

all parties). The principal importance of the certificate of service is to provide the court with clear proof that service has been accomplished. *Helgenberger v. Chung*, 20 FSM R. 519, 521 (Pon. 2016). The Court's rules allow motions to be served on other parties prior to being filed. *Setik v. FSM*, 6 FSM R. 446, 448 (Chk. 1994). In addition, the certificate of service accompanying the motion should state whether service was effected personally or by mail. *Chen Ho Fu v. Salvador*, 7 FSM R. 306, 308 n.4 (Pon. 1995). In this case, it appears that no service of the pending motion to stay was performed upon either Fred Carl, as the administrator of the Estate of Yoshiro Carl, and/or Kazuhiro Fujita.

Therefore, the motion to stay filed by Yosilyn Carl, as the administrator of the Estate of Linda Carl, is hereby stricken from the record of this case for failure to comply with Rule 5(a) of the Court's Rules of Civil Procedure. FSM Civ. R. 12. This action by the Court is without prejudice. The moving party may file a renewed motion to stay in this case provided that service of the motion is made upon all of the parties, including Kazuhiro Fujita.

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FSM SUPREME COURT TRIAL DIVISION

WARREN CHING,)	CIVIL ACTION NO. 2018-021
)	
Plaintiff,)	
)	
vs.)	
)	
COLLEGE OF MICRONESIA,)	
)	
Defendant.)	
_____)	

ORDER RE: DISPOSITIVE MOTIONS; SCHEDULING ORDER

Beauleen Carl-Worswick
Associate Justice

Decided: September 15, 2021

APPEARANCES:

For the Plaintiff:	Vincent Kallop, Esq. Micronesian Legal Services Corporation P.O. Box 129 Kolonias, Pohnpei FM 96941
For the Defendant:	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonias, Pohnpei FM 96941

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HEADNOTES

Jurisdiction – Arising Under; Jurisdiction – Exclusive FSM Supreme Court

The FSM Supreme Court has jurisdiction when the plaintiff claims that the termination of his

employment violated his due process and civil rights under the FSM Constitution, but, even if a violation of national law was not alleged, the court still has exclusive subject-matter jurisdiction based upon the named-party defendant being an entity of the FSM national government. Ching v. College of Micronesia, 23 FSM R. 397, 399 (Pon. 2021).

Torts – Fraud

The elements of fraud are: 1) a knowing or deliberate misrepresentation by the defendant; 2) made to induce action by the plaintiff; 3) with justifiable reliance by the plaintiff upon the misrepresentation; 4) to the plaintiff's detriment. Ching v. College of Micronesia, 23 FSM R. 397, 403 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Torts – Fraud

A plaintiff cannot claim fraud based on an allegation that the defendant purportedly depicted something other than it actually was to some other entity because, even if proven, the plaintiff has not stated a claim upon which he can be afforded any relief, as a party may only raise its own claims, and must assert its own legal rights and interests. Ching v. College of Micronesia, 23 FSM R. 397, 403 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Public Officers and Employees – Termination; Torts

Title 40, which created the College of Micronesia and established certain requirements for its operations, does not give rise to a private cause of action, even if the College acts contrary to the Title 40 policy statements. Thus, a plaintiff, relying on Title 40, does not state a claim upon which any relief can be granted. Ching v. College of Micronesia, 23 FSM R. 397, 403 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Ching v. College of Micronesia, 23 FSM R. 397, 403, 404, 405 (Pon. 2021).

Civil Procedure – Summary Judgment – Procedure

Once the moving party presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence showing that a genuine issue of material fact remains for resolution. Ching v. College of Micronesia, 23 FSM R. 397, 403 (Pon. 2021).

Contracts – Breach; Employer – Employee

When an employment contract entitled the employee to receive notice from the employer that his contract either would or would not be renewed no later than 60 days before its end and the employee received no notice of any kind by that date but instead was notified that his contract would not be renewed 31 days before its end, that was a breach of the employment contract. Ching v. College of Micronesia, 23 FSM R. 397, 404 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

Summary judgment will be denied when a material issue of fact about the implication that arose from the employer's failure to give the employee any notice of any kind that his contract would be either renewed, or not renewed, by the date provided by the employment contract is unresolved or in dispute, and the contract, on its face, does not resolve this issue, as it obligates the employer to provide notice either way, regardless of its decision. Ching v. College of Micronesia, 23 FSM R. 397, 404 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

Summary judgment will be denied when the former employee held and was compensated for a second position for which there was no contract and his existing employment contract was silent about whether he could hold another position at his employer or be assigned additional duties. Ching v. College of Micronesia, 23 FSM R. 397, 405 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When there is a genuine dispute over certain material facts at issue, the court will deny the respective summary judgment motions filed by both parties. Ching v. College of Micronesia, 23 FSM R. 397, 405 (Pon. 2021).

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COURT’S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

This case comes before the Court on the parties’ cross-motions for summary judgment, including: 1) the Defendant’s motion for summary judgment, filed on January 20, 2020; 2) the Plaintiff’s consolidated opposition pleading to the Defendant’s motion for summary judgment, which also includes the Plaintiff’s cross-motion for summary judgment, filed on March 17, 2020; and 3) the Defendant’s consolidated reply in support of its own motion for summary judgment as well as its opposition to the Plaintiff’s cross-motion for summary judgment, filed on March 27, 2020.

For the reasons stated below, the Court grants the Defendant’s motion for summary judgment with regard to the Plaintiff’s causes of action based upon fraud and a violation of Title 40 of the FSM Code. FSM Civ. R. 56(c). With regard to the remaining causes of actions set forth in the complaint, the Court finds that there are certain issues of material fact that remain in dispute and, as such, both of the parties’ pending motions for summary judgment are hereby denied. As further explained, if the parties wish to pursue their dispositive motions further in this case, they may do so by each submitting a renewed motion for summary judgment that addresses the unresolved issues discussed in his Order, within the time frame established by the Court, as set forth below. FSM Civ. R. 56(d). Otherwise, this case will proceed to trial, subject to the scheduling order set forth below. FSM Civ. R. 16.

A. Background: Complaint and Answer

At issue in this case is the Plaintiff’s termination from employment at the Federated States of Micronesia (“FSM”) College of Micronesia (“COM” or “FSM-COM”). As described more fully below, the Plaintiff claims that the termination of his employment violated, *inter alia*, his due process and civil rights under the FSM Constitution. Even if a violation of national law was not alleged, this Court has exclusive subject-matter jurisdiction over this case based upon the named-party Defendant being an entity of the FSM national government. Ramirez v. College of Micronesia, 20 FSM R. 254, 263 (Pon. 2015) (for purposes of jurisdiction, since the College of Micronesia was created by national statute, and given the nature of its structure and functions, it is an instrumentality or agency of the FSM national government).

For its part, the Defendant denies any liability. According to the Defendant, the Plaintiff was a contract employee who had no right to continued employment. The Defendant acknowledges that it failed to provide the Plaintiff with 60 days of notice provided for under his contract, that his employment would not be renewed, but asserts that the Defendant was nonetheless fully paid for this entire 60-day period of time. As such, the Defendant maintains that the Plaintiff sustained no actual damages.

1. Complaint

According to the Plaintiff, he held two positions at COM: 1) he was the “Chief of Security”; and 2) he served as the COM “Coordinator” for certain programs funded by the United States government that COM participated in. The Plaintiff maintains that through a series of consecutively-issued contracts, he held the position of Security & Safety Supervisor for nearly 13 years until he was, in his words, “unceremoniously” terminated sometime between July and September 2017.

With regard to the coordinator position, the Plaintiff maintains that he was required to take on an “impromptu assignment” in order to help COM meet its accreditation requirements with regard to participation in certain federally-funded programs offered by the United States government. The Plaintiff describes these additional duties as a nefarious ploy undertaken by the Defendant to deceive the United States into believing that the Plaintiff had all along been serving in this position so that COM could secure accreditation for its participation in the federally-funded programs in question. According to the Plaintiff, there was no written contract for this additional position that he held, yet he was inexplicably paid for the work he performed.

In all, the Plaintiff alleges six causes of action:

- 1) wrongful termination;
- 2) violation of due process due to lack of a hearing, as provided for under the FSM Administrative Procedures Act, 17 F.S.M.C. 101 *et seq.*;
- 3) wrongful termination under Title 40 of the FSM Code, which is the enabling statute that established FSM-COM;
- 4) fraud with regard to the additional duties imposed upon the Plaintiff to fulfill the need for a coordinator of federal programs;
- 5) violation of due process due to there being no valid basis for termination of employment; and
- 6) violation of civil rights.

2. Answer

In its Answer, the Defendant admits that it employed the Plaintiff pursuant to a series of contracts to be its “Safety and Security Supervisor.” The Defendant maintains that on August 3, 2017, the Defendant notified the Plaintiff, purportedly in writing, that his contract would not be renewed. Although neither the complaint nor the answer specifies the exact term of the Plaintiff’s contract, the Defendant acknowledges that the August 3, 2017 non-renewal notice it issued was less than the 60 days-notice that was required for terminating the Plaintiff’s contract. According to the Defendant, it remedied this lapse in notice by paying the Plaintiff for the full 60 days he was to be afforded, or until October 3, 2017.

The Defendant also admits that the defendant served as the acting “Title IX Coordinator,” from October 2015 to July 2017. The term Title IX apparently relates to a provision in United States law that applies to the accreditation of colleges that participate in certain, federally-funded programs, such as the “Pell grant” program. According to the Defendant, the Plaintiff was paid \$1,500 annually for assuming what it calls: “extra duties.” The Defendant states that the Plaintiff was relieved of these extra duties in July 2017, when another employee assumed them as the permanent Title IX Coordinator. As noted above, the Defendant purportedly notified the Plaintiff of the termination of his contract as the Security & Safety Supervisor on August 3, 2017.

In a nutshell, the Defendant maintains that it followed the proper procedures for the Plaintiff’s “layoff,” and that it is not liable for any damages. The various affirmative defenses that the Defendant raises provide that the Plaintiff was afforded every right guaranteed to him under his contract, the FSM Constitution, and the Defendant’s own policies and procedures, as established under Title 40 of the FSM Code, which governs the establishment of COM, including the requirement that COM devise its public service system separate and apart from that which applies to FSM national government employees under Title 52 of the FSM Code.

B. Dispositive Motions filed by the Parties

1. Defendant’s Motion for Summary Judgment

In its subsequent motion for summary judgment, the Defendant states that the Plaintiff’s most recent contract for employment as the COM “Security & Safety Supervisor,” at issue here, expired on September 3, 2017. The Defendant further maintains that the Plaintiff’s contract to hold this position, in addition to the

terms expressly provided for therein, is also governed by the COM “Personnel Procedures and Policy Manual” (the “Manual”). The Defendant states that both the contract and the Manual provide that the Defendant “has no obligation to offer subsequent employment” to an employee when the term of the employee’s existing contract for employment expires. In the case of the Plaintiff, the Defendant states that he was notified that his contract would not be renewed on August 3, 2017.

In support of these assertions, the Defendant provided a copy of: 1) the Plaintiff’s contract for employment; 2) the written August 3, 2017 notice of non-renewal at issue here; and 3) a personnel action form showing that the Plaintiff’s employment contract was not renewed. Although the Defendant did not provide a copy of its “Manual,” it did provide a copy of a written policy statement issued by the FSM COM board of directors regarding the Manual, and specifically that portion of the Manual – Section VII of the May 13, 2013 Manual – that governs contracts for the employment of individuals at COM. This policy statement includes a provision that provides that the renewal of a COM employee’s contract is not automatic. It further provides that a COM employee whose contract is not renewed may not appeal that decision.

The Defendant, citing to a string of cases beginning with Reg v. Falan, 14 FSM R. 426 (Yap. 2006), Ihara v. Vitt, 18 FSM R. 516 (Pon. 2013), George v. Palsis, 19 FSM R. 558 (Kos. 2014), and ending with Ramirez v. College of Micronesia, 20 FSM R. 254 (Pon. 2015), argues that its Manual is an integral part of its contracts for employment, including the contract for the Plaintiff’s employment at the COM Security & Safety Supervisor. Indeed, the Plaintiff’s contract for employment expressly references the existence of the Manual and its application to the terms of employment for the Plaintiff. As noted above, the Defendant did not, however, include a copy of its Manual in its motion for summary judgment. As such, its applicability to this situation remains unclear. In addition, unlike the Manual, there is no similar provision in the Plaintiff’s contract that references policy statements issued by the COM board of directors, much less the applicability of those statements to the Plaintiff’s terms of employment. Likewise, the cases reference above concern only the applicability of the COM Manual, and not the written policy statements of the COM board of directors.

The Defendant acknowledges that it failed to meet the 60-day notice requirement that it would not be renewing the Plaintiff’s employment contract. The Defendant states that although the Plaintiff’s last day of employment under his contract was September 3, 2017, he was nonetheless paid through October 3, 2017, in order to meet the 60-day notice requirement at issue here. The Defendant asserts that the Plaintiff suffered no financial damage as a result of its actions at issue here.

With regard to the position of Title IX Coordinator, the Defendant maintains that the Plaintiff “was appointed to serve on a temporary basis as the acting Title IX Coordinator,” on October 13, 2015. According to the Defendant, “[t]his was not a full-time position, nor were many additional duties assigned” to the Plaintiff. For this appointment, the Defendant states that the Plaintiff received a stipend of \$1,500 annually over the course of the two-year period he held this position. The Defendant maintains that another employee was eventually appointed to be the permanent Title IX Coordinator on, or about, July 17, 2017. As noted above, the written notice issued to the Plaintiff that his existing contract would not be renewed was dated August 3, 2017. In any event, it is unclear if this notice applied to only the Plaintiff’s contract to serve as the Security & Safety Supervisor, or also his role as the Title IX Coordinator.

In further support of its motion for summary judgment, the Defendant provides affidavits from Joseph M Daisy, the President and Chief Executive Officer of FSM COM, and Rencelly Nelson, the Director of Human Resources at FSM COM. Both affiants attest to the details surrounding the non-renewal of the Plaintiff’s employment contract as the COM Security & Safety Supervisor. In his affidavit, Mr. Daisy further notes that the Plaintiff was “appointed” to serve as the “temporary and acting Title IX Coordinator,” which he states is not a full-time position. Mr. Daisy further explains that another COM employee, Joey Oducado, was eventually selected to fill the permanent position of Title IX Coordinator, and even then, it remained a part-time position as Mr. Oducado had other duties to fulfill at COM.

2. Plaintiff's Opposition & Cross Motion for Summary Judgment

In his opposition pleading, the Plaintiff does not dispute the Defendant's assertions regarding the period of his employment, the date of the notice advising him that his contract as the Security & Safety Supervisor would not be renewed, or the period for which he was paid following the notice that his contract would not be renewed. The Plaintiff also does not challenge the authenticity of any of the documents submitted by the Defendant in its motion for summary judgment. Similarly, however, the Plaintiff also did not include a copy of the Defendant's Manual in support of either his opposition pleading or his cross-motion for summary judgment.

Instead, the Plaintiff, citing to only his affidavit, appears to argue that because he fulfilled a series of contracts as the COM Security & Safety Supervisor over time, and because he was not given any notice of prior poor performance, that he had an expectation to continued employment through the renewal of yet another contract at COM. In further support of his position, the Plaintiff cites to the cases of Talley v. Lelu Town Council, 10 FSM R. 226 (Kos. S. Ct. Tr. 2001) and Linter v. FSM, 20 FSM R. 553 (Pon. 2016), which he apparently maintains serve as precedent for his contract to be renewed. The Talley case, however, is not controlling precedent for this Court, while the Court's decision in Linter addressed a different factual scenario. In Linter, by the time the Plaintiffs realized that their contracts would, in fact, not be renewed, they had already commenced – or continued, as the case may be – their normal work assignments. Linter v. FSM, 20 FSM R. 553, 558 (Pon. 2016).

With regard to his position as the COM Title IX Coordinator, the Plaintiff maintains that the Defendant apparently committed fraud as it identified the Plaintiff as its Title IX Coordinator, while the Plaintiff instead only served as the acting Title IX Coordinator. The Plaintiff, however, provides no evidence of any kind showing that the Defendant presented him to be anything other than the acting Title IX Coordinator. In addition, the Plaintiff asserts that since he received a training certificate for the Title IX Coordinator position, he apparently should have been considered the permanent Title IX Coordinator for COM. He maintains that the Defendant failed to hire him in a permanent capacity, and instead selected another COM employee, Joey Oducado, for the position. According to the Plaintiff, this action is in violation of his due process rights.

Lastly, the Plaintiff challenges the College's Manual governing employment as contrary to the wishes of Congress, when it enacted legislation creating COM. According to the Plaintiff, when COM created its Manual, it was erroneous of COM to not recognize that an employee who fulfills a series of contracts has an expectation of continued employment. Similarly, to the extent the Plaintiff recognizes COM's authority to not renew an employee's contract, then COM should afford that employee with an avenue of redress, such as a right to appeal.

3. Defendant's Reply & Opposition to Cross Motion for Summary Judgment

In its consolidated reply and opposition pleading, the Defendant argues that its Manual properly reflects the will of Congress, as well as the due process requirements of the FSM Constitution and civil rights laws. Specifically, the Defendant notes that the provisions of Sections 701 *et seq.*, of Title 40 of the FSM Code, which created COM, provide that COM is to adopt a "personnel system" which, *inter alia.*, establishes that COM employees are not covered by the provisions of Title 52 of the FSM Code, which govern the FSM national government's public service employees. In doing so, Congress expressly provided that COM employees are entitled to hold their positions during periods of good behavior, except "that the tenure of a contract employee is the terms stated in his/her contract." 40 F.S.M.C. 722(3). The Defendant, citing to the decision issued in Ramirez v. College of Micronesia, 20 FSM R. 254, 266 (Pon. 2015), argues that this Court has previously recognized that COM may employ people using a contract, and also that the employee is subject to the terms of COM's Manual.

With regard to the Plaintiff's role as the Title IX Coordinator, the Defendant maintains that the selection of another COM employee to serve as the permanent Title IX Coordinator has no relevance on the

issue of the Defendant's decision to not renew the Plaintiff's contract. According to the Defendant, the sole issue before the Court is the non-renewal of the Plaintiff's contract to serve as Security & Safety Supervisor, the resolution of which is borne out by the terms of the Plaintiff's contract, including the Defendant's Manual governing employment at COM.

4. *Analysis*

a. *Dismissal of Fraud and Alleged Title 40 Violation Causes of Action*

To begin, the Plaintiff's causes of action for fraud and a violation of Title 40 of the FSM Code are dismissed for failure to state a claim upon which any relief can be granted. The elements of fraud are: 1) a knowing or deliberate misrepresentation by the defendant; 2) made to induce action by the plaintiff; 3) with justifiable reliance by the plaintiff upon the misrepresentation; 4) to the plaintiff's detriment. Setik v. Mendiola, 21 FSM R. 537, 556 (App. 2018) (citing Arthur v. Pohnpei, 16 FSM R. 581, 597 (Pon. 2009)). Here, it appears that the Plaintiff is alleging that the Defendant purportedly depicted the Title IX Coordinator position as something other than it actually was to the academic regulatory authorities in the United States government. This, however, is a matter for the United States to address. Indeed, even if proven, the Plaintiff has not stated a claim upon which he can be afforded any relief, as a party may only raise its own claims, and must assert its own legal rights and interests. *Id.* at 557. See FSM v. Udot Municipality, 12 FSM R. 29, 40 (App. 2003) (a party generally must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interest of third parties); Sipos v. Crabtree, 13 FSM R. 355, 365 (Pon. 2005) (party cannot raise claims of third persons).

Likewise, the Plaintiff's claim that the Defendant violated Title 40 of the FSM Code, even if true, do not provide any remedy for the Plaintiff. Title 40 was enacted to create COM, including establishing certain requirements for COM to adhere to in its operations. This, however, does not give rise to a private cause of action like that alleged here. Indeed, even if COM did act contrary to the policy statements enunciated in Title 40 of the FSM Code, the Plaintiff has not stated a claim upon which any relief can be granted. Setik v. Mendiola, 21 FSM R. 537, 557 (App. 2018). See FSM Dev. Bank v. Jonah, 13 FSM R. 522, 523 (Kos. 2005); FSM Dev. Bank v. Mudong, 10 FSM R. 67, 76-77 (Pon. 2001).

As this Court has explained, under FSM Civil Rule 56, a trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013). Once the moving party presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence showing that a genuine issue of material fact remains for resolution. *Id.* at 8. See FSM v. Ting Hong Oceanic Enterprises, 8 FSM R. 79, 81 (Pon. 1997) (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 that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law).

In this case, based upon the parties' pleadings, the Court grants the Defendant's motion for summary judgment with regard to the Plaintiff's causes of action based upon fraud and a violation of Title 40 of the FSM Code.

b. *Wrongful Termination, Civil Rights and Due Process Violation Causes of Action*

That aside, with regard to the remaining claims asserted by the Plaintiff, both parties acknowledge that the Plaintiff was employed to serve as the Security & Safety Supervisor at COM pursuant to the terms of a written contract. Both parties further acknowledge that by its very terms, the Plaintiff's employment contract expired on September 3, 2017. It is also undisputed that the contract at issue here expressly provides that COM "has no obligation upon completion of this contract to provide further employment." The

contract also states that “[n]otification to the employee must be provided at least 60 calendar days prior to the expiration date of the contract of the College’s intent to renew or not renew the contract.” Thus, if the Defendant’s action of notifying the Plaintiff that his contract would not be renewed was proper, then the Plaintiff’s causes of action for wrongful termination, due process and civil rights would fail.

i. *Security & Safety Supervisor*

The record here shows that the parties do not dispute that the Defendant gave the Plaintiff notice that his contract for the position of Security & Safety Supervisor would not be renewed on August 3, 2017. By its own admission, the Defendant acknowledges that this notice did not comply with the 60-day notice requirement provided for in the Plaintiff’s contract for employment. The Defendant explains that it attempted to remedy this situation by paying the Plaintiff for the entire 60-day period that the notice should have been applicable to, or until October 3, 2017.

Thus, with regard to the Plaintiff’s position as Security & Safety Supervisor, there is no genuine dispute as to the material fact that the Defendant breached the parties’ employment contract. Indeed, and by the very terms of the parties’ contract, the Plaintiff was entitled to receive notice from the Defendant that his contract either would or would not be renewed no later than 60 days before September 3, 2017, or by July 5, 2017. Here, however, and as reflected in the parties’ pleadings and related documents now before the Court, the Plaintiff received no notice of any kind from the Defendant by July 5, 2017. Instead, it was not until August 3, 2017, that the Defendant notified the Plaintiff that his contract would not be renewed. In addition, this notice does not attribute any wrongdoing or malfeasance on the part of the Plaintiff. The fact that the Plaintiff unilaterally extended the period of time for the Plaintiff to receive his wages an additional 30 days beyond the term of the parties’ contract does not change this result.

Under FSM Civil Rule 56, a court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Iriarte v. Etscheit*, 8 FSM R. 231, 236 (App. 1998). The facts must be viewed in the light most favorable to the party against whom judgment was entered. *Id.* at 236. Here, a material issue of fact that is unresolved – or in dispute – however is the implication that arose when the Defendant failed to give the Plaintiff any notice – of any kind – that his contract would either be renewed, or not renewed, by July 5, 2017.

The face of the Plaintiff’s contract does not resolve this issue, as it obligates the Defendant to provide notice either way, regardless of its decision. The COM board policy presented by the Defendant in its dispositive motion possibly resolves the issue, as it infers that at a minimum, a notice of non-renewal of a contract should be forthcoming. If this controlled, then the Plaintiff might have had an expectation as early as July 6, 2017, that his contract would be renewed. To date, however, the Court has not acknowledged the applicability of COM board policy statements to personnel matters, like it has for the COM Manual. However, and as noted above, neither party has submitted the Manual to the Court with its arguments about what may be lawfully permitted in a situation like that at issue here where the Defendant has failed to provide the Plaintiff with 60-days of notice of its intentions, at all.

Moreover, while it may be true that a decision to not renew a contract is not subject to appeal, the same can be said for the termination of employment for cause, based upon some level of unsatisfactory performance by the employee. In that situation, the employee is indeed entitled to notice and an opportunity to be heard. Yet, the notice issued in this case on August 3, 2017 was silent as to any alleged wrong doing or poor performance on the part of the Plaintiff.

ii. *Title IX Coordinator*

With regard to the Title IX Coordinator position, by the Defendant’s own admission, this is, in fact, a “position” at COM. That it may be only a part-time position, with limited duties, does not change this conclusion. Here, however, here is a dispute as to whether the Plaintiff was filling a position that was

separate and apart from his position as the Security & Safety Supervisor, or whether he was assuming certain additional duties that fell within his existing position as the COM Security & Safety Supervisor.

According to the Plaintiff, there was no contract for the position of Title IX Coordinator. The Defendant appears to corroborate this assertion as it provided no such contract in either its motion for summary judgment or its consolidated reply and opposition pleading. The parties' contract for the Plaintiff's position as Security & Safety Supervisor is also silent as to whether the Plaintiff may hold other positions at COM, or conversely, be assigned additional duties under his existing contract. In either event, this existing contract provides no basis for any additional pay, leaving the determination as to why the Plaintiff received payments of \$1,500 annually, as stated by the Defendant, to speculation. In addition, although the COM Manual may address this issue, that document has not been submitted by either party in the dispositive motions now pending before the Court.

The fact that the Plaintiff was compensated for serving as the Title IX Coordinator only serves to confirm that he fulfilled the duties assigned to him; it does not resolve the issue as to whether these duties arose in the context of a separate position, or whether they were subsumed within his existing contract. These payments also do not address the terms of the Plaintiff's role as the Title IX Coordinator, including what type of notice the Plaintiff was entitled to receive when the Defendant no longer required his services, and when that notice was to be issued. By all accounts, the Plaintiff appears to have received no separate notice of any kind from the Defendant that he would no longer serve as the Title IX Coordinator. If the Plaintiff held his position separate and apart from his role as the Security & Safety Supervisor, then he may have been entitled to some notice. Although the August 3, 2017 notice given to the Defendant appears to relieve him of all of his duties at COM, that notice was neither timely for a decision to not renew the Plaintiff's contract, nor was it sufficient to justify the Plaintiff's termination for cause, as it cited no poor performance, much less an opportunity to be heard.

A court must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Taulung v. Kosrae, 8 FSM R. 270, 272 (App. 1998). The facts must be viewed in the light most favorable to the party against whom judgment was entered. *Id.* at 272.

c. Denial of Motions for Summary Judgment

Under these circumstances, and with regard to the causes of action set forth in the complaint that have not been dismissed, the Court finds that there is a genuine dispute over certain material facts at issue in this case. As such, the Court denies the respective summary judgment motions filed by both parties. See Richmond Wholesale Meat Co. v. George, 11 FSM R. 86, 88 (Kos. 2002) (when questions of fact and law exist as to liability for interest charges, a cross motion for summary judgment which seeks dismissal of the interest claim will be denied); Isaac v. Weilbacher, 8 FSM R. 326, 337 (Pon. 1998) (cross motions for summary judgment on an exemplary damages claim will both be denied when neither motion has presented any evidence on the claim).

If the parties wish to renew their dispositive motions, provided that the motions address the issues discussed above, and also include, by stipulation, or otherwise, the COM Manual that governs personnel matters such as those at issue here, including: 1) what the implication is if a contract employee like the Plaintiff is provided with no notice of any kind as to the Defendant's intentions to renew or not renew a contract; 2) what occurs when a notice to not renew a contract is not timely issued, e.g., unilaterally paying a contract employee for the 60-day time period that notice of non-renewal of a contract should have been issued; 3) what COM's policy is with respect to an employee concurrently holding multiple positions is, including the terms for doing so, e.g., by employment contract, personal services contract, or no contract; and 4) what the COM Manual provides for assigning additional duties to a contract employee like the Plaintiff. FSM Civ. R. 56(d).

C. *Scheduling Order*

In the event that the parties wish to renew their dispositive motions in this case, which address the issues described above, they may do so by filing their renewed motions within 30 days from the date this Order is received. Each party shall then have 20 days to file an opposition pleading. FSM Civ. R. 6(d) (established period for opposing a motion is 10 days after service, unless the court establishes otherwise). Each party may also file a reply pleading within 10 days after the opposition pleadings are filed. FSM Civ. R. 5 (service of all pleadings shall be hand delivery or first-class mail). If no pleadings are filed by either of the parties within 30 days from the date this Order is received, then the Court will schedule a pretrial hearing, at which time the parties shall appear and offer suggested dates for trial, including the filing of pretrial statements. FSM Civ. R. 16.

D. *Conclusion*

In conclusion, and for the reasons stated above, the Court grants the Defendant’s motion for summary judgment with regard to the Plaintiff’s causes of action based upon fraud and a violation of Title 40 of the FSM Code. With regard to the remaining causes of actions set forth in the complaint, the Court finds that there are certain issues of material fact that remain in dispute and, as such, both of the parties’ pending motions for summary judgment are hereby denied. As further explained, if the parties wish to pursue their dispositive motions further in this case, they may do so by submitting a renewed motion for summary judgment that address the unresolved issues set forth above, within the time frame established by the scheduling order set forth above. Otherwise, this case will proceed to trial, subject to the scheduling order set forth above.

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FSM SUPREME COURT TRIAL DIVISION

MARY BERMAN,)	CIVIL ACTION NO. 2009-023
)	
Plaintiff,)	
)	
vs.)	
)	
POHNPEI STATE GOVERNMENT, HENRY)	
SUSAIA, as EPA Director, and POHNPEI STATE)	
ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Defendants.)	
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Larry Wentworth
Associate Justice

Trial: March 2, 2021
Decided: September 16, 2021