



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**

<b>JAMES C. DELEON GUERRERO,</b>	)	<b>CIVIL CASE NO. 09-0186</b>
<b>and 26 DPS Officers as Intervenors,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>FINDINGS OF FACT AND</b>
	)	<b>CONCLUSIONS OF LAW</b>
<b>CNMI DEPARTMENT OF PUBLIC</b>	)	
<b>SAFETY by and through its Commissioner,</b>	)	
<b>Santiago F. Tudela,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	
_____	)	

**I. INTRODUCTION**

**THIS MATTER** came for an evidentiary hearing on March 9, April 4 and April 6, 2011 in Courtroom 223A. Defendant CNMI Department of Public Safety (“DPS”) was represented by Assistant Attorney General James T. Mitchell, Esq. Plaintiff James C. Deleon Deleon Guerrero and 26 DPS Officers as Intervenors (“Plaintiff” or “Deleon Guerrero”) was represented by, Robert Tenorio Torres, Esq.

This Petition for Judicial review stems from grievances by Deleon Guerrero, a DPS Employee, taking issue with the actions of DPS with respect to the hiring, selection and promotion of civil service employees within DPS.

The agency record below is sparse. Similarly, the Civil Service Commission (“CSC”), the entity charged with administration of the Personnel Service System Rules and Regulations (“PSSRR”) as well as the Civil Service Act (“CSA”), was unable to take action as to Deleon Guerrero’s grievance due to lack of quorum and advised him to file his grievance with the Court. The Court is therefore charged with undertaking judicial review of agency inaction and Deleon Guerrero’s grievance.

1 Despite a dearth of a record at the agency level, the Court is now in possession of a substantial body  
2 of pleadings, deposition transcripts, exhibits, and testimony as to this matter.

3  
4 **II. BACKGROUND**

5 On February 1, 2011, the Court issued an Order Granting in Part Plaintiff’s and Defendant’s Motions  
6 for Summary Judgement. The Court concluded that issues of material fact still remain as to (1) whether  
7 Officer Tagabuel and Officer Ogumoro were hired in violation of the PSSRRs; and (2) whether the  
8 Governor’s Directive made Plaintiff’s request for an order ending discriminatory practices and disparate  
9 treatment moot. An evidentiary hearing was held on March 9, April 4 and April 6, 2011 in order to elicit  
10 evidence on these remaining factual questions.

11 **A. REALLOCATION, UNFAIR PROMOTIONS AND SELECTIONS**

12 Deleon Guerrero filed a grievance regarding the reallocation of Alfred Celes (“Celes”) from Police  
13 Officer II to Sergeant and the unfair practices within DPS relating to promotions and selections. Previously  
14 the Court ruled on Deleon Guerrero’s grievance as to the reallocation of Celes. DPS asserted that, due to  
15 its demotion of Celes, the matter of his grievance was rendered moot.

16 While, the matter as to Celes may have been rendered moot in light of his demotion as a final  
17 adverse action, the question of continued unfair practices as to promotions and/or selections, whether or not  
18 by reallocation, remains before the Court. DPS asserts it has ended this practice, however, the testimony  
19 elicited revealed that the additional efforts, though unsuccessful, to reallocate with other employees and the  
20 actual and completed reallocation of Sgt. Eloy K. Fitial (“Sgt. Fitial”) on Tinian from Sergeant to Captain  
21 has not obviated the need for judicial review and action. Indeed, these facts not only compel judicial review  
22 but they mandate enforcement of the law and the imposition of sanctions in the form of attorneys fees and  
23 costs against DPS.

24 The Court finds, as discussed further below, as to the reallocation of Sgt. Fitial to Captain, that the  
25 grievance by Deleon Guerrero with respect to violations of the PSSRR and the CSA as to *de facto*

1 promotions, or selections for promotion through the reallocation process, is well-taken and sustained.  
2 Deleon Guerrero has met his burden of showing by substantial evidence that DPS has in fact acted unfairly  
3 and illegally when it reallocated. Therefore, the grievance on this ground is sustained.<sup>1</sup>

4 **B. A DPS DESK AUDIT WAS CONDUCTED**

5 With respect to Deleon Guerrero’s grievance regarding the need for a DPS desk audit in light of the  
6 foregoing, the Court would have found the need for such a desk audit as an appropriate remedy. However,  
7 since Deleon Guerrero’s filing of his Petition for Judicial Review, DPS and the CNMI Government  
8 commissioned a desk audit within DPS. The desk audit by Management Analysis Inc. (“MAI”) was  
9 completed, filed and accepted by the CNMI Government and the administration.

10 In his grievance and in Petition for Judicial Review, Deleon Guerrero sought desk audit relief or  
11 remedy, as permitted under the PSSRR as one approach to ensure the fair process of promotions or  
12 selections for promotions within DPS. In his testimony on April 6, 2011, Deleon Guerrero admitted that  
13 he was interviewed by MAI regarding the organizational duties of officers within DPS, but not specifically  
14 as to his duties. (*See* Deleon Guerrero TR of April 6, 2011 45-47.) The quality of and whether the MAI  
15 audit will be implemented are not within the Court’s purview here.

