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For The Northern Mariana Islands
By _____
(Deputy Clerk) *[Signature]*

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

HENRY S. HOFSCHEIDER,)
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Plaintiff,)
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v.)
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ANA DEMAPAN-CASTRO,)
)
Defendant.)

Case No. CV-04-0022-ARM

ORDER ON MOTION TO DISMISS

This matter is before the Court on the Amended Motion to Dismiss the First, Second and Third Claims for Relief (Doc. ##8-9) filed by the defendant, Ana Demapan-Castro. Upon consideration of the memoranda of the parties, the argument of counsel and the applicable law, the Court makes the following disposition.

I. BACKGROUND

The plaintiff, Henry Hofschneider was the Commissioner of the Marianas Public Lands Authority ("MPLA"). The defendant, Ana Demapan-Castro, is the Chairwoman of the MPLA Board of Directors. It is alleged that defendant first suspended plaintiff without pay on July 30, 2004. On or about October 11, 2004, it is alleged that defendant terminated plaintiff.

On November 8, 2004, plaintiff filed his First Amended Complaint (Doc. #2) wherein he alleged four claimed violations of 42 U.S.C. § 1983. In Count I plaintiff alleged that defendant suspended him without pay in violation of his procedural due process rights granted to him by the Fourteenth Amendment to the United States Constitution. In Count II plaintiff alleged that defendant terminated him in violation of his procedural due process rights granted to him by the Fourteenth

1 Amendment to the United States Constitution. In Count III plaintiff alleged that defendant suspended
2 plaintiff without pay and ultimately terminated plaintiff in retaliation for exercising his First
3 Amendment free speech rights, all in violation of the Fourteenth Amendment to the United States
4 Constitution. Finally, in Count IV, plaintiff alleged that defendant suspended plaintiff without pay
5 and ultimately terminated plaintiff because of his political affiliation¹, all in violation of the First
6 Amendment as applied to the Commonwealth through the Fourteenth Amendment of the United States
7 Constitution.

8 On December 27, 2004 defendant filed a Motion to Dismiss the First, Second and Third
9 Claims for Relief (Doc. ##5-6) followed by an Amended Motion to Dismiss the First, Second and
10 Third Claims for Relief (Doc. ##8-9) filed on December 30, 2004. Plaintiff filed an Opposition to
11 Defendant's Motion to Dismiss (Doc. #13) on February 25, 2005. On March 18, 2005, defendant filed
12 a reply to plaintiff's opposition.

13 II. STANDARD OF REVIEW

14 Dismissal under Fed.R.Civ.P. 12(b)(6) is appropriate only when "it appears beyond doubt that
15 the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
16 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
17 Dismissal is warranted where the complaint lacks a cognizable legal theory or where the complaint
18 presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson v.*
19 *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

20 In reviewing a Fed.R.Civ.P. 12(b)(6) motion to dismiss, the court must assume the truth of all
21 factual allegations and must construe them in the light most favorable to the nonmoving party. *Cahill*
22 *v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). However, legal conclusions need not
23 be taken as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*,
24 812 F.2d 1173, 1177 (9th Cir. 1987). When ruling on a motion to dismiss, the court may consider the

26 ¹ It is alleged that the defendant is a political supporter of Governor Babauta while the
27 plaintiff is the brother of Heinz Hofschneider, a political rival of Governor Babauta.

1 facts alleged in the complaint, documents attached to the complaint and matters of which the court
2 takes judicial notice. *Venetian Casino Resort L.L.C. v. Cortez*, 96 F.Supp.2d 1102, 1106 (D.Nev.
3 2000).

4 **III. LAW AND ANALYSIS**

5 Defendant seeks the dismissal of plaintiffs First, Second and Third Claims for Relief.
6 Upon review of the allegations in the complaint and the applicable law, it is my opinion that
7 defendants motion should be granted in its entirety. This conclusion is explained more fully below.

