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

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|----|-------------------------------|---|--------------------------------|
| 7 | JEANNE H. RAYPHAND, |) | Civil Action No. 94-912 |
| 8 | Plaintiff, |) | |
| 9 | v. |) | MEMORANDUM DECISION AND |
| 10 | FROILAN C. TENORIO, Governor, |) | ORDER ON DEFENDANTS' |
| 11 | <u>et al.</u> , |) | MOTION TO DISMISS |
| 12 | Defendants. |) | |

This matter came before the Court on February 15, 1995, on the motion of Defendant Governor Froilan C. Tenorio to dismiss this taxpayer action as moot. The Governor argues that two recent appropriation bills enacted by the Commonwealth Legislature ratified all of the Governor's expenditures at issue. Plaintiff Jeanne H. Rayphand counters that the Legislature's actions were ineffective to accomplish this purpose.

I. FACTS

During the first year of Governor Tenorio's term of office, and for all of Fiscal Year 1994, the Commonwealth Government operated without a current budget appropriation. Instead, the Commonwealth operated under the budget for Fiscal Year 1992, the

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1 most recent validly-enacted general appropriation up to that time.
2 In early 1994, Governor Tenorio took the position that he had
3 plenary authority, under Article III, § 9(a) of the Commonwealth
4 Constitution, to reprogram funds allocated by the 1992 budget, in
5 the absence of a valid appropriation for the current fiscal year.
6 In the Governor's view, the only limit to this reprogramming
7 authority was that total expenditures must remain within the
8 overall spending cap of the 1992 budget, set at \$152,657,591.

9 Accordingly, the Governor undertook substantial reprogramming
10 of the 1992 budget allocations to meet his current budget
11 priorities during late 1994. Among these reprogramming actions
12 were a \$6.2 million payment to Mitsubishi Electric Company to pay
13 for generators purchased by the Commonwealth Utilities
14 Corporation, a \$1 million payment pursuant to a settlement of a
15 federal discrimination lawsuit against the Public School System
16 (PSS), and a payment to the Judges and Justices of the
17 Commonwealth Judiciary for salary increases which had been
18 approved by the Legislature in early 1993. None of these
19 expenditures took place pursuant to legislative appropriation.

20 On September 13, 1994, Plaintiff filed this action, alleging
21 that the Governor's reprogramming authority is limited by the
22 restrictions of the Planning and Budgeting Act, 1 CMC § 7101 et
23 seq. Plaintiff's suit set forth nine causes of action, later
24 amended to fourteen, alleging that the expenditures described
25 above -- and others -- exceeded the Governor's authority. The
26 Complaint requested a declaration that the expenditures were
27 illegal, an injunction prohibiting further such reprogramming, a
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1 judgment against the Governor in the amount of the claimed illegal
2 expenditures, and an award of attorneys' fees and costs.

3 On January 24, 1995, the Legislature passed and the Acting
4 Governor signed two appropriation measures. Public Law 9-23,
5 entitled "To make special appropriations for Fiscal Year 1994 and
6 1995 and for other purposes," contained the following findings:

7 (1) there has not been an adopted budget since
8 Fiscal Year 1992 and, since that Fiscal Year,
9 obligations have been incurred at the level for that
10 fiscal year pursuant to Article III, Section 9(a) of the
11 Constitution; and

12 (2) as described in Sections 2 through 4 of this
13 Act, a number of special circumstances have arisen since
14 Fiscal Year 1992 that have required or will require
15 payments from the Commonwealth Treasury, particularly
16 the settlement of the Public School System lawsuit, the
17 payments of amounts in arrears to Mitsubishi Electric
18 Company for electric generators, and the salary increase
19 for the judges of the courts of the Commonwealth; and

20 (3) the need for these payments was unforeseen in
21 the Fiscal Year 1992 budget and appropriations acts; and

22 (4) the judiciary has publicly advised and
23 admonished the executive and legislative branches to
24 find a political solution to the legal and financial
25 problems raised by reprogramming, rather than through
26 litigation; and

27 (5) due to the general language of Article III,
28 Section 9(a) of the Constitution, it is prudent for the
Legislature to ratify the actions taken to respond to
such special circumstances and to appropriate funds for
such payments, to the extent that such appropriations
may be necessary; and

(6) the Legislature and the Governor agree that
the expenditure of Public funds as described in sections
2 through 4 of this Act should have been appropriated by
the Legislature.