16 Because DPS has conducted a desk audit, Deleon Guerrero’s grievance on this point has been  
17 addressed. How the audit recommendations are carried out by the Office of Personnel Management  
18 (“OPM”) and/or DPS, if ever, is not for this Court to determine in this action. DPS heeded the concern of  
19 Deleon Guerrero and completed an agency desk audit. Deleon Guerrero has proffered no further facts  
20 disputing the desk audit nor any other reason related to the desk audit issue. Therefore, Deleon Guerrero’s  
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22 <sup>1</sup> DPS was given several opportunities to address this matter and it failed to do so with Deleon Guerrero’s grievances. (*See*  
23 Transcript of April 6, 2011 Hearing at 39-46.) The CSC could not hear the matter due to a lack of quorum, the appointees of  
24 whom are nominated by the Governor. Thus, Deleon Guerrero was given his right to appeal this matter to the court as a final  
25 agency decision and he was forced to prosecute his grievance before this Court. DPS has fully abdicated its responsibility to  
handle and consider grievances. Having done so, this Court will now fully arbitrate this matter as an final decision on judicial  
review.

1 grievance with regards to a desk audit is resolved.

2 **C. HIRING AND SELECTION OF SGT. PAUL OGUMORO AND SGT. VICENTE TAGABUEL**

3 As to the grievance and objections by Deleon Guerrero with respect to the selection of Sgt. Paul  
4 Ogumoro (“Ogumoro”) and Sgt. Vicente Tagabuel (“Tagabuel”), the Court finds them to be meritorious  
5 with regard to their hiring and selection. The Court summarizes its decision here as the testimony is clear  
6 and undisputed.

7 As to Ogumoro, the deposition testimony of Rebecca Warfield is that she selected Ogumoro on a  
8 provisional appointment so that he could “hit the ground running” based on her estimation of his experience.  
9 The position was duly announced and published under the OPM rules and procedures under the PSSRR.  
10 (*See* Rose Dela Cruz Transcript (“TR”) of March 9, 2011 10-28.) In the eligibility list Ogumoro was rated  
11 below another individual. Ogumoro was selected by the DPS Commissioner and he was hired as a Sergeant.  
12 (*Id.*; *see* Joseph Pangelinan TR 77.)

13 Deleon Guerrero’s grievance is that Ogumoro’s salary is higher than his salary despite Deleon  
14 Guerrero’s time in service and despite the fact that Ogumoro previously was with DPS as a rank officer.  
15 The group of officers who have joined Deleon Guerrero’s action also assert that had they known of the  
16 vacancy announcement they would have applied for the position. However, there is no proof or evidence  
17 that DPS or OPM caused the vacancy announcement to be withheld or hidden in any way. For example,  
18 DPS Administrative Assistant Rose Dela Cruz testified that she placed the vacancy announcement for the  
19 Sergeant position in the DPS Section boxes for posting. (*See* Rose Dela Cruz TR 15-17.) The joining  
20 officers, Sgt. Anthony Macaranas, Police Officer III Juan Mendiola, Sgt. Elden Dela Cruz and Sgt. Vicente  
21 Sablan testified that they did not see the vacancy announcement and would have sought the position or  
22 salary but for the salary  
23 freeze. (*See* Intervening Officers’ April 6, 2011 TR; Sgt. Anthony Macaranas TR 86.) Police Officer III  
24 Juan Mendiola testified that he submitted an application for the position of Sergeant in 2003 expecting to  
25 be considered when the vacancy issued. (*See* Juan Mendiola TR of April 6, 2011 77.) However, no one

1 has testified that the announcement was done out of the regular procedure of sending out position openings  
2 to all agencies and for posting in all agency offices. In fact, the testimony is that the position was  
3 announced. (Joseph Pangelinan TR 77-90.)

4 DPS's position with respect to the higher salary or selection of Ogumoro is that due to the austerity  
5 measures promotions within DPS and salaries were frozen. The only way a person could advance would  
6 be either through a reallocation or through an outside hire on a competitive announcement. (See Paul  
7 Ogumoro TR 51-52.) Thus, officers like Officer Mendiola could never receive a raise or promotion unless  
8 they took the curious route of resigning from DPS and applying for the vacant Sergeant position.

9 If the Government wished to save money, hiring a sergeant from the outside at the highest salary  
10 level would make no sense. The Court disagrees with DPS's rationale or justification for its actions and  
11 finds its approach circumspect. The approach taken by DPS was wrong and usurped the civil service  
12 protections of employees who merit increases in favor of outside hires whose selection can be suited as  
13 needed for political or arbitrary reasons. But that is not the issue of concern as to Deleon Guerrero's  
14 grievance; he objects to the manner of Ogumoro's selection. The relevant question is whether Deleon  
15 Guerrero's grievance as to the manner of Ogumoro's selection and/or hiring is sustained that DPS violated  
16 any PSSRR provisions or procedures including the CSA.

17 The Court can find no basis for the proposition that what DPS and OPM did as to the vacancy which  
18 lead to Ogumoro's selection was improper or in violation of the PSSRR. There is also no dispute in the  
19 Court's view that the intervening officers such as Officer Mendiola and/or Sgt. Dela Cruz, for example, and  
20 many more within DPS merited either promotions or salary increases or both.<sup>2</sup> As to the salary of Ogumoro,  
21 the Court finds that the austerity measures, promulgated as regulations within the PSSRR, do impose a

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23 <sup>2</sup> The Court comments on the position by DPS and Ogumoro that he performed as a law enforcement officer during his tenure  
24 with the Attorney General's Investigate Unit. (Paul Ogumoro TR 64-67.) The provisions of 1 CMC §8282 establish that an  
25 AGIU Investigator is not a law enforcement officer position. Commissioner Tudela has asserted that he has authority to  
deputize personnel to carry firearms and/or act as law enforcement officers. (TR 20-21.) This practice has no authority in law  
and is not set forth in the duties of the DPS Commissioner. "Deputizing" personnel is without authority.