8 **A. First and Second Claims for Relief**

9 Plaintiff's first two claims for relief claim that defendant violated the Fourteenth Amendment
10 to the United States Constitution. Basically, plaintiff alleges that his suspension without pay and
11 eventual termination, all without notice and an opportunity to respond, violated his right to procedural
12 due process. In order to determine whether plaintiff's suspension and termination violated his due
13 process rights, the Court must first determine whether plaintiff had a constitutionally protected
14 property interest in continued employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538
15 (1985); *Dyack v. Commonwealth of the Northern Mariana Islands*, 317, F.d3 1030, 1033 (9th Cir.
16 2003).

17 Property interests subject to procedural due process protection are not limited by a few
18 rigid, technical forms. Rather, "property" denotes a broad range of interests that are
19 secured by "existing rules or understandings." A person's interest in a benefit is a
20 "property" interest for due process purposes if there are such rules or mutually explicit
21 understandings that support his claim of entitlement to the benefit and that he may
22 invoke at a hearing.
23 *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Written contracts, as clear evidence of a formal
24 understanding supporting a claim of entitlement, can create protected property interests. *Id.*
25 Moreover, "a state law which limits the grounds upon which an employee may be discharged, such
26 as conditioning dismissal on a finding of cause," creates a constitutionally protected property interest.
27 *Dyack*, 317 F.3d at 1033(quoting *Brady v. Gebbie*, 859 F.2d 1543, 1548 (9th Cir. 1988)). However,
28 where a state employee serves at will, he or she has no reasonable expectation of continued
employment, and thus no property right. *Id.*

1 Article XX of the Constitution of the Commonwealth of the Northern Mariana Islands states
2 that “[e]xemption from the civil service shall be as provided by law...” Under Article XX only the
3 legislature may create exceptions from the civil service. Dyack, 317 F.3d at 1033. Pursuant to CNMI
4 statutory law, every government employee falls in the Civil Service System unless exempted by 1
5 CMC § 8131. Section 8131(a)(7) excepts from Civil Service “[p]ositions specifically exempted by
6 any other law of the Commonwealth.” Pub. L. No. 12-71 (2001) states that the Commissioner of the
7 MPLA “shall serve at the pleasure of the Board of Directors” of the MPLA.

8 Defendant claims that under Pub. L. No. 12-71, plaintiff was an at will employee of the MPLA
9 Board, and as such, could not possess a constitutionally protected property interest in continued
10 employment. Plaintiff disagrees and makes two arguments. First, plaintiff argues that the “complete
11 statutory scheme” applicable to plaintiff’s employment demonstrates that plaintiff had a property
12 interest. Second, plaintiff argues that his employment contract created an expectation of continued
13 employment.

14 **1. Statutory Scheme**

15 As stated, plaintiff argues that the “complete statutory scheme” applicable to plaintiff’s
16 employment demonstrates that plaintiff had a property interest in continued employment. Plaintiff
17 argues that the Court should consider the fact that Pub. L. 12-71 states that the Commissioner served
18 at the pleasure of the MPLA “Board of Directors” and that the Board of Directors can only act by the
19 “affirmative vote of the majority of the five directors.” *Id.* Plaintiff further points out that CNMI law
20 requires meetings of the MPLA Board to be open and afford people an opportunity to be heard. CNMI
21 Open Government Meetings and Records Act, 1 CMC § 9901 *et seq.* Plaintiff states that the
22 combination of these statute’s requirements granted plaintiff a property right to continued employment.

