Michael P. Cody,
Appellant/Cross-Appellee,
v.
Northern Mariana Islands Retirement Fund; Northern Mariana Islands Retirement Fund Board of Trustees,
Appellees/Cross-Appellants.
Supreme Court No. 2010-SCC-0027
Civil Case No. 09-0079

Cite as: 2011 MP 16

Decided December 29, 2011

Jeanne H. Rayphand, Saipan, MP, for Appellant/Cross-Appellee.
Carolyn M. Kern, Saipan, MP, for Appellees/Cross-Appellants.
BEFORE: MIGUEL S. DEMAPAN,[1] Chief Justice (Ret.); ALEXANDRO C. CASTRO, Acting Chief Justice; JOHN A. MANGLONA, Associate Justice.

MANGLONA, J.:

¶ 1 Michael P. Cody ("Cody") appeals a trial court order reviewing a decision issued by the Northern Mariana Islands Retirement Fund ("Fund"). This appeal presents two distinct issues. The first issue concerns the constitutionality of P.L. 6-17. Cody appeals the trial court's conclusion that section 8341 of P.L. 6-17, which provided that "Class II" members of the Fund must contribute nine percent ("9 %") of their salary to the Fund, was not a substantial impairment of contract. The second issue concerns the interpretation of P.L. 13-60. The Fund argues on cross-appeal that the trial court erred when it awarded Cody a disability retirement annuity of sixty-six and two-thirds percent ("66⅔ %") of his salar y. According to the Fund, Cody was only entitled to a disability retirement annuity of fifty percent ("50 %") pursuant to P.L. 13-60.

¶ 2 We decline to consider the constitutionality of P.L. 6-17, because we hold that Cody has no standing to challenge that law. We also vacate the portion of the trial court's final order that adjudicated the constitutionality of P.L. 6-17. As to P.L. 13-60, we hold that the 50 % disability retirement annuity contained in that law is not retroactive, and is only applicable to persons who were not yet members of the Fund on the date the law was enacted. Persons who were members of the Fund prior to the enactment of P.L. 13-60 are entitled to a 66⅔ % disability retirement annuity pursuant to P.L. 1-43. Because Cody was a Fund member prior to the enactment of P.L. 13-60, we affirm the trial court's conclusion that Cody's disability retirement annuity should be 66⅔ % of his salary at the time he became disabled.

I

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[1] Chief Justice Miguel S. Demapan heard oral argument. He retired from the Commonwealth Judiciary prior to the issuance of this opinion.

¶ 3 Cody commenced his employment with the Commonwealth government in 1989. In November 2006 he applied for disability retirement.[2] The Fund Administrator issued a written denial of Cody's application for disability benefits in July 2007, reasoning that Cody was not totally and permanently disabled as required by 1 CMC § 8347(a).[3] Cody subsequently submitted a notice of appeal to the Fund, and the Fund appointed an administrative hearing officer[4] to adjudicate the appeal. An administrative hearing began on October 11, 2007 and continued on October 25, 2007, February 20, 2008, February 28, 2008, and March 6, 2008.[5]

¶ 4 Neither the administrative hearing officer nor the Northern Mariana Islands Retirement Fund Board of Trustees ("Board") ever issued a decision on Cody's appeal. *Cody v. N. Mariana Islands Ret. Fund et al.*, No. 09-0079E (NMI Super. Ct. June 15, 2010) (Final Order at 3-4) ("No decision has been issued by either the Hearing Officer or the Board.").[6] On January 30, 2009, over seven months after the parties submitted their proposed findings and conclusions to the hearing officer, Cody submitted a "request for decision" to the Fund and "respectfully request[ed] that this appeal be resolved without further delay." Administrative Record ("A.R.") at 60 ("request for decision"). The record does not contain any response to the request for decision.

¶ 5 On March 3, 2009, Cody filed a petition for judicial review[7] with the trial court, appealing the Administrator's denial of his application for disability benefits. Following a hearing, the trial court issued its final order. The trial court concluded that Cody was totally and permanently disabled as provided for by 1 CMC § 8347,

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[2] Cody is no longer employed by the Commonwealth government. He was "separated" from government employment on December 31, 2007. *Cody v. N. Mariana Islands Ret. Fund et al.*, No. 09-0079E (NMI Super. Ct. June 15, 2010) (Final Order at 2).

[3] Title 1 CMC § 8347 provides:

> § 8347. Disability: Administrative Provisions.
> a) A [Fund] member *shall be considered totally and permanently disabled* after the board receives written certification by at least two licensed and practicing physicians and a vocational rehabilitation counselor . . . . If, upon consideration of the reports of the physicians . . ., the board finds the member to be totally and permanently disabled, it *shall grant the member a disability retirement annuity*. . . .

1 CMC § 8347(a) (emphasis added). It is undisputed that Cody was a "Fund member" by virtue of his employment with the Commonwealth government, and was therefore entitled to apply for disability retirement.

[4] The administrative regulations governing the Fund provide that, after reviewing the notice of appeal, the Board may at its discretion either "preside at the taking of evidence" or "appoint a hearing officer to preside at the taking of the evidence." NMIAC § 110-10-510(a). If a hearing officer is appointed, the hearing officer "shall initially decide the case." NMIAC § 110-10-510(b). The Board apparently chose to appoint a hearing officer rather than to hear evidence itself, and the hearing officer was thus required to "initially decide the case" pursuant to NMIAC § 110-10-510(b). This issue is discussed further in Part III, *infra*.