1 salary freeze within DPS and all other agencies unless there are certain exemptions. The Governor's  
2 Directive #275 at Exhibit "A" reaffirms the austerity measures regulation, and DPS simply cannot confer  
3 salary increases or promotions by reallocation or in any way such as it should not have done with Celes.  
4 For the above reasons and those cited in the exhibits including the testimony of DPS Commissioner  
5 Warfield; Commissioner Tudela; Ogumoro; Ms. Dela Cruz and OPM Classification Chief Joseph  
6 Pangelinan, Deleon Guerrero's grievance on this ground is without basis and is denied. As to Tagabuel,  
7 Deleon Guerrero and the joining officers such as Sgt. Macaranas and Sgt. Elden Dela Cruz, in similar  
8 fashion, take issue with his selection under a "rolling vacancy announcement"<sup>3</sup> by OPM and for which  
9 Tagabuel was the only person whom applied and was selected. Deleon Guerrero and the joining officers also  
10 take issue with Tagabuel's return to DPS as a Sergeant, a rank and salary that those officers in the Police  
11 Officer III position would have sought had they been afforded the opportunity. Again, in this respect DPS  
12 has taken the view that it does not open the position "in-house" due to austerity measures. Nevertheless,  
13 none of the officers applied for the Sergeant vacancy position. There is no testimony or basis for the Court  
14 to conclude that the manner of the vacancy announcement for Tagabuel's salary was improper or involved  
15 any design by OPM or DPS to tailor-make the position for Tagabuel. There is the conflicting testimony by  
16 DPS Administrative Assistant Ms. Dela Cruz who testified that Commissioner Tudela admitted to her that  
17 Tagabuel's hiring was pursuant to the instructions of Governor Fitial. (Dela Cruz TR 74.)

18 Commissioner Tudela, however, testified that it was not the case that Governor Fitial directed  
19 Tagabuel's hiring or selection. (Tudela TR 22.) Rather, Commissioner Tudela testified that despite  
20 Tagabuel's prior higher rank, he wished to give Tagabuel a second chance. (See Commissioner Tudela  
21 Dep.) OPM Classification Chief Pangelinan testified that there was no consideration or knowledge of  
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23 <sup>3</sup> This "rolling vacancy" announcement is an interesting point. OPM employee Joseph Pangelinan claimed that such an  
24 announcement was limited to one year but could cite to no regulation in support of the proposition. In light of Deleon  
25 Guerrero's submitted application for Captain in Exhibit 25, the practice can be manipulated to suit the wishes of any agency  
head.



1 the filling of vacancies. The PSSRRs further establish standards for training and experience and the other  
2 qualifications of applicants. To effect employee promotions, the PSSRRs generally call for a two step salary  
3 increase. *See* NMIAC §10-20.2-1101. Prior to promoting an employee to a higher position, however, the  
4 PSSRRs and DPS policy require the position to be announced. (Rosario Dep. at 22, 26; Tudela Dep. at 20-  
5 21.) To address the financial realities facing the Commonwealth and as codified in the PSSRR since 2005,  
6 the Governor has put in place certain austerity measures that have effectively frozen all salary promotions  
7 and within grade increases. NMIAC § 10-20.2-1101(Financial Austerity Measures). As a result of these  
8 austerity measures, no salary increases have been permitted. Imposing austerity measures also triggered  
9 a freeze on hiring, except when the governor saw a need to hire certain individuals with certain expertise.  
10 (Rosario Dep.16.) Even in the event of some perceived exception to the freeze, the Governor has made clear  
11 that his “approval of that hire does not waive any statutory or regulatory hiring requirements for process and  
12 will be recalled if any such violation is created by hiring.” (Rosario Dep. Ex. 18.)

13         During austerity, any hiring remains subject to the classification and compensation requirements of  
14 the CSA and PSSRR’s. (*Id.* at 18.) While austerity measures remain in effect, employees have been  
15 promoted but do not receive salary increases. (*Id.* at 22.) During the pendency of austerity measures and  
16 since 2006, OPM has not been processing promotions. (*Id.* at 27.) In contrast to a promotion, a reallocation  
17 may occur when an employee is performing over and beyond his normal duties and is actually performing  
18 the duties required of another position. (*Id.* at 30.) The NMIAC likewise includes specific policies,  
19 procedures, practices and guidelines governing specific functions and activities relative to position  
20 classification and compensation in the personnel service system. *See* NMIAC § 10-20.1-101; 1 CMC §  
21 3806(d). In addition to calling for accurate and timely position descriptions, the NMIAC allows for  
22 reallocation or reclassification of positions to permit higher pay. *See* NMIAC § 10-20.2-332.<sup>4</sup>

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24 <sup>4</sup> The Code also calls for position audits, sometimes called desk audits, to be conducted whenever a new position is proposed,  
25 or there is to be a significant change in the duties and responsibilities of an existing position. Often, this type of audit occurs  
as a result of budget requests, or to make certain that the agency is using its budget properly. NMIAC § 10-20.1-901.



1 According to Special Assistant to the Governor in Personnel Matters, Matilde A. Rosario,  
2 reallocation occurs when an employee does more than the job requires.<sup>5</sup> When there is a reallocation or  
3 reclassification of any employee position to a higher class, NMIAC § 10-20.2-332 requires the employee  
4 to be compensated “at the lowest step in the higher pay level which at least equals the amount of a two step  
5 increase in the lower pay level.” In the event of a reallocation or reclassification, however, “the rate of  
6 compensation cannot exceed the rate of the maximum step in the higher pay level.”

