By Order of the Court, Judge Joseph N. Camacho

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

ISLAND MARINE SPORTS, INC., AQUATIC MARINE CO., INC. d.b.a. AMIGO AQUATIC SPORTS, AUTOMARINE, INC., SEAHORSE, INC., and BSEA, INC.,

Petitioners/Plaintiffs,

v.

DEPARTMENT OF PUBLIC LANDS, and TASI TOURS & TRANSPORTATION INC.,

Respondent/Defendant.

CIVIL CASE NO. 12-0151

ORDER LIFTING STAY AND GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

THIS MATTER came before the Court on January 17, 2013 for a status conference. Petitioners Island Marine Sports, Inc., Aquatic Marine Co., Inc., d.b.a. Amigo Aquatic Sports, Automarine, Inc., Seahorse, Inc., and BSEA, Inc., ("Petitioners") were represented by Mark A. Scoggins. The Department of Public Lands ("DPL") was represented by Charles Brasington. Tasi Tours & Transportation Inc., was represented by Rexford Kosack. At the status conference, Petitioners asked the Court to lift the stay as to their summary judgment motion. For the following reasons the stay is lifted and Petitioners motion for summary judgment in **GRANTED**.

II. BACKGROUND

Petitioners are five marine sports operators seeking to invalidate agency action by DPL which forbids them from picking up customers from Managaha Island and taking them on water sports

activities such as banana boat rides and parasailing. Petitioners argue that a letter written by DPL in December of 2011 ("December Letter") and another letter written in June of 2012 ("June Letter") constituted rulemaking by DPL, taken without appropriate administrative procedures. On June 25, 2012 Petitioners filed a complaint for declaratory judgment invalidating the rule, and a temporary restraining order and preliminary injunction to enjoin enforcement of the rule. (*See* Compl. 10-11.) On June 28, Petitioners filed a first amended petition seeking the same relief. (*See* FAC 11-12.) On July 2, 2012 the Court allowed Tasi Tours & Transportation Inc., to intervene as defendant based on their concession contract with DPL. Beginning on July 2, 2012 the Court heard extensive testimony regarding injunctive relief.

On July 19, the Court granted a preliminary injunction prohibiting DPL from enforcing an interpretation of its 1993 regulation which was first announced by DPL in the December Letter.[1] In its order the Court found that the dispute regarding the interpretation of the 1993 regulation began sometime around October of 2011 and prior to the dispute DPL had not enforced the 1993 regulation in accordance with the view announced in the December Letter. (Prelim. Inj. 14.) The 1993 regulation and the concession agreement between DPL and Tasi Tours both contain language regarding the scope of Tasi Tour's exclusive concession. The parties dispute the meaning of "tours . . . from the Island" in the regulation, and the concession contract. *See* NMIAC § 145-30-015(b); (Def.'s Ex. A, 3.)

On July 16, 2012 the Petitioners moved for summary judgment. On July 30, 2012, Defendants filed their opposition and cross motion for summary judgment. On August 29, 2012 DPL published proposed amendments to the 1993 regulations in the Commonwealth Register. (*See* Ex. 1 to Decl. of Counsel in Supp. of Mot. for OSC.) On October 23, 2012 the Court stayed decision on summary judgment based on representations from counsel that DPL was in the process of promulgating an

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[1] A more thorough factual history is set out in the Court's preliminary injunction order. *See Commonwealth v. Dept. of Public Land*, Civ. No. 12-0151 (NMI Super. Ct. July 19, 2012) (Opinion & Order Granting Preliminary Injunction 1-11.)

amendment to the regulation at issue in this case that would render the case moot. (*See* Order Stay' J. 2.) On December 6, 2012 the parties filed a stipulated request to reschedule their status conference based on ongoing settlement negotiations. DPL represented that it was refraining from taking action to adopt the proposed amendment to the 1993 regulation due to the ongoing negotiations. (Stipulated Req. to Reschedule Status Conference 2.) The Court granted the request and re-set the status conference for January 17, 2013. At the status conference on January 17, 2013, Petitioners orally moved to lift the stay and asked the Court to proceed to summary judgment.

II. STAY

The Court lifts the stay as to summary judgment because it finds a live controversy exists. The summary judgment hearing was heard on October 16, 2012. At that hearing the Court learned from counsel that: (1) the August 29, 2012 proposed amendment had not gone into effect yet and; (2) a legislative hearing regarding the amendment to the 1993 regulation was scheduled for October 26, 2012. The Court issued a stay in part because the parties agreed that adoption of the proposed amendment would moot the instant case. (Order Stay' J. 2.) Later, the Court learned that DPL had forgone adoption of the proposed amendment to the 1993 regulation in an attempt to reach a settlement. However, at the status conference on January 17, 2012 counsel for DPL was unable to convey to the Court whether DPL was still planning to adopt the amendment. As of this date, no new information regarding the proposed amendment has come to the Court's attention. Accordingly, the Court proceeds to address the pending motion and cross-motions for summary judgment.