[5] The record does not indicate whether the hearing concluded on March 6, 2008 or whether the parties and the hearing officer intended to continue the hearing at a later date. In April 2008, both Cody and the Fund timely submitted their proposed findings of fact and conclusions of law to the hearing officer.

[6] In a letter dated April 18, 2008, the Administrator did issue an "amended Notice of Denial" of Cody's disability retirement benefit claim. Pl.'s Supp. Exhibits, *Cody v. N. Mariana Islands Ret. Fund et al*., No. 09-0079E (NMI Super. Ct. March 20, 2010) (Supp. Exhibit 29). The amended notice "reinfom[ed]" Cody that his application for disability benefits was denied. *Id.* It also stated that Cody had the "right to appeal to the Board of Trustees" and that the Board "may appoint a hearing officer to hear [his] appeal" or "choose to hear the appeal themselves." *Id.* It is unclear from the record why the Administrator issued an amended notice of denial. It is also unclear from the record whether the Administrator was aware of the administrative hearing that was held between October 2007 and March 2008.

[7] Cody titled his petition as a "Complaint for Judicial Review of Agency Action."

and it accordingly reversed the Administrator's decision and granted Cody a disability retirement annuity. The trial court also considered the constitutionality of a public law that increased member contributions to the Fund. Public law 1-43, the law that created the Fund, provided that all Fund members must contribute 6 ½ % of their annual salary to the Fund.[8] In May 1989, the legislature enacted P.L. 6-17, which created two classes of Fund members: "Class I" members, defined as persons who became members of the Fund after the enactment of the law, and "Class II" members, defined as persons who were members of the Fund prior to the enactment of the law.[9] The law allowed Class I members to continue to contribute only 6 ½ % of their annual salary to the Fund. However, the law required Class II members to contribute 9 % of their salary to the Fund. Cody argued before the trial court that the increased contribution rate in P.L. 6-17 was an unconstitutional impairment of the contractual relationship between himself and the Fund. The trial court rejected this argument.

¶ 6 Finally, the trial court considered the amount of disability benefits to which Cody was entitled. Public Law 1-43 provided for a disability retirement annuity of 66 ⅔ % of a member's salary.[10] However, P.L. 13-60, enacted December 5, 2003, decreased that disability retirement annuity to 50 %.[11] A regulation subsequently enacted by the Fund in 2006 ("2006 regulation") interpreted P.L. 13-60 as prospective only, and stated that persons who were members of the Fund prior to the enactment of P.L. 13-60 would continue to receive a disability retirement annuity

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[8] Section 19. Contributions to the Fund.
(a) Each member of the Fund *shall contribute six and one-half percent of salary earned* and accruing to such member.
(b) These contributions shall be made as a deduction from salary . . . .
PL 1-43, § 19(a)-(b) (emphasis added).

[9] (k) Member means any person who is included within the membership of the Fund at any time, and includes *both Class I and Class II members* unless the context indicates otherwise.
(l) *Class I Member means*:
(1) *All employees* of the government including employees of all public corporations, agencies, and instrumentalities of the government, *hired on or after the date of this Act.*
. . . .
(4) All government employees who were members of the Fund prior to the effective date of this act and who elect to transfer their membership to Class I membership under the provisions of this act.
. . . .
(m) *Class I1 Member* means all *persons who were Fund members prior to the effective date of this Act*, and who do not elect to become Class I members under the terms of this act.
PL 6-17, § 8314(k)-(m) (emphasis added).

[10] Section 13. Disability.
(a) Any member less than sixty (60) years of age, who shall become totally and permanently disabled for service, either mentally or physically, regardless of how or where the disability shall have occurred, shall be entitled to a disability retirement annuity . . . .
. . . .
(c) *The amount of disability retirement annuity shall be sixty-six and two-thirds percent (66 ⅔%) of the salary of the member in effect at the date of disability . . . .*"
PL 1-43, § 13(a), (c) (emphasis added).

[11] Section 6. Amendments.
(a) Subsection (a) of 1 CMC § 8345 is amended as follows:
"§ 8345. Occupational Disability Benefits.
(a) Any member who becomes totally and permanently disabled for service from an occupational cause shall receive an annuity *equal to 50 percent of the salary such member was receiving at the time the disability was incurred*. Such annuity shall continue until the member reaches 62 years of age."
PL 13-60, § (6)(a) (emphasis added).

of 66 ⅔ %. The trial court relied upon the 2006 regulation to conclude that, because Cody was a member of the Fund prior to the enactment of P.L. 13-60, he should receive a disability retirement annuity of 66⅔ % rather than 50 %.

¶ 7 Cody timely appealed the trial court's order to this Court, and the Fund cross-appealed. On appeal, neither party disputes the trial court's reversal of the Administrator's decision and its conclusion that Cody is eligible for a disability retirement annuity. Instead, Cody appeals the trial court's conclusion as to P.L. 6-17 and maintains that the increased contribution rate in P.L. 6-17 is unconstitutional. The Fund appeals the trial court's conclusion that Cody's disability benefits should be calculated at the 66⅔ % rate. It argues that P.L. 13-60 is retroactive and applicable to persons who were Fund members prior to the enactment of that law, and that Cody's disability benefits should thus be calculated at the lower 50 % rate.

II

¶ 8 This Court has jurisdiction over this appeal pursuant to 1 CMC § 9113, which grants "aggrieved parties" standing to appeal Superior Court decisions reviewing administrative matters. *N. Marianas College v. Civil Serv. Comm'n*, 2006 MP 4 ¶ 5.

