COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA and NORTHERN ISLANDS

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Eloy S. Inos
Governor

Jude U. Hofschneider
Lieutenant Governor

EXECUTIVE ORDER NO. 2013-03

SUBJECT: DECLARATION OF A STATE OF DISASTER EMERGENCY: COMMONWEALTH UTILITIES CORPORATION'S IMMINENT FAILURE AND THE NEED TO PROVIDE IMMEDIATE RELIABLE POWER, WATER, AND WASTEWATER SERVICES.

AUTHORITY: I, ELOY S. INOS, pursuant to the authority vested in me as Governor of the Commonwealth of the Northern Mariana Islands by Article III, § 10 of the Commonwealth Constitution and 3 CMC § 5121 of the Commonwealth Disaster Relief Act of 1979, do hereby declare a State of Disaster Emergency for the Commonwealth of the Northern Mariana Islands due to the imminent threat of the inability of the Commonwealth Utilities Corporation ("CUC") to provide critical power generation, water, and wastewater services to the CNMI and considering the harm such condition would pose to the Commonwealth of the Northern Mariana Islands.

WHEREAS, ON MAY 18, 2012, THROUGH EXECUTIVE ORDER 2012-05, I issued a Declaration of a State of Disaster Emergency regarding the Commonwealth Utilities Corporation's imminent failure and the need to provide immediate reliable power, water, and wastewater services.

WHEREAS, CUC IS THE SOLE ELECTRICITY SUPPLIER to the Government of the CNMI, including all public safety activities, the schools, and the only hospital. CUC also supplies electricity to most of the CNMI's businesses and homes. While some businesses and agencies own backup generators, they are not generally organized to use the backups as permanent power sources and the diesel oil purchased to run these generators is substantially more expensive than that used for CUC power.

WHEREAS, WITHOUT CUC ELECTRICITY:

(1) Most CNMI economic activity would come to a halt, much refrigeration and air conditioning would end, and the airports and ports would be forced to rely on emergency generation on the limited, expensive oil supply for it;

(2) The CNMI's health and safety would immediately be at risk because traffic signals and street lighting would cease to function; emergency, fire, police facilities and their communications systems, and the hospital and island clinics would have to rely on limited oil supplies for emergency generation

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and then cease functioning; and much refrigeration of food and medicines would end, as would air conditioning for the elderly and sick;

(3) The public schools and the Northern Marianas College would close. Other educational institutions would close as their backup oil supplies for emergency generators were exhausted; and

(4) Water and sewage treatment would soon end. One of CUC's largest electric customers is the combined CUC Water and Wastewater Divisions. CUC is the sole supplier of electricity for these systems. CUC's water system relies on electricity to maintain the system pressure needed to prevent the backflow of pathogens, to chlorinate, and to pump, store, and distribute water supplies. CUC's wastewater system requires electricity to collect, pump, process, treat, and discharge sewage. The lack of electricity could result in sewage overflows, contaminating land and water.

WHEREAS, THERE EXISTS A FINANCIAL CRISIS:

(1) CUC is owed approximately $14 million by the public school system ("PSS") and the Commonwealth Healthcare Corporation ("CHC") and is owed over millions more by residential users;

(2) There is conflict and potential conflict between CUC and government agencies over money owed and other issues. Such conflict drains resources especially if it results in the parties going to court. Interagency cooperation and oversight is vital to ensure that government agencies can continue its operations without draining CUC's remaining resources. Further, regulatory oversight adds severe financial burdens to CUC.

(3) The people of the Commonwealth and its government are going through severe economically distressed times. This has put a severe strain on the government to meet its obligation.

(4) CUC often only has days' worth of purchased diesel fuel to power its system because it lacks the funds to buy oil from its sole, cash-only supplier. CUC has no credit or other means to buy fuel than the revenue it collects from its customers;

(5) A unified government approach is necessary to reconcile and resolve the fiscal crises of the government with the fiscal crises of CUC. This can only be achieved through an emergency declaration.

