COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA and NORTHERN ISLANDS

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COMMONWEALTH REGISTER

VOLUME 41
NUMBER 06
JUNE 28, 2019

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COMMONWEALTH REGISTER

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Commonwealth Healthcare Corporation
Commonwealth of the Northern Mariana Islands
1 Lower Navy Hill Road Navy Hill, Saipan, MP 96950

PUBLIC NOTICE OF EMERGENCY REGULATIONS

WHICH ARE ONCOLOGY FEE AMENDMENTS TO THE COMMONWEALTH HEALTHCARE CENTER'S CHARGEMASTER

EMERGENCY ADOPTION AND IMMEDIATE EFFECT: The Commonwealth Healthcare Corporation (hereinafter "CHCC") of the Northern Mariana Islands, finds that:

(1) the attached rules and regulations regarding Oncology Fee amendments to the CHCC Chargemaster shall be adopted immediately on an emergency basis because the public interest so requires, for the reasons stated below (1 CMC § 9104(b), (c); 1 CMC § 9105(b)(2)); and

(2) the same rules and regulations shall be adopted, after a proper notice and comment period, as permanent regulations pursuant to the attached Notice of Proposed Rules and Regulations and the Administrative Procedure Act, 1 CMC § 9104(a) and will be published at NMIAC 140-10.8-101.

AUTHORITY: The Board of Trustees may prepare and adopt rules and regulations to assure delivery of quality health care and medical services and the financial viability of the Corporation that will best promote and serve its purposes. 3 CMC Section 2826(c).

The Administrative Procedure Act provides that an agency may adopt an emergency regulation upon fewer than 30 days' notice if it states its reasons in writing:

> (b) If an agency finds that the public interest so requires, or that an imminent peril to the public health, safety, or welfare requires adoption of a regulation upon fewer than 30 days' notice, and states in writing its reasons for that finding, it may, with the concurrence of the Governor, proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency regulation. The regulation may be effective for a period of not longer than 120 days, but the adoption of an identical regulation under subsections (a)(1) and (a)(2) of this section is not precluded.
>
> (c) No regulation adopted is valid unless adopted in substantial compliance with this section. . . .

1 CMC § 9104(b), (c).

THE TERMS AND SUBSTANCE: These Rules and Regulations provide for Oncology fee amendments to the CHCC Chargemaster.

P.O. Box 500409 CK, Saipan, MP 96950
Telephone: (670) 234-8950 FAX: (670) 233-8756

THE SUBJECTS AND ISSUES INVOLVED: Oncology Fee Amendments to the CHCC Chargemaster to provide for new services not previously offered at CHCC.

ADOPTION OF EMERGENCY REGULATIONS FOR 120 DAYS: The Corporation has followed the procedures of 1 CMC § 9104(b) to adopt these Proposed Regulations on an emergency basis for 120 days.

REASONS FOR EMERGENCY ADOPTION: The CHCC finds that the public interest requires adoption of these regulations on an emergency basis, for the following reasons:

1. The Current Procedural Terminology (CPT) Codes determine the structure of the fees at the Commonwealth Health Center. Recent changes make it necessary for CHC to make amendments to their Schedule of Fees, as described by the CPT structure.

2. CHCC has a new provider providing services that have not previously been offered at CHCC. For the first time ever, CHCC is directly employing an oncologist. Previously, while CHCC administered chemotherapy and other services, any variance from the initial oncologist's order required the patient to go off island to consult with the oncologist. Now, with having an oncologist on island, chemotherapies and other oncology treatments can be performed without having the patient travel off island. CHCC attempted to add additional oncology fees prior to the new physician arriving on island, but this was not possible. The oncologist has worked with members of the CHCC Revenue team in order to create these new fees. In order for CHCC to employ new higher level specialists at CHCC, CHCC needs to bill for those services. Having the oncologist at CHCC saves the patient from having to travel, often times when the patient is least able to physically travel, and saves Medical Referral all the travel costs associated with the patient and escort having to go off island. CHCC continues to bring new specialists to the island but can only continue to do so if the Corporation is financially viable. Charging market rate fees contribute to the financial viability of the Corporation and the Board is required to ensure CHCC is charging market rate fees.

3. Oncology services are already being rendered and an emergency promulgation will allow for timely billing.

DIRECTIONS FOR FILING AND PUBLICATION: These Proposed Emergency Rules and Regulations shall be published in the Commonwealth Register in the section/s on emergency and proposed regulations (*see* 1 CMC § 9102(a)(1)) and posted in convenient places in the civic center and in local government offices in each senatorial district (1 CMC § 9104(a)(1)) and will be codified at NMIAC Sections 140-10.8-101 and 140-10.8-201.

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The CEO shall take appropriate measures to make these Rules and Regulations known to the persons who may be affected by them (1 CMC 9105(b)(2)).

IMMEDIATE EFFECT: These Emergency Rules and Regulations become effective immediately upon filing with the Commonwealth Register and delivery to the Governor. (1 CMC § 9105(b)(2)) This is because the CHCC has found that this effective date is required by the public interest or is necessary because of imminent peril to the public health, safety, or welfare. (*Id.*)

TO PROVIDE COMMENTS: No comments are required for these Emergency Rules and Regulations. However, the related Notice of Proposed Rules and Regulations will specify comment procedures. Please see the notice regarding these emergency regulations being presented as proposed regulations, in the June 2019 Commonwealth Register.

These emergency regulations were approved by the CHCC on 19 day of June, 2019.

Submitted by: for Esther L. Muna — 6/19/19
Chief Executive Officer — Date

for Lauri B. Ogumoro — 6/19/19
Chair, CHCC Board of Trustees — Date

Received by: Mathilda A. Rosario — 06/25/19
Special Asst. for Administration — Date

Concurred by: Ralph DLG. Torres — 6-25-19
Governor — Date

Filed and Recorded by: ESTHER SN. NESBITT — 06.26.2019
Commonwealth Register — Date

P.O. Box 500409 CK, Saipan, MP 96950
Telephone: (670) 234-8950 FAX: (670) 233-8756

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the proposed regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General and shall be published (1 CMC § 2153(f) (publication of rules and regulations)).

Dated the 25th day of June, 2019.

EDWARD E. MANIBUSAN
Attorney General

P.O. Box 500409 CK, Saipan, MP 96950
Telephone: (670) 234-8950 FAX: (670) 233-8756

CHCC Chargemaster Amendments 05/2019

PLEASE NOTE THAT THE FEES LISTED BELOW ARE APPLICABLE UNLESS THE CURRENT MEDICARE RATE IS HIGHER, IN WHICH CASE THE CURRENT MEDICARE RATE WILL APPLY INSTEAD OF THE RATE LISTED BELOW.

CPT/HCPCS	MOD	DESCRIPTION	PRICE
81206		Bcr/abl1 gene major bp	$674.73
81207		Bcr/abl1 gene minor bp	$596.04
81208		Bcr/abl1 gene other bp	$661.89
10004		Fna bx w/o img gdn ea addl	$136.01
10005		Fna bx w/us gdn 1st les	$228.68
10006		Fna bx w/us gdn ea addl	$155.75
10007		Fna bx w/fluor gdn 1st les	$295.23
10008		Fna bx w/fluor gdn ea addl	$192.67
10009		Fna bx w/ct gdn 1st les	$357.08
10010		Fna bx w/ct gdn ea addl	$261.06
80320		Drug Screen Quantalcohols	$52.00
49406		Image cath fluid peri/retro	$625.88
38220		Dx bone marrow aspirations	$1,308.00
38220	26	Bone marrow aspiration	$528.00
38220	26	Midlevel bone marrow aspiration	$448.80
38221		Dx bone marrow biopsies	$1,204.80
38221	26	Bone marrow biopsy	$475.20
38221	26	Midlevel Bone marrow biopsy	$403.75
38222		Dx Bone Marrow Bx & Aspir	$2,512.80
38222	26	Bone marrow bx & asp	$1,003.20
38222	26	Midlevel Bone marrow bx & asp	$852.72
83789		Mass spectrometry quant	$109.48

Commonwealth of the Northern Mariana Islands
NORTHERN MARIANAS HOUSING CORPORATION
Tel. (670) 234-6866/234-9447/234-7689/234-7670 - Fax. (670) 234-9021
Email: nmhc@nmhc.gov.mp

Ralph DLG. Torres
Governor

Arnold I. Palacios
Lt. Governor

PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF REGULATIONS OF Northern Marianas Housing Corporation

PRIOR PUBLICATION IN THE COMMONWEALTH REGISTER
AS PROPOSED REGULATIONS
Volume 38, Number 06, pp 038199-038200, of June 28, 2016

Regulations of the Northern Marianas Housing Corporation: NMIAC Chapter 100-90, Section 8 Administrative Plan for Rental Assistance Program

ACTION TO ADOPT PROPOSED REGULATIONS: The Northern Marianas Housing Corporation ("NMHC"), HEREBY ADOPTS AS PERMANENT regulations the Proposed Regulations which were published in the Commonwealth Register at the above-referenced pages, pursuant to the procedures of the Administrative Procedure Act,1 CMC § 9104(a). The NMHC announced that it intended to adopt them as permanent, and now does so. A true copy is attached. I also certify by signature below that:

as published, such adopted regulations are a true, complete and correct copy of the referenced Proposed Regulations,

and that they are being adopted without modification or amendment:

PRIOR PUBLICATION: The prior publication was as stated above. The Board adopted the regulations as final at its meeting of October 22, 2015.

MODIFICATIONS FROM PROPOSED REGULATIONS, IF ANY: "None".

I further request and direct that this Notice be published in the Commonwealth Register.

AUTHORITY: The NMHC Board is required by the Legislature to adopt rules and regulations regarding those matters over which the NMHC Board has jurisdiction, including its regulation of the Section 8 Administrative Plan for Rental Assistance Programs pursuant to Executive Order No. 94-3, Section 407 of the Reorganization Plan No. 2 of 1994, Directive No. 138, and NMHC's Articles of Incorporation and Bylaws on file with the Registrar of Corporation as of February 06, 1995.

EFFECTIVE DATE: Pursuant to the APA, 1 CMC sec. 9105(b), these adopted regulations are effective 10 days after compliance with the APA, 1 CMC §§ 9102 and 9104(a) or (b), which, in this instance, is 10 days after this publication in the Commonwealth Register.

COMMENTS AND AGENCY CONCISE STATEMENT: Pursuant to the APA, 1 CMC sec. 9104(a)(2), the agency has considered fully all written and oral submissions respecting the proposed regulations. Upon this adoption of the regulations, the agency, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. Please see the following pages for this agency's concise statement, if there are any, in response to filed comments.

ATTORNEY GENERAL APPROVAL: The adopted regulations were approved for promulgation by the Attorney General in the above-cited pages of the Commonwealth Register, pursuant to 1 CMC § 2153(e), to review and approve, as to form and legal sufficiency, all rules and regulations to be promulgated by any department, agency or instrumentality of the Commonwealth government, including public corporation expect as otherwise provide by law.

I DECLARE under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 4th day of June, 2019, at Saipan, Commonwealth of the Northern Mariana Islands.

Certified and ordered by:

Aubry M. Hocog
Chairwoman,
Northern Marianas Housing Corporation

6/4/19
Date

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the certified final regulations, modified as indicated above from the cited proposed regulations, have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General, and shall be published (1 CMC § 2153(f) (publication of rules and regulations)).

Dated the 6 day of June, 2019.

EDWARD MANIBUSAN
Attorney General

Filed and
Recorded by:

ESTHER SN. NESBITT
Commonwealth Registrar

06.06.2019
Date

COMMONWEALTH PORTS AUTHORITY

Main Office: FRANCISCO C. ADA/SAIPAN INTERNATIONAL AIRPORT
P.O. Box 501055, Saipan, MP 96950-1055
Phone: (670) 237-6500/1 Fax: (670) 234-5962
E-mail Address: cpa.admin@pticom.com
Website: www.cpa.gov.mp

AMENDED
PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF REGULATIONS FOR THE COMMONWEALTH PORTS AUTHORITY (CPA)

PRIOR PUBLICATION IN THE COMMONWEALTH REGISTER AS PROPOSED RULES AND REGULATIONS
Volume 41, Number 1, pp 041332–38, of January 28, 2019

Addition of NMIAC § 40-40-620 to the Commonwealth Ports Authority Personnel Rules and Regulations

ACTION TO ADOPT THESE PROPOSED RULES AND REGULATIONS: The Commonwealth Ports Authority HEREBY ADOPTS AS PERMANENT NMIAC § 40-40-620, which was published in the Commonwealth Register pursuant to the procedures of the Administrative Procedure Act, 1 CMC § 9104(a). I certify by signature below that as published, such adopted regulations are a true, complete, and correct copy of the referenced Proposed Regulations, and that they are being adopted without modification.

PRIOR PUBLICATION: These regulations were published as Proposed Regulations in Volume 41, Number 1, pp 041332–38 of the Commonwealth Register.

AUTHORITY: The authority for promulgation of regulations for CPA is set forth in 2 CMC § 2122.

EFFECTIVE DATE: NMIAC § 40-40-620 will become effective ten days after publication of this Notice of Adoption in the Commonwealth Register. 1 CMC § 9105(b).

COMMENTS AND AGENCY CONCISE STATEMENT: During the 30-day comment period, the Authority received no comments regarding the proposed regulations. No individual requested the Authority issue a concise statement of the principal reasons for and against the adoption of the proposed amendments.

In March 2019, CPA inadvertently routed for signature a "Public Notice of Certification and Adoption of Regulations for the Commonwealth Ports Authority" for the adoption of the proposed regulations. That public notice was published in Volume 41, Number 3, pp 041423–24, of the March 28, 2019, Commonwealth Register. That notice mistakenly stated that the Personnel Committee recommended that the CPA Board of Directors adopted the proposed regulations on December 10, 2018, and that the Board of Directors adopted the proposed regulations as final at a December 18, 2018, Board of Directors meeting. The intent of this notice is to correct those errors and properly adopt the proposed regulation pursuant to the procedures of the Administrative Procedure Act.

At a Personnel Committee meeting held on March 14, 2019, the Committee agreed to recommend to the Board of Directors that the proposed regulations be adopted without further revisions. The Board of Directors adopted the proposed regulations as final at the May 10, 2019, Board of Directors meeting.

FRANCISCO C. ADA / SAIPAN INTERNATIONAL AIRPORT
Port of Saipan
P.O. Box 501055, Saipan, MP 96950

BENJAMIN TAISACAN MANGLONA INTERNATIONAL AIRPORT
Rota West Harbor
P.O. Box 561, Rota, MP 96951

TINIAN INTERNATIONAL AIRPORT
Port of Tinian
P.O. Box 235, Tinian, MP 96952

TERMS, SUBSTANCE, AND DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED: The adopted regulation provides the new section NMIAC § 40-40-620. Section 40-40-620 is added to establish that directives and other memoranda issued by the Governor of the Commonwealth of the Northern Mariana Islands that affect personnel matters will be made applicable to the Commonwealth Ports Authority, and the Executive Director may interpret and modify substantive provisions of such directives and other memoranda in order to tailor such documents to the Commonwealth Ports Authority. Additionally, NMIAC § 40-40-620 suspends any rules or regulations that conflict with such directives, memoranda, or interpretations thereof until such directives, memoranda, or interpretations are deemed no longer effective or applicable to the Commonwealth Ports Authority.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the ____ day of _____, 2019, at Saipan, Commonwealth of the Northern Mariana Islands.

Submitted by: _____ Date: 6/12/19
CHRISTOPHER S. TENORIO
Executive Director

Pursuant to 1 CMC § 2153(e) and 1 CMC § 9104(a)(3) the certified final regulations have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General and shall be published. 1 CMC § 2153(f).

Dated this 19th day of June, 2019.

LILLIAN A. TENORIO, DAG
for EDWARD MANIBUSAN
Attorney General

Filed and Recorded by: _____ Date: 06.26.2019
ESTHER SN. NESBITT,
Commonwealth Register

Commonwealth Healthcare Corporation
Commonwealth of the Northern Mariana Islands
1 Lower Navy Hill Road Navy Hill, Saipan, MP 96950

PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF RULES AND REGULATIONS OF THE COMMONWEALTH HEALTHCARE CORPORATION

PRIOR PUBLICATION IN THE COMMONWEALTH REGISTER
AS PROPOSED RULES AND REGULATIONS
Volume 41, Number 04, pp. 041627-041645, of April 28, 2019

AMENDMENTS TO THE CHCC CHARGEMASTER AND SCHEDULE OF BEH FEES

ACTION TO ADOPT PROPOSED REGULATIONS: The Commonwealth of the Northern Mariana Islands, COMMONWEALTH HEALTHCARE CORPORATION ("CHCC"), HEREBY ADOPTS AS PERMANENT regulations the Proposed Regulations which were published in the Commonwealth Register at the above-referenced pages, pursuant to the procedures of the Administrative Procedure Act,1 CMC § 9104(a). The CHCC announced that it intended to adopt them as permanent, and now does so. (Id.) A true copy is attached. I also certify by signature below that:

as published, such adopted regulations are a true, complete and correct copy of the referenced Proposed Regulations,

and that they are being adopted as published.

PRIOR PUBLICATION: The prior publication was as stated above.

MODIFICATIONS FROM PROPOSED REGULATIONS: Adoption as Amendments to the Chargemaster and BEH Schedule of Fees.

AUTHORITY: The Corporation is empowered by the Legislature to adopt these rules and regulations pursuant to 3 CMC Section 2826(c).

EFFECTIVE DATE: Pursuant to the APA, 1 CMC sec. 9105(b), these adopted regulations are effective 10 days after compliance with the APA, 1 CMC §§ 9102 and 9104(a) or (b), which, in this instance, is 10 days after this publication in the Commonwealth Register.

COMMENTS AND AGENCY CONCISE STATEMENT: Pursuant to the APA, 1 CMC sec. 9104(a)(2), the Corporation has considered fully all written and oral submissions respecting the proposed regulations. Upon this adoption of the regulations, the Corporation, if requested to do

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so by an interested person, either prior to adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

The adopted regulations were approved for promulgation by the Attorney General in the above-cited pages of the Commonwealth Register, pursuant to 1 CMC sec. 2153(e)

I DECLARE under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 19 of June, 2019 at Saipan, Commonwealth of the Northern Mariana Islands.

Certified and ordered by:

for _____
Esther L. Muna
Chief Executive Officer, CHCC

for _____
Lauri B. Ogumoro
Chair, CHCC Board of Trustees

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the certified final regulations, modified as indicated above from the cited proposed regulations, have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General, and shall be published (1 CMC § 2153(f) (publication of rules and regulations)).

Dated the 24th day of June, 2019.

_____
EDWARD MANIBUSAN
Attorney General

Filed and
Recorded by:

_____ 06.26.2019
ESTHER SN. NESBITT
Commonwealth Register

Date

P.O. Box 500409 CK, Saipan, MP 96950
Telephone: (670) 236-8201/2 FAX: (670) 233-8756

Commonwealth of the Northern Mariana Islands
COMMONWEALTH CASINO COMMISSION
Juan M. Sablan, Chairman
P.O. Box 500237
Saipan, MP 96950
Tel. 233-1857/8

PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF REGULATIONS OF THE COMMONWEALTH CASINO COMMISSION

PRIOR PUBLICATION IN THE COMMONWEALTH REGISTER
AS PROPOSED REGULATIONS
Volume 41, Number 03, pp 041438-489, of March 28, 2019

ACTION TO ADOPT PROPOSED REGULATIONS: The Commonwealth of the Northern Mariana Islands, ("CNMI"), Commonwealth Casino Commission ("the Commission"), HEREBY ADOPTS AS PERMANENT regulations the Proposed Regulations which were published in the Commonwealth Register at the above-referenced pages, pursuant to the procedures of the Administrative Procedure Act,1 CMC § 9104(a). The Commission announced that it intended to adopt them as permanent, and now does so. (Id.) A true copy is attached. I also certify by signature below that:

as published, such adopted regulations are a true, complete and correct copy of the referenced Proposed Regulations, and that they are being adopted without modification or amendment, except as stated as follows (and more particularly described below):

(1) Deletion and addition requiring promulgation of a time clock policy.
(2) Deletion removing inapplicable reference to health care and fire employees.
(3) Deletion concerning CCC ability to provide health insurance.
(4) Deletion concerning payment of accrued annual leave.
(5) Authorization of random drug testing for employees.

PRIOR PUBLICATION: The prior publication was as stated above. The Commission adopted the regulations as final at its meeting of June 27, 2019.

MODIFICATIONS FROM PROPOSED REGULATIONS, IF ANY:

1. § 175-10.3-135(a)(2) Work Hours amended to read: (2) The Commission is a 24-hour operation. In the Division(s) that operate outside of normal business hours, the Manager of the Division together with the Executive Director shall make a schedule for the employees who work hours other than the standard work week. ~~Please refer to the~~ The Executive Director shall promulgate a Time Clock / Biometric Timekeeping Policy~~, Policy No. 1095~~ for the hours of all units operating outside of the standard work week.
2. § 175-10.3-125(e) Compensation and Work Schedules " ... Employers may apply different work periods ~~for health care employees, or different work periods~~ and/or overtime thresholds for law enforcement ~~and fire~~ employees~~,~~ as permitted by federal law."

3. § 175-10.3-210(i) (i) The Executive Director may, with the concurrence of the Chairman, ~~ommission and of the Governor,~~ approve a lump-sum cash payment ...
4. § 175-10.3-290(a) (a) Insurance Benefits. Employees who are scheduled to work at least 40 hours each week may participate in insurance and medical benefit programs made available and, in the manner, provided under the Life and Health Insurance Programs (GLHIP) administered through the Department of Finance~~, or such other insurance program offered by the Commission~~. ...
5. § 175-10.3-325(f)(4) Alcohol and Drug Free Workplace Policy (4) Random Testing. During each calendar year, randomly-selected employees ~~performing safety sensitive functions~~ will be required to submit to breath tests for alcohol and urine tests for cocaine, marijuana, opiates, amphetamines, phencyclidine as well as any other controlled or banned substance required by the Executive Director. The testing will be done during on-duty time. Except as otherwise provided, the Commission shall pay for the testing.

AUTHORITY: The Commission has the authority to adopt rules and regulations in furtherance of its duties and responsibilities pursuant to Section 2314 of Public Law 18-56.

EFFECTIVE DATE: Pursuant to the APA, 1 CMC sec. 9105(b), these adopted regulations are effective 10 days after compliance with the APA, 1 CMC §§ 9102 and 9104(a) or (b), which, in this instance, is 10 days after this publication in the Commonwealth Register.

COMMENTS AND AGENCY CONCISE STATEMENT: Pursuant to the APA, 1 CMC sec. 9104(a)(2), the agency has considered fully all written and oral submissions respecting the proposed regulations of which it was aware. Upon this adoption of the regulations, the agency, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. The CCC received one comment from the Attorney General and made the requested amendment.

I DECLARE under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 27th day of June, 2019, at Saipan, Commonwealth of the Northern Mariana Islands.

Certified and ordered by:

Submitted by: _____ June 27, 2019
JUAN M. SABLAN — Date
Chairman of the Commission

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the certified final regulations, modified as indicated above from the cited proposed regulations, have been reviewed and approved

as to form and legal sufficiency by the CNMI Attorney General, and shall be published (1 CMC § 2153(f) (publication of rules and regulations)).

Dated the 28 day of June, 2019.

Hon. EDWARD MANIBUSAN
Attorney General

Filed and
Recorded by: _____

ESTHER SN NESBITT Date
Commonwealth Registrar

TITLE 175
COMMONWEALTH CASINO COMMISSION

Chapter 175-10	**Commonwealth Casino Commission**
Subchapter 175-10.1	**Commonwealth Casino Commission Rules and Regulations**
Subchapter 175-10.2	**Code of Ethics**
Subchapter 175-10.3	**Personnel Regulations**

CHAPTER 175-10
COMMONWEALTH CASINO COMMISSION

SUBCHAPTER 175-10.3
PERSONNEL REGULATIONS

Part 001
GENERAL PROVISIONS
§ 175-10.3-001 General
§ 175-10.3-005 Applicability
§ 175-10.3-010 Purpose
§ 175-10.3-015 Definitions
§ 175-10.3-020 Types of Employment

Part 100
STAFFING AND ADMINISTRATION
§ 175-10.3-101 Recruitment and Selection Procedures
§ 175-10.3-105 Disqualification of Applicants
§ 175-10.3-110 Nepotism
§ 175-10.3-115 Effective Dates
§ 175-10.3-120 Duty Station and Work Assignments
§ 175-10.3-125 Overtime and Compensatory Time
§ 175-10.3-130 Acting Appointment
§ 175-10.3-135 Work Hours
§ 175-10.3-140 Recognized Holidays with Pay

Part 200
EMPLOYEE BENEFITS
§ 175-10.3-201 Expatriation and Repatriation (Reserved)
§ 175-10.3-205 Housing (Reserved)
§ 175-10.3-210 Annual Leave
§ 175-10.3-215 Sick Leave
§ 175-10.3-220 Administrative Leave with Pay
§ 175-10.3-225 Holidays
§ 175-10.3-230 Advance Leave
§ 175-10.3-235 Court Leave
§ 175-10.3-240 Compassionate Leave
§ 175-10.3-245 Miscarriage Leave
§ 175-10.3-250 Pregnancy Disability Leave
§ 175-10.3-255 Maternity and Paternity Leave
§ 175-10.3-260 Military Leave
§ 175-10.3-265 FMLA Leave
§ 175-10.3-270 Leave without Pay
§ 175-10.3-275 Unauthorized Absence or Absence without Leave
§ 175-10.3-280 Part-Time Accrual
§ 175-10.3-285 Transfers within Government
§ 175-10.3-290 Insurance and Retirement Benefits

Part 300
EMPLOYEE CONDUCT AND OBLIGATIONS
§ 175-10.3-301 Grievance Procedures
§ 175-10.3-305 Termination of Services
§ 175-10.3-310 Non-Discrimination Policy
§ 175-10.3-315 Non-Tolerance of Sexual Harassment
§ 175-10.3-320 Anti-Bullying Policy
§ 175-10.3-325 Alcohol and Drug Free Workplace Policy
§ 175-10.3-330 Disciplinary Actions
§ 175-10.3-335 Vehicle Policy
§ 175-10.3-340 Outside and Dual Employment
§ 175-10.3-345 Safety Programs
§ 175-10.3-350 Whistleblower Policy
§ 175-10.3-355 Utilization of Sister Agencies

Part 001 – General Provisions

§ 175-10.3-001 General

(a) This chapter provides the regulations to appoint, reassign or transfer, promote or demote, or otherwise change status of, and to remove from service, employees who are employed by the Commonwealth Casino Commission (Commission).

(b) Public Law 18-56, enacted July 11, 2014, exempted the staff of the Commission from the Civil Service. The Commission has the authority to promulgate rules and regulations to regulate personnel matters. See 4 CMC §2316(a). Pursuant to this authority, the Commission promulgates the following Personnel Regulations, to be administered by the Executive Director.

§ 175-10.3-005 Applicability

(a) The regulations in this chapter shall apply to employment of personnel in all positions within the Commission. However, nothing in these regulations shall be construed to apply to Members of the Commission unless specifically stated otherwise.

(b) It is not the intention of the regulations in this chapter to create any legally protected property interests in employment with the Commission or any employment right or benefit not explicitly stated in these regulations or the employment contract. Notwithstanding any other regulation, policy, or practice to the contrary, all commission staff employment may be terminated at the will of the employee and/or employer pursuant to the terms of the contract and these regulations.

§ 175-10.3-010 Purpose

The regulations in this subchapter establish regulatory direction for employing, compensating, providing employee benefits, and effecting other personnel actions for Commission employees. These regulations shall be construed and applied to promote the following underlying purposes and policies:

(a) Simplify, clarify, and modernize the employment policies and practices of the Commission.

(b) Establish consistent employment policies and practices among various divisions and activities of the Commission.

(c) Create increased public confidence in the procedures followed in Commission employment.

(d) Ensure the fair and equitable treatment of employees within Commission.

(e) Provide safeguards for the maintenance of an employment system of quality and integrity.

§ 175-10.3-015 Definitions

For purposes of this subchapter, the following terms shall be defined as follows:

(a) "Dependent(s)" Spouse, minor children, unmarried and under 21 years of age, physically or mentally handicapped children incapable of supporting themselves, regardless of age, wholly dependent parents of employee or spouse, or minor children by

previous marriage, unmarried and under 21 years of age, for whom the employee or spouse have legal custody. Children by a previous marriage who are primarily domiciled by court order in other than the employee's household are not considered dependents.

(b) "CNMI" means the Commonwealth of the Northern Mariana Islands.

(c) "Commission" means the Commonwealth Casino Commission established by PL 18-56.

(d) "Commission Employee" An employee holding a position within the Commission, pursuant to a Commission Service Contract or other contract, and further pursuant to the laws and regulations of the Commonwealth.

(e) "Commission Service Contract" Employment contract entered into by the employee and employer for a term not to exceed five years, subject to the availability of funds, budgeted FTEs (if applicable), and any statutory limitations.

(f) "Commissioner" means the commission member of the Commission appointed and confirmed pursuant to PL 18-56.

(g) "Commonwealth" means the Commonwealth of the Northern Mariana Islands.

(h) "Members" mean the Commissioners of the Commonwealth Casino Commission.

(i) "Employer" The Commonwealth Casino Commission; or, if the context so requires, the hiring official.

(j) "Executive Director" means the Executive Director of the Commonwealth Casino Commission appointed pursuant to PL 18-56, or his or her designee.

(k) "FTE" Full-time employee.

(l) "Willful Abandonment" When a Commission employee is absent without authorized leave for a combined total of ten days without valid reason during a twelve-month period.

(m) "Termination for Cause" Termination for cause before the end of the contract term may be for any of the following reasons:

(1) Failure or inability to perform competently;

(2) Willful misconduct;

(3) Willful abandonment of job;

(4) Substantial or repeated violation of law, or of this subchapter, or of Division or Commission rules or policies;

(5) Willful failure or inability to plan, manage, or evaluate employee or unit performance in a timely or effective manner;

(6) Conviction of a felony or other crime involving moral turpitude;

(7) Other good cause that adversely affects the employee's ability to perform the job or that may have an adverse effect on the Division or Commission if employment is continued.

§ 175-10.3-020 Types of Employment.

The type of employment is dependent upon the position that is being filled. The Executive Director shall consider how best to accommodate and balance the present and expected future needs of the Commission with available and projected resources in determining the type of employment.

(a) Employment Contract – Employment Contract employees shall be hired on a contractual basis. Employment Contract employees shall be hired for a period of one to five years and are entitled to all the benefits of employment, including annual and sick leave, and are eligible for health and life insurance and the 401(a). Employees under this status are subjected to the Offer Letter of Employment from the Executive Director, the Commission Service Contract, and the additional Terms and Conditions of Employment promulgated by the Executive Director.

(1) Part-time Employment Contract employees may be hired for one or five years and do not receive annual or sick leave and are not eligible for health and life insurance or the 401(a) program.

(2) The contracts of all contract employees shall contain a 90-day probationary period. The Executive Director should try to provide periodic feedback so that the employee is aware of any deficiencies he or she needs to correct prior to the end of the 90-day period. The Executive Director may promulgate a feedback form for this purpose. An employee who receives all or primarily all "unsatisfactories" on the evaluative criteria should assume he or she will be separated from service. The Executive Director may provide a letter that the employee either has or has not successfully passed his or her probationary period. The employee who has not received a letter about passing the probationary period should request one. Once the employee successfully completes the probationary period, or extended probationary period(s), he or she can be terminated with or without cause, as may be allowed by the Commission Service Contract.

(3) No contract employee shall have an expectation of renewal of any contract and my not rely on any such expectation.

(b) Provisional Appointment – Provisional Appointment employees are hired by short term contract on no more than a 90-day period to fulfill an urgent need of the Commission. This is usually done in order to allow time to obtain a full-time permanent employee for the position. If the Commission still needs the services of the provisional employee and the position has not yet permanently been filled, the Executive Director may extend the provisional employee another 90 days but the employment of a provisional employee shall not exceed 180 consecutive days. Provisional employees receive annual and sick leave and are eligible for health and life insurance but cannot use any annual leave during the first 90-day period. If the employee is then converted to a full-time position, he or she still has to complete the 90-day probationary period.

(c) Limited Term Appointment – Limited Term Appointment employees may be hired by short term contract to work on programs funded through federal or Commonwealth grants. The terms of these employees shall be congruent with the budget cycle of the grant. Limited Term Appointment employees receive annual and sick leave and are eligible for health and life insurance but cannot use any annual leave during the first 90-day period.

(d) Temporary Appointment – Temporary Appointment employees are employees who are hired by a short-term contract for a period of less than one year. While their terms may be extended, there should be no expectation of and reliance upon an extension. Temporary employees do not receive annual or sick leave and are not eligible for health and life insurance or the 401(a) program.

Part 100 - Staffing and Administration

§ 175-10.3-101 Recruitment and Selection Procedures

(a) When the Executive Director seeks to fill a vacant position, he or she will first ensure the availability of funds by checking with the Department of Finance or otherwise. Executive Director will authorize a vacancy announcement to initiate a search for a qualified and suitable person. The terms for the position shall be in accordance with the position description. The recruitment and selection process will follow procedures established by Executive Director.

(b) An existing position is deemed to be vacant upon expiration or termination of the present or last employment contract. The position can be announced sixty days before the end-date of the current employment contract if the intent is not to renew the incumbent, or some shorter time should the intent to renew occur at a date closer to the expiration of the contract.

(c) There is no requirement for the employer to renew a Commission Service Contract. If the employer, through the Executive Director, elects to renew the employment contract of a Commission Employee, the employer, through the Executive Director, may waive the announcement of the position.

(d) Newly established or otherwise unfilled positions will be announced. Provided, however, when necessary for the provision of essential services, the Executive Director may waive the requirement of a vacancy announcement for selection of a candidate for any position within the Commission. However, prior to waiving the vacancy announcement, the Executive Director shall obtain certification of the availability of funds for the position to be filled.

(e) Upon selection of an applicant the Executive Director will cause a Commission Service Contract, with Terms and Conditions, to be routed. The selected candidate will not be authorized to begin work until the contract has been fully routed and approved, a negative report has been received for the pre-employment drug test, all other requirements have been met, and the Executive Director has made payroll certification that the employee has been employed in accordance with relevant statutes and regulations.

§ 175-10.3-105 Disqualification of Applicants

(a) The Executive Director may refuse to examine an applicant, or after examination may refuse to place his or her name on an eligible list, or may remove his or her name from an eligible list, or may refuse to certify any person on an eligible list who:

(1) Has failed to submit a complete and accurate application or failed to submit within the prescribed time limit;

(2) Is found to lack any of the minimum qualifications in the recruitment announcement or examination for the position;

(3) Has applied for a position as an "in-house" applicant, but whose last performance evaluation was below average;

(4) Has received any disciplinary action (other than an oral reprimand, warning, or counseling) from the Commission (or any other branch, agency or instrumentality of the Commonwealth government) within a 12-month period preceding application and it has not been rescinded;

(5) Is found to have been convicted for violation of the law of the CNMI or federal government within the past two years. Conviction includes guilty, "nolo" and "*Alford*" pleas.

(6) Has been convicted of any crime involving violence or dishonesty within the last two years;

(7) Has withheld information of material fact or made a false statement of material fact in regard to the application for employment;

(8) Has ever been dismissed from the Commission or from other employer for disciplinary reasons or resigned in lieu of termination;

(9) Has used or attempted to use bribery to secure an advantage in the examination or appointment;

(10) Has directly or indirectly obtained information regarding examinations to which the applicant is not entitled; or

(11) Is disqualified under other sections of these rules or the laws, regulations or policies of the CNMI Government or the Commission.

§ 175-10.3-110 Nepotism

There shall be no limit to the number of members of the same household who may be employed under other appointments, provided:

(a) No member of the same household may supervise another.

(b) All other qualifications for employment are met.

(c) No costs other than for salary and employment benefits as provided by regulation, shall accrue to the Commission as a result of hiring persons from a household containing another employee.

§ 175-10.3-115 Effective Dates

(a) Employment Start Date. Employment for all Commission Employees, whether residing inside or outside the Commonwealth at the time of hire, shall be effective on the first day the employee reports to work. Expatriation travel time is outside the employment period and will not be compensated.

(b) Contract Completion. Completion of the term of employment shall be effective on the last day of the term of the employment contract.

(c) Early Termination. Early termination of employment, with or without cause, shall be effective on the date of termination stated in the termination letter. Repatriation travel time is outside the employment period and will not be compensated.

§ 175-10.3-120 Duty Station and Work Assignments

(a) Duty station is primarily defined as Saipan, C.N.M.I. Duty Station may also, at the discretion of the Executive Director, include Rota, Tinian, the Northern Islands, or as otherwise assigned as the duties and responsibilities of the Commission may be expanded by legislation or executive order.

(b) The employee is assigned to a specific duty station as identified in the employment contract. However, with the employee's consent, the employee may be assigned to another duty station, based upon the needs of the Commission.

(c) If the transfer of duty station involves a permanent move for a period in excess of six months to another island within the CNMI, the employee shall be entitled to transportation for self and dependents, if any, and shipment of household effects, not to exceed 1,500 pounds for a single status employee or 3,000 pounds for an employee with dependents. This benefit is available only in cases where the transfer is initiated by the Commission.

(d) Temporary assignments to another duty station for periods of not more than ten consecutive workdays do not require the employee's approval, if the assignment is required by the needs of the Commission.

§ 175-10.3-125 Compensation and Work Schedules

(a) The salary will be subject fiscal availability (and to budget appropriations, if applicable) and will be expressed in terms of the gross amount to be paid during a twelve-month annual period, and for each of the twenty-six bi-weekly pay periods.

(b) Periods of compensable time shall include time worked during the assigned work schedule, overtime for overtime-eligible employees, legal holidays, and approved annual, sick, administrative and other leaves, as defined herein or subject to the Executive Order of the Governor. Periods of absence without leave (AWOL) and leave without pay (LWOP) will not be compensated and will be subject to appropriate timekeeping and administrative action.

(c) The employee's specific workday and workweek may differ from the standard workweek on a permanent basis, or vary from time to time, according to the needs of the Commission. Every effort shall be made to maintain a reasonable five-day, forty- hour work schedule, but the schedule is subject to variation, to include required overtime for overtime-eligible employees, extra hours for overtime-exempt employees, shifts of differing duration, and broken periods of duty, according to the needs of the Commission.

(d) All employees are covered by the Federal Fair Labor Standards Act (FLSA). Employees cannot waive their rights under FLSA. An employee will be designated as overtime-eligible or overtime-exempt based upon the duties performed and in accordance with the federal FLSA. Such designated executive, administrative, and professional employees are exempt from, and shall not be paid, overtime payment. These terms have the meanings given them in the federal Fair Labor Standards Act. The employee's overtime eligibility status is stated in the employment contract.