7 The CSA and PSSRR authorize employees to protest unlawful personnel actions by bringing a  
8 grievance. The PSSRR names the DPS Commissioner as the appointing or supervising authority for the  
9 receipt and consideration of employee grievances. *See* NMIAC § 10.20.2-285. NMIAC § 10-20.2-293 first  
10 requires an aggrieved employee to discuss the problem informally with his or her supervisor, or if  
11 impracticable, with a higher level supervisor. *Id.* If the grievance is not settled within five calendar days,  
12 or if the employee is not satisfied with the decision of the immediate supervisor, the employee or  
13 representative may, within the next ten calendar days, put the grievance in writing and submit it to the  
14 appointing authority as a formal grievance.

15 Under NMIAC § 10-20.2-294, the appointing authority is charged with examining the grievance,  
16 discussing it with the grievant or his representative, and rendering a written decision within fourteen  
17 calendar days after receipt of the grievance.

18 If the appointing authority cannot settle the grievance to the employee’s satisfaction within this time  
19 frame, the employee is entitled to submit a grievance to the CSC within fifteen calendar days after receiving  
20 written notification of the appointing authority’s decision. The time for the CSC to address an employee  
21 grievance is not unlimited. If the CSC desires to have the grievance heard by a hearing officer, it must  
22 inform the aggrieved employee and representative as soon as possible.

23 The CSC may, however, deny a hearing when a hearing would be impractical or for any other  
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25 <sup>5</sup> Ms. Rosario worked at OPM for thirty years before occupying her present position with the Governor. As previous  
Director of OPM, Ms. Rosario was charged with overseeing the implementation of the CSA and following the PSSRs.

1 extraordinary circumstance. NMIAC § 10-20.2-276(b)(1). In such a scenario, the CSC must notify both  
2 parties in writing of the reason(s) for denying a hearing.

3 Finally, any citizen may bring suit to restrain a disbursing officer from making any payments of any  
4 salary or compensation to any person whose appointment or employment has not been made in accordance  
5 with the CSA or the rules and regulations implementing its provisions. *See* 1 CMC § 8144(a). The CSA  
6 further provides that “[a]ny sum paid contrary to . . . [its provisions] and the rules and regulations  
7 established thereunder may be recovered in an action maintained by any citizen from any officer who made,  
8 approved, or authorized such payment, or who signed or countersigned a voucher, payroll, check or warrant  
9 for such payment . . . .” Any citizen bringing such an action is entitled, under the CSA , “to costs of the suit,  
10 including a reasonable attorney’s fee, from any money recovered in such action.” *Id.*

11 Commissioner Tudela did not approve of the decision to promote Celes to police sergeant. (Tudela  
12 Dep. 22-23.) According to Commissioner Tudela, there were already several Police Officer IIs that could  
13 do the work of Police Sergeant and who had been with the DPS longer than Celes. *Id.*

14 To protest this action and to correct a violation of the CSA and the PSSRR, Deleon Guerrero filed  
15 his Informal Grievance the very next day. (*See* Ex. 16.) Deleon Guerrero addressed the Informal Grievance  
16 to DPS Captain Lawrence M. Camacho. Although Captain Camacho agreed that the promotion and salary  
17 increase were wrong, he ignored Deleon Guerrero’s Informal Grievance and failed to address Deleon  
18 Guerrero’s concerns.<sup>6</sup> Deleon Guerrero’s timely Petition for Judicial Review followed on May 9, 2009  
19 pursuant to 1 CMC § 9112. DPS only took action after Deleon Guerrero prosecuted this action out of DPS  
20 to the CSC and then to the Superior Court.

21 In the Notice of Proposed Adverse Action to Reduce Celes’ Rank and Pay, DPS through then Acting  
22 Commissioner Aniceto Ogumoro admitted that competitive promotion procedures were not applied, and  
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24 <sup>6</sup> Captain Camacho testified at his deposition that he had received Deleon Guerrero’s letter and handed it to his boss, Aniceto  
25 Ogumoro. (*See* Captain L. Camacho Dep. 31.) Camacho further testified that Celes’ promotion and salary increase were  
wrong, but he was not in a position to do anything about it. (*Id.* 33.)

1 thus, Celes' promotion "was inappropriately prepared and deemed in violation of the PSSRR and NMIAC  
2 under the Reallocation/Reclassification provisions." *Id.* Commissioner Tudela has confirmed as much in  
3 his testimony. (Tudela TR 13-15; 38-42.)

4 In June of 2009, Director of Personnel Management Isidro Seman signed off on a Notification of  
5 Personnel Action ("NOPA") demoting Celes to Police Officer II from Sergeant. (*See* Aniceto Ogumoro  
6 Dep.) Notwithstanding the NOPA, Director Seman could not testify with any certainty as to whether Celes  
7 had been returned to his prior position of Police Officer II and whether Celes's salary had been reduced to  
8 what he was earning prior. Commissioner Tudela answered this question unequivocally in his testimony:  
9 DPS has not acted to recover the illegal overpayments to Celes. (Tudela TR 18-19.)

10 The Administrative Procedure Act ("APA") at 1 CMC § 9112(f) prescribes the standard of review  
11 that the Superior Court must apply when reviewing agency action under the APA. *See Camacho v.*  
12 *Northern Marianas Retirement Fund*, 1 N.M.I. 362 (1990). In his administrative appeal, Deleon Guerrero  
13 asked DPS and now this Court to set aside the reallocation of Celes and to Order immediate corrective  
14 action. That includes the recovery of overpayments and ending the *de facto* "promotion by reallocation"  
15 that will force DPS compliance with promotion and salary/merit increase procedures inclusive of Deleon  
16 Guerrero.