III

A. Threshold Issues

¶ 9 Parties are generally required to exhaust all administrative remedies before pursuing an action in court. *See Rivera v. Guerrero*, 4 NMI 79, 84 n.37 (1993). The Northern Mariana Islands Administrative Procedure Act ("NMI APA"), 1 CMC §§ 9101-15, also requires final agency action before a party may appeal to the trial court. *Marianas Ins. Co. v. Commonwealth Ports Auth.*, 2007 MP 24 ¶ 15 ("The APA provides for judicial review of final agency actions. 1 CMC § 9112(d). An aggrieved party may seek judicial review within thirty days after an administrative agency issues its final decision."). Here, when Cody did not receive a decision from the administrative hearing officer assigned to his intra-agency appeal, he appealed the Administrator's initial decision directly to the trial court. Before addressing the merits of the parties' claims, we must consider both whether Cody has exhausted his administrative remedies and whether he has appealed from a final agency action.

¶ 10 We note that neither of the parties have raised exhaustion or final agency action as issues on appeal. Both exhaustion and final agency action are jurisdictional prerequisites to judicial review. *Marianas Ins. Co.*, 2007 MP 24 ¶ 27 (citing *Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1047, 1050 (11th Cir. 2003)) ("Only final agency actions can be subject to judicial review."); *Rivera*, 4 NMI at 84 ("If [the agency action] was a non-final . . .action, then Rivera *could not seek review* under the APA, which authorizes review only of final agency decisions.") (emphasis added); *id.* at 84 n.37 ("Such exhaustion requirements *create jurisdictional prerequisites* to proceeding to court.") (emphasis added) (citations omitted). Because exhaustion and finality are jurisdictional, the Court must address exhaustion and finality *sua sponte* if the parties fail to raise the issues themselves. *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008) (citing *Bernhardt v. County of L.A.*, 279 F.3d 862, 868 (9th Cir. 2001)) ("[B]oth the Supreme Court and this Court have held that whether or not the parties raise the issue, 'federal courts are required *sua sponte* to examine jurisdictional issues . . . .'"; holding that lower court was required to raise jurisdictional issue of standing *sua sponte*) (internal brackets omitted).

1. Exhaustion of Administrative Remedies

¶ 11 The doctrine of exhaustion of administrative remedies requires parties challenging agency actions and decisions to exhaust all administrative remedies before seeking judicial review. *Marianas Ins. Co.*, 2007 MP 24 ¶ 12 (citing *Myers v. Bethlehem Shipbldg*, 303 U.S. 41, 50-51 (1939)). Parties need not exhaust every potential remedy available to them. Instead, parties must only exhaust "all intra-agency appeals *expressly mandated either by statute or by the agency's regulations*." *Rivera*, 4 NMI at 84 n.37 (emphasis added). Thus, to determine if Cody has satisfied the exhaustion requirement, we must first determine whether the statutes and regulations governing the Fund expressly mandate any intra-agency appeals.

¶ 12 The NMI ADA does not expressly mandate any intra-agency appeals, and we therefore turn to the regulations that govern the Fund. Northern Mariana Islands Administrative Code section 110-10-501 provides that "any person aggrieved by a decision of the Administrator of the Retirement Fund shall appeal the decision to the Board by filing a written notice of appeal . . . ." NMIAC § 110-10-501. "The word 'shall' is unambiguous and means 'must.'" *N. Marianas College*, 2007 MP 8 ¶ 9 (quoting *Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284, 292 (1992)). Thus, an appeal of the Administrator's decision to the Board and a subsequent decision ("initial intra-agency appeal") is an expressly mandated remedy that aggrieved Fund members are ordinarily required to exhaust.[12]

[12] Northern Mariana Islands Administrative Code section 110-10-515 further provides that that, "[a]ny person aggrieved by a decision of the hearing officer *may* appeal the decision to the Board by filing a written notice of

¶ 13 There are certain "broad sets of circumstances" in which "the interests of the individual weigh heavily against requiring administrative exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)) (superseded by statute on other grounds as stated in *Gonzales v. O'Connell*, 355 F.3d 1010, 1015 n.5 (7th Cir. 2004)). Exhaustion may not be required in circumstances where "the exhaustion requirement would cause undue prejudice to a subsequent assertion of a court action." *Marianas Ins. Co.*, 2007 MP 24 ¶ 21 (citing *McCarthy*, 503 U.S at 146-47). The United States Supreme Court ("U.S. Supreme Court") has stated that "such prejudice may result from an "*unreasonable or indefinite timeframe* for administrative action." *McCarthy*, 503 U.S. at 147 (emphasis added) (citations omitted). In *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989) (superseded by statute on other grounds as stated in *George Kellett & Sons v. Homes*, 1992 U.S. Dist. LEXIS 7269 (E.D. La. May 19, 1992)), the agency regulations failed to "place a clear and reasonable time limit on [the agency's] consideration of whether to pay, settle, or disallow claims." *Id.* at 586. The U.S. Supreme Court stated that the agency's indefinite time limit gave the agency "virtually unlimited discretion to bury large claims . . .in the administrative process, and to stay judicial proceedings for an unconscionably long period of time . . . ." *Id.* It further stated that "[a]dministrative remedies that are inadequate need not be exhausted." *Id.* at 587. (citations omitted). It concluded that, because the agency's regulations did not place reasonable time limits on the agency's consideration of claims, the claimant was not required to exhaust administrative remedies, and was entitled to proceed directly to court. *Id.*

¶ 14 The U.S. Supreme Court addressed a similar situation in *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 590-92 (1926). In that case, the complainant company brought the agency's attention to a delay in the determination of its cause and requested that the agency set the cause for an early hearing. *Id*. The agency ignored the company's request and subsequently "failed and refused to determine the issues in the cause or to determine whether [the corporation's actions were] just and reasonable . . . ." *Id*. On appeal, the *Smith* Court declined to enforce the exhaustion requirement against the complainant company reasoning that a claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief." *Id.* at 591-92.