(e) Overtime for overtime-eligible employees shall be approved in accordance with a procedure established by the Executive Director. The Executive Director shall also establish a policy to address administrative actions for unauthorized overtime work. However, prohibition of unauthorized overtime does not relieve the employer of the requirement to pay for time actually worked. Overtime is that time a non-exempt employee is directed or permitted to work in excess of the 40 hours during a standard work week (40 hours in seven consecutive days). Employers may apply different work periods and/or overtime thresholds for law enforcement employees as permitted by federal law. Such overtime hours are paid at 1.5 times the regular rate of pay, as defined in the Fair Labor Standards Act.

(f) Compensatory time-off can be used to replace monetary payment for overtime-eligible employees, at the discretion of the Executive Director. In such cases replacement will be at the rate of one and one-half hours of compensatory time-off for each one hour of overtime worked. The employee's acceptance of employment serves as an agreement to receive compensatory time-off in lieu of paid overtime. The employer can require the employee to use the compensatory time-off that they have earned, rather than allowing it to excessively accumulate or paying it as overtime. Restated, this means that the Executive Director can schedule compensatory time-off periods and require the employee to take that time-off. This does not prevent an employee from also scheduling time off at a time of his or her choosing, as long as approving the request does not unduly disrupt the Commission's operations.

(g) Compensatory time accrued must be taken within the year that it was earned.

(h) The Executive Director may approve compensatory time or extra payment to an overtime-exempt employee, in exceptional situations. Such situations will be considered the exception, not the rule, and will be limited to declared emergencies and extraordinary work requirements. In such cases compensatory time-off or extra payment will be on a one-to-one regular base pay basis.

§ 175-10.3-130 Acting Appointment

(a) An acting appointment is made when an employee may be required to serve temporarily and accept responsibilities for work in a vacant higher-level position which the Executive Director has determined cannot be left vacant for any but the shortest period of time. This type of appointment gives the acting appointed employee no advantage in competition for regular filling of this position. However, time in acting appointment may be counted toward experience for the class of position concerned.

(b) All acting appointments require the written approval of the Executive Director. Any employee who is acting for a period in excess of 90 days will receive acting pay effective the 91st day in acting capacity. If the employee does not meet the minimum qualifications of the position for which he or she is in acting capacity, the acting pay will be at least 10% more than the employee was earning immediately prior to accepting the acting role but not more than the pay level for the position the employee is filling.

§ 175-10.3-135 Work Hours

(a) Regular Hours of Work.

(1) Regular working hours of the Commission employees shall consist of a five-day week, eight hours a day, 40 hours per workweek from 8:00 am to 5:00 pm. The standard workweek shall consist of the period from midnight Sunday to the following midnight Sunday.

(2) The Commission is a 24-hour operation. In the Division(s) that operate outside of normal business hours, the Manager of the Division together with the Executive Director shall make a schedule for the employees who work hours other than the standard work week. The Executive Director shall promulgate a Time Clock / Biometric Timekeeping Policy for the hours of all units operating outside of the standard work week.

(b) Evening and Night Shift Differential. (RESERVED)

(c) On-Call Employees (RESERVED)

(d) Time and Attendance Record. All Commission employees shall sign a Time and Attendance Record such as may be required by the Executive Director. The Executive Director shall review and approve Time and Attendance Records. The Commission pay periods shall be identical with those of the CNMI Government. Executive, managerial, professional and exempt employees are expected to work the regular 40 hours a week of employment but need not time-in or time-out.

(e) Payment of Salary. All Commission employees shall be paid within two weeks after end of every pay period.

(f) Temporary Schedule. Temporary shifting of employee's working hours to meet routine needs may be done as necessary and if approved by the Division Manager or the Executive Director. Changes in temporary schedule for more than one-week duration require at least one week's advance notice to employees except in emergency situations, or when the employees waive the need for notice.

(g) Lunch Period. For most positions, lunch shall be one-hour unpaid time, usually from 11:30 am to 12:30 pm. Deviation from the standard lunch time requires the approval of the employee's Supervisor or the Executive Director. If employee is on a shift schedule, lunch or dinner break should be complied accordingly based on existing policy.

(h) Rest Periods. Employees are entitled to rest periods of fifteen minutes during the first four (4) hours of work and another fifteen minutes during the second four hours of work. The responsibility for scheduling break periods rests with the immediate supervisor. The 30 minutes allotted for break time may not be used to lengthen lunch hours or shorten working days. Rest periods shall not be used to cover late arrivals nor may they be accumulated for scheduled time-off.

(i) Changes of Permanent Schedule. All long-term changes to the established work schedules shall be provided to the employees affected at least one week's notice prior to the change, if possible, except in emergency situations or when the employees waive the need for notice.

§ 175-10.3-140 Work Hours Recognized Holidays with Pay (a) Holidays with Pay. The following days will be recognized as holidays with pay for all employees. These holidays are subject to change pursuant to Executive Order of the CNMI Governor or by statute.

New Year's Day (January 1)

Martin Luther's King, Jr. Day (3rd Monday in January)

President's Day (3rd Monday of February)

Covenant Day (3rd Friday in March)

Good Friday (as designated by the Catholic Church calendar)

Memorial Day (last Monday in May)

Independence Day (July 4)

Labor Day (September 4)

Commonwealth Cultural Day (2nd Monday in October)

Citizenship Day (November 4)

Veteran's Day (November 11)

Thanksgiving Day (last Thursday in November)

Constitution Day (December 8)

Christmas Day (December 25)

(b) Holiday Falling on Saturday or Sunday. When a recognized holiday falls on a Saturday, the preceding Friday shall be recognized as the holiday. When a recognized holiday falls on a Sunday, the Monday following shall be recognized as the holiday.

(c) Computation of Holiday Pay

(1) Employees shall receive their regular straight time rate of pay for recognized holidays if they do not work.

(2) Employees who are not managers but who work on the holiday shall receive at the rate of one compensatory time-off hour for each one hour of holiday hours worked. Managers who work on a holiday shall receive a compensatory day off.

(3) Holiday during annual, or sick leave. A recognized holiday occurring during the employee's annual or sick leave shall not be counted as a day of annual or sick leave.

(d) Forfeiture of Holiday Pay. Employees shall forfeit their right to payment for any holiday if they are on leave without pay (LWOP) or absent without leave authorization (AWOL) for the entire shift on the last regular work day preceding such holiday or on the next regular work day following such holiday.

(e) Pay for Employees who Work on a Holiday. Employees who perform work on a holiday will be compensated straight time pay in addition to the holiday pay. Overtime rate will be applied for hours worked beyond the 40-regular work hours. A work hour is defined as actual hours of performance. Holiday hours are not counted as regular work hours.

Part 200 - Employee Benefits

§ 175-10.3-201 Expatriation and Repatriation [Reserved]

§ 175-10.3-205 Housing [Reserved]

§ 175-10.3-210 Annual Leave

(a) Annual leave, or vacation, shall be granted for the purpose of rest and relaxation. Except as provided in this section, employees who have less than three years of creditable service shall earn annual leave at the rate of four hours per pay period. Employees with three but less than six years of creditable service shall earn annual leave at the rate of six hours per pay period. Employees with six or more years of creditable service shall earn annual leave at the rate of eight hours per pay period.

(b) Activity or division heads, attorneys, executive directors and assistant executive directors shall earn annual leave at the rate of eight hours per pay period.

(c) Annual leave accrual rate per pay period for Commission Employees with advanced degrees and/or exceptional skills or experience shall be at a rate not to exceed eight hours, and:

(1) Based, specific to each employee, upon:

(i) The critical need to fill the position;

(ii) The availability of qualified applicants; and

(iii) The amount and quality of related education, training, and experience possessed by the employee.

(2) An employee employed in the first year of the initial contract shall not be entitled to use annual leave during the first ninety days of employment. Annual leave earned during this period will be credited to the employee upon completion of this initial period. This restriction does not apply to employees employed on an immediately subsequent contract.

(d) Commission Employees shall accrue annual leave at the rate set forth in their employment contract. If the employee takes leave without pay (LWOP) or is in an absence without leave (AWOL) status there will be no leave accrual for that pay period.

(e) Annual leave may be used only upon prior written approval of the employer and will be scheduled based upon the needs of the employer. Annual leave requests must be made in advance, except in cases of bona fide emergencies, on a leave request form provided by the Executive Director. All annual leave requests must be approved by the Executive Director. The employer will approve all properly submitted leave requests unless the needs of the government prevent the absence of the employee.

(f) Annual leave must be utilized during the contract period. Except as provided in subsections (g), (h), and (i) below, any annual leave not utilized will be converted to sick leave at the end of the employment term. No cash payment will be made for unused annual leave, except as provided for in subsection (i) below.

(g) If an offer and acceptance for a new employment contract is agreed upon, or if a civil or excepted service employee accepts a contract with the Commission, accrued and unused annual leave credits from the prior period of employment, not to exceed 360 hours, shall be carried over to the new employment contract. Unused annual leave in excess of the limits cited above will be converted to sick leave.

(h) Employees converting from the civil service or excepted service status will be authorized to carry over not more than 360 hours of annual leave. Hours in excess of this amount will be converted to sick leave if not used prior to conversion.

(i) The Executive Director may, with the concurrence of the Chairman, approve a lump-sum cash payment of up to 360 hours of unused annual leave in cases of involuntary separation due to reasons of bona fide personal emergency beyond the control of the employee or as otherwise permitted by the regulations or the Executive Director.

§ 175-10.3-215 Sick Leave

Accumulation of sick leave is allowed primarily for the purpose of providing an employee with an economic cushion to be used in the event of an illness or lengthy absence for legitimate medical reason. In addition, in accordance with PL 15-69, as repealed in part by PL 15-115, an employee may use sick leave to care for a sick spouse or child. In this case, "sick" means a serious or life-threatening illness. Approval of the Executive Director is required to use sick leave in this way. A doctor's certification will be required.

(a) Sick leave shall accrue to the employee at the rate of four hours per pay period, provided the employee has been in pay status as required by the employment contract. If the employee takes leave without pay (LWOP) or is in an absence without leave (AWOL) status the sick leave accrual shall be prorated for that pay period.

(b) The employee is entitled to use accrued sick leave from the time sick leave is first earned. An employee who is absent from work for a reason for which Sick Leave may be used shall inform his or her immediate supervisor of the fact and reason, and failure to do so within a reasonable time may be cause for disciplinary action. Notification in this context shall mean notification no later than an hour after the accident, emergency or injury, or advance notice if medical and/or dental appointment is being sought.

(c) Any absence on sick leave where the employee misses more than three continuous days of work must have the illness verified by a note from a medical doctor in order to claim sick leave.

(d) The employee is not entitled to any payment for accrued and unused sick leave upon completion of an employment contract or termination of employment.

(e) If an offer and acceptance for a new period of employment is agreed upon under a new employment contract/appointment, all accrued and unused sick leave credits from the prior contract/appointment will be carried over, provided that if the employee is separated from government service for a period longer than three years, the employee shall be divested of accumulated sick leave.

(f) If the Executive Director has reasonable grounds to believe that the employee is misusing sick leave, or requesting sick leave for purposes other than illness, the Executive Director may request proof of illness from a health care professional for any period of illness. If the certification is not provided, or is unpersuasive, the supervisor may deny the sick leave request. Disallowed sick leave shall be charged as Annual Leave, if available, or AWOL.

(g) Sick leave may be accumulated without limit.

(h) Commission Employees are eligible for the sick leave bank program pursuant to applicable regulations adopted on October 16, 1997 and published in the Commonwealth Register, Vol. 19, No. 11, on November 15, 1997, at pages 15748-15757. (See NMIAC title 100, chapter 50).

(i) Sick Leave Bank

(1) Donation. The Commission hereby establishes a Sick Leave Bank. Employees may donate sick leave either to a designated employee or to the Sick Leave Bank in general. Employees may donate as much sick leave as they want to the Bank but no more than 160 hours to any specific employee.

(2) Use. Employees must be approved by the Executive Director to use the Sick Leave Bank. In order to be eligible, employees must have a serious or life-threatening illness or accident that precludes the employee from working. The employee must have exhausted all other leave, including advanced leave, prior to using the Sick Leave Bank. Employees using either designated time or general Sick Leave Bank time may use no more than 160 hours total during the course of their employment.

(j) Transfer-In of Sick Leave from other CNMI Government Agencies. The Commission will accept up to 500 hours of sick leave from other CNMI Government agencies.

(k) For employees with serious medical conditions resulting in prolonged illness or disability as documented by his or her physician, unpaid sick leave may be requested under the Family Medical Leave Act (FMLA).

§ 175-10.3-220 Administrative Leave with Pay

Administrative leave with pay may be granted by the Governor or the Executive Director for a public purpose.

§ 175-10.3-225 Holidays

Unless the Executive Director determines that the Commission Employee must, due to the services provided by the employee, report to work on a legal holiday, the employee shall be released from work on all legal holidays, except during emergencies.

§ 175-10.3-230 Advance Leave

Where, for good reason, the employee requires an advance of annual or sick leave, the Executive Director may grant leave in advance up to a maximum of one-half of the total eamable leave credits for one year from the date the request is approved or for the remainder of the employment contract/appointment, whichever is shorter. Subsequent leave earnings shall serve to replace the amount of advance leave taken. In the event an employee resigns from his or her employment, any annual or sick leave overdraft must be paid as part of the final clearance.

§ 175-10.3-235 Court Leave

The Commission encourages its employees to fulfill their obligations as citizens and residents of the Commonwealth and the federal government. Thus, employees who are called upon to serve as jurors and witnesses may, at their option, be granted court leave for such period as required by the court. Employees who are called to jury duty or as witnesses

shall present their summons to their immediate supervisor together with a completed request for leave for his or her signature and processing. Employees using court leave to cover the period of absence shall turn over to the Commission such jury or witness fees (as distinct from expense allowances) as they receive from the court or summoning party. Expense allowances paid the employee for whatever purpose may be retained by the employee to defray the expenses for which granted.

§ 175-10.3-240 Compassionate Leave

Full-time Commission Employees may be granted compassionate leave of no more than five workdays, not necessarily consecutive, in cases of death in the immediate family of the employee. For the purpose of this section, the term immediate family shall include a mother, father, brother, sister, spouse, immediate offspring (natural and culturally or legally adopted), stillborn child, grandfather, grandmother, grandchild, mother-in-law, or father-in-law. Compassionate leave must be taken within eighteen days after the death of the immediate family member.

§ 175-10.3-245 Miscarriage Leave

Miscarriage leave shall be granted to a Commission Employee who is absent from work because of miscarriage or the subsequent convalescence. Such miscarriage leave shall not exceed five work days, and shall be in addition to any accumulated sick leave. An employee who wishes to claim miscarriage leave must have the miscarriage verified by a note from a medical doctor in order to claim miscarriage leave. Any additional leave taken after five work days shall be charged against accumulated sick leave.

§ 175-10.3-250 Pregnancy Disability Leave

Pregnancy disability leave shall be granted to a Commission Employee who is absent from work because of childbirth or the subsequent convalescence. Such pregnancy disability leave shall not exceed thirteen work days, shall be in addition to any maternity leave or accumulated sick leave, and shall be any thirteen work days encompassing the date of childbirth. Any additional leave taken for such childbirth purposes shall be charged against accumulated sick leave. Pregnancy disability leave shall be available to a Commission Employee who suffers a still birth.

§ 175-10.3-255 Maternity and Paternity Leave

Maternity or paternity leave shall be granted to a Commission Employee who is absent from work because of the employee or the employee's spouse giving birth. Such leave shall also be available for absences due to the cultural or legal adoption of a child. Such maternity or paternity leave shall not exceed two work-days and shall be taken within one week of the date of childbirth or the adoption.

§ 175-10.3-260 Military Leave

(a) Any employee who is involuntarily enlisted, drafted or is called into active service in the armed service of the United States shall be granted military service leave in accordance with this Section and applicable Federal Law. Upon discharge from such service, the employee shall be re-employed with such seniority, status and pay as would have been attained if employment had continued with the Commission without interruption, provided

that the employee's absence has not voluntarily exceeded two years and application for re-employment was made within 30 days of release from active military service.

(b) In accordance with local and federal laws, any employee who enlists or is called to federal active duty, territorial active military service or training duty as a Reserve of the Armed Forces or a member of the National Guard will be granted up to 120 hours of unpaid military leave for the period of active duty upon presentation of Orders into service to the Executive Director or his or her designee. This leave shall be granted solely for the purpose of and will continue only for the time stated in the Orders into service and that said employee is actually performing said military service.

(c) Any employee who is a veteran of a branch of the United States Armed Services will be excused from work duties without loss of pay for the time necessary, not to exceed eight hours in any one day, to participate as an active pall bearer or as a member of a firing squad or honor guard in a funeral ceremony for a member of the Armed Forces of the United States whose remains final interment is in the Commonwealth.

(d) Extended military leave shall be granted to employees pursuant to the federal Uniformed Services Employment and Reemployment Act (USERRA).

§ 175-10.3-265 FMLA Leave

Leave under the federal Family and Medical Leave Act of 1993 (FMLA) shall be granted to employees as provided in FMLA.

§ 175-10.3-270 Leave without Pay

The Executive Director or his or her designee shall be the approving authority for Leave without Pay (LWOP). It is the responsibility of the employee to apply for leave without pay. If LWOP is not authorized, it is characterized on the employee's payroll as Absent without Leave (AWOL). If an employee believes he or she has been adjudged AWOL improperly, he or she needs to clear that issue with the Executive Director within the next pay period after having received the AWOL. Leave and benefits shall not accrue during leave without pay except as provided in this section. The employer-employee relationship is maintained during a period of leave without pay, but the Commission shall pay no other compensation.

§ 175-10.3-275 Unauthorized Absence or Absent Without Leave (AWOL)

(a) Absence without Leave is defined as leave without approval and may subject the employee to discipline. For purposes of this section, AWOL will be evaluated per calendar year. Previous years' AWOL will not apply to subsequent years for disciplinary purposes. Such leave is unpaid.

(1) Discipline may be as follows:

(i) Employees who accrue AWOL hour(s) during any one pay period shall be issued a reprimand.

(ii) Employees who accrue an additional hour(s) after reprimand in any following pay period shall receive a five-day suspension without pay.

(iii) Employees who accrue an additional hour(s) after a five-day suspension shall be terminated.

(iv) Employees who accrue 80 hours of AWOL in one year shall be terminated.

(b) Abandonment of Position. Any employee AWOL for a consecutive total of 10 working days shall be deemed to have resigned without notice by abandonment of position. Employees will be responsible to submit leave applications prior to the leave being taken or immediately upon return to work. Failure by the employee to submit leave applications may result in AWOL. For circumstances that are beyond the control of the employee, AWOL may be amended. The AWOL assessed may only be amended on the following payroll. Amendments will not be allowed on the second pay period following the AWOL assessment.

§ 175-10.3-280 Part-Time Accrual

Part-time or intermittent employees with regular scheduled tours of duty of forty to less than eighty hours during a biweekly period will accrue annual leave and sick leave at a prorated amount of the full-time benefit, rounded off to the nearest quarter hour per pay period, and will be eligible for other paid leaves, provided in this part, at this rate. Part-time or intermittent employees with regular scheduled tours of duty of less than forty hours during a biweekly pay period will not accrue annual or sick leave or be eligible for the other paid leave benefits. If a part-time or intermittent employee takes leave without pay (LWOP) or is in an absence without leave (AWOL) status for a scheduled duty period there will be no leave accrual for that pay period.

§ 175-10.3-285 Transfers within Government

(a) If a Commission Employee transfers to another position within the executive branch, the new employer may assume all liability for the payment or transfer of all earned contractual benefits. Transfers to similar positions within the executive branch with no change in salary may be affected by the employer with or without the employee's permission.

(b) If a Commission Employee transfers to another government entity, the receiving entity may assume any liability for the payment or transfer of all earned contractual benefits. Similarly, the Commission may assume a similar liability for the payment or transfer of all earned contractual benefits if it accepts the transfer of an employee contractually entitled to such benefits from another government entity.

§ 175-10.3-290 Insurance and Retirement Benefits

(a) Insurance Benefits. Employees who are scheduled to work at least 40 hours each week may participate in insurance and medical benefit programs made available and, in the manner, provided under the Life and Health Insurance Programs (GLHIP) administered through the Department of Finance. Such benefits shall continue to be in effect during absences due to paid leave, up to three (3) months of family and medical leave, and approved leave without pay when the employee pays the insurance premium.

(b) Retirement Benefits.

(1) Employees currently grandfathered in to the NMI Settlement Fund will be able to retire consistent with the NMISF regulations.

(2) Full time employees not part of the NMISF will be allowed to participate in the CNMI's 401(a) plan to the same extent as employees of the central government.

Part 300 - Employee Conduct and Obligations

§ 175-10.3-301 Grievance Procedure(s)

(a) A Commission Employee may submit a grievance regarding any matter involving the interpretation, application, or alleged violation of any Policy, Rule or Regulation or any other matter concerning general conditions of employment. The aggrieved employee shall first discuss the grievance with the immediate supervisor in an attempt to resolve the issue. If the issue cannot be resolved with the immediate supervisor or manager, the employee should contact the Executive Director or his or her designee. The Executive Director or his or her designee will attempt to satisfactorily resolve the grievance. The employee may appeal an unsatisfactory determination of the designee to the Executive Director. If the matter has been addressed by the Executive Director, the employee shall not seek contravention of that decision by the Commission or any individual Member of the Commission; the decision of the Executive Director shall be treated as a final agency decision.

(b) Commission Employees may seek dispute resolution to resolve conflicts and disputes by means of a mediation procedure as provided by the Executive Director and pursuant to available resources.

§ 175-10.3-305 Termination of Services

An employee may be separated from employment with the Commission by resignation, retirement, involuntary termination (either with or without cause), or lay off.

(a) Resignation.

(1) An employee should submit a written resignation at least 60 calendar days notice prior to the effective date of separation to the Executive Director. The period of notice may be reduced or waived by the Executive Director.

(2) Withdrawal of Resignation. An employee may withdraw his or her resignation only with the written approval of the Executive Director. Approval shall be obtained before the effective date stated in the resignation.

(3) Failure to give adequate notice. Failure to give adequate notice of resignation may be considered separation not in "good standing" and may preclude consideration for future employment with the Commission.

(4) Effective Date of Separation. The effective date of separation shall be at the close of business on the last day on which the employee works or uses approved leave.

(b) Retirement. Employees retiring from the Commission are required to provide a written notice the same as if they were resigning. This advance time is needed so that retirement benefits can begin as soon as possible following date of retirement and to allow

management to plan for the departure of the retiring employee. Employees should submit a letter indicating the date of retirement to the Executive Director accompanied by a letter from the Northern Mariana Island Settlement Fund indicating eligibility for retirement.

(c) Austerity/Reduction in Hours. If the need arises for austerity, employees may have their hours reduced. The Notice shall be given 30 days in advance of the beginning of the austerity. The Governor or Executive Director may exclude certain positions from the austerity. Neither the Governor's nor the Executive Director's decisions to exclude or not to exclude positions for austerity are grievable.

(d) Payment upon Separation.

(1) Employees may be paid out for unused annual leave. Employees should be aware of their leave balances and plan to exhaust their annual leave prior to their separation date. If an employee has leave that he or she is not able to use due to short staffing or some other emergent condition, the employee shall seek the approval of Executive Director to get approval to have those funds paid out.

(2) Moneys the employee owes the Commission or any agency or instrumentality of the Commonwealth Government shall be deducted from the final paycheck. Deductions from accrued leave pay may be made for the replacement value or fair market value of the Commission's property not returned by the employee on or before the effective date of separation

(3) Final paycheck for separation on account of death of employee shall include final wages or salary and other payments the Commission owes the employee, e.g., reimbursable travel advances and other similar payments made by the employee on behalf of the Commission.

(4) Final paycheck shall be paid only to the beneficiary designated in writing filed by the employee before death or to the employee's estate. Commonwealth law does not recognize common-law spouses. If no beneficiary has been designated final payment should be made to surviving legal spouse; if no legal spouse, to surviving children, or guardian of any minor children in equal shares; otherwise to father and/or mother in equal shares; if parents are not living, then to brothers and sisters in equal shares; if no surviving next of kin, payment should be made to the Commission as escheat.

(e) Medical Separation. An employee who is unable to return to work or has been determined by a licensed physician or medical professional as unable to perform the essential duties of the job, in accordance with federal and CNMI laws and Commission policies (sick leave, annual leave, and FMLA leave) shall be separated from employment.

(f) Termination

(1) The Executive Director may terminate the employee without cause upon written notice sixty days in advance of the date of termination of employment. This time may be shortened only by specifying in the employment contract a lesser period of advance notice. Such notice shall specify the date of termination and be delivered in person to the employee, or by certified mail if the employee is otherwise unavailable for personal delivery. Payment of salary comprising the sixty-day (or contractually shortened) notice period may be made in lieu of notice.

(2) The Executive Director may terminate the employee with cause upon written notice seven days in advance of termination of employment. Payment of salary comprising the seven-day notice period may be made in lieu of notice.

§ 175-10.3-310 Non-Discrimination Policy

(a) It is the policy of the Commission that discrimination, for or against any employee, because of race, creed, color, gender (including sexual harassment), sexual orientation, national origin, age, religion, political affiliation, organizational membership, veteran status, disability, or genetic information is prohibited and will not be tolerated. No adverse action or hiring decision shall be made on the basis of any of the above factors except that veteran status may be considered positively as permitted by law.

(b) The Commission shall maintain every workplace free from unlawful harassment, including sexual harassment. Any employee or official who engages in any act of discrimination or harassment on the basis of any of the above factors violates Commission policy, and such misconduct will subject the employee to corrective action ranging from counseling to disciplinary action up to and including termination. Such harassment by a non-employee (for example, a client or contractor) is also prohibited. The Commission shall not tolerate any such outside harassment and shall take necessary action to prevent its continuation or recurrence.

(c) Any employee who feels that he or she has been discriminated against on the basis of any of the above factors, or sexually harassed, should immediately report such incidents to a supervisor at any level without fear of reprisal. Confidentiality will be maintained to the extent permitted by the circumstances.

(d) Any Commission employee who receives a claim of discrimination or harassment in violation of this policy shall take such complaint seriously and immediately advise the Executive Director or the Commonwealth Equal Employment Opportunity (EEO) Coordinator of the situation. The Executive Director, with the assistance of the EEO Coordinator, if sought, will ensure that it is investigated promptly, privately, and with as much confidentiality as possible, consistent with the need to determine the facts. The investigation will be documented by an investigative report that will be retained in a confidential file by the Executive Director or EEO Coordinator. Any person accused of a violation shall be allowed the opportunity to rebut the charges.

(e) After determining the facts through the investigation, the Executive Director shall take corrective action as required by the circumstances. This may include counseling any employee, whether or not a violation has occurred; imposing an appropriate sanction, including disciplinary action; making sure that this policy is reiterated to all employees or any group. An employer, or any supervisory staff, who does not take appropriate action also violates this policy and exposes the Commonwealth government to liability.

§ 175-10.3-315 Non-Tolerance of Sexual Harassment

(a) Applicability. This policy and procedures applies to all Commission Employees and Members of the Commission.

(b) Purpose. This policy and procedure will establish the Commission's policy of non-tolerance of sexual harassment of any form, by its Members or employees, toward its

Members or employees, or by non-governmental agents against the Commission's Members or employees. It will also provide guidance for the education and training of Members and employees to recognize, avoid and prevent sexual harassment in the workplace. This policy and procedure will provide steps for reporting, investigating, and taking administrative action in situations involving sexual harassment.

(c) Definitions

(1) Sexual harassment is an unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature. Sexual harassment occurs when:

(i) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or

(ii) Submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or

(iii) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

(2) Sexual harassment can be divided into two basic types of misconduct:

(i) When an employee or Member suffers or is threatened with a quid pro quo (this for that) situation. This form of sexual harassment occurs when a supervisor or someone else with authority over the victim makes a put out or get out demand, such as "submit to my sexual requests or you will be fired, demoted, passed over for promotion, or in some other way made miserable on the job". This type of sexual harassment can be committed only by someone in the organization structure who has the power to control the victim's job destiny.

(ii) When behavior in the workplace creates a hostile environment. This form of sexual harassment occurs when a supervisor, co-worker, or someone else with whom the victim comes into contact on the job creates an abusive work environment or interferes with the employees work performance through words or deeds because of the victim's gender. The following kinds of behavior have been recognized by the courts as contributing to a sexually hostile environment:

(A) Discussing sexual activities;

(B) Telling off-color jokes;

(C) Unnecessary touching;

(D) Commenting on physical attributes;

(E) Displaying sexually suggestive pictures;

(F) Using demeaning or inappropriate terms, such as babe, honey, etc.;

(G) Using indecent gestures;

(H) Sabotaging the victims work;

(I) Engaging in hostile physical conduct;

(J) Granting job favors to those who participate in consensual sexual activity; or

(K) Using crude and offensive language;

(L) Wearing provocative, sensual attire, i.e. tight, skimpy, short-length, etc.

(iii) The above listed behaviors can create a liability for the government and any such conduct must be addressed and corrected at its earliest stage before it becomes severe or pervasive.

(3) A workplace environment is considered sexually hostile when conduct occurs that meets the following two conditions:

(i) It must be subjectively perceived as abusive by the person(s) affected, and

(ii) It must be objectively severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive.

(iii) A determination of whether or not a situation would be construed as sexual harassment should also take into consideration the following factors:

(A) The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex;

(B) The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee;

(C) The victim does not have to be the person harassed, but could be anyone affected by the offensive conduct;

(D) Unlawful sexual harassment may occur without economic injury to the victim;

(E) The harassers conduct must be unwelcome.

(4) Sexual discrimination is distinguished from sexual harassment in that it reflects biases in employment actions based upon gender, but does not involve the abusive behavior described in subsection (c) above.

(d) Policy

(1) It is the policy of the Commission that all Members and employees shall enjoy a work environment free from sexual harassment and all forms of discrimination. Sexual harassment is illegal, under Title VII of the Civil Rights Act of 1964, as amended and as implemented by 29 CFR 1604.11, and is prohibited under this chapter and Article 1, Section 6, of the Commonwealth Constitution.

(2) Sexual harassment is specifically prohibited and will not be tolerated in any form, regardless of whether the offensive conduct is committed by Members, supervisors, managers, non-supervisors (co-workers), or nonemployees (consultants, contractors, general public).

(3) All employees are encouraged to report any violation of this policy. If management is not aware of specific incidents of sexual harassment in the workplace it cannot properly address them. If an employee observes or is subjected to sexually discriminatory or harassing behavior in the workplace, it should be reported immediately to the Executive Director so it can be resolved at the earliest possible time. Employees will not be retaliated against for making truthful statements about perceived harassment.

(4) No employee will be denied or will receive employment opportunities and/or benefits because of a sexual relationship with a Member, co-worker or supervisor. No Member, employee or non-employee shall imply to an employee, an applicant for employment, or a client of a government activity, that conduct of a sexual nature will have an effect on that person's employment, assignment, advancement, other condition of employment, or any other relationship with the government. Any incidents of this type, upon verification by investigation, will be subject to disciplinary and corrective action.

(5) The employer, at all supervisory levels, is responsible for the occurrence of acts of sexual harassment in the work place when they know or should have known of the prohibited conduct. As an official of an autonomous agency of the Commonwealth government, a supervisor's improper action or failure to act creates a liability on the part of the government. All incidents of sexual harassment will be immediately reported to the Equal Employment Opportunity Coordinator or Executive Director, for guidance. Supervisors and managers who knowingly allow harassing behavior to occur, or participate in such behavior, will be subject to disciplinary action up to and including termination.

(6) The Director of Personnel, as the Deputy Commonwealth Equal Employment Officer, should be immediately informed by the Executive Director of any incident of sexual harassment reported within the Commission, or of any charges received from the Equal Employment Opportunity Commission (EEOC).

(7) The Executive Director will ensure that all sexual harassment complaints receive swift and thorough investigations. Appropriate action will be taken in situations where the complaint is validated to correct the situation and appropriately discipline the harasser. Complaints determined to be deliberate false accusations will also be treated as potential disciplinary situations. Situations where the victim requests that no investigation be conducted or action taken must also be investigated and acted upon to avoid future liability and to effect consistent enforcement of the Commission's policy of non-tolerance for sexual harassment.

(8) Complaints of sexual harassment should be filed immediately upon occurrence to facilitate a timely response and to minimize the time that an employee would be subjected to such treatment. However, per EEOC statutes complaints may be filed anytime within one-hundred and eighty days of an incident's occurrence.

(9) Incidents of harassment due to an employee's sexual orientation, while not covered by law as an Equal Employment Opportunity violation, are a violation of the Commission's policy of ensuring that every employee is provided with a work environment that is safe, non-threatening, and non-discriminatory. Incidents of this nature comprise misconduct and will be subject to disciplinary action up to and including termination.

(10) The hiring of an employee with a known history of sexual harassment or misconduct could result is government liability for negligent hiring. No applicant for employment with such a history will be employed without a complete background investigation and the specific approval of the Executive Director.

(11) The Executive Director is required to distribute this policy to every employee under his or her authority and to ensure that this policy is posted in an accessible location at all times.

(12) All supervisors will be provided training on identifying and preventing sexual harassment in the workplace. They will also receive training on how to conduct a limited administrative investigation and the reporting procedures for allegations of harassment.

(e) Procedures

(1) Any Commission Employee who is aware of an incident or situation involving sexual harassment must report it immediately to his or her Equal Employment Opportunity Coordinator, supervisor, or the Executive Director. The Commonwealth government has legal liability for any action where a government official subjects an employee to sexual harassment, or is aware that an employee subjects another employee to sexual harassment and fails to take corrective action.

(2) Any employee who is personally subjected to sexual harassment, or is aware that other employees are being subjected to sexual harassment, should report the incident or situation immediately to his or her departmental Equal Employment Opportunity Coordinator, supervisor, or the Executive Director. If the employee does not feel comfortable bringing it to the attention of any of these parties, or supervisor, or the Executive Director is somehow involved in the harassment, he or she should immediately contact the Commonwealth Equal Employment Coordinator at the Office of Personnel Management, or the Director of Personnel directly. The initial contact does not have to be in writing.

(3) If the sexual harassment incident involves a physical assault, such as rape, attempted rape, assault, or other actions involving physical contact, either the employee or the official who becomes aware of the incident should report it immediately to the Department of Public Safety for immediate processing and investigation. Any physical evidence should not be disturbed until the arrival of the Department of Public Safety,

(4) All incidents of alleged sexual harassment must be immediately reported to the Executive Director and the Commission's designated Commonwealth Equal Employment Opportunity Coordinator or directly to the Director of Personnel as soon as the employer, or other senior official in case of the employer's unavailability, becomes aware of it. The complaining employee should be interviewed by the departmental Equal Employment Coordinator, legal counsel, or the Executive Director to determine the basic facts of the allegation. The Director of Personnel or the Commonwealth Equal Employment Opportunity Coordinator will then be consulted to determine if the investigation will be conducted at the departmental level or if an outside investigator will be appointed.

(5) Due to the potential legal liabilities resulting from sexual harassment situations, the Executive Director or the Director of Personnel will assume responsibility for the investigation and assign the investigating official (selected EEO official, manager, or legal counsel) or unit (Office of the Attorney General or Department of Public Safety).

(6) All allegations of sexual harassment from employees or perceptions of sexual harassment from third parties or management staff will be reported to the Executive Director or Director of Personnel and will be investigated. Those situations where the victim requests that no investigation be conducted or action taken must also be investigated and acted upon to avoid future liability and to effect consistent enforcement of the Commission's policy of non-tolerance for sexual harassment.

(7) The division(s) involved in the complaint and the official or unit appointed to conduct the investigation will cooperate fully with the Executive Director or Office of Personnel Management in the process of investigating, reporting, and resolving the complaint.

(8) The division(s) involved in the complaint and the Executive Director or Office of Personnel Management will ensure that no retaliation is taken against the complainant or any witnesses by the alleged harasser or by any other employees.

(9) In the process of investigating the complaint, the following guidance will be followed at all times:

(i) All complaints will be taken seriously.

(ii) Guilt should not be presumed on either party. The rights of both parties must be protected.

(iii) Both parties should be afforded the opportunity to state their side.

(iv) Confidentiality must be maintained at all times.

(10) An administrative investigation will be completed as expeditiously as possible. The final report will be delivered to the Executive Director or Director of Personnel in the following format:

(i) Summary of Incident

(ii) Findings of Fact

(iii) Discussion

(iv) Conclusions

(v) Recommendations

(11) The Executive Director or Director of Personnel will review the investigative report to ensure that the facts support the conclusions and that the recommendations are reasonable and consistent with the Commission's disciplinary policy. The Office of the Attorney General will be consulted to ensure that the resolution is legally appropriate.

(12) The Executive Director or Director of Personnel will forward the final report to the Department/employer with the Executive Director's or Office of Personnel Management's recommendations for the resolution of the complaint.

(13)(i) Depending upon the severity of the incident of sexual harassment, the resolution of the situation could involve the following administrative actions:

(A) Conference/counseling

(B) Oral or written warning

(C) Letter of reprimand

(D) Suspension

(E) Demotion

(F) Termination

(ii) Any administrative actions are separate from and not contingent upon any civil or criminal court actions.

(14) The employer will resolve the complaint/grievance based upon the investigation and the recommendation of the Executive Director or Office of Personnel Management. If the division head/employer disagrees with the recommended resolution, he or she must immediately meet with the Executive Director or Director of Personnel to resolve their differences. If both parties cannot reach agreement, the case may be brought before the Governor for a final decision.

(15) Either the complainant or the respondent may appeal the final resolution to the Executive Director or Director of Personnel, not later than fifteen days after receiving notice of the final resolution. The complainant may appeal the final resolution to the Executive Director or Director of Personnel, not later than fifteen days after receiving notice of the final resolution.

(16) The Executive Director or Director of Personnel will conduct a hearing on the appeal and make a final decision on the matter.

(17) Incidents or situations of sexual discrimination that do not involve acts of harassment will be processed through the normal grievance procedure utilized for other Equal Employment Opportunity complaints.

(f) Records and Reports

(1) The Executive Director or Office of Personnel Management will maintain records of all allegations of sexual harassment to include copies of investigative reports.

(2) Records of on-going investigations will be kept in a confidential file separate from the official personnel folder. Upon resolution of the complaint, appropriate records of the resolution or disciplinary action will be placed in the appropriate official personnel folder.

(3) The Executive Director or Office of Personnel Management will report to the Governor annually in its annual personnel report on the number of sexual harassment cases and their resolution.

(g) Responsibilities

(1) All employees will be familiar with the Commission's Equal Employment Opportunity and Non-tolerance of Sexual Harassment Policies and will comply with these policies to create a safe, non-threatening, and non-discriminatory workplace.

(2) All Members, supervisors, managers, and directors will develop and maintain a work environment that is safe, non-threatening, and non-discriminatory. They will ensure that all employees know that sexual harassment will not be tolerated and will ensure that any incident of sexual harassment is reported as directed by this policy.

