

FEB 07 2002

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

COLIN DYACK,

Plaintiff

v.

COMMONWEALTH OF THE
NORTHERN MARIANA
ISLANDS and JOSEPH K.P.
VILLAGOMEZ, Secretary of
Health, in his individual and official
capacities,

Defendants

Civil Action No. 01-0033

ORDER DENYING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT, *SUA SPONTE*
GRANTING SUMMARY
JUDGMENT IN FAVOR OF
DEFENDANTS, DISMISSING
DEFENDANTS' CROSS-CLAIM
AS MOOT, AND DISMISSING
REMAINING NON-FEDERAL
CAUSES OF ACTION

THIS MATTER came before the court on Wednesday, February 6, 2002,
for hearing of plaintiff's motion for partial summary judgment and defendants'
cross-motion for summary judgment on the issue of qualified immunity.

1 Plaintiff appeared by and through his attorney, Jay H. Sorensen; defendants
2 appeared by and through their attorney, Commonwealth Assistant Attorney
3 General Andrew Clayton.
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5 THE COURT, having considered the written and oral arguments of
6
7 counsel, rules as follows:

8 Rule 56 of the Federal Rules of Civil Procedure states, in part, that
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10 judgment "shall be rendered forthwith if the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the affidavits, if any, show
12 that there is no genuine issue as to any material fact and that the moving party is
13 entitled to judgment as a matter of law."
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15 Plaintiff's complaint alleges three causes of action. The first cause alleges
16
17 a violation of his civil rights under 42 U.S.C. § 1983. The second and third
18 causes of action, for premium pay under the Commonwealth of the Northern
19 Mariana Islands' Civil Service "Personnel Service System Rules and Regulations"
20 and for wrongful termination, respectively, are common law contract claims for
21 which plaintiff invokes the court's supplemental jurisdiction under 28 U.S.C. §
22
23 1367.
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25 The undisputed, material facts are as follows: Plaintiff, a physician and
26 citizen of Canada, signed and entered into a two-year "Excepted Service

1 Employment Contract with the Commonwealth of the Northern Mariana
2 Islands” on October 22, 1999. By the terms of the contract, plaintiff was to
3 work at the Commonwealth Health Center as an obstetrician/gynecologist and
4 receive an annual salary of \$101,500.00. The contract also included Conditions
5 of Employment. Mathilda A. Rosario, Director of Personnel, Office of
6 Personnel Management, certified “that the service contracted qualifies the
7 Employee as Excepted Service under 1 CMC 8131[.]”¹

8 Under his contract, and in addition to his salary, plaintiff received “either
9 free government housing or a housing allowance,” a travel allowance and *per*
10 *diem* for he and family members to and from his point of hire in Nova Scotia,
11 Canada, and a transportation expense for his personal effects. Plaintiff’s
12 \$100,000.00+ salary and housing, travel, and transportation of effects benefits
13 are not available to Commonwealth government civil service employees.

14 Paragraph 13(B)(1) of plaintiff’s contract states in relevant part:

15 The Employer may terminate the Employee without cause upon
16 notice sixty days in advance of termination of employment.

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18 “CMC” is the abbreviation for “Commonwealth Code.” In this decision,
19 the Commonwealth Code will be cited “___ N.Mar.I. Code § __,” as
20 prescribed by “A Uniform System of Citation (16th ed.).”

1 By letter dated July 17, 2002, plaintiff was terminated without cause.

2 Plaintiff was paid by defendants up to and including September 18, 2000,
3
4 the end of the sixty day period specified in his contract under Paragraph
5 13(B)(1).
6

7 Plaintiff argues that, despite his explicit contract, he was in fact a
8 Commonwealth civil servant, entitled to all of the procedures and protections
9 afforded government employees by the Commonwealth civil service laws. This
10 is for two reasons. First, based on decisions emanating from this court, the
11 Commonwealth Superior Court, and the U.S. Court of Appeals for the Ninth
12 Circuit, the Commonwealth is prohibited from entering into excepted service
13 contracts with persons who do not fall under 1 N.Mar.I. Code § 8131, and is
14 estopped from asserting that such persons are not entitled to full civil service
15 protections, despite their contracts which purport to exempt them from the
16 civil service. And, second, that plaintiff must have been a civil service employee
17 because he was not a "nonpermanent" employee.
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22 Title 1, N.Mar.I. Code § 8131, Civil Service System: Applicability,
23 Exemptions, provides in relevant part:
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25 (a) Except as provided in this section, the civil service system shall
26 apply to all employees of and positions in the Commonwealth government now existing or hereafter established. Unless this part

1 is otherwise specifically made applicable to them, the following
2 persons or positions are exempt from the civil service system:

* * *

3 (2) Persons or organizations retained by contract
4 where the Personnel Officer has certified that the
5 service to be performed is special or unique and
6 nonpermanent, is essential to the public interest, and
7 that, because of the degree of expertise or special
8 knowledge required and the nature of the services to be
9 performed, it would not be practical to obtain
10 personnel to perform such service through normal
11 public service recruitment procedures.

