

D. Somerfleck

IN THE SUPERIOR COURT
OF GUAM

FILED
SUPERIOR COURT
OF GUAM

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DOUGLAS E. SHERWIN, et al.,

Special Proceedings Case no. SP 0222-10

Petitioners,

v.

DECISION AND ORDER
re: Petition for Writ of Mandate

FELIX P. CAMACHO, et al.,

SOMERFLECK & ASSOCIATES, PLLC
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Respondents.

APR 22 2011

INTRODUCTION

Time: Ct Bx By: DS

This matter came before the Honorable Judge Michael J. Bordallo on December 16, 2010. The Petitioners were represented by Attorney Daniel S. Somerfleck. The Respondents were represented by Assistant Attorney General Kenneth Orcutt. After considering the matters presented, the court now issues the following decision and order denying the Petition for Writ of Mandate. There is no duty on the part of the Governor to implement the raises because there has been no appropriation of funds to cover the costs of the raises. The Petitioners have also failed to prove they lack of any plain, speedy and adequate remedy at law, and they failed to exhaust their administrative remedies.

BACKGROUND

On November 1, 2010, Petitioners filed a petition for writ of mandate seeking to compel the implementation and enforcement of Public Law 29-105, which is codified as 10 Guam Code Ann. § 55102. The law provides for a forty percent (40%) increase in compensation for public safety and law enforcement officers over a four year period. The Petitioners received ten percent (10%) increases in their salaries on October 1, 2008 and October 1, 2009 as required by 10 Guam

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2 *v. Responsible Choices for all Adults Coalition*, 2007 Guam 20 ¶26. The issuance of a writ of
3 mandamus is an extraordinary remedy employed in extreme situations. *A.B. Won Pat Guam Int'l*
4 *Airport Auth. v. Moylan*, 2005 Guam 5 ¶ 10.

5 The first issue, therefore, is whether, at the time mandate was sought, the Governor was
6 under a clear, present and usually ministerial duty to compensate the Petitioners with the funds
7 for the purpose of paying them in accordance with 10 Guam Code Ann. § 55102(e). It is not
8 denied that if the Governor was under such a duty, then the rest of the Respondents were under
9 consequential-and equally compellable-duties to perform the remaining official acts prayed for
10 in this proceeding. The other issues before the court are whether the Petitioners assert facts
11 sufficient to support the conclusion that they lack a plain, speedy and adequate remedy at law and
12 whether they exhausted their administrative remedies.

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14 **I. Whether the Respondents are under a clear, present, and usually ministerial duty.**

15 As stated above, Respondents argue that Petitioners are not entitled to a writ of mandate
16 requiring them to pay Petitioners the ten percent (10%) salary increase because there is no funding
17 authorizing such pay. Respondents point to the lack of appropriation by the Legislature as the
18 reason why the Petitioners have not received their third ten percent (10%) increment as required
19 by 10 Guam Code Ann. § 55102(e).

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21 Mandamus cannot issue to compel an officer to satisfy an obligation for which no
22 appropriation exists. *Griefen v. Treasurer and Receiver-General*, 459 N.E.2d 451, 452 (Mass.
23 1983). Under the Organic Act, the legislative power is vested in the "Legislature of Guam." 48
24 U.S.C. § 1423a. The power to appropriate money is expressly reserved to the Legislature. 48
25 U.S.C. § 1423j(a). Thus, pursuant to the Organic Act, "the Legislature has plenary or absolute
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2 corporation or agency to perform an act involving the expenditure of money, it must affirmatively
3 appear that there are funds available for that purpose. *Sutro Heights Land Co. v. Merced Irr. Dist.*,
4 211 Cal. 670, 703-04 (1931).

5 In the case at bar, Respondents' duty to pay was dependent upon there being an
6 appropriation of money to fund the government of Guam's obligation under 10 Guam Code Ann.
7 § 55102(e) for the 2011 fiscal year. If none was made, the Respondents are not under a clear,
8 present and ministerial duty to comply with Public Law 29-105 because they did not have the
9 money to do so. The court agrees with the Respondents that Petitioners are not entitled to a writ
10 of mandate requiring them to pay Petitioners the ten percent (10%) salary increase because there
11 is no funding authorizing such pay.
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13 Thus, the only other ways the court can meet the Petitioners' requests are by (1)
14 compelling the Legislature to appropriate funds or (2) ordering the appropriation of money from
15 already existing funds. However, as will be discussed below the former would be a violation of
16 the doctrine of separation of powers and the latter is neither legally possible or feasible.
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18 The separation of powers doctrine exists to prevent the abuses that can flow from
19 centralization of power. *In re Request of Governor Carl T.C. Guterrez*, 2002 Guam 1 ¶ 33 (citing
20 *Mo. Coalition for Env't Joint Comm. On Admin. Rules*, 948 S.W.2d 125, 132 (Mo. 1997) (en
21 banc)). The Guam Supreme Court has recognized that under the separation of powers doctrine,
22 one branch is prohibited from either delegating its enumerated powers to another branch of the
23 government or aggrandizing its powers by reserving for itself the power given to another branch.
24 *Id.* at ¶ 35. Furthermore, even absent a finding that one branch has usurped a power exclusively
25 reserved for another branch, a separation of powers violation may be found if one branch unduly
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2 this rule exists. A court may order appropriate expenditures from already existing funds if the
3 funds are reasonably available for the expenditures in question, which means that the purposes
4 for which those funds were appropriated are generally related to the nature of costs incurred. *see*
5 *Butt v. State of California*, 4 Cal.4th 668, 698-703 (Cal. 1992). This exception must be strictly
6 construed and is inapplicable if the existing funds have been appropriated for other purposes. *Id.*
7 Moreover, a trial court has broad discretion to determine whether a mandamus remedy requiring
8 a particular payment from an existing fund is warranted under the totality of the circumstances.
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10 *County of San Diego*, at 599.