Sections 2 and 4 of Public Law 9-23 appropriate specific
funds to pay for the PSS settlement and the judges' retroactive
salary increase. In both cases, the funds are appropriated "out

1 of any funds available for Fiscal Year 1994^{1/} pursuant to Article
2 III, Section 9(a) of the Constitution and not otherwise
3 obligated." Section 3(d) appropriates \$10,000,000 to cover the
4 payments to Mitsubishi. According to the provision, these funds
5 are appropriated "to [Commonwealth Development Authority] derived
6 from bond interest and currently held by the Bank of Guam."
7 Section 5 provides that "the Governor and Legislature shall take
8 the appropriations made by this Act into consideration when
9 adopting a budget for Fiscal Year 1995."

10 Section 6 purports to absolve from civil liability "any
11 employee of the Commonwealth government" in connection with the
12 PSS settlement, the Mitsubishi payment, and the payment of
13 judicial salaries. The provision likewise relieves employees of
14 liability "for having exceeded the overall budgetary spending
15 during the period of continuing appropriations beginning October
16 1, 1992."

17 Public Law 9-25, also enacted on January 24, 1994, is a
18 general appropriation measure for the operations of the
19 Commonwealth Government for Fiscal Year 1995. While the parties
20 to this motion did not submit the budget worksheets for this
21 measure, the face of the statute does not explicitly account for
22 the appropriations contained in Public Law 9-23 in determining
23 revenues available for expenditure in Fiscal Year 1995.^{2/}

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26 ^{1/} Section 4 also appropriates an equal amount of funding for
the Judges' salaries in Fiscal Year 1995.

27 ^{2/} Specifically, while § 201 of the 1995 budget deducts from
28 total identified revenues the Legislature's previous budget
appropriation for the Commonwealth Judiciary (Public Law 9-15), §
201 does not mention the appropriations of Public Law 9-23.

1 Defendant's motion followed on February 7, 1995. It was
2 heard on an expedited timetable, pursuant to a stipulation of the
3 parties, and taken under advisement.

4
5 **II. ISSUES**

6 Four issues are presented:

7 1. Whether the Commonwealth Legislature has power to ratify
8 the reprogramming acts of the Governor and other Commonwealth
9 employees;

10 2. Whether, as a matter of law, the actions of the
11 Commonwealth Legislature in passing Public Laws 9-23 and 9-25
12 constitute an effective ratification of the Governor's
13 reprogramming acts and an effective release from liability arising
14 from those acts;

15 3. Whether, as a matter of law, Public Laws 9-23 and 9-25
16 have any effect on reprogramming actions not specifically
17 mentioned in those statutes;

18 4. Whether this action should be dismissed due to
19 Plaintiff's failure to join either the Commonwealth Development
20 Authority or the former Governor and Secretary of Finance as
21 Defendants.

22
23 **III. ANALYSIS**

24 **A. MOOTNESS**

25 A case is rendered moot if the factual or legal posture of
26 the controversy has changed in such a way as to render it non-
27 justiciable. In particular, legislative enactments may satisfy
28 claims of illegality, ratifying acts which were arguably illegal

1 at the time they were committed. Wright, Miller & Cooper, Federal
2 Practice and Procedure, 2d, § 3533; See also Southern California
3 Gas Co. v. Public Utilities Comm., 695 P.2d 186 (Cal. 1985). The
4 party contending that a case is moot must bear the heavy burden of
5 demonstrating facts underlying that contention. In re Duncan, 3
6 C.R. 383, 387 (Comm. Tr. Ct. 1988). Furthermore, on a motion to
7 dismiss, the court must view the facts in the light most favorable
8 to the non-moving party. Govendo v. Micronesian Garment Mfg.,
9 Inc., 2 N.M.I. 270 (1991), citing *Abramson v. Brownstein*, 897 F.2d
10 389 (9th Cir. 1990).