12 As to plaintiff's first contention---that he does not fall within the civil
13 service exemptions set out in 1 N.Mar.I. Code § 8131(a)---the court finds as a
14 matter of law that he does. A physician² does provide special or unique services,
15 those services are clearly essential to the public interest, and his or her degree of
16 expertise or special knowledge is such that it would be impractical, although
17 perhaps not impossible, to obtain such services through normal public service
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21 Title 1 N.Mar.I. Code § 8248(a), Government Salary Ceiling, provides
22 that, with certain exceptions, "no employee of the Commonwealth government
23 shall receive an annual salary of more than \$50,000." Subsection (b) provides
24 that medical doctors may receive in excess of \$50,000 per year but the salaries
25 "must be certified by the Governor to the presiding officers of the legislature
26 and the Civil Service Commission." Thus, while it appears that the
Commonwealth may attempt to recruit and hire doctors to become permanent
Commonwealth government employees (who would then be entitled to the
civil service protections afforded such employees), the statute by its terms is
limited to and directed to that situation, and addresses a situation different than
that for persons hired pursuant to 1 N.Mar.I. Code § 8131(a).

1 recruitment procedures.³

2 Plaintiff's second contention, that he must be a civil service employee
3 because he is not a "nonpermanent" employee, also fails. Plaintiff relies heavily
4 on the Commonwealth Superior Court's decision on a motion to dismiss in
5 Bisom v. CNMI, et al., Commonwealth Superior Court Civil Action 96-1320,
6 Decision and Order of Nov. 6, 1998. First, that decision is not binding on this
7 court. Second, to the extent the Superior Court relied on the definition of
8 "nonpermanent" set out in the Commonwealth Civil Service System's
9 "Personnel Service System Rules and Regulations," this court believes it was in
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16 Because plaintiff falls within an exemption of 1 N.Mar.I. Code § 8131, his
17 situation is different from that of the plaintiffs in Gourley v. Sablan, D.N.M.I.
18 Civil Action No. 94-0046, Olopai-Taitano v. Guerrero, D.N.M.I. Civil Action
19 No. 93-0019, and Sonoda v. Cabrera, D.N.M.I. Civil Action No. 96-0012, *aff'd*
20 *in part and rev'd in part*, 255 F.3d 1035 (9th Cir. 2001). In those cases, plaintiffs
21 and defendants had violated the hiring laws by entering into excepted service
22 contracts for positions that were classified by the civil service or were otherwise
23 clearly not exempt positions, in order that plaintiffs could circumvent the civil
24 service statutory salary and benefits cap. For example, as noted by the Ninth
25 Circuit in Sonoda, "At the time of Sonoda's employment and termination, his
26 position as Director of the Division of Customs Services was not one of the
statutorily exempted positions. Therefore, under CNMI law at that time, and
regardless of the employment contract he signed, Sonoda was a civil service
employee. As a civil service employee, Sonoda had a constitutionally protected
property interest in his continued employment." *Supra* at 1043. The instant
plaintiff's situation is different from the cases he relies upon because he does fall
into one of the exempted categories of 1 N.Mar.I. Code § 8131(a).

1 error to do so. The Office of Personnel Management, not the Civil Service
2 Commission, oversees excepted service contracts under 1 N.Mar.I. Code § 8131;
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4 reference to civil service rules and regulations for a definition of
5 “nonpermanent,” while having a superficial plausibility, overlooks the fact that
6 the issues, goals, employment relationships, and employee decisions facing the
7 two executive branch departments are considerably different. The Office of
8 Personnel Management, except as restricted by statute, can enter into contracts
9 of any length it chooses. Finally, the Superior Court based its decision to deny
10 the motion to dismiss in large part on defendants’ failure to meet their burden
11 of producing evidence to show that plaintiff’s claim was without merit.
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15 Therefore, because the court finds that plaintiff’s services are unique or
16 special and essential to the public interest, and because the Personnel Officer
17 certified the same, the court concludes as a matter of law that plaintiff is an
18 exempted employee under 1 N.Mar.I. Code § 8131(a)(2). He is not entitled to
19 Commonwealth civil service protections, he received the full benefit of his
20 bargain under his Excepted Service Contract, and he was terminated lawfully
21 under the terms of that contract. Accordingly, plaintiff’s motion for summary
22 judgment is denied.
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Further, the court *sua sponte* enters summary judgment in favor of

1 defendants, and each of them, on the issue of liability on the grounds set forth
2 above. See e.g. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554
3 (1986) (recognizing court's power to enter summary judgment *sua sponte* when
4 party has had opportunity to be fully heard on its motion); Cool Fuel, Inc. v.
5 Connett, 685 F.2d 309, 311-312 (9th Cir. 1982) (Where the party's own evidence
6 shows an undisputed material fact that bars its claims as a matter of law, the
7 court may enter summary judgment against that party *sua sponte*.)
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11 In light of the court's ruling, the issue of qualified immunity is moot. To
12 the extent that this decision may not also address plaintiff's second and third
13 common law causes of action, the court, in an exercise of its discretion to
14 decline supplemental jurisdiction, dismisses those claims without prejudice.
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17 IT IS SO ORDERED.

18 DATED this 7th day of February, 2002.
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23 ALEX R. MUNSON
24 Judge
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