23 These statutes do not grant a property right to continued employment because the statutory
24 passages cited by plaintiff do not create an expectation of continued employment. At most, they
25 explain the procedures the MPLA should take to discharge plaintiff and the process that would be due
26 plaintiff. However, this is different from whether a property interest exists in the first place. Whether
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1 plaintiff possessed a property right in continued employment depends on whether CNMI law created
2 a reasonable expectation of continued employment. CNMI law is very clear that the Commissioner
3 serves at the pleasure of the MPLA Board of Directors. It does not say that plaintiff can only be
4 discharged for cause or other reason. Thus, even if defendant violated all cited statutes in suspending
5 and terminating plaintiff, it does not matter for purposes of determining whether plaintiff has a
6 property interest in continued employment. See *Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir.
7 1986)("[A] substantive property right cannot exist exclusively by virtue of a procedural right");
8 *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 475 (9th Cir. 1991)("[W]hile state law may
9 create an interest in having officials adhere to state procedures, those procedures alone do not give rise
10 to a 'legitimate claim of entitlement' that is subject to the protections of the federal due process
11 clause"). As the statutes cited by plaintiff provide no reasonable expectation of continued
12 employment, plaintiff cannot base a claim of deprivation of due process on them.

13 **2. Contract**

14 Plaintiff argues that the contractual relationship between plaintiff and the MPLA created a
15 constitutionally protected property interest in: (1) continued employment with MPLA until May 4,
16 2007, unless (2) in the event of termination for cause, sixty days advance written notice and payout
17 of the lump sum payment for the salary and benefits he would lose during the remainder of his contract
18 period or twelve months, whichever period is longer; or (3) termination for cause in a manner
19 consistent with Section 10 of the contract and applicable CNMI law.

20 The employment contract did not create a property interest in continued employment. The law
21 of the Commonwealth is a part of every contract. See 72 Am. Jur.2d *States, Territories and*
22 *Dependencies* § 75 (2001). A person who contracts with the Commonwealth is chargeable with
23 knowledge of the statutes that regulate its contracting powers and is bound by them. *Id.* It is generally
24 held that officers of a government may not enter into contracts that exceed statutory authority. *Id.* §
25 72. In the same vein, as stated by courts addressing similar issues, "no employee has a vested
26 contractual right to continue employment beyond the time or contrary to the terms and conditions
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1 fixed by law.” *Berstein v. Lopez*, 321 F.3d 903, 905 (9th Cir. 2003)(quoting *Miller v. State*, 18 Cal.d3
2 808, 813 (1977)). Statutes controlling the terms of employment cannot be circumvented by contract.
3 *Id.* See *Kelly v. Ogata*, 120 F.Supp.2d 1244, 1250 n.6 (D.Haw. 2000). The clauses in the employment
4 contract conflict with the Pub. L. 12-71's clear statement that plaintiff served at the pleasure of the
5 Board. As such, the Board could not authorize these terms. Thus, the contract does not give plaintiff
6 a property interest in continued employment.

7 The cases cited by plaintiff in support of his argument that the contract created a property
8 interest are distinguishable. In *Breedon v. Nome*, 628 P.2d 924 (Alaska 1981), the Alaska Supreme
9 Court found an employment contract created a constitutionally protected property right in continued
10 employment. However, unlike the present case, the applicable Alaska statute designated the public
11 employee as terminable at will *subject to an employment contract to the contrary*. In *Henderson*, 940
12 F.2d at 476, the Ninth Circuit found that the subject employment contract gave rise to a “legitimate
13 claim of entitlement” to ninety days of continued employment because the contract contained a clause
14 stating that plaintiff could be fired at will but must be given ninety days notice. Unlike the present
15 case, there was no statute in *Henderson* regulating his employment status, *i.e.*, a statute stating that
16 he served at the pleasure of his employer. His status was determined by the contract alone. Thus the
17 cases cited by plaintiff do not dissuade the Court from its determination that the contract in this case
18 did not create a property interest in continued employment.

19 Because the statutory scheme cited by plaintiff and the employment contract between plaintiff
20 and the MPLA do not create a reasonable expectation of employment, that is, a property interest
21 protected by the Fourteenth Amendment to the United States Constitution, plaintiff fails to state a
22 claim for a deprivation of due process. Consequently, plaintiff’s first and second claims for relief will
23 be dismissed.