(3) All Equal Employment Program counselors must be knowledgeable concerning equal employment opportunity laws, regulations and policies, both federal and Commonwealth, and will strive to remain up-to-date on current EEO trends and activities. They will make themselves readily available to listen to EEO-related complaints from their department or activity and provide counseling and assistance to affected employees. They will coordinate with the Executive Director or department/activity EEO Coordinator.

(4) The Executive Director and all division/activity Equal Employment Coordinators must be knowledgeable concerning Equal Employment Opportunity laws, regulations, and policies, both federal and Commonwealth and will strive to remain up-to-date on current EEO trends and activities. The coordinators will provide EEO expertise and assistance to the department/activity EEO counselors and management staff. They will coordinate with the Commonwealth EEO Coordinator.

(5) The Executive Director and all division/Activity heads, as activity Equal Employment Officers, will issue an Equal Employment Opportunity policy statement and establish a departmental Equal Employment Opportunity Program that includes a policy of non-tolerance of sexual harassment. They will hold their supervisors, managers, and directors accountable for developing and maintaining a work environment that is safe, nonthreatening, and nondiscriminatory. They will enforce the Commonwealths policy of non-tolerance of sexual harassment and take reasonable and consistent action in resolution of any sexual harassment situation.

(6) The Director of Personnel, as the Deputy Equal Employment Officer for the Commonwealth, will ensure the development and maintenance of a viable Commonwealth wide Equal Employment Opportunity Program that includes training at all levels in prevention and resolution of sexual harassment situations. The Executive Director or the Director of Personnel will initiate administrative investigations for all allegations of sexual harassment and will ensure their appropriate resolution in accordance with this policy and procedure.

(7) The Governor, as the Equal Employment Officer for the Commonwealth, will establish and promote a policy of non-tolerance of sexual harassment in any form. The Governor will hold all Department and Activity Heads accountable for their active support of the Commonwealths Equal Employment Opportunity and non-tolerance of sexual harassment policies, and for their fulfillment of the responsibilities assigned in this policy and procedure.

(h) Equal Employment Opportunity Commission

(1) If an employee's sexual harassment complaint is not acted upon to his or her satisfaction, the employee has the option of filing a complaint with the Equal Employment Opportunity Commission (EEOC). It should be noted that there is a statutory limitation of 180 days from the harassing/discriminatory incident during which the complaint may be filed. For more information, please visit www.eeoc.gov.

(2) Although the Commonwealth government would like to resolve all complaints through its administrative processes, employees will not be subjected to any retaliatory actions for filing a complaint with the Equal Employment Opportunity Commission.

§ 175-10.3-320 Anti-Bullying Policy

(a) The Commission is committed to providing all Members and employees a healthy and safe work environment. It is the policy of the government that workplace bullying will not be tolerated. All agencies shall maintain every workplace free from bullying. This policy shall apply to all Commission Members and Employees, regardless of his or her employment status.

(b) Bullying is defined as persistent, malicious, unwelcome, severe, and pervasive mistreatment that harms, intimidates, offends, degrades, or humiliates an employee, whether verbal, physical, or otherwise, at the place of work and/or in the course of employment.

(1) The following types of behavior have been interpreted to constitute workplace bullying. This list is not meant to be exhaustive and is only offered by way of example:

(i) Staring, glaring, or other nonverbal demonstrations of hostility;

(ii) Exclusion or social isolation;

(iii) Excessive monitoring or micro-managing;

(iv) Work-related harassment (work-overload, unrealistic deadlines, meaningless tasks);

(v) Being held to a different standard than the rest of an employee's work group;

(vi) Consistent ignoring or interrupting of an employee in front of co-workers;

(vii) Personal attacks (angry outbursts, excessive profanity, or name-calling);

(viii) Encouragement of others to turn against the targeted employee;

(ix) Sabotage of an employee's work product or undermining of an employee's work performance;

(x) Stalking;

(xi) Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets;

(xii) Conduct that a reasonable person would find hostile, offensive, and unrelated to the employer's legitimate business interests.

(2) Workplace bullying must be addressed and corrected at its earliest stage before it becomes severe or pervasive.

(c) Any Member or employee who feels that he or she has been bullied should immediately report such incidents to a supervisor at any level without fear of reprisal.

(d) An employer who receives a claim of bullying in violation of this policy shall take such complaint seriously and immediately advise the Executive Director or Director of Personnel or the Commonwealth Equal Employment Opportunity (EEO) Coordinator of the situation. The employer, with the assistance of the EEO Coordinator, will ensure that it is investigated promptly, privately, and with as much confidentiality as possible, consistent with the need to determine the facts. The investigation will be documented by an investigative report that will be retained in a confidential file by the EEO Coordinator. Any person accused of a violation shall be allowed the opportunity to rebut the charges.

(e) After determining the facts through the investigation, the employer shall take corrective action as required by the circumstances. This may include counseling any employee, whether or not a violation has occurred; imposing an appropriate sanction, including disciplinary action; making sure that this policy is reiterated to all employees or any group. An employer, or any supervisory staff, who does not take appropriate action also violates this policy and exposes the Commonwealth government to liability.

§ 175-10.3-325 Alcohol and Drug Free Workplace Policy

(a) Policy. As an employer, the Commission recognizes it has a responsibility to its employees and the public it serves to take reasonable steps to assure safety in the workplace and in the community. Furthermore, the Commission is concerned about the adverse effect alcohol and drug abuse has on safe and productive job performance. It also recognizes that any employee, whose ability to perform safely and productively is affected by the use of alcohol and other drugs, jeopardizes the integrity of the workplace and the achievement of the government's mission. The government realizes that alcoholism, problem drinking, and drug addiction are treatable illnesses. The government, therefore, encourages employees who have problems with drugs or alcohol to utilize all available resources to resolve their problems before those problems affect their job performance.

(b) Definitions. For the purposes of this section, the following definitions apply:

(1) "Accident." An event which causes

(i) A fatality,

(ii) An injury to a person requiring professional medical treatment beyond simple at-scene first aid, or

(iii) An economic loss, including property damage, greater than $2,500.00.

(2) "Assessment." A determination of the severity of an individual's alcohol or drug use problem and an analysis of the possible courses of treatment, made by an expert in the field of substances abuse.

(3) "Breath Alcohol Concentration" ("B.A.C."). The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath testing device (E.B.T.).

(4) "Breath Alcohol Technician" ("B.A.T."). An individual authorized to collect breath specimens under subsection (g)(2) and who operates an E.B.T.

(5) "Consulting Physician." A licensed physician retained or employed by the government to advise on drug testing.

(6) "Drug." A substance

(i) Recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, or the official National Formulary, or any supplement to any of them; or

(ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; or

(iii) Other than food, minerals, or vitamins, intended to affect the structure or any function of the body of a human or other animal; or

(iv) Intended for use as a component of any article specified in subsection (b)(6)(i), (ii), or (iii) above.

Devices or their components, parts, or accessories are not considered drugs under this definition.

(7) "Evidential Breath Testing Device" ("E.B.T."). A device which is

(i) Approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath; and

(ii) Is on the NHTSAs Conforming Products List of E.B.T.s; and

(iii) Conforms with the model specifications available from the NHTSA, Office of Alcohol and State Programs.

(8) "Illegal Drug." A drug that

(i) Is not possessed or obtained legally; or

(ii) Is knowingly used for other than the prescribed purpose or in other than the prescribed manner; or

(iii) Is a designer drug or drug substance not approved for medical or other use by the U.S. Drug Enforcement Administration or the U.S. Food and Drug Administration; or

(9) "Invalid Test." A breath or urine test that has been declared invalid by a Medical Review Officer (M.R.O.), including a specimen that is rejected for testing by a laboratory for any reason. An invalid test shall not be considered either a positive or a negative test result.

(10) "Medical File." The file containing an employee's medical examination form, mental health referrals, alcohol and drug test results, and other health related documents, maintained by the Office of Personnel Management separate from an employee's official personnel folder.

(11) "Medical Review Officer" ("M.R.O."). A licensed physician, appointed by the government, with specialized training in substance abuse disorders and in the use and evaluation of drug test results. The M.R.O. shall be the only person authorized to receive laboratory drug test results and shall be the primary contact for technical inquiries to the drug testing laboratory.

(12) "Reasonable Suspicion." A perception based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of an individual or on specific facts, circumstances, physical evidence, physical signs and symptoms, or on a pattern of performance or behavior that would cause a trained supervisor to reasonably conclude that the individual may be under the influence of alcohol or illegal drugs while on duty.

(13) "Safety-sensitive." A word describing activities which directly affect the safety of one or more persons, including the operation of motor vehicles or heavy machinery or the carrying of firearms. Each department, entity, or organization head, in conjunction with the Director of Personnel Management, shall identify all positions to be considered safety-sensitive positions due to the amount of time the employee spends performing safety sensitive functions.

(14) "Statement of Fitness for Duty." A written statement from a Substance Abuse Professional (S.A.P.), certifying that the named employee is not dependent on alcohol or any drug to the extent such dependence will affect safe and productive work.

(15) "Substance Abuse Professional" ("S.A.P."). A physician, psychologist, psychiatrist, or social worker with knowledge of and clinical experience in the diagnosis and treatment of drug and alcohol related disorders; or a counselor certified by the National Association of Alcoholism and Drug Abuse Counselors.

(16) "Under the Influence." A condition where a person's behavior, attention, or ability to perform work in the usual careful fashion has been adversely affected by the use of alcohol or drugs; intoxicated.

(17) "Vehicle." A device in, upon, or by which any person or property is or may be propelled or moved on a highway, on a waterway, or through the air.

(c) Prohibited Conduct

(1) Sale, Purchase, Possession with Intent to Deliver, or Transfer of Illegal Drugs. No employee of the Commission shall

(i) Sell, purchase, or transfer;

(ii) Attempt to sell, purchase or transfer; or

(iii) Possess with the intent to deliver, any illegal drug while on government or Commission property, in any government or Commission vehicle, or on any government or Commission business. It is a defense to this provision that the employee is employed by a law enforcement agency and the conduct occurs as part of the employee's assigned duties for the purpose of investigating illegal drug trafficking or the violation of any applicable law or regulation.

(2) Possession of Illegal Drugs. No employee of the Commission shall possess any illegal drug on government or Commission property, in any government or Commission vehicle, or while on government or Commission business. It is a defense to this provision that the employee is employed by a law enforcement agency and the conduct occurs as part of the employees assigned duties for the purpose of investigating illegal drug tracking or the violation of any applicable law or regulation.

(3) Possession of Open Containers of Alcohol. No employee of the Commission shall possess an open container of alcohol in any vehicle while on duty or in any government or Commission vehicle at any time. No employee shall possess an open container of alcohol while at his or her workplace.

(4) Under the Influence of Alcohol or Illegal Drugs. No employee of the Commission shall be under the influence of alcohol or any illegal drug when at work, or reporting to work with the intention of working. As used in this subsection, alcohol includes any alcohol found in any prescription or non-prescription drug such as cough syrup. An employee is presumed to be under the influence of alcohol or an illegal drug if

(i) The employee has a B.A.C. of 0.02 or more;

(ii) The employee has a detectable amount of any illegal drug in his or her urine;

(iii) The employee uses alcohol or any illegal drug while on call when the employee knows he or she may be called upon to perform safety-sensitive functions;

(iv) The employee uses alcohol or any illegal drug within four hours prior to reporting to work and expects to perform a safety-sensitive duty.

(5) Refusal to Be Tested. No employee of the Commission required to be tested for drugs or alcohol under any provision of this section refuse to be tested. The following conduct shall be considered a refusal to be tested:

(i) Refusing in writing to submit to testing after receiving clear and specific written notice of the requirement to be tested;

(ii) Refusing verbally, in front of at least two witnesses, to submit to testing after receiving clear and specific written notice of the requirement to be tested;

(iii) Failing to timely provide an adequate specimen for testing, without a valid medical explanation, after receiving clear and specific written notice of the requirement to be tested. An M.R.O. or consulting physician shall determine if there is any medical reason for failure to provide an adequate urine sample (shy bladder) or an adequate breath sample (shy lung);

(iv) Engaging in conduct that clearly obstructs the specimen collection process;

(v) Failing to remain available for post-accident testing, or leaving the scene of an accident before a testing decision is made. An employee may leave the scene of an accident only to obtain necessary medical care or assistance in responding to the accident. If the employee leaves the scenes the employee must notify his or her supervisor as soon as possible of his or her location and reason for leaving the scene;

(vi) Consuming alcohol or illegal drugs after an accident and before a testing decision is made;

(vii) Failing to report, during the work shift in which an accident occurred, an accident which could have resulted in a testing decision; and

(viii) Failing to report to the specimen collection site timely after being informed of the requirement to be tested.

(6) Giving False Information. No employee of the Commission shall give false information about a urine specimen or attempt to contaminate or alter the specimen.

(7) Refusal to Comply with Treatment Recommendations. No employee of the Commission shall fail to comply with recommendations for treatment or after-care made by an M.R.O. or S.A.P. as a consequence of a prior positive drug or alcohol test result.

(8) Failure to Notify Executive Director of Conviction. No employee of the Commission shall fail to notify the Executive Director of any criminal drug statute conviction, within five days of such conviction, if the violation of the criminal drug statute occurred while the employee was conducting Commission business, or while on or using Commission property.

(9) Supervisors' Responsibility for Confidentiality. No employer shall knowingly disregard an employee's right to confidentiality in matters relating to alcohol or drug testing or otherwise neglect his or her responsibilities under this section.

(d) Penalties and Consequences

(1) Disciplinary Action. An employee of the Commission committing any act prohibited by subsection (c) shall be subject to an appropriate form of discipline, depending on the circumstances, up to and including termination.

(i) Generally. Where an employee commits an act prohibited by subsection (c) without valid reason, the employee shall be disciplined up to and including removal. At a minimum, the employee shall receive a formal reprimand. If the prohibited act committed by the employee relates to the use or possession of alcohol or illegal drugs, the employee shall be referred to an S.A.P. for assessment and treatment.

(ii) First offense, under the influence. An employee found to be under the influence of alcohol or illegal drugs in violation of subsection (c)(4), for a first offense, shall not be subject to removal solely for being under the influence of alcohol or illegal drugs. However, if the person is also involved in an accident depending on the circumstances, the employer may decide to initiate a disciplinary action for removal, even on a first offense.

(iii) Serious offenses. The following acts, even for a first offense, will result in an immediate disciplinary action for removal:

(A) The sale, purchase, possession with intent to deliver, or transfer of illegal drugs, or the attempt to sell, purchase, or transfer illegal drugs in violation of subsection (c)(1);

(B) Being involved in an accident resulting in a fatality while under the influence of alcohol or illegal drugs, in violation of subsection (c)(4);

(C) While performing and about to perform duties in a safety sensitive position, being under the influence of alcohol or illegal drugs, in violation of subsection (c)(4);

(D) An unexcused refusal to be tested, in violation of subsection (c)(5);

(E) Giving false information, contaminating, or attempting to contaminate a urine sample, in violation of subsection (c)(6);

(F) Failing to notify the proper authority of conviction for a drug offense in violation of subsection (c)(8);

(G) Testing positive for alcohol or illegal drugs within five years of a prior positive test; and

(H) Breaching any term of a return to duty contract executed under the provisions of subsection (e)(2).

(2) Information Concerning Treatment Options. Those employees not removed from service after committing any act prohibited by subsection (c) shall be informed of resources available for evaluating and resolving problems associated with the use of alcohol and illegal drugs. At a minimum, the Executive Director or Office of Personnel Managements' Alcohol and Drug Free Workplace Coordinator shall give the names addresses, and telephone numbers of local S.A.P.s and substance abuse counseling or treatment programs. The employees will then be required to fulfill all the specified steps of treatment before being considered ready for return to duty.

(3) Report to Department of Public Safety. An employee committing any act prohibited by subsection (c)(1) or (c)(2) shall be reported, by the employer, to the Department of Public Safety for the purpose of possible criminal prosecution.

(4) Duty/Pay Status Pending Disciplinary Action. Unless the employee was involved in an accident resulting in a fatality, an employee subject to a disciplinary action for committing any act prohibited by subsection (c), except for subsection (c)(7), shall be allowed to remain on the job pending resolution of any proposed disciplinary action but shall not be allowed to perform a safety-sensitive function, even if that means assigning the employee duties the employee would not otherwise be performing. An employee subject to a disciplinary action for committing any act prohibited by subsection (c) who was involved in a fatal accident shall be placed on leave without pay pending resolution of the disciplinary action for removal.

(e) Return to Work Procedures

(1) Prerequisites to Returning to Duty. No employee who has tested positive for the presence of alcohol or illegal drugs shall be allowed to return to work until the employee has:

(i) Complied with treatment recommendations of an M.R.O. or S.A.P. and been released for work by an S.A.P. in consultation, when appropriate, with the M.R.O. or a consulting physician;

(ii) Tested negative in a subsequent test paid for by the employee for the presence of alcohol, if the removal from duty was due to alcohol use; or cocaine, marijuana, opiates, amphetamines, and phencyclidine, if the removal from duty was due to drug use; and

(iii) Agreed to execute a return to duty contract.

(2) Return to Duty Contract. The return to duty contract shall include the following provisions:

(i) Aftercare. An agreement to comply with aftercare and follow up treatment recommendations for one to five years, as determined appropriate by the employees S.A.P.;

(ii) Follow-up testing. An agreement to unannounced alcohol or drug testing, depending on the substance which resulted in the removal from duty, paid for by the employee, for one to five years, as determined appropriate by the employees S.A.P., but there shall be no fewer than six tests in the first year after the employee returns to work;

(iii) Compliance with rules. An agreement to comply with government rules, policies, and procedures relating to employment;

(iv) Term. An agreement that the terms of the contract are effective for five years after the employees return to duty; and

(v) Breach of contract. An agreement that violation of the return to duty contract is grounds for termination.

(f) Testing Occasions

(1) Pre-employment Testing. At the time of application, persons applying for any position within the Commission will be notified that any offer of employment is contingent upon a

negative urine test. After receiving an offer of employment, the candidate shall be tested for the presence of cocaine, marijuana, opiates, amphetamines, phencyclidine, as well as any other controlled or banned substance required by the Executive Director, in the urine. The test shall be paid for by the candidate. Testing shall be in compliance with subsection (h), below. Applicants who were previously employed by the government and applicants who have had an offer for government employment withdrawn due to a previous positive urine test result, must also provide a written release of drug testing history for the two years immediately preceding the application date.

(i) No new Commission Employee may be assigned to work in any position until he or she presents the results of a urine test, taken after the offer for employment has been made, that shows negative for the presence of cocaine, marijuana, opiates, amphetamines, phencyclidine as well as any other controlled or banned substance required by the Executive Director.

(ii) If the candidate's test result is positive for the presence of a tested drug, without a legitimate explanation, the offer of employment will be withdrawn.

(iii) If the candidate presents a drug testing history showing a positive drug test within two years prior to the application date, the offer of employment will be withdrawn unless the candidate submits a statement of fitness for duty and agrees to execute an agreement similar to a return to duty contract described in subsection (e)(2).

(2) Reasonable Suspicion Testing. Where there is a reasonable suspicion that an employee is under the influence of alcohol or drugs while at work or about to begin work, he or she shall submit to a breath or urine test for the presence of alcohol, cocaine, marijuana, opiates, amphetamines, and phencyclidine, upon written notice from the employee's supervisor or the Executive Director. Except as otherwise provided, the Commission shall pay for the testing.

(i) Properly trained supervisor. Only a supervisor or a designated employee with government-approved training in the physical, behavioral, and performance indicators of probable drug and alcohol use is permitted to make reasonable suspicion testing decisions.

(ii) Objective inquiry. The properly trained supervisor or a designated employee will observe the employee suspected of being under the influence of alcohol or illegal drugs. A decision to request testing shall be based on eye witness reports, facts of the event, and observed physical and behavioral characteristics of the employee. Prior to making the decision to require testing, the supervisor will question the employee in a private area to ascertain whether there are any reasons other than alcohol or drug use for any behavior observed.

(iii) Verification. No employee shall be required to submit to a drug or alcohol test based on reasonable suspicion unless the need for the test is verified by a second properly trained Commission employee. The regained verification shall be done in person.

(iv) Transportation assistance. The employee shall be accompanied to the collection site by a supervisor or manager, and shall be provided transportation home from the collection site. If the individual refuses and demands to drive his or her vehicle, the supervisor or manager shall notify the Department of Public Safety.

(v) Duty pending test results. Until the results of the drug and alcohol test are complete and verified, no employee tested based upon reasonable suspicion shall be allowed to perform or continue to perform a safety-sensitive duty.

(vi) Report. The supervisor ordering reasonable suspicion testing shall put in writing, in detail, the facts leading to the decision. This report shall be considered confidential and will be maintained in the employee's medical file, which is confidential, until needed for a disciplinary action. Only at that time will the report be filed in the employee's official personnel folder.

(3) Post-accident Testing. As soon as practical after an accident any Commission Employee whose action or inaction may have contributed to the accident must submit to breath and urine tests for the presence of alcohol, cocaine, marijuana, opiates, amphetamines, phencyclidine as well as any other controlled or banned substance required by the Executive Director, upon written notice from the employee's supervisor. Except as otherwise provided, the Commission shall pay for the testing.

(i) Supervisor training. Only a supervisor or a designated employee with government-approved training in the physical, behavioral, and performance indicators of probable drug and alcohol use is permitted to make post-accident testing decisions.

(ii) Objective inquiry. A supervisor or a designated employee's decision to request testing shall be based on eye witness reports, facts of the event, and observed physical and behavioral characteristics of the employee. Specifically, the properly trained supervisor or a designated employee shall require the driver of any Commission vehicle or the operator of any Commission equipment involved in the accident to be tested.

(iii) Transportation assistance. The employee shall be accompanied to the collection site by a supervisor or manager, and shall be provided transportation home from the collection site. If the individual refuses and demands to drive his or her vehicle, the supervisor or manager shall notify the Department of Public Safety.

(iv) Duty pending test results. Until the results of the drug and alcohol test are complete and verified, no employee reasonably suspected of having been under the influence of alcohol or drugs at the time of the accident shall be allowed to perform or continue to perform a safety-sensitive duty.

(v) Report. The supervisor ordering post-accident testing shall put in writing, in detail, the facts leading to the decision. This report shall be considered confidential and will be maintained in the employee's medical file, which is confidential, until needed for a disciplinary action. Only at that time will the report be filed in the employee's official personnel folder.

(4) Random Testing. During each calendar year, randomly-selected employees will be required to submit to breath tests for alcohol and urine tests for cocaine, marijuana, opiates, amphetamines, phencyclidine as well as any other controlled or banned substance required by the Executive Director. The testing will be done during on-duty time. Except as otherwise provided, the Commission shall pay for the testing.

(i) Method of selection. Employees of the Commission will be selected by a statistically valid method such as a random-number table or computer-based random number generator

that is matched with employee Social Security numbers, payroll identification numbers, or other comparable identifying numbers.

(ii) Number to be tested. No more than twenty-five percent of all employees performing safety-sensitive functions in each division each year shall be required to submit to breath alcohol testing and no more than fifty percent shall be required to submit to urine testing. The actual percentage may be determined at the beginning of each fiscal year by the Executive Director in consultation with the Office of Personnel Managements Alcohol and Drug Free Workplace Coordinator and the M.R.O. after reviewing the Commission staff's prior positive testing rates, reasonable suspicion and post accident events, and referrals for service.

(g) Collecting and Testing Breath Specimens

(1) Collection Site. Breath specimens shall be collected only at a site approved by the Executive Director or Director of Personnel Management or at the scene of an accident if proper equipment and personnel can be made immediately available.

(2) Collection Protocol. Breath specimens shall be collected only by a B.A.T. trained in the collection of breath specimens at a course approved by the United States Department of Transportation in accordance with standard collection protocols as specified in 49 CFR, Part 40(C) Procedures for Transportation Workplace Drug Testing Programs - Alcohol Testing, except as otherwise provided in this section. However, the M.R.O. or a consulting physician, when requested, may assist in facilitating the collection for post-accident testing.

(3) Confirming Test. Breath specimens shall first be subjected to a screening test for alcohol. If that test indicates a probable breath alcohol concentration of 0.02 or greater, a second test confirming the first and providing quantitative data of alcohol concentration, shall be performed. No alcohol test shall be considered positive unless both the screening test and the confirming test show a B.A.C. of 0.02 or greater.

(4) Results. The breath test results shall be transmitted by the B.A.T., in a manner to assure confidentiality, to the employee, to the employee's employer, and to the Director of Personnel Management.

(5) Confidentiality. Other than as specified above, no person involved in the testing process shall release the results of breath tests to any other individual without a written release from the tested employee.

(6) Invalid Test. If the Executive Director or Director of Personnel Management determines the test is invalid, using the factors found at 49 CPR, Part 40.79, the test result shall be reported as negative.

(7) Statistical Reporting. The B.A.T. shall compile statistical data that is not name specific, related to testing results. The B.A.T. shall release the statistical data to the Executive Director or Director of Personnel Management upon request.

(h) Collecting and Testing Urine Specimens

(1) Collection Site. Urine specimens shall be collected only at a site approved by an appropriate government agency, and identified by the Executive Director or Director of Personnel Management.

(2) Collection Protocol. Urine specimens shall be collected by persons trained in the collection process developed by the Substance Abuse and Mental Health Service Administration, United States Department of Health and Human Services, in accordance with standard collection protocols as specified in 49 CFR, Part 40(8), Procedures for Transportation Workplace Drug Testing Programs - Drug Testing, except as otherwise provided in this section. However, the M.R.O. or a consulting physician, when requested, may assist in facilitating the collection for post-accident testing.

(3) Confirming Test. Urine specimens shall first be subjected to a screening test. Only if the screening test shows positive for the presence of a prohibited drug, will a second test be conducted on the same urine specimen to identify the presence of a specific drug or metabolite, using a gas chromatography/mass spectrometry (GC/MS) test. No drug test shall be considered positive unless both the screening test and the confirming test show the presence of one or more of the drugs tested for.

(4) Results. The laboratory conducting the urine test shall give the results only to the M.R.O. The M.R.O. shall discuss the test result with the tested individual.

(5) Invalid Test. If the M.R.O. decides that the test is invalid, the candidate shall immediately submit another urine specimen for testing.

(6) Alternative Explanations for Positive Test Results.

(i) Upon receiving a report of a positive test results the M.R.O. shall determine if there is any alternative medical explanation for the results including the use of prescribed medication by the employee. Such a determination shall be based on information received from the employee such as the tested individual's medical history and records. If the M.R.O. determines it to be necessary he or she may request pertinent analytical records from the laboratory or require a re-analysis of the specimen.

(ii) The M.R.O. shall report the urine test result as negative and shall take no further action if he or she determines:

(A) There is a legitimate medical explanation for a positive test result, other than the use of the specific drug; or

(B) Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the positive drug test result is scientifically insufficient for further action.

(7) Illegal Use of Opium. If the GC/MS does not confirm the presence of 6-monoacetylmorphine; the M.R.O. shall determine whether there is clinical evidence, in addition to the urine test result, of illegal use of any opium, opiate, or opium derivative.

(8) Report to Government. The M.R.O. shall report all positive and negative urine drug test results, in a manner to assure confidentiality, to the employee's employer, and to the Director of Personnel Management.

(9) M.R.O. and Confidentiality. Other than as specified above, the M.R.O. shall not release the results of drug tests to any other individual without a written release from the tested employee.

(10) Statistical Reporting. The M.R.O. shall compile statistical data that is not name specific, related to testing and rehabilitation. The M.R.O. shall release the statistical data to the Executive Director or Director of Personnel Management upon request.

(i) Employee Awareness and Rehabilitation

(1) Employee Awareness Training. All employees shall receive information concerning the effects and consequences of drug and alcohol use on personal health, safety, and the work environment; the manifestations and behavioral clues indicative of drug and alcohol use; and the resources available to the employee in evaluating and resolving problems associated with the use of illegal and legal drugs and alcohol.

(2) Employees Seeking Voluntary Assistance. Commission employees shall be allowed to voluntarily seek assistance for alcohol or drug use at any time prior to being required to be tested under the reasonable suspicion, post-accident, or random testing procedures.

(i) Referrals. Employees may request referral to an S.A.P. for treatment, may refer themselves, or may be referred by a supervisor as part of a performance counseling. Such referrals shall only be made a part of the employee's medical file and shall not be a part of the employee's official personnel folder. Referrals shall be kept confidential.

(ii) Voluntary referrals. Employees who voluntarily seek assistance in dealing with drug and alcohol problems or accept referrals, before job performance is compromised, shall be provided the same leave benefits for recommended treatment as provided for any other health problem.

(iii) Accountability for job performance. Regardless of participation in or requests for referrals, employees shall be held accountable for acceptable job performance. In no case where job performance has been compromised will disciplinary action be waived for employees asking for assistance and referral. However, such requests may be considered a mitigating factor in determining the appropriate form of discipline.

(3) Job Security Maintained. Employees shall not have job security or promotional opportunities jeopardized solely because of a request for a drug or alcohol treatment referral.

(4) Required Documentation. Although voluntary referrals or referrals made prior to testing are kept strictly confidential, documentation of poor performance or disciplinary actions taken due to drug or alcohol abuse shall be included in the employee's official personnel folder.

(j) Disseminating Information on Regulations

(1) Distribution to Employees. All current employees shall receive a copy of the regulations in this section at least thirty days before the implementation date. New employees hired after the effective date of this policy will be given a copy of the policy in this section at the time of hire. Each employee shall sign a form prescribed by the Executive Director or Director of Personnel Management which acknowledges the receipt of the policy and the employees understanding that he or she is bound by this policy. This acknowledgment shall be kept in the employee's official personnel folder.

(2) Posting. The regulations in this section will be posted in the primary workplaces of the Commission for at least sixty days following their implementation.

(k) Record Retention and Reporting Requirements

(1) Administrative Records. Records relating to the administration of the policy in this section, including policy and program development, employee awareness training, supervisory training, collection site training, program administration, and calibration documentation, shall be kept by the Executive Director or Director of Personnel Management and the M.R.O. for five years.

(2) Records Relating to Collection Process. Records relating to the breath and urine collection process shall be kept by the Executive Director or Director of Personnel Management, the M.R.O., and the specimen collector at the collection site for two years.

(3) Refusals, Referrals, and Test Results. The Executive Director or Director of Personnel Management shall keep a copy of all records of refusals to be tested, breath and urine test results, and referrals to an S.A.P. in the employees medical file, not the employee's official personnel folder, at least until such time as disciplinary action is taken. The M.R.O. shall keep a copy of all urine test results and the B.A.T. shall keep a copy of all breath test results in a manner to assure confidentiality. No test results shall be available for use in a criminal prosecution of the employee without the employees' consent.

(i) Positive test result records, records of refusals to be tested, and referrals to an S.A.P. shall be kept for five years.

(ii) Negative test resent records shall be kept for a period of one year.

(4) Report to Federal Contract Agency. To comply with the Drug Free Workplace Act of 1988, 41 U.S.C. 701(a)(1)(E), the Executive Director or Director of Personnel Management shall notify the federal contracting agency of the conviction of any employee for selling, manufacturing, or dispensing any illegal drug on government business property or government time, within 10 days of the conviction.

§ 175-10.3-330 Disciplinary Actions

(a) General Policy. The Commission expects its employees to maintain standards of conduct and behavior appropriate to its mission of service to the public. All documentation for disciplinary actions issued by the Manager, Supervisor, or Executive Director or his or her designee must be provided to the Executive Director and employee file. The Executive Director, his or her designee, or Division Managers initiate disciplinary actions. The Executive Director, his or her designee, or Division Managers, shall issue written disciplinary actions after review by Legal Counsel including suspension (with or without pay), transfer, demotion, or dismissal. The Executive Director, his or her designee, or Division Managers may take immediate action to remove an employee from duty only in circumstances involving immediate danger to the health or, safety of Commission employees or the public. Examples of unacceptable conduct or performance that may result in corrective actions up to and including dismissal include, but are not limited to the following:

(1) Any violations of the Bank Secrecy Act, or other Federal or Commonwealth Law applicable to casinos and financial institutions;

(2) Habitual attendance problems such as not showing up for work and not calling or using approved leave or habitual tardiness that is more than de minimis;

(3) Repeated violations of Federal or Commonwealth law or regulations or a single violation if the conduct is egregious;

(4) Violation of a written policy, procedure or regulation, which was known or should have been known to the employee; including safety rules and policies as well as all other policies set out by the Executive Director;

(5) Inefficiency, inadequacy or unsatisfactory work performance after notice and opportunity to correct performance;

(6) Insubordination, or disruptive behavior; including the violation of an oral or written directive(s) which was known or reasonably should have been known to the employee;

(7) Any breach of duty or trust to the Commission;

(8) Use of obscene or abusive language;

(9) Falsification of any portion of the employment application;

(10) Unauthorized removal of property of Commission or stealing government or others' property while on duty.

(11) Harassment of other employees or the public, or violation of Commission's sexual-harassment policy;

(12) Leaving the work site during working hours without permission from supervisory officials;

(13) Theft, conversion, or unauthorized removal of Commission's property, or the use of Commission property without authorization;

(14) Fighting and/or acts of violence; or threats of violence constituting assault;

(15) Abuse or destruction of Commission property;

(16) Unauthorized possession of weapons, explosives;

(17) Sleeping on duty;

(18) Unauthorized use of vehicles, equipment;

(19) Punching another's time card/alter time records;

(20) Misusing mail, phones, computer system, internet access;

(21) an Ethics Code Violation;

(22) Conviction or arrest for a crime involving violence, dishonesty or drug use or trafficking or any other crime which casts doubt on the employee's suitability for work. Absence from the job without approval or notification to Manager or Supervisor due to arrest and incarceration will be considered an unapproved absence or absence without leave (AWOL);

(23) Substance abuse on the job; or violation of the Employee's Drug and Alcohol Abuse Policy; reporting to work when impaired by or under the influence of alcohol or controlled substance;

(24) Other conduct or failure of performance which the management of the Commission reasonably recognizes as justification for serious discipline, including dismissal; or

(b) Forms of Corrective Action. Progressive corrective action shall be followed when practicable. However, when the severity of the inappropriate conduct warrants and it is in the best interest of the Commission, the Executive Director or his or her designee may impose any of the following forms of corrective action.

(1) Verbal Reprimand or Warning or Counseling. This type of corrective action is usually the first step in identifying and correcting failure to perform or misconduct and may be carried out by a Manager or Supervisor or the Executive Director or his or her designee. A written reprimand may also be given by the Manager, Supervisor, or the Executive Director or his or her designee, however, all other forms of corrective action require action by the Executive Director or his or her designee. A reprimand or warning and/or oral counseling should be a private conference between an employee and supervisor whereby the problem can be worked out in a constructive manner. The supervisor, manager, or the Executive Director or his or her designee will advise the employee of the problem, such as misconduct or failure to perform to expectation and present a solution to correct the problem. The supervisor, manager or the Executive Director or designee will offer guidance and assistance in an effort to prevent the problem from occurring again. The supervisor, manager, or the Executive Director or designee will also point out future corrective action that might be taken should the problem continue. Supervisors, managers, or the Executive Director or designee will document the nature of the problem and retain a record of the problem and the action taken. Such documentation will remain with the supervisor unless it is needed as justification for taking further corrective or other problems.

(2) Written Reprimand. A written reprimand is an official notice to the employee of a failure of performance or misconduct. The nature of the breach and all related facts are documented and placed in the employee's official file by the Manager, Supervisor, or the Executive Director or designee. A copy shall be given to the employee. Unless circumstances do not permit the supervisor and employee shall meet to discuss the problem before issuance of the reprimand to allow the employee an opportunity to respond.

(3) Immediate Suspension Without Pay.

(i) Employees shall be immediately suspended, upon verbal notice, when the nature of the breach of discipline or misconduct makes it imprudent or hazardous for a supervisor to allow an employee to remain on the job. Supervisors or managers shall immediately, before taking any immediate suspension action, unless circumstances do not permit, advise the Executive Director or designee to discuss the nature of the discipline problem and the suspension. An immediate suspension is without pay. In any event, the immediate suspension shall be followed up with a written notice to the employee within five (5) working days in accordance with the notice requirement under these rules. If more time is required to provide the employee written detail/support about the suspension, the employee will be notified. A copy of the notice of immediate suspension shall be placed in the official

employee file. An immediate suspension may be followed by additional corrective action based on the same incident.

(ii) An employee under a suspension shall not receive pay including holiday or other unearned pay. Other benefits shall not be affected during the period of suspension. Lost pay shall be restored to the employee only upon determination that the employee is not at fault or the successful appeal of the suspension.

(4) Regular Suspension. An employee may be suspended without pay for a repeated offense or a serious failure of performance or misconduct. A regular suspension generally will not exceed 20 working days. When legal issues prevent the closure of a case pertaining to an employee's performance or action, the suspension may be longer than 20 working days. The employee shall be given the opportunity to respond to the allegations of misconduct or failure of performance prior to suspension. Subsequently, if the suspension is warranted, the employee shall be notified in writing in accordance with the provision of these rules and a copy shall be placed in the official employee file. An employee under a suspension shall not receive pay including holiday or other unearned pay. Other benefits shall not be affected during the period of suspension. Lost pay shall be restored to the employee only upon successful appeal of the suspension. An employee charged with a criminal offense may be suspended without pay if the offense arises in connection with the employee's job responsibilities or is an offense which in the Executive Director's opinion, would affect continued job performance or bring discredit to the Commission.

(5) Demotion. The Executive Director or his or her designee may demote an employee for misconduct, failure of performance, or other reason as set out in Section 1 of this rule. A disciplinary demotion shall result in a reassignment of the employee to a position in a lower classification at a lower pay band.

(6) Dismissal. Employment may be terminated when previous corrective actions have failed to bring about correction or when serious misconduct or failure to perform occurs. The employee shall be given notice of the decision to terminate employment. The dismissal will take effect only in accordance with the procedures in these rules. The mere failure to renew a contract is not a dismissal.

(c) Corrective Action Reporting.

(1) Action Notice for Written Reprimands. All reprimands shall be documented on a corrective action report form. A record of the date, time and subject of a written reprimand shall be maintained in the official employee file. The employee shall be given an opportunity to review the report with his or her Manager, Supervisor or the Executive Director's designee. If the employee disagrees with the facts or conclusions contained in the report, he or she shall be permitted to submit, within ten (10) workdays after receiving the report a statement of disagreement. The statement shall clearly and concisely set forth the employee's reasons for disagreeing with the report. One copy of the employee's statement shall be appended to the report and shall become a part of it. If the employee has no comment or has not responded within the required time frame, the report shall be forwarded to the Executive Director or his or her designee. Upon completion of the approvals section of the disciplinary action report form, one copy shall be filed in the official employee file.

(2) The Manager, Supervisor, or Executive Director's designee will, if appropriate, complete periodic reviews of the employee's progress in correcting the cause of the original discipline. Such reports shall be made a part of the official employee file.

(d) Corrective Action Procedure and Appeals

(1) A suspension without pay, demotion, or dismissal for cause, shall be accomplished and reviewed only in accordance with the procedures stated in this section. No procedure or process is due for a dismissal without cause.

