



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION



E-FILED
CNMI SUPERIOR COURT
E-filed: Sep 16 2015 03:10PM
Clerk Review: N/A
Filing ID: 57874455
Case Number: 15-0047-CV
N/A

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

**TINIAN CASINO GAMING CONTROL)
COMMISSION, LUCIA L. BLANCO-)
MARATITA, and LISA-MARIA B.)
AGUON,)**

Plaintiffs,

**LYDIA F. BARCINAS, MATTHEW C.)
MASGA, and BERNADITA C.)
PALACIOS,)**

Plaintiff-Intervenors

v.

**CHARLENE M. LIZAMA,)
in her individual and official capacities,)
JOEY P. SAN NICOLAS,)
in his individual and official capacities,)
and the MUNICIPALITY OF TINIAN)
AND AGUIGUAN,)**

Defendants.

CIVIL CASE NO. 15-0047

**ORDER GRANTING DEFENDANTS'
CHARLENE M. LIZAMA AND JOEY P.
SAN NICOLAS' MOTION TO DISMISS
IN THEIR INDIVIDUAL CAPACITIES**

I. INTRODUCTION

THIS MATTER came before the Court on September 1, 2015, at 9:30 a.m. in the Tinian Courthouse. Plaintiffs, Tinian Gaming Control Commission, Lucia L. Blanco-Maratita, and Lisa-Maria B. Aguon (collectively, "the Commission"), were represented by Attorneys Robert J. O'Connor and Joseph E. Horey. Plaintiff-Intervenors, Lydia F. Barcinas, Matthew C. Masga, and Bernadita C. Palacios, were represented by Attorney Claire Kelleher-Smith. Defendants sued in their official capacities, Charlene M. Lizama, Joey P. San Nicolas, and the Municipality of Tinian and Aguiguan, were represented by Attorneys Matthew T.

1 Gregory and Kimberlyn K. King-Hinds. Defendants sued in their individual capacities, Ms. Lizama and Mr.
2 San Nicolas, were represented by Assistant Attorney General David Lochaby.

3 Ms. Lizama and Mr. San Nicolas (collectively, the "Mayor's Office") filed a motion to dismiss the
4 Commission's 42 U.S.C. § 1983 claim under Rule 12(b)(6) of the Commonwealth Rules of Civil Procedure,
5 for failure to state a claim.

6 Based on review of the filings, oral arguments, and applicable law, the Court **GRANTS** the motion
7 to dismiss filed by the Mayor's Office.

8 **II. BACKGROUND**

9 The primary issue before the Court is whether the Mayor's Office should be granted qualified
10 immunity for its alleged act of halting increased salary payments to the Commission's employees. The
11 allegations in the complaint are as follows:

12 The Tinian Casino Gaming Control Commission is a regulatory body established through the Tinian
13 Casino Gaming Control Act ("the Casino Act"). Ms. Maratita is the Executive Director of the Commission.
14 Ms. Aguon was employed by the Commission in the position of Inspector I. In December 2014, the
15 Commission raised the salaries of certain employees—including Ms. Maratita and Ms. Aguon's—for fiscal
16 year 2015 under the applicable provisions of the Casino Act. Even with their increased salaries, the total
17 compensation for Commission employees remained below the total amount budgeted under the Tinian &
18 Aguiguan Municipal Legislative Delegation's Budget Act for fiscal year 2015.

19 The Commission complains that the Mayor's Office illegally halted payments of their increased
20 salaries. Ms. Lizama is the Municipal Treasurer of the Municipality of Tinian and Aguiguan. Mr. San
21 Nicolas is the Mayor of Tinian and Aguiguan. Beginning with the fourth pay period of fiscal year 2015, Mr.
22 San Nicolas instructed Ms. Lizama to refuse to issue paychecks that reflected the increased salaries to the
23 Commission's employees. The Mayor's Office instead paid only the salary amount to the Commission's
24 employees as allocated under—and in reliance of—the relevant provisions of the Budget Act: (1) the
25 Commission's employees' salaries as set forth; and (2) that the Commission would issue no raises to its

1 employees.