¶ 15 Here, Cody's interests "weigh heavily against requiring administrative exhaustion." *McCarthy*, 503 U.S. at 146. As in *Coit Indep. Joint Venture* and *Smith*, the relevant agency regulations do not provide any definite time frame for decision. Northern Mariana Islands Administrative Code section 110-10-510 provides that, upon receiving a claimant's notice of appeal pursuant to NMIAC § 110-10-505, the Board shall either decide the initial intra-agency appeal itself or shall appoint a hearing officer to issue a decision. NMIAC § 110-10-510(a)(1)-(2). The section further provides that "[i]f a hearing officer is appointed, the hearing officer shall initially decide the case . . . ." and "[i]f the Board presides at the initial hearing, the Board shall decide the case . . . ." NMIAC § 110-10-510(b)-(c). However, neither NMIAC § 110-10-510 nor any other Fund regulation states any time limit for a decision by the Board or the hearing officer.[13] Thus, under the plain language of the Fund regulations, the Fund may indefinitely delay its adjudication of the initial intra-agency appeal.

¶ 16 Similar to the claimants in *Coit Indep. Joint Venture* and *Smith*, Cody diligently pursued his administrative remedies. He appealed the administrator's decision, as required by the Fund's regulations, and he subsequently participated in an administrative hearing and submitted findings of fact and conclusions of law to the hearing officer. After submitting his findings of fact and conclusions of law, Cody waited over seven months for a decision from the Fund. When the Fund failed to issue a decision, Cody did not immediately seek relief from the trial court. Instead, he submitted a written request for decision. Only after waiting an additional month did Cody resort to a direct appeal to the trial court.

¶ 17 Applying the exhaustion requirement as a bar to Cody's appeal would unjustly penalize Cody for resorting to the trial court when his efforts to pursue his administrative remedies were met with silence. *Smith*, 270 U.S. at 590. Moreover, applying the exhaustion requirement as a bar would facilitate the Fund's ability to use its indefinite

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appeal within fifteen days of the date of service." NMIAC § 110-10-515(a) (emphasis added). However, the use of the word "may" rather than the word "shall" in NMIAC § 110-10-515 indicates that an intra-agency appeal to the Board is not expressly mandated, and is optional only. The intra-agency appeal provided for by NMIAC § 110-10-515 is therefore not an administrative remedy that a claimant must exhaust prior to proceeding to the trial court.

[13] Northern Mariana Islands Administrative Code section 110-10-510 does state that the hearing officer or the Board shall "decide the case" in accordance with 1 CMC § 9109. *See* NMIAC § 110-10-510(b)-(c). However, title 1 CMC § 9109 merely governs the conduct of agency hearings, and it does not provide any time limits for agency decisions. 1 CMC § 9109.

timeframe to bury unfavorable claims in the administrative process and to stay the proceedings for an indefinite time. *Coit Indep. Joint Venture*, 489 U.S. at 586. We therefore hold that, after properly filing his notice of appeal with the Fund pursuant to agency regulations that provided no definite time frame for decision, waiting over seven months for a decision by the hearing officer, submitting a written request for decision, and waiting for a response from the Fund, Cody was entitled to bring his appeal to the trial court. We emphasize that our holding is narrowly tailored to the circumstances presented by this case. Our holding is not intended to create a broad exception to the exhaustion doctrine. Neither does it permit parties to appeal to the trial court to expedite an agency's decision-making process.[14]

2. Final Agency Action

¶ 18 The NMI APA provides for judicial review of final agency actions. *Marianas Ins. Co.*, 2007 MP 24 ¶ 15. (citing 1 CMC § 9112(d)). Under the NMI APA, an aggrieved party must seek judicial review within thirty days of a final agency action. *Id.* (citing 1 CMC § 9112(a)-(b)). Two requirements must be satisfied for an agency action to be considered final. *Id.* at ¶ 27. First, the action "must mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Second, the action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* Because finality is a jurisdictional requirement, either a finding of finality or a finding of an applicable exception to finality is a pre-requisite to any appeal of an agency action. *See Ukiah Valley Med. Ctr. v. Fed. Trade Comm'n*, 911 F.2d 261, 264 n.1 (9th Cir. 1990) ("[A] finding of finality, or of an applicable exception, is essential when the court's reviewing authority depends on one of the many statutes permitting appeal only of 'final' agency action . . . .").

¶ 19 Applying the final agency action requirement to this case, Cody did not appeal from a final agency action when he appealed the Administrator's decision to the trial court. The Administrator's decision satisfied the first requirement for finality, because it denied Cody's application for disability benefits and thus determined rights or obligations However, the Administrator's decision did not satisfy the second finality requirement because it was not a consummation of the agency's decision-making process. Cody appealed the decision as required by NMIAC § 110-10-505, and that intra-agency appeal was still pending when Cody filed his petition for judicial review with the trial court. Because Cody did not appeal from a final agency action, we now consider whether there is any exception to the finality requirement that would grant the trial court jurisdiction over Cody's claim.