17 Specifically, Deleon Guerrero argues that 1CMC § 9112(f)(2)(I) and (iv) control the outcome of this  
18 case. Section 9112(f)(2) mandates that a court set aside agency action if it finds the action is found to be  
19 "(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, . . . [or] (iv)  
20 without observance of procedure required by law." Alternatively, Deleon Guerrero contends that the  
21 promotion/reallocation decisions described herein were also "unwarranted by the facts to the extent that the  
22 facts are subject to trial de novo by the reviewing court." 1 CMC § 9112(f)(2)(i), (iv), (vi).

23 An agency action qualifies as arbitrary and capricious "if the agency has . . . entirely failed to  
24 consider an important aspect of the problem." *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993).  
25 The arbitrary and capricious standard is appropriate, moreover, when the agency has refused to hold a

1 formal hearing, where the agency has not bothered to hear evidence and the testimony of witnesses, and  
2 where the agency continues to follow a course of action that contravenes the law of the Commonwealth and  
3 its own procedures. *See Dept. of Pub. Safety v. Office of the Civil Service Commission (Chong)*, No. 01-  
4 521E (N.M.I. Super. Ct. Sept. 12, 2002) (Order Setting Aside Oct. 4, 2001 CSC Decision and Order), *aff'd*,  
5 2005 MP 6.<sup>7</sup>

6 Commonwealth courts, accordingly, have followed the rule that the construction given to a statute  
7 by the executive and administrative officers of the Commonwealth charged with its implementation is  
8 generally entitled to great weight and will be followed unless there are cogent reasons for holding otherwise.  
9 *See Island Apparel, Inc. v. Secretary of Finance*, Civil Action No. 01-0110 (N.M.I. Super. Ct. November  
10 29, 2001) (Order on Partial Motion for Summary Judgment).

#### 11 12 **IV. DISCUSSION**

##### 13 **A. CONTINUING VIOLATIONS EXISTED IN THE PROMOTION AND/OR REALLOCATION EFFORTS BY DPS**

14 The evidentiary hearing before this Court dealt with the remaining issues of Deleon Guerrero's  
15 grievance regarding non-compliance by DPS with the CSA and PSSRR relating to promotions and salaries  
16 through the reallocation process. The original matter of Celes prompted the grievance by Deleon Guerrero,  
17 but the question remains whether DPS's actions constituted continuing violations for which judicial redress  
18 is appropriate. For the reasons discussed below, the Court finds that there were continuing violations  
19 constituting *de facto* promotion by reallocation which were not proper.

20 DPS is a line department of the Commonwealth of the Northern Mariana Islands as set forth in 1  
21 CMC § 2501 *et. seq.* Pursuant to 1 CMC § 8131(a), DPS is subject to the CSC and the rules and regulations  
22 enacted to implement its objectives. DPS is headed by a Commissioner, a position occupied by Tudela in  
23 this matter at its inception. At all times material hereto, Commissioner Tudela functioned as the appointing

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25 <sup>7</sup> The Court observes that like this prior DPS case involving the Division of Corrections, DPS has not heard or considered anything on the grievance.

1 authority to whom Deleon Guerrero filed his grievance and whose inaction and non-response Deleon  
2 Guerrero appealed to the CSC. Indeed, Tudela was the Commissioner who caused the demotion of Celes  
3 from Sergeant back to Police Officer II finding that his reallocation was inappropriate and wrong.

4         Nonetheless, Tudela was also in charge of the promotions of DPS officers and the payment of their  
5 salary and merit increases. (*See* Santiago Tudela Dep. May 5, 2010.) Deleon Guerrero filed this action to  
6 protest the DPS’s non-compliance with the PSSRR and the CSA governing civil-service employees. Deleon  
7 Guerrero has maintained in this action that DPS’s demotion of Celes did not bring DPS into compliance  
8 with the PSSRR and/or the CSA. DPS has conceded and admitted that it violated the Austerity Measures  
9 in the PSSRR by reallocating/promoting Celes, notwithstanding its attempt to minimize this particular  
10 ”transgression” as the violation of an executive decree, to wit Governor’s Directive #275 and not a statute  
11 or regulation. (*See* Opposition to Appellant’s Motion for Summary Judgment and Award of Attorneys Fees  
12 9.) Moreover, it is undisputed DPS has not acted to recover the illegal overpayments to Celes. (*See* Tudela  
13 TR 19.) Deleon Guerrero has maintained that this is an appropriate remedy for his grievance as provided  
14 for under the CSA and PSSRR.

15         Section 8 of the CSA, however, provides that the PSSRR have the force and effect of law. PSSRR  
16 § I.A; *see also* 1 CMC § 8117. The austerity measures were published in the Commonwealth Register and  
17 suspended portions of the PSSRR. DPS admits that exceptions have been made to the 1999 financial  
18 austerity ban on promotions. (*See* Appellee’s Memorandum submitted in support of its Motion for  
19 Summary Judgment 7.) According to DPS, however, promoting from within DPS would require pay  
20 increases in violation of the financial austerity measure. Therefore, DPS has no choice but to fill vacant  
21 positions by lateral hire. (*Id.* at 8.)

22         While the Court has already ruled on that portion of Deleon Guerrero’s grievance regarding  
23 Ogunoro and Tagabuel, the question remains whether or not DPS had continued to violate the CSA and the  
24 PSSRR, inclusive of the austerity measures, by its efforts to use reallocation *de facto* promotion procedure  
25 to circumvent the prohibitions of the Austerity Measures.

