL 6-17. The Court is reluctant to remand back to a body who appears to have little to no consideration of the urgency of claims before it, especially when such claims have a large impact on the livelihood of claimants, who by submitting applications for disability have impliedly limited capacity to work and earn a living. Pursuant to § 8347(a), however, as to Petitioners Santos, Arriola and Taisacan the Board must consider their claims for disability retirement anew in light of the Boards fiduciary duty. The Boards factual findings and determination shall be consistent with the Order of this Court.[3]

It is regrettable that the Board did not address the Petitioners' appeals and instead chose to delay the proceedings through its inaction. The Court, however, cannot step in at this point and substitute its judgment for that of the Board. In light of the decision in *Cody* establishing the appropriate law to

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[3] "The administrative regulations governing the Fund provide that, after reviewing the notice of appeal, the Board may at its discretion either 'preside at the taking of evidence' or 'appoint a hearing officer to preside at the taking of the evidence.' NMIAC § 110-10-510(a). If a hearing officer is appointed, the hearing officer 'shall initially decide the case.' NMIAC § 110-10-510(b)." *Cody v. Northern Mariana Islands Retirement Fund*, 2011 MP 16, fn. 4.

be used for Petitioners, the Board now has clear direction in order to determine the disability status of Petitioners.

As to Petitioner Basa-Alam, a factual determination has been made awarding disability retirement, however at a rate of 50 percent of her salary. *Cody* has made clear that PL 6-17 applies to Basa-Alam and therefore a rate of 66 - 2/3 percent should have been awarded.

The Court, therefore, remands this case with regards to Petitioners Santos, Arriola and Taisacan for a factual determination and decision in accordance with the law set forth in *Cody* and this Order. Petitioner Basa-Alam is to receive an annuity of 66 - 2/3 percent henceforth, and shall receive back pay to April 4, 2009 (the date of her approval for disability pension). Pet'rs Ex. at p. 93(b).

VI. CONCLUSION

For the foregoing reasons, the Court hereby **REMANDS** the case with instructions as to Petitioners Santos, Arriola and Taisacan. Santos, Arriola and Taisacan are given the opportunity to resubmit their application for disability retirement. The Court **ORDERS** the Board of Trustees to take immediate action and reach a determination on these cases, such action shall not exceed 30 days from the submission of disability applications by Petitioners.

IT IS FURTHER ORDERED that Petitioner Basa-Alam is to receive forthwith an annuity of 66 - 2/3 percent of her salary at the time of separation, and shall receive back pay amounting to the difference dating back to April 4, 2009.

So ORDERED this 9th day of January, 2012.

/ s /

David A. Wiseman, Associate Judge