¶ 20 Agency inaction may constitute a final action subject to judicial review when the agency inaction has the same impact upon the rights of the parties as a denial of relief. *Associacao Dos Industriais de Cordoaria e Redes v. United States*, 828 F. Supp. 978, 985 (Ct. Int'l Trade 1993); *see also Beyond Pesticides/Nat'l Coalition Against the Misuse of Pesticides v. Whitman*, 294 F. Supp. 2d 1, 20 (D.C. Cir. 2003) ("[T]he Court agrees that jurisdiction is conferred where agency inaction is tantamount to a 'final action' . . . ."); *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) ("In certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate.") (citations omitted); *Her Majesty the Queen v. United States EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) ("[W]e have previously held that we have jurisdiction to review claims of unreasonably delayed agency action . . . ."); *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 396 (D. Wyo. 1980) ("When administrative inaction has precisely the same effect on the rights of the parties as denial of the requested agency action, an agency may not prevent judicial review by masking agency policy in the form of inaction."); *Accomack County v. Burnley*, 66 Va. Cir. 83, 85 (Va. Cir. Ct. 2004) (stating, "[r]egarding the allegations in the County's Bill of Complaint that the [the agency] has not responded to its submissions over the years pursuant to the Consent Order

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[14] The NMI APA allows a trial court to "compel an agency action unlawfully withheld *or unreasonably delayed*," 9 CMC § 9112(f)(1) (emphasis added), and the Federal Administrative Procedure Act contains an identical provision. 5 U.S.C. § 706(1) ("section 706"). Under the Federal Administrative Procedure Act, certain case law indicates that parties seeking relief from agency inaction may be required to proceed by way of a section 706 action to compel. *See, e.g., United States v. Bean*, 537 U.S. 71, 74 n.2 (2002) ("[I]t is not clear that respondent would prevail were he to file *a requisite action* under 5 U.S.C. § 706(1) . . . .") (emphasis added). Here, however, the Fund did not argue either at trial or on appeal that Cody was required to seek relief from the agency's inaction by bringing an action to compel under 9 CMC § 9112(f)(1). We therefore decline to address this issue. *See generally Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 165 n.30 (1994) (stating that non-jurisdictional issues not raised at trial or in an appellant's brief are generally waived).

and has not responded for great lengths of time to requests for termination of the Order, agency inaction may be reviewed by the Court.").

¶ 21 Here, the Fund's inaction had the same impact upon Cody as a denial of relief. As stated above, the Administrator denied Cody's application for disability benefits. When Cody appealed that decision, the Fund appointed a hearing officer to adjudicate the appeal. However, the hearing officer never issued a decision. Moreover, when Cody sent the Fund a request for a decision in January 2009, over nine months after the last date of the administrative hearing, the Fund did not respond. The Fund's inaction thus ensured that Cody had no relief from the Administrator's decision. Unless Cody wished to wait indefinitely for a decision from the Fund, his only opportunity for relief was to appeal the Administrator's decision to the trial court.

¶ 22 "Agencies cannot insulate their decisions from . . . judicial review simply by failing to take 'final action' . . . ." *Pac. Gas & Elec. v. Fed. Energy Regulatory Comm'n* (In re *Cal. Power Exch. Corp*.), 245 F.3d 1110, 1124 (9th Cir. 2001). Were we to deny the trial court jurisdiction over Cody's claim, we would "preclude[] review in circumstances where review would be most needed, in the face of administrative recalcitrance." *Associacao Dos Industriais*, 828 F. Supp. at 985. We hold that, because the Fund's inaction was equivalent to a denial of relief, the inaction was sufficiently final so as to make judicial review of the Administrator's decision appropriate.

B. Constitutionality of P.L. 6-17

¶ 23 Having determined that there are no jurisdictional impediments to the consideration of this case, we now turn to the merits of Cody's appeal and the Fund's cross-appeal. Cody contends that section 8341 of P.L. 6-17, which provides that Class I members of the Fund may continue to contribute only 6 ½ % of their salary to the Fund while Class II members must contribute 9 % of their salary, is an unconstitutional impairment of the contractual relationship between himself and the Fund. We first consider Cody's standing to challenge P.L. 6-17. Standing is a question of law reviewable de novo. *Commonwealth v. Anglo*, 1999 MP 6 ¶ 3 (citing *Mafnas v. Commonwealth*, 2 NMI 248, 256 (1991)). Because standing is jurisdictional, this Court may raise it as an issue *sua sponte*. *Bernhardt*, 279 F.3d at 868 (holding that lower court was required to raise jurisdictional issue of standing *sua sponte*).

¶ 24 The essence of the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. *Estate of Ogumoro v. Ko*, 2011 MP 11 ¶ 19 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The essential element of standing is that a plaintiff personally has suffered either actual injury or threat of injury as a result of the defendant's conduct. *Anglo*, 1999 MP 6 ¶ 8 (citation omitted). "Moreover, the plaintiff must show that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Id.* (internal quotations omitted). The burden of proof for standing is at all times on the party bringing the action. *Or. v. Legal Servs. Corp*., 552 F.3d 965, 969 (9th Cir. 2009) (abrogated on other grounds) ("The plaintiff bears the burden of proof to establish standing with the manner and degree of evidence required at the successive stages of the litigation.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

¶ 25 In *Commonwealth v. Oden*, 3 NMI 186 (1992), we addressed a party's standing to challenge the constitutionality of a statute.[15] We stated that the power to declare a statute unconstitutional is "the gravest and most delicate duty that this court is called on to perform." *Id.* at 202 (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)). Thus, "[t]his Court . . . has no jurisdiction to pronounce any statute void . . .except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Id.* (quoting *Raines*, 362 U.S. at 21). This rule "makes good judicial sense," because it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* (citations omitted).