1 Specifically, Deleon Guerrero has proffered testimony and exhibits regarding DPS police officers  
2 for whom the agency sought reallocation. The record establishes that Notices of Personnel Action for  
3 Reallocation were initiated for DPS Police Officers Josepha Deleon Guerrero; Sandy Hambros; and Aniceto  
4 Ogomoro. (Dela Cruz TR 84-93.) Josepha Deleon Guerrero was to be reallocated from a Police Officer III  
5 to a Sergeant with a 10% increase, initiated in October, 2010. (*Id.*) Police Officer III Sandy Hambros was  
6 to be reallocated to a Sergeant with a 10% increase, initiated in October, 2010. (*Id.*) Police Officer II  
7 Dewain Stephen was to be reallocated to a Sergeant position, initiated in October, 2010. (*Id.*) DPS Captain  
8 Aniceto Ogomoro was to be reallocated to a Police Director. (*Id.*) However, these efforts were never  
9 approved nor did they ever take effect as to any of those officers as they were stopped by Commissioner  
10 Tudela. (*Id. at 91.*)

11 The testimony of Ms. Dela Cruz and Commissioner Tudela, however, evidence that the *de facto*  
12 practice of “promotion by reallocation” had not ended contrary to the representations by DPS or its counsel.  
13 On cross examination of Ms. Dela Cruz by DPS Counsel, DPS asserted, as it has stated in its pleadings, that  
14 there was no other reallocation within DPS save for the case of Celes. (*Id. at 96.*) On re-direct examination,  
15 Ms. Dela Cruz was asked regarding the reallocation of Sgt. Fitial. (Dela Cruz TR 98.)

16 Commissioner Tudela also testified and confirmed that Sgt. Fitial was reallocated from DPS  
17 Sergeant to Police Captain, leapfrogging over the Police Lieutenant position and salary and earning a  
18 Captain’s salary of approximately \$42,000. (Tudela TR at 11.) Commissioner Tudela attempted to draw  
19 a distinction between a DPS Captain position on Tinian, which was Sgt. Fitial’s station of duty. Tudela,  
20 however, admitted that DPS is in fact one agency. (*Id.*) Tudela also admitted that a job vacancy within DPS  
21 is not geographically exclusive to eligible officers on one island and not the other. (*Id. at 28; see also*  
22 *Pangelinan TR 102-04.*) Tudela admitted that as Commissioner he signed-off on the personnel actions for  
23 all DPS officers notwithstanding the island or location. (Tudela TR 28:16-22.) As such, Commissioner  
24 Tudela conceded that unlike Celes, he signed-off on the reallocation of Sgt. Fitial from DPS Sergeant to a  
25 DPS Captain position, a position which Fitial now occupies and continues to occupy. DPS offered no

1 testimony, exhibits or evidence to show that the job vacancy for the Police Captain position was conducted  
2 properly inasmuch as the matter was one of reallocation rather than a job vacancy announcement.

3 By comparison, Deleon Guerrero has occupied the position of DPS Sergeant for several years.  
4 Deleon Guerrero held the same rank and position as Sgt. Fitial and they attended the same police academy.  
5 Deleon Guerrero asserts that even on a reallocation, as previously discussed with Celes and as set forth in  
6 the PSSRR, Sgt. Fitial would not have qualified for a leapfrogging reallocation approach, in effect a  
7 promotion and for which he objects and seeks redress. Moreover, Deleon Guerrero applied for a Captain's  
8 position. (*See* Deleon Guerrero TR 31, 36-36.) He applied for the position because he was performing the  
9 duties of a Captain. (*Id.*) The application was received by OPM and remains on file. (*Id.*)

10 DPS has pointed to Directive #275 by Governor Fitial dated October 20, 2010 for the proposition  
11 that any improper reallocation or any actions, including that of now Captain Fitial, preceded the "Directive"  
12 and ceased after October 2010. Looking to the Directive, DPS's assertion is incorrect given a plain reading  
13 of that document. Directive # 275, as a DPS exhibit, discusses the MAI desk audit and its possible  
14 implementation by the Administration. Governor Fitial states in Directive #275 that DPS "should continue"  
15 to "comply with the PSSRR and CSA concerning salary/merit increases and promotions."

16 Footnote 1 of Directive #275 is telling in that it points out that since 1999, NMIAC §10-20.2-1101  
17 has been in effect and remains in effect, and that NMIAC provision states all sections in the PSSRR and  
18 CSA which require salary increases due to, among other things, "reallocation or reclassification of positions,  
19 and step increases based on attendance at workshops or other training programs will be suspended." The  
20 Directive also says DPS should comply with the CSA to require "strict adherence" to the merit principles  
21 including "[j]ust opportunity for competent employees to be promoted within the civil service."

22 As to Sgt. Fitial, who is now a Captain within DPS on Tinian,<sup>8</sup> DPS has admitted that in addition  
23 to Celes, the *de facto* promotion by reallocation and attending salary increases had continued.

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24  
25 <sup>8</sup> The Court finds the effort to justify the reallocation of Sgt. Fitial because he was stationed on Tinian to be without merit and unsupported by the PSSRR which provide for no such distinctions.

1 Commissioner Tudela admitted the reallocation and approved the papers. (Tudela TR 11.) Commissioner  
2 Tudela believed that the reallocation of Sgt. Fitial to Captain preceded Directive #275.<sup>9</sup> DPS Administration  
3 also made prior attempts at reallocation of other officers with salary increases, which apparently failed.  
4 However, like Commissioner Warfield did for Celes, Commissioner Tudela signed-off on a reallocation and  
5 salary increase for Sgt. Fitial despite the PSSRR prohibition and the Governor's own disregard of the  
6 PSSRR and his Directive #275.