11 Here, the arguments before the Court call into question the
12 validity of an enactment of the Commonwealth Legislature.
13 Therefore, the standard presumptions recited above collide full-
14 force against the equally-standard rule that regularly-enacted
15 statutes are presumed to be constitutional. See In re Seman, 3
16 N.M.I. 57 (1992). In resolving the conflict between these
17 opposing presumptions, the Court notes that Defendants¹ motion is
18 potentially dispositive of this entire action at a pre-trial
19 juncture before a full evidentiary record has been presented.
20 Moreover, the issues raised by Plaintiff's Complaint are of the
21 most serious character and deserve careful consideration by the
22 Court. It is therefore appropriate to give effect to the
23 presumptions favoring Plaintiff even if this means subjecting
24 Public Law 9-23 to greater scrutiny than is customary when a
25 statute is challenged.

1 **B. LEGISLATURE'S POWER OF RATIFICATION.**

2 A legislature may validly ratify or cure procedural defects
3 regarding any action which the legislature could have authorized
4 in advance. *Fairbanks North Star Borough v. Alaska*, 753 P.2d
5 1158, 1160 (Alaska 1988); *Southern California Gas Co.*, *Supra*, 695
6 P.2d at 188; *Ventura Port Dist. v. Taxpayers, Property Owners,*
7 *Citizens and Electors of Ventura County*, 347 P.2d 305, 310 (Cal.
8 1959); *Singer, Sutherland Statutory Construction* (5th Ed. 1993),
9 § 41.11. Where the legislature's intention to cure prior
10 procedural lapses is clearly expressed, such enactments are given
11 full effect. *Fund Manager v. Corbin*, 778 P.2d 1244 (Ariz. 1989).
12 See also *Johnston v. Connor*, 236 P.2d 987, 991 (Okla. 1951)
13 (legislature may appropriate funds to pay for contract entered
14 into by Governor years earlier); *Ogilvie v. Lewis*, 274 N.E.2d 87,
15 95 (Ill. 1971).

16 However, a legislature may not pass a statute which
17 prescribes a rule of decision in a pending case unless the
18 legislation itself amends the substantive law underlying the case.
19 *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).^{3/} As

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21 ^{3/} In *Klein*, an administrator brought suit against the
22 United States to recover an estate seized by the government during
23 the Civil War. While the case was on appeal, Congress directed
24 that a claimant's receipt of a presidential pardon should be
25 considered conclusive proof that the recipient had aided and
26 comforted the Confederacy, making him ineligible to recover his
27 land under applicable law. The Supreme Court held the proviso
28 unconstitutional because it "passed the limit which separates the
legislative from the judicial power" by "prescrib[ing] a rule of
decision of a cause in a particular way." *Id.* at 146-47.

29 The *Klein* Court distinguished *Pennsylvania v. The Wheeling*
30 *and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), which had
31 held that a Congressional retroactive ratification of a bridge's
32 specifications did not violate the separation of powers doctrine,
33 even though the Congressional Act had the effect of thwarting a
34 preexisting judicial decree declaring the bridge an obstruction to
35 (continued...)

1 expressed by the Ninth Circuit, "[t]he constitutional principle of
2 separation of powers is violated where (1) 'Congress has
3 impermissibly directed certain findings in pending litigation,
4 without changing any underlying law,' or (2) 'a challenged statute
5 [is] independently unconstitutional on other grounds.'" Gray v.
6 First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993), quoting
7 Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1315-16 (9th
8 Cir. 1990), *rev'd* on other grounds 112 S.Ct. 1407 (1992).

9 In sum, while there is no question that the Commonwealth
10 Legislature has the power to ratify the Governor's reprogramming
11 expenditures, that power must be exercised within the limits
12 imposed by the separation of powers doctrine and the provisions of
13 the Commonwealth Constitution. In order to prevail on this motion
14 to dismiss, Defendants must show that these limits have been
15 observed.

