

FSM SUPREME COURT TRIAL DIVISION

BRENDA H. EPERIAM,) CIVIL ACTION NO. 2016-034
)
Plaintiff,)
)
vs.)
)
FEDERATED STATES OF MICRONESIA,)
)
Defendant.)
_____)

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Beauleen Carl-Worswick
Associate Justice

Decided: February 19, 2021

APPEARANCES:

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HEADNOTES

Civil Procedure – Judgment on the Pleadings

A motion for judgment on the pleadings is not appropriate when: 1) the motion is untimely and will unnecessarily delay trial because the pleadings were closed with the filing of the answer to counterclaims on January 30, 2017; 2) matters outside the pleadings have been presented to and not excluded by the court, including the issue of the adequacy of the ad hoc committee hearing transcript; and 3) the movant has waived the motion by failing to submit a memorandum of points and authorities in support, as required by Rule 6(d). Eperiam v. FSM, 23 FSM R. 169, 174 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

Summary judgment will be granted, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Eperiam v. FSM, 23 FSM R. 169, 174 (Pon. 2021).

Civil Procedure – Summary Judgment – Procedure

Once a summary judgment movant presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to show that a genuine issue of material fact remains for resolution. In considering a summary judgment motion, the court must view the facts and inferences in a light that is most favorable to the party opposing the motion. Eperiam v. FSM, 23 FSM R. 169, 174 (Pon. 2021).

Administrative Law – Judicial Review

An appeal of an administrative agency decision is limited to review of the administrative record. Eperiam v. FSM, 23 FSM R. 169, 174 (Pon. 2021).

Administrative Law – Judicial Review

Although a hearing officer has the discretion to decide which recording method to use – stenographic or recording machine – the hearing officer does not have the discretion to altogether fail to make a record of the hearing, a verbatim record of the administrative proceedings is not required, but the hearing officer must prepare a full written statement of his findings of fact and his decision. What is most critical is the totality of the record, not necessarily the transcript. Eperiam v. FSM, 23 FSM R. 169, 175 (Pon. 2021).

Constitutional Law – Due Process – Procedural

Article IV, Section 3 of the Constitution provides that a person may not be deprived of life, liberty or property without due process of law, and the fundamental concept of due process is that the government may not take from a citizen his life, liberty, or property in an unfair or arbitrary fashion, but must follow procedures that ensure a fair and rational decision-making process. The essential features of procedural due process, or fairness, require notice and an opportunity to be heard. Eperiam v. FSM, 23 FSM R. 169, 177 (Pon. 2021).

Constitutional Law – Due Process – Procedural

In evaluating an alleged due process violation, courts usually look at the procedure that the government followed. Three important elements in establishing a procedural due process claim are: 1) whether the government is involved; 2) whether there is a life, liberty or property interest at stake; and, if so, 3) whether adequate due process procedures are employed by the government before a party is deprived of such an interest. Eperiam v. FSM, 23 FSM R. 169, 177 (Pon. 2021).

Constitutional Law – Taking of Property; Public Officers and Employees

To be property protected under the FSM Constitution, there must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. These assurances may come from various sources, such as statute, formal contract, or actions of a supervisory person with authority to establish employment terms. Eperiam v. FSM, 23 FSM R. 169, 177-78 (Pon. 2021).

Constitutional Law – Due Process; Constitutional Law – Taking of Property; Public Officers and Employees

Government employment that is "property" within the meaning of the Due Process Clause cannot be taken without due process. To be property protected under the Constitution, the employment right must be supported by more than merely the employee's own personal hope. There must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. Eperiam v. FSM, 23 FSM R. 169, 178 (Pon. 2021).

Constitutional Law – Due Process; Public Officers and Employees – Termination

The plaintiff's claim that she was wrongfully terminated after about 14 years' of government employment is a claim based on a "property" interest in government employment protected by the Due Process Clause. Eperiam v. FSM, 23 FSM R. 169, 178 (Pon. 2021).

Public Officers and Employees

A regular employee who is promoted or transferred to another public service position must serve a new probation period in the new position, and if the employee is removed from that new position, as distinguished from dismissal from the public service, the employee must be reinstated in his or her former position or in another position in the same class, without prejudice. Eperiam v. FSM, 23 FSM R. 169, 180-81 (Pon. 2021).

Public Officers and Employees

Each public employee must be rated at least once a year with a copy of each evaluation given to the employee affected, and with written notification given to any employee whose performance in his position is substandard. Eperiam v. FSM, 23 FSM R. 169, 181 (Pon. 2021).

Administrative Law; Public Officers and Employees – Termination

Within seven calendar days of the hearing's end, the ad hoc committee prepares a full written statement of its findings of fact and its recommendations for action, which may include modification or reversal of the disciplinary action, from which appeal was taken. The ad hoc committee's recommendation is then submitted to the President, who is the highest management official for any the executive branch agency and whose decision is final, subject to judicial review. Eperiam v. FSM, 23 FSM R. 169, 182 (Pon. 2021).