7 Deleon Guerrero has also testified that he submitted an application for the Captain position within  
8 DPS. (TR 34-36.) He was clear that he sought the position of Captain given that he was performing a  
9 Captain's duties. (*Id.*) Deleon Guerrero testified clearly that he sought a Captain position and looked for  
10 consideration. It is also noteworthy that Sgt. Fitial's reallocation was the approach taken instead of DPS  
11 looking from outside of DPS to hire a Captain given the austerity measures as it previously justified. But  
12 the fact of the matter is that Sgt. Fitial was a lateral in-house hire, and there is no testimony nor evidence  
13 that he resigned nor separated from DPS.<sup>10</sup> The fact is that Deleon Guerrero testified that had the position  
14 been announced he wished to be considered as his application was already before OPM.

15 Apparently, it was possible within DPS to leapfrog over ranks and receive the attending salary  
16 increases. Yet for DPS it asks Ms. Rose Dela Cruz to admit that there have been no other reallocations save  
17 for Celes while all the while, since the inception of Deleon Guerrero's grievance and during the pendency  
18 of this case, DPS had continued the illegal practice unabated resulting in DPS picking and choosing when  
19 it will apply the rules and when it will disregard the rules.

20 Tudela confirmed the adverse effect of Celes' reallocation on the DPS morale and even went so far  
21

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22 <sup>9</sup> As the Governor's Directive states, the restrictions on austerity measures have always been in effect and the Directive said  
23 nothing more except to comply with that Directive.

24 <sup>10</sup> While Deleon Guerrero had the burden of proof as to his grievance, DPS presented no countervailing testimony or  
25 evidence to rebut the assertion regarding the in-house reallocation of Sgt. Fitial. Indeed, whether by promotion or  
reallocation, Commissioner Tudela confirmed that he signed off on the papers and there is no proffered exhibit showing a  
vacancy announcement nor an eligibility list for the DPS Captain position for which Sgt. Fitial was selected.



1 as to say that others were more qualified than Celes. (Tudela TR at 151.) To correct this inequity and to  
2 sustain Deleon Guerrero's grievance would be sending a message to DPS regarding strict adherence to the  
3 rule of law.

4 For the above reasons, the Court finds that in addition to a well-taken grievance as to Celes's *de*  
5 *facto* promotion by reallocation procedure, DPS had also violated the CSA and the PSSRR inclusive of the  
6 austerity measures with respect to the reallocation of Sgt. Fitial as another *de facto* promotion. This Court  
7 believes Deleon Guerrero will not receive a remedy for his grievance and to prevent further violations issues  
8 this judicial disposition. The Court, therefore, finds that the actions of DPS with respect to the reallocation  
9 or promotion of Sgt. Fitial to Captain violated the CSA and PSSRR. The Court finds that what DPS did as  
10 to Celes and Sgt. Fitial was and is improper.

11 The DPS should implement, if not already, immediate corrective action to follow the competitive  
12 selection process for hiring or promotions of those qualified if they are going to do so, with appropriate  
13 justification and the proper concurrence by OPM, Department of Finance, and the Office of the Governor.

14 The issues in this case involve practices in place three or more years ago. Hopefully, the improper  
15 practices discussed herein have ceased. DPS must not engage in non-objective practices and disparate  
16 treatment between officers of equal rank and experience as to hiring, selection, salary increases, promotions  
17 based on merit, evaluations and time in-grade.

#### 18 **B. DELEON GUERRERO IS ENTITLED TO ATTORNEYS FEES AND COSTS**

19 In his motion for summary judgment Deleon Guerrero sought attorneys fees. The Court denied that  
20 request on grounds that there was no showing of the need to deviate from the American Rule that a party  
21 bears his own attorneys fees and costs. At that point in time the Court did not have the complete record on  
22 submission.

23 Inasmuch as Deleon Guerrero has previously sought attorneys fees, the Court can reconsider the  
24 matter at this point. The Court has also received the full record of depositions, exhibits and testimony in  
25 this matter and has the benefit of the full landscape of the facts in this case. In light of the testimony and

1 continued violations by DPS as to reallocations, the Court finds that attorneys fees are due to Deleon  
2 Guerrero.

3 As previously stated, as a general rule “[i]n the United States, the prevailing litigant is ordinarily not  
4 entitled to collect a reasonable attorneys' fee from the loser.” *Alyeska Pipeline Service Co. v. Wilderness*  
5 *Society*, 421 U.S. 240, (1975). Exceptions to the American Rule exists including: bad faith conduct of the  
6 losing party, preservation of a common fund, protection of constitutional principles, and private attorney  
7 general actions. *Public Util. Dist. 1 v. Kottsick*, 86 Wash.2d 388, 545 P.2d 1 (1976). The Court finds the  
8 private attorney general exception applies here.

9 When DPS demoted Celes it may have done so as part of an effort to render Deleon Guerrero’s  
10 grievance moot as to reallocations. (Deleon Guerrero TR 38.) However, the testimony elicited as to the  
11 promotion or reallocation of Sgt. Fitial and other officers, whose reallocations were attempted, albeit  
12 unsuccessfully, show that DPS’s screening of the reallocation or promotion process was lacking beyond  
13 Celes.

14 Against daunting odds and facing the substantial resources of DPS, OPM and the Office of the  
15 Attorney General, Deleon Guerrero continued to prosecute his grievance to establish his burden of showing  
16 that DPS was continuing to violate the CSA and PSSRR in its practices. Through this process Deleon  
17 Guerrero had to request and review documents; he had to propound discovery with depositions and  
18 transcripts of several witnesses; and he had to present his case before this Court with witnesses and present  
19 exhibits. In doing so, Deleon Guerrero has had to act as a private party seeking to correct a prohibited  
20 practice in DPS, an agency which either refused to heed his grievance or wished only that he remain quiet.  
21 His actions have benefitted the class of officers within DPS who are civil service employees. His grievance  
22 prompted a DPS-wide audit with MAI and his grievance prompted Governor’s Directive # 275 which  
23 reaffirmed the rules and merit-based principles of the CSA and PSSRR.