17 C. VALIDITY OF PUBLIC LAW 9-23

18 Defendants contend that Public Law 9-23 which purports to
19 ratify various expenditures and reprogramming activities of the
20 Governor, has made all of the claims contained in Plaintiff's
21 complaint moot. To satisfy the test enunciated in Gray, *supra*,
22 989 F.2d at 1568, Defendants must show: 1) that Public Law 9-23
23 effects a change in the existing law governing Defendants'

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26 _____
27 3/(...continued)

28 navigation and directing its removal. *Id.* The *Klein* court
explained that "[n]o arbitrary rule of decision was prescribed [in
Wheeling Bridge] . . . , but the court was left to apply its
ordinary rules to the new circumstances created by the act. *Klein*
at 147. See also *Puterbaugh v. Gila County*, 46 P.2d 1064 (Ariz.
1935).

1 actions; and 2) that Public Law 9-23 meets constitutional
2 requirements for valid appropriations.

3 **1. Ratification of Expenditures.**

4 **a. Change in Underlying Substantive Law.** The principal
5 defect alleged regarding the Governor's reprogramming actions was
6 his failure to secure legislative appropriation prior to expending
7 the funds in question. There is no doubt that the Legislature, in
8 enacting Public Law 9-23, intended to provide an appropriation
9 authorizing expenditures for the PSS settlement, the Mitsubishi
10 generators and the judicial salary increase. If such
11 appropriations were effectively made, they would amount to a
12 change in the substantive law underlying the Governor's actions.
13 Thus, *assuming for the moment* that these appropriations were
14 constitutionally permissible (a question addressed below), the
15 first part of the two-part test of *Gray, supra*, 989 F.2d at 1569,
16 is satisfied with regard to these expenditures.

17 **b. Constitutionality.** A legislative enactment must be
18 "constitutional on other grounds" in order to satisfy the second
19 part of the test in *Gray, supra*, 989 F.2d at 1570-71. Plaintiff
20 claims that the appropriations contained in sections 2 and 4 of
21 Public law 9-23 are beyond the Legislature's power, because they
22 seek to appropriate funds from Fiscal Year 1994 in excess of the
23 Governor's identified revenues for that year. *See Opposition*
24 *Memorandum* at 12-13.

25 To evaluate this claim, the Court looks to Amendment 14 of
26 the Commonwealth Constitution, in which the 1985 Constitutional
27 Convention modified Art. III, § 9(a) to read:

28 The Governor shall submit to the Legislature a proposed
annual *balanced* budget for the following fiscal year.

1 The proposed *balanced* budget shall describe anticipated
2 revenues of the Commonwealth and recommend expenditures
3 of Commonwealth funds. *The anticipated revenues may not
be increased by the Legislature without the consent of
the Governor.* (language of Amendment 14 in italics)

4 Plaintiff argues that this provision effectively requires a
5 balanced budget and prevents the Legislature from appropriating
6 funds in excess of identified revenues.

7 On its face, the language of the Amendment is ambiguous.
8 Section 9(a) does not explicitly prohibit the Legislature from
9 appropriating funds in excess of identified revenues, as do the
10 "balanced budget" provisions of other state constitutions.^{4/}
11 Article II, the portion of the Constitution dealing with the
12 powers of the Legislature, is silent on the issue. Moreover, the
13 *Analysis to the Constitution* (1976), at 76, makes it clear that §
14 9(a) in its pre-amendment form was *not* intended to limit the
15 powers of the Legislature to enact deficit-spending bills: "The
16 budget is a guide [to the Legislature]. It is not intended as a
17 limitation."