WHEREAS, THERE EXISTS A TECHNICAL WORKER CRISIS:

(1) CUC faces a manpower crisis. Skilled workers and a responsive support system are key to the success of the operation, particularly for preventative maintenance. At present, CNMI law at 3 CMC §§ 4531 and 4532 prohibits CUC from hiring any more non-U.S. technical workers;

(2) CUC bears a substantial obligation to deliver highly technical work on time to the satisfaction of the U.S. District Court and the U.S. Environmental Protection Agency ("EPA"), pursuant to two sets of consent, or "Stipulated Orders." Failure to meet the requirements of the federal court orders could subject CUC and the CNMI to substantial fines and charges and, in the extreme, to a federal takeover of their finances;

(3) CUC requires employees with specialized training. There are many non-U.S. citizens whom CUC needs to retain on technical and professional contracts. Without these positions filled, CUC operations would be severely compromised;

(4) The legislature, through P.L. 17-1 (Mar. 22, 2010), has limited CUC's ability to hire technical staff, eliminating prior statutory permission to hire up to nineteen foreign workers and reinstituting a moratorium on the government's hiring of foreign nationals, even if needed for highly technical positions for which no local or mainland citizens are available. The CUC Act, as subsequently reenacted by P.L. 16-17 (Oct. 1, 2008), provides that CUC shall hire such persons as are necessary for operations, *except as otherwise limited by other law*. 4 CMC § 8123(h);

(5) There are not enough U.S. citizen or U.S. resident technical specialists at CUC to perform the power generation work, particularly specialists with experience in the type of engines that CUC uses. U.S. citizens with the necessary skills are not readily available in the CNMI and it is costly to recruit from the United States. CUC believes that the vast majority of skill sets, considering its cash restrictions, must come from non-U.S. personnel. CUC has tried to hire diesel mechanics in the CNMI, but has been unsuccessful in finding enough qualified candidates;

(6) The impact of an inadequate workforce is substantial. First, there would be a direct deterioration of service to existing customers. There would be brownouts or area blackouts with the above-mentioned loss of service. Second, the power plants would again degrade, producing more of these outages. Third, if CUC fails to meet federal court deadlines for the Stipulated Orders, the Court could appoint a federal receiver and its consulting team, with all expenses charged to CUC customers.

(7) CUC's renewal of contracts and hiring of foreign expert workers is necessary to sustain the integrity of CUC's systems. Thus, continued relief from the legislative prohibition on hiring foreign national workers is necessary to ensure the delivery of uninterrupted power services to the people of the Commonwealth.

WHEREAS, A BOARD OF DIRECTORS DOES NOT EXIST:

(1) There is no Board of Directors. CUC has functioned without a Board because it has had to. While CUC's enabling act, reenacted as P.L. 16-17, as amended, authorizes a Board, there is no CUC Board yet because, while the staff of the

Governor's Office have diligently tried to find Board volunteers who meet the complex statutory qualifications, they have been unable to do so. Nonetheless, CUC must continue to function.

(2) Without a Board in place, I still must provide for the continued operations of CUC. The Director needs to be able to negotiate with federal and other agencies.

WHEREAS, BY THIS RENEWAL OF THE DISASTER EMERGENCY DECLARATION, I intend to enable CUC to continue to provide necessary services to the people of the Commonwealth. This Declaration is necessary to protect the health and safety of our children, our senior citizens, businesses, and all other CNMI residents and visitors.

NOW, THEREFORE, I hereby invoke my authority under Article III, § 10 of the Commonwealth Constitution and 3 CMC § 5121(f) to take all necessary measures to address the imminent threats facing the Commonwealth of the Northern Mariana Islands including, but not limited to, the authority to:

1. Suspend all statutory or regulatory provisions as required; and
2. The reprogramming of funds necessary to meet this emergency.

It is hereby **ORDERED** that:

This Declaration of a State of Disaster shall take effect immediately and all memoranda, directives, and other measures taken in accordance with this Declaration shall remain in effect for thirty (30) days from the date of this Executive Order unless I, prior to the end of the thirty (30)-day period, notify the presiding officers of the Legislature that the state of emergency has been lifted or has been extended for an additional period of thirty (30) days. 1 CMC § 7403(a); 3 CMC § 5121(c).

Under authority of this Declaration and with the goal of mitigating or ameliorating the above described crises, I immediately direct the following:

DIRECTIVE 1: I hereby assume all of the executive power of the CUC which shall include any and all powers vested in the board of Directors and the Executive Director. This executive authority shall be exercised either by me or by my designated Executive Director.

DIRECTIVE 2: All provisions in Title 4 of the Commonwealth Code and P.L. 17-34 that concern PUC regulation of CUC and its actions are suspended under this Order.

DIRECTIVE 3: Section 4531 of Title 3 of the Commonwealth Code is hereby suspended as to CUC as follows:

The following strike-out formatted language of the quoted provisions of the following statute regulating government employment is, as indicated, suspended immediately:

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3 CMC §4531. Restrictions on Government Employment
~~Employment by departments, agencies, and all other instrumentalities of the Commonwealth government is limited to citizens and permanent residents; provided that the government may enter into contracts with foreign nationals for services performed outside of the Commonwealth.~~

As a result of my suspension of 3 CMC § 4531, CUC shall have the full power and authority to retain staff which may include employees other than citizens and permanent residents of the United States.