¶ 26 Here, Cody has failed to show any personal injury or threat of injury from the increased contribution rate mandated by P.L. 6-17. He does not allege that he was ever required to pay the higher contribution rate of 9 % pursuant to P.L. 6-17. Neither does he allege that he suffered any other injury or threat of injury from the increased contribution rate.[16] Moreover, Cody's initial petition for judicial review before the trial court only requested relief

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[15] *Oden* involved a constitutional challenge to 6 CMC § 1307, a criminal oral copulation statute. 3 NMI at 201. Oden argued that 6 CMC § 1307 violated the rights of married couples to due process, equal protection, and privacy. *Id.* The Court ultimately held that Oden had no standing to challenge the statute, because he was under 18 and unmarried and therefore "did not fall within that category of individuals whose rights he claims are affected by the statute . . . ." *Id.*

[16] On the contrary, Cody's briefing indicates that his salary deductions may have remained 6 ½ % even after the enactment of P.L. 6-17. Cody stated in his initial brief filed with the trial court that "*[d]eductions in the amount of 6½%* have been made from [his] salary in accordance with the controlling statutory provision, i.e., P.L. 1-43 §

related to his disability retirement annuity. *Cody v. N. Mariana Islands Ret. Fund et al.*, No. 09-0079E (NMI Super. Ct. Mar. 3, 2010) (Complaint for Judicial Review of Agency Action at 11-12). The petition for judicial review did not request any relief related to his contribution to the Fund, and the trial court did not award any such relief.

¶ 27 Under the rule articulated in *Oden*, the lack of a cognizable injury is fatal to Cody's standing. This Court has no jurisdiction to pronounce the increased contribution rate in P.L. 6-17 unconstitutional when such a pronouncement would not adjudicate any legal rights of Cody. *Oden*, 3 NMI at 202 ("[T]his Court . . .has no jurisdiction to pronounce any statute . . .void, except as it is called upon to adjudge the legal rights of litigants in actual controversies.") (citation omitted). Moreover, consideration of Cody's argument would open the door to consideration of "every conceivable situation which might possibly arise" in the application of the complex statutes and regulations that govern the Fund. *Id.* We therefore decline to consider Cody's claim that P.L. 6-17 is unconstitutional, and we hold that the issue must await a challenge by a party with proper standing. The trial court's conclusion that P.L. 6-17 is not an unconstitutional impairment of the contractual relationship between Cody and the Fund is also vacated for lack of subject matter jurisdiction.[17]

C. Effect of P.L. 13-60 on Amount of Disability Retirement Annuity

¶ 28 Having declined to consider the constitutionality of P.L. 6-17, we now turn to the Fund's argument that Cody's disability retirement annuity should be 50 % instead of 66⅔ %. We specifically consider whether the 50 % disability retirement annuity contained in P.L. 13-60 applies retroactively to persons who became members of the Fund prior to the law's enactment. Issues of statutory interpretation are reviewed de novo. *Guerrero v. Dep't of Pub. Lands*, 2011 MP 3 ¶ 9 (citation omitted).

¶ 29 "[T]he presumption is that a constitutional amendment is to be given only prospective application unless the intention to make it retrospective in operation clearly appears from its terms." *Torres v. Commonwealth Utils. Corp.*, 2009 MP 14 ¶ 29 (quoting *Camacho v. N. Marianas Ret. Fund*, 1 NMI 362, 368-69 (1990) (citations omitted)). This presumption of prospective application applies equally to statutes. Generally speaking, changes in statutory laws apply prospectively unless there is a clear manifestation of intent that they should be applied retroactively." *Id.* (citing *Wabol v. Muna*, 2 CR 963, 980 (D.N.M.I. App. Div. 1987)).

¶ 30 This Court has previously applied the presumption of prospective application to the Fund. In *Camacho*, a Fund member argued that the Nineteenth Amendment to the NMI Constitution[18] applied retroactively to employees who retired before the effective date of the amendment. 1 NMI at 369. The Court unequivocally rejected this argument. It stated:

> [T]he language does not support Camacho's contention that it should (in effect) be applied retroactively to enable employees who retired prior to the effective date to take advantage of its terms. *There is no indication that it was intended to apply retroactively. Cf. Torvinen v. Rollins*, 93 Nev. 92, 560 P.2d 915, 917 (Nev. 1977) ("the amendment is void of any terms indicating the legislature or electorate intended retrospective application.").

Id. (emphasis added).

¶ 31 Here, there is "no indication" that the legislature intended section 6 of P.L. 13-60 to apply retroactively to persons who were members of the Fund prior to the enactment of the law. *Id.* at 369. Section 6 is silent as to any retrospective effect. In light of the presumption of prospective application articulated in *Torres* and *Camacho*, we hold that section 6 of P.L. 13-60 was intended to apply only prospectively, to persons who became members of the Fund after its enactment date. Section 6 of P.L. 13-60 was not intended to apply retrospectively to persons who were Fund members before its enactment date.