III. LEGAL STANDARD

A movant is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." NMI R. Civ. P. 56(c). The moving party bears both the initial and the ultimate burden of establishing its entitlement to summary judgment. *Furuoka v. Dai-Ichi Hotel*

(Saipan), Inc., 2002 MP 5 ¶ 24. If a moving party is the plaintiff he or she must prove that the undisputed facts establish every element of the presented claim. *Id.* Where the movant fails to meet its initial burden summary judgment must be denied. *See, e.g*., *Sablan v. Roberto (In re Roberto)*, 2002 MP 23, ¶¶ 19-20 (reversing trial court's grant of summary judgment where movant failed to meet its initial burden).

"If . . . the moving party meets his initial burden then the burden of production shifts to the nonmoving party, who must produce just enough evidence to create a genuine fact issue." *Sablan v. Roberto (In re Roberto)*, 2002 MP 23, ¶ 18 (citations omitted.) In shouldering its burden the opposing party may not simply rely upon the pleadings but must tender evidence of specific facts in the form of affidavits, and/or admissible evidence. NMI R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586, n. 11 (1986). A disputed fact is considered material "if its determination may affect the outcome of the case." *Triple J Saipan, Inc. v. Agulto*, 2002 MP 11 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-49 (1986)). In considering the motion, the Court views facts and inferences in the light most favorable to the non-moving party. *Aplus Co. v. Niizeki Int'l Saipan Co*., 2006 MP 13 ¶ 10. Where no genuine issue as to any material fact exists, the movant is entitled to judgment as a matter of law. NMI R. Civ. P. 56(c).

With these principles in mind the Court turns to the issues in the case.

IV. DISCUSSION

Petitioners move for summary judgment on their claim for judicial review of agency action, assertedly taken without appropriate procedures under the Administrative Procedure Act[2] ("APA"). Petitioners argue that: (1) a letter dated December 13, 2011 which DPL wrote constituted agency

[2] The Administrative Procedure Act is codified at 1 CMC §§ 9101-9115.

rulemaking; (2) the June Letter affirmed the rule; (3) the rule was given effect without appropriate administrative procedures; and (4) as a result, this Court should find the rule invalid.

To sustain their initial burden Petitioners must demonstrate that the undisputed facts establish that: (1) they have exhausted their administrative remedies; (2) the December and June Letters constitute rulemaking; and (3) DPL failed to comply with the appropriate administrative procedures. *Furuoka*, 2002 MP 5 ¶ 24 (movant bears the burden to establish every element of the claim).

A. PETITIONERS EXHAUSTED ADMINISTRATIVE REMEDIES

First, Petitioners must demonstrate that they have exhausted their administrative remedies. Parties seeking review under the APA must first exhaust all intra-agency appeals expressly mandated either by statute or by an agency's regulations. *Rivera v. Guerrero*, 4 NMI 79, 85 (1993). Where no statute or regulation mandates exhaustion, a court may proceed to review the agency's final decision under the APA, and may not impose additional exhaustion requirements. *Id*. at 85 (citing *Darby v. Cisneros*, 509 U.S. 137 (1993)).

Under Section 9106 of the APA,

> An interested person may petition an agency requesting the adoption, amendment, or repeal of a rule. Within 30 days after submission of a petition the agency shall either deny the petition in writing, stating its reasons for the denial, or shall initiate rule-making proceedings in accordance with this chapter.

1 CMC § 9106.

Here, by letter dated March 1, 2012, Island Marine Sports, Inc. on behalf of itself and similarly situated marine sports operators, petitioned DPL in accordance with 1 CMC § 9106 to amend repeal or otherwise invalidate the December 13, 2011 rulemaking. (Compl. 6; Ex. B.) The March Letter reads in pertinent part:

> In accordance with 1 CMC § 9106 of the Commonwealth Administrative Procedure Act ("APA"), [Island Marine Sports] hereby petitions the Department of Public Lands to repeal or amend the rule which restricts

> certain access to Managaha Island, or for DPL to otherwise declare the rule invalid, void, and unenforceable.

Id.

There is no specific time period in which Section 9106 petitions must be brought. *See* 1 CMC § 9106. Moreover, no administrative appeal lies for persons seeking to invalidate a rule under that section. No other intra-agency procedures or appeals are expressly mandated by statute or by DPL regulations for persons seeking to invalidate a rule. Therefore, Petitioners have exhausted their administrative remedies.

B. DECEMBER AND JUNE LETTERS CONSTITUTE RULEMAKING

Second, the Court considers whether the December and June Letters constitute rulemaking. This Court has previously considered whether the December Letter constitutes rulemaking. For the reasons set forth more thoroughly in this Court's Opinion & Order Granting Preliminary Injunction, Petitioners have demonstrated that the December Letter constitutes rulemaking because it effectively interprets the 1993 regulation. (Prelim. Inj. 18-19.)

The June Letter also interprets the 1993 regulation and is therefore a rule. As this Court has previously noted whether an interpretive letter from an agency, such as the one here, is a rule under the APA is an issue of first impression in the Commonwealth. Pursuant to 1 CMC § 9101(m), a rule means "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule." 1 CMC § 9101(m). There are several exceptions to this general definition. *See* 1 CMC § 9101(m)(1)-(3). The June Letter is a rule if it conforms to the definition of rule in 1 CMC § 9101(m) and does not fall into an exception under 1 CMC §§ 9101(m)(1)-(3). The Commonwealth Supreme Court has consistently held that statutes are interpreted according to their plain meaning. *See, e.g.*, *J.G. Sablan Rock Quarry, Inc. v. Dep't of Pub. Lands*, 2012 MP 2 ¶ 31.

The Court first considers whether the letter was an agency statement. The June Letter was written by Pedro Itibus, Acting Secretary of DPL at the time and is on DPL letterhead. (*See* Compl. Ex. D 1.) The June Letter expresses the view of the agency regarding certain portions of the concession agreement with Tasi Tours, which track the language of the 1993 regulation. (*Id*.) The letter indicates that enforcement of this view by DPL will be immediate. Attached to the letter is a Press Release to the General Public concerning the same subject, also on DPL letterhead and signed by the Acting Secretary. (*Id*. at 2-6.) Consequently, there is no question that this is an agency statement.

Next, the Court considers whether the June Letter is generally applicable. The letter was sent to beach concessionaires and marine sports operators and describes prohibited conduct which applies to any similarly situated boat operators. The accompanying Press Release was made available to the general public, demonstrating that it was intended to be generally applicable. Thus, the June Letter is a statement of general applicability.

Finally, the Court considers whether the letter "implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency [including] the amendment or repeal of a prior rule[.]" 1 CMC 9101(m). "'To interpret'" means '[t]o construe; to seek out the meaning of language'" *People ex rel. Judicial Inquiry Bd. v. Courts Com*., 91 Ill. 2d 130, 135 (Ill. 1982) (quoting Black's Law Dictionary 953 (5th ed. 1979)).

The June Letter provides:

> I have reconsidered the conclusion of the May letter that was sent to you regarding the conduct of tours from Mañagaha Island. The letter indicated that any water sports tour could depart from Mañagaha Island so long as the tour was sold before the customer arrived at Mañagaha Island. This interpretation of the exclusive concession agreement for the Island (the "Agreement") has been questioned.
>
> Upon further investigation of the history and language of the Agreement, Public Lands has determined that it is *not the place of the sale of the tour that controls, but the place where the tour takes place* that controls. Any tour conducted on Mañagaha Island or from Managaha Island comes

> within the terms of the Agreement. This means that **customers may not be picked up from Mañagaha Island for a water sports tour by any company other than the exclusive concessionaire or its subcontractor.** For example, companies offering banana boat rides and parasail rides cannot pick up customers for these tours at either the Island's pier or beaches.

(Compl. Ex. D 1.) (emphasis in original).

To determine whether the letter interprets law it must be viewed in context. In December of 2011 DPL issued a letter forbidding boat operators other than the concessionaire or its subcontrators from picking up customers on Managaha for water sports activities based on language in the concession contract granting Tasi Tours the exclusive right to conduct "tours . . . from the Island." (*See* Compl. Ex. A 1.) The 1993 regulation promulgated by DPL which governs the commercial use of Managaha also grants the concessionaire the right to conduct "tours . . . from the Island." The parties in this case dispute the meaning of these words, demonstrating that their meaning requires some construction.