The above described Directives are in no way meant as the limits of my actions or authority under this Emergency Declaration. Accordingly, I reserve the right under this Emergency Declaration to issue any and all directives necessary to prevent, mitigate or ameliorate the adverse effects of the emergency.

SIGNED AND PROMULGATED on this **20th** day of February 2013.

ELOY S. INOS
Governor,
Commonwealth of the Northern Mariana Islands

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Eloy S. Inos
Governor

Jude U. Hofschneider
Lieutenant Governor

EXECUTIVE ORDER No. 2013-04

DECLARATION OF HEALTH EMERGENCY

WHEREAS, the Commonwealth Healthcare Corporation ("CHC") provides the bulk of necessary healthcare in the Commonwealth, as well as providing all emergency medical services; and

WHEREAS, the disruption of the provision of medical services by the CHC poses a direct threat to the health and safety of the people of the Northern Mariana Islands; and

WHEREAS, the CHC is currently in arrears for payments to vendors providing vital services and is in arrears in regards to certain salary payments to or on behalf of employees; and

WHEREAS, CHC's continuing financial challenges affects its ability to maintain adequate infrastructure, equipment and personnel such that it is jeopardizing CHC's federal funding; and

WHEREAS, CHC, has been notified by federal authorities that, due to remaining deficiencies in CHC operations and infrastructure, CHC will cease to be eligible for Medicare/Medicaid payments along with other penalties if the deficiencies are not promptly remediated.

WHEREAS, Article III §10 of the Constitution of the Commonwealth and section 5101 *et seq.* of Title Three of the Commonwealth Code provide that the Governor has the authority and duty to take the necessary steps to respond to impending disasters;

NOW THEREFORE, a State of Emergency for the Commonwealth of the Northern Mariana Islands is declared due to the imminent threat of the disruption of critical medical services in the Commonwealth and the danger that such a condition poses to the public because of the great increase in otherwise preventable deaths that would result.

In order to meet this imminent threat, the Constitutional authority provided under Article III §10 is invoked, including, but not limited to, the authority to:

1. Suspend pertinent statutory or regulatory provisions as required; and

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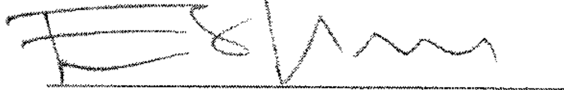
2. The reprogramming of funds necessary to meet this emergency.

To ensure that the suspension of regulatory provisions does not lead to financial abuse, this emergency declaration incorporates the March 19, 2012 Memorandum of Understanding (MOU) between CHC and the Department of Finance, Office Management and Budget, and Office of the Attorney General. In addition, any financial reports submitted by the CHC pursuant to the MOU must be submitted with a certification of the person submitting them stating that the reports are a full and accurate under penalty of perjury.

Done this 1st day of March, 2013.



ELOY S. INOS
Governor

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Eloy S. Inos
Governor

Jude U. Hofschneider
Lieutenant Governor

DIRECTIVE

DATE: Feb. 22, 2013
No. 1

TO: ALL DEPARTMENTS AND AGENCIES

FROM: **GOVERNOR**

SUBJ.: Hiring Freeze

Effective immediately, all personnel actions including, but not limited to, change in salary compensation and re-allocations, shall be frozen until further notice.

ELOY S. INOS

cc: Lt. Governor
Civil Service Commission

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Eloy S. Inos
Governor

Jude U. Hofschneider
Lieutenant Governor

DIRECTIVE

DATE: 22 FEB 2013
No. 2

TO: ALL DEPARTMENTS AND AGENCIES

FROM: GOVERNOR

SUBJ.: Travel

Effective immediately, all airline tickets for approved government travel, both locally and federally funded, shall be purchased at the approved and applicable government discounted rate.

All autonomous and independent agencies are requested to follow this Directive so as to limit and control government expenses.

ELOY S. INOS

cc: Lt. Governor
Secretary of Finance

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Attorney General of the Northern Mariana Islands

JOEY P. SAN NICOLAS
Attorney General

VIOLA ALEPUYO
Deputy Attorney General

Attorney General Opinion 2013-01

I. Issue Presented

Whether a vacancy in the Senate with less than one-half of the term remaining is filled by the Governor by appointing the unsuccessful candidate who received the highest number of votes from the most recent election or whether the vacancy is filled by the unsuccessful candidate who received the highest number of votes from the last election for that specific office?