24 **B. Third Claim for Relief**

25 Plaintiff’s third claim for relief alleges that defendant suspended plaintiff without pay and
26 ultimately terminated plaintiff in retaliation for exercising his First Amendment free speech rights, all
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1 in violation of the Fourteenth Amendment to the United States Constitution. To state a viable
2 unlawful retaliation claim under § 1983, the Ninth Circuit has outlined the following factors. First,
3 whether the plaintiff was engaged in a constitutionally protected activity. *Rendish v. City of Tacoma*,
4 123 F.3d 1216, 1219 (9th Cir.1997). Second, whether plaintiff's exercise of her constitutionally
5 protected right was a "substantial" or "motivating" factor in the defendant's action. *Id.* Finally, whether
6 defendant has established by a preponderance of the evidence that it would have taken the same action
7 in the absence of the protected conduct. *Id.*; see also *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th
8 Cir.1989); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.1989). Preliminarily, the
9 Court must determine if the First Amendment protects Plaintiff against termination for the type of
10 speech in which he was engaged. *McKinley v. City of Eloy*, 705 F.2d 1110, 1113 (9th Cir.1983). In
11 *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), the United States Supreme Court articulated the
12 "public concern" test in an attempt to balance the rights of public employees to free speech and of the
13 government to regulate the workplace. Under *Pickering*, termination or other retaliation as a
14 consequence of speech does not run afoul of the First Amendment unless the speech addresses a
15 matter of "public concern." *Id.* at 572-74. Determining whether the speech in question involves a
16 matter of public concern mandates an inquiry into the "content, form, and context of a given
17 statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148(1983).

18 Well settled is the principle that speech by public employees "may be characterized as not of
19 'public concern' when it is clear that such speech deals with individual personnel disputes and
20 grievances and that the information would be of no relevance to the public's evaluation of the
21 performance of governmental agencies." *McKinley*, 705 F.2d at 1114, *Connick*, 461 U.S. at 148. On
22 the other hand, speech that enables the population to "make informed decisions about the operation
23 of their government merits the highest degree" of First Amendment protection. *McKinley*, 705 F.2d
24 at 1114.

25 In the complaint, plaintiff made the following relevant allegations:

26 84. Subsequent to his suspension with pay, Commissioner Hofschneider made
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multiple statements to Board members, other governmental authorities, MPLA employees, and Defendant herself indicating that his suspension was made without lawful authority and without factual basis.

* * *

86. Such statements by Commissioner Hofschneider and the support from other Board members constituted speech that is protected by the First Amendment...

* * *

88. Subsequent to his suspension without pay, Commissioner Hofschneider made multiple statements to Board members, other governmental authorities, MPLA employees, and Defendant herself indicating that his suspension without pay was made without lawful authority and without factual basis.

89. In addition, Commissioner Hofschneider filed a lawsuit in this Court, met with representatives of the AGO, OPA, and CNMI Finance to explain why his actions were not unlawful and the Defendant's were.

91. Such statements by Commissioner Hofschneider and the support from other Board members constituted speech that is protected by the First Amendment and touched on matters of public concern...

The Court finds that these allegations show that plaintiff's speech deals with his personal dispute with defendant. It was not speech that enabled the population to "make informed decisions about the operation of their government." Thus this claim will be dismissed.

C. Motion to Strike

Defendant moves to strike pursuant to Fed.R.Civ.P. 12(f) certain comments contained in the complaint as immaterial and impertinent. Specifically, defendant moves to strike what it characterizes as "editorial comments" or what could be also characterized as headlines for subsequent groups of allegations. These include the following statements as they appear in the amended complaint:

Other MPLA Board Members Inform Defendant That She Is Acting Illegally

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(Am. Compl. at 5)

Others Explain Why Defendant Was Wrong but She Refuses to Reconsider

(*Id.* at 6)

Defendant Retaliates By Suspending Commissioner Hofschneider Without Pay Pending the Outcome of an AGO/Finance Review

(*Id.* at 8)

Defendant Refuses to Cooperate With The AGO/Finance Review That She Requested

(*Id.*)