Constitutional Law – Due Process; Public Officers and Employees – Termination

Normally, the highest management official will accept the ad hoc committee's recommendation without extended consideration or review of the hearing record, if he accepts their findings of fact and law or merely overrules a legal decision unaffected by any difference in the facts, but to overrule the committee's factual findings or rulings on mixed issues of fact and law, the official is required to review all pertinent parts of the hearing record and to explain his analysis in his final decision. If the highest management official declines to accept a finding of fact of the ad hoc committee, the official is statutorily, as well as constitutionally, required to review those portions of the record bearing on the factual issues and to submit a reasoned statement demonstrating why the ad hoc committee's factual conclusion should be rejected. Eperiam v. FSM, 23 FSM R. 169, 183 (Pon. 2021).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

The court's role in reviewing the correctness of termination of public employees is to review the factual findings insofar as necessary to determine whether there is evidence to establish that there were grounds for discipline, not to engage in fact finding. The FSM Supreme Court's review is for the sole purpose of preventing statutory, regulatory and constitutional violations, and review of factual findings is limited to determining whether substantial evidence in the record supports the administrative official's conclusion that a violation of the kind justifying termination has occurred. Eperiam v. FSM, 23 FSM R. 169, 183 (Pon. 2021).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

It is not the court's task to weigh the conclusions of the President and of those of the ad hoc committee against each other or to decide which is more persuasive because, under the National Public Service System Act, the committee merely recommends; the highest management official makes the final decision. Therefore, the court is required to uphold the President's findings of fact if there is substantial evidence in the record to support them, but the court may refer the case back to the President to clarify his or her decision. Eperiam v. FSM, 23 FSM R. 169, 183-84 (Pon. 2021).

Administrative Law – Judicial Review; Public Officers and Employees – Termination

When the President summarily rejected the ad hoc committee's authority to make its reinstatement recommendation, the President was incorrect regarding the ad hoc committee's role because the ad hoc

committee is to prepare a full written statement of its findings of fact and its recommendations, which may include modification or reversal of the disciplinary action from which appeal was taken, and to transmit that statement to the highest management official, which may be the President. Since 52 F.S.M.C. 156 does not limit the scope of the committee's recommendations, the court will refer the matter back to the President to exercise his discretion and enter a decision, based on the administrative record, accepting or rejecting the ad hoc committee's recommendation to reinstate the plaintiff to her prior government employment. Eperiam v. FSM, 23 FSM R. 169, 184 (Pon. 2021).

Administrative Law – Exhaustion of Remedies Civil Rights – Remedies and Damages; Public Officers and Employees – Termination

The court will not reach the issues of violation of the plaintiff's civil rights and damages when the matter is returned to the President for further analysis and decision because, until such decision is rendered, the plaintiff's administrative remedies have not been exhausted. Eperiam v. FSM, 23 FSM R. 169, 185 (Pon. 2021).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

BACKGROUND

On December 29, 2016, plaintiff Brenda Hadley Eperiam ("Eperiam") filed a Complaint to Appeal Agency Action; Due Process and Civil Rights Violation and Complaint for Declaratory Relief. Defendant Federated States of Micronesia ("FSM") filed its Answer; Affirmative Defenses; Counterclaim on January 18, 2017. Eperiam filed her Answer to Counterclaims; Affirmative Defenses on January 30, 2017.

At hearing on May 9, 2017, the parties agreed to convert the complaint into a petition for review of an agency decision.

On June 8, 2017, the court ordered the FSM to deliver the transcript of agency hearing to Eperiam and Eperiam to report on the adequacy of the Transcript. The parties were ordered to stipulate to those parts of the records agreed upon.

Eperiam filed a Notice on Examination of Administrative Trial Transcript on July 7, 2017 and a Supplement to Filed Report on July 14, 2017 regarding errors in the administrative hearing transcript.

On March 7, 2018, Eperiam filed her Notice to the Court on Amended Transcript, stating that the amended transcript "is much better than the original" and that plaintiff seeks to proceed "using the transcript as a major basis for fact-finding."

On September 28, 2020, the FSM filed its Motion for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment.

A Status Conference was held in this matter on September 29, 2020 and the court ordered Eperiam to file any response to the FSM's Motion for Judgment on the Pleadings or in the alternative Motion for Summary Judgment by October 9, 2020. The parties agreed that if the court did not find the FSM's Motion dispositive, the matter should be set for trial sometime in November, 2020. Eperiam has not filed a response.

FACTS

Eperiam was employed with the Department of Health and Social Services as a Surveillance Officer for the FSM Tobacco Program for over eleven (11) years. Submission of Administrative Record Ex. D Ad Hoc Committee Findings and Recommendations at 3. ("Committee Report"). She was credited with "good performance." *Id.*

In April 2012, she received a lateral transfer to the position of Administrative Officer ("AO") with the Department of Health and Social Services. *Id.*

Eperiam had "no experience or qualifications of an administrative officer." *Id.* at 5. It was expected her skills could be improved with training. *Id.* She did not receive a "formal" job performance evaluation until February and July 2014. *Id.* On February 3, 2014, Eperiam's job performance as AO was rated "unsatisfactory", except for her work attitude, which was rated "satisfactory."¹ The Explanation to Performance Ratings details numerous major faults in Eperiam's job performance. Mot. for Summ. J. Ex. C. In addition, on February 3, 2014, Eperiam's supervisor, Secretary Vita Skilling ("Skilling"), offered her the opportunity to apply to two (2) different positions in the department that Skilling believed were in an area in which Eperiam was very experienced. Also, Skilling requested that Eperiam turn in her letter of resignation. *Id.* at Ex. D.

According to Skilling, in May, 2014, there was mutual agreement that Eperiam would transfer to a less demanding position. Submission of Administrative Record Ex. B Tr. at 195. On May 22, 2014, Skilling gave Eperiam a letter extending her termination date until July 19, 2014, providing her extra help and assistance with transfer to another department. Tr. at 187. However, Eperiam ultimately decided not to accept the transfer. Skilling testified that Eperiam told her that she felt pressured to accept the transfer because she could not find another position. Tr. at 188. Also, the transfer required a \$5,000 decrease in pay per year and she would move from public service to become a contract employee. Tr. at 208-11.

On July 25, 2014, Eperiam's job performance was rated "unsatisfactory," except her work attitude and public relations on Pohnpei traditional matters, which were rated "satisfactory." Mot. for Summ. J. Ex. B.² A letter dated July 25, 2014 notified Eperiam of her proposed termination. *Id.* at Ex. F. A letter dated August 6, 2014, informed Eperiam that her effective date of termination was August 8, 2014. *Id.* at Ex. G. On August 14, 2014, Eperiam was notified by letter of her right to appeal her termination. *Id.* at Ex. H.³

After extensive testimony, the ad hoc committee entered its decision on July 31, 2016. The ad hoc committee upheld the removal of Eperiam from her AO position and recommended that she be reinstated in her former position as a Tobacco Surveillance Officer or in another position in the same class. Committee Report at 6.

On October 11, 2016, President Christian accepted the Recommendation of the Committee to uphold the termination of Eperiam and refused the Committee's Recommendation to restore Eperiam to her previous job with the Department as a Tobacco Surveillance Officer, as beyond the Committee's authority. Submission of Administrative Record Ex. E.

¹ This document is dated to cover the period 11/12 – 01/14. Mot. for Summ. J. Ex. C.

² Mot. for Summ. J. Ex. B, E and I are identical.

³ Mot. for Summ. J. Ex. H and J are identical.

On appeal, Eperiam contends that the record of the ad hoc committee hearing is unclear due to poor sound recording quality and resultant inadequate transcription of the record. Eperiam seeks to conduct "fact finding" before the court. Notice to the Ct. on Am. Tr. at 1-2.

The court will deny the FSM's Motion for Judgment on the Pleadings and Motion for Summary Judgment and refer this matter back to the President of the FSM, as set forth below.

DISCUSSION

Motion for Judgment on the Pleadings

FSM Civil Rule 12

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A Motion for Judgment on the Pleadings is not appropriate in this case for several reasons: (1) the motion is untimely and will unnecessarily delay trial (the pleadings were closed with the filing of the Answer to Counterclaims on January 30, 2017); (2) matters outside the pleadings have been presented to and not excluded by the court, including the issue of the adequacy of the ad hoc committee hearing transcript; and (3) movant FSM has waived the motion by failing to submit a memorandum of points and authorities in support of the motion, as required by FSM Civil Rule 6(d), or offer legal argument in support of the motion.

Accordingly, the Motion for Judgment on the Pleadings is summarily denied.

Motion for Summary Judgment

Under FSM Rule 56, a Motion for Summary Judgment shall be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FSM Civ. R. 56(c); Kyowa Shipping Co. v. Wade, 7 FSM R. 93, 95 (Pon. 1995); Kihara Real Estate, Inc. v. Estate of Nanpei, 6 FSM R. 48, 52 (Pon. 1993). Once the party moving for Summary Judgment presents a prima facie case of entitlement to Summary Judgment, the burden shifts to the non-moving party to show that a genuine issue of material fact remains for resolution. Urban v. Salvador, 7 FSM R. 29, 31 (Pon. 1995); Kyowa Shipping Co., 7 FSM R. at 95; FSM v. Ponape Builders Construction, Inc., 2 FSM R. 48, 52 (Pon. 1985). In considering a Summary Judgment motion, the court must view the facts and inferences in a light that is most favorable to the party opposing the motion. FSM Dev. Bank v. Mudong, 10 FSM R. 67, 72 (Pon. 2001).

A. Eperiam's First Cause of Action for Appeal of Decision of Administrative Agency

This matter was converted from a civil action to an appeal of an administrative agency decision. Eperiam notes that "such an appeal is limited to review of the administrative record", as set forth in 52 F.S.M.C. 157 and 17 F.S.M.C. 111.

However, Eperiam argues that "if no complete record is available or if a finding of [violation of] procedural due processes [sic] is made, then a trail [sic] *de novo* shall be required." Compl. at 4.

Eperiam's first cause of action does not make a request for declaratory relief. However, the title page of the Complaint requests Declaratory Relief. The court will assume that Eperiam requests a ruling as to whether she is entitled to a *de novo* hearing if the "complete record is unavailable".

Sufficiency of the Record

Eperiam argues that she is entitled to a "complete record" of the ad hoc committee administrative proceedings or a *de novo* hearing is required. She specifically objects to the quality of the transcript of the committee hearing. However, Eperiam may not be entitled to a verbatim transcript of the ad hoc committee proceedings.

52 F.S.M.C. 155(2) provides that, "At the hearing . . . evidence shall be taken stenographically or by recording machine."

Two administrative agency appeals discuss the quality of transcript required for court review of an administrative decision.⁴

Ruben v. FSM

Although a "hearing officer has the discretion to decide which recording method to use – stenographic or recording machine – the hearing officer does not have the discretion to altogether fail to make a record of the hearing" and its failure to substantially comply with this procedural requirement is a reason an agency action must be set aside. *Ruben v. FSM*, 15 FSM R. 508, 517 (Pon. 2008). When an agency "failed to substantially comply with the procedures required by law through the hearing officer's failure to prepare a full written statement of his findings of fact and his decision and the [agency's] failure to make a record of the hearing proceedings, either stenographically or by recording machine," the court will set aside the agency order. *Id.*⁵

Louis v. FSM Social Security Administration

In *Louis*, the Court found that the FSMSSA was not required to produce a verbatim record of the administrative proceedings for the parties and the court to consider. Instead the Court cited the statutory language of 17 F.S.M.C. 109(6) to require that, "*the hearing officer shall prepare a full written statement of his findings of fact and his decision.*" *Louis v. FSM Social Sec. Admin.*, 20 FSM R. 268, 274 (Pon. 2015) (emphasis in original).

The *Louis* Court distinguished *Ruben v. FSM*, noting,

In *Ruben v. FSM*, 15 FSM R. 508 (Pon. 2008), the court set aside the administrative decision of the FSM Department of Finance because it was not clear from the record what evidence was used to reach a final decision, no statement of findings of fact was included, and neither party presented any evidence of a recording or transcript of the hearing.

Louis, 20 FSM R. at 274.

⁴ These cases may be of limited precedential value, as they arise from appeals of agency decisions not subject to Presidential approval (the FSM Department of Finance and the FSM Social Security Administration).

⁵ The matter was referred to the FSM Department of Finance and Administration under the doctrine of primary jurisdiction.

Totality of the record

What is most critical is the totality of the record, not necessarily the transcript.

In Poll v. Victor, the court affirmed the agency's termination of the plaintiff's employment based on the totality of evidence in the record, not including the ad hoc committee's transcript. Poll v. Victor, 18 FSM R. 235, 239-41 (Pon. 2012).

The court in Poll v. Victor conducted a review of the documents of record before the ad hoc committee that were stipulated to, or otherwise entered into evidence by the parties, the ad hoc committee's Findings and Recommendation and the Memorandum signed by the President of the FSM.

The court took testimony but it appears to be limited to the following:

Other evidence presented at trial going to Poll's termination date, the date when the FSM stopped paying Poll, the date of the President's affirmance of the Ad Hoc Comm.'s Findings and Recommendation, Poll's leave situation, and Poll's attempts to find work after his termination are also considered as going to the issue of a violation of Poll's constitutional due process rights and damages relating to FSM liability for payroll payments owed to Poll.

Poll, 18 FSM R. at 241.

The plaintiff in Poll v. Victor argued that the ad hoc committee's transcript was incomplete (there was nothing on the first tape and the second tape was incomplete); however, the court in that matter did not find the transcript necessary to its adjudication of the case.

Here, the Administrative Record consists of the following exhibits from the FSM's Submission of Administrative Record:

1. Exhibit A: Personnel Action Form and Supporting Performance Evaluations;
2. Exhibit B: Transcript of Administrative Hearing for Appeal
3. Exhibit C: Parties Closing Arguments to Ad Hoc Administrative Committee;
4. Exhibit D: Finding and Recommendations of Ad Hoc Administrative Committee;
5. Exhibit E: Letter from H.E. Peter Christian to Dwight Edwards; and
6. Exhibit F: Plaintiff's Notice of Appeal of Agency Action.

In addition, the FSM submitted the following Exhibits to its Motion for Summary Judgment:

Exhibit A Performance Rating Report (11/12 -01/14)⁶

Exhibit B Performance Evaluation (Feb. 1, 2014 – May 15, 2014)⁷

Exhibit C Performance Rating Report (11/12 -01-14)

Exhibit D Evaluation for Continuation of Work (February 3, 2014)

⁶ Exhibits A and C are identical. However, the FSM's Motion for Summary Judgment only included a tab for Exhibit A and omitted the contents, which should be the Performance Rating Report dated 11/12 -01/14.

⁷ Exhibits B, E and I are identical.

Exhibit E Performance Evaluation (Feb. 1, 2014 to May 15, 2014)

Exhibit F Letter of proposed termination (July 25, 2014)

Exhibit G Letter re effective date of termination (August 6, 2014)

Exhibit H Letter advising of right to appeal work termination (August 14, 2014)⁸

Exhibit I Performance Evaluation (Feb. 1, 2014 – May 15, 2014)

Exhibit J Letter advising of right to appeal work termination (August 14, 2014)

The court finds that the Motion for Summary Judgment can be adjudicated from the totality of the record set forth in the above-noted exhibits, which include the Transcript of Administrative Hearing for Appeal. The transcript consists of 355 pages of testimony and is sufficiently transcribed and comprehensible to serve as a factual basis for determination of the instant motion without further testimony.

B. Eperiam's Second Cause of Action for Violation of Due Process Clause of the FSM Constitution

Eperiam contends that the FSM terminated her employment illegally, taking her property right in government employment, and failed to pay her after termination, all in violation of the due process guarantee in the FSM Constitution.

Article IV, Section 3 of the FSM Constitution provides that "a person may not be deprived of life, liberty or property without due process of law. . . ." FSM Const. art. IV, § 3. "The fundamental concept of due process is that [the] government may not take from a citizen his life, liberty, or property in an unfair or arbitrary fashion, but must follow procedures that ensure a fair and rational decision-making process." AHPW, Inc. v. FSM, 12 FSM R. 114, 118 (Pon. 2003) (citing Suldan v. FSM (II), 1 FSM R. 339, 354-55 (Pon. 1983)); Ladore v. Panuel, 17 FSM R. 271, 275 (Pon. 2010); Isaac v. Weilbacher, 8 FSM R. 326, 333 (Pon. 1998). "The essential features of procedural due process, or fairness, require notice and an opportunity to be heard." Taulung v. Kosrae, 8 FSM R. 270, 275 (App. 1998); Panuelo v. Amayo, 12 FSM R. 365, 374 (App. 2004).

In evaluating an alleged due process violation, courts usually are looking at the procedure that was followed by the government when, for example, the government is denying a benefit or taking some property from a party. Three important elements in establishing a procedural due process claim are: (1) whether the government is involved; (2) whether there is a life, liberty or property interest at stake; and, if so, (3) whether adequate due process procedures are employed by the government before a party is deprived of such an interest.

Pohnpei Cmty. Action Agency v. Christian, 10 FSM R. 623, 635 (Pon. 2002); Kama v. Chuuk, 18 FSM R. 326, 333 (Chk. S. Ct. Tr. 2012).

The first element is satisfied, as the FSM Department of Health and Social Services is a government entity for the purpose of constitutional due process analysis.

The second element regards whether government employment is "property" within the meaning of the due process clause that cannot be taken without due process. To be property protected under the FSM

⁸ Exhibits H and J are identical.

Constitution, there must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. "These assurances may come from various sources, such as statute, formal contract, or actions of a supervisory person with authority to establish terms of employment." Suldan (II), 1 FSM R. at 351-52 (citing J. Nowak, R. Rotunda & J. Young, Constitutional Law 495-96 (1978)). Although a governmental entity's breach of contract, without more, does not constitute a civil rights or due process violation, "a person who has been employed for twelve years under a series of one year contracts could prove that by that length of employment, there was [an] unwritten claim to continued employment . . ." Talley v. Lelu Town Council, 10 FSM R. 226, 237 (Kos. S. Ct. Tr. 2001) (citing Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)).

Government employment that is "property" within the meaning of the Due Process Clause cannot be taken without due process. To be property protected under the Constitution, the employment right must be supported by more than merely the employee's own personal hope. There must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons.

Panuelo v. FSM, 20 FSM R. 62, 68 (Pon. 2015) (citing Suldan (II), 1 FSM R. at 351-52).

The record shows that Eperiam was employed by the FSM Department of Health and Social Services for approximately fourteen (14) years. Her claim is based on a "property" interest in government employment protected by the Due Process Clause.

The third element requires that a claimant show that the procedures employed by the government were inadequate or unfair.

The FSM's Motion for Summary Judgment shows that the FSM provided Eperiam with two detailed job reviews by which Eperiam was informed of defects in her performance that she failed to correct. Mot. for Summ. J. Ex. C and Ex. B.⁹ In addition, Eperiam was given the opportunity to apply for other positions that might have better suited her talents, for which she did not apply. *Id.* at Ex. D. Also, Eperiam was given the option to respond to the letter of proposed termination. *Id.* at Ex. F.¹¹

It would appear from the face of the Motion for Summary Judgment and supporting exhibits that the motion should be granted, especially in the absence of a response from Eperiam, and this matter adjudicated in favor of the FSM.

The administrative hearing record largely supports the FSM's Motion for Summary Judgment. The hearing transcript consists primarily of testimony from Secretary Skilling, Brenda Eperiam's supervisor at the Department of Health and Human Services, in support of termination; however, Ms. Eperiam offers rebuttal testimony as well.¹²

However, the Motion for Summary Judgment fails to account for the FSM's noncompliance with FSM

⁹ Exhibits B, E and I are identical.

¹⁰ Skilling gave Eperiam verbal explanations, evaluations and written assistance. (Submission of Administrative Record, Ex. B Tr. at 39, 43, 44, 46, 48-49, 54, 71, 104-105, 184, 217.)

¹¹ There is no evidence that Eperiam responded to the letter of proposed termination.

¹² There is brief testimony from Shoniber Abraham, former Payroll Manager for the Department of Finance.

personnel rules and regulations, which militates against a grant of the Motion for Summary Judgment and in favor of referral of this matter to the President of the FSM for reconsideration.

AD HOC COMMITTEE FINDINGS AND RECOMMENDATIONS

1. *Administrative Hearing Transcript Review*

Secretary Skilling testified to numerous problems with Brenda Eperiam's work performance as Administrative Officer for the Department of Health and Human Services.¹³

Ongoing Duties: It would take Eperiam at least one full day to prepare a travel authorization because of errors in calculating costs. Travel had to be postponed due to Eperiam's errors.¹⁴¹⁵ Submission of Administrative Record Ex. B Tr. at 53. Wiring of checks for international payments would take more than 2 full days. *Id.* at 62, 63, 64. A financial recording system was installed on her computer, which she couldn't use after more than a year. *Id.* at 64, 65. Employment contracts were delayed because of incomplete documents, vendors could not be paid because contracts were not prepared, TAs and requests to finance were still delayed. *Id.* 168-70.

Projects: more than a year passed and the processing of fixed assets that needed to be surveyed was not done.¹⁶ *Id.* at 57, 59, 61. Eperiam failed to update personnel files.¹⁷ *Id.* at 167.

Budgeting: more than one year passed and Eperiam was still unable to do the budgeting of the department, resulting in the secretary, assistant secretary, and two other financial specialists from two other programs having to do the actual work on budgeting in spite of on-the-job assistance by [an]other financial specialist in the department. *Id.* at 74. One of the duties of the administrative officer is to prepare the budget for the whole department and Eperiam was unable to report the budget expenditure for the last year and to request the new budget in the new fiscal year. *Id.* at 75.

Payroll: almost every pay period there had to be supplemental pay requests because there was information missing from time sheets that Eperiam prepared. *Id.* at 83. Once in a while, Finance employees had to stay until seven o'clock. Eperiam had asked them to wait because she was still

¹³ This list is an overview of Secretary Skilling's testimony at the administrative hearing regarding Brenda Eperiam's allegedly substandard work performance. It is not exhaustive, nor is Eperiam's rebuttal testimony.

¹⁴ Eperiam testified that the practice in the department was that TAs were prepared in 1 to 3 days, but that all the TAs she remembered preparing never lasted for more than one full day based on calculations and costs. Tr. at 296-97.

¹⁵ The FSM offered, and Eperiam identified, two Amended TAs that she signed. They were entered into evidence as FSM's Exhibits 6 and 7. It is inconclusive whether she prepared them or Francelynn did so and Eperiam signed them. It is unclear from the testimony if Eperiam made mistakes or there had been requests for additional time, necessitating amended TAs. Tr. at 340-45.

¹⁶ According to Eperiam, she was able to inventory fixed assets, including government vehicles in Pohnpei, where she had access to the equipment; however, not all states responded to her email requests for information on their property so she did not complete the task assigned to her by Skilling. This task had not been handled for the previous two years. Tr. 298-302.

¹⁷ Per Eperiam, the personnel files were left for over two years before she took the job and were "already all over the place." She testified that she filled the employee files and cited the file of Ben Jesse. Tr. at 297-98.

working on the timesheets. This happened about 20 times every year.¹⁸ *Id.* at 83-84.

Reports: reports had to be redone for more accuracy due to too many assumptions and too much hearsay and not following protocols. *Id.* at 84. Reports were "wordy" and lengthy, without much substance. *Id.* at 95, 96, 98. Eperiam was disorganized. *Id.* at 106, 107, 109. She was unable to organize her work even after being given a pad of paper. *Id.* at 229. Eperiam did not keep departmental logs and reports accurately. *Id.* 174-75. She did not prepare reports timely. *Id.* at 178.

Attendance: Eperiam would come to work early but then disappear for most of the day and stay and work late. *Id.* at 105. Eperiam left work for half a day to do 0-1 errands and had continuing unjustified absences. *Id.* at 179-81.

2. *Compliance with Personnel Regulations*

Eperiam may be entitled to reinstatement to the position of Tobacco Surveillance Officer or another position in the same class, as (1) she was not qualified to serve as an Administrative Officer, (2) she was not provided with a written personnel evaluation during her probationary period, or within one year of her transfer to the AO position, despite substandard performance, as required by regulation, and (3) presumably, had her substandard performance been identified sooner, she would have been entitled to reinstatement to her previous position or a position in the same class, not termination.

Qualifications

The ad hoc committee found that Eperiam was transferred to the AO position because the position had been vacant for nearly two years and an AO was needed. Also, the move was needed to help resolve a dispute Eperiam had with another employee in the Tobacco division. Committee Report at 3.

The ad hoc committee determined that,

Presentations by the parties clearly shows that Brenda [Eperiam] has no experience or qualifications of an administrative officer. Secretary Skilling testified that, she intended to hire Brenda as AO and help groom her up to be able to perform the duties of the position. The panel believes that both management and the employee failed in this attempt to train her to be an AO. Clearly she was not able to perform the duties of the position.

Committee Report at 5.

Eperiam testified at the administrative hearing that she did not know anything about accounting or the job of an AO. Her line of work dealt with surveillance and evaluation but she would try to do the AO job because she could not find another job right away. Tr. at 270.

Probationary Period and Job Performance Evaluations

National Public Service System Act Regulation, 52 F.S.M.C. 138, provides that,

A regular employee who is promoted or transferred to another position in the public

¹⁸ According to the testimony of Shoniber Abraham, former Payroll Manager for the FSM Department of Finance, sometimes Eperiam had to come in to request a supplement but the supplement was needed due to delays caused by FSM states. Sometimes they would submit their time without their hours. Tr. at 308-10.

service shall be required to serve a new probation period in his new position, but he shall be entitled to all the rights and privileges of a member of the public service except the right to appeal in case of removal from the new position, as distinguished from dismissal from the public service.¹⁹ In case of such removal, the employee shall be reinstated in his former position or in another position in the same class, without prejudice.

(emphasis added).

National Public Service System Act Regulation, 52 F.S.M.C. 141, provides that,

The Personnel Officer shall develop and maintain a system of performance evaluation for the purpose of appraising the productivity of employees in the public service. *Each agency shall develop performance evaluation criteria for every class or, if appropriate, for individual positions, and shall rate each employee under its jurisdiction at least once a year.* The Personnel Officer shall standardize performance evaluation criteria, develop evaluating procedures, and certify the final evaluations. *A copy of each evaluation shall be given to the employee affected, and the management official shall give written notification to any employee whose performance in his position is substandard.*

(emphasis added).²⁰

Here, Eperiam was transferred to the AO position in April 2012, her performance was substandard and she did not receive a written evaluation for over a year. According to the ad hoc committee report,

[T]he appellant was promoted to AO without qualifications of an AO and with the intend [sic] to groom her or train her to become one. Mrs. Brenda H. Eperiam was employed for close to two years as an AO during which trainings and orientation were made and yet no improvements. Formal evaluation [sic] were made on her in February and July of 2014.

Committee Report at 5.

The administrative hearing record confirms that Skilling did not provide Eperiam with a written work performance evaluation within one year of her transfer to the AO position. Tr. at 38, 39. Skilling was familiar with the FSM Public Service System Regulations regarding evaluations, *id.* at 39, and that an evaluation was required to have a valid disciplinary action. *Id.* at 47. Eperiam asked Skilling to do a one-year evaluation in 2013 and filled out the form. Skilling declined to do the evaluation because she claimed Eperiam's performance was poor. *Id.* at 288-89, 330-31. However, Skilling had meetings with Eperiam about her performance and gave Eperiam verbal evaluations, explanations, evaluations and written assistance, which Skilling felt was sufficient. *Id.* at 39, 43, 44, 46, 48-49, 54, 71, 104-05, 184, 217. Eperiam asked to return to her original job but Skilling told her that she could not return because Shra Alik, her former supervisor, disliked her and that they must be separated. *Id.* at 241-42, 289. Skilling claimed that she was trying to bring Eperiam along and improve her skills because if she contacted personnel Eperiam would be fired and been unable to support her family. *Id.* at 217.

¹⁹ FSM National Public Service System Regulation 5.12 provides for up to a one year probationary period for a permanent employee after a promotion or transfer. *Issac v. Weilbacher*, 8 FSM R. 326, 332 (Pon. 1998).

²⁰ Regulation 9.4 states that, "[w]here ratings are not received within the time limits provided by this Part, the employee shall be presumed to have been rated 'Less than Satisfactory' by his supervisor . . . until such time as a rating is received." FSM Pub. Serv. Reg. 9.6. *Issac v. Weilbacher*, 8 FSM R. at 336.

The ad hoc committee upheld the removal of Eperiam from the AO position and recommended to the FSM President that she be reinstated to her former position as a tobacco surveillance officer or in another position in the same class. The court reviews the decision of the FSM President, as the highest management official.

THE ROLE OF THE AD HOC COMMITTEE

The Ad Hoc Committee Prepares a Recommendation to the President

52 F.S.M.C. 156. Recommendations.

The [ad hoc] committee shall prepare a full written statement of its findings of fact and its recommendations for action within seven calendar days after the close of the hearing. Its recommendations may include modification or reversal of the disciplinary action, from which appeal was taken. It shall forthwith transmit that statement, with such supporting documentation as it deems appropriate, to the highest management official responsible for the agency in which the appellant was employed. The decision of that management official shall be final.

(emphasis added).

Once the ad hoc committee makes its recommendation it is

submitted to the President, who is identified in the National Public Service System Regulations, § 18.14 b. (Dec. 1980), as the highest management official for any agency within the executive branch of the National Government. The National Public Service System Act provides that the decision of the highest management official "shall be final," 52 F.S.M.C. 156, subject to judicial review under 52 F.S.M.C. 157.

Semes v. FSM, 4 FSM R. 66, 70 (App. 1989) (emphasis added).

THE ROLE OF THE PRESIDENT (Highest Management Official)

Review of Ad Hoc Committee Recommendation

The provision for a final decision by the official apparently is in the nature of a safeguard, against decisions either patently unfair to an employee or seriously at odds with agency or branch policy. The plain implication of the statutory scheme is that Congress expects that the highest management official would normally accept the committee's recommendation without extended consideration.

Suldan (II), 1 FSM R. at 359.

[In summary,] the Act's disciplinary sections allow the highest management official to finalize the decision of the ad hoc committee without review of the hearing record, if he accepts their findings of fact and law, or merely overrules a legal decision unaffected by any difference in the facts. To overrule the committee's factual findings or rulings on mixed issues of fact and law, the official is required to review all pertinent parts of the hearing record and to explain his analysis in his final decision.

Suldan (II), 1 FSM R. at 361.

a. Acceptance of the committee's recommendation. The apparent Congressional assumption was that the highest management official would normally find the ad hoc committee's recommendation reasonably fair to the employee and substantially in accord with the policy and needs of the branch or agency. Congress apparently expected that the official would normally issue formal approval of the ad hoc committee's recommendation without full review of the record. That final decision would merely give legal force to a decision reached in compliance with statutory and due process requirements. The official's decision would meet the statutory requirements.

b. Rejection of the decision. The more difficult questions will arise where the highest management official is not content with the decision of the ad hoc committee. There the due process and implied statutory requirements could vary, depending on whether the disagreement is on issues of fact, law, or mixed questions of fact and law.

If the highest management official declines to accept a finding of fact of the ad hoc committee, the official will be required by statutory as well as constitutional requirements to review those portions of the record bearing on the factual issues and to submit a reasoned statement demonstrating why the ad hoc committee's factual conclusion should be rejected.

Suldan (II), 1 FSM R. 360-61.

THE ROLE OF THE COURT

Limited Review of Administrative Record

The plaintiff urges the court to engage in fact finding. However, this is not normally the role of the court in reviewing the correctness of termination of public employees: This court has established that in reviewing the termination of government employees under Title 52, the FSM Supreme Court will review factual findings insofar as necessary to determine whether there is evidence to establish that there were grounds for discipline. Semes, 4 FSM R. at 71.

In Semes, the court stated that:

The judicial review provisions of 52 F.S.M.C. 157 is written in restrictive form, permitting judicial review of factual findings only by implication, and then only so far as necessary to determine whether there has been a violation of law or regulation or denial of due process. This limiting language is sufficiently "explicit" to prevent the expansive judicial review of findings normally available under the [Administrative Procedures Act], which authorizes the court to "make its own factual determinations." Olter v. National Election Comm'r, 3 FSM Intrm. 123, 131 (App. 1987). Under the National Public Service System Act, where our review is for the sole purpose of preventing statutory, regulatory and constitutional violations, we conclude that review of factual findings is limited to determining whether substantial evidence in the record supports the conclusion of the administrative official that a violation of the kind justifying termination has occurred.

Semes, 4 FSM R. at 72. It is not the court's

task to weigh against each other the conclusions of the President and of those of the ad hoc committee or to decide which of those conclusions were considered more persuasive. Under the Act, the committee merely recommends; the highest management official makes the final decision. 52 F.S.M.C. 156. Here then, *the court is required to uphold the President's findings*

of fact if there is substantial evidence in the record to support them.

Semes 4 FSM R. at 72 (emphasis added).

The court may refer a case to the President to clarify his or her decision within proceedings regarding the National Public Service System Act. Suldan (II), 1 FSM R. at 340-41.

Analysis

Here, the President accepted the ad hoc committee's recommendation that Eperiam should be removed from her position as Administrative Officer for the Department. Submission of the Administrative Record Ex E. The Act's disciplinary sections allow the President to finalize the decision of the ad hoc committee without full review of the hearing record if he accepts their findings of fact and law. Suldan(II), 1 FSM R. at 361.

However, the President summarily rejected the ad hoc committee's authority to make its second recommendation, that Eperiam be reinstated to her former position as a tobacco surveillance officer or in another position in the same class: "To the extent that the committee has recommended that Mrs. Eperiam be reinstated into a position that she previously held, this recommendation is outside the scope of the committee's mandate and therefore recommendation #2 is invalid." Submission of Administrative Record Exhibit E.

The President is incorrect regarding the role of the ad hoc committee. Pursuant to 52 F.S.M.C. 156, the ad hoc committee is charged with preparing a full written statement of its findings of fact and its recommendations, which may include modification or reversal of the disciplinary action from which appeal was taken, and transmit that statement to the highest management official responsible for the agency in which the appellant was employed, which in this case is the President. 52 F.S.M.C. 156 does not limit the scope of the committee's recommendations.

The President's decision not to consider the ad hoc committee's recommendation to reinstate Eperiam in her previous position or a position in the same class misses the crucial purpose of the committee's hearing in the statutory scheme because, "[t]o permit a final decision without considering the information provided at the hearing or based on other information would render the hearing, as well as the § 155 rights to counsel, to be heard and to confront adverse witnesses, *meaningless*." Suldan (II), 1 FSM R. at 360 (emphasis added).

Accordingly, the court will refer this matter back to the President to exercise his discretion and enter a decision, based on the administrative record, accepting or rejecting the ad hoc committee's recommendation to reinstate Eperiam to government employment, as set forth in 52 F.S.M.C. 156.

C. Eperiam's Third Cause of Action for Violation of Civil Rights

The FSM civil rights statute, 11 F.S.M.C. 701(3), creates a private cause of action for damages against any person, including a national government instrumentality, that deprives another of his civil rights guaranteed by the FSM Constitution. Eperiam's claim, therefore, lies in whether or not she was given notice and an opportunity by the highest management official.

Constitutional Violations

Eperiam's cause of action for violation of her constitutional rights to Due Process (Second Cause of Action), may be determined only in conjunction with a Petition for Review under 52 F.S.M.C. 154.

The court would adjudicate the Eperiam's constitutional claims under the provisions of the Administrative Procedures Act, as follows:

On an appeal from an FSM administrative agency, the court, under the Administrative Procedures Act, must hold unlawful and set aside agency actions and decisions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or contrary to constitutional right, power, privilege, or immunity; or without substantial compliance with the procedures required by law. These Administrative Procedures Act provisions apply to all agency action unless Congress by law provides otherwise and it applies to the Social Security Administration appeals because no part of the Social Security Act provides otherwise.

Miguel v. FSM Social Sec. Admin., 20 FSM R. 475, 478 (Pon. 2016).²¹

However, the court will not reach the issues of violation of Eperiam's civil rights and damages, as this matter shall be returned to the FSM President for further analysis and decision.

CONCLUSION

The FSM has not established that judgment should be granted on the pleadings, nor has the FSM set forth a prima facie case in support of its Motion for Summary Judgment as to the causes of action set forth in Brenda Eperiam's Complaint.

This matter shall be referred back to the President of the FSM for entry of a new decision re whether to reinstate Eperiam to FSM government employment as set forth above. Until such decision is rendered, administrative remedies have not been exhausted in this matter. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015) (the express language of Title 52, creating the National Public Service System Act, requires that the exhaustion of remedies doctrine be applied). This case shall not be set for trial until agency proceedings have been concluded.

THEREFORE IT IS HEREBY ORDERED that the FSM's Motion for Judgment on the Pleadings or in the alternative Motion for Summary Judgment is hereby DENIED.

IT IS FURTHER ORDERED THAT this matter shall be referred to the FSM President, as the highest FSM management official, to enter a decision whether to reinstate Brenda H. Eperiam's government employment.

* * * *

²¹ Attorney's fees can be awarded under 11 F.S.M.C. 701(3) in actions regarding the National Public Service System Act. Manuel v. FSM, 19 FSM R. 382, 393 (Pon. 2014); Isaac v. Weilbacher, 8 FSM R. 326, 336 (Pon. 1998).