11 Here, the petition for writ of mandate does not allege, nor is there any proof, as to the
12 existence of any surplus funds from which payment of the Petitioners' claims could be made at
13 the present time. However, in Petitioners' reply brief to the second declaration of Bertha Duenas,
14 they suggest that their claim could be paid for by using the money put forward in Public Law 30-
15 196, which provides funding for each agency. More specifically, Petitioners assert that the money
16 appropriated to pay for salaries, increments, promotions, special pay, benefits etc... can be used
17 to pay them in accordance with 10 Guam Code Ann. § 55102(e).
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19 The court does not agree for the following reasons. First, the existing funds referred to by
20 the Petitioner have been appropriated for other purposes. Thus, if the court ordered the
21 Respondents to take away funds that have been appropriated for the specific purposes of paying
22 salaries, overtime, specialty pay benefits and so forth, then the money already appropriated would
23 be insufficient to pay both the regular salaries and the ten percent (10%) compensation increase.
24 Furthermore, the estimated cost of implementing the third increment of the law enforcement pay
25 raise is over \$5 million. The Petitioners did not present any specific evidence regarding the
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2 in this jurisdiction to fulfill the requirement that there be an inadequate remedy at law: "The
3 inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one
4 of the hardships of litigation in our judicial system, but such hardship does not measure up to the
5 inconveniences which would result if piecemeal appeals were permitted." *Limtiaco v. Guam Fire*
6 *Dept.*, at ¶ 19 (citing *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 459 (9th Cir.
7 1951)). Thus, the Supreme Court found that inconvenience is insufficient to justify mandamus.
8 *Id.*

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10 Furthermore, the Guam Supreme Court reviewed a mandamus action in *Limtiaco v. Guam*
11 *Fire Dept.*, to compel the Guam Fire Department to comply with a Civil Service Commission
12 order filed as a result of an employee grievance alleging that petitioner was entitled to back pay
13 which he was never paid. That case was a mandamus action to compel the Guam Fire Department
14 to perform a ministerial act, i.e., comply with the Civil Service Commission's order awarding
15 back pay. The Supreme Court held that the Petitioner had exhausted his administrative remedies
16 at law by filing a grievance under Chapter 12 of the Department of Administration Personnel
17 Rules and Regulations, *Limtiaco*, at ¶ 21.

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19 The court agrees with the Petitioners that grievance proceedings or filing a civil suit is
20 inconvenient and may take in excess of six months. However, the Supreme Court has held that
21 inconvenience is insufficient to justify mandamus. *see Limtiaco v. Guam Fire Dept.*, at ¶ 19. The
22 Petitioners have also not proven that they lack the remedy of a civil suit under the Government
23 Claims Act or that they lack any other remedies. Thus, the court finds that the Petitioners have
24 not proven that they lack a plain, speedy, and adequate remedy at law because inconvenience is
25 not enough to justify mandamus. Furthermore, there is no evidence that Petitioners filed any
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2 grievances with the Respondents or the Department of Administration. Thus, unlike *Limitiaco*,
3 where the Supreme Court held that the Petitioner had exhausted his administrative remedies at
4 law by filing a grievance under Chapter 12 of the Department of Administration Personnel Rules
5 and Regulations, this court finds that the Petitioners have failed to exhaust their administrative
6 remedies because they did not first bring the matter before the Department of Administration.

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8 **CONCLUSION**

9 Having heard arguments on this motion and having received and considered all of the
10 evidence presented, the court finds that no duty exists because of the lack of appropriation by the
11 Legislature. The court also finds that the Petitioners have failed to prove that they lack of any
12 plain, speedy and adequate remedy at law and that Petitioners failed to exhaust their
13 administrative remedies. Based on the foregoing, the Petitioners' request is DENIED.

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15 SO ORDERED, this 22 day of April 2011.

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HONORABLE MICHAEL J. BORDALLO
Judge, Superior Court of Guam

I do hereby certify that the foregoing
is a full, true and correct copy of the
original on file in the office of the
Clerk of the Superior Court of Guam
dated at Hagåtña, Guam

APR 22 2011

James R. Borja
Clerk of the Superior Court of Guam