(2) The process of discipline begins with the immediate supervisor reporting misconduct or failure of performance with concurrence of the Executive Director or his or her designee.

(3) Before the Executive Director issues a notice to terminate employment, demote with a reduction in pay, or suspend without pay an employee, the Executive Director shall require a designee to investigate the basis for the proposed corrective action. The investigation shall include an interview of the employee with or without Legal Counsel, unless the employee has made him or herself unavailable. The employee shall be invited to submit a response in writing after the interview and it shall be included in the record of the matter. The findings and recommendations for action shall be prepared by the designee, and reviewed by Legal Counsel. In deciding what type of disciplinary action should be taken, the following shall be considered:

(i) Seriousness of the breach of discipline, misconduct, or failure of performance.

(ii) The circumstances surrounding the incident.

(iii) The past service record of the employee. The conduct should be considered within the context of the employee's total record. If the employee's record includes past misconduct, the action taken will ordinarily be more severe.

(iv) The Executive Director will consult with the Legal Counsel concerning action to be taken.

(4) The Executive Director shall issue a notice of action for all warnings and counseling.

(5) The Executive Director, with the signature confirmation of legal sufficiency by the Legal Counsel, based on the investigation, any follow-up after receiving the designee's report and after review of the proposed action by Legal Counsel, shall issue all notices of suspension or termination. The notice shall state any and all factual findings and reasons for the corrective action completely and concisely.

§ 175-10.3-335 Vehicle Policy

(a) Introduction. The Commission requires all employees who drive a Commission vehicle to obtain a CNMI Government Driver's License. The Commission requires employees who drive on behalf of the Commission to operate vehicles safely for the protection of the public. In addition, the Commission reminds its employees who drive to operate vehicles responsibly and maintain the vehicles so that they are available to the Commission work force and costs of maintenance, repair and replacement are kept to a minimum.

(b) Driver Responsibilities.

(1) Documents Driver Must Carry When Driving:

(i) Valid CNMI Driver's License

(ii) Current Government Driver's License

(iii) Current Vehicle Registration

(iv) Authorization to Drive After Regular Working Hours if driver is assigned to drive after 4:30pm Monday-Friday or on Saturday, Sunday or holidays.

(2) Driver's Responsibility for Condition of Vehicle.

(i) Driver is responsible for ensuring that the vehicle is fueled and that the proper fuel is put into the vehicle.

(ii) Driver is responsible for inspecting the vehicle daily to identify and correct or report obvious problems including oil level, tire inflation, signal, head and taillights, wipers.

(iii) Driver is responsible for reporting any damage to the vehicle immediately to a supervisor or the Executive Director.

(iv) Driver is responsible for operating the vehicle properly, so that the condition of the vehicle is not diminished as a result of improper operation.

(3) Safety Rules Drivers Must Know and Follow:

(i) All CNMI driving laws;

(ii) Laws regarding vehicle safety;

(iii) Law regarding restrictions on use of government vehicles.

(c) Prohibitions.

(1) No Commission employee shall drive a Commission vehicle for personal business.

(2) No Commission employee driving a Commission vehicle shall drive any non-Commission person in the Commission vehicle unless that person is an employee of the Commonwealth government, a federal employee working with the Commission employee, or the passenger is integrally involved in the conduct of the Commission's affairs.

(3) No Commission employee shall drive his or her spouse or child in a Commission vehicle unless the spouse or child is a Commission employee, or a person described in (2) above.

(4) No Commission employee shall take a vehicle home unless he or she is authorized by the Executive Director to use the vehicle on a 24-hour basis. That approval must be in writing in accordance with the CNMI Government Vehicle law.

(5) No Commission employee shall drive a Commission vehicle while intoxicated from alcohol or under the influence of illegal drugs.

(6) Notwithstanding any other regulation to the contrary, any violation of these prohibitions are grounds for immediate termination.

§ 175-10.3-340 Outside and Dual Employment

(a) No Commission Employee shall engage in any employment other than that assigned by the Commission whether public, private or self-employment, during scheduled work hours,

nor outside scheduled work hours if such employment conflicts with the Commission's interests or adversely affects the employee's availability or productivity.

(b) Any employee who wants to engage in outside employment with a company that may engage in business dealings with the Commission directly or indirectly shall request approval from the Executive Director or his or her designee in writing. The Executive Director or designee shall decide for or against the outside employment request according to the concept of conflict of interest under the CNMI Laws, and the best interests of the Commission.

§ 175-10.3-345 Safety Programs

All Commission Employees are responsible for following all federal and CNMI occupational safety and health regulations. All Employees are encouraged to learn CPR from an accredited training provider (such as, but not limited to, the American Red Cross).

§ 175-10.3-350 Whistleblower Policy

(a) Reprisal Prohibited. No Commission employee or Member shall engage in reprisal against an employee for disclosing to the Attorney General, the United States Attorney, or other local or federal law enforcement a violation or suspected violation of a CNMI or federal law, or a regulation promulgated by Commission or any other agency or instrumentality of the Commonwealth government pursuant to CNMI law.

(b) Application. An employee who reports, or who is known by any person in a management or supervisory position to have indicated to report, such violation or suspected violations described in (a) above shall be protected by this rule, unless the employee knew the report was false. This protection shall extend to employees who participate, or who have indicated an intent to participate, in an investigation, hearing or inquiry conducted by a public body, and to employees who participate, or who were known by management or supervisor to have indicated an intent to participate, in a court proceeding.

(c) Forms of Reprisal. Reprisal includes such actions as discharge, threats of discipline, or arbitrary and capricious changes in the conditions of employment.

§ 175-10.3-355 Utilization of Sister Agencies

Any time the Executive Director deems prudent (including, but not limited to, the enforcement or other implementation of the Commission's Anti-Discrimination, Anti-Harassment, Anti-Bullying, and/or Anti-Drug and Alcohol policies and procedures), the Executive Director may, and is encouraged, to utilize the expertise and manpower of any agency of the CNMI government on terms mutually agreeable. By way of example and not by limitation, the Executive Director may utilize the services of the Office of Personnel Management to conducting random or other drug or alcohol tests, investigation of complaints of discrimination or harassment, or the like.

Commonwealth Healthcare Corporation

Commonwealth of the Northern Mariana Islands
1 Lower Navy Hill Road Navy Hill, Saipan, MP 96950

PUBLIC NOTICE OF PROPOSED ONCOLOGY AMENDMENTS TO THE CHCC CHARGEMASTER

INTENDED ACTION TO ADOPT THESE PROPOSED REVISIONS TO THE RULES AND REGULATIONS: The Commonwealth Healthcare Corporation (CHCC) intends to adopt as permanent the attached additional Chargemaster Fees, pursuant to the procedures of the Administrative Procedure Act,1 CMC § 9104(a). The additional Chargemaster will become effective 10 days after adoption and publication in the Commonwealth Register. (1 CMC § 9105(b))

AUTHORITY: The Board of Trustees may prepare and adopt rules and regulations to assure delivery of quality health care and medical services and the financial viability of the Corporation that will best promote and serve its purposes. 3 CMC Section 2826(c).

THE TERMS AND SUBSTANCE: There are new fees for services that were not previously identified because CHCC recently employed an oncologist for the first time.

THE SUBJECTS AND ISSUES INVOLVED: There are new fees for services that were not previously identified because there is a new service provider at CHCC.

DIRECTIONS FOR FILING AND PUBLICATION: This Notice of Proposed Amendments to the Chargemaster shall be published in the Commonwealth Register in the section on proposed and newly adopted regulations (1 CMC § 9102(a)(1)) and posted in convenient places in the civic center and in local government offices in each senatorial district, both in English and in the principal vernacular and will be codified at NMIAC Sections 140-10.8-101. (1 CMC § 9104(a)(1)). Copies are available upon request from Tiffany Sablan, Director of Revenue.

TO PROVIDE COMMENTS: Send or deliver your comments to Tiffany Sablan, Director of Revenue, tiffany.sablan@dph.gov.mp, *Attn: Oncology Amendments to the Chargemaster* at the above address, fax or email address, with the subject line "Oncology Amendments to the Chargemaster." Comments are due within 30 days from the date of publication of this notice. Please submit your data, views or arguments. (1 CMC § 9104(a)(2)).

P.O. Box 500409 CK, Saipan, MP 96950
Telephone: (670) 234-8950 FAX: (670) 236-8930

These proposed amendments to the Chargemaster were approved by the CHCC Board of Trustees and the CHCC CEO.

Submitted by:

ESTHER MUNA
Chief Executive Officer

6/19/2019
Date

for

LAURI B. OGUMORO
Chair, CHCC Board of Trustees

6/19/19
Date

Filed and
Recorded by:

ESTHER SN. NESBITT
Commonwealth Register

06.26.2019
Date

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the proposed regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General and shall be published, 1 CMC § 2153(f) (publication of rules and regulations).

Dated the 25th day of June, 2019.

for

EDWARD E. MANIBUSAN
Attorney General

CHCC Chargemaster Amendments 05/2019

PLEASE NOTE THAT THE FEES LISTED BELOW ARE APPLICABLE UNLESS THE CURRENT MEDICARE RATE IS HIGHER, IN WHICH CASE THE CURRENT MEDICARE RATE WILL APPLY INSTEAD OF THE RATE LISTED BELOW.

CPT/HCPCS	MOD	DESCRIPTION	PRICE
81206		Bcr/abl1 gene major bp	$674.73
81207		Bcr/abl1 gene minor bp	$596.04
81208		Bcr/abl1 gene other bp	$661.89
10004		Fna bx w/o img gdn ea addl	$136.01
10005		Fna bx w/us gdn 1st les	$228.68
10006		Fna bx w/us gdn ea addl	$155.75
10007		Fna bx w/fluor gdn 1st les	$295.23
10008		Fna bx w/fluor gdn ea addl	$192.67
10009		Fna bx w/ct gdn 1st les	$357.08
10010		Fna bx w/ct gdn ea addl	$261.06
80320		Drug Screen Quantalcohols	$52.00
49406		Image cath fluid peri/retro	$625.88
38220		Dx bone marrow aspirations	$1,308.00
38220	26	Bone marrow aspiration	$528.00
38220	26	Midlevel bone marrow aspiration	$448.80
38221		Dx bone marrow biopsies	$1,204.80
38221	26	Bone marrow biopsy	$475.20
38221	26	Midlevel Bone marrow biopsy	$403.75
38222		Dx Bone Marrow Bx & Aspir	$2,512.80
38222	26	Bone marrow bx & asp	$1,003.20
38222	26	Midlevel Bone marrow bx & asp	$852.72
83789		Mass spectrometry quant	$109.48

Commonwealth Healthcare Corporation
Commonwealth gi Sangkattan na Islas Marianås Siha
1 Lower Navy Hill Road Navy Hill, Saipan, MP 96950

NUTISIAN PUPBLIKU NU I MANMAPROPONI NA TINULAIKA TINILAIKA CHCC CHARGEMASTER

AKSION NI MA INTENSIONA PARA U MA ADÅPTA ESTE SIHA I MANMAPROPONI NI MARIBISA SIHA PARA I AREKLAMENTU YAN REGULASION SIHA: I Commonwealth Healthcare Corporation (CHCC) ma intensiona para u ma adåpta kumu petmanienti i mañechettun siha nuebu na Chargemaster Åpas siha, kumu para i procedures nu i Åktun Administrative Procedure, 1 CMC 9104(a). I tinulaikan todu i Chargemaster siha siempre ifektibu dies (10) dihas dispues di adåptasion yan pupblikasion giya i Rehistran Commonwealth. (1 CMC § 9105(b))

ATURIDÅT: I inetnon i trustees siha siña ma pripåra yan ma adåpta areklamentu yan regulasion siha para u mana siguru i linakngus nu i kuålidat na health care yan setbision Medikåt siha yan i financial viability nu i Corporation ya siempre u ma håtsa yan sietbe i intension siha. 3 CMC Seksiona 2826 (c).

I TEMA YAN SUSTÅNSIA I PALÅBRA SIHA: I nuebu na CHCC Chargemaster esta ma kumpli i tinulaika yan nuebu. I prisenti NMIAC Subchapter 140-10.8, Prugråman i Medikåt yan ottru siha na klåsen åpas siempre man ma abandona yan ma tulaika todu. Påtti sientu siempre para i nuebu na Chargemaster.

I SUHETU YAN MANERA NI SUMÅSAONAO SIHA: Todu i åpas CHCC siha man inafekta ginen esti i ma abandona yan tinulaika. Pot fåbot attan i nuebu na CHCC Chargemaster.

DIREKSION PARA U MA POLU YAN MA PUPBLIKA: Este na nutisia nu i man ma abandona yan tinulaika ni manmaproponi pot i Regulasion siha debi na u ma pupblika gi hålum i Rehistran Commonwealth gi hålum seksiona gi hilu' i manmaproponi yan nuebu na man ma adåpta na regulasion siha (1 CMC §9102(a)(1)) yan u mapega gi hålum man kumbieni na lugåt siha giya i civic center yan gi hålum Ufisinan gubietnu gi kada distritun senatorial parehu yan gi lingguåhi natibu and will be codified at NMIAC Sections 140-10.8-101. (1 CMC §9104 (a)(1)) Mana guahayi kopia siha yanggin man gågao ginen as Tiffany Sablan, Direktot nu i Revenue.

PARA U MAPRIBENIYI UPIÑON SIHA: Na hålom pat na hånao i upiñon mu guatu as Tiffany Sablan, Direktot i Revenue, tiffany.sablan@dph.gov.mp, Atension: Tinilaika na åpas Chargemaster guåtu gi sanhilu na address, fax pat email address, yan i råyan

suhetu"Tinilaika Chargemaster." I upiñon man ma ekspekta gi hålum trenta (30) dihas ni tinatiyi gi fetcha nu i pupblikasion ni este na nutisia. Pot fabot na hålom i infotmasion, upiñon pat ågumientu siha. (1 CMC § 9104(a)(2)).

Esti i manmaproponi i abandona yan tinulaika ma aprueba ginen i CHCC Board of Trustees yan i CHCC Chief Executive Officer.

Nina hålum as: _____ 6/19/2019
ESTHER L. MUNA — Fetcha
Chief Executive Officer

for _____ 6/19/19
LAURI B. OGUMORO — Fetcha
Chair, CHCC Board of Trustees

Pine'lo yan Ninota as: _____ 06.26.2019
ESTHER SN. NESBITT — Fetcha
Rehistran Commonwealth

Sigun i 1 CMC § 2153 § (Inaprueban regulasion siha ni Abugådu Hineråt na para u macho'gui kumu fotma) yan 1 CMC § 9104(a)(3) (hinentan inaprueba kumu fotma yan sufisienti ligåt ginen i CNMI Abugådu Hineråt yan debi na u ma pupblika, 1 CMC § 2153(f)(pupblikasion areklamentu yan regulasion siha).

Mafetch gi 25th diha June, 2019.

for _____
EDWARD E. MANIBUSAN
Abugådu Hineråt

Commonwealth Healthcare Corporation

Commonwealth of the Northern Mariana Islands
1 Lower Navy Hill Road Navy Hill, Saipan, MP 96950

ARONGORONGOL TOULAP REEL POMMWOL SIIWEL NGÁLI ALONGAL AAR CHCC CHARGEMASTER FEES

MÁNGEMÁNGIL MWÓGHUT REEL REBWE ADÓPTÁÁLI POMMWOL SIIWEL KAL NGÁLI ALLÉGH ME MWÓGHUT: Commonwealth Healthcare Corporation (CHCC) re mángemángil rebwe adóptááli bwe ebwe llégh1ó ffééról mille e appasch bwe ffél Listal Alillis ikka re ayoorai ngáliir Toulap ngáre Chargemaster Fees, sángi mwóghutughutúl Administrative Procedures Act, 1 CMC § 9104(a). Siiwel ngáli alongal Chargemaster ebwe bwunguló seigh ráál mwiril aar adóptááli me akkatééwowul me llól Commonwealth register. (1 CMC § 9105(b))

BWÁNGIL: Eyoor bwángil Board-il Trustees reel rebwe ammwela me adóptááli allégh me mwóghutughut bwe ebwe alúghúw ghatchúl health care me alillisil medical me financial viability reel Corporation bwe ebwe ghatch me ffééró mwóghutughutúl. 3 CMC Tálil 2826(c).

KKAPASAL ME AWEEWEL: Ra takkal siiweli me ffééró sefááliy ffél CHCC Chargemaster. Mille e lo bwe NMIAC Subchapter 140-10.8, Schedule reel Medical me Ákkááw Óbwóss ikka e bwal Schuu rebwe lighitaaló me siiweli óutol. Part 100 ebwe le lo bwe ffél Chargemaster.

KKAPASAL ME ÓUTOL: Alongal óbwóssul CHCC e siiweli mereel mille re bwughi sefááliy me siiwelil. Amwuri Ffél CHCC Chargemaster iye e appasch.

AMMWELIL REEL AKKATÉÉWOWUL ME ARONGOWOWUL: Arongorongol Pommwol mille re Bwughi SefáAliy me Liiweli reel Mwóghutughut ebwe akkatééwow me llól Commonwealth Register llól tálil ffél me Pommwol mwóghutughut ikka ra adóptáálil (1 CMC § 9102(a)(1)) me appaschetá llól civic center me bwal llól Bwulasiyol gobetnameento llól senatorial district, fengál reel English me mwáliyaasch y will be codified at NMIAC Sections 140-10.8-101. (1 CMC § 9104(a)(1)) Emmwelil ubwe bweibwogh pappidil yeel tingór ngáli Tiffany Sablan, Direkktoodil Revenue.

REEL ISIISILONGOL KKAPAS: Afanga ngáre bwughiló yóómw ischil kkapas ngáli Tiffany Sablan, Direkktoodil Revenue, tiffany.sablan@dph.gov.mp, *Attn: New Chargemaster Fees* reel féléfél iye e lo weiláng, fax ngáre email address, ebwe lo wóól subject line bwe "New Chargemaster Fess." Ischil kkapas ebwe toolong llól eliigh ráál

mwiril aal akkatééwow arongorong yeel. Isiisilong yóómw data, views ngáre angiingi. (1 CMC § 9104(a)(2)).

Pommwol milikka re bwughi sefááliy me siiweli aa átirow sángi CHCC Board-il trustees me CHCC Chief Executive Officer.

Isáliyalong: _____ 6/19/2019
ESTHER MUNA — Ráál
for Chief Executive Officer

_____ 6/19/19
LAURI B. OGUMORO — Ráál
Chair, CHCC Board of Trustees

Ammwelil: _____ 06-26-2019
ESTHER SN. NESBITT — Ráál
Commonwealth Register

Sángi 1 CMC § 2153(e) (sángi átirowal AG reel mwóghutughut kkal bwe aa ffil reel ffééról) me 1 CMC § 9104(a)(3) (sángi átirowal AG) reel Pommwol mwóghutughut ikka e appasch bwe ra takkal amwuri fischiiy me átirowa bwe aa lléghló reel ffééról me legal sufficiency sángi Soulemelemil Allégh Lapalapal CNMI me ebwe akkatééwow, 1 CMC § 2153(f) (akkatééwowul allégh me mwóghutughut).

Aghikkilátiw wóól 25th ráálil June, 2019.

_____
EDWARD E. MANIBUSAN
Soulemelemil Allégh Lapalap

ORIGINAL

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	**Labor Case No. 18-069**
Reynaldo B. Awin,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
Imperial Pacific International (CNMI) LLC,	)	
Respondent.	)	

This matter was scheduled for an Administrative Hearing on May 23, 2019 at 9:00 a.m. at the CNMI Department of Labor, Administrative Hearing Office. Respondent Imperial Pacific International (CNMI) LLC ("Respondent") was present and represented by Bertha Leon Guerrero and Attorney Kelley Butcher. CNMI Department of Labor, Enforcement Section ("Enforcement") was present and represented Investigators Bonifacio Castro and Jerrick Cruz. Complainant Reynaldo B. Awin ("Complainant") failed to appear.

Respondent orally moved for entry of default judgement.

Pursuant to NMIAC § 80-20.1-480(l), "[e]xcept for good cause shown, failure of a party to appear at a hearing after timely being served notice to appear shall be deemed to constitute a waiver of any right to pursue or content the allegations in the complaint. If a party defaults, the hearing officer may enter a final order containing such findings and conclusions as may be appropriate." "When an application for an entry of default or a default judgment occurs such application is a representation that due service has been made of all pleadings or papers required by [the regulations] to be made as a condition to the relief sought." NMIAC 80-20.2-135(a).

Upon a review of the record, the undersigned hearing officer declares the following findings of fact and conclusions of law:

1. On December 28, 2018, Complainant filed a labor complaint against Respondent Imperial Pacific International (CNMI) LLC ("Respondent") for unpaid wages, a violation of the

WARN Act, nonpayment of paid time off, nonpayment of bonuses, and front pay of 60 days notice.

2. On March 5, 2019, the parties attended mediation. At mediation, Complainant was represented by Attorney Joe Hill. Attorney Joe Hill did not file a notice or entry of appearance for his limited representation. The parties failed to resolve the dispute.
3. On March 6, 2019, an Order Referring Parties for Investigation and Notice of Hearing was issued and served to the parties at the Administrative Hearing Office. Subsequently, the parties participated in an investigation conducted by Enforcement.
4. On April 9, 2019, a Notice of Prehearing Conference was issued which scheduled a Prehearing Conference for May 2, 2019 at 9:00 a.m. at the Administrative Hearing Office
5. On April 12, 2019, the undersigned issued an Amended Order Rescheduling Hearing. The Order indicated that the Hearing was rescheduled to May 23, 2019 at 9:00 a.m. at the Administrative Hearing Office. Pursuant to NMIAC § 80-20.1-475(d), Complainant was duly served with adequate notice of the above-mentioned hearing date, time and location.
6. On May 1, 2019, Enforcement issued determination recommending judgment in favor of Respondent or dismissal of Complainant's claim.[1]
7. The written determination was untimely served to the parties during the May 2, 2019 Prehearing Conference. In order to allow parties additional time to prepare and respond to the merits of the determination, the Prehearing Conference was continued to May 10, 2019 at 9:00 a.m. at the Administrative Hearing Office. Parties were given sufficient written and verbal notice.
8. On May 10, 2019, Complainant failed to appear for the second Prehearing Conference.
9. On May 23, 2019, Complainant failed to appear for the Administrative Hearing.

In consideration of the above findings and conclusions, the undersigned hearing officer deems default judgement is appropriate. Accordingly, pursuant to NMIAC §80-20.1-480(l), default judgement is hereby entered in favor of Respondent.

So ordered this **23rd** day of May, 2019.

/s/
Jacqueline A. Nicolas
Administrative Hearing Officer

[1] The written determination by Enforcement cited the wrong date. However, the hearing officer has the sole authority to control the calendaring of hearings. *See Pua v. Suwaso Corporation dba Coral Ocean Golf Resort*, LC 18-049 (Administrative Order issued April 25, 2019 at 2). Further, the correct date was verbally reiterated during the initial prehearing conference.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	Labor Case No. 17-003(T)
Emeelourd C. Udani,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Huang Shun Corporation,	)	
Respondent.	)	
	)	

This labor case came on for hearing on October 3, 2017, in the Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The parties testified via a Skype internet connection from the Tinian Labor Office to the Hearing Officer who was in the Administrative Hearing Office in Saipan.

Complainant Emeelourd C. Udani appeared without counsel. Respondent Huang Shun Corporation appeared through its Assistant Office Manager, Henrietta Cruz, and its legal counsel, Robert O'Connor. The Tinian Labor Office appeared through investigator Ramona P. Cabrera-Viches. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

Complainant Emeelourd C. Udani ("Employee") worked as a store cashier for Respondent Huang Shun Corporation ("Employer") in Tinian from June 20, 2016, until July 17, 2017. During her employment, on June 20, 2017, Employee filed a complaint against Employer. [A copy of the Complaint was entered into evidence as Hearing Exhibit 1.] This case followed.

Denial of the Motion For Continuance of the Hearing:

On the morning of the hearing, October 3, 2017, upon realizing that Employer had brought an attorney to represent the company, Employee asked that the hearing be postponed for thirty (30) days so that she could hire an attorney to represent her. The request was untimely. The Notice of Hearing, issued on July 28, 2017, states that "any request for continuance of the hearing must be made in writing to the

Hearing Office at least five days prior to the scheduled hearing date." [Notice of Hearing; Order Referring Parties For Investigation; Other Orders, issued on 7/28/2017.] Although Employee had known of the hearing since July, she had taken no steps to hire counsel. Employee admitted that she had not thought to hire an attorney until the morning of the Hearing when she saw that Employer had hired an attorney to represent the company. [Testimony of Ms. Udani.]

Employer opposed the request on the grounds that it was untimely and prejudicial to its interests. Employer noted that, given the last-minute nature of the request, Employer's counsel had already flown to Tinian to defend the case. Employer had prepared for hearing and gathered its witnesses. Employer contended that lost costs and attorney's fees for the session would be about $700.

Based on the facts, the Hearing Officer denied Employee's request to postpone the hearing and ordered the Hearing to proceed. As in the case of all litigants who appear *pro se*, the Hearing Officer gave Complainant wide latitude in terms of procedural and/or evidentiary rules. [See Employment Rules and Regulations, codified in the Northern Mariana Administrative Code ("NMIAC") at § 80-20.1-460(b).] [1]

FINDINGS OF FACT

Employee worked as a store cashier for Employer at the Huang Shun Market in Tinian from June 16, 2016 until July 17, 2017. [Testimony of Ms. Cruz and Ms. Udani.] Employee was hired without a written contract and the employment was not made subject to any written contract. [Testimony of Ms. Cruz.]

At the time that Employee was hired, Employer presented her with a 4-page document, entitled "Rules and Regulations." Employee read these rules and signed the document, indicating that she agreed to abide by the rules. [A copy of Employer's Rules and Regulations was entered into evidence as Hearing Exhibit 2; the original of the document was entered into evidence as Hearing Exhibit 2a.]

Rule no. 5 of Employer's Rules and Regulations stated that "cashiers are not allowed to get short or over of 2 dollars or less. Any cashiers who got short must be responsible, you cannot be short or over. This will reflect on your

[1] Section 460(b), entitled "Pro Se Litigants," states, in part: "In applying the rules of procedure in adjudicative proceedings, a hearing officer shall give added accommodation to parties appearing *pro se* to ensure than no party is prejudiced and that the ends of justice will be served. " NMIAC at § 80-20.1-460(b).

performance." [*Id.* at no.5.] Stated simply, Employer expected its cashiers to reconcile the amount of cash they collected at the end of each shift; discrepancies between the cash received and the cash register tape needed to be no more than two dollars, either over or under. Discrepancies of more than two dollars would reflect negatively on the cashier's performance.[2]

Employee worked as a cashier at Huang Shun Market on the overnight shift (midnight to 8 a.m.) from June 2016 until late March 2017. On March 16, 2017, Employee requested and received a Certificate of Employment from Employer which stated, among other things, that "she (Employee) was proven to be with satisfactory performance, good moral character." [A copy of the Certificate of Employment was entered into evidence as Hearing Exhibit 7,]

On March 26, 2017, Employee was attacked by a store customer while working her shift at Huang Shun Market. She spent several days recovering, including two days that were spent at the hospital in Saipan. Employee testified that around this time, the Tinian police asked Employer to move Employee's shift from the night to the day shift. On April 2, 2017, Employee shift at Huang Shun Market was changed to the "day" shift (4 p.m. to midnight).

After Employee transferred to the day shift, she began having difficulty keeping up with the increased customer traffic at the store. [Testimony of Ms. Udani and Ms. Cruz.] Employee found the pace to be must faster, given the increased number of customer business compared to that of the overnight shift. At Hearing, Employee admitted that she had had difficulty keeping up with the increased pace at the cash register. Employee asked her Employer to give her a few "weeks or months" to improve her performance. [Testimony of Ms. Udani.]

Employee's Informal Complaint lodged on May 25, 2017:

In April and May 2017, Employee took offense at comments made by Employer's bookkeepers, Jayleen Dimalanta and Sunny Zhang, who had commented out loud about the long lines behind Employee's cash register and urged her to work faster. On May 25, 2017, Employee visited the Tinian Labor Office and filed an informal complaint about the harassment she was allegedly suffering from the actions of Employer's accountants. DOL's Ms. Cabrera contacted Employer's Assistant

[2] Employee testified that she believed that Exhibit 4 was not the document that she had signed when she was hired. Employer then produced the original Rules and Regulations [Hearing Exhibit 4(a)] that contained the original signature of Ms. Udani. The Hearing Officer finds that Employee signed this document on the date indicated – 6/15/16, as evidenced by Hearing Exhibit 4(a).

Manager, Henrietta Cruz, in an effort to diffuse the situation. Ms. Cruz then spoke to the bookkeepers, reminding them that it was not in their job description to criticize other employees and to instruct them not to lecture co-workers about how to do their jobs. [Testimony of Ms. Cabrera and Ms. Cruz.] Employee reported no further incidents of harassment after Ms. Cruz spoke to the bookkeepers.

Employee's Labor Complaint Filed on June 20, 2017:

As stated above, Employee lodged an "informal" complaint against her two co-workers on May 25, 2017. On June 20, 2017, Employee returned to the Tinian Labor Office and filed a "formal and final" complaint against Employer. Again, this complaint mainly focused on the actions of Employee's two co-workers, Jayleen Dimalanta and Sunny Zhang. [A copy of the Complaint Letter ("Complaint") was entered into evidence as Hearing Exhibit 1.]

The Complaint contained certain allegations and requests for relief that were entirely ignored by Employee at Hearing. These include: an allegation that Jayleen denied Employee's request to change her schedule due to her son's illness; an allegation that Employer failed to bring Employee to the hospital after she was attacked in March 2017; a request for compensation for "shocking threats" and for "emotional damages;" and a reference to "issues...regarding CNMI Employment Equal Opportunity." Given that no evidence was presented regarding these issues and no mention was made of them by Employee at Hearing, they are deemed waived. [See Conclusions of Law, item no. 2, on page 7.]

Amended Complaint: After Employee was terminated on July 17, 2017, she shifted the focus of her Complaint to the contention that she had been wrongfully terminated in retaliation for her filing the Complaint with the Department of Labor. [Testimony of Ms. Udani.] During the Hearing, the Hearing Officer, *sua sponte*, issued an oral order amending the Complaint to add this charge. [See Conclusions of Law, item no. 1, on page 7.]

Employee's Job Performance:

After Employee began working the day shift in April 2017, Employer's management noticed that Employee's daily sales reports contained many discrepancies and several incorrect transactions that were more than two dollar errors, in violation of Employer's Rule 5 (Hearing Ex. 2). [Test. of Ms. Cruz.]

First Warning Letter: On April 20, 2017, Employer issued its "First Warning Letter." [A copy of the First Warning Letter was entered into evidence as Hearing Exhibit 3.] In the letter, Employer wrote: "We reviewed your daily sales reports for the month of April, 2017. We noticed that you had a constant cash sales discrepancy on your report." The letter listed six daily sales discrepancies in the first 15 days of April, and reminded Employee that company cashiers were only allowed cash discrepancies of less than $2. The letter continued: "We do not tolerate this matter. The situation showed negligence and unsatisfactory performance of yours....This is a serious matter and deserves your prompt attention. We are expecting you to improve your performance...." *Id.*

During the months of May, June and early July 2017, Employee continued to have cash sales discrepancies of more than $2 in her daily sales reports. Employee testified that she knew Employer was dissatisfied with her job performance during this period. Employee asked her employer again and again to give her more time, months if necessary, to improve her performance on the register. [Testimony of Ms. Udani.]

Second Warning Letter: On July 12. 2017, management prepared a second warning letter, entitled "Warning Letter," signed by Asst. Manager Henrietta Cruz. In the letter, Cruz noted that a review of Employee's daily sales reports for the past two months revealed 11 days (between May 1 and July 5) in which the discrepancies or incorrect transactions were for amounts greater than two dollars. The letter noted that Employer did not see any improvement after the first warning letter. Once again, Employer stated that the matter was "serious" and noted that "this situation showed negligence and unsatisfactory performance of yours." [A copy of the Warning Letter, dated 7/12/2017, was entered into evidence as Hearing Exhibit 4.][3] The Warning Letter was delivered to Employee on about July 15, 2017. [Testimony of Ms. Udani.]

On July 15, 2017, Employee's daily sales report again showed a discrepancy of more than two dollars (over by $5.15). [A copy of this daily sales report was entered into evidence as Hearing Exhibit 6.]

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[3] Both the First Warning Letter and the (second) Warning Letter attached copies of all daily sales reports that were cited in the letters. These back-up documents were entered into evidence along with the letters (see Hearing Exhibits 3 and 4).

Termination

On about July 15, 2017, Employer's management prepared a termination letter for the review of the chief executive officer, Huang, Yuren. Mr. Huang arrived on Tinian around July 15, 2017, and reviewed the situation. According to Ms. Cruz, Mr. Huang had been inclined to give Employee one more chance to improve her performance, but an incident occurred on July 16, 2017, which caused Mr. Huang to decide to terminate Employee. [Testimony of Ms. Cruz.]

The incident involved a videotape of store operations on the evening of July 16, 2017, which showed that shortly after 10 p.m., Employee had allowed a customer to buy items that were concealed in a black plastic bag without scanning such items, as was company policy. Employer believed the customer had loaded the bag with beer, which all stores are prohibited by law from selling to the public after 10 p.m. [4 CMC § 5555; and regulations at NMIAC § 20.1-10.1-145(5).] [4] Employer testified that selling alcoholic beverages after 10 p.m. is a very serious matter because violating this prohibition could cause Employer to lose its license to sell beer. If that were to happen, Employer could lose many customers who buy beer along with other groceries at Employer's store. [Testimony of Ms. Cruz.]

After viewing the videotape on July 16, 2017, Mr. Huang decided to terminate Employee; Mr. Huang then signed the Termination Letter, which had previously been prepared for his signature.[5] [A copy of the Termination Letter was entered into evidence as Hearing Exhibit 5.] The letter was delivered to Employee at her home on July 17, 2017.

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[4] A digital copy of the "videotape" was produced by Employer post-hearing and entered into evidence as Hearing Exhibit 10. After viewing the tape, the Hearing Officer notes that the "tape" shows the customer approaching the register with a closed black bag and Employee ringing up something on the register without looking in the bag. Prior to that, the tape shows the customer going to the refrigerated section of the store and putting one or two cans of something in the bag; the Hearing Officer cannot see if the cans are beer or some other beverage.

[5] Tbe Termination Letter made no mention of the videotaped incident. Rather, it only referred to the discrepancies in Employee's daily sales reports. [See Hearing Exhibit 5.]

CONCLUSIONS OF LAW

1. Employee's Complaint was amended during the Hearing to add a claim for wrongful termination in retaliation for filing a labor complaint.

After Employee was terminated on July 17, 2017, she shifted the focus of her Complaint to the contention that she had been wrongfully terminated in retaliation for her filing the Complaint with the Department of Labor. [Testimony of Ms. Udani.] Employee never formally requested an amendment of her Complaint to add this charge, but it was clear from her Opening Statement at Hearing that the gist of her complaint had become wrongful termination due to alleged retaliation. During the Hearing, the Hearing Officer, *sua sponte*, issued an oral order amending the Complaint to add this charge. This was done in accordance with the Hearing Officer's responsibilities to protect *pro se* litigants against being prejudiced by their lack of legal expertise and to ensure that the ends of justice are served. [Regs. at NMIAC § 80-20.1-460(b) ("The hearing officer should take all steps necessary to develop the record fully, including the record adverse to the Department." See also fn. 1.]

2. The Complaint requested certain relief that falls outside the jurisdiction of the Hearing Office; those portions shall be stricken from the Complaint.

The Complaint, filed on June 20, 2017, requests compensation for "shocking threats," and "emotional damages" as well as compensation for Employer's alleged failure to bring Employee to a hospital after she was attacked (she took herself to the hospital) and compensation for the alleged harassment that Employee suffered at the hands of her co-workers. Such relief is outside the jurisdiction of the Hearing Office. See 3 CMC § 4942(a) (granting the Administrative Hearing Office jurisdiction over "all actions involving alleged violations of the labor and wage laws of the Commonwealth"). Accordingly, these portions of the Complaint shall be stricken and shall not be considered in this Administrative Order.

3. Employee worked for Employer under an "at will" employment arrangement.

Commonwealth courts have followed the principle that employment of unspecified duration is considered "at will" employment. [*See Shiprit v. STS Enterprises, Inc.*, Civ. Action No. 99-0490, Order Granting Defendant's Motion To Dismiss, issued December 13, 1999.] Employee was hired without a written contract and for an unspecified duration; thus, she was an at-will employee.

4. As an "at will" employee, Employee could be terminated with or without cause, provided that the termination did not otherwise violate protected employee rights. Under the so-called "public policy" exception to the at-will doctrine, Employee could maintain a claim for wrongful termination based on her allegation that Employer retaliated against her for filing a labor case.

The "at-will" employment doctrine provides that employment for an indefinite term may be terminated by either the employer or employee at any time or for no reason, without legal liability. *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989). However, there are three general exceptions to this rule: (1) where employer's conduct undermined an important public policy; (2) where discharge would breach an implied-in-fact promise of employment for a specific duration; or (3) where discharge would breach an implied-in-law covenant of good faith and fair dealing in employment contracts. *Shiprit, supra* [*citing Huey v. Honeywell, Inc.* 82 F.3d 327, 330-331 (9th Cir. 1996)].

The applicable exception in this case is the so-called "public policy" exception to the at-will doctrine. Employee alleged that the actual reason for her termination was as retaliation for her filing a labor complaint against Employer one month before her termination. If this charge were proven, it could support a finding of wrongful termination, given that there is a strong public policy in the CNMI against employers retaliating against their employees for filing a labor complaint. This principle is codified in a labor regulation which states that "[a]n employer shall not retaliate against an employee for filing a complaint. Such retaliation is a separate cause of action against the employer." [Employment Rules and Regulations at NMIAC § 80-20.1-455(1).]

5. Employee failed to prove by a preponderance of the evidence that her termination was done in retaliation for her filing of a labor complaint against her employer about one month before her termination.

Employee failed to meet her burden of proving by a preponderance of the evidence that she had been terminated in retaliation for filing a labor complaint against Employer. In fact, Employee presented no evidence at Hearing to prove her assertions regarding retaliation.

Employee's main contention was that Employer complained about her poor performance on the cash register as a mere pretext for the "actual" reason which was to retaliate against her for "seeking assistance from Labor." [Testimony of Ms. Udani.] Yet, this contention is belied by the fact that Employer began

complaining about Employee's poor performance on the cash register three months *before* Employee filed her labor complaint (and two months before her "informal" complaint). Moreover, as she admitted during the Hearing, Employee's labor complaint attacked the conduct of her co-workers, the bookkeepers, rather than company management. Nothing in the record suggests that Employer's management - Asst. Manager Cruz or Mr. Huang – were angry or resentful about Employee's charges, or that they felt the need to protect the bookkeepers. On the contrary, Ms. Cruz testified that she had reprimanded the bookkeepers for the comments they made against Employee.

