



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION



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

THELMA S. KAPILEO,	)	CIVIL CASE NO. 12-0095
	)	
Petitioner,	)	
	)	
v.	)	<b>ORDER GRANTING STAY OF</b>
	)	<b>ADMINISTRATIVE ACTION AND</b>
<b>DEPARTMENT OF COMMUNITY AND</b>	)	<b>REINSTATEMENT PENDING FINAL</b>
<b>CULTURAL AFFAIRS SECRETARY</b>	)	<b>DECISION AND DENYING CROSS</b>
<b>MELVIN O. FAISAO, ET AL.,</b>	)	<b>MOTION TO REMAND</b>
	)	
Respondents.	)	
	)	
_____	)	

**I. INTRODUCTION**

**THIS MATTER** came for hearing on August 30, 2012, in Courtroom 223A for Thelma S. Kapileo’s Motion for a Stay of Administrative Action and Reinstatement Pending Final Decision. Thelma S. Kapileo (hereinafter “Petitioner”) was represented by attorneys Jane Mack and Dimitri Varmazis. The Department of Community and Cultural Affairs (hereinafter “DCCA”) Secretary Melvin O. Faisao and Governor Benigno R. Fitial (hereinafter “Respondents”) were represented by Assistant Attorney General Rebecca Wrightson. Pursuant to Commonwealth Rules of Administrative Appeals 3 and 1 CMC § 9112(e), this Court has the authority to grant a motion to stay an agency action if the Petitioner can show he will suffer irreparable injury. This Court also has the authority to order reinstatement pending a full order and final adjudication in this matter.

In this case, Petitioner argues a stay is needed to preserve the status quo ante. In support of her Motion, Petitioner claims that with the loss of her income, her family now lives in poverty. She claims the impact from the income loss includes the negative consequences of not having enough money to pay for

1 important obligations, such as the mortgage and car payments, and the consequences from non-payment.  
2 Among such consequences are possible foreclosure of the mortgage on the home and non-payment on her  
3 car. Petitioner also claims she has suffered extreme emotional harm, including the shame and loss of self  
4 esteem caused by unemployment, negative effects on her family life, and the personal toll of anger and  
5 frustration from the allegations at issue.

6 Respondents oppose Petitioner's Application for a Stay of Administrative Agency Action and  
7 Reinstatement Pending Final Decision and move for a remand, or, in the alternative, for denial of  
8 Petitioner's Motion. Respondents argue Petitioner's complaint is a petition for review of an agency decision  
9 and should be remanded to the Civil Service Commission (hereinafter "CSC"). In support of their argument,  
10 Respondents claim the CSC could have heard and decided Petitioner's appeal and that the Court should  
11 reject the CSC's allegedly flawed statutory interpretation regarding quorum and order the CSC to hear and  
12 decide Petitioner's appeal. Respondents further argue Petitioner's Motion should be denied because she  
13 does not meet the requirements for granting a stay because: (1) Petitioner's claim is not likely to succeed  
14 on the merits; (2) Petitioner's injury absent a stay is outweighed by the public interest in denying the Motion;  
15 (3) Granting Petitioner's Motion will substantially injure other interested parties in this proceeding; and (4)  
16 the public interest is contrary to granting a stay to Petitioner.

## 17 **II. BACKGROUND**

18 On or about August 12, 2011, the Commonwealth of Northern Mariana Islands filed criminal charges  
19 against Pedro I. Sablan, criminal case number 11-0215E, alleging four counts of sexual abuse of a minor  
20 child over whom he occupied a position of authority. The allegations of criminal conduct against Sablan  
21 allegedly occurred while he was employed by DCCA, supervising children at the Department of Youth  
22 Services (hereinafter "DYS") Emergency Shelter.

23 On or about September 23, 2011, Petitioner and two other employees who worked in similar  
24 positions at the DYS Emergency Shelter were each given a "Notification on Work Suspension," which  
25 placed them on work suspension without pay pending the outcome of an ongoing investigation regarding

1 the allegations against Sablan. Pursuant to the Notice, DYS and DCCA suspended Petitioner from work  
2 indefinitely, commencing immediately.

3 On October 5, 2011, Petitioner received a Notice of Proposed Adverse Action for Termination dated  
4 September 27, 2011. Petitioner claims her notice indicated that she could review evidence against her and  
5 materials would be made available to her if she contacted Faisao. Petitioner attempted to meet with  
6 management to discuss the notice of proposed adverse action, but was unsuccessful. Petitioner appealed her  
7 termination to the CSC on October 25, 2011. On March 29, 2012, the CSC, after waiting for a period of five  
8 months, denied Petitioner a hearing because it lacked a sufficient number of members to hear the matter and  
9 declared Petitioner had exhausted her administrative remedies.

10 Subsequently, on April 23, 2012, Petitioner filed her Petition for Judicial Review. On July 30, 2012,  
11 Petitioner filed an Application for Stay of Administrative Agency Action and Reinstatement Pending Final  
12 Decision.