18 Despite this ambiguity, the repeated insertion of the word
19 "balanced," and the added language in Art. III, § 9(a) as amended
20 does suggest that the drafters of Amendment 14 intended to bind
21 the Legislature to a balanced budget. Committee Recommendation
22 No. 50 to the Second Constitutional Convention conclusively
23 demonstrates this intent of the drafters:

24
25 *See, e.g., Grossman v. State Dept. of Natural Resources,*
26 682 P.2d 1319, 1333 (Mont. 1984) (citing Montana constitutional
27 provision that "[a]ppropriations by the Legislature shall not
28 exceed anticipated revenue"); *City of Camden v. Byrne,* 411 A.2d
462, 471 (N.J. 1980) (citing New Jersey constitutional provision
that "[n]o general appropriation law ... shall be enacted if the
appropriation contained therein ... shall exceed the total amount
of revenue on hand").

1 Under Section 1 of the proposed amendment, the
2 governor would be required to submit and the legislature
3 to approve a balanced budget for the Commonwealth
Government in every fiscal year. A balanced budget
means that revenues are at least equal to outlays.

4 [...]

5 [This proposal] will prevent the legislature from
6 appropriating funds in excess of the amount of revenue
estimates as being available from existing resources.

7 [...]

8 The Committee believes that the proposed amendment
9 requiring a balanced budget sets the Commonwealth on the
right financial course.

10 On July 16, 1985, the Second Constitutional Convention unanimously
11 passed Amendment 14 as proposed by the Committee. Constitutional
12 Convention Journal, 29th Day, at 497.

13 A cardinal principle of statutory construction is that the
14 Court should give effect to the intention of the legislature.
15 Commonwealth Ports Authority v. Hakubotan Saipan Enterprises,
16 Inc., 2 N.M.I. 212, 221 (1991). Here, the intention of the
17 drafters of Amendment 14 is crystal clear, despite the ambiguity
18 of the provision they enacted. The Court therefore concludes that
19 the Commonwealth Legislature is constitutionally prohibited from
20 appropriating funds in excess of the identified revenues for the
21 fiscal year in question.^{5/}

22 Returning to Public Law 9-23, sections 2 and 4 of the statute
23 expressly acknowledge the constitutional limits on deficit
24 spending. These sections appropriate funds for the PSS settlement
25

26 ^{5/} For discussions of the mechanisms employed by other
27 jurisdictions to keep government spending within constitutionally-
28 mandated balanced budgets, see *Sikeston R-VI School Dist. v.*
Ashcroft, 828 S.W.2d 372 (Mo. 1992); *Grossman*, supra, 682 P.2d at
1333; *Camden*, supra, 411 A.2d at 462; *Ogilvie*, supra, 274 N.E.2d
at 94; *Boneno v. State*, 284 S.E.2d 170, 171 (N.C. App. 1981).

1 and the judicial salary increase "out of any funds available for
2 Fiscal Year 1994 pursuant to Article III, Section 9(a) of the
3 Constitution and not otherwise obligated." " However, it is
4 unclear whether there are such funds available for Fiscal Year
5 1994 to fund the 1994 retroactive judge's salaries or the PSS
6 settlement payments. Plaintiff has offered evidence in opposition
7 to this motion that there are no such available funds. See "Exh.
8 I" to Plaintiff's Opposition Memorandum. However, this single
9 document cannot constitute conclusive proof on the question.

10 Section 5 of Public Law 9-23 requires the Legislature to
11 "take the appropriations made by this Act into consideration when
12 adopting a budget for Fiscal Year 1995." However, the text of
13 Public Law 9-25, which enacted the 1995 budget, contains no
14 mention of either Public Law 9-23 or the appropriations made
15 therein. Neither party has submitted the worksheets for the 1995
16 budget or other documentation to enable the Court to determine
17 whether the Legislature's 1995 appropriation bill makes allowances
18 for the expenditures authorized by Public law 9-23, if there were
19 in fact no funds available in the 1994 budget to offset these
20 expenditures. If there are no funds available in Fiscal Years
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23 ^{5/} The judicial salary increases for Fiscal Year 1995 have
24 clearly been authorized by other legislation. Indeed, Public Law
25 9-23 is the third time the Commonwealth Legislature has voted to
26 authorize expenditures for the judicial salary increase. Public
27 Law 8-15, which enacted the increase itself, provided "[t]here is
28 hereby authorized to be appropriated out of the Commonwealth
General Fund the sum or sums necessary to implement the provisions
of this Act." Public Law 9-19, enacted January 12, 1995,
appropriates the amount necessary to cover the judicial salary
increase for Fiscal Year 1995. The Legislature explicitly took
this appropriation into account in passing the 1995 general
budget. See Public Law 9-25, § 201(b).