II. Short Answer

A vacancy in the Senate is filled by appointing the unsuccessful candidate from the last election who received the highest number of votes for that particular office and not by the unsuccessful candidate from the most recent election.

III. Analysis

A. Commonwealth Authority

The Commonwealth Constitution Article II, § 9 states:

> A vacancy in the legislature shall be filled by special election if one-half or more of the term remains. If less than one-half of the term remains, the governor shall fill the vacancy by appointing the unsuccessful candidate for the office in the last election who received the largest number of votes and is willing to serve or, if no candidate is available, a person qualified for the office from the district represented.

This language is clear enough with respect to members of the House of Representatives because all Representatives are elected every two years; thus, the unsuccessful candidate for the office will always be the unsuccessful candidate from the most recent election. CNMI Const. art. II, § 3. In the Senate, however, members are elected to four year terms. *Id.* art. II, § 2. Specifically, "[t]he term of office for senator shall be four years except that the candidate receiving the third highest number of votes in the first election in each senatorial district shall serve a term of two years." *Id.* § 2(b). This term of office scheme creates staggered elections in

that every two years either one or two Senate offices are up for election and one is not. This election procedure combined with the vacancy language from section nine creates an ambiguity with respect to which unsuccessful candidate is to fill a vacancy in the Senate when the office vacated was elected not in the most recent election, but in the previous election.

None of the materials from the first Constitutional Convention[1] definitively address the problem, but the documents do provide guidance. The Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, December 6, 1976 ("Analysis"), provides that "[t]he governor must appoint the unsuccessful candidate for the seat in the last election who received the highest number of votes and who is able and willing to serve." Analysis at 50. The Analysis goes on to provide that the seat must be offered to the unsuccessful candidate regardless of party affiliation, and also that if the unsuccessful candidate withdrew from the race even though votes were cast in their favor, they are not a candidate within the meaning of the section. *Id.* at 50-51. The difference between this language and the constitutional language is "seat" versus "office." Specifically, Article II, § 9 states: "the unsuccessful candidate for the *office* in the last election," whereas the Analysis languages provides: "the unsuccessful candidate for the *seat* in the last election." (emphasis added). Thus, it is necessary to determine the meaning of these two words.

The distinction between "office" and "seat" raises the question of what these terms precisely mean and whether they are interchangeable. The pertinent definition of "seat" is: "Membership and privileges in an organization." Black's Law Dictionary, 9th Ed. 2009. "Seat" is also defined as: "14. A right to sit as a member in a legislative or similar body: *He was elected to a seat in the senate.*" Random House College Dictionary, Revised Ed., 1980 at 1187. Thus, seat used in this manner indicates that it is a position held by a certain person in a certain institution. "Office" is relevantly defined as: "1. A position of duty, trust, or authority, esp. one conferred by a governmental authority for a public purpose." Black's Law Dictionary, 9th Ed. 2009. Office is also defined as: "6. a position of duty, trust, or high authority: *the office of president.*; 7. Employment or position as an official: *to seek office.*" Random House College Dictionary, Revised Ed., 1980 at 923. Office is used in this manner as referencing a specific individual and/or a specific position. Applying these definitions to the Commonwealth Constitution Article II, §§ 2(a) and (b), there are nine senatorial offices divided equally between the three main islands of the Commonwealth. Each island is entitled to three senators who will hold three offices, and those offices are filled through staggered elections. *Id.* Thus, an election is held every four years for each senator's office. In this regard, the term, "office" and "seat" are interchangeable, since it is the position that matters, a senatorial representative, and not the name of that position used in the Constitution versus the documents that accompanied its ratification, (*i.e.* office versus seat). Therefore, any reference to "seat" in such accompanying documents can

[1] CNMI Const. art. II, § 9 was adopted by delegates from the first Constitutional Convention, and the language has remained the same since adoption.

be interpreted as having the same meaning as the word "office" as it is used in the final Constitution.

Turning back to the documents that accompanied the ratification of the Constitution, the Journal of the Northern Mariana Islands Constitutional Convention of 1976 ("Journal") provides more guidance. The Verbatim Journal Transcript from the Thirty-Seventh Day, Tuesday November 23, 1976, is the day when the delegates adopted Article II, § 9. *See* Journal, Vol. I, November 23, 1976 at 174-76. While the delegates debated other sections of Article II, there was no discussion on the meaning of section nine. *Id.* at 168-77. Thus, it is not helpful because it adopted the relevant constitutional language without debate.