### 13 **III. APPLICABLE LAW**

14 Commonwealth Rules of Administrative Appeals, Rule 3, and 1 CMC § 9112(e) govern a stay of  
15 a decision pending appeal. Rule 3(e) provides:

16 In the event a party files a motion to stay the action of the administrative agency in the trial  
17 court, unless otherwise directed by statute, the trial court may hold a hearing within fifteen  
18 days. The standard for granting a stay shall be that standard which governs such motions in  
19 civil matters.

20 NMI R.P. Admin. App. (3)(e).

21 In addition, section 9112(e) provides, in part:

22 On such conditions as may be required and to the extent necessary to prevent irreparable  
23 injury, the reviewing court, including the court to which a case may be taken on appeal from  
24 or on application for certiorari or other writ to a reviewing court, may issue all necessary and  
25 appropriate process to postpone the effective date of an agency action or to preserve statute  
or rights pending conclusion of the review proceedings.

1 CMC § 9112(e).

26 Therefore, when NMI R.P. Admin. App. (3)(e) and 1 CMC § 9112(e) are read in conjunction, it is  
27 clear that this Court has the authority to issue a stay. Before a stay can issue, however, the moving party

1 must show either: (1) a combination of probable success on the merits and the possibility of irreparable  
2 injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Vaughn*  
3 *v. Bank of Guam*, 1 NMI 318, 321 (1990). Because Petitioner has shown a combination of probable success  
4 on the merits and the possibility of irreparable injury, this Court need not address whether Petitioner's appeal  
5 raises serious legal issues at this time.  
6

#### 7 **IV. DISCUSSION**

##### 8 **A. Stay of Administrative Agency Action and Reinstatement Pending Final Decision**

9 Petitioner claims there is a very high degree of likelihood of success on the merits because she was  
10 terminated from her civil service employment without a hearing. Petitioner argues she was suspended for  
11 more than three days, and is now *de facto* terminated, as she has not been allowed to return to work.  
12 Petitioner argues the suspension notice did not give 30 days advance warning, did not provide any  
13 information or details about the basis or charges of alleged misconduct, did not provide any information  
14 about Petitioner's rights to answer the charges, failed to give a reason as to why Petitioner was not kept on  
15 active duty, was not based on an emergency, and failed to comply with due process. Because of these  
16 failures, Petitioner argues the notice failed to comply with the requirements of section 10-20.2-257(h) and  
17 (m) of the Northern Mariana Islands Administrative Code (hereinafter "NMIAC").  
18

19 Petitioner claims the only basis given for her termination was the following: "On at least one  
20 occasion, a female detainee was sexually assaulted while on your watch by a male Emergency Shelter  
21 Caretaker." Petitioner also claims that although the notice indicated she could review the evidence against  
22 her and materials would be made available to her if she contacted Faisao, her attempts to do so were to no  
23 avail.  
24

25 Respondents argue Petitioner was adequately notified of the reasons underlying her termination

1 because on September 1, 2011, DYS Director Laura Ogumoro met with four employees, including  
2 Petitioner, and informed them of the incident with Sablan. Respondents claim Ogumoro also explained to  
3 the employees that if they were derelict in their duties, they should tender their resignations. Based on this  
4 meeting with Omugoro and the one-line notice in the suspension letter, Respondents argue Petitioner was  
5 notified of the reasons underlying her impending termination.  
6

7 Respondents also claim Petitioner was provided an opportunity to respond to the allegations against  
8 her. Petitioner contacted DCCA twice, once by mail and once by phone. Respondents claim that at both  
9 times, a DCCA employee and Secretary Faisao attempted to call Petitioner at the number she provided but  
10 there was no answer. Respondents therefore claim Petitioner was provided an opportunity to respond,  
11 although Petitioner failed to provide adequate contact information. Respondents thus argue Petitioner is  
12 unlikely to succeed on her procedural due process claim.  
13

14 Respondents further claim that although the emergency provision provided for by section 10-20.2-  
15 2257(5) of NMIAC was not mentioned in Petitioner's suspension notice, this provision applies as it was not  
16 practicable to keep Petitioner in her position as a Shelter caretaker. On this ground, Respondents argue  
17 Petitioner is unlikely to succeed on the merits of her civil service protection claim.

18 Petitioner is a Civil Service employee and the CSC is unavailable to address her grievances.  
19 Although granting a stay pending judicial review is something that is only done in extraordinary  
20 circumstances where irreparable injury is clearly apparent, the Court believes that Petitioner has satisfied  
21 her burden. The Court finds Petitioner and her family will suffer irreparable injury from her lack of income  
22 if a stay is not issued. The Court is satisfied with Petitioner's showing of irreparable injury regarding the  
23 stress her lack of income has imposed on what was a two-income earning household with a husband and  
24 three minor children. Moreover, Petitioner could suffer irreparable injury if the lack of income indeed  
25

1 results in foreclosure of Petitioner’s home and other consequences of non-payment of essentials.