1 1994 or 1995, then the appropriations at issue fail to satisfy the
2 requirements of Art. III, § 9(a) and are a nullity.

3 Likewise, if these provisions are ineffective to appropriate
4 the funds at issue, then the legislature's attempt to moot this
5 controversy fails as to those expenditures. As noted above, the
6 Defendants as moving party bear the burden of proving facts
7 showing mootness. *Duncan, supra*, 3 C.R. at 387. The Court finds
8 that Defendants have not discharged their burden here. The issue
9 is best resolved on motions for summary judgment, where the Court
10 has both an ample evidentiary record and focused arguments by the
11 parties.

12 Applying the same analysis, the Court cannot find on this
13 record that Section 3 of Public Law 9-23 is a constitutionally-
14 effective appropriation of funds. This section appropriates
15 \$10,000,000 "out of the trust fund derived from bond interest and
16 currently held by the Bank of Guam." The evidence submitted does
17 not indicate whether this fund was within the Legislature's power
18 of appropriation in the manner exercised. It may be that an
19 appropriation from this special fund is fully exempt from the
20 requirement that all appropriations be within the total identified
21 revenues for the fiscal year. See *McLean v. Lanza*, 137 A.2d 622,
22 631 (N.J. 1957), app. dism., 79 S.Ct. 351. Conversely, other
23 jurisdictions have held that certain federal moneys "impressed
24 with a trust" to be used only for certain purposes are not freely
25 subject to legislative appropriation. See Opinion of the Justices
26 to the Senate, 378 N.E.2d 433, 436 (Mass. 1978). The Court cannot
27 at this juncture find conclusively that the source of the
28

1 Mitsubishi appropriation is proper without a fuller evidentiary
2 record before it.

3 Nothing in this ruling on Defendants' motion to dismiss
4 should be construed to limit the power of the Legislature to pass
5 further acts ratifying the expenditures at issue here, or other
6 past expenditures, if it deems such appropriations advisable.
7 However, in order to be constitutionally effective, such
8 appropriations must draw from a source of available funds (i.e.,
9 funds which have not already been allocated up to the limit of
10 identified revenues for the fiscal year in question). See
11 *Ogilvie*, supra, 274 N.E.2d at 95 (legislature may authorize
12 expenditures out of available funds in future fiscal years so long
13 as budgets for future years take expenditures into account and
14 total expenditure for any given fiscal year is within identified
15 revenue ceiling).

16
17 **2. Release from Liability.**

18 Section 6 of Public Law No. 9-23 contains two parts. The
19 first clause purports to release government employees from civil
20 liability for the part they played in reprogramming funds to pay
21 for the PSS lawsuit, the CUC generators, and the judges' salary
22 increases. The second clause exonerates employees from having
23 exceeded the overall budgetary spending cap for the period of
24 continuing appropriations beginning October 1, 1992.

25 Applying the Gray test to the first clause concerning the
26 three specific reprogrammed expenditures, the Legislature must
27 have actually changed underlying law before any such release from
28 liability can be deemed effective. In this regard, the Court

1 notes a distinction between legislative appropriation beyond the
2 level of identified revenues, which is prohibited by Art. III, §
3 9(a) of the Constitution, and executive spending beyond
4 legislative appropriations, which is prohibited by the Planning
5 and Budgeting Act, 1 CMC §§ 7101 et seq. In seeking to release
6 Commonwealth employees for allegedly unauthorized spending, the
7 Legislature has not made any changes to the Planning and Budgeting
8 Act. Rather, as noted above, it has sought to authorize the
9 expenditures at issue by making the required appropriations.