Furthermore, Employee cited no facts to support her suspicion that management sought to retaliate against her for her filing of the labor complaint. Employee testified that nobody from management mentioned the case to her. This was contradicted somewhat by Ms. Cruz who testified that she had told Employee, it's "your right to file a complaint if you want to." Ms. Cruz testified credibly that the company's decision to issue the second warning letter, and Mr. Huang's decision to terminate, were in no way connected to the fact that Employee had filed a labor case. [Testimony of Ms. Cruz.]

Finally, as discussed below, Employer presented credible evidence to show that its decision to terminate Employee was based on valid business reasons. Absent some credible evidence that Employer acted with a retaliatory motive, the retaliation claim remains merely an unsubstantiated suspicion on the part of Employee.

6. Employer established by a preponderance of the evidence that it had cause to terminate Employee for valid business reasons and that its decision to terminate was based on those legitimate reasons.

As an at-will employee, Employer did not need "cause" to terminate Employee. Nevertheless, Employer presented credible evidence that its decision to terminate Employee was based on valid business reasons.

Employer complained about Employee's numerous cash discrepancies that she reported while operating the cash register; these discrepancies were in amounts above what was allowed under company Rules and Regulations. [Hearing Exhibit 2.] These mistakes were numerous enough to cause Employer's management to be concerned about Employee working the cash register at the market. Employer brought this issue to Employee's attention and warned her in April 2017, months before her termination, that unless she improved, such performance would not be tolerated. [See First Warning Letter at Exhibit 3.]

After receiving the warning, Employee continued to perform below the standards set by Employer: 11 days of inaccurate daily sales reports were reported over the next three months. The issue of Employee's poor performance arose again in mid-July 2017, in connection with a general employee review conducted by the chief executive officer, Mr. Huang. Employer then issued a second warning letter (Hearing Exhibit 4) noting the Employee's continued mistakes on her daily sales reports. [Testimony of Ms. Cruz.]

The final conduct that led to termination occurred on July 16, 2017, when Employee allowed a customer to purchase an unknown beverage after 10 p.m., without requiring the customer to show the item he was buying and without scanning the item on the register, as was company policy. Whether the videotape shows a beer being bagged or not is almost beside the point. Given the known law against selling alcoholic beverages after 10 p.m., the cashier should not have allowed a customer to hide the beverage he was purchasing, especially after 10 p.m. Employee's conduct put Employer at risk for being cited for a violation and losing its license to sell alcoholic beverages. This proved to be the final negative mark against Employee's performance. After viewing the video, Mr. Huang made the decision to terminate Employee.

The Hearing Officer finds that the evidence establishes that Employer had cause to terminate Employee. It was reasonable for Employer to expect Employee's performance on the cash register to improve after *many months* on the job. It was also reasonable for Employer to conclude, when the cash discrepancies continued, that Employee was simply not going to improve. Furthermore, Employee's failure to scan all products, especially those purchased after 10 p.m., caused Employer to have a legitimate concern that Employee was jeopardizing Employer's license to sell beer. For these reasons, Employer had cause to terminate Employee. Thus, even if Employee's employment had been subject to a "termination only for cause" requirement, Employer would not have been found at fault for this termination.[6]

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[6] Employer produced an example of the type of written contract that Employer uses in employing CW-1 status workers. The contract contains a section regarding "Termination For Cause" and one cause listed is "neglect" or "careless performance." [A copy of the contract was entered into evidence at Hearing Exhibit 9.] Employer argued that Employee's inaccurate daily sales reports demonstrated poor or careless performance; therefore, even if Employee had been employed under these types of written contracts, she could have been terminated for cause. The Hearing Officer agrees.

7. Based on the above conclusions, judgment should be entered in favor of the Respondent Employer in this case.

For the foregoing reasons, the Hearing Officer finds that Employer did not violate any labor laws or statutes by terminating Employee in July 2017. Accordingly, Employee shall take nothing from the Complaint and judgment shall be entered in favor of Employer – Huang Shun Corporation.

8. Employer shall be awarded the reasonable costs it incurred in defending this case, provided that such costs are itemized in an Affidavit and approved by the Hearing Officer.

At the conclusion of the Hearing, Employer's counsel made an oral request for reimbursement of Respondent's reasonable "costs" incurred in defending this action, excluding attorney fees. As the prevailing party, Respondent could request attorney fees but chose not to do so. The Hearing Officer finds Respondent's request to be justified. Therefore, Respondent shall be awarded its reasonable costs incurred in defending this case, provided that those costs are substantiated in an itemized Affidavit to be submitted to the Hearing Officer for approval. [3 CMC §§ 4947(d)(8) and (d)(11); and Regs. at §§ 80-20.1-485(c)(13) and (c)(14).]

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Motion to Postpone Hearing was Denied:** For the reasons stated in the discussion on pages 1-2, Complainant's request to postpone the hearing on October 3, 2017, was denied as untimely and prejudicial. 3 CMC § 4947(d)(11).

2. **Judgment:** Based on the findings and conclusions detailed above, judgment is hereby entered in favor of Respondent Huang Shun Corporation with respect to the Complaint filed on June 20, 2017, and amended at Hearing. 3 CMC § 4947(b).

3. **Award of Costs:** Respondent Huang Shun Corporation shall be awarded the costs it reasonably incurred in defending itself in this action (excluding attorney fees). 3 CMC § 4947(d)(8) and (d)(11). Respondent is ORDERED to submit an Affidavit of Costs to the Hearing Office within ten (10) days after the date of issuance of this Order, if it wishes to pursue its request for costs.

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[L.C. No. 17-003(T)]

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 25, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY

ORIGINAL

In the Matter of:	**Labor Case No. 17-018** **Secretary Appeal No. 2019-001**
Zaji O. Zajradhara, Appellant, v. Nippon General Trading Corporation dba Country House Restaurant, Appellee.	**FINAL ORDER**

I. INTRODUCTION

On March 28, 2019, Appellant Zaji O. Zajradhara ("Appellant") filed an appeal to the Administrative Order granting Appellee's Nippon General Trading Corporation dba Country House Restaurant ("Appellee") Motion to Dismiss. On April 26, 2019, Appellee filed a Brief of Appellee and Cross Appeal. For the following reasons, the undersigned hereby **AFFIRMS** the above-stated Administrative Order.

II. BACKGROUND

This matter concerns an alleged violation of the CNMI's employment preference statute for a bartending position at Appellee's business. On June 2, 2017, Appellant filed a hand written complaint alleging the following:

> On 3-22-2017, I applied to the above stated Company via their contact email advertised within their JVA. I have previously applied for the same positions advertised

> (Bartender) back in 6-4-2016. I have also previously filed a Complaint against this Company.
>
> The position – JVA: 17-03-46295, is presently held by a Contract Worker – all (5) positions are Contract Worker Renewal Visa position [*sic*]!
>
> To this day, I have neither been contacted for an interview nor hired; though I believe that I am qualified for the position.
>
> I seek back pay from date of application – and that this Company be sanctioned!!

On August 14, 2017, a mediation between the above-captioned parties was conducted, but ultimately failed. Subsequently, on October 10, 2017, Appellee filed a Motion to Dismiss arguing, in part, that Appellant's complaint contained false allegations. Specifically, Appellee argued:

1. Appellant knowingly filed false allegations against Appellee;
2. Appellant's statement that he was not contacted for an interview was a lie;
3. Appellant's statement that he was qualified for the position is also a lie;
4. Appellee hires "status qualified" workers whenever possible; and
5. The Complainant presented other false information in his resume.

Additionally, Appellee requested an award of attorney fees.

On October 11, 2017, Appellant filed a Response in Opposition to the Motion to Dismiss. Therein, Appellant stated, among other things, that the above-mentioned false information was a mistake and the test given to determine qualifications was discriminatory.[1]

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[1] Appellant fails to articulate how the alleged discrimination is relevant in establishing or rebutting a violation of the employment preference statute.

On October 16, 2017, Appellee filed a Reply to Complainant's Response. Effectively, Appellee reiterates that dismissal is appropriate because: (1) Appellee refuted the pertinent allegations in the complaint; and (2) the allegations in the complaint are insufficient to maintain a cause of action for the employment preference statute.

A hearing was held on October 9, 2018. On March 19, 2019, the Administrative Hearing Office issued an Administrative Order granting the motion to dismiss but declining to award attorney's fees in the matter. On March 28, 2019, Appellant filed an appeal to the dismissal. The grounds for appeal were unclear. On April 26, 2019, Appellee filed a Brief of Appellee and Cross-Appeal. Therein, Appellee argues that nothing in the Appellant's filing warrants reversal or remand of the March 19th Administrative Order. Further, Appellee argues that the matter should be remanded for an award of fees and costs. On April 28, 2019, Appellant filed a response to the cross appeal. Appellant's response makes several inflammatory and salacious statements, however, again, the statements were irrelevant to the issue or unsupported in law or fact.

III. LEGAL STANDARD

Pursuant to 3 CMC § 4528(g),

> [w]ithin fifteen days of issuance, any person or party affected by findings, decisions, or orders made pursuant to subsection (f) of this section may appeal to the Secretary. Upon appeal, the Secretary may, in the Secretary's discretion, restrict review to the existing records, supplement the record with new evidence, hear oral argument, or hear the matter de novo pursuant to 1 CMC §§ 9109 and 9110. The Secretary shall have the same powers as a hearing officer in addition to other powers pursuant to this section. Upon completion of review, the Secretary shall affirm or modify the finding, decision, or order in writing. Any modification shall include supplemental findings. The Secretary's decision shall constitute final action for purposes of judicial review.

3 CMC § 4528(g).[2]

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the parties' filings, the undersigned finds a number of issues on appeal. As a preliminary matter, the undersigned notes that all arguments that are irrelevant, incomplete, and baseless in law or fact will not be considered or further discussed in this Order.

1. Dismissal was warranted as the Appellant fails to state sufficient allegations to support a claim for a violation of the employment preference statute.

Generally, "[c]itizens and CNMI permanent residents and U.S. permanent residents shall be given preference for employment in the Commonwealth." 3 CMC § 4521; *see also* NMIAC § 80-20.1-101 ("It is the policy of the Commonwealth that citizens, CNMI permanent residents and U.S. permanent residents shall be given preference for employment in the private sector workforce in the Commonwealth. . . ."). "A citizen or CNMI permanent resident or U.S. permanent resident who is qualified for a job may make a claim for damages if an employer has not met the requirements of 3 CMC § 4525, the employer rejects an application for the job without just cause, and the employer

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[2] Parties seeking review under the CNMI Administrative Procedure Act must first exhaust all intra-agency appeals expressly mandated either by statute or by the agency's regulations. Thereunder, an agency action should be overturned only when the agency has relied on factors the Legislature has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Calvo v. NMI Scholarship Advisory Bd.*, 2009 MP 2 ¶ 10; *see also Pacific Security Alarm, Inc. v. CPA*, 2006 MP 17 ¶14. Agency actions are entitled to a presumption of regularity. Consequently, an agency is not required to justify an action or decision unless the presumption of regularity has been rebutted by evidence suggesting that the agency decision is arbitrary and capricious. *Id.*; *see also Pacific Security Alarm, Inc., v. CPA*, 2006 MP 17 ¶15. The term "arbitrary and capricious" characterizes a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle. *In re Blankenship*, 3 NMI 209 ¶ 15 (1992). The standard of review for an appeal alleging an arbitrary and capricious action is similar to, if not the same as, the abuse of discretion standard. A court will review an action or decision alleged to be arbitrary and capricious to determine whether the action was reasonable and based on information sufficient to support the decision at the time it was made. *Id* at ¶ 16.

employs a person who is not a citizen or CNMI permanent resident or U.S. permanent resident for the job." 3 CMC § 4528(a)[3]; *see also* NMIAC § 80-20.1-455(f) ("Any citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job, as described in a job vacancy announcement, may file a complaint making a claim for damages if an employer rejects an application for the job without just cause and the employer employs a person who is not a citizen, CNMI permanent resident, or U.S. permanent resident for the job."); *see also* NMIAC § 80-20.1-220(a) ("No employer may hire a foreign national worker, transitional worker, or other nonimmigrant alien if a qualified citizen, CNMI permanent resident, or U.S. permanent resident applied for the job in a timely fashion.").[4]

Pursuant to NMIAC § 80-20.2-130(c)(1), a party may file a motion to dismiss on the following grounds: lack of jurisdiction over the subject matter; lack of jurisdiction over the person; insufficiency of process; insufficiency of service of process; and failure to state a claim upon which relief can be granted. While the Administrative Hearing Office has not specifically adopted nor bound to the pleading or motion to dismiss standard under Commonwealth Rules of Civil Procedure and its progeny of cases—they may be instructive.

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[3] Section 4525 states, "[i]n the full-time workforce or any employer, the percentage of citizens, U.S. permanent residents, and CNMI permanent residents and their immediate relatives employed shall equal or exceed the percentage of citizens, U.S. permanent residents, and CNMI permanent residents and their immediate relatives in the available private sector workforce unless attainment of this goal is not feasible within the current calendar year after all reasonable efforts have been made by the employer." 3 CMC § 4525. "The current percentage specified by the Department . . . is 30%." NMIAC § 80-20.1-210(c)(3). This provision, however, "shall not apply to employers of fewer than five employees, provided however, the Secretary may, by regulation, require each business to have a least one employee who is a citizen or CNMI permanent resident and U.S. permanent resident, or remove the exemption available to employers against whom two or more judgments are entered in Department proceedings in any two year period. "No waivers are available with respect to the workforce participation objective." NMIAC 80-20.1-210(f); *contra* NMIAC § 80-20.1-215.

[4] "The Secretary shall promulgate regulations to implement the intent of this chapter pursuant to the Administrative Procedures Act including any delegation of the Secretary's duties as imposed herein to any employee of the Department." 3 CMC § 4530.

Having reviewed the record, the undersigned finds that dismissal was warranted because the complaint fails to include sufficient allegations to support a claim for a violation under 3 CMC § 4528(a). Specifically, there are no allegations in the complaint regarding: (1) the employer's failure to meet the 30% workforce objective requirement; (2) the employer rejected the application without just cause; and (3) the employer employs a person who is not a citizen, CNMI permanent resident or U.S. permanent resident for the job. Instead, Complainant simply alleges that he applied and was never contacted or interviewed for the bartender position. Said allegations are insufficient to provide notice of the claim to which the opposing party must defend against and insufficient to state a claim—especially when they are proven to be false statements. Accordingly, dismissal was warranted.

2. The failure to hire Appellant was justified considering the lack of qualifications and multiple misrepresentations by Appellant.

The Department's regulations provide, in part, "[t]he term 'just' cause' for rejecting an application for employment includes the lawful criteria that an employer normally applies in making hiring decisions such as rejecting persons with criminal records for positions of trust, ***rejecting persons who present fraudulent or inaccurate documentation in support of the application***; rejecting persons without an education degree necessary for the position, ***rejecting persons with unfavorable recommendations from prior employment***, rejecting persons with an employment history indicating an ability to perform the job successfully, rejecting persons with an educational background making it unlikely that the necessary education or training to hold the position could be accomplished successfully within a reasonable time; and similar just causes." NMIAC § 80-20.1-455(f)(1) (emphasis added). Notably, the aforementioned list of "just causes" is not exhaustive. "Any criteria in making hiring decisions advanced in support of just cause must be consistent with the published job vacancy announcement for the job and must be a part of the employer's established hiring procedures." NMIAC § 80-20.1-455(f)(2).

Contrary to the allegations made in the complaint, Appellant was interviewed for the bartender position on April 21, 2017. The decision not to hire Appellant was supported by a number of reasons. According to Appellee, Appellant was not qualified to bartend. Appellant represented that he had approximately twelve (12) years' worth of experience as a bartender. However, given the opportunity to demonstrate his bartending ability and skill in a practical test, Appellant was unable to correctly make any of the common drinks requested. While Appellant argues he could learn how to make the drinks, Appellee's decision to reject Appellant's application was partly due to false information in the Appellant's resume. Specifically, in an attempt to follow up on Complainant's qualifications and experience, the businesses in his resume did not exist or could not be reached. Given the inability to perform and the viewed misrepresentations by Appellant, the undersigned finds that Appellee had just cause to reject Appellant's application.

3. Appellant fails to meet his burden in filing an appeal.

Administrative adjudications enjoy a presumption of regularity. *Estate of Muna v. Commonwealth*, 2000 MP 2 ¶ 13. One who attacks an administrative adjudication bears the burden of rebutting the presumption of regularity by evidence of unfairness or prejudice in the proceedings. The burden of rebutting the presumption is a heavy one. *Id.*

Appellant alludes to and accuses of unfairness and discrimination—however, Appellant fails to present even a scintilla of evidence to support his unfounded accusations. For example, Appellant states; "I have repeatedly sent requests for the adjudication . . . yet, when a white/male attorney sent in a request for adjudication Mr. [S]oll, completes one which totally negates the original premise of what he was 'supposed' to be looking into; which was/is if [Appellee] gave me an arbitrary test, and applied a standard that it did not apply to its foreign workers."[5] Appellant harps on this

[5] Upon review of the record, there is no such filing for requests of adjudication from Appellant.

"arbitrary test" yet fails to show any evidence why it was an unfair or discriminatory under the circumstance. Moreover, Appellant fails to articulate why the hiring practice to test an applicant's alleged skills and qualifications was unjustified.[6]

Further, instead of combatting issues of unfairness or prejudice in the proceedings, Appellant merely reiterates his arguments made at the hearing. Specifically, Appellant argues that there were no false misrepresentations in the complaint, but mistakes he made "due in part because of his many filings at the time." First, as further discussed below, a party's pro se status does not excuse them from the applicable rules. Second, in consideration of Commonwealth law favoring the finality of judgments, reiterated arguments are inadequate towards meeting his burden in appeal.[7] Third, Appellant's arguments are unpersuasive because the records shows that the statements made in the complaint were proven to be plainly false. Fourth, if it were an innocent mistake, the Appellant should have taken steps to cure his mistake (i.e., amend the complaint) to preserve the integrity of the adjudications—rather than litigating ancillary or moot issues. It should be noted that filing a complaint is a very serious matter that initiates legal proceedings and investigations. The appellant's inability to keep track of his numerous bare bone complaints and the unverified allegations made therein, despite the attestations of a certifying signature,[8] are telling of a deeper issue and cut against the authenticity and

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[6] It should further be noted that Appellant may be arguing discrimination based on federal laws outside the jurisdiction of this Office. This venue is limited to adjudication of Appellant's CNMI employment preference statute. Accordingly, discussion on the alleged discrimination is limited.

[7] Commonwealth law favors the finality of decisions, to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Cushnie v. Arriola*, 2000 MP 7 ¶ 14. Accordingly, it is the general practice of the court "to refuse to reopen what has been decided." *Id.*

[8] The signature of the complaint "constitutes a certificate by the signer that he or she has read the pleading; that to the best of his or her knowledge, information and belief, there are good grounds to support it; and that it is not filed for purposes of delay." NMIAC § 80-20.1-455(e).

credibility of Appellant's complaints and appeals—as well as a serious diversion of the Commonwealth Legislature's intent in enacting the employment preference statute.[9]

In short, Appellant's filings simply deflects serious holes in his claim, points fingers, and confuses the issues. Further, there was substantial evidence in the record to support the decision in the March 19, 2019 Administrative Order. In fact, the records shows: (1) the Motion to Dismiss was supported by 7 exhibits; (2) both parties had a meaningful opportunity to respond in the filings and during oral arguments; and (3) the Administrative Order analyzes the records and comes to a logical and reasonable conclusion. Clearly, the Appellant fails to meet its burden in rebutting the presumption of regularity with evidence of unfairness or prejudice.

4. Pro se status does not excuse a party from applicable rules.

The undersigned finds that it is imperative to recognize the underlying policies and the parties' arguments as to accommodations and leniency towards pro se litigants. While a party has the irrefutable right to proceed as a pro se litigant, it undoubtedly presents obstacles in construing pleadings, filings, and arguments. Oftentimes, the Administrative Hearing Officer's duties in maintaining impartiality, upholding applicable rules or regulations, and ensuring that a decision is well supported by the record are in direct conflict. The overwhelming majority of complainants at the Administrative Hearing Office are pro se litigants without the legal acuity to articulate elaborate arguments or strategize a course through procedural minefields. Purposefully, the administrative complaint process at the Department of Labor was designed to give added accommodations and simplified procedures to ensure access to justice. Further, where there is a lack of binding precedent, mandatory bright-line rules, or strictly enforced standards, the Administrative Hearing Officer's arduous task in balancing competing

[9] *See* PL 15-108 ("The overall guiding policy with respect to foreign national workers is to provide for a stable work force and protect due process rights without creating entitlements.").

policies supports the need for discretion and liberal construction of pleadings, filings, and arguments.

That being said, there must be a limit to accommodations and liberal construction afforded to pro se pleadings and filings. While the Department's regulations specifically provide for added accommodations, the Commonwealth Supreme Court found that one's pro se status does not excuse repeated, unexcused, and prejudicial violations of the applicable rules. *Villagomez v. Sablan*, 4 NMI 396 (1996). Further, the undersigned agrees that it is beyond the duty of the adjudicator to make or strain to infer unfounded or baseless arguments on behalf of the party. Accordingly, where even a liberal construction would not add meaning to the filings, dismissal is appropriate.

In this matter, Appellant's complaint asserts a blanket entitlement to relief solely because he applied and was not interviewed. The adjudicator must make unreasonable leaps and bounds to even infer a violation of the CNMI employment preference statute. Appellant argues that additional discovery will prove his claim, however, the initiation of the baseless complaint is not a fishing expedition. Further, Appellant's request for discovery was denied and the time for discovery in this matter has passed. In reviewing the filings on appeal, the undersigned finds that, even the most liberal construction, within the confines of the regulations, fails to add any meaning to Appellant's pleadings. Further, it should be noted that Appellant's filings in the appeal fall below the standard of conduct mandated by NMIAC § 80-20.1-480(c).[10] Accordingly, Appellant may not use his pro se status to excuse mistakes or applicable rules.

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[10] Without cause or justification, Appellant makes salacious arguments that are baseless in law or fact—unfairly impugning the integrity of the parties, irrationally questioning the impartiality of the Hearing Officer, and disrespecting the proceedings of the Administrative Hearing Office. For example, Appellant states, "ATTORNEY SCOGGINS IS AN OVERT RACIST CLOWN DISGUISING HIMSELF AS AN ATTORNEY WHEN I RELAITY [*sic*] ALL HE IS IS A LIAR FOR HIRE . . . ." and "RINGS OF AN INSECURE WHITEMAN [*sic*] TO ME." Also, Appellant further states that the Hearing Officer acted for "the sake of saving his brother in juris," and "rescuing his brother." Without any actual evidence or showing of discrimination to support his accusations,

5. Appellee's Cross Appeal is untimely.

The deadline to appeal is established by statute and mirrored in the Department's regulations. *Compare* 3 CMC § 4948 and NMIAC § 80-20.1-620(b). Certainly, the statute is controlling. The statute provides, "within fifteen days of issuance, any person or party affected by findings, decisions, or orders . . . may appeal to the Secretary." 3 CMC § 4948(a). Further, "[i]f no appeal is made to the Secretary within fifteen days, the findings, decisions, or orders ***shall be unreviewable*** administrative or judicially." *Id* (emphasis added).[11] Administrative proceedings that are not appealed within the designated time for appeal become final under the principle of administrative res judicata. *Flores v. Commonwealth*, 2004 MP 9 ¶ 11.

Here, the Administrative Order on appeal was issued on March 19, 2019. The parties were served on March 20, 2019. On March 27, 2019, Appellant filed an appeal to overturn the dismissal. On April 28, 2019, Appellee filed a cross appeal to overturn the denial of attorney's fees.[12] Despite the persuasive arguments made for awarding attorney's fees in cases where vexatious complainants file meritless, frivolous, or

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Appellant seriously jeopardizes his credibility through inappropriate mudslinging. Despite Appellant's misinformed and misdirected accusations, the undersigned finds that the Appellee and Hearing Officer simply made legal arguments and logical conclusions based on the facts presented.

[11]The doctrine of exhaustion of administrative remedies requires parties challenging agency actions and decisions to exhaust all administrative remedies before seeking judicial review. *Cody v. NMI Retirement Fund*, 2011 MP 16 ¶ 11. When exhausting administrative remedies, claimants must comply with an agency's deadlines and other critical procedural rules. Additionally, the exhaustion doctrine requires that claimant's raise issues with the agency or lose the right to challenge those issues in court. *Marianas Insurance Co. v.* CPA, 2007 MP 24 ¶ 14. The time limit for filing an intra-agency appeal is mandatory and jurisdictional. *Rivera v. Guerrero*, 4 NMI 79 (1993). A court lacks jurisdiction to review administrative decisions not timely appealed during the administrative process. *Rivera v. Guerrero*, 4 NMI 79 (1993). A court has no jurisdiction to review administrative decisions unless timely appealed during the administrative process. *Pac. Saipan Technical Contractors v. Rahman*, 2000 MP 14 ¶ 14.

[12] Generally, under the "American Rule," each party is responsible for paying its own attorneys' fees and costs, "unless specific authority granted by statute, contract, or court rule allows for the assessment of those expenses against the other party." *Atom's Co. Ltd. v. Orlando Mallari,* SC-15-0237 (NMI Super. Ct. June 7, 2018) (Written Decision Following Evidentiary Hearing Awarding Costs in the Amount of $55.00 and Attorneys' Fees in the Amount of $187.50 at 2). Additionally, an adjudicator may award attorney's fees in the interest of fairness and equity. Under the regulations, "[a]ny complainant or respondent may by motion, file and recover sanctions and attorney's fees for an opposing party's advocation of a claim or defense that is frivolous, without merit, or in bad faith." NMIAC § 80-20.2-140; *see also* NMIAC 80-20.2-130(c)(5).

fraudulent complaints, Appellee's cross appeal to overturn the decision of attorney's fees is outside the fifteen deadline under 3 CMC § 4948(a). Accordingly, the Administrative Order, with respect to the issue of attorney's fees, is final.

V. CONCLUSION

For the foregoing reasons, the Administrative Order dismissing the complaint, dated March 19, 2019, is hereby **AFFIRMED**.

So ordered this **13th** day of June, 2019.

/s/
VICKY BENAVENTE
Secretary of Labor

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of	)	
Jose Juan C. Reyes,	)	L.C. No. 16-001(T)
Complainant,	)	ADMINISTRATIVE ORDER
v.	)	
Bridge Investment Group LLC,	)	
Respondent.	)	
	)	

This labor case came on for hearing on August 30 and October 19, 2016, in the Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The parties testified via a Skype internet connection from Tinian to the Hearing Officer who was in the Administrative Hearing Office in Saipan.

Complainant Jose Juan C. Reyes appeared without counsel. Respondent Bridge Investment Group LLC appeared through its Human Resources Assistant, Wayne Sanchez, and its legal counsel, Joaquin Dlg. Torres. The Tinian Labor Office appeared through investigator Ramona Cabrera-Viches. The following individuals testified as witnesses: Ray Pangelinan, Romeo A. Diaz, Faruk Jahir, Vincent Cing and Steve Mendiola. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

Beginning in July 2015, Complainant Jose Juan C. Reyes ("Employee") was hired by Respondent Bridge Investment Group LLC ("Employer") without a contract for an indefinite period. Employee worked for Employer as a heavy equipment operator from July 2015 until February 19, 2016. Employee's supervisor was Joe Villagomez; Mr. Villagomez reported to the Construction Site Supervisor, Romeo A. Diaz. During certain months of his employment, Employee worked with co-worker, Faruk Jahir, at a construction site in Tinian.

During his employment, Employee never received any written performance reviews, warnings or suspensions. Until his termination, Employee believed he was getting along well with his supervisor and co-workers. [Test. of Mr. Reyes.]

On February 19, 2016, Employer's Security Chief, Ray Pangelinan, approached Employee as he was ending his day shift and handed him a sealed envelope. The envelope contained a Memorandum from his supervisor, Joe Villagomez, notifying Employee that he was being terminated immediately from the company for violating numerous work rules and policies. The Memorandum stated no facts specifying how or when Employee had committed these alleged violations of company rules. Employee claimed that when Mr. Pangelinan gave him the letter, he told him that he was being terminated because of an incident resulting in a "dump truck tail light being broken." [Handwritten Complaint, entered into evidence as Hearing Exhibit A.]

On April 22, 2016, Employee filed a labor complaint against Employer for wrongful termination. In his Complaint, Employee alleged that he had been terminated without notice and for no valid reason, and that Employer had failed to follow its own internal grievance procedures in terminating him. *Id.*

The Employer's Investigation

In early February 2016, Construction Site Manager Romeo ("Rem") Diaz decided to review Employee's on-the-job conduct. Mr. Diaz testified that he had heard negative rumors about Employee and wanted to determine if the rumors were true. Diaz instructed Security Chief Ray Pangelinan to conduct an internal investigation of Employee's conduct. [Testimony of Mr. Diaz.]

Mr. Pangelinan conducted his investigation of Employee by gathering four of Employee's co-workers (Joe Villagomez, Vincent Cing, Rino Reyes and Faruk Jahir) into one room; Pangelinan then spent about ten minutes asking them questions regarding several incidents that had been reported to him regarding Employee. Pangelinan recorded his group interview with these four co-workers, and later had his staff transcribe the tape and prepare a written transcript of the interview. [A copy of the transcribed questions and answers was entered into evidence at Hearing Exhibit F.] [Note: the Hearing Officer rejects these transcripts as being inherently unreliable and having no probative value.[1]]

[1] At Hearing, Employer offered into evidence transcripts of the investigator's interviews with Employee's co-workers as well as his post-termination interview with Employee (see Hearing Exhibits F and R, respectively). The Hearing Officer finds these transcripts to be incomplete and incoherent, in large part, due to gaps in the "testimony" in which the transcriber could not decipher what had been said. As a result of these deficiencies, the Hearing Officer concludes that this evidence has no probative value except to show that an interview occurred.

After conducting the interview with Employee's co-workers, Mr. Pangelinan concluded that Employee had violated numerous work rules and provisions of the Employee Handbook. At that point, Pangelinan drafted a Memorandum for Mr. Villagomez's signature, recommending that Employee be terminated. [A copy of the Memorandum (hereinafter, "Termination Memo"), dated February 19, 2016, was entered into evidence as Hearing Exhibit B.]

During his investigation, investigator Pangelinan never gave Employee notice of the allegations against him, nor an opportunity for Employee to give his own version of facts in his defense. [Note: Mr. Pangelinan did interview Employee by telephone, but that interview took place *after* Employee had been terminated.]

At Hearing, investigator Pangelinan filled in the gaps in the Termination Memo by explaining why he had concluded that Employee had violated company rules. Mr. Pangelinan cited two specific instances in which Employee engaged in misconduct. The **first incident** occurred on December 28, 2015. Faruk was operating a front-end loader when he brushed into a fence and bent some piping on the loader. The **second incident** occurred on January 8, 2016. Employee and Faruk were operating as a team with Faruk driving a dump truck and Employee working as a spotter. As Faruk backed up the truck, a branch hit the back tail-light and broke it. [Testimony of Mr. Pangelinan.]

Mr. Pangelinan testified that Faruk told him that he (Faruk) had wanted to make a report about these incidents, but Employee had not wanted to report it. Faruk claimed that Employee said, "You have to listen to me. I am the boss." Faruk told the investigator that he felt harassed by Employee on several occasions. *Id.*

Based on his interview with Faruk, Mr. Pangelinan concluded that Employee had violated several company rules: (1) Employee (and Faruk) had failed to protect company property; (2) Employee had failed to report damage to company property that occurred on 12/28/2015 and 1/08/2016; and (3) Employee had harassed and intimidated his co-worker. At that point, Pangelinan drafted the Termination Memo (Ex. B) that recommended termination of Employee for violating various company rules.[2]

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[2] The Employee Handbook in this case gives Employer a wide variety of options in disciplining employees. Similar conduct on the part of an employee may justify differing outcomes - from progressive discipline (verbal or written warnings and/or temporary suspension) to immediate dismissal. [See Handbook at Hearing Exhibit K; see discussion on pages 6-7.]

Petition: A Petition was produced by Employer during the case investigation, signed by 10 company employees, including Employee's supervisor, Joe Villagomez. [A copy of this petition was entered into evidence as Hearing Exhibit J.] The petition stated: "We the employees of Bridge Investment Group and Supervisors wants a cohesive and collegial work group. Therefore,... [w]e ask that this individual operator Joe John C. Reyes be transfer, release or terminated due to numerous misconduct." The Petition accused Employee of lacking any sense of teamwork, only thinking of himself rather than the group, threatening other employees, failing to attend morning briefings with his peers, refusing to follow orders most of the time, failing to conduct preventative maintenance on the vehicles he uses, lacking integrity or "personal courage" and having the attitude that he is "better than everyone." *Id.* The evidence did not establish who was the primary author of the Petition, when it was drafted or to whom it was distributed. Mr. Pangelinan testified that the Petition had been forwarded to company CEO Phillip Long after Employee was terminated. It is not clear whether Rem Diaz considered the Petition at the time he made his decision to terminate Employee.

Memorandum Re Employee's Inappropriate Conduct ("Memo"), dated 2/19/2016, from Supervisor Joe Villagomez to "Corporate Executive Officer." On February 19, 2016, the same day as Employee's termination, Employee's supervisor, Joe Villagomez, submitted a Memo to Construction Site Manager Rem Diaz regarding the subject of "Inappropriate Conduct of Mr. Joe John C. Reyes.". [A copy of the Memorandum (hereinafter, "Memo") was entered into evidence as Hearing Ex. E.] The Memo, which recommended "transfer or termination" of Employee, was clearly based on the Petition (Hearing Ex. J), as it gave nearly the identical reasons as were cited in the Petition, such as Employee's arrogance, his demanding attitude, his angry and defiant attitude, his lack of teamwork, his verbal threats to his co-workers, his failure to attend weekly briefings with other employees and his failure to assist company mechanics with preventative maintenance of the equipment. *Id.* Again, it is not clear to what extent this Memo influenced Rem Diaz's decision to terminate Employee.

Termination Memorandum: On February 19, 2016, the same date as the above-noted Memo, Mr. Pangelinan prepared a Termination Memo (Hearing Exhibit B) for Mr. Villagomez's signature. The Termination Memo stated that Employee was being terminated for committing multiple violations of the Handbook, including: (1) six violations of work rules subject to progressive discipline, (2) six violations of the BIG general work rules (3) three work rules subject to instant dismissal, and

six violations of the General Work Rules (Hearing Ex. L).[3] As noted earlier, the

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[3] Six violations taken from "General Work Rules," a one-page list of 18 (unnumbered) rules that pre-dated the Employee Handbook. The six rules cited (attached to Hearing Exhibit B and submitted in a slightly different form at Hearing Exhibit L) were highlighted on the page given to Employee. These included:
(6) Neglect of duty and in subordination will not be tolerated.
(7) Employees must take all practicable steps to perform the job in a way that is safe and healthy for themselves and their co-workers. Physical violence, verbal abuse, inappropriate or indecent conduct and behavior are prohibited.
(12) Employees shall not falsify or submit inaccurate or untruthful information on any client records, work reports, employee records, or other official documents.
(13) Not taking proper care of, neglecting or abusing company equipment and tools is prohibited.
(14) The removal or destruction of Company property, documents, and/or other equipment or material, including client property or records, from work sites without authorization is prohibited.
(18) Employees shall immediately report alleged violations of existing work rules, policies, procedures or regulations to a supervisor.

Six Violations of Work Rules subject to Progressive Discipline:

Rule no. 2:	Misuse, or unauthorized use, of employer's property;
Rule no. 14:	Displaying an attitude towards a...supervisor, or fellow employee... detrimental to the company's...work to be performed.
Rule no. 3:	Carelessness whereby work has not been performed to the required standard.
Rule no. 18:	Breakage...due to negligence.
Rule no. 37:	Swearing or the use of profane language in the presence of...guests or other staff.

Six Violations of BIG General Work Rules:

Bullet no. 6:	Neglect of duty and insubordination will not be tolerated.
Bullet no. 7:	Employees must take all practicable steps to perform the job in a way that is safe and healthy for themselves and their co-workers. Physical violence, verbal abuse, inappropriate or indecent conduct and behavior are prohibited.
Bullet no. 12:	Employees shall not falsify or submit inaccurate or untruthful information on any client records, work reports, employee records or other official documents.
Bullet no. 13:	Not taking proper care of, neglecting, or abusing company equipment and tools is prohibited.
Bullet no. 14:	The removal or destruction of company property, documents, and/or other equipment or material, including client property or records, from work sites without authorization is prohibited.
Bullet no. 18:	Employees shall immediately report alleged violations of existing work rules, policies, procedures or regulations to a supervisor.

Three Violations of BIG Employee Handbook Working Draft – Instant Dismissal:

Internal no. 6:	Intimidating or threatening other employees of the Company.
Internal no. 11:	Any willful or deliberate act which adversely affects the quality or productivity, or causes...damage or harm to...equipment or property.
Internal no. 14:	Falsification or being a party to the falsification of any company...record, (including) accidents.

Termination Memo did not set forth any *facts* describing Employee's conduct which led to Employer's finding that Employee had violated these work rules.

Upon receiving one or both of the above-noted memoranda from Security Chief Pangelinan, Construction Site Supervisor Rem Diaz concluded that Employee's conduct was unacceptable and that immediate termination of Employee was justified. [Testimony of Mr. Diaz.] Mr. Diaz then instructed Mr. Villagomez to sign the Termination Memo and told Mr. Pangelinan to deliver it to Employee. *Id.*

On February 19, 2016, Mr. Pangelinan approached Employee as he was ending his shift and handed him the envelope containing the Termination Memo that informed Employee he was being immediately terminated for violating Employer's work rules and policies. [Testimony of Messrs. Reyes and Pangelinan; Hearing Ex. B.]

About one week after he was terminated, Employee contacted Employer's CEO, Phillip Long, to complain about his sudden termination. In response, the CEO instructed Mr. Pangelinan to contact Employee and interview him about his conduct that led to the termination. Pangelinan then interviewed Employee by telephone, but did not change his mind about the decision to terminate. [Test. of Mr. Pangelinan.] As stated earlier, Employer submitted a purported transcript of the interview at Hearing Exhibit R, but the Hearing Officer finds that the transcript is incomplete and unreliable and thus, has no probative value. [See fn. 1 at p. 2.]

Employee Handbook: Given that the Termination Memo (Ex. B) cited portions of the Employee Handbook, it is worth reciting facts concerning this document. When Employee was hired in July 2015, Employer showed Employee only a one-page list, entitled "General Work Rules" (Hearing Ex. L) and instructed him that his employment would be subject to these rules. [Testimony of Mr. Sanchez.]