24 In *Public Util. Dist. 1 v. Kottsick*, 86 Wash.2d at 392, 545 P.2d 1, the doctrine of “private attorney  
25 general” was noted as an exception to the American Rule. Simply stated, this doctrine provides that a private

1 attorney general may be awarded attorney fees whenever the successful litigant (1) incurs considerable  
2 economic expense, (2) to effectuate an important legislative policy, (3) which benefits a large class of  
3 people.

4         These policies plainly call for the application of the private attorney general theory here to allow  
5 Deleon Guerrero to recover attorney fees incurred in forcing DPS to take corrective action. The deference  
6 toward government agencies creates a difficult and expensive challenge for citizens seeking relief from any  
7 governmental action. The Commonwealth empowered administrative agencies with the authority to resolve  
8 issues from within for several reasons, including the agencies' specialized knowledge of the regulations.  
9 As part of that authority, most governmental agencies prohibit a citizen from taking a dispute directly to  
10 court until all administrative remedies have been exhausted.

11         The exhaustion of administrative remedies requirement was intended to save taxpayer dollars and  
12 promote consistent, coherent, logical and efficient application of agency laws. However, in too many  
13 instances such as this, the citizen/employee and his claim remain in limbo for years, resulting in the  
14 expenditure of thousands of dollars. Here, DPS turned a blind eye to Deleon Guerrero's grievances, and  
15 CSC was unable to hear his grievance due to lack of quorum, forcing him to hire an attorney to remedy the  
16 agency's selection principles with reallocation and "outside hire promotions." In bringing this action,  
17 Deleon Guerrero alone effectuated the important legislative policies underlying the CSA and PSSRR as well  
18 as Governor's Directive #275.

19         Deleon Guerrero's actions benefitted not only himself as a taxpayer and a DPS employee, but all  
20 those who work for the government and have come to expect and rely on some modicum of fairness and fair  
21 play. Adoption of the private attorney general theory would be appropriate here as an award of fees would  
22 not only serve the public interest, but would further the policies underlying the CSA, which authorizes the  
23 payment of fees to any citizen bringing such an action to recover funds spent in violation and "costs of the  
24  
25

1 suit, including a reasonable attorney's fee, from any money recovered in such action."<sup>11</sup>

2 Moreover, even when the DPS Commissioner Tudela acted to try and re-announce the corrected  
3 position for Celes, he was denied outright. (Tudela TR 16.) In doing so, Deleon Guerrero vindicated his  
4 cause, he incurred substantial attorneys fees and costs with conducting depositions; reviewing documents  
5 from the OPM; filing his Motion for Summary Judgment; opposing DPS's motion to dismiss; presenting  
6 witnesses and exhibits at the hearing; and submitting proposed findings of act and conclusions of law.

7 For the above reasons, the Court awards attorneys fees and costs in favor of Deleon Guerrero on  
8 grounds of a private attorney general action as allowed under the CSA, and for bad faith conduct by DPS.

9  
10 **V. CONCLUSION**

11 For the foregoing reasons, the actions of DPS complained of herein as to *de facto* promotion by  
12 reallocation are deemed improper.

13 **THE COURT HEREBY ORDERS THE FOLLOWING:**

- 14 A. Judgment is rendered in favor of Plaintiff James C. Deleon Guerrero with respect to the  
15 violations of the CSA and PSSRR with the use of the reallocation process to promote Alfred  
16 Celes and Eloy K. Fitial along with attending salaries. The grievance is sustained and the  
17 agency action by DPS is deemed to be arbitrary and capricious as well as a violation of law.
- 18 B. The grievance with respect to the hiring and/or selection of Paul Ogumoro and Vicente  
19 Tagabuel is denied as there is no showing that DPS violated the PSSRR and such actions  
20 were within the agency's discretion and that the positions were duly announced.
- 21 C. Attorneys' fees and costs are awarded in favor of James C. Deleon Guerrero on grounds of  
22 his prosecution of a private attorney general action as permitted under the CSA. Counsel for  
23

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24 <sup>11</sup> Moreover, 25 Police Officers moved for and the Court found good cause for them to be accepted as Intervenors as their  
25 interests and concerns followed that of Plaintiff.

1 Deleon Guerrero shall submit his statement of fees and costs within fifteen (15) days of this  
2 order.

3 D. DPS shall cause the demotion and rescind the reallocation of Eloy K. Fitial to Sergeant and  
4 the vacated position shall be announced and competitive selection shall be afforded to  
5 eligible candidates as provided for in the PSSRR and as directed by Governor's Directive  
6 #275.

7 E. DPS and OPM shall take all appropriate measures to recover the illegal overpayments from  
8 Alfred Celes and Eloy K. Fitial for all salaries received as Sgt. and Captain respectively  
9 which were illegal and prohibited by the CSA and PSSR inclusive of the Austerity Measures.

10 F. Until such time as the Austerity Measures are repealed, whether by force of law or  
11 administrative action, DPS is enjoined from conducting any further reallocations,  
12 promotions, or merit-increases without court approval.

13 G. This ruling by the Court constitutes both a final agency decision of the grievance by James  
14 C. Deleon Guerrero and resolves all issues so as to constitute a final judgment.

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16  
17 **SO ORDERED this 19<sup>th</sup> day of March, 2012.**

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