Volume II of the Journal contains Committee Recommendation Number Three, from the Committee on Government Institutions, which is the Committee that proposed the language for section nine. Committee Recommendation Number Three: Legislative Branch of Government, Section 9: Vacancies, states: "Seats that become vacant when less than half the term remains shall be filled by the governor. He is obliged to appoint to the vacancy the unsuccessful candidate for the seat in the last election who received the highest number of votes, who is able and willing to serve." Journal, Vol. II, Recommendation Number Three at 397. The Recommendation goes on to explain that for these shorter terms of office that the Committee did not want to impose the cost of a special election on the Commonwealth, "and therefore, provided that the highest available *runner-up* should be appointed to terms with relatively little time remaining. Such persons, the Committee believed, would have demonstrated their acceptability to the voters by receiving votes in an election." *Id.* at 397-98 (emphasis added).

Once again, the drafters of the language were focused on the particular position held by the vacating member. This is demonstrated by the use of the term *runner-up*,[2] which is a clear reference to the individual who lost to the Senator who ultimately vacated the seat. A person cannot be a runner-up if they did not run in the election. In other words, the Governor is required to appoint the runner-up for that *office*, not the runner up from the most recent election. While this is qualified by the duty to appoint from the last election, elections for Senate seats/offices are not elected every two years. In other words the last election for a particular Senate seat/office is not necessarily the last Commonwealth-wide election held. *See* CNMI Const. Art. II, § 2(b).

The final relevant document from the Constitution Convention is the Briefing Papers for the Delegates to the Northern Marianas Constitutional Convention ("Briefing Papers").[3] Briefing

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[2] The term "runner-up" is not defined in any of the Constitutional Convention materials. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), discusses how in an election with a plurality of candidates, the runner-up may be preferable to the majority of electors than the winning candidate. *See also Corner v. Solis*, 280 Fed.App. 532, 534 (7th Cir. 2010) (describing the runner-up candidate in a union election as the one who received the second highest number of votes in an election with one victor). Thus, the meaning of "runner-up" is the unsuccessful candidate who received the highest number of votes.

[3] The Briefing Papers are not a record or summary of what occurred at the Constitution Convention, but rather is a document prepared by the law firm of Wilmer, Cutler & Pickering to provide the delegates with examples of constitutions from other U.S. jurisdictions and the rationales for and effects of differing provisions.

Paper Number Three discusses the Legislative Branch. *See* Briefing Papers, Vol. I, No. 3. The section discussing how to fill legislative vacancies provides several alternative methods employed throughout the United States and includes citations to various state constitutions. The last option given in the Briefing Papers discusses appointing a runner-up and states:

> One compromise between appointment and special election would be the appointment of the *runner-up* in the previous election. The *runner-up* may more nearly reflect the view of the voters, particularly if the election was close, than a representative appointed by other means. On the other hand, if a two-party system is in operation, this alternative would probably result in giving the seat to a party different from the one favored by the voters in the last election. Another compromise might be the use of two of the possible methods—appointment if the remaining term is short, and a special election if a substantial portion of the term remains.

Briefing Papers, Vol. I, No. 3 at 67 (emphasis added). Once again a definitive intent was not expressed, but clues are given. Specifically, the Briefing Paper explains that "[t]he *runner-up* may more nearly reflect the view of the voters, particularly if the election was close, than a representative appointed by other means." *Id.* (emphasis added). Which election is not specified, but presumably it is the last election for the seat; otherwise, the runner-up from a different election for a different seat would not express the views of the voters because the voters would have been presented with a different slate of candidates during a different timeframe.[4] While the Briefing Papers do not directly address which candidate should be appointed, it is another clear reference to the runner-up being appointed, and a person cannot be a runner-up to the successful candidate if they did not run against that candidate.

The Commonwealth Constitution creates the ambiguity by referring to the unsuccessful candidate for the office from the last election without explicitly addressing staggered senatorial elections. The Convention Journals, Committee Reports, and Briefing Papers use similar language without directly addressing the issue of who assumes a Senate office when the last election for that office was not the most recent election. However, there are multiple references to the runner-up assuming the vacated office, and a person cannot be a runner-up to a successful candidate who subsequently vacates unless they actually ran against that candidate. While these materials provide guidance, it is still necessary to examine other authority to make a final determination.

B. <u>The Fifty States</u>

Surprisingly, no other State has a similar constitutionalized legislative succession provision. Most States provide for a special election every single time. *See* Ark. Const. art. 5, § 6

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[4] It is useful to consider that the CNMI is governed by the results of two elections. The election held every two years for House members and the election held every four years for Senators and for Governor. Similarly, the United States is governed by the results of three different elections since U.S. Senators are elected to six year terms. Thus, our elected system of government reflects the will of the voters over staggered time periods and not just the most recent election.

("The Governor shall issue writs of election to fill such vacancies as shall occur in either house of the General Assembly."). Some simply specify that the method of filling a legislative vacancy shall occur pursuant to law. *See* Mich. Const. art. 4, § 38 ("The legislature may provide by law the cases in which any office shall be vacant and the manner of filling vacancies where no provision is made in this constitution."). Others provide that certain bodies, such as county commissioners, shall fill the vacancy through appointment. *See* Nev. Const. art. 4, § 12 (". . . the county commissioners of the county from which such member was elected shall appoint a person of the same political party as the party which elected such senator or assemblyman to fill such vacancy . . . ."). Therefore, it is necessary to turn to cannons of construction in order to more thoroughly interpret the language found in Article II, § 9 of the Commonwealth Constitution.

C. Canons of Construction

A basic principle of statutory construction is that language must be given its plain meaning. *Century Ins. Co. v. Guerrero*, 2009 MP 16 ¶ 20. In *Century*, the Court addressed an ambiguity in 7 CMC § 2502(a)(2), a statute of limitations, that is similar to the ambiguity contained in section nine of the Constitution. Section 2502(a)(2) provided for a twenty-year limitations period for "'actions for the recovery of land or any interest therein.'" *Id.* (citing 1 CMC § 2502(a)(2)). The Court reasoned that "[t]he plain meaning of the statute could either be interpreted as applying (1) to the recovery of land or to the recovery of an interest in land, or (2) to the recovery of land specifically or to any interest in land generally." This is similar to the pertinent language from CNMI Const. art. II, § 9, which states: ". . . the governor shall fill the vacancy by appointing the unsuccessful candidate for the office in the last election who received the largest number of votes . . . ." The plain meaning could be either (1) the unsuccessful candidate who ran for that specific office from the last election, or (2) the unsuccessful candidate from the most recent election.

The *Century* Court recognized that "if 7 CMC § 2502(a)(2) was interpreted to apply to actions for any interest in land then the second clause of the statute would make the first clause, the recovery of land clause, 'meaningless.'" *Id.* ¶ 21 (citing *Estate of Faisao v. Tenorio*, 4 NMI 260, 265 (1995)) at 265. The Court concluded this section of analysis by holding:

> In essence, if the legislature intended 7 CMC § 2502(a)(2) to apply to causes of action for any interest in land then there was no reason for the legislature to include the provision specifying that it also applied to actions for the recovery of land. An action for the recovery of land would be a subset of an action concerning any interest in land. Therefore, CIC's interpretation of the statutory language causes the second clause of 7 CMC § 2502(a)(2) to render the first clause meaningless.

Id. The prohibition on meaningless constructions is directly related to the surplusage canon, and it is well established. *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *Reiter v. Sonontone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *Burdon Cent. Sugar Ref. Co. v. Payne*, 167 U.S. 127, 142 (1897) ("[T]he contract must

be so construed as to give meaning to all its provision, and . . . that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part . . .").

This reasoning can be applied to the issue surrounding the language from section nine. The Constitution specifically references ". . . the unsuccessful candidate for the office . . ." and if this language was to be subsumed by the following phrase ". . . in the last election . . . ." then the qualification of "for the office" would become meaningless. CNMI Const. art. II, § 9. The Constitution plainly states that it is the unsuccessful candidate for *the* office[5] from the last election who shall be appointed by the Governor. The definition of office in this context is specific to an individual who holds a position and not generic as in any office in the Senate. This is interpretation is further bolstered by the runner-up language from the Committee Report and Briefing Papers. The appointed individual must be the runner-up for *the* office, in other words, he or she was the person who came in directly behind the person ultimately elected. If the only consideration was who was the runner-up from the recent election then there would be no reason to use the words for *the* office, and the use of the word *runner-up* in the convention materials would itself be non-sensical because a person cannot be a runner-up in an election that they did not run in. To appoint the candidate from the most recent election would render the constitutional language "for the office" surplusage and such a construction violates *Century*, 2009 MP 16 ¶ 20. Thus, the plain meaning of section nine that does not render any of its words meaningless, and furthers the understanding from the Constitutional Convention materials, requires that the unsuccessful candidate from the last election for the specific office be appointed by the Governor—not the unsuccessful candidate from most recent election.

The current situation is whether the Governor must appoint the unsuccessful candidate who received the highest number of votes from the 2012 or 2009 election. The only reason that the 2009 election is even at issue, when it clearly was not the most recent election, is because the member who vacated the Senate office in question was elected in 2009. The only way for the unsuccessful candidate from the 2012 election to be appointed to the Senate office that was last up for election in 2009 is if that candidate was also the unsuccessful Senate candidate in 2009 because then he or she would also be the unsuccessful candidate for that specific office. Stated differently, if the unsuccessful candidate from 2012 did not run for that office in 2009, then that

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[5] The difference between "a" and "the" is important. In *American Business Association v. Slater*, 231 F.3d 1, 4-5 (Fed. Cir. 2000), the court explained that "[i]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.' *Brooks v. Zabka*, 450 P.2d 653, 655 (1969) (en banc); *see also* Black's Law Dictionary 1477 (6th ed. 1990) ("In construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an'.")." Thus, "the" office means the exclusive office that was up for election versus "an" office meaning that any Senate office.

This is important because for *the* office could be interpreted to apply generally, *e.g.* any senate office, and such a meaning for that phrase would not render it meaningless if *in the last election* was interpreted to mean the most recent election. The phrase being exclusive, however, eliminates any objection to the prohibition on meaningless constructions because only one senate office is at issue—the one vacated. Therefore, the "a" versus "the" distinction is critical.

candidate is not the runner-up for the vacated Senate office. He or she is the runner-up for the office elected in 2012. Therefore, CNMI Constitution article II, § 9, "[i]f less than one-half of the term remains, the governor shall fill the vacancy by appointing the unsuccessful candidate for the office in the last election who received the largest number of votes and is willing to serve . . ." means that the unsuccessful candidate from the last election *for that office* must be appointed. The language does not mean that the unsuccessful candidate from the most recent election shall be appointed because such an interpretation would render part of the constitutional language meaningless in violation of principles of construction adopted by the Commonwealth Supreme Court, and does not effectuate the intent contained in the Constitutional Convention materials.

The plain meaning and surplusage canons are not the only principles of interpretation that are useful in deciphering this matter. The whole-text canon also provides guidance. In *M'Culloh v. Maryland*, 17 U.S. 316, 406 (1819), the Court called "on a fair construction of the whole instrument" in deciphering the meaning of the U.S. Constitution. More recently, the Supreme Court has affirmed this principle by calling for a holistic approach to construction that looks not to just the particular statute in question, but the entire statutory scheme." *United Sav. Ass'n of Tex v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Relevant to the present inquiry into legislative vacancies it is necessary to examine all of Article II. As discussed above, CNMI Const. art. II, § 2(b) provides that "[t]he term of office for senator shall be four years except that the candidate receiving the third highest number of votes in the first election in each senatorial district shall serve a term of two years." This created staggered elections for senate offices. In other words, the entire Senate is not up for election every four years, but rather some Senate offices are up for election in one election cycle and others are up for election in the subsequent cycle. Interpreting section 2(b) in conjunction with section nine reveals that the election for the different Senate offices occurs in different elections. Therefore, when section nine calls for the appointment of the unsuccessful candidate for the office in the last election, it is specifically referencing the unsuccessful candidate from the last election for that specific office/seat and not just the most recent election because section 2(b) created different election times for different Senate offices.

IV. Conclusion

The Commonwealth Constitution Article II, § 9 reads in pertinent part that when "less than one-half of the term remains, the governor shall fill the vacancy by appointing the unsuccessful candidate for the office in the last election who received the largest number of votes and is willing to serve . . . ." This language does not clearly state what shall occur when the vacated Senate office was up for election in the previous election cycle instead of the most recent election cycle. The materials accompanying the First Constitutional Convention do not directly address this issue, but they do create a presumption that the runner-up will be the appointed individual. A person must run in an election and lose to be considered a runner-up. Cannons of construction, however, do provide a definitive answer. In interpreting the language of section nine all of its words must be given effect. The only way to determine that the unsuccessful

candidate comes from the most recent election renders the *for the office* phrase meaningless. This is a violation of *Century*, 2009 MP 16 and the surplusage canon. Furthermore, when Article II is read as a whole, Senate offices are elected on different election cycles and the particular election for a given Senate office is not necessarily the last or most recent election. By applying these principles of construction in conjunction with the Constitutional Convention materials makes it clear who must be appointed. Therefore, for the Senate vacancy in question, since that Senate office was filled pursuant to an election held in 2009, the unsuccessful candidate who received the largest number of votes from the 2009 election and who is willing to serve must be appointed by the Governor to fill the vacancy.

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Date

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PUBLIC REPRIMAND

MICHAEL KONING, MD

This matter came to the attention of the CNMI Health Care Professions Licensing Board through a letter submitted by Dr. Michael Koning, a physician licensed to practice medicine in the CNMI. Dr. Koning self-reported to the Board that he had pled guilty to a single count in violation of 26 USC § 7201 and 18 USC § 2, a federal income tax offense related to events that took place relative to the 2003 Tax Year in the State of Nebraska. The Board made an official decision to await disciplinary action until a sentence had been issued in the matter.

On February 1, 2012, the United States District Court of Nebraska imposed a sentence in Civil Case 4:09CR3031-001. The conditions of this Order are as stated in the Findings of Fact, below. Upon receiving this document, the Board made a decision at its regular Board meeting of July 18, 2012 to enter into a settlement agreement with Dr. Koning and now issues this public reprimand. This is done according to the Board's powers to issue disciplinary reprimands, stated in Public Law 15-105 § 2206(k). This reprimand shall be the extent of action the Board shall take against Dr. Koning in this matter.

FINDINGS OF FACT

Dr. Michael Koning holds a professional license issued by the CNMI Health Care Professions Licensing Board (the "Board") that authorizes him to engage in the practice of medicine and has held such a license continuously and in good stead since 2008. Other than the Tax Evasion conviction which will be discussed below, there are no events or claims of which the Board is aware that indicate in any way that Dr. Koning is anything other than an exemplary and dedicated doctor.

On March 24, 2011, Dr. Koning filed in the United States District Court of Nebraska a voluntary Petition to Enter a Plea of Guilty to Count IV in Civil Case No. 4:09cr3031 Dr. Koning pled guilty to Tax Evasion, a federal offense in violation of 26 USC § 7201 and Aiding and Abetting, in violation of 18 USC § 2, such tax evasion of which occurred on or about April 15, 2004. On March 25, 2011, Dr. Koning self-reported to the Board that he entered a plea of guilty to the aforementioned crime. Dr. Koning self-reported the tax investigation upon his first contact with the Board in 2008, even before the indictment was handed down, and has continuously kept the Board and his employer, the Commonwealth Health Center, apprised of the developments with his case.

On February 1, 2012, Judge Richard G. Kopf of the United States District Court of Nebraska sentenced Dr. Koning to probation for a term of five years. For the entire term of Dr. Koning's probation, he was ordered to work as a physician or otherwise provide medical services at the Commonwealth Health Center in Saipan or to work as a physician or otherwise provide medical services at such other place as the judge may approve that serves acutely under-served, under-privileged and impoverished American citizens. Dr. Koning was ordered to complete 100 hours of community service and pay a fine in the amount of $60,000. Dr. Koning paid the then-estimated taxes due in the amount of $989.531.00 years in advance of his sentencing, and at the sentencing $989,531.00 was accepted as the appropriate and paid in full restitution amount. Dr. Koning has completed the required 100 hours of community service, has been regularly making payments on the fine imposed at sentencing, and the Board is unaware of any information which would indicate that Dr. Koning is in any way not in compliance with the terms of his probation.

Dr. Koning has worked continuously at the Commonwealth Health Center as an Anesthesiologist since 2008 and, other than Dr. Koning's self-reported tax conviction, the Board has received no complaints regarding Dr. Koning.

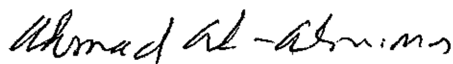
CONCLUSION

Dr. Michael Koning was convicted and sentenced for tax evasion, a felony. Public Law 15-105 §2224(b)(1) authorizes the Board to take disciplinary action against any CNMI-licensed health professional who has committed such a crime in any jurisdiction. Dr. Koning has been honest and open with the HCPI B, every indication that we have suggests that his skills and professional conduct are exemplary, and he appears to be in compliance with the court's sentence.

ORDER OF PUBLIC REPRIMAND

Now pursuant to P L. 15-105 §§ 2206(k) and §2224(b)(1), the CNMI Health Care Professions Licensing Board hereby orders that Michael Koning, M.D., be and is hereby PUBLICLY REPRIMANDED for the above set forth violation.

Date this 14 day of March, 2013.



Ahmad Al-Alou, M.D.
Acting Chairperson
CNMI Health Care Professions Licensing Board