19(a)." Complaint for Judicial Review of Agency Action at 9, *Cody v. N. Mariana Islands Ret. Fund et al.*, No. 09-0079E (NMI Super. Ct. Mar. 3, 2010) (emphasis added). Cody made the same statement in his primary brief filed with this Court. Appellant's Br. at 12. In neither brief did Cody state that his deductions were at any time 9 % instead of 6 ½ %.

[17] The trial court adjudicated Cody's argument as to P.L. 6-17 on its merits, without discussing its jurisdiction or discussing Cody's standing to challenge the law.

[18] The Nineteenth Amendment provides that government employees who have "acquired not less than 20 years of creditable service" shall be credited an additional five years and shall be eligible to retire. NMI Const. amend. XVIIII.

¶ 32 Our interpretation of P.L. 13-60 is reinforced by article 3, section 20 of the Commonwealth Constitution. Section 9 of P.L. 13-60 states: "All of the provisions of this Act are subject to the mandate set forth by N.M.I. Const. art. 3, § 20(a) and *no provision of this Act*, including amendments and repealers, *shall be construed to be in violation of the constitutional mandate*." PL 13-60, § 9 (emphasis added).[19] The "mandate" in article 3, section 20 in turn provides that: "Membership in an employee retirement system of the Commonwealth shall constitute a contractual relationship. *Accrued benefits of this system shall be neither diminished nor impaired*." NMI Const. art. 3, § 20 (emphasis added). The word "accrued" has the same meaning as "vested." *Kaho'ohanohano v. State*, 162 P.3d 696, 742 (Haw. 2007) ("[T]he phrase 'accrued rights' is synonymous with vested rights.") (citation omitted).

¶ 33 In the Commonwealth, persons acquire an accrued or vested right to disability retirement benefits by virtue of their membership in the Fund. *See Mallette v. Arlington County Emples. Supp. Ret. Sys. II*, 91 F.3d 630, 636 (4th Cir. 1996) ("The right to payment of disability retirement benefits arises by virtue of past labor services and past contributions to a disability fund. Member employees, who contribute their earnings to the system, reasonably expect that accrued benefits will be waiting if they need them and qualify for them."); *see also, e.g., Opinion of the Justices to the House of Representatives*, 303 N.E.2d 320, 328 (Mass. 1973) (quoting *Wisley v. San Diego*, 188 Cal. App. 2d 482, 485-86 (Cal. 1961)) ("It is well settled that the pension rights of the employees are an integral part of the contract of employment and that these rights are vested at the time the employment is accepted.); *Kern v. City of Long Beach*, 179 P.2d 799, (Cal. 1947) ("This court has stated in two recent decisions that the right to a pension vests upon acceptance of employment;" holding that a public employee, as part of his compensation, obtained a vested right to his pension upon entering public employment); *Kraus v. Bd. Of Trustees of the Police Pension Fund of the Village of Niles*, 390 N.E. 2d 1281, 1290 (Ill. Ct. App. 1979) ("[E]mployee's rights become fixed as of the time they entered the [retirement] system . . .not at the time of retirement.") (citations omitted).

¶ 34 Interpreting section 6 of P.L. 13-60 as retroactive, and forcing plan members to receive disability retirement benefits at the lower 50 % rate, would impair the vested rights of Fund members in violation of the "mandate" in article 3, section 20. *See Everson v. State*, 228 P.2d 282, 297 (Haw. 2010) (interpreting constitutional provision stating that accrued benefits shall not be diminished or impaired; holding that retired employees' health benefits were accrued benefits because they arose from a person's membership in the retirement system, and that law altering entitlement to health benefits impaired employees' right to benefits); *Sheffield v. Ala. Pub. Employees' Ret. Ass'n, Inc.*, 732 P.2d 1083, 1085-86 (Ala. 1987) (interpreting constitutional provision stating that accrued benefits shall not be diminished or impaired; holding that the adoption of a new actuarial table that affected the amount of benefits to which retirees were entitled was an impairment of vested rights).[20] Such an interpretation of P.L. 13-60 is also untenable under section 9 of P.L. 13-60 and its instruction that "no provision" of P.L. 13-60 shall be construed to violate article 3 section 20. We accordingly affirm the trial court's conclusion that Cody, who was a Fund member prior to enactment of P.L. 13-60, should receive disability benefits in the amount of 66 ⅔ % of his salary at the time he became disabled.

D. Validity of Fund Regulations Interpreting Section 6 of P.L. 13-60

¶ 35 Before concluding, we must address several administrative regulations that interpret P.L. 13-60. In 2006, the Fund enacted a regulation codified at NMIAC § 110-10-220(a) ("2006 regulation"). That regulation interpreted section 6 of P.L. 13-60 as prospective only, and provided that persons who became members of the Fund prior to the enactment of P.L. 13-60 would continue to receive a disability retirement annuity of 66 ⅔ % of their salary.[21] In

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[19] We note that the Court at all times holds the power of judicial review and may find laws, including P.L. 13-60, to be unconstitutional.

[20] We note that a number of jurisdictions allow an employee's vested contractual pension rights to be modified under certain circumstances. *See, e.g., Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Ala. 1981) (holding that alterations of vested pension rights may be sustained as reasonable if they bear a material relationship to the theory of a pension system, and if changes in a pension plan which result in disadvantage to employees are accompanied by comparable new advantages). We do not reach the issue of whether or under what circumstances the legislature may be able to reasonably modify the vested rights of Fund members. We hold only that a retroactive interpretation of section 6 of P.L. 13-60 is an unconstitutional impairment of vested rights.