2 III. DISCUSSION

3 In their motion brought under Rule 12(b)(6) of the Commonwealth Rules of Civil Procedure, the
4 Mayor's Office asserts the affirmative defense of qualified immunity against the Commission's § 1983
5 claim.¹ The Court notes that affirmative defenses to a § 1983 claim are properly brought during the pleadings
6 stage. *See Sablan v. Tenorio*, 4 NMI 351, 355 n.1 (1996) (affirming application of a legislative immunity
7 defense brought under 12(b)(6)). The Supreme Court of the United States has repeatedly stressed the
8 importance of resolving § 1983 claims at the earliest possible stages in litigation. *Hunter v. Bryant*, 502 U.S.
9 224, 227 (1991).

10 1. Legal Standard

11 On a Rule 12(b)(6) motion, the moving party must show that an affirmative defense "clearly appears
12 on the face of the complaint." *See Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993). Here, the
13 Mayor's Office carries the burden to show that the qualified immunity defense applies through a two-part
14 inquiry. First, the pleading must not contain allegations when, taken as true, show that there was an actual
15 violation of a constitutional right. *Rayphand v. Tenorio*, 2003 MP 12 ¶ 68; *Atalig v. Mobil Oil Marianas*
16 *Islands, Inc.*, 2013 MP 11 ¶ 23. Second, the right must not have been clearly established at the time of the
17 alleged violation. *Rayphand*, 2003 MP 12 ¶ 68. Where the right is clearly established, then no reasonable
18 Government-official should have known that his or her acts violated the right in question.² *See id.*

19
20 ¹ This Court has jurisdiction over the Commission's § 1983 claim under Article V of the Northern Mariana Islands
21 Constitution. NMI Const. art. V § 102 (2) ("[T]hose laws not described in paragraph (1) which are applicable to Guam and which
22 are of general application to the several States as they are applicable to the several states"); *see Haywood v. Drown*, 556 US 729,
731 (2009) ("In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to
42 U.S.C. § 1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state
law.").

23 ² The Mayor's Office argues that the Commission carries the burden of persuasion to show that a constitutional right was
24 "clearly established." However, the relevant cases that the Mayor's Office cites to all pertain to summary judgment motions—not
25 motions made under Rule 12(b)(6) for failure to state a claim. *Sorrels v. McKee*, 290 F.3d 965 (9th Cir. 2002) (summary
judgment); *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996) (summary judgment); *Browning v. Vernon*, 44 F.3d 818 (9th Cir. 1995)
(summary judgment); *Neely v. Feinstein*, 50 F.3d 1502 (9th Cir. 1995) (summary judgment); *L.W. v. Grubbs*, 92 F.3d 894 (9th

1 **a. For the purpose of ruling on the instant Rule 12(b)(6) motion, the Court finds that**
2 **halting increased salary payments was a constitutional violation.**

3 The Court addresses the first part of the qualified immunity defense: an actual constitutional
4 violation. The Commission claims that the Mayor's Office violated its constitutional due process rights. Due
5 process is violated when there is a (1) deprivation of a life, liberty, or property interest; (2) where the
6 deprived life, liberty, or property interest was protected as a matter of substantive law; and (3) lack of
7 adequate procedures to safeguard constitutional protections. *See Premier Ins. Co., Inc. v. Commonwealth*
8 *Dep't of Labor*, 2012 MP 16 ¶ 8. Any deprived property interest must be protected as a matter of substantive
9 law when the act of deprivation took place. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541
10 (1985). Property interests must be created “from an independent source such as state law” *Id.* at 538
11 (distinguishing liberty interests which arise from the Constitution). Furthermore, the independent source
12 must create a reasonable expectation in the plaintiff that he or she would continue to receive the benefit of
13 a property interest. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (explaining that “It
14 is a purpose of the ancient institution of property to protect those claims upon which people rely in their
15 daily lives, reliance that must not be arbitrarily undermined.”).

16 Here, the Commission alleged facts to show the existence of a reasonable expectation that its
17 employees would continue to receive increased salary benefits. The sufficiency of an entitlement claim to
18 a property interest may only lie by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 344–45 (1976)
19 (“The North Carolina Supreme Court has held that an enforceable expectation of continued public
20 employment in that State can exist only if the employer, by statute or contract, has actually granted some
21 form of guarantee. Whether such a guarantee has been given can be determined only by an examination of
22 the particular statute or ordinance in question.”) (external citation omitted). The plain language of the Tinian

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25 Cir. 1996) (summary judgment); *Alston v. Read*, 663 F.3d 1094 (9th Cir. 2011) (summary judgment); *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011) (summary judgment).

1 Casino Gaming Control Act, an appropriate independent source,³ provides that the Commission may appoint
2 its members and set its members' salaries. Revised Tinian Casino Gaming Control Act ("RTC GA") § 5 (14)
3 ("Persons appointed under this section shall be appointed on such terms and conditions as to remuneration
4 and otherwise are not subject to the Commonwealth Civil Services System, except that all employees other
5 than the Executive Director and Deputy Director may be dismissed only for cause."). Therefore, under the
6 view most favorable to the Commission, there was relevant state law that allowed the Commission to set
7 a higher salary for its employees—and it was reasonable for those affected employees to expect receipt of
8 the continued benefits.

9 Accordingly, for the limited purpose of ruling on this 12(b)(6) motion and in consideration of its
10 procedural posture, the Court finds that the salary increases in question were a constitutionally-protected
11 property interest at this time.⁴ Therefore, the Mayor's Office did not meet its burden to clearly show that a
12 constitutional violation did not appear on the face of the complaint.

13 **b. The Commission's right to receive a higher salary was not a "clearly established" right.**

14 Having found that a constitutional violation appears on the face of the complaint, the Court addresses
15 the second step of the qualified immunity defense inquiry: (1) whether the constitutional right was clearly
16 established at the time of the Government officials' action; and (2) if the right was clearly established,
17 whether such action was legally reasonable. *See Rayphand v. Tenorio*, 2003 MP 12 ¶ 68; *see also, e.g.,*
18 *Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) ("Even 'where a right is clearly established,'
19 the defendants may nonetheless establish immunity by showing that reasonable persons in their position
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21 ³ The Tinian Casino Gaming Control Act took effect on January 1, 1990 through local law initiative. In the 1992 case
22 of *Commonwealth v. Tinian Casino Gaming Control Commission*, the Commonwealth Supreme Court directed the Superior Court
23 to apply a newly-formulated test to determine the legality of a number of challenged provisions within the Control Act. 3 NMI
24 134 (1992). Upon remand, the Superior Court found that some of the provisions were invalid. This Court further ordered the
25 Commission to submit a Revised Tinian Casino Gaming Control Act. *Commonwealth v. Tinian Casino Gaming Control Comm'n*,
Civ. No. 91-0690 (NMI Super. Ct. Apr. 8, 1993) (Final Order at 15). This Court issued an order approving and adopting the
Revised Control Act on August 18, 1993.

⁴ The Court notes that the Mayor's Office did not argue the remaining elements of a constitutional due process
violation—deprivation and lack of an adequate process.

1 would not have understood that their conduct was within the scope of the established prohibition.”).

2 In other words, even if the Court finds that a constitutional right was violated, the qualified immunity
3 defense still applies if the right was not "clearly established." To this extent, the Mayor’s Office argues that
4 the complaint alleges two irreconcilable sets of laws as to the Commission’s ability to set its members’
5 salaries: the Casino Act and Tinian Local Ordinance 18-3. The former allows compensation for the
6 Commission’s members up to \$75,000, but subject to approval by the Tinian & Aguiguan Legislative
7 Delegation. RTCGA § 5 (7) (“ . . . Each member . . . [of the Commission] . . . shall receive compensation
8 not to exceed \$75,000 annually from a budget adopted by the commission for its operations and approved
9 by the Tinian Municipal Council.”). The latter prevents the Commission from setting its members' salaries
10 or increasing the salaries of any of its own employees. T.L.O. §§ 104(d), 404(c), 404(i). Where there are
11 conflicting authorities and no sufficient case law to guide the correct course of action—the Mayor's Office
12 argues—there is no "clearly established" right . The Court is persuaded by this argument.

13 If regulations or case law provides reasonable warning to a Government official that his or her action
14 would violate a constitutional right, then that right is clearly established. *Anderson v. Creighton*, 483 U.S.
15 635, 640 (1987) (“The contours of the right must be sufficiently clear that a reasonable official would
16 understand that what he is doing violates that right.”). The requisite degree of warning does not necessarily
17 extend to a decision by the highest court. *See United States v. Lanier*, 520 U.S. 259, 269 (1997). But the
18 court should look to binding authorities to determine whether a Government official had fair warning. *See,*
19 *e.g., Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir. 1993) (explaining that an Attorney General’s opinion
20 cannot by itself be “clearly established law” because it is not binding). Where no binding authority is
21 available, clearly established law may be shown by identifying a “consensus of cases of persuasive
22 authority.” *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

23 Here, the Mayor’s Office met its burden to show that the qualified defense should apply because
24 there was no "clearly established" right on the face of the complaint; and the Commission's opposition
25

1 arguments are unpersuasive. In addition to other case law,⁵ the Commission directs this Court to a consent
2 decree issued by the United States District Court of the Northern Mariana Islands in the case of *Sattler v.*
3 *San Nicolas*, D.N.M.I. Civ. No. 07-0005 (Consent Decree and Final Judgment) (June 14, 2007). In *Sattler*,
4 the district court held by consent decree that the Mayor's Office and "each of his officers, agents, employees,
5 successors, assigns . . ." from altering the Commission's ability to set its members' salaries. *Id.* at 6.
6 Accordingly, the Commission argues that the Mayor's Office was on fair notice that halting salary
7 distributions to the Commission's employees was a constitutionally-illegal act.

8 However, there are two problems with the Commission's argument. First, decisions of a district court
9 are not binding on this Court. *See* 7 CMC § 3401 (directing the court to the restatements of law where there
10 is no binding written or customary authority). Second, consent decrees do not carry sufficient precedential
11 effect to show a "clearly established" right. *Cf.* Clark E. Walter, *Consent Decrees and the Judicial Function*,
12 20 CATH.U.L.REV. 312, 323 (1971) ("Settlement by consent decree, on the other hand, provides no
13 meaningful precedent, thereby depriving business and bar of an opportunity to ascertain whether, in fact, the
14 practices attacked in the government's complaint are illegal."); *see Mafnas v. Yuji Matono*, Civ. No. 03-0341
15 (Order Granting Motion for Summary Judgment at 5) (Mar. 17, 2004) (holding that a consent decree is "not
16 a judicial determination of the rights of the parties and does not represent a judgment of the court, but merely
17 records a preexisting agreement of parties."). Therefore, the Commission's constitutional due process right
18 was not "clearly established" when the Mayor's Office halted the payment of additional salaries.

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21 ⁵ The cases that the Commission cites are not persuasive as to whether the due process right was "clearly established."
22 In *Lawrence v. Reed*, the defendant conceded that the constitutional right was clearly established. 406 F.3d 1224, 1230 (10th Cir.
23 2005) ("Mr. Reed has not challenged the district court's finding that he violated Mrs. Lawrence's Fourth and Fourteenth
24 Amendment rights and that these rights were clearly established at the time he acted."). In *Roska v. Peterson*, the court found that
25 the law was clearly established through binding precedent. 328 F.3d 1230, 1250 (10th Cir. 2003) (citing *Malik v. Arapahoe
County Dep't of Soc. Servs.*, 191 F.3d 1306, 1315 (10th Cir. 1999)). In *Grossman v. City of Portland*, the lower court did not
resolve whether the law was clearly established. 33 F.3d 1200, 1203 (9th Cir. 1994) ("In explaining its judgment, the court adopted
a somewhat unusual approach to the legal issues. It did not reach the question whether section 010 was unconstitutional, but
instead rested its holding solely on the fact that under that section the arresting officers had probable cause to make the arrest.").
The Commission argues that the Mayor's Office's reliance on the Budget Act was not reasonable, but that analysis must come after
a finding of a "clearly established" right.

1 Accordingly, the Mayor's Office is entitled to the qualified immunity defense. The Mayor's Office
2 met its burden to show that the Commission has not alleged a "clearly established" right on the face of its
3 complaint. Having met this burden, the Mayor's Office does not need to show whether their act as alleged
4 was legally reasonable. Therefore, the Mayor's Office's 12(b)(6) motion is granted.

5 **CONCLUSION**

6 Based on the foregoing, the motion to dismiss filed by the Mayor's Office is **GRANTED** with respect
7 to Defendants Ms. Lizama and Mr. San Nicolas in their individual capacities.

8
9 **SO ORDERED** this 16th day of September, 2015.

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11 /s
12 David A. Wiseman, Associate Judge