On about December 22, 2015, Employer's management team finalized a Draft Employee Handbook that outlined general work rules that all employees were expected to follow during their employment. [Testimony of Mr. Sanchez. A copy of the Draft Employee Handbook ("Handbook") was entered into evidence as Hearing Exhibit K.] In December 2015, Employer's management team informed company employees that the terms of the Handbook applied to every employee and that each employee would be required to comply with these rules. *Id.*

Employer claims it distributed copies of the Handbook to all employees by posting the handbook on bulletin boards in every division of the company. [Testimony of Mr. Sanchez.] Employee testified that he never received or saw a copy of the

Handbook and never attended any meeting in which the Handbook was discussed. [Testimony of Mr. Reyes.] No sign-up sheet was prepared to document which employees received copies of the Handbook.

The Handbook sets forth dozens of company rules and policies which, if violated, could lead to different types of discipline, ranging from a warning to temporary suspension to immediate dismissal. In particular, the Handbook states that "violation on any provision of this handbook and violation of any company policy may lead to termination of employment." *Id.* at p. 16. The section entitled, "Instant Dismissal" states that "[t]he Company may dismiss a worker without further notice for serious misconduct at work or on your personal time. Acts constituting serious misconduct are set forth [in the Handbook]." *Id.* at p. 14.

CONCLUSIONS OF LAW

I. The Investigation Was Conducted In Good Faith But Was Flawed.

Employer began its investigation of Employee in a reasonable manner, assigning an experienced staff to conduct the investigation by interviewing co-workers to determine whether Employee had violated company rules.

The evidence establishes that the investigation was conducted in good faith. First, the investigation was begun at the request of Project Supervisor Romeo Diaz, who testified that he had begun to hear rumors about certain alleged misconduct by Employee.[4] Mr. Diaz chose Employer's Security Chief, Ray Pangelinan, who had prior experience conducting internal investigations. Once assigned the task, Mr. Pangelinan acted reasonably by interviewing four co-workers who had worked with Employee and witnessed his conduct.

Mr. Pangelinan recorded the interviewees' responses so that he could create a written transcript. He reached his conclusions based on the group interviews he conducted. For some unknown reason, the Termination Memo never mentioned the Petition (Hearing Ex. J), submitted by Employee's co-workers, which severely criticized Employee's work attitudes and practices. Instead, the Termination Memo listed a series of company rules that Employer claimed had been violated, but the Memo failed to specify what conduct of Employee's led to that conclusion.

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[4] After an incident on January 8, 2016, Faruk told his co-worker, Vincent Cing about it. Cing then reported it to supervisor Joe Villagomez, who reported it to Romeo Diaz. Mr. Diaz then instructed Mr. Pangelinan to investigate the matter by interviewing witnesses. [Testimony of Mr. Pangelinan.]

As stated earlier, Mr. Pangelinan testified that he had focused on two incidences that occurred on December 28, 2015, and January 8, 2016. Those incidences involved damage to company property and an allegation that Employee failed to report the damage that occurred during his shift.

Although the investigation was done in good faith, it was flawed in several important respects. First, the investigator chose a questionable method of talking to all four co-workers together in a room and asking them to talk about Employee. A better practice would have been to interview each co-worker separately where the employee could give information privately to the investigator without being affected by their neighbor's responses.

Second, the Termination Memo listed many company rules that were allegedly violated by Employee; yet it failed to list any *facts* upon which Employer based its conclusions that the rules were violated. Thus, Employee had no way of knowing what specific conduct on his part had led to his termination.

Third, although Employer downplayed the significance of the Petition from Employee's coworkers, the Hearing Officer finds it likely that the Petition (Ex. J) and the Memo re Inappropriate Conduct (Ex. E), influenced management's decision to terminate Employee. Both documents asserted that Employee was deeply unpopular with his co-workers and that he was a source of discord within the Employer's construction project. However, the Termination Memo made no mention of either the Petition or the Memo re Inappropriate Conduct. Likewise, Employer's management, in testifying at Hearing, did not discuss the effect of either document. Despite Employer's silence on the matter, it is difficult to believe that these documents did not play an important role in the decision to terminate this Employee. [5]

Fourth, the Hearing Officer notes that certain Incident Reports produced by Employer during the investigation contradict Employer's assertion that these incidents were *never* reported by Employee or Faruk. [6] Pangelinan testified that

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[5] The Hearing Officer's inquiry was seriously hampered by the failure of Supervisor Joe Villagomez to appear and testify. Even though Mr. Villagomez signed the Termination Memo, Employer did not produce this witness to testify at the first hearing session. After the first hearing, Mr. Villagomez left his employment with Respondent and exited the CNMI. Last minute attempts to compel him to testify before departing, were not successful. As a result, we were deprived of testimony from one of the persons most knowledgeable about the events that led to Employee's termination.

[6] (1) Employee's supervisor, Joe Villagomez, wrote an incident report stating that Faruk had informed

"no reports" had been submitted by Employee or Faruk, but that statement is not correct, based on the reports in evidence. Pangelinan also maintained at hearing that these written reports were submitted by Employee and Faruk well after the events in question; however, this assertion was never proven and the documents, themselves, are dated 1/08/16 and 1/11/16, which is on or shortly after the events in question.

Finally, *Employer never interviewed Employee before the termination* to give him notice of the charges against him and a meaningful opportunity to respond to those charges prior to his termination.[7] It was only after Employee had been terminated that Mr. Pangelinan conducted a detailed interview with Employee to receive his version of events. Employer's failure to provide Employee with notice of charges and an opportunity to respond to those charges – both fundamental common law principles of due process - calls into question the fairness of Employer's decision to terminate Employee.

Even though Employer's investigation was flawed, and its conclusions – that Employee failed to protect company property and intimidated one co-worker – were somewhat questionable, the central issue of the case remains whether Employer was legally entitled to terminate Employee, an at-will employee, without cause. If so, the wrongful termination charge must fail as a matter of law.

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him that on January 8, 2016, that the dump truck tail light had been broken by a piece of plywood that "slid down the bucket" as Faruk was operating it. Villagomez said he had told Faruk and Employee to submit a written report about the broken tail light.

(2) Faruk submitted an Employee Incident Report, dated 1/08/16, giving the same information about the broken tail light as he had told supervisor Villagomez.

(3) Employee submitted an Employee Incident Report, dated 1/11/16, regarding this incident on 1/08/16, stating that he witnessed the tail light breaking while the driver was unloading the truck. [Note: Copies of all four reports were entered collectively as Hearing Exhibit D.]

[7] Mr. Pangelinan testified that during his initial investigation, he had spoken briefly to Employee about the two incidents and that Employee had denied everything. Employee testified that he had never been questioned by Pangelinan until after his termination. The Hearing Officer finds Employee's testimony on this issue to be more credible than that of Mr. Pangelinan.

II. Complainant Was An At-Will Employee Who Could Be Terminated With Or Without Cause, Unless A Recognized Exception Applied.

Complainant's employment in this case is properly termed "at-will" employment. Under American common law that developed in the late 19th century, employment of unspecified duration that is begun without a written contract is considered "at-will" employment.[8]

The general rule is that an at-will employee may be terminated at any time, with or without cause. However, this rule is subject to certain exceptions. The American common law doctrine of "at-will" employment appears to have been addressed in only one reported decision in the CNMI: *Shiprit v. STS Enterprises, Inc.*, CV99-0490, issued by Judge Lizama on 12/13/99. In that case, the Court analyzed the "at will" doctrine in the context of granting Defendant's Motion to Dismiss the case on procedural grounds. In its analysis, the Court noted that there are three general exceptions to the rule that at-will employees may be terminated at any time, with or without cause:

> First, the **public policy exception** to the at-will doctrine permits an at-will employee to recover for wrongful discharge upon a finding that the employer's conduct undermined an important public policy. Second, an exception based on contract law allows an at-will employee to recover for wrongful discharge upon proof of an **implied-in-fact promise of employment for a specific duration**. Such an implied-in-fact promise can be found in the circumstances surrounding the employment relationship, including assurances of job security in company personnel manuals or memoranda. Third, courts have found an **implied-in-law covenant of good faith and fair dealing** in employment contracts and have held employers liable in both contract and tort for breach of this covenant.

Shiprit [*citing Huey v. Honeywell, Inc.*, 82 F.3d 327. 330-331 (9th Cir. 1996)].

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[8] "The concept of employment-at-will emerged in the United States as a complement to laissez-faire capitalism. By the late 1880's, at-will had replaced the traditional presumption... with the individualist conception that indefinite hirings are terminable at the discretion of either party [citations omitted]." James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing In American Employment Law*, 32 Comp. Lab. L. and Policy J. 774-775 2010-2011 [hereinafter Brudney, *Reluctance and Remorse*].

III. Complainant's Termination Does Not Fit Within Any Recognized Exception To The General Rule That An At-Will Employee May Be Terminated With or Without Cause.

Given that this was at-will employment, Employee's wrongful termination claim must fail unless he proves that he fits one of the exceptions to at-will employment. As noted in *Shiprit, supra,* the only CNMI decision to address the matter, courts have found there to be three exceptions to the general rule that the employer may terminate an at-will employee for any reason, with or without cause. These potential exceptions are: (1) termination in violation of a fundamental public policy, (2) termination as a breach of an implied-in-fact promise of continued employment, or (3) termination as a breach of the implied covenant of good faith and fair dealing.

As to the first exception, there was no allegation or evidence presented that any public policy issue was involved in this termination. The case does not present any important public policy concerns. Employee was terminated by Employer based on its conclusion that Employee had damaged company property and neglected to inform Employer, and that Employee had harassed and intimidated a co-worker. Neither of these issues involves important public policy concerns. Therefore, the public policy exception is inapplicable.

The second exception – an implied-in-fact promise of continued employment – tends to arise in terminations of long-term employees with reasonable expectations of lifetime or continuing jobs.[9] But at-will employees do not enjoy this special relationship of trust and reliance.[10] In this case, the duration of employment was short – a mere 7 months - and no special relationship of trust or promise of continued employment was ever alleged, let alone proven. Accordingly, the second exception does not apply in this case.

The third exception – violation of the implied covenant of good faith and fair dealing - is problematic. The implied covenant is usually cited as being implied in *written* contracts, whereas the "at-will" employment in this case arose without a written contract.

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[9] See *Schoen v. Amerco, Inc.*, 896 P.2d 469,475-6 (Nev. 1995); see also *Wilder v. Cody Co. Chamber of Commerce*, 868 P.2d 211, 220-21 (Wyo. 1995) (recognizing a tort claim for breach of the covenant).

[10] *See Sands Regent v. Valgardson*, 777 P.2d 898, 899 (Nev. 1989); see also *Loghry v. Unicover Corp.*, 927 P.2d 706, 711-12 (Wyo. 1996) (declining to recognize cause of action for breach of the covenant under a contract theory).

As to whether this covenant should be invoked in at-will employment situations, we turn to other jurisdictions. Research reveals that the majority of states examining this issue have declined to find that a covenant of good faith and fair dealing applies to at-will employment.[11] A small minority of state courts have applied the covenant to at-will employment but those cases have typically involved two or three specific scenarios. First, the covenant has been applied where the termination of an at-will employee was done in bad faith to deprive the employee of some added or collateral benefit of the employment such as accrued leave[12] or earned sales commissions,[13] or to prevent the vesting of retirement benefits.[14] Secondly, the covenant has been applied where the termination of an at-will employee involves misrepresentations made by the employer to induce the employee to enter into the employment in the first place.[15]

Turning to the present case, CNMI courts have given no indication that they would adopt the "minority view" and hold that the implied covenant of good faith and fair dealing applies to at-will employment. Even if the CNMI judiciary were to adopt that minority view, the present case does not present any facts similar to the above-noted scenarios that have led courts to find that an employer's termination of an at-will employee amounted to a breach of the implied covenant of good faith and fair dealing. For the foregoing reasons, the Hearing Officer finds that the implied covenant of good faith and fair dealing does not apply to the at-will employment in this case.

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[11] See Brudney, *Reluctance and Remorse, supra* note 8, at 774-775: "A mere handful of jurisdictions, about 10 states, have accepted the covenant of good faith and fair dealing in at-will situations. See Clyde W. Summers, Kenneth G. Dau-Schmidt and Alan Hyde, *Legal Rights and Interests in the Workplace: Statutory Supplement and Materials* 193-200 (reporting that 9 or 10 states accept covenant in employment-at-will settings and 29 of 50 states have declined to adopt the covenant in the employment context)."

[12] *See Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Idaho 1989).

[13] *See Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass 1976).

[14] *See* Brudney, *Reluctance and Remorse, supra* note 8, at 773:

[15] *See Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 98-99 (Del. 1992). In that case, the Deleware Supreme Court applied the covenant to an employee's claim that his employer had induced him to accept an indefinite-term job offer while secretly intending to keep him on only temporarily until a suitable permanent candidate was hired.

CONCLUSION

The present case involves an at-will employee who was terminated by his employer for perceived violations of company policies. Employer argued that whether or not its decision was correct, was immaterial because, as a matter of law, Employer needed no cause to terminate an at-will employee. The Hearing Officer finds that under the law applicable to at-will employment, Employer could terminate Employee, an at-will employee, without cause, provided that none of the three recognized exceptions was applicable. *Shiprit, supra.* An analysis showed that none of the recognized exceptions apply in this case: (1) the termination did not violate public policy; (2) the termination did not breach any implied promise for continued employment, and (3) the covenant of good faith and fair dealing does not apply to terminations of this type. Accordingly, the charge of wrongful termination must fail.

Employee argued that the decision to terminate him had been unfair and unjust because he had not committed the charged conduct and because he had not been given an opportunity to give the Employer his own version of events before Employer terminated him. Given the flawed manner in which the investigation was carried out, it is understandable that Employee felt he had been treated unfairly. However, such unfairness is not a "wrong" for which the law recognizes a legal remedy. Accordingly, judgment shall be entered in favor of the Employer.

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered in favor of respondent Bridge Investment Group LLC with respect to this labor claim.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 19, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Concepcion, Loriella T., Complainant, v. Triple J Saipan, Inc., *dba* Tony Roma's Restaurant, Respondent.	)	Labor Case No. 16-001 **ADMINISTRATIVE ORDER DISMISSING CASE**

After reviewing the record, the Hearing Officer makes the following findings and conclusions:

Both parties appeared for mediation in the above-referenced case on January 26, 2016. Complainant appeared without counsel; Respondent was represented by its Human Resources Manager, Francisco S. Ada. The parties failed to resolve the case; whereupon, the Mediator issued a Notice of Hearing; Order Referring Parties For Investigation; Other Orders (hereinafter, "Notice"). The Notice scheduled the Hearing for March 29, 2016.

On February 15, 2016, Complainant sent an email to Respondent (addressed to Manager Francisco Ada) stating that she had decided to "move on" and just wanted a one-way airline ticket back to Manila. The email was also copied and sent to the Hearing Office. (Letter from L. Concepcion to Frank Ada, dated 2/15/2016.) In her email, Complainant made a vague request to be reimbursed for the last two months of expenses, but it was not phrased as a demand.

On February 24, 2016, Respondent informed the Hearing Office that the company had provided the one-way ticket to Complainant, as requested by Complainant due to the fact that her mother was seriously ill. Respondent did not agree to Complainant's request for additional compensation. [Email from Frank Ada to Jerry Cody, dated 2/24/2016.]

Respondent also sent the Hearing Office a copy of a mutual release, drafted by the company, which both parties signed on February 15, 2016. The Hearing Office was not included in negotiations of this mutual release.

An airline ticket was provided to Complainant for departure from the CNMI on February 15, 2016. It is believed that Complainant departed from the CNMI on that date.

Based on the foregoing facts, it appears that Complainant voluntarily abandoned her labor case and departed the CNMI on February 15, 2016. Complainant chose to deal with Respondent rather than asking for assistance from the Hearing Office. Although the Hearing Officer would have preferred both parties to approach the Hearing Office directly in order to close the case, they chose to handle the matter themselves, and it is done.

The Hearing Officer finds that good cause exists to DISMISS this Labor Case with prejudice. As stated in the Employment Rules and Regulations: "A complaint may be dismissed upon its abandonment or settlement by the party or parties who filed it." NMIAC § 80-20.1-485(b). Presumably, Complainant has departed the CNMI and abandoned her labor claim. Under the circumstances, dismissal is warranted.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Dismissal:** For the reasons stated above, the Labor Case No. 16-001 is hereby DISMISSED without prejudice. 3 CMC §§ 4947(b) and (d)(11) and Regs. at NMIAC § 80-20.1-485(b).

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC § 4948(a).

DATED: February 25, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: LANE, Ahmed Javon, Complainant, v. VAN HARRIS ENTERTAINMENT, INC. Respondent.	)	Labor Case No. 16-004 **ADMINISTRATIVE ORDER**
Counterclaim: VAN HARRIS ENTERTAINMENT, INC. Counterclaimant, v. LANE, Ahmed Javon, Respondent.	)	

This case was heard on July 13 and 21, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. Complainant Ahmed Javon Lane appeared via Skype connection from Florida.[1] Respondent Van Harris Entertainment, Inc. appeared through its President Allen Van Harris via Skype connection from Macao. The following employees of Strategic Gaming Solutions, Inc. appeared and testified at the Hearing Office in Saipan in support of Respondent: Peter Stewien, Anita Go, Greg P. Deleon Guerrero, Maria Carlota Santiago and Dagger Diaz. The Department of Labor appeared at the Hearing through investigator Ben Castro. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

[1] Complainant Ahmed Javon Lane attended the hearing via Skype connection on July 13, 2016, but failed to appear on July 21, 2016, despite being given written notice of the hearing. The Hearing Officer finds that Complainant voluntarily waived his attendance at the hearing on July 21, 2016, and thereby, waived his right to cross-examine witnesses and otherwise defend himself against the counterclaim in this case.

INTRODUCTION

Skype Hearing:
Complainant Ahmed Javon Lane filed this Complaint and returned to Florida shortly thereafter. Respondent's President, Allen Van Harris, has been working in Macao from the time that the parties signed an Employment Contract until the present. Both parties asked, and were allowed, to attend the Hearing via a Skype connection. The supporting witnesses for Respondent testified in person at the Hearing Office in Saipan.

Complainant Is Deemed to Have Waived His Attendance At Hearing on July 21, 2016: Complainant attended the first hearing session on July 13, 2016, but failed to attend the continued Hearing on July 21, 2016, despite receiving written notice many days in advance of the Hearing. The following is a detailed record of the events.

On July 13, 2016, Complainant attended the hearing via a Skype connection from Florida. After several hours of testimony, the internet connection with Complainant suddenly disconnected.[2] All attempts to reconnect with Complainant via Skype failed midway during a hearing on July 13, and again on July 14, 2016. On July 14, the Hearing Officer sent a Notice of Continued Hearing by email to the parties, continuing the Hearing until July 21, 2016.

Complainant responded to the Notice of Continued Hearing with an email message, stating that he was unavailable to attend the July 21st hearing because he would be "travelling." The Hearing Officer construed the email as a request for continuance, but denied Complainant's request on the grounds that Complainant had not provided specific facts to justify postponing the Hearing. The Hearing Officer informed Complainant that if he provided specific facts as to his travel schedule, the Hearing Officer might reconsider his denial and reschedule the hearing; but warned that if no additional facts were given, the Hearing would proceed as scheduled on July 21, 2016.

Complainant never responded to the Hearing Office's request for additional information.

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[2] When all attempts to reconnect with Complainant via Skype failed, the Hearing Officer sent notice to the parties via email that the Hearing Office would attempt to reconvene the hearing on the next day - July 14, 2016. The next day, the Hearing Office once again was unable to establish a Skype connection with Complainant. At that point, the Hearing Officer scheduled a continued Hearing for July 21, 2016, and sent the Notice of Continued Hearing by email to the parties.

On July 21, 2016, the Hearing Officer convened the Hearing and, after attempting unsuccessfully to establish an internet connection with Complainant in Florida, resumed taking testimony. Mr. Harris established a Skype connection from Macao and various witnesses appeared and testified in person at the Hearing Office in Saipan. The Hearing was concluded at about 1 p.m. on July 21, 2016.

Based on the above facts, the Hearing Officer finds that Complainant voluntarily waived his right to appear on July 21, 2016, to cross-examine witnesses and present rebuttal evidence. 3 CMC § 4528(c) and Employment Rules and Regulations, codified at Northern Mariana Island Administrative Code ("NMIAC") §§ 80-20.1-480(l).[3]

FINDINGS OF FACT

This Complaint was brought by Ahmed Javon Lane ("Employee") against Van Harris Entertainment, Inc., ("Employer") on April 13, 2016, alleging that Employer breached an employment contract by terminating Employee after only one month. Employee alleged that as a result of this breach of contract, he is entitled to the remaining three months of unpaid wages due under the Contract. [Hearing Exhibit 1 – a copy of Employee's Complaint Letter, filed in the Hearing Office on April 13, 2016.]

Employer alleges that it terminated the Contract for cause and therefore, does not owe any amounts to Employee. In its Counterclaim, Employer also alleges that because this was a termination for cause, Employer is entitled to be reimbursed for all travel costs it incurred on Employee's behalf; Employer claims the travel costs amount to $2,825.36. [4]

The basic facts are as follows. Employer operates a business that hires musicians to provide live musical entertainment at a nightclub, called "Club C," located at the Kanoa Resort on Saipan. Club C is managed by a company called Stategic Gaming Solutions, Inc., which contracted with Employer. [A copy of the

[3] The Regulation states that "[f]ailure of a party to appear at a hearing after timely being served notice to appear shall be deemed to constitute a waiver of any right to pursue or contest the allegations in the complaint."

[4] Respondent moved for leave to file a Counterclaim in an email to the Hearing Officer on June 20, 2016. Complainant indicated that he did not oppose the filing of the counterclaim, but opposed it on its merits. The Hearing Officer granted the filing of the counterclaim on July 5, 2016 (email from Hearing Officer to parties, dated 7/05/2016).

Independent Contractor Agreement between Van Harris Entertainment, Inc. and Strategic Gaming Solutions, Inc. was entered into evidence as Hearing Exhibit 4.]

Employee, who was residing at the time in Florida, was hired over the internet by Employer's President, Mr. Harris, in March 2016. By the time Employee arrived in Saipan to begin his employment, Mr. Harris had relocated to Macao to begin a long-term performance gig there. During Employee's performance of the contract, the parties communicated primarily, if not exclusively, by means of their Facebook accounts. [A copy of reprinted communications between Mr. Harris and Mr. Lane was entered into evidence as Hearing Exhibit 3. See also testimony of Mr. Lane and Mr. Harris.]

Employer and Employee entered into an employment contract (hereinafter, the "Contract") in about March 1, 2016. [A copy of the Contract was entered into evidence as Hearing Exhibit 2.] The Contract describes Employee's position as "Singer/Entertainer" and states that Employee shall have a work schedule of six working days per week, consisting of 4 x 45 minute sets or 5 x 30 minute sets per day. The duration of the Contract was specified as four months – from March 1, through June 30, 2016. *Id.*

The Contract did not state the specific type of work involved, but the parties' course of dealing, as evidenced through numerous emails, established that Employee agreed to provide a "live" solo performance, singing pop music and R&B (rhythm and blues) songs. Pursuant to the Contract, Employee was obligated to perform a series of 45-minute sets each night, six nights per week. In return, Employer agreed to pay Employee's travel expenses, lodging, and compensation of $2,400 per month. *Id.*

The expected nature of Employee's performance was established through communications between Employee and Employer as well as through established norms of the industry. Employer's President, Mr. Harris, who himself is a solo performer, testified that in these types of solo performances, it is customary nowadays for the singer to arrange his own musical back-up by downloading a series of MP3 (digital) files and playing them in sequence on stage using a computer laptop. This was communicated to Employee who agreed to this arrangement. [Testimony of Mr. Harris.]

Termination Clause: The Contract refers to the services as "at-will employment" that could be terminated by Employer at any time with or without cause. The Contact contains a provision for termination for cause, which states:

> The employer may terminate this Contract on the following just causes: serious misconduct, willful disobedience of employer's lawful orders, habitual neglect of duties, absenteeism, insubordination revealing secrets of establishment, when employee violates customs, traditions, and laws of the Commonwealth of the Northern Mariana Islands (CNMI). If the artist is terminated by the Employer or Club C management, the terminated artist shall repay all of the expenses incurred by the Employer or Club Management back to the party that paid the expenses. That includes flights, visas and any other expense connected to this contract.

Contract (Hearing Exhibit 1) at p. 2, Article 9.

The parties signed the Contract and Employer provided an airline ticket to Employee. Employee arrived on Saipan and began working at Club C on about March 1, 2016.

From the start, Club C's management had problems with Employee's performance. First, Club C's staff noticed that Employee was working short sets of less than 45 minutes each, sometimes spending only 20 minutes on stage.[5] [Testimony of Ms. Go, Mr. Guerrero and Mr. Diaz.] Club C's management notified Mr. Harris in Macao about the problem of Employee working short sets. Mr. Harris passed the comment along to Employee. Employee then began to sing longer sets, but other problems continued (see below). [Testimony of Mr. Harris.]

A larger problem concerned the nature of Employee's act. Employee did not appear to have a pre-selected list of songs arranged on his laptop, as do other solo performers and as he had been instructed to do by Mr. Harris. Instead, Employee searched for MP3 songs in the middle of his performance, causing "dead time" on stage during his act. [Testimony of Ms. Go and Mr. Diaz.][6]

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[5] Club C's Surveillance Supervisor, Greg P. Deleon Guerrero, tracked Employee's on stage time on March 10, 2016, and calculated the following times: 1st set = 36 minutes; 2nd = 26 minutes; 3rd set = 20 minutes. [A copy of Surveillance Investigative Report from G. Guerrero to General Manager, dated 3/10/2016, was entered into evidence as Hearing Exhibit 5. Testimony of Mr. Guerrero.]

[6] At Hearing, Club C management testified that other lounge performers who have performed at Club C have used pre-set digital song lists, which they arranged with their laptops. In those cases, there were no inappropriate gaps between songs. Club C's Management also noted that it had no problem with the singer who arrived to take Employee's place. That singer performed at Club C from April 11, 2016 until July 9, 2016, without incident. [Testimony of Mr. Harris and Ms. Go.]

Employer's President, Mr. Harris, is an experienced professional singer who has performed a solo lounge act onstage in Macao and other parts of Asia. Mr. Harris testified that in his experience, a typical performer of a solo club act nowadays is expected to pre-select a list of songs he plans to perform on stage, then arrange those songs for quick digital access on his laptop computer. Employee seemed not able to master this technique, and instead, struggled with the process of presenting a sequence of songs on stage in an organized manner. [Testimony of Mr. Harris.]

Employee also regularly talked on stage with the audience for minutes between songs; he often stopped midway through a song and abandoned the song, in order to engage in conversation with the audience or to take a "selfie" with his cell phone. Then, he would begin a new song, only to interrupt that song as well. These habits made Employee's act seem disorganized and unprofessional to club staff. [Testimony of Ms. Go and Mr. Diaz.]

Club C staff reported to management that after attending his performance, certain local customers told the staff that they would not return to see Employee's act a second time. [Testimony of Ms. Go.] Other staff noted that many guests were complaining about Employee's act. [Testimony of Mr. Diaz.] Certain staff members commented to management that Employee was adversely affecting Club C's business. [7]

There were also incidences of inappropriate conduct. In one instance, Employee sang a song that contained a curse ("Fu** You") in it. [Testimony of Ms. Go, Mr. Diaz and Ms. Santiago.] After that performance, Club C Management asked Employee to stop singing those words as some audience members were offended by that language. [Testimony of Mr. Diaz and Ms. Go.] In another instance, management believed that Employee had inappropriately touched a guest while she was up on stage getting a selfie taken with Employee. [Testimony of Mr. Diaz and Mr. Lane.]

Based on all of the above issues, and the fact that Employee did not seem to be moving to correct the disjointed style of his performance, Club C management decided it wanted Employee to stop performing at Club C. At that point, Club C

[7] Dagger Diaz, wrote to Peter Stewien that "I am hearing from the guest and also F&B staff that Javon was being offensive to guests....Our F&B area used to be really packed but most people are not coming because of him and also the gaming area....Instead of attracting guest/customers, he seems to be doing the opposite and chasing them away. I am getting really concern how this is affecting our business." [A copy of Memo from Dagger Diaz to Peter Stewien, dated 3/30/2016, was entered into evidence as Hearing Exhibit 7.]

management contacted Employee's President, Mr. Harris, in Macao and informed him of their decision. Mr. Harris agreed with the decision and, believing that Employee had performed below acceptable standards and contrary to the agreed terms, he informed Employee via a Facebook message that he was terminating him for cause. [Testimony of Mr. Harris.] Mr. Harris then instructed Employee to stop working at Club C immediately, to move out of Club C's apartment and to reimburse Employer for the costs it incurred in transporting Employee to and from the mainland U.S. [Testimony of Mr. Harris.]

During the several weeks following the termination, Mr. Harris contended that the termination was "for cause" and, citing the Contract, he demanded that Employee reimburse Employer for the full cost of his transportation to and from Saipan. Employer claimed that total costs incurred for the airline ticket amounted to $2,825.36. Employee responded by filing the Complaint. Shortly thereafter, Employee returned to the U.S. mainland.

The evidence shows that in the end, Employer and Strategic Gaming Solutions, Inc., negotiated the matter between them and Strategic Gaming Solutions, Inc. agreed to incur half of the cost ($1,412.68) of Employee's airline ticket. [See Hearing Exhibit 10 – a copy of an invoice, dated 4/13/16, showing that Van Harris Entertainment issued a credit to Strategic Gaming Solutions of $1,412.68, representing a "50% Credit for Ahmad Javon Lane Ticket."]

The Department investigated this case and concluded that Employer did not breach the contract by terminating Employee; and that Employee was terminated for cause. [Determination (Hearing Exhibit 9) at p. 2 (Findings) at ¶ 1 (citing Article 9 of the Contract).

CONCLUSIONS OF LAW

I. Employer Had Grounds To Terminate Employee For Cause And The Termination Was In Accordance With the Contract Terms.

The primary issue in this case concerns whether Employer had grounds to terminate Employee "for cause" pursuant to the Contract. As the moving party, Employee has the burden of proving that his termination was without cause, thereby triggering Employer's duty to give 30-days' notice and to cover all of Employee's travel expenses to and from Saipan.

Although the Complaint demanded lost wages for the three months remaining on the 4-month contract, the Contract would not support that relief, even if Employee were to prevail on his claim. Notwithstanding the stated duration of this contract as four months, there appears no legal basis for requiring Employer to employ Employee for the entire 4-month term. This is because the Contract provided that the employment was "at will;" in other words, terminable with or without cause at any time. [8]

Under the Contract, if Employer terminated this "at will" employment without cause, Employer would need to give Employee 30 days' advance notice of such termination and Employer would remain responsible for paying all travel expenses. On the other hand. if Employer terminated the employment "for cause," no advance notice would be required and Employer would be legally entitled to be reimbursed by Employee for all of Employer's expenses, including all travel expenses, that it had incurred.

In short, the "termination for cause" issue is relevant to (a) whether Employee is entitled to 30 days' notice; and (b) whether Employer is entitled to be reimbursed for the costs it incurred in providing round-trip airfare between Florida and Saipan.

The evidence in this case establishes that Employer had sufficient grounds to terminate Employee for cause. The Contract stated that Employee could be terminated for "serious misconduct, willful disobedience of employer's lawful orders, [and] habitual neglect of duties," among other things. [Contract (Hearing Exhibit 2) at Article 9.] Employee's performance of his lounge act was deemed by Employer to be so unprofessional and unacceptable to Club C's management and audience that it constituted "misconduct" or a "habitual neglect of duties."

The eye-witness observations of Club C's staff support Employer's conclusion that Employee's performances were substandard and unprofessional. At Hearing, Club C employees testified as to the sub-standard quality of the performances, noting how Employee repeatedly interrupted his own songs, spent minutes conversing with the audience between musical selections and regularly failed to prepare digital markers to a sequenced set of music, as is the industry norm. Instead, Employee preferred to engage in certain on-stage antics that included snapping photos of fans with his and their own cell phones. The evidence supports

[8] The Contract entitled Employer to terminate the Contract without cause by giving 30 days' advance notice and paying for return airfare back to the U.S. mainland. Thus, if Complainant prevailed in this case, he would be entitled to only one month's wages, to cover the "notice" period that he was never given.

a finding that these performances were so haphazard, disjointed and unprofessional that they could well be deemed "habitual neglect of duties." Employer's client, Club C management, was even concerned that Employee's performances were hurting attendance at the club. For all of these reasons, Club C rejected any further performances and Employer believed he had cause to terminate the Contract. The Hearing Officer agrees, based on the evidence presented, and finds that Employer had grounds to terminate Employee for cause in accordance with the contract terms under Article 9. Accordingly, Employer was not required to provide advance notice of the termination and does not owe Employee any unpaid or "lost" contractual damages.

NOTE: Given the "artistic" subject matter of this contract, one must be careful to avoid conclusions based on musical aesthetics. In this case the problem appears with the *type* of performance that was given, rather than with its content or artistry. The testimony of Mr. Harris and Club C staff establish the type of performance that one would normally expect from a solo night club act. Employee's performance fell below these expected standards of conduct.

II. Counterclaim: Employee Should Be Ordered To Reimburse Employer For the Costs It Incurred In Providing Airfare to Employee. This amounts to $1,412.66, given that a portion of airfare costs was paid by Employer's Client.

In its Counterclaim, Employer requested reimbursement only for the costs it incurred in providing roundtrip airfare for Employee to travel between Saipan and the U.S. mainland (Florida) – not other costs. [Counterclaim; testimony of Mr. Harris.] As stated above, the Contract provided that if Employee were terminated for cause prior to the end of the Contract, Employer would be entitled to be reimbursed for its expenses incurred in connection with the employment, including airfare. [Contract at Hearing Exhibit 2, Article 9.] [9]

After Employee was terminated on March 31, 2016, and after he had filed a labor claim, he announced that he wanted to return to the U.S. mainland (Florida). He re-booked and used the ticket that had been purchased by Employer. At Hearing, Employer asked to be reimbursed for the total amount of the ticket - $2,825.36. However, Employer testified that he had been reimbursed initially for the total

[9] This paragraph provides that the "terminated artist shall repay all of the expenses incurred by the Employer or Club Management back to the party that paid the expenses." However, "Club C Management" is not the employer in this case and is not a party to this Labor Case; therefore, any claim it may have against Employee for reimbursement cannot be adjudicated in the present case.

airfare by Strategic Gaming Solutions; and Employer only credited back half of the amount to that company. [See Hearing Exhibit 10, discussed on page 7.] Accordingly, Employer only incurred costs of 50% of the airfare, amounting to $1,412.68.

Based on the evidence presented, the Hearing Officer finds that Employee, having been terminated for cause, should be held legally obligated to reimburse Employer for the costs it expended on the airline ticket. Judgement shall be entered in favor of respondent Employer regarding the Counterclaim in the amount of $1,412.68. Employee shall be ordered to deliver payment of $1,412.68 to the Hearing Office within forty-five days of the date of issuance of this Order.

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Complaint: Judgment for Respondent Van Harris Entertainment, Inc.:** Based on the findings above, judgment is entered in favor of Respondent Van Harris Entertainment, Inc. and against Complainant Ahmed Javon Lane with respect to the allegations in the Complaint.

2. **Counterclaim: Judgment for Counterclaimant Van Harris Entertainment, Inc.:** Based on the findings above, judgment is entered on the Counterclaim in favor of Counterclaimant Van Harris Entertainment, Inc. in the (revised) amount of $1,412.68. Respondent Lane is ORDERED to pay the sum of $1,412.68 to reimburse Counterclaimant for the airfare expenses it incurred in connection with this Contract. The payment shall be made as set forth below.

3. **Payment Terms:** The above-ordered payment of $1,412.68 shall be made by delivering a cashier's check or postal money order, payable to Van Harris Entertainment, Inc., to the Administrative Hearing Office (mailing address: Dept. of Labor Hearing Office, P.O. Box 10007 CK, Saipan, MP 96950) no later than forty-five (45) days after service of this Order on Mr. Ahmed Javon Lane.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of service of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 22, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Beri, Walden Q., Lapuz, Violeta L., Complainants, v. Interpacific Resort (Saipan) Corp., *dba* Pacific Islands Club, Respondent.	)	Labor Case Nos. 16-010 and 16-011 **ADMINISTRATIVE ORDER DISMISSING DISCRIMINATION CLAIMS WITHOUT PREJUDICE**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Complainants Walden Q. Beri and Violeta L. Lapuz filed their respective labor complaints, Labor Case Nos. 16-010 and 16-011, against Respondent Interpacific Resort (Saipan) Corporation, *dba* Pacific Islands Club ("PIC"), on May 27, 2016.

Complainants began their cases by filing two handwritten complaints that are virtually identical in content. The letter complaints are not pled in any legally precise manner. Complainants are not lawyers and, evidently, they did not hire lawyers to represent them before they filed these cases.

A review of the complaint letters reveals that complainants assert two basic claims. First, they allege that their arrangement to perform music at PIC was cancelled as a result of Respondent's age-related discrimination against them. Second, the complaints appear to allege that Respondent violated CNMI preference law by failing to hire these two individuals for one or more applied-for positions. Respondent denies all allegations of improper conduct. As to the discrimination claims, Respondent asserts that its decision to terminate the independent contractor arrangement that it had with complainants, was not based on discriminatory intent on any kind.

The Administrative Hearing Office has for many years declined to exercise jurisdiction over discrimination complaints. There are several reasons for this policy. First, discrimination claims have traditionally been handled in the CNMI

by the Equal Employment Opportunity Commission ("EEOC"). The EEOC's Honolulu Office extends its jurisdiction to the CNMI and receives complaints under its broad jurisdiction. Second, the Hearing Office has not been given any specialized training in adjudication of discrimination cases; therefore, it lacks the expertise necessary to competently adjudicate such cases.

In summary, the Administrative Hearing Office is not equipped to handle discrimination claims and the EEOC is available as a forum for workers who wish to bring such claims against their employer. Thus, if complainants Beri and Lapuz wish to pursue discrimination cases against Respondent, they may file charges with the EEOC's Honolulu office.

Based on the foregoing, the Hearing Officer shall, by this Order, dismiss all discrimination claims from Labor Case nos. 16-010 and 16-011. The Hearing Officer issues this Order *sua sponte*, pursuant to authority granted both specifically and inherently in the Commonwealth Employment Act of 2007, as amended, and in its implementing regulations. [See 3 CMC §§ 4947(a) and (d)(11); Employment Rules and Regulations, codified in the Northern Mariana Administrative Code ("NMIAC") at §§ 80-20.1-485(c)(13) and (14).]

As to the claims alleging violations of the CNMI preference statute, the Hearing Office does exercise jurisdiction and adjudicates claims filed under that statute [3 CMC § 4528(a)]. The present Order addresses only the discrimination portion of the complaints and does not deal with the preference claims. Therefore, these cases shall proceed to investigation so that the Enforcement Section may determine whether credible evidence exists that establishes the elements of a statutory violation under CNMI preference law. See 3 CMC § 4528(a).

Good cause appearing therefor, the Hearing Officer ORDERS as follows:

1. Those portions of Labor Case Nos. 16-010 and 16-011 that concern discrimination claims, are hereby DISMISSED WITHOUT PREJUDICE to Complainants' right to file such claims in another forum.