Defendant Reneges on Her Settlement Agreement Whereby Commissioner Hofschneider Would return to Work Immediately

(*Id.* at 9)

This Lawsuit is Filed and Commissioner Hofschneider Requests Release of His Annual Leave

(*Id.* at 10)

Three of The Five Board Members Order Commissioner Hofschneider Back to Work But Defendant and Her Attorneys Refuse To Allow Him Back

(*Id.*)

The Tables Are Turned: AGO and Finance Are Tired of Defendant's Refusal to Cooperate, Defendant Surreptitiously Receives A Copy of the Draft AGO/Finance Report Which Exonerates Commissioner Hofschneider, and She learns That OPA is Now Investigating her Actions

(*Id.* at 11)

Commissioner Hofschneider Writes Defendant to Indicate that Her One-Month Delay In Releasing His Annual Leave Payment Reeked of Retaliation

(*Id.* at 12)

Defendant's Final Desperate Act? She Terminates Commissioner Hofschneider

(*Id.* at 13)

Under Fed.R.Civ.P. 12(f) the Court may strike from a complaint “any redundant, immaterial, impertinent, or scandalous matter.” Matter which is “immaterial” is “that which has no relationship to the claim for relief or the defenses being pleaded.” *Fantasy, Inc. v. Figwort*, 984 F.2d 1524, 1527

1 (9th Cir. 1993) *rec'd. on other grounds*, 510 U.S. 517 (1994). “‘Impertinent’ matter consists of
2 statements that do not pertain, and are not necessary to the issues in question.” *Id.*

3 The Court agrees that the above cited passages are immaterial and impertinent. The passages
4 are immaterial because they are conclusory “headlines” that look to have been placed in the complaint
5 only for sensationalistic effect. *C.f. Bureerong v. Uvawas*, 922 F.Supp 1450, 1479 (C.D.Cal.
6 1996)(striking the term “Slave Sweatshops” because the court found it appeared “only for
7 inflammatory effect”). The passages are impertinent because they add nothing to the First Amended
8 Complaint. They are just conclusory summaries of other factual allegations contained in the
9 complaint. Because the passages are immaterial and impertinent, the above cited passages will be
10 stricken by the Court.

11 **D. Leave to Amend Complaint**

12 When a court grants a Fed.R.Civ.P. 12(b)(6) motion to dismiss, it generally will permit the
13 plaintiff an opportunity to amend the complaint to cure any defects. However, dismissal without leave
14 to amend is appropriate where a court “‘determines that the pleading could not possibly be cured by
15 the allegation of other facts.’” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)(en banc)(citations
16 omitted). The Court will not grant plaintiff leave to amend the first and second claims for relief. The
17 claims could not possibly be cured by the allegations of other facts since the law is clear that plaintiff
18 could never gain a constitutionally protected property interest in continued employment. On the other
19 hand, the Court will grant plaintiff leave to amend his third claim for relief. There is the possibility
20 that the pleading of other facts may demonstrate that plaintiff engaged in speech protected by the First
21 Amendment. Thus the Court will grant plaintiff ten (10) days from the date of this order to file an
22 amended complaint amending the third claim for relief.

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CONCLUSION

Based on the foregoing, it is **ORDERED** that:

1. The Amended Motion to Dismiss the First, Second and Third Claims for Relief (Doc. ##8-9) filed by the defendant, Ana Demapan-Castro is **GRANTED**.
2. Plaintiff's first and second claims for relief are **DISMISSED** with prejudice and without leave to amend.
3. Plaintiff's third claim for relief is **DISMISSED** without prejudice and with leave to amend plaintiff's third claim for relief within ten (10) days of the date of this order.
4. Plaintiff's motion to strike is **GRANTED**. Accordingly, the passages cited in this order will be stricken from plaintiff's Amended Complaint.

DATED this 11²⁴ day of April, 2005



Alex R. Munson
Chief Judge, United States District Court