2           The Court further finds Petitioner has shown a probability of success on the merits because she was  
3 not provided with a hearing prior to being terminated, and there was no relief available to her as a Civil  
4 Service employee. Additionally, DCCA’s one-line sentence regarding the charges against her failed to  
5 specify if Petitioner was even working at the time the incident with Sablan took place and was, in view of  
6 the circumstances, a woeful attempt at notifying Petitioner of the official charges against her. All of these  
7 factors combined tend to show a probability of success on the merits.

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9           Another factor the Court will consider in granting Petitioner’s request is the Government’s poor  
10 record of satisfying its judgments. For example, if Petitioner were to succeed with her Judicial Review  
11 claim and obtain a judgment against the Government, it would be extremely difficult for her to try to collect  
12 an award for back-pay or money damages in lieu of the number of unpaid judgments that currently exist  
13 against the CNMI government. As our Supreme Court has noted, “[t]he government’s inaction in satisfying  
14 [its] judgement[s] is a grave injustice that unfortunately only the political process can remedy.” *Marine*  
15 *Revitalization Corp v. SLNR*, 2010 MP 18 ¶ 54.

16  
17           The Court is, therefore, of the opinion that Petitioner has satisfied the requirements necessary for  
18 issuing a stay.

19 **B. Respondents’ Cross Motion to Remand**

20           Respondents argue the instant case is a petition for review of an agency decision and should be  
21 remanded to the CSC. Respondents claim the CSC indeed has a quorum and this Court should therefore  
22 reject the CSC’s statutory interpretation regarding quorum as flawed and order the CSC to hear and decide  
23 Petitioner’s appeal.

24  
25           Petitioner argues Respondents have failed to show that the four members of the CSC are available

1 and accounted for, given that there are currently only three members of the CSC, with a fourth pending  
2 confirmation in the CNMI Senate. Petitioner argues that remanding this case to the CSC would be a  
3 violation of Petitioner’s due process rights, given that the CSC is in a state of not being able to effectively  
4 function. Petitioner further argues that Respondents’ request that the Court overrule the CSC’s interpretation  
5 of its own rules and regulations is a violation of the Separation of Powers Doctrine. Petitioner asserts that  
6 Respondents fail to address and meet the standard of review established by the U.S. Supreme Court under  
7 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* for a court to apply to an agency’s reading  
8 of a statute. 467 U.S. 837 (1984). Petitioner also argues Respondents’ Cross Motion to Remand is  
9 premature and procedurally incorrect because by answering Petitioner’s Complaint, Respondents have  
10 locked themselves into a judicial process now governed by the Commonwealth Rules of Procedure for  
11 Administrative Appeals.  
12

13           Respondents argue the Separation of Powers Doctrine is not violated in this case, as this case  
14 involves an issue of statutory construction, of which the judiciary is the final authority. Respondents also  
15 argue that a *Chevron* analysis is merely a “progressive inquiry” and not a test that must be met before a  
16 remand, and that in any event, a remand in this case does comport with a *Chevron* analysis. Respondents  
17 argue that their Cross Motion to Remand is timely because the Rules provide that a court may consider to  
18 a motion to remand at any stage in the proceeding.  
19

20           Pursuant to Rule 6(e)(2) of the Commonwealth Rules of Procedure for Administrative Appeals, a  
21 court may:  
22

23           [O]rder any other remedy appropriate to the facts and circumstances of a particular appeal,  
24 including but not limited to remanding the case to the agency for further action if it finds that  
25 either the fairness of the proceedings or the correctness of the action has been impaired by  
a material error in procedure or a failure to follow prescribed procedure and the error cannot  
be corrected in the trial court proceedings.

1 NMI R.P. Admin. App. 6(e)(2).

2 This Court finds that a remand to the CSC, in this case, is not an appropriate remedy. The CSC has  
3 already officially declared that Petitioner has exhausted her administrative remedies and it took the CSC five  
4 months for them to make that declaration. Respondent is asking the Court to reverse the CSC's decision  
5 and send Petitioner's matter back to an agency that is essentially nonoperating and lacks a quorum. Such  
6 an action would be an exercise in futility and would constitute a deprivation of Petitioner's due process  
7 rights. This Court therefore DENIES Respondents' Cross Motion to Remand.

8 **C. Conclusion**

9 After a full and close analysis and consideration of all Petitioner has offered, the Court is of the  
10 opinion that Petitioner has satisfied the requirements necessary for issuing a stay. Petitioner's Motion for  
11 a Stay of Administrative Action is hereby **GRANTED**. Petitioner's Motion for Reinstatement Pending a  
12 Final Decision is also hereby **GRANTED** and this Court orders Respondents to fully reinstate Petitioner to  
13 her position of Juvenile Correction Worker 1, as an employee of the DYS, effective immediately. Because  
14 this Court finds a remand is not an appropriate remedy in this particular case, Respondents' Cross Motion  
15 to Remand is hereby **DENIED**.

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18 **SO ORDERED this 26<sup>th</sup> day of September, 2012.**

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