2. The remaining preference claims contained in Labor Case Nos. 16-010 and 16-011, shall not be affected by this Order. Those claims already have been referred to investigation.

//

[Labor Case Nos. 16-010 and 16-011]

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC § 4948(a); NMIAC § 80-20.1-485(b).

DATED: September 29, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	L.C. No. 16-014
Sofronio R. Tale, Jr.,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Geotesting, Inc.,	)	
Respondent.	)	
	)	

This Labor Case came on for hearing on October 17, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. Complainant appeared without counsel. Respondent Geotesting, Inc. appeared through its President, Ukrit Siriprusanan. The Department of Labor Enforcement and Compliance Section was represented by Jeff Camacho. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

Complainant Sofronio Tale, Jr. ("Employee") filed a labor case against his employer, Respondent Geotesting, Inc. ("Employer"), on July 6, 2016. In his complaint, Employee alleged that Employer had breached its employment contracts with Employee for three years by deducting $100 per month from Employee's wages as a payment for housing. Employee alleged that under his employment contracts with the company, Employer was legally obligated to provide free housing to him while he worked in Saipan.

It is undisputed that Employer has provided an apartment to Employee since May 2014, but has deducted $100 per month, plus his share of utilities, for this benefit. [See Complaint letter, filed on 7/06/16; testimony of Mr. Tale, Jr.]

Employee bases his claim entirely on a reference to "free housing" that is contained in the CW-1 Petition filed by Employer in early 2014. [A copy of the relevant excerpt of the CW-1 Petition was entered into evidence as Hearing Exh 3.]

The Department of Labor Enforcement and Compliance Section ("Enforcement") investigated this case and concluded that Employer was not at fault and that judgment should be entered in favor of Employer. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.] For reasons stated below, the Hearing Officer agrees that judgment should be entered in favor of Employer.

BASIC FACTS:

Employee has worked for Employer as a Core and Deep Well Drill Operator ("driller") almost continuously since 1995. Employee worked for Employer in the CNMI from 1995 until about 2009; Employee also worked for Employer in Guam in 2010 and 2012. In 2013, Employee returned to the Philippines while Employer petitioned the United States Citizenship and Immigration Services ("USCIS") to grant CW-1 status to Employee. In early 2014, the CW-1 petition was granted; Employee re-entered the CNMI under a CW-1 visa on May 10, 2014, and began working for Employer.

Employee has worked for Employer in the CNMI under CW-1 status from May 2014 until the present. The basic employment terms are set forth in the 2014 Employment Contract, which was signed by both parties in February and March 2014, respectively. [A copy of this contract was entered into evidence at Hearing Exhibit 2.] This contract covers employment for 12 months or until the expiration of the CW-1 visa: March 27, 2014 to December 2, 2014.

The 2014 Employment Contract was renewed in December 2014 and December 2015. Both renewals were documented in CW-1 Petitions to USCIS, in which Employer represented that the parties had orally agreed to renew the contract on the same basic terms.[1]

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[1] The Petitions included the following documents:

> **Summary of Terms of Oral Agreement,**[1] dated 11/14/2014, signed by Employer but not Employee, covering employment from December 3, 2014 to December 2, 2015 (attached to CW1 Petition, entered into evidence as Hearing Exhibit 5);
>
> **Summary of Terms of Oral Agreement,** dated 11/05/2015, signed by Employer but not Employee, covering employment from December 3, 2015 to December 2, 2016 (attached to CW1 Petition, entered into evidence as Hearing Exhibit 6).

Note: The full title of the one-page document is: "Summary of Terms of Oral Agreement Under Which Mr. Sofronio R. Tale, Jr. Will Be Employed As A Core And Deep Well Drill Operator With Geotesting, Inc. ('GEO') Under CW-1 Status." (Attached to CW1 Petitions, entered into evidence as Hearing Exhibits 5 and 6.)

In the 2014 Employment Contract and subsequent renewal documents for 2015 and 2016 employment, there is no mention of any housing benefit owed by Employer.

The only mention of any housing benefit appears in a portion of the 2014 CW-1 Petition filed by Employer with the USCIS to renew Employee's CW-1 status. [Hearing Exhibit 3.] In that document, under the topic of "other compensation," someone typed "free housing." President Siriprusanan testified credibly that this was a mistaken entry made by Employer's agent and that the entry did not reflect the actual agreement of the parties, as set forth in the 2014 Employment Contract. As stated, this contract contains no mention of a housing benefit.

Subsequent CW-1 petitions submitted by Employer to the USCIS to renew Employee's CW-1 status, make no mention of "free housing." [See copies of 2015 and 2016 Petitions at Hearing Exhibits 5 and 6, respectively.]

President Siriprusanan testified credibly that Employer never promised Employee free housing when Employee returned to work in the CNMI in 2014, under CW-1 status. Likewise, Employee admitted under oath that he never heard the Employer promise free housing to him in connection with his work in the CNMI from 2014 through 2016. [Testimony of Mr. Siriprusanan and Mr. Tale, Jr.]

The course of dealing between the parties from 2014 through 2016, established an agreed-upon arrangement under which Employer provided Employee and his co-worker with an apartment in Saipan in exchange for each employee's payment of $100 per month, plus that person's share of utilities. President Siriprusanan testified that the two-bedroom apartment rented for Employee and a co-worker costs Employer more than the amount charged to those two employees, but Employer absorbs the extra costs and simply deducts $100 from each employee's salary. Employer began deducting $100 per month from Employee's wages in May 2014 and these monthly deductions have continued from May 2014, until the present. Employee never approached Employer to complain about the deduction until Employee filed this labor complaint in July 2016. [Testimony of Mr. Tale, Jr. and Mr. Siriprusanan.]

Holding: Based on the above, the Hearing Officer finds that Employee failed to prove that Employer ever agreed, orally or in writing, to provide "free housing" as part of Employee's employment during the period from 2014 through 2016. The evidence establishes that there was no contractual provision obligating Employer to provide free housing. Accordingly, judgment should be entered in favor of Employer.

Statute of Limitations:

In addition, the Hearing Officer finds that this claim is partially barred by the six-month statute of limitations applicable to cases filed in the Administrative Hearing Office. 3 CMC § 4962(b). Viewing this claim under a "continuing accrual" analysis, the claim period would be limited to a period from January 6, 2016 (6 months prior to the filing of the complaint on July 6, 2016) until the present.[2] Any claims accruing prior to January 2016 are barred, as a matter of law, by the applicable statute of limitations at 3 CMC § 4962(b).

It should be noted that this ruling on the limitations issue does not change the Hearing Officer's ultimate finding that judgment in this case should be entered in favor of Employer because Employee has failed to prove that Employer had any legal obligation to provide free housing.

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[2] The statute of limitations refers to the period of time in which a claimant is allowed to bring a legal claim against a potential respondent. The general rule is that a limitations period begins to run from the time a cause of action accrues. In contract cases, accrual often occurs when the first (alleged) breach occurred, which in this case, would be when Employer took the first housing deduction from Employee's wages in May 2014. Applying the general rule to this claim would bar the claim entirely because Employee would have had to file his claim within 6 months of May 2014, or be barred from filing thereafter.

However, some courts have applied a theory of "continuing accrual" or "continuing breach" (*aka* "continuing violation doctrine") to certain types of contracts. Under the "theory of continuous accrual," where there is a continuing breach of a severable contract, each new breach may give rise to a new cause of action and new limitations period. See *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 112, 119 (1996). If each failure to pay constitutes a separate breach, those that occurred within the statutory period are not barred from recovery. Using this analysis, the statute may run on some breaches, but not others, depending on when they occurred. For example, in *Peterson v. Highland Music Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998), the Ninth Circuit held that that a periodic obligation to make royalty payments was a "continuing obligation" that was subject to separate "statute of limitations" analysis, depending on when the particular payment obligation arose. In effect, claims for certain royalty payments were barred as they were beyond the statutory period, whereas other claims were allowed. *Id.* Typical examples of contracts to which the "continuing accrual doctrine" may be applied, include: installment contracts, periodic rental payments, and contracts calling for periodic pension-like payments.

The Hearing Officer finds no reported decisions in the CNMI that address the "continuing breach" analysis. Nevertheless, I believe this analysis should be applied in this administrative case, based on the type of periodic contractual obligation that is alleged. Under the analysis, each housing deduction would be considered a separate (potential) breach of contract. Thus, claims for deductions taken within six months of the filing date of the complaint (i.e., beginning in January 2016) would not be barred by the six-month statute of limitations; whereas claims for deductions taken prior to January 2016, are barred. 3 CMC § 4962(b).

[L.C. No. 16-014]

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Statute of Limitations:** Any claims accruing prior to January 2016 are barred, as a matter of law, by the applicable, six-month statute of limitations. 3 CMC § 4962(b).

2. **Judgment:** Judgment is hereby entered in favor of Respondent Geotesting, Inc. based on the above findings and conclusions. Complainant shall take nothing from the Complaint.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 26, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of	)	
Gina A. Gamboa,	)	L.C. No. 15-008(T)
Complainant,	)	ADMINISTRATIVE ORDER
v.	)	
	)	
K-Amusement Corporation,	)	
Respondent.	)	
	)	

This matter came on for hearing on June 21 and August 15, 2016, in the Hearing Office of the Department of Labor, Saipan, under 3 CMC §4444, 1 CMC §§ 9109 and 9110, and Section IV(C) of the Employment Rules and Regulations. The parties testified via a Skype internet connection from Tinian to the Administrative Hearing Office in Saipan.

Complainant Gina A. Gamboa appeared without counsel. Respondent K-Amusement Corporation appeared through its General Manager, Ig Sang Kwon. The Tinian Labor Office appeared through investigator Patrick King. Cherie Sanchez and Jeanette Ramos testified as witnesses for Respondent. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

On September 14, 2015, complainant Gina A. Gamboa ("Employee") filed a labor complaint against her employer, K-Amusement Corporation ("Employer"), for wrongful termination/breach of contract. [The Complaint was entered into evidence as Hearing Exhibit 1.] On that same day, Employee filed an Incident Report in support of her Complaint. [A copy of the Incident Report was entered into evidence as Hearing Exhibit 2.] The facts underlying the case are as follows:

On July 16, 2015, Employer visited Employee's home town in the Philippines and entered into an Employment Contract with Employee (hereinafter, "Contract"). [A correct copy of the Contract was entered into evidence as Hearing Exhibit 3.] The

Contract, which was printed under the heading of the "Philippine Overseas Employment Administration," contained terms and conditions regarding the termination of employment, including the following:

> The employer may terminate this contract on the following just causes: serious misconduct, willful disobedience of employer's lawful orders, habitual neglect of duties, absenteeism, insubordination revealing secrets of establishment, when employee violates customs, traditions and laws of host country and/or terms of this agreement. The employee shall shoulder the repatriation expenses. [Hearing Exhibit 3, ¶ 10(a).]

Both parties signed the Contract on July 16, 2015. Subsequently, Employer petitioned the U.S. government for permission to employ Employee under CW1 status as a poker attendant. Ultimately, the CW1 petition was granted and Employee entered the CNMI with a CW1 visa, on about August 26, 2015. Employer arrived on Tinian on August 27, 2015, and began working for Employer on September 1, 2015. The CW1 visa was scheduled to expire on February 19, 2016. [A copy of the visa was entered into evidence as Hearing Exhibit 7.]

Employee began working at Employer's poker game room on September 1, 2015. Employee worked a full-time schedule for one week - from September 1 through September 7, 2015. Employer (Mr. Kwon) testified that he had no problems with her performance during that week; Employee reported no difficulties during that week in her testimony. [Testimony of Mr. Kwon and Ms. Gamboa.]

On September 8, 2015, Manager Kwon asked Employee and her co-worker, Cherie Sanchez, to meet with him at the poker game room to discuss a work-related issue. Both workers attended the meeting, as Kwon instructed, at the game room. The meeting lasted about an hour. [Testimony of Mr. Kwon, Ms. Gamboa and Ms. Sanchez.]

During the meeting, Employee testified that Mr. Kwon seemed annoyed with her. Kwon asked Employee how she had originally found out about the job in Tinian. Kwon stated that it had not been his idea to hire Employee; but rather, his wife's idea. Employee recalls Kwon making an offhanded comment that he "would be watching her" or words to that effect. [Testimony of Ms. Gamboa and Mr. Kwon.]

At the end of the meeting, the parties had a brief exchange of words, which the parties remember differently. According to Employee, Mr. Kwon turned to her as the meeting ended and said: "Don't come to work tomorrow." Employee asked,

"Did I hear that right?" but Kwon just walked away from her. [Testimony of Ms. Gamboa.] In contrast, Mr. Kwon denies that he told Employee not to come to work the next day. Instead, Kwon claims that he told Employee that "she should come to the office tomorrow (September 9, 2015) because he wanted to talk to her." [Testimony of Mr. Kwon.]

It should be noted that Employer regularly posted employees' work schedules on a bulletin board at the poker game room. As of September 8, 2015, Employer had posted the next week's schedule for the September 8-15, 2015 period. Employee was listed as having numerous work shifts during that week. Employee admitted that she read the schedule on September 8th and was aware that she was assigned work shifts on the schedule. [Testimony of Ms. Gamboa.]

On the day after the meeting (September 9), Employee did not come to the poker game room. Mr. Kwon asked his staff to call Employee on her telephone. The staff later reported to Kwon that Employee was not answering her phone. [Testimony of Mr. Kwon.]

Employee did not go to work on September 9, 2015, and she did not contact her employer. Instead, she came to the Tinian Labor Office and filed a labor complaint for wrongful termination/breach of contract. [Testimony of Ms. Gamboa, Hearing Exhibits 1 and 2.]

Alleged Constructive Termination on September 8, 2015: At Hearing, Employee testified that she believed Kwon had terminated her on September 8, 2015, when he told her not to come to work the next day. She believed that Kwon "no longer wanted her to work" at the Game Room. After filing her complaint on September 9, 2015, Employee never called or returned to work at the Employer's poker game room. [Testimony of Ms. Gamboa.]

Written Termination: As of September 19, 2015, Employee had been absent from work for 11 days without making contact with Employer. On September 19, 2015, Employer served Employee with a written Notice of Termination. Two days later, Employer filed the Notice with the Tinian Labor Office. [A copy of the Notice of Termination was entered into evidence as Hearing Exhibit 4.]

The Notice of Termination states that Employee is terminated for the following "valid causes:" willful disobedience of employer's lawful orders, neglect of duties, absenteeism, incompetence in her job as a Poker Attendant and abandoning of job assigned to her. [*Id.*] At Hearing, Mr. Kwon testified that he decided to terminate

Employee because of her absenteeism and abandonment of the job, based on her failure to return to work after September 8, 2015. Kwon testified that the allegation that Employee was "incompetent" was his wife's idea. Kwon denied that his decision was based in any manner on a personal grudge that he allegedly held against Employee's brother. [Testimony of Mr. Kwon.]

Determination: The Tinian Labor Office's Enforcement Section investigated this case after mediation was unsuccessful in resolving the case. The Department's findings were set forth in a Determination filed on April 29, 2016. [A correct copy of the Determination was entered into evidence as Hearing Exhibit 5.] In its Determination, Enforcement concluded that Employee "did her part as a poker attendant" and that Employer terminated the complainant due to a personal issue rather than job performance. The Determination did not address the issue of whether Employee's absences after September 8, 2015, justified termination. [Determination, Findings at ¶¶ 14-19. at Hearing Exhibit 5.]

II. CONCLUSIONS OF LAW

A. Employee was not constructively discharged on September 8, 2015.

Alleged Constructive Discharge: Employee argues that she was constructively terminated from her job on the evening of September 8, 2015, when Kwon told her not to come to work the next day. Employee took that comment to mean that she was being permanently barred - effectively terminated – from her job at the poker game room. Employee's understanding that she was terminated was based upon the single statement she claimed that Mr. Kwon had made: "Don't come to work tomorrow." [Testimony of Ms. Gamboa.]

In order to prevail in her claim, Employee must prove by a preponderance of the evidence that she was constructively discharged on September 8, 2015, based on the alleged statement of General Manager Kwon. Alternatively, Employee could establish that the work conditions were so onerous as to constitute an intolerable work environment that compelled her to leave her employment.

Commonwealth law does not specifically address the doctrine of "constructive discharge." Rather, the doctrine has developed largely through the federal courts in cases involving unfair labor practices.[1] These courts hold that a constructive

[1] Under 7 CMC § 3401, Commonwealth courts look to the rules of the common law in the absence of written law or local customary law to the contrary.

discharge results when "job conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted.) *Junior v. Texaco. Inc.*, 688 F.2d 377, 379 (5th Cir. 1982); *see also Alicea Rosadou v. Garcia Santiago,* 562 F/2d 114 (1st Cir. 1977); *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982); *Tonry v. Security Experts, Inc.,* 20 F.3d 967 (9th Cir. 1994). The employer's conduct is judged under a "reasonable person" standard as opposed to the subjective view of the complainant. Thus, whether the employer's actions amount to constructive discharge depends upon whether a reasonable person under similar circumstances would have viewed working conditions as so intolerable that a reasonable person would have felt compelled to resign. *Id.*

Based on the evidence presented in this case, I conclude that the facts do not constitute constructive discharge, as a matter of law.

Accepting Employee's disputed version of events for the sake of argument, Employer allegedly told Employee on September 8, 2015: "Do not come to work tomorrow." Employee filed her labor complaint the very next day. Employee never returned to work, despite the fact that she had seen her name on the work schedule for Sept. 8-15, 2015, which was posted at the poker game room. Employee never called Mr. Kwon or otherwise attempted to learn whether she was expected to work the shifts she was listed as working on the posted schedule.

The threshold question is whether the Employer's (Kwon's) words and actions should have led Employee to believe she had been terminated, or whether the working conditions were so intolerable as to justify Employee's decision to abandon her job. In other words, would a reasonable person in Employee's situation have believed that she had been terminated, or been compelled to leave, given the situation as of September 8, 2015?

We begin with the words allegedly spoken by Mr. Kwon: "Don't come to work *tomorrow*." Even assuming that Kwon made this statement, these words are ambiguous as they leave open the issue of whether Employee could return to work the *day after tomorrow*.[2] Given that Employee's name was listed on the work schedule for September 10, 2015, it would have been reasonable for Employee to contact the General Manager on September 10, to ask whether she was expected to work her work shift on that day and later that week. Instead of asking her

[2] For example, a statement such as "don't *ever* come back" (as opposed to "don't come back to work *tomorrow*") would have expressed a more unambiguous intent to end the employment relationship.

manager, Mr. Kwon, for clarification, Employee simply assumed she had been terminated, filed a labor claim and stopped going to work.

After hearing the testimony, the Hearing Officer is still at a loss to explain why Employee walked away from this job. Employee worked only one week at the game room and it appears to have been an uneventful week. Employee does not allege that she was physically or verbally abused, or harassed in any manner. Employee barely had any contact with Manager Kwon during her one week of work. The only "incident" that Employee described in her testimony was the short meeting she attended with her co-worker and Mr. Kwon on September 8, 2015. By Employee's own description, Kwon's behavior at the meeting seemed curt and a bit distant, perhaps annoyed, but he was neither hostile nor abusive.

The Hearing Officer finds that the facts do not justify Employee's conclusion that she had been terminated, nor do the facts establish that Employee's work environment was intolerable. Employee's assumption that she had been terminated on September 8, 2015, was unreasonable, based on the factual circumstances. Even assuming that Employee's version of events is true, Kwon's statements did not rise to the level of threats or harassment, and one uneventful week of work did not create any situation that could be described as "intolerable" for Employee. Thus, the evidence does not prove Employee's claim for constructive discharge by a preponderance of the evidence.

The evidence is insufficient to prove Employee's claim that her termination for absenteeism was a pretext because, in fact, she was terminated to satisfy a personal grudge.

Finally, the Hearing Officer finds the evidence insufficient to prove Employee's claim that her termination for absenteeism was a pretext because, in fact, she was terminated to satisfy a personal grudge. Employee alleged that Mr. Kwon bore a personal grudge against her because of a past dispute that Kwon had had many years before with Employee's brother, William Olympa Alberio. Employee testified that when she first arrived on Tinian, Kwon questioned the group of new workers to determine who was the sister of his former employee. When Kwon singled her out as the relative, Employee felt embarrassed and apprehensive. [Testimony of Ms. Gamboa.] At Hearing, Kwon testified that he believed that Employee was overreacting to the situation. Kwon admitted that he had known Employee's brother, but denied that he had formed any plan to terminate or harass Employee because she was related to the brother, Mr. Alberio. Furthermore, Kwon argued that he had not done or said anything that should have made

Employee feel embarrassed or concerned. Kwon testified credibly that he gave Employee a fair chance to work and was disappointed when she filed a case and failed to return to work. [Testimony of Mr. Kwon.]

The Hearing Officer finds that the simple, offhanded comment of the Employer (that he recalled her brother and would be "watching" this employee) is not enough, standing alone, to establish that the termination was a pretext to satisfy some long-standing grudge. If, indeed, Kwon harbored some resentment, he did not act on his resentment to the extent that would make the employment intolerable to Employee. The facts demonstrate that it was Employee's decision not to return to work which gave Employer valid grounds to claim that she had abandoned her job. Any claim that Employer wanted this result remains speculation – not fact.

B. Employer's termination of Employee for cause on September 19, 2015, was justified, based on Employee's unauthorized absences from work from September 8-19, 2015.

It is not clear whether Employee sought to gain a tactical advantage by filing a labor case. In retrospect, Employee could have filed the case but returned to work, thereby avoiding the charge that she had abandoned her job. In any event, by not returning to work after September 8, 2015, Employee seemed to have abandoned her job. Her failure to return to work gave the Employer grounds to terminate her employment based on excessive absences, pursuant to the Contract. [See Exhibit 3, ¶ 10(a).]

Holding: In conclusion, I find that Employee presented insufficient evidence to prove wrongful termination or breach of contract. Furthermore, Employee's failure to return to work after filing her claim was unjustified and therefore, gave Employer valid grounds on September 19, 2015, to terminate Employee for unexcused absences. Accordingly, judgment should be entered in favor of the respondent Employer on the labor claim; Employee's claim for damages is denied, and Employee is deemed terminated for cause for unexcused absences.

Transfer Relief is not at issue: After filing this claim, Employee spent many months on Tinian without work. Meanwhile, Employee's original CW1 status expired on February 19, 2016. At Hearing, Employee testified that after her termination, she had applied for a different CW1-status job with a manpower agency. That company, Curtwill Corporation, submitted a CW1 Petition on her behalf, which was received by USCIS on May 3, 2016. [A copy of a Notice of

Action (I-797C Form) was entered into evidence as Hearing Exhibit 8.] In any event, granting transfer relief is not within the jurisdiction of the Hearing Office.[3]

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered in favor of respondent K-Amusement Corporation and against complainant Gina A. Gamboa with respect to this labor claim.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: August 17, 2016

Jerry Cody
Hearing Officer

[3] Employee testified that she has no current plan to return to her country of origin and therefore, she is not asking Employer to pay for her repatriation expenses. Accordingly, the Hearing Officer shall not address the issue of whether Employee would be legally entitled to receive reimbursement for her ticket. The Hearing Officer notes that this issue remains an open question.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of	)	
Gina A. Gamboa,	)	L.C. No. 15-008(T)
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	**ON REMAND**
K-Amusement Corporation,	)	
Respondent.	)	
	)	

This case was originally heard on June 21 and August 15, 2016, in the Administrative Hearing Office of the Department of Labor, Saipan. An Administrative Order was issued on August 17, 2016, which was then appealed by Complainant. Pursuant to the Secretary's Order On Appeal, issued on August 23, 2016, the case was remanded to the Hearing Office for further proceedings. A remand hearing was held in the Hearing Office on September 13 and 22, 2016.

In all hearings, certain witnesses testified from Tinian via a Skype internet connection between the Tinian Labor Office and the Administrative Hearing Office in Saipan, while other witnesses testified at the Hearing Office in Saipan.

At the remand hearings, Complainant Gina A. Gamboa ("Employee") appeared without counsel. Respondent K-Amusement Corporation ("Employer") appeared through its General Manager, Ig Sang Kwon, and its counsel, Ms. Kimberlyn King-Hinds. The Tinian Labor Office appeared through investigator Patrick King. Mr. Olympo Alberio testified as a witness. Hearing Officer Jerry Cody, presiding.

The present Remand Order supersedes the initial Administrative Order issued by this Hearing Officer on August 17, 2016. The present Order incorporates some of the earlier findings, but revises and adds to them, as set forth below.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

On September 14, 2015, Employee filed a labor complaint and an incident report against Employer, in essence, for constructive discharge/breach of contract. [The Complaint and Incident Report were entered into evidence at Hearing Exhibits 1 and 2, respectively.] The facts underlying the case are as follows:

FINDINGS OF FACT

1. In the summer of 2015, Employee, who was living in the Philippines, received a phone call from her neighbor, Bernard Dicang, who is the brother-in-law of Ig Sang Kwon, the General Manager of K-Amusement Corporation.[1] Mr. Dicang, who was calling from the CNMI, asked Employee if she wanted to work for K-Amusement Corporation as a poker attendant in Tinian. Employee told Mr. Dicang that she was interested in the job and Employer then began preparing documents for the employment. [Testimony of Ms. Gamboa.]

2. In June or July 2015, both parties entered into an Employment Contract on a form provided by the Philippine Overseas Employment Administration ("POEA"). Employee signed a blank contract that was sent to her, then sent it to Employer, whose General Manager signed it and arranged for it to be filed with the POEA. [The Employment Contract was entered into evidence at Hearing Exhibit 3.]

3. Subsequently, Employer petitioned the United States Citizenship and Immigration Services ("USCIS") for permission to employ Employee under a CW-1 status. After that petition was approved, Employee obtained a CW-1 visa to enter the CNMI and arrived in Tinian on about August 27, 2015. The CW-1 visa was scheduled to expire on February 19, 2016. [A copy of the visa was entered into evidence at Hearing Exhibit 7.]

4. Employee first met General Manager Kwon on August 27, 2015, when she was taken to his office with two other new employees. Mr. Kwon asked, "Who is the sister of Kimpo (Employee's brother)?" When Employee raised her hand, Kwon laughed and said, "I will give you a hard time from now on, so watch out." [Testimony of Ms. Gamboa.]

5. Employee began working at Employer's game room on September 1, 2015. Employee worked only one full week for Employer (September 1 to 7, 2015). During that week, Employee had almost no contact with General Manager Kwon. Mr. Kwon appeared to be satisfied with her work.[2]

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[1] Bernard Dicang currently lives near Employee's family in the Philippines; however, in the summer of 2015, he was working in Tinian for K-Amusement Corporation (Employer). Bernard continued to work for Employer during the time that Employee worked there – throughout September and October 2015.

[2] Mr. Kwon testified that he had no problems with her performance during that week, except for the one issue discussed at the meeting on September 8, 2015. Employee testified that she had no difficulties at work during that week; she only saw Mr. Kwon about once. [Testimony of Mr. Kwon and Ms. Gamboa.]

6. On September 8, 2015, Manager Kwon asked Employee and co-worker Cherie Sanchez, to meet with him at the poker game room to discuss a work-related issue.[3] Both workers attended the meeting at the game room. The meeting, which lasted about an hour, took place on the evening of September 8, 2015.

7. Employee testified credibly that during the meeting, Mr. Kwon seemed somewhat annoyed. Kwon asked Employee how she had originally found out about the job in Tinian, and he noted that it had not been his idea to hire Employee, but rather, his wife's idea. Employee recalls Kwon making an off-handed comment that he "would be watching her from now on" or words to that effect. [Testimony of Ms. Gamboa.]

8. At the end of the meeting, Kwon and Employee had a brief exchange of words, which the parties recall differently. According to Employee, Mr. Kwon turned to her as the meeting ended and said, "Don't come to work tomorrow." Employee asked, "Did I hear that right?" but Kwon just walked away from her. [Testimony of Ms. Gamboa.] In contrast, Mr. Kwon denies making that statement. Instead, he claims he told Employee to "come to the office tomorrow (September 9) because [he] wanted to talk to her." [Testimony of Mr. Kwon.]

9. On September 9, 2015, Employee did not return to work. Instead, she went to the Tinian Labor Office to seek assistance. She was told by Department personnel that in order to get assistance, she would need to file an official labor complaint.

10. Employee never returned to work for Employer, despite the fact that she was listed on that week's work schedule.

11. Employer regularly posted employees' work schedules on a bulletin board at the poker game room. By September 8, 2015, Employer had posted the next week's schedule for September 7-13, 2015. [See copy of Employee Work Schedule at Hearing Exhibit 6.] Employee was listed as having numerous work shifts during that week, including shifts on September 9, 10, 11 and 12. Employee admitted that she read the schedule on September 8 and was aware that she was assigned work shifts on the schedule for that week. [Testimony of Ms. Gamboa.]

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[3] One poker machine had malfunctioned after midnight and Employee had not contacted Mr. Kwon due to the late hour. Mr. Kwon wanted to inform his employees that the workers should contact him in that circumstance, no matter how late in the evening it occurs. [Testimony of Mr. Kwon and Ms. Gamboa.]

12. On September 9, 2015, Employer's staff attempted to call Employee on her cell phone numerous times, but the phone either was turned off or nobody answered. [Testimony of Mr. Kwon and Ms. Ramos.][4]

13. Employee testified that during this week, she was "disappointed and depressed" and feeling "in chaos." She felt that she had no one to talk to, so she stayed home and waited to hear from the Tinian Labor Office. *Id.*

14. On about September 10, 2015, Employee received a telephone call from her co-worker, asking whether she was going to come to work her shift that day at the poker game room. Employee replied, "No." Employee testified that she said "no" because she did not feel well and was stressed by the situation. [Testimony of Ms. Gamboa, taken at the remand hearing on 9/13/2016.]

15. On September 14, 2015, Employee paid the filing fee and filed her complaint letter and an Incident Report with the Tinian Labor Office. [Hearing Exs. 1 and 2.]

16. On September 19, 2015, Employer served Employee with a Notice of Termination, citing grounds of absenteeism and abandonment of her job, among other reasons. [A copy of the written Termination of the Contract, hereinafter "Notice of Termination," was entered into evidence at Hearing Exhibit 4.]

The Failed Mediation

17. The Hearing Office conducted two mediation sessions with the parties in October 2015, in an attempt to settle the case. The parties were unable to agree on a settlement. At the second session, the Mediator (Jerry Cody) encouraged the parties to meet informally to discuss settlement.

18. Acting on the Mediator's suggestion, the parties met twice outside of the Labor Office to discuss a possible settlement. The first meeting was short and uneventful. The second meeting – held on October 21, 2015, was attended by Mr. Kwon, Employee, Employee's brother (Olympo Alberio) and corporate secretary Anthony Hofschneider. By this time, Employer was considering withdrawing his termination in exchange for Employee's dismissal of her Complaint, but Employer was not agreeing to resume the employment. [Testimony of Kwon and Gamboa.]

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[4] Ms. Jeanette Ramos testified credibly that on September 9, 2015, Kwon instructed her to call Employee; she did call Employee's cell phone 5 to 7 times during that day, but no one answered.

19. At the meeting, the main issue discussed was whether Employee's brother would agree to reimburse Employer for expenses that Employer incurred in bringing Employee to the CNMI to work.[5] [A recording of the two-hour meeting was entered into evidence at the remand hearing. See footnote 10.]

20. At the end of the meeting, Mr. Alberio agreed to pay a total of $1,000 to Kwon, in installments taken from each of his paychecks; and Mr. Kwon agreed to withdraw his termination of Employee so that she could more easily find another job. Mr. Kwon was not agreeing to resume the employment and there was no discussion of that issue at the meeting. [During the next 12 months, Mr. Alberio never made any payments to Mr. Kwon; nevertheless, Kwon fulfilled his promise by submitting the withdrawal letter to the Tinian Labor Office within a matter of days (see ¶¶ 22 and 23).]

21. The issue of whether an agreement was reached that day between Employer and Employee, is complicated. It seems that Employer believed Employee had agreed to withdraw her complaint and leave her employment voluntarily to find another job, in exchange for Employer's withdrawal of the termination notice. Employee admits that she told Mr. Kwon that she would dismiss her complaint.[6] The October 21, 2015 meeting ended on a positive note with all parties joking and laughing. [Recording of meeting; testimony of Mr. Kwon and Ms. Gamboa.]

22. On October 22, 2015, Mr. Kwon prepared and signed a letter to the Tinian Labor Office, withdrawing his termination of Employee. Kwon's letter stated (incorrectly) that Employee had withdrawn her labor complaint. Kwon filed his letter at the Tinian Labor Office on October 27, 2015. [See copy of Mr. Kwon's letter at Hearing Exhibit 9.] In the months that followed, Kwon assumed that the case had ended. [Testimony of Mr. Kwon.]

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[5] Prior to hiring Employee, Kwon and Employee's brother, Mr. Alberio, had entered into an agreement whereby Alberio promised to reimburse Employer for its expenses in hiring Employee, in exchange for Employer's act of hiring Employee and arranging for her CW-1 Petition and visa. Mr. Kwon promised Mr. Alberio that if Employee continued working for Employer until 2019, Employer would return the reimbursement money to Alberio. Both Kwon and Alberio testified that the agreement had been in writing, but neither person could find and produce the document at Hearing. [Testimony of Messrs. Kwon and Alberio.]

[6] At Hearing, Employee testified: "I said I would withdraw my complaint, but I was just confused. I ignored everything. I kept coming to [investigator] King." [Testimony of Ms. Gamboa, taken on 8/15/2016.] Employee later testified that she did not understand that she was supposed to go to the Tinian Labor Office to withdraw her complaint, so she didn't do that. *Id.*

23. Employee never submitted a letter withdrawing her labor complaint, and her brother, Mr. Alberio, never paid any reimbursement to Mr. Kwon. [Testimony of Messrs. Gamboa, Alberio and Kwon.]

24. Employee made several attempts to obtain a copy of Mr. Kwon's letter from the Tinian Labor Office. Employee asked the Labor investigator for the letter on October 26 and November 23, 2015, and in March 2016. In October and November 2015, investigator Patrick King told Employee that she should get a copy of the letter directly from Mr. Kwon. Employee testified that she was "afraid" to approach Kwon because of his "hostile attitude" during their last meeting on October 21, 2015. In March 2016, Employee approached the Tinian Labor Office accompanied by a local friend. This time the Tinian Labor Office gave her a copy of Mr. Kwon's letter.

Procedural History

25. As stated earlier, after the second official mediation on about October 19, 2015, the Mediator suggested that the parties meet informally to resolve the dispute. Thereafter, the parties never informed the Tinian Labor Office or Mediator that they had reached a settlement. Likewise, no action was taken by the Department of Labor or Mediator to learn whether the parties had reached a settlement. In March 2016, the Hearing Officer learned of Mr. Kwon's letter of October 22, 2015, then asked the Tinian Labor Office to contact the parties to find out whether they had settled the case. Soon thereafter, the investigator reported that Employee no longer wanted to settle her case. The Hearing Officer then issued an Order referring the case to investigation and setting the case for hearing in May 2016. The May hearing was subsequently moved to June 21, 2016, due to the Hearing Officer's referral off-island for medical treatment in May 2016.

26. As stated, Tinian Labor officials investigated this case in March 2016. The Department's findings were set forth in a Determination filed on April 29, 2016. [See copy of Determination at Hearing Exhibit 5.] In its Determination, Enforcement concluded that Employer terminated Complainant due to a personal issue rather than job performance. The Determination did not address whether Employee's absences after September 8, 2015, justified termination. *Id.*, Findings at ¶¶ 14-19.

27. The evidentiary hearing of this case occurred on June 21 and August 15, 2016. An Administrative Order was issued on August 17, 2016. After Complainant filed an appeal, the Secretary of Labor issued the Secretary's Order on Appeal, which

remanded the case to the Hearing Office with instructions to "reconvene an evidentiary hearing giving complainant one more opportunity to present evidence on the issues raised by complainant." [Secretary's Order on Appeal, issued on August 23, 2016; e-mail from Secretary Edith Deleon Guerrero to Hearing Officer Jerry Cody, dated August 24, 2016.]

COMMENT

Constructive discharge cases often entail the breakdown of an employer-employee relationship and an assessment of what caused that break. In many cases, as here, neither party is entirely blameless.

The above facts set forth the brief employment of Employee at Employer's game room and the manner in which that employment ended. The Hearing Officer has reached the conclusions set forth below by examining the conduct of each party in view of that party's legal obligations. As stated below, the Hearing Officer finds that Employee failed to prove that she was constructively discharged from this employment. The facts demonstrate that Employee overreacted to certain off-handed comments of her employer and stayed away from her workplace, even though she was on the work schedule and despite the fact that Employer was trying to contact her. Unfortunately, this conduct gave Employer the legal grounds to terminate the employment, which it promptly did.

Although a more understanding employer might have seen the matter as a misunderstanding, this employer took a hard line and insisted that breach of contract had occurred. Based on the terms of the contract, the Employer had the right to respond with a termination notice. Although the Employee alleges that Employer bore a grudge against her on account of her brother, the evidence is insufficient to support this conclusion. To be sure, Employer could have taken a more conciliatory approach during settlement discussions, but the Hearing Office cannot force settlement and the Employer had the legal right to stand by its termination.

CONCLUSIONS OF LAW

I. Employee Was Not Constructively Discharged On September 8, 2015.

Employee argues that she was constructively terminated from her job on the evening of September 8, 2015, when, according to Employee, Mr. Kwon told her not to come to work the next day. Employee claims that she took that comment

to mean that she was being permanently barred and terminated from her job at Employer's game room. Employee testified that her understanding that she was terminated was based entirely on the alleged single statement by Mr. Kwon: "Do not come to work tomorrow." [Testimony of Ms. Gamboa.]

In order to prevail in this case, Employee must prove by a preponderance of the evidence that she was constructively discharged on September 8, 2015, based on the alleged statement of General Manager Kwon. Alternatively, Employee could establish that the work conditions were so onerous as to constitute an intolerable work environment that compelled her to leave her employment on that date.

Commonwealth law does not specifically address the doctrine of "constructive discharge." Rather, the doctrine has developed largely through the federal courts in cases involving unfair labor practices.[7] These courts hold that a constructive discharge results when "job conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted.) *Junior v. Texaco. Inc.*, 688 F.2d 377, 379 (5th Cir. 1982); *see also Alicea Rosadou v. Garcia Santiago,* 562 F/2d 114 (1st Cir. 1977); *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982); *Tonry v. Security Experts, Inc.,* 20 F.3d 967 (9th Cir. 1994). The employer's conduct is judged under a "reasonable person" standard as opposed to the subjective view of the complainant. Thus, whether the employer's actions amount to constructive discharge depends upon whether a reasonable person under similar circumstances would have viewed working conditions as so intolerable that the person would have felt compelled to resign. *Id.*

Based on the evidence presented in this case, I conclude that the facts do not constitute constructive discharge, as a matter of law.