In May, 2012 DPL issued another letter, relying on different language in the contract, and concluded that the conduct which the December Letter prohibits is allowed. (*See* Compl. Ex. C 1.) Finally, in June of the same year DPL reversed its position and reiterated the prohibition announced in the December Letter, concluding that the exclusive right to conduct tours from the island, in the concession agreement, prohibits boat operators other than Tasi Tours or its subcontractors to pick up their customers for water sports activities. (*See* Compl. Ex. D 1.) This conclusion required a certain construction of the word "tours" which is not defined in the regulation. Although couched in terms of contract law, the letter and Press Release have the direct effect of interpreting the 1993 regulation in accordance with DPL's interpretation of the concession contract. Consequently, the June Letter construes what "tours conducted from . . . [Managaha] Island" means in the 1993 regulation.

The June Letter also implements a policy of enforcement based on the interpretation in the December Letter which had not been previously implemented. (*See* Prelim. Inj. 14.) The letter and

accompanying Press Release indicate that DPL will enforce the "contract right," beginning immediately. (*See* Compl. Ex. D 1, 6.) Accordingly, the letter falls squarely within the definition of rulemaking because it implements an agency policy of enforcement. *See* 1 CMC 9101(m).

Finally, none of the statutory exceptions to rules apply. The June Letter is not a statement by the Attorney General, an intra-agency memoranda, a declaratory ruling or another internal document. 1 CMC § 9101(m)(1)-(3). The June Letter has the practical effect of interpreting agency regulations, and it does not fall under any exception, therefore it is a rule within the meaning of the APA. As a result DPL was required to follow appropriate administrative procedures.

C. DPL FAILED TO FOLLOW ADMINSTRATIVE PROCEDURES

Petitioners correctly argue that DPL failed to follow agency procedures for rulemaking or for promulgating regulations prior to issuance of the December and June letters. As a result, the rule announced in the December letter is invalid.

Initially, the Court notes that because the December and June letters announced a rule, the letters constitute agency action within the meaning of the APA, requiring certain procedures. 1 CMC 9101(c) ("Agency action includes the whole or a part of an agency rule . . . or the equivalent or denial thereof . . ."). The adoption of a rule which is not a regulation requires: (1) approval by the Attorney General after review pursuant to 1 CMC § 2153(e), *id*. § 9102(c); (2) publication in accordance with Section 9102(a), *Id*. § 9102(d); and (3) filing with the Registrar of Corporations and the Governor. *Id*. Whereas the adoption of a regulation—a rule which has the force of law—must additionally comply with Section 9104 requiring notice and comment. *See* 1 CMC §§ 9104(a)(1)-(2). The APA requires a reviewing court to "hold unlawful and set aside agency, action, findings, and conclusions found to be," made "without observance of procedure required by law." 1 CMC § 9112(f)(2)(iv).

There is no evidence in the record that DPL published the letters in the Commonwealth Register, gained the approval of the Attorney General, or filed with the Registrar of Corporations and the

Governor. Petitioners offer a sworn affidavit indicating that they searched the Commonwealth Register for the appropriate time period and no such notice appeared. (Decl. of Counsel with Exhibits 2:4.) Petitioners also testified at the preliminary injunction hearing that they had never been notified of any rule change prohibiting them from picking up their customers form Managaha for water sports activities prior to the December Letter. (*See* Prelim. Inj. 8, 11.)[3] No evidence in the record indicates that any of the additional procedures for adoption of regulations were followed either.[4] As a result, Petitioners have met their burden to show that the undisputed facts establish every element of the presented claim. *Furuoka*, 2002 MP 5 ¶ 24. Petitioners are entitled to summary judgment, unless Defendants can point to a genuine issue of material fact preventing summary disposition.

In opposition Defendants principally argue one legal issue: they claim that the letters were not rules because they do not interpret law or policy based on a plain reading of the regulation. Based on the reasons previously mentioned herein, the Court finds that: (1) the meaning of the contested language in the 1993 regulation is not self-evident; and (2) the letters in fact interpret the regulation. Consequently summary judgment is **GRANTED** to Petitioners. For the same reasons herein stated, Defendants' cross-motions for summary judgment are **DENIED**.

V. DECLARATORY RELIEF AND ORDER

Pursuant to 1 CMC § 9112(f)(2)(iv) the Court holds the December Letter and the June Letter unlawful agency actions made without observance of the procedures required by law. The rule announced in those letters is hereby set aside as invalid.

The bond posted by Petitioners shall be returned in full.

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[3] The Preliminary Injunction order records statements made by the Petitioners. There is no written transcript. However, the Court maintains audio records from the preliminary hearing dated July 2, 2012 and July 3, 2012.

[4] Because no procedures were followed the Court need not reach the issue of whether the letters were rules or regulations. DPL can determine what if any rules or regulations it wishes to promulgate.

IT IS SO ORDERED this 26th day of March, 2013.

/s/

Joseph N. Camacho, Associate Judge