10 However, if such appropriations are ineffective because of a
11 failure to identify available funds, the underlying substantive
12 law governing Defendant's actions has not changed. And without
13 such a change of law, the Legislature is powerless to exonerate
14 Commonwealth officials from liability. See Gray, supra, 989 F.2d
15 at 1568; Puterbaugh, supra, 46 P.2d at 1064. Therefore, the Court
16 is unable at this stage to rule as a matter of law that the first
17 portion of Section 6 moots any of Plaintiff's claims.

18 As to the second clause of Section 6 concerning alleged
19 violations of the overall budgetary spending cap, the Court is
20 able to rule as a matter of law. Art. III, § 9(a) clearly forbids
21 any appropriations over and above "the level of the previous
22 fiscal year^H when the government is operating under a continuing
23 resolution. Even if the Court were to agree with Defendants' view
24 that § 9(a) allows plenary reprogramming within the overall budget
25 ceiling,^{2/} the ceiling itself cannot be lifted by Legislative act

26
27 ^{2/} While the Court's ruling on this issue must await the
28 parties' motions for summary judgment, the Court notes that the
language relied on by the Governor was part of the original
Commonwealth Constitution as passed in 1976. In discussion this
(continued...)

1 alone. As we have seen, Public Law 9-23 cannot make
2 appropriations which are prohibited by Art. III, § 9(a).
3 Accordingly, that portion of P.L. 9-23, § 6 which reads: "... nor
4 for having exceeded the overall budgetary spending limit during
5 the period of continuing appropriations beginning October 1, 1992"
6 is unconstitutional on its face. Applying the savings clause of
7 § 7 of the statute, the Court strikes the unconstitutional
8 language from P.L. 9-23, leaving the remainder of the statute in
9 force.

10 Again, the Court emphasizes that this result does not imply
11 that the Legislature is powerless to relieve executive branch
12 employees from any liability arising from 1994 reprogramming
13 decisions. It is not the Court's role to comment on the wisdom or
14 desirability of legislative action; however, from a purely
15 constitutional viewpoint, the Legislature has two choices in this
16 regard. First, it may retroactively amend the Planning and
17 Budgeting Act itself to allow spending beyond budget
18 authorizations. Second, it may enact constitutionally-effective
19 appropriations, such that the spending in question is accounted
20 for and any resulting deficits are effectively retired.

21
22
23 ^{2/}(...continued)
language, the *Analysis to the Constitution* provides:

24 [i]f the legislature does not approve a budget by the
25 end of the fiscal year, the appropriations of the
26 previous fiscal year continue at the same *levels*. *This*
27 *means that programs are funded and money may be expended*
28 *by the executive branch in the same manner as if the*
legislature had passed an omnibus appropriation bill
containing the same figures as all of the appropriation
bills that passed in the previous year. Emphasis added.

1 **D. OTHER EXPENDITURES NOT NAMED IN THE STATUTE.**

2 Defendants argue that all remaining causes of action in
3 Plaintiff's Complaint are rendered moot by the release from
4 liability in Public Law 9-23, § 6. Defendants ask the Court to
5 infer from this provision a release from liability for all
6 reprogramming decisions made prior to the passage of Public Law 9-
7 25. Defendants argue that the Legislature intended to resolve the
8 issue of the Governor's reprogramming authority outside the
9 context of litigation, and that:

10 [i]t strains logic to conclude that the Legislature
11 would seek to accomplish this purpose by eliminating
12 civil liability for the total expenditure for Fiscal
13 Year 1994 while at the same time permitting civil
14 liability to attach to individual expenditures that make
15 up that total. **Motion** at 9.

16 This argument fails for three reasons. First, as discussed
17 above, the Legislature's attempt to absolve Defendants from having
18 exceeded constitutional budget limitations is invalid because it
19 is beyond the power of that body. Thus, this portion of the
20 statute is stricken as unconstitutional, and Defendants may not
21 rely on it for any purpose.

22 Second, even if the unconstitutional portion were not
23 stricken, the Court would interpret § 6 as a release limited only
24 to the three enumerated expenditures dealt with elsewhere in the
25 statute. As to those specific expenditures, the Legislature
26 clearly took the view that it was proper to "ratify the actions
27 taken [...] **and to appropriate funds for such payments.**" P.L. 9-
28 23, § 1(5). Thus, the first clause of the release in section 6
relates directly to the appropriations of sections 2 through 4.

 The more general language of the second clause appears to
reflect the Legislature's view that these three specific

1 expenditures may have also been above and beyond the overall
2 spending ceiling set by Art. III, § 9(a). Such excess spending
3 would constitute a separate violation of law from the act of
4 exceeding statutory reprogramming authority. Thus, it was
5 advisable to absolve Commonwealth employees from liability for
6 both potential violations arising from these three acts. There is
7 no basis in this plain language to imply a sweeping release from
8 liability for all reprogramming acts not enumerated in the
9 statute.

10 Finally, as noted above, to enact a valid release from
11 liability for past acts, the Legislature must change the
12 substantive law underlying the challenged acts in a manner that is
13 within the Legislature's constitutional power. Gray, supra, 989
14 F.2d at 1568. In this context, the validity of such a release
15 depends on the validity of the appropriation which authorizes the
16 expenditure in question. And nowhere in the text of Public Law 9-
17 23 is there a general appropriation covering all of the Governor's
18 reprogramming decisions prior to the passage of Public Law 9-25.
19 Thus, even if the Court were to accept Defendants' proffered
20 interpretation of § 6, such an attempted release would fail the
21 Gray test and therefore be ineffective.

22
23 **E. FAILURE TO JOIN AN INDISPENSABLE PARTY**

24 Com. R. Civ. P. 19(a) defines an indispensable party as a
25 person:

26 in [whose] absence complete relief cannot be accorded
27 among those already parties, or [who] claims an interest
28 relating to the subject of the action and is so situated
that the disposition of the action in his absence may
(i) as a practice matter impair or impede his ability to
protect that interest or (ii) leave any of the persons

1 already parties subject to a substantial risk of
2 incurring double, multiple or otherwise inconsistent
obligations by reason of his claimed interest.

3 When faced with a motion under Rule 12(b)(7) to dismiss for
4 failure to join an indispensable party, the Court should grant the
5 motion only if the absent party cannot be joined. Wright &
6 Miller, **Federal Practice and Procedure, Civil 2d § 1359.**

7 Here, Plaintiff has already expressed a willingness and
8 ability to join the Commonwealth Development Authority as a
9 defendant to this action. **Opposition Memorandum at 14.** Thus,
10 dismissal on this ground is not warranted.

11 As for the former Governor and Secretary of Finance,
12 Defendants have not shown how the failure to join these persons as
13 defendants will prevent the Court from according complete relief
14 in this case or will expose any party to multiple or inconsistent
15 obligations. As Plaintiff correctly observes, there is no
16 allegation before the Court that the former Administration spent
17 beyond the constitutional limits in its last three months in
18 office or reprogrammed funds in violation of law. *Id.* at 17.
19 Accordingly, the Court finds that these persons are not necessary
20 parties to this action.

21 22 **IV. CONCLUSION**

23 For the foregoing reasons, the Court hereby ORDERS:

24 1. Defendant's motion to dismiss is DENIED. The Court
25 reiterates that this ruling does not constitute a finding that
26 Public Law 9-23 is unconstitutional as a whole. Nor is the
27 Court's ruling intended to preclude future actions by the
28 Legislature, should it deem such actions advisable. However, any


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future legislative ratification of past expenditures must identify available funds, either for the present or future fiscal years, for the appropriation in question,

2. That portion of Public Law 9-23, § 6 which reads "... nor for having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992: is declared unconstitutional and is STRICKEN,

3. Defendants' motion to dismiss this action for failure to join an indispensable party is DENIED,

SO ORDERED this 4th day of April, 1995,


BENJAMIN J.F. CRUZ, Special Judge
Superior Court for the Commonwealth
of the Northern Mariana Islands