[21] § 110-10-220 Disability Benefits:
(a) *Any member who becomes disabled from an occupational cause and qualifies for disability benefits will have his or her benefits computed at 50 percent of the salary* earned at the time the disability was incurred, *except that a person who became a member before December 5, 2003 (the effective date of*

June 2008, the Fund reconsidered its interpretation of P.L. 13-60, and it enacted 30 CR 28984 to amend NMIAC § 110-10-220(a) ("2008 amendment"). The 2008 amendment altered NMIAC § 110-10-220 to state in relevant part:

> Any member who becomes disabled from an occupational cause and qualifies for disability benefits will have his or her benefits computed at 50 percent of the salary earned at the time the disability was incurred, *except that a person who is found by the Board to be disabled shall receive the amount of salary applicable according to the law in place at the time the Board finds the disability*.

29 CR 28984 (Dec. 22, 2008) (emphasis added). The 2008 amendment thus made the rate of disability benefits contingent upon the date the Board found a person to be disabled, rather than upon the date the person became a Fund member. It also applied P.L. 13-60 retroactively to persons who were members of the Fund prior to the enactment of the law. Under the amendment, both persons who were Fund members prior to the enactment of P.L. 13-60 and persons who became Fund members after the enactment of that law would be subject to the lower 50 % rate, unless the Board found them to be disabled prior to the enactment of the law.

¶ 36 On appeal, the Fund argues that the 2006 regulation is invalid as contrary to legislative intent. The Fund also asks this Court to adjudicate the validity of the 2008 amendment, although the amendment is not directly at issue in this case.[22] When an agency has given a statute inconsistent interpretations, the Court has authority to resolve the conflicting interpretations and to determine whether the interpretations are contrary to clear legislative intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421 446-48 (1987) (resolving conflicting administrative interpretations of a statute enacted under the Immigration and Naturalization Act; stating that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *see also Rosas v. Montgomery*, 88 Cal. Rptr. 907, 917 (Cal. Ct. App. 1970) (citing *Marion v. Gardner*, 359 F.2d 175, 181 (8th Cir. 1966)) (stating, "[w]hen . . .[an administrative regulation] . . . is inconsistent with the statute it must, of course, give way."; holding regulation invalid because it "conflicts with the 'purpose of the . . .statute.'"). The applicable standard of review is de novo. *See id.*

¶ 37 Here, the 2006 regulation and the 2008 amendment constitute conflicting agency interpretations of P.L. 13-60. Pursuant to *Cardoza-Fonseca*, we therefore have authority to review both the 2006 regulation and the 2008 amendment, and to determine whether either is contrary to the intent of the legislature. In light of our determination that P.L. 13-60 was intended to apply prospectively only, we invalidate the portion of the 2008 amendment that states: "a person who is found by the Board to be disabled shall receive the amount of salary applicable according to the law in place at the time the Board finds the disability." The quoted language applies the 50 % disability retirement annuity in P.L. 13-60 retroactively to persons who were members of the Fund prior to the enactment of that law, but who had not yet been declared disabled prior to the enactment of the law. The language is therefore contrary to the intent of the legislature and must "give way." *Marion*, 359 F.2d at 181. Turning to the 2006 regulation, the regulation correctly interpreted P.L. 13-60 as prospective only, and was therefore not contrary to legislative intent.

> *Public Law 13-60) and did not refund contributions will have benefits computed at sixty-six and two-thirds percent of the salary earned* at the time the disability was incurred. Provided however, that any disabled class I member, who is otherwise eligible to retire on a normal or service retirement, shall not receive a retirement annuity but rather shall receive disability benefits in an amount no greater than the retirement annuity to which they would have been otherwise entitled.

NMIAC § 110-10-220(a) (emphasis added).

[22] The Fund argued below that "there is an internal inconsistency in this honorable Court's order that resulted from applying the Fund's regulations as they existed in 2006; regulations that were amended before this matter was heard by the honorable Court." *Cody v. N. Mariana Islands Ret. Fund et al*., No. 09-0079E (NMI Super. Ct. July 21 2010) (Order Denying Respondent's Motion for Reconsideration of Court's Final Order at 1). The Fund apparently believed that Cody's disability retirement annuity was governed by the amended regulation rather than the original 2006 regulation. *Id.* The trial court rejected the Fund's argument and concluded that the 2008 amendment was not applicable to Cody because "the 2006 regulation was the law in effect at the time Petitioner became disabled." *Id.* at 4. On appeal, the Fund concedes that the 2006 regulation, not the 2008 amendment, applies to Cody. However, the Fund asks this Court to adjudicate the validity of the 2008 amendment "to provide the Fund guidance with respect to members other than Mr. Cody." Appellee's Reply Br. at 13.

IV

¶ 38 In light of the foregoing, we DECLINE TO CONSIDER the constitutionality of the increased contribution rate contained in P.L. 6-17. We also VACATE for lack of subject matter jurisdiction the portion of the trial court's final order that adjudicated the constitutionality of the increased contribution rate contained in P.L. 6-17, and VACATE the trial court's conclusion that the increased contribution rate contained in P.L. 6-17 is not a substantial impairment of the contractual relationship between Cody and the Fund. However, we AFFIRM the trial court's conclusion that Cody is entitled to a disability retirement annuity in the amount of 66⅔ % of his salary.

SO ORDERED this 29th day of December, 2011.

/s/
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice