

Based on the undisputed facts and the law, this Court determines that the authorized observer's knowledge of the violation is imputed to NORMA and in turn DOJ under principles of agency law as set forth in the restatement of the law, after a reasonable time for communication. This Court concludes that a reasonable length of time for communication of the report on the violations from the authorized observer's debriefing (at the port in Pohnpei) to DOJ (in Palikir) was less than 28 days. Imputing to DOJ knowledge of the violation on March 16, 2019, and finding tolling under 6 F.S.M.C. 808 to be inapplicable, this Court determines the Complaint herein, filed on June 16, 2021, to be time-barred.

REQUEST FOR SANCTIONS

In its Reply Brief and reiterated in later filings, TMC requested an award of sanctions or attorneys' fees, on the basis that the Complaint was frivolous or vexatious. The request is denied on two grounds. First, while the Complaint is time-barred, the Court finds it neither frivolous nor vexatious, as it raises issues of law not previously addressed in the FSM. Second, in making this motion to dismiss, Defendants failed to comply with FSM Rule of Civil Procedure 6(d), which requires in part that "[a]ll motions shall contain certification by the movant that a reasonable effort has been made to obtain the agreement or acquiescence of the opposing party and that no such agreement has been forthcoming." Defendants' failure to do so could have been a basis for denying its motion without prejudice, outright. Calvary Baptist Church v. Pohnpei Bd. of Land Trustees, 9 FSM R. 238, 239 (Pon. 1999). Instead, it is a basis for denying this request.

CONCLUSION

Summary judgment is hereby granted in favor of Defendants on the basis of the statute of limitations.

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FSM SUPREME COURT TRIAL DIVISION

NORLEEN OLIVER and MARK DEORIO,	)	CIVIL ACTION NO. 2021-020
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
PRESIDENT DAVID W. PANUELO and	)	
the FSM GOVERNMENT,	)	
	)	
Respondents.	)	
_____	)	

ORDER GRANTING WRIT OF MANDAMUS

Larry Wentworth  
Associate Justice

Decided: December 21, 2021

APPEARANCE:

For the Petitioners: Marstella E. Jack, Esq.  
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## HEADNOTES

### Public Officers and Employees – Termination

An ad hoc committee panel's findings and recommendations are forwarded to the President for him to review and make the final decision since 52 F.S.M.C. 156 requires that the highest management official responsible for that government agency make the final decision, and the President is considered the highest management official for the executive branch. Oliver v. Panuelo, 23 FSM R. 475, 477 (Pon. 2021).

### Mandamus and Prohibition – Authority and Jurisdiction

The five elements that must all be present in order for the FSM Supreme Court to exercise its discretion to issue a writ of mandamus are: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to perform the act; and 5) there must be no other adequate legal remedy available. Oliver v. Panuelo, 23 FSM R. 475, 477 (Pon. 2021).

### Mandamus and Prohibition – Nature and Scope

A writ of mandamus is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear, nondiscretionary duty. The party seeking a writ of mandamus must show that its right to issuance of the writ is clear and indisputable. Oliver v. Panuelo, 23 FSM R. 475, 477-78 (Pon. 2021).

### Mandamus and Prohibition – When May Issue; Public Officers and Employees – Termination

When the President is the public officer who is the highest management official responsible for the agency in which the petitioners were employed, he must make the final decision. His duty to make that decision is ministerial and non-discretionary even though he may have a conflict of some kind. Oliver v. Panuelo, 23 FSM R. 475, 478 (Pon. 2021).

### Mandamus and Prohibition – When May Issue; Public Officers and Employees – Termination

Under 52 F.S.M.C. 156, the President has a clear legal duty to render a final decision in employment termination appeals. The ad hoc committee panels' findings and recommendations do not constitute final decisions. Only the President can make a final decision. Section 156 does not require that the President's decision be the same as the ad hoc committee's findings and recommendations. It only requires that he consider them and the parties' comments on them in coming to his final decision. Oliver v. Panuelo, 23 FSM R. 475, 478 (Pon. 2021).

### Mandamus and Prohibition – When May Issue; Public Officers and Employees – Termination

When the President has refused or otherwise neglected to act on the petitioners' employment termination appeals, no other adequate legal remedy is available because without a final decision the petitioners cannot decide whether to pursue further remedies or abide by whatever status quo may result from a final decision, and when there can be no resolution of the matter without the President's final decision since until the President has made a final decision, no other remedies are available, the petitioners have satisfied all of the elements for a writ of mandamus to issue compelling the President to make a final decision on the petitioners' employment termination appeals within 45 days. Oliver v. Panuelo, 23 FSM R. 475, 478 (Pon. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On July 13, 2021, Norleen Oliver and Mark DeOrio filed their petition for a writ of mandamus to compel the President of the Federated States of Micronesia, David W. Panuelo, to exercise his statutory authority under 52 F.S.M.C. 156 to review the recommendations of the ad hoc committees recommending their reinstatement in the FSM public service and make a final decision on whether to follow those recommendations or modify them or reject them. Once the current justice was assigned this case, the court, not being of the opinion that the writ clearly should not be granted, ordered the respondents to file and serve an answer to the petition by October 29, 2021. No answer was filed.

The court considered the possibility that the President may not have acted because he felt he had a conflict of interest since the events leading to the petitioners' termination of government employment involved the President's wife. The court mulled over the possibility of holding a hearing at which it would inquire into this possibility and whether the President could designate a final decision-maker without a personal conflict, but discarded that notion because the respondents' failure to comply with the order to file an answer indicated that any such hearing would be fruitless if, as seemed likely, no one appeared for the respondents.

For the reasons given below, the petition is granted. The writ of mandamus issues herewith.

I. BACKGROUND

On October 13, 2020, Mark DeOrio was served a notice of proposed termination from his employment at the FSM Department of Transportation, Communications and Infrastructure, and on October 16, 2020, Norleen Oliver was served a notice of proposed termination from her employment at the FSM Department of Health and Social Affairs. Both DeOrio and Oliver responded to their respective notices. Both were terminated. On November 30, 2020, both petitioners, pursuant to 52 F.S.M.C. 154, appealed their respective terminations through the Personnel Office.

As provided for in 52 F.S.M.C. 154, an ad hoc committee panel heard each petitioner's grievance. On April 20, 2021, each ad hoc committee panel issued findings that favored DeOrio and Oliver and that recommended that each be reinstated positions with retroactive pay. These findings and recommendations were forwarded to President Panuelo for him to review and make the final decision since 52 F.S.M.C. 156 requires that the highest management official responsible for that government agency make the final decision, and the President is considered the highest management official for the executive branch. See Suldan v. FSM (I), 1 FSM R. 201, 206 (Pon. 1982).

To date, President Panuelo has not rendered any decision on either ad hoc committee panel's findings and recommendations concerning DeOrio's and Oliver's public service system employment.

II. ISSUANCE OF WRIT OF MANDAMUS

A. *Requirements*

The five elements that must all be present in order for the FSM Supreme Court to exercise its discretion to issue a writ of mandamus are: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to perform the act; and 5) there must be no other adequate legal remedy available. Etscheit v. Amaraich, 14 FSM R. 597, 600 (App. 2007). It is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear, nondiscretionary duty. *Id.* The party seeking a writ

of mandamus must show that its right to issuance of the writ is clear and indisputable. *Id.*

Oliver and DeOrio contend that these elements are satisfied and that therefore the President must be commanded through a writ of mandamus to make a final decision on the ad hoc committee panels' recommendations.

#### B. *Analysis of Elements*

It is undisputed that the President is a public officer. Nor is it genuinely in dispute that the act the petitioners seek to compel is ministerial and non-discretionary. Under 52 F.S.M.C. 156, "the highest management official responsible for the agency in which the appellant[s] w[ere] employed" must make the final decision, and "[t]he decision of that management official shall be final." In the case of the executive branch, "the highest management official" is the President, and it seems that he must make the final decision even though he may have a conflict of some kind. Suldan (I), 1 FSM R. at 203-05 (employment termination remanded to President for final decision even though President had declined to make final decision due to a perceived conflict). The President's duty to make a final decision is ministerial and nondiscretionary. The President does not have the discretion not to issue a final decision even though he might feel he has a conflict. *Id.*; *but see Suldan v. FSM (II)*, 1 FSM R. 339, 364 (Pon. 1983) (no indication that President was biased). The President does have some discretion concerning what his final decision may be. See Semes v. FSM, 4 FSM R. 66, 73 (App. 1989) ("statute places broad authority in the highest management official").

Under 52 F.S.M.C. 156, the President has a clear legal duty to render a final decision in both Oliver's and DeOrio's employment termination appeals. The ad hoc committee panels' findings and recommendations do not constitute final decisions. Only the President can make a final decision. Section 156 does not require that the President's decision be the same as the ad hoc committee's findings and recommendations. It only requires that he consider them and the parties' comments on them in coming to his final decision. Suldan (I), 1 FSM R. at 206-07.

The President has so far refused or otherwise neglected to act on Oliver's and DeOrio's employment termination appeals. No other adequate legal remedy is available because without a final decision, the petitioners cannot decide whether to pursue further remedies or abide by whatever status quo may result from a final decision. There can be no resolution of the matter without the President's final decision(s). Until the President has made a final decision, no other remedies are available. 52 F.S.M.C. 157; *see also Suldan (I)*, 1 FSM R. at 206.

The petitioners have satisfied all of the elements for a writ of mandamus to issue.

### III. CONCLUSION

Accordingly, the petitioners have shown a clear and indisputable right to a writ of mandamus commanding the President to issue a final decision on Norleen Oliver's and Mark DeOrio's employment termination appeals. The writ will issue herewith. The President, in this case, will have the same 45 days to render his final decisions that President Nakayama was given in Suldan v. FSM (I), 1 FSM R. 201, 207 (Pon. 1982) to render a final decision.

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