Accepting Employee's disputed version of events for the sake of argument, Employer allegedly told Employee on September 8, 2015: "Don't come to work tomorrow." Employee approached the Tinian Labor Office the next day and filed her labor case five days thereafter (9/14/2015). Employee never returned to work, despite the fact that she had seen her name on the work schedule for Sept. 7-13, 2015, which was posted at the poker game room. [See Hearing Ex. 6.] Employee never called Mr. Kwon or the game room to learn whether she was expected to work the shifts that she was listed as working on the posted schedule.

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[7] Under 7 CMC § 3401, Commonwealth courts look to the rules of the common law in the absence of written law or local customary law to the contrary.

The threshold questions are: (1) whether the Manager's (Kwon's) words and actions would have led a reasonable employee to believe she had been terminated, or (2) whether working conditions were so intolerable or oppressive as to compel a reasonable employee to leave her job?

On the first question, we begin with the words allegedly spoken by Mr. Kwon: "Don't come to work tomorrow." Assuming that Kwon made this statement, these words are ambiguous as they leave open the issue of whether Employee should return to work the *day after tomorrow*.[8] Given that Employee's name was listed as having shifts on the work schedule on September 10, 11 and 12, 2015, it would have been reasonable for Employee to contact the Manager on September 10, to ask whether she was expected to work her shift on that day and later that week. Instead of asking for clarification, Employee testified that she simply assumed she had been terminated and stopped going to work. Meanwhile, Employer's staff tried to reach Employee by phone for several days but Employee would not answer her phone or turned the unit off. [Testimony of Ms. Ramos.]

During the remand hearing, Employee admitted for the first time that she had, in fact, been contacted by her co-worker on September 10, 2015. Employee testified that her co-worker, Ms. Ramos, called on that day to ask if Employee was coming to work her shift and Employee replied, "No." [See Finding no. 14.] This conversation is important, for it shows that as of September 10, Employer still considered Employee to be expected to work her shift - in other words, she was still being treated as if she were employed, and *Employee knew that she was being treated as an employee.* This admission calls into question Employee's contention that she believed during the period of September 8-14, 2015, that she had been terminated. (If she were terminated by Employer on September 8, why would the staff be calling on September 10, to ask if she were going to work her shift?)

On the second question - whether the working conditions were so intolerable as to justify Employee's decision to leave her job - the evidence does not establish a claim for constructive discharge. Employee worked only one week at the game room and it was an uneventful week. Employee did not allege that she was physically or verbally abused, or harassed in any manner, during that week. In fact, Employee barely had any contact with Manager Kwon during the week. The only "incident" that Employee cited was the short meeting she attended with her co-worker and Mr. Kwon on September 8, 2015. By Employee's own

[8] For example, a statement such as "don't *ever* come back" (as opposed to "don't come back to work *tomorrow*") would have expressed a clearer intent to end the employment.

description, Kwon's behavior at the meeting seemed curt and a bit distant, perhaps annoyed, but he was neither hostile nor abusive.

The Hearing Officer finds that the facts do not justify Employee's claim of constructive discharge. First, Employee's assumption that she had been terminated on September 8, 2015, was unreasonable, based on the circumstances. The Manager's statement on September 8th was ambiguous and did not signify a dismissal. Even if Employee had doubts as to her status, Employee neglected to follow-up with Employer to determine whether she was being taken off the work schedule. Furthermore, the call from Employee's co-worker on September 10th, asking if she were coming to work, undercuts Employee's contention that she believed she had been terminated. Upon receiving that call, Employee knew her Employer still expected her to come to work, yet she remained at home and neglected to contact the Employer.

Second, Employee's working conditions were not intolerable or oppressive so as to compel a "reasonable person" to leave the employment. Employee's complaints about her Manager seem aimed more at his attitude than his conduct.[9] The Manager had very limited contact with Employee during her one week of work, and the Manager's off-handed comments on two occasions that he would be "watching her" did not create such an oppressive or harassing environment so as to constitute constructive discharge. In summary, the evidence does not prove Employee's claim for constructive discharge by a preponderance of the evidence.

II. Employer's Termination of Employee For Cause On September 19, 2015, Was Valid Pursuant To The Terms Of The Contract.

By not returning to work after September 9, 2015, even though she was listed as having work shifts on the work schedule, and not contacting Employer to explain the reason for her absences, Employee seemed to have abandoned her job. Her

[9] As to an employer's *attitude* versus conduct: every employee hopes for the "perfect" employer – one who will appreciate, and reward, his or her efforts with an even temper and cheerful disposition. In fact, many of us work under bosses who are less than perfect and we are called upon to adjust to our boss's personality. It is true that federal law protects employees against unlawful discrimination based on race, religion, gender, age, etc. Laws also protect against workplaces that are physically unhealthy, or against employers who fail to pay wages or engage in sexual harassment. However, there is no local or federal law that prevents employers from being erratic, divisive, anxious, socially inept, emotional, small-minded or mean-spirited. We have all had bosses who tried our patience by means of their *attitude*. For the most part, the law does not dictate that an employer's attitude must be exemplary. We live in an imperfect world.

failure to return to work gave the Employer grounds to terminate her employment based on excessive absences, pursuant to the Contract. [See Exhibit 3, ¶ 10(a).]

The Contract (Hearing Exhibit 3) contained terms and conditions regarding the termination of employment, including the following statement:

> The employer may terminate this contract on the following just causes: serious misconduct, willful disobedience of employer's lawful orders, **habitual neglect of duties, absenteeism**, insubordination, revealing secrets of establishment, when employee violates customs, traditions and laws of host country and/or terms of this agreement. The employee shall shoulder the repatriation expenses. [Hearing Exhibit 3, ¶ 10(a) (emphasis added).]

The Notice of Termination stated that Employee was terminated for "valid causes" including willful disobedience of employer's lawful orders, neglect of duties, **absenteeism**, incompetence in her job as a Poker Attendant and **abandoning of job assigned to her.** [Hearing Exhibit 4 (emphases added).]

At Hearing, Mr. Kwon testified credibly that he decided to terminate Employee because of her absenteeism and abandonment of her job, based on her failure to return to work from September 9 to 19, 2015. Mr. Kwon noted that he and his staff had made many attempts to contact Employee during her absence, but she had not responded. Kwon stated that the allegation of "incompetence" in the Notice of Termination was his wife's idea, and he admitted that it was not justified. He denied that his decision was based in any manner on a personal grudge that he allegedly held against Employee's brother. [Testimony of Mr. Kwon.] The Hearing Officer finds Mr. Kwon's testimony on this issue to be credible.

Holding: Employee's failure to report to work from September 9-19, 2015, was not justified; Employee's week-long absence with no explanation, provided Employer with valid grounds to terminate Employee on September 19, 2015, for unexcused absenteeism and abandonment of her job. Accordingly, Employer's Notice of Termination was valid.

Note: The Hearing Officer finds Employer's letter, withdrawing the Notice of Termination (Hearing Ex. 9), to be of little or no legal significance. At Hearing, Employer never repudiated the termination or his position that he had issued the Notice of Termination on September 19, 2015, based on Employee's failure to report to work. The withdrawal letter was filed in response to a settlement, based on an unfulfilled promise by Employee to withdraw her complaint. Indeed, the

plain language of the letter indicates that Employer filed the letter in the mistaken belief that Employee had already withdrawn her complaint. Moreover, Employer never agreed to allow Employee to resume her employment with K-Amusement Corporation. Employer issued the withdrawal letter to allow Employee to tell potential employers that she had voluntarily left her employment – not to announce that the employment was being resumed. [Testimony of Kwon; Hearing Exhibit 10.]

In legal terms, Employee should be equitably estopped from claiming that the withdrawal letter operates to rescind the termination, especially given that Employer was induced (negligently or fraudulently) to submit the letter based on Employee's unfulfilled promise to dismiss the case. At Hearing, Employee admitted that she had told Mr. Kwon that she would withdraw her complaint, but then failed to do so. [Test. of Ms. Gamboa.] Accordingly, the withdrawal letter shall have no effect on the above-noted conclusion regarding termination for cause.

III. Employee's Termination Was Not Pretextual, Based On An Alleged Ulterior Motive By Employer To Seek Revenge For A Personal Grudge.

Employee claims that her termination for absenteeism was a pretext because, in fact, she was terminated to satisfy a personal grudge that Manager Kwon held against Employee's brother, William Olympo Alberio. The Hearing Officer finds that the evidence presented was insufficient to prove this contention.

Employee alleged that Mr. Kwon bore a personal grudge against her because of a past dispute that Kwon had had many years before with Employee's brother, Mr. Alberio (nicknamed, "Kimpo"). Employee testified that when she first arrived on Tinian, Kwon questioned the group of new workers and singled her out as the sister of Kimpo. [Finding no. 4.] Later, on September 8, 2015, Mr. Kwon again mentioned Employee's brother and again told Employee that he, Kwon, would be "watching" her in the future. [Testimony of Ms. Gamboa.]

At Hearing, Mr. Kwon testified that he believed that Employee was overreacting to the situation. Kwon admitted that he had known Employee's brother, Alberio, but denied that he had formed any plan to terminate or harass Employee because she was related to Mr. Alberio. Kwon argued that he had not done or said anything that should have made Employee feel embarrassed or concerned. Kwon testified credibly that he gave Employee a fair chance to work and was disappointed when she neglected to show up for work after September 8, 2015. [Test. of Mr. Kwon.]

Upon remand of this case, Employee contended that the tape of her settlement meeting with Mr. Kwon on October 21, 2015, would prove her allegations regarding Mr. Kwon's ulterior motives in terminating her. The Hearing Officer admitted the cell phone recording of the two-hour meeting between the parties, over objections of Employer's counsel.[10] The October 21, 2015 meeting contains settlement discussion among the parties - Kwon, Employee and Employee's brother, Olympio Alberio – which Employee recorded on her cell phone without telling the participants. The Hearing Officer listened to the entire recording.

The Hearing Officer finds that the recording does not prove that Mr. Kwon held a personal grudge that motivated him to terminate Employee. In the meeting on October 21, 2015, Mr. Kwon did most of the talking in a kind of stream of consciousness; he was angry or annoyed at certain times, friendly and joking at other times. One major topic discussed was Kwon's insistence that if he withdrew the termination, he wanted to be reimbursed for the costs he incurred in arranging for Employee to come from the Philippines to work in Tinian. Both Kwon and Alberio testified that prior to Employee's hiring, Kwon and Alberio had entered into an agreement wherein Alberio agreed to reimburse Mr. Kwon for the money it cost to arrange for a CW-1 "permit" for his sister. Under the agreement, Alberio would reimburse Employer, but if Employee continued working for Employer until 2019, Mr. Kwon would return the reimbursed amount to Alberio.[11]

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[10] The admission of the tape is problematic. First, Department Regulations state that "mediations will be conducted informally...without a taped or other record of the proceedings" and that any statements made during the mediation are "inadmissible in evidence." Regs. at NMIAC § 80-20.1-465(c). The Hearing Officer notes that the Regulation refers to the official mediation session held with the Mediator, whereas this discussion was an informal meeting between the parties, outside the presence of the Mediator. On the other hand, the Regulations state that "[s]trict adherence to the formal rules of evidence shall not be necessary and the Hearing Officer shall make appropriate accommodations for *pro se* litigants" Regs. at NMIAC § 80-20.1-465(c). Given that the trier of fact– the Hearing Officer - is a lawyer, it is thought that any arguably relevant evidence should be heard by the Hearing Officer and that objections may go to the weight given to the evidence rather than its admissibility. Third, statements of this Employer/Manager could be deemed admissions of a party, which would be admissible in any case. Fourth, the fact that Employee made the recording without the other participants' knowledge is troubling, but the Hearing Officer finds no CNMI statute prohibiting such conduct. Finally, given the Secretary's instruction on remand to consider all evidence that Complainant wished to present in support of her case, the Hearing Officer decided that the best course was to admit the tape and listen to its contents. The tape was downloaded from Ms. Gamboa's cell phone by Hearing Office staff. The MP3 file is entered into evidence as Hearing Exhibit 10. There is no written transcript of the tape.

[11] During the meeting on October 21, 2015, Mr. Alberio promised to begin reimbursing Mr. Kwon in exchange for Kwon submitting a letter to Tinian Labor withdrawing the termination (but not accepting Employee back to work). On October 27, 2015, Kwon submitted the letter (Hearing Ex. 9) to Tinian Labor; however, Mr. Alberio never paid reimbursement to Mr. Kwon. [Finding nos. 20, 22 and 23.]

Although the side-agreement between Kwon and Alberio may be improper, it does not show that Manager Kwon wanted to sabatoge Employee's employment. On the contrary, the agreement tends to show that Kwon initially hoped that Employee would work for him for several years.

Other comments by Kwon on the recording suggest that he was annoyed at Employee for stopping her work in mid-September 2015. At one point, Mr. Kwon says to Employee: "Already we have the problem. You working for one week, September 1 to 7; how many times did you see me there? I try my best, but you don't like me. I don't have a problem with you. When you're working time, how many times I bother you? You working one week – you only see me one time…I give you the chance." Later, Kwon says to Alberio: "I can or cannot ask you about your sister? That's why I call you. I want to ask – does she want to work or not? But she don't show up – that's why I put the termination letter." At another point, Kwon says to Employee, "You stopped – that's why I issued the termination letter." [Recording at Hearing Exhibit 10.]

The recording gives certain insights into the side agreement between Kwon and Alberio, but it does not establish that Employee was terminated to satisfy a grudge, as she claimed. On the contrary, the above-cited comments suggest that it was Employee's act of not returning to work after September 9, 2015, that led Employer to issue the termination on the grounds that Employee had abandoned her job. *Id.*

Finally, the Hearing Officer finds that the comments made by Manager Kwon to Employee during her employment - that he recalled her brother and would be "watching" her – are not enough, standing alone, to establish that the termination was a pretext to satisfy some long-standing grudge. If, indeed, Kwon harbored some grudge against the brother, Alberio did not testify to that fact at the hearing. The Hearing Officer cannot discern Manager Kwon's inner thoughts, but his *conduct* during that first week of Employee's employment was entirely benign, leaving Employee to work without any interference. Such conduct in no way signaled that Mr. Kwon was planning to sabotage Employee's employment with the company in any way. Mr. Kwon's recorded comments on October 21, 2015 (Hearing Exhibit 10) further support a finding that it was Employee's abandonment of her job that led Employer to issue a Notice of Termination – not some preexisting grudge. Any claim that Employer terminated Employee to retaliate against Employee's brother, is speculation – not fact.

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[L.C. No. 15-008(T)]

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED ON REMAND:

1. **Prior Order:** This Administrative Order On Remand supersedes and replaces the prior Administrative Order issued in this case by this Hearing Officer on August 17, 2016.

2. **Judgment:** Based on the foregoing, judgment is hereby entered in favor of Respondent K-Amusement Corporation and against Complainant Gina A. Gamboa with respect to this labor case.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 3, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR
SAIPAN, NORTHERN MARIANA ISLANDS

In the Matter of Dador, Raymond Y., Complainant, vs. Aquatic Marine Co., Inc., *dba* Amigo Aquatic Sports, Respondent.	)	Labor Case No. 15-1192 **ADMINISTRATIVE ORDER DISMISSING CASE**

On March 4, 2015, the Administrative Hearing Office issued an Amended Notice of Mediation, which scheduled the above-captioned case for mediation on April 21, 2015, at 9:30 a.m. The Amended Notice of Mediation was personally served on Complainant Raymond Y. Dador on March 23, 2015.

On April 21, 2015, Complainant failed to appear for the mediation. Later that same day, Complainant was instructed by telephone to submit a written explanation of his failure to appear to the Hearing Office, along with a request to reschedule the mediation. Complainant was instructed to file the letter at the Hearing Office on or before April 23, 2015. In the weeks since the mediation date, Complainant has not submitted the requested letter.

The labor statute governing Hearing Office procedures provides that failure of a complainant to appear at a mediation may result in dismissal of the case. 3 CMC § 4938(d)(3). Given Complainant's failure to appear at the mediation and his failure to provide a written explanation of his absence at the mediation, the Hearing Officer finds that this case should be DISMISSED without prejudice.

IT IS ORDERED that Labor Case No. 15-1192, is hereby DISMISSED without prejudice.

ISSUED: June 15, 2015.

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	Labor Case No. 15-1193
Bicas, Flora Lyn P. (299347),	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	**GRANTING RESPONDENT'S**
	)	**MOTION TO DISMISS CASE;**
v.	)	**AND DISMISSAL**
	)	
Joyce, Jocelyn Y.,	)	
dba Jo-Lyn's Kitchen,	)	
Respondent.	)	
	)	

Introduction

Both parties appeared for mediation in the above-referenced case on March 9, 2015. Complainant appeared without counsel. Respondent appeared and was represented by her counsel, Samuel Mok, Esq. During the mediation, Respondent indicated that she intended to file a Motion to Dismiss the case for lack of subject matter jurisdiction, whereupon the Mediator/Hearing Officer established a briefing schedule, as follows: Respondent was required to file the Motion by March 25, 2015; Complainant was required to file her Opposition by April 8, 2015; Respondent was given leave to file a Reply by April 10, 2015. The parties and Hearing Officer agreed that the briefs would be served by e-mail.

On March 25, 2015, Respondent filed its Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Memorandum In Support ("Motion"). The Motion was supported by Affidavits and several written statements from restaurant customers. Complainant never filed an Opposition to the Motion.

Having reviewed the evidence and arguments filed in support of the Motion, the Hearing Officer finds that the uncontested facts establish that the business arrangement between the parties was not an employer-employee relationship; therefore, the Administrative Hearing Office lacks subject matter jurisdiction over this dispute. Accordingly, the Motion shall be granted and the case dismissed with prejudice.

UNCONTESTED FACTS

Given that Complainant failed to file an Opposition to the Motion, the following facts, which are supported by affidavits, are deemed uncontested.

In October 2014, Complainant Flora Lyn P. Bicas and Respondent Jocelyn Y. Joyce agreed to go into business together by starting a small restaurant in Susupe. [Declaration of Jocelyn Y. Joyce ("Joyce Declaration"), attached to Motion as Exhibit A.]

During meetings with a document handler in Saipan, both parties made clear to the document handler that they intended to operate the restaurant as business partners. [Declaration of Nenita De Los Santos, attached to Motion as Exhibit B.]

The name of the restaurant, "Jo-Lyn's Kitchen," was intended by the parties to be an amalgamation of their names: "Jo" for Jocelyn and "Lyn" for Flora-Lyn. [Joyce Declaration at Exhibit A.]

In November 2014, while the parties were preparing to open the restaurant, both took responsibility for business expenses. Respondent spent approximately $2,000 renovating the commercial space for the restaurant; meanwhile, Complainant paid the first month's rent for Jo-Lyn's Kitchen and paid for the restaurant's phone, trash collection service and groceries. *Id.*

After the restaurant opened, both parties worked many hours at the restaurant every day (seven days a week). During this time, Complainant made key management decisions, such as deciding which food would be listed on the menu, the pricing of entrees, the purchasing of groceries, and which customers would receive credit. *Id.*

Complainant represented to Jo-Lyn Kitchen customers that she was the co-owner of Jo-Lyn's Kitchen. [Signed statements submitted by four customers of the restaurant, attached to Motion at Exhibit C.]

In February of 2015, the parties had a verbal argument over the preparation of food for the night market at the Marianas Business Plaza. Complainant then demanded that she be paid for her initial investment and, when she was refused, she took several food preparation items from the kitchen and left. [Joyce Declaration at Exhibit A.]

Shortly thereafter, Complainant filed the present labor case alleging that she was owed minimum and overtime wages as an "employee" of Respondent. Complainant filed her labor complaint in the Administrative Hearing Office of the Department of Labor on February 27, 2015.

DISCUSSION

The Administrative Hearing Office has original jurisdiction to resolve all actions involving alleged violations of the labor and wage laws of the Commonwealth. 3 CMC § 4942(a). The claims that are covered under the Hearing Office's jurisdiction are those that arise out of an "employment relationship." 3 CMC §§ 4942(b).

An employer is one who employs the services of others; one for whom employees work and who pays them wages or salaries. In contrast, a partnership is a voluntary association of two or more persons who jointly own and carry on a business for profit. Under the Uniform Partnership Act of 1997 ("UPA"), a partnership is presumed to exist if the persons agree to share proportionally in the business's profits and losses. (See UPA, adopted in the CNMI pursuant to Public Law 15-88.)

The uncontested facts in this case establish that Complainant and Respondent entered into a business association or partnership to operate the restaurant known as Jo-lyn's Kitchen. The arrangement constituted a partnership rather than an employer-employee relationship given that both individuals from the outset agreed to share both expenses and profits equally. Complainant was not the employer of Respondent and any work performed by Complainant was not done as an "employee" but rather, in furtherance of the jointly-owned business venture. Accordingly, Respondent was not legally obligated to pay a salary or hourly wages to Complainant for the hours she worked at Jo-Lyn's Kitchen.

The Hearing Officer takes no position as to whether business revenues are owed by one partner to another. Complainant may file this case in another forum such as the Small Claims Court operated by the Commonwealth Superior Court.

In any event, disputes of this kind are not within the jurisdiction of the Department of Labor Administrative Hearing Office which was established specifically to adjudicate employment-related disputes that arise in the context of employer-employee relationships.

Good cause having been shown, IT IS HEREBY ORDERED:

Dismissal: For the foregoing reasons, Respondent's Motion to Dismiss For Lack of Subject Matter Jurisdiction, is GRANTED; and the above-captioned Complaint is DISMISSED with prejudice.

Appeal: Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 13, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	Labor Case No. 15-1199
Magofna, Brilliant T.,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	**DISMISSING CASE**
	)	
Saipan Shrimp & Broodstock Co., Ltd.,	)	
Respondent.	)	
	)	

This Labor Case came on for hearing on July 30, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. Complainant did not appear, despite having received advance written notice of the proceedings. Respondent appeared through its legal counsel, Steven Pixley, Manager Rommel Catalma and Accountant Mellany Regaton. The Department of Labor Enforcement Section ("Enforcement ") appeared through investigator Jeffrey T. Camacho. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

Complainant Brilliant T. Magofna filed a hand-written complaint against Respondent Saipan Shrimp & Broodstock Co., Ltd. at the Hearing Office on March 13, 2015. After obtaining a waiver of the filing fee, the case was officially filed on April 2, 2015.

A mediation of the case was conducted on May 5, 2015 and was attended by Complainant, Respondent's counsel Steven Pixley and Mediator/Hearing Officer Jerry Cody. The mediation session failed to resolve the dispute between the parties, whereupon the Mediator/Hearing Officer set the case for Hearing and referred the case for investigation. See Notice of Hearing; Order Referring Parties For Investigation; Other Orders, issued and served on the parties on May 5, 2015. The Notice of Hearing set the case for hearing on June 25, 2015.

Enforcement interviewed the parties and issued its written Determination of No Violation and Notice of Hearing ("Determination") on June 17, 2015. [The

Determination was entered into evidence as Hearing Exhibit 3.] The Determination stated that the Hearing was scheduled to commence on June 25, 2015.

In about late June 2015, the hearing was rescheduled. On July 8, 2015, the Hearing Officer issued an Amended Notice of Hearing that set the new date for hearing as July 30, 2015, at 9:30 a.m. [The Amended Notice of Hearing was entered into evidence as Hearing Exhibit 1.]

The Hearing was held on July 30, 2015, at 9:30 a.m., as set forth in the Amended Notice of Hearing. In attendance were Respondent's counsel, Steven Pixley, along with Respondent's Manager and Accountant as supporting witnesses. Also present was investigator Jeff Camacho, representing Enforcement. The parties waited more than 20 minutes for Complainant to arrive; however, Complainant never appeared. This Hearing Officer then commenced the Hearing.

Investigator Camacho testified that he had hand-served Complainant with the Amended Notice of Hearing on July 8, 2015, at 3:00 p.m. Mr. Camacho submitted a signed Proof of Service, which was signed and acknowledged by Brilliant T. Magofna on July 8, 2015. [Testimony of Mr. Camacho; the original Proof of Service was entered into evidence as Hearing Exhibit 2.]

In view of Complainant's failure to appear at the Hearing without giving any explanation or making any attempt to request rescheduling, the Hearing Officer concluded that the case should be dismissed with prejudice, pursuant to the Employment Rules and Regulations (see below).

DISCUSSION

The Hearing in this case took place on July 30, 2015. As stated, Complainant failed to appear at the Hearing. Investigator Jeff Camacho testified that on July 8, 2015, he had personally served Complainant with the Amended Notice of Hearing, which specified the date and time of hearing. Mr. Camacho presented an original Proof of Service, containing Complainant's signature, acknowledging his receipt of the Amended Notice of Hearing on July 8, 2015. [The Proof of Service was entered into evidence as Hearing Exhibit No. 2.]

Department Regulations that govern Hearing Office operations provide that "[a] dismissal may be entered against any party failing, without good cause, to appear at a hearing....." Regs. at NMIAC § 80-20.1-485(b).[1]

Based on the foregoing, the Hearing Officer finds that good cause exists to DISMISS this Labor Case with prejudice. Complainant received ample written notice of the hearing when the Amended Notice of Hearing was personally served on him weeks before the Hearing. Complainant's failure to appear at the Hearing on July 30, 2015, and his failure to contact the Hearing Office either before or after the hearing, demonstrated his intention to abandon his Labor Case. Under the circumstances, dismissal is warranted.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Dismissal:** For the reasons stated above, the Labor Case No. 15-1199 is hereby DISMISSED with prejudice. 3 CMC §§ 4947(b) and (d)(11); Regs. at NMIAC § 80-20.1-485(b).

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC § 4948(a).

DATED: October 3, 2016

Jerry Cody
Hearing Officer

[1] The Employment Rules and Regulations ("Regulations"), codified at the Northern Mariana Administrative Code ("NMIAC") at section 80-20.1-485(b), address the issue of dismissal by stating the following:

> A complaint may be dismissed upon its abandonment...by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor the party's representative appears at the time and place fixed for the hearing unless good cause is show. A dismissal may be entered against any party failing, without good cause, to appear at a hearing....

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR
SAIPAN, NORTHERN MARIANA ISLANDS

In the Matter of Zajradhara, Zaji O., Complainant, vs. Saipan Stevedore Company, Inc., Respondent.	)	Labor Case No 15-1208 **ADMINISTRATIVE ORDER DISMISSING CASE WITHOUT PREJUDICE**

Factual Background

The mediation of the above-captioned case was first scheduled to be held in July 2015, but the mediation did not occur as a result of the closure of the Hearing Office due to Typhoon Nangka. The case could not be scheduled for mediation in August and September 2015, because the Department of Labor was still without electricity as a result of Typhoon Soudelor.

On about January 5, 2016, the Hearing Office attempted to schedule this case for mediation once again. An attempt was made to schedule the mediation for January 14, 2016; however, Complainant indicated that he was booked in mid-January.

Complainant requested that the matter be scheduled "after January 22." (Email from Zajradhara to Renita Camacho, dated 1/06/2016.) Accordingly, on January 14, 2016, the Hearing Office served the parties with an Amended Notice of Mediation setting the mediation for January 25, 2016, at 9:30 a.m.

Upon receiving the Amended Notice, Complainant sent an email to the Hearing Office confirming that he would be attending the "hearing" on 1/25/2016 at 9:30 a.m. (Email from Zajradhara to Renita Camacho, dated 1/14/2016.)

On the morning of the mediation (January 25, 2016) at 7:27 a.m., Complainant sent an email message referring to some "federal way to solve the problem." As this was ambiguous, the Hearing Office sent an email reminding Complainant that there were two mediations scheduled for this morning: L.C. No. 15-1208 (Saipan

Stevedore Company, Inc.) was scheduled for 9:30 a.m. and L.C. No. 14-1166 (Mobil Oil Company) was scheduled for 11:00 a.m. (Email from Renita Camacho to Zaji Zajradhara, dated 1/25/15 at 9:05 a.m.)

Complainant responded at about 9:10 a.m by telephoning Renita Camacho at the Hearing Office. During that telephone call, Complainant indicated that he would not be attending the mediations, but he indicated that he was willing to dismiss the cases. Ms. Camacho then asked complainant to confirm that fact in an email.

Several minutes later, Complainant sent an email message requesting that both cases be "taken off calendar." He also requested that the cases not be heard by Hearing Officer Jerry Cody because, he alleged, that "he is but a pawn of the Chinese Power Structure." Complainant also made vague assertions that he intended to report various labor officials for unspecified violations of "both federal and state law." (Email from Zajradhara to Renita Camacho, dated 1/25/16, at 9:21 a.m.)

On January 25, 2016, at 9:30 a.m., Respondent's General Manager appeared for the mediation. Complainant failed to appear.

Legal Standards

The Commonwealth Employment Act of 2007, as amended, provides: "Failure of a complainant to appear at the mediation without providing the Administrative Hearing Office with advance written notice at least five (5) days prior to the scheduled appearance may result in the dismissal of a complaint without prejudice." 3 CMC § 4938(d)(3). The Employment Rules and Regulations also state that "[i]f a complainant does not attend the mediation session after adequate notice, a hearing officer may dismiss the complaint without prejudice." NMIAC section 80-20.1-465(d).

As set forth above, the present case has been pending for many months now. Recently, the Hearing Office determined that the case needed to be scheduled for mediation. Complainant indicated about one week ago that he would attend the mediation of L.C. 15-1208, but ultimately, he failed to attend on the day it was scheduled to proceed.

Complainant continues to request that the case be taken off calendar. There are no provisions in the statute or regulations for keeping a case "on hold" for any period of time. Moreover, no further delay is justified in this case.

[L.C. No. 15-1208]

Based on Complainant's failure to appear at the mediation and his failure to provide a written justification for his absence at the mediation, the Hearing Officer finds that this case should be DISMISSED without prejudice. A dismissal without prejudice will not prevent Complainant from re-filing the case when Complainant is ready to proceed with the litigation. Given Complainant's refusal to mediate, it is appropriate to dismiss the case without prejudice at this time.

Good cause appearing therefor, IT IS ORDERED that Labor Case No. 15-1208, is hereby dismissed without prejudice.

ISSUED: January 26, 2016.

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	Labor Case No. 14-1159
Zajradhara, Zaji Obatala, (500923)	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	**GRANTING RESPONDENT'S**
v.	)	**MOTION TO DISMISS CASE**
	)	
Commonwealth Utilities Corporation,	)	
Respondent.	)	
	)	

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On March 31, 2014, Respondent filed a Motion to Dismiss Matter in which Respondent argued that the Department of Labor lacks subject matter jurisdiction to investigate and adjudicate this case. The Hearing Officer provided notice and an opportunity to be heard on this matter to all parties, including Complainant and the Department of Labor ("DOL" or "Department"), pursuant to 3 CMC § 4947(a).[1]

The Hearing Officer reviewed the following pleadings in connection with this matter: the Complaint, Respondent's Motion to Dismiss Matter ("Motion To Dismiss"), Respondent's Supplemental Brief Re CUC's Motion To Dismiss ("Supplemental Brief"), Department's Response to Motion to Dismiss ("Response") and Complainant's Response: To Supplemental Brief Re-CUC's Motion To Dismiss ("Complainant's Response").

Having read and considered the arguments contained in the briefs on file, the Hearing Officer issues the following findings and conclusions:

Findings of Fact

On or about January 14, 2014, Zajradhara Zaji Obatala ("Complainant") filed a complaint against his employer, the Commonwealth Utilities Corporation ("CUC") in the Administrative Hearing Office of the Department of Labor.

[1] See Interim Order Granting Request For Extension To File A Reply; And Amending Briefing Schedule, issued on May 7, 2014.

In his Complaint, Complainant claims to have suffered adverse employment conditions and decisions as follows:
1. Violation of civil rights;
2. obstruction by a supervisor to obtaining administrative training;
3. denying Complainant access to a computer at work so complainant can understand employer's internal work procedures,
4. denial of supervisor to reissue work keys to Complainant;
5. verbal threat by supervisor against Complainant;
6. refusal of Complainant's request for transfer;
7. refusal of deputy director to take action against fraudulent statements made by a CW-1 worker;
8. unfair work evaluations;
9. arbitrary disciplinary write ups;
10. employer permitted use of a foreign language in the work place;
11. employer failed to investigate an incident of vandalism to Complainant's vehicle while parked on work premises;
12. supervisor excluded Complainant from meetings to hinder Complainant's ability to be fully informed of work-related matters; and
13. employer preventing Complainant from using a computer in order to file a grievance against the employer.

CUC is a governmental public, non-profit corporation. CUC is not required to obtain a business license and it does not have a business license.

Both parties attended a mediation session on February 26, 2014. At that session, respondent's counsel indicated that Respondent intended to file a motion to dismiss this case for lack of subject matter jurisdiction and other reasons. Thereafter, the Hearing Officer issued a Briefing Schedule on March 10, 2014, which schedule was subsequently amended on May 8, 2014 (see fn. 1).

In its Motion to Dismiss, Respondent argued that CUC does not fall within the scope of the Administrative Hearing Office's subject matter jurisdiction because it does not fit the definition of an "employer" under the applicable labor statute. In its Response, DOL agreed with Respondent, likewise contending that it has no jurisdiction to investigate or adjudicate this Complaint because (1) CUC does not fit the definition of an "employer" under the relevant statutes, and (2) CUC employees such as Complainant are required to follow the CUC grievance and appeal procedures that are specified in CUC's Human Resources Rules & Regulations. [Response at p.2:19-23.] Complainant's Response fails to address the legal issues raised in either the Motion to Dismiss or the Response.

CONCLUSIONS OF LAW

1. ***The Commonwealth Utilities Corporation does not fall within the subject matter jurisdiction of the Administrative Hearing Office with respect to the type of claim filed by Complainant in this case.***

Both CUC and DOL contend that CUC is not covered as an "employer" under the relevant labor statute that applies in this case, and therefore, the Hearing Office lacks subject matter jurisdiction over this case. The Hearing Officer agrees.

The definition of "employer" varies with the nature of the complaint. For example, where wage and hour violations are at issue, the CNMI's wage and hour laws define "employer" as including the government, its agencies and instrumentalities. 4 CMC § 9212(f). On the other hand, in cases involving alleged violations of laws dealing with employment preference for citizens and permanent residents, the relevant CNMI labor statutes define "employer" in a manner that does not include government, its agents and instrumentalities. 3 CMC § 4511(f).[2]

In this case, Complainant alleges neither violations of wage and hour laws nor any breach of employment preference laws. Rather, Complainant claims he suffered adverse treatment from his supervisor, the denial of educational and training opportunities and a failure of his employer to handle a property damage claim. DOL correctly characterizes Complainant's claims as "disputes over standards of employment and promotion." Response at p. 3:9-15.

The only labor statutes that deal with employment disputes related to adverse working conditions are those governing the employment of foreign nationals in title 3 chapter 3 division 4 of the Commonwealth Code. This chapter adopts and incorporates by reference the definition for employer found in 3 CMC § 4511. [See 3 CMC § 4911.] The definition of "employer" in Section 4511(f) contains no reference to government, its agencies or instrumentalities, and defines "employers" as including corporations or other legal entities that have a current business license.

The present employment dispute does not fit within the subject matter jurisdiction of Chapter 3 (formerly Chapter 6) in two respects. First, Complainant is not a foreign national but rather a U.S. citizen. Secondly, CUC is a governmental, non-

[2] In Public Law 15-108, the definition of "employer" appears at 3 CMC § 4511(e). When Public Law 17-1 was enacted, it made changes to certain subsections of Section 4511, thus re-numbering the identical "employer" definition to 3 CMC § 4511(f). Public Law 17-1 also renumbered Chapter 6 ("Employment of Foreign Nationals") as Chapter 3.

profit corporation that does not have a business license and is not required to maintain a business license; therefore, it does not meet the definition of "employer" incorporated by Chapter 3. [Motion at pp. 4-5; Response at p. 4.] [3]

Complainant's allegations involve a dispute about employment conditions that could only fall within the scope, if at all, of Chapter 3, yet CUC is not subject to the provisions of Chapter 3; therefore, the Administrative Hearing Office lacks the subject matter jurisdiction to adjudicate this case.

2. Complainant was obligated by Regulation and by contract to utilize CUC's grievance procedure to resolve the disputed issues listed in the Complaint in this Case.

The above result does not leave Complainant without means to address and adjudicate his various complaints about the conditions of his employment. CUC was mandated by law to create Human Resource Rules and Regulations that govern employment and grievance standards of CUC employees. [See CUC Human Resource Rules & Regulations at Sections 6,7 and 9; Response at pp. 4-5.]

CUC's Human Resource Rules & Regulations at Section 8 provides a grievance procedure that arguably could address each of the issues listed in Complainant's Complaint. The procedures set forth in the CUC Human Resource Rules are mandatory – not optional. [Response at p. 5:3-8 (citing Human Resource Rules & Regs. at Section 8.2).] Moreover, as a condition of his employment, Complainant agreed to fully comply with these Human Resource Rules and Regulations. [Response at Exhibit B.] Thus, Complainant is contractually bound to do so.

Complainant was given the opportunity to submit a response to CUC's Motion to Dismiss and DOL's Response. The Hearing Officer has reviewed Complainant's Response and rejects the arguments asserted therein. First, Complainant states that he "wishes to have this matter reviewed by a neutral party..." rather than his employer. [Complainant's Response at p. 2.] Yet, as DOL notes, Complainant is obligated by the terms of his CUC contract to utilize CUC's grievance procedure. If Complainant disagrees with the final decision of CUC's grievance procedure, he could then appeal the final CUC decision to CNMI Superior Court pursuant to the Administrative Procedures Act (1 CMC § 9112(b) *et seq.*).

[3] DOL also notes that Chapter 2 prohibits the government from employing foreign nationals with a few minor exceptions; therefore, even it Chapter 4 were applicable, the government would fall outside its scope for the most part. See Response at p. 4, fn. 3.

Secondly, Complainant's Response argues that this matter should be adjudicated by the U.S. Department of Labor or the Department of Justice. The Hearing Office lacks the authority to "transfer" a case to federal agencies. Moreover, that legal issue is beside the point. The only issue before the Hearing Officer is whether the Administrative Hearing Office has subject matter jurisdiction over this Complaint – not whether this dispute could or should be handled by the United States Department of Justice or the United States Department of Labor. In any event, nothing in this Order prevents Complainant from complaining to those agencies, if he chooses to do so.

In conclusion, the nature of this Complaint is one in which the Administrative Hearing Office lacks subject matter jurisdiction to resolve, simply because the employer is not the type of employer covered under the applicable labor statutes. The proper forum to address Complainant's grievances is through CUC's Human Resources Rules and Regulations. Complainant may make a timely appeal of CUC's final grievance decisions directly to the Commonwealth Superior Court, under 1 CMC §§ 9101 *et seq.* Accordingly, the Hearing Officer shall dismiss the Complaint with prejudice.[4]

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Dismissal:** For the reasons stated herein, the Hearing Officer concludes that the Administrative Hearing Office lacks subject matter jurisdiction to adjudicate this matter. Accordingly, the Complaint is hereby DISMISSED with prejudice. 3 CMC § 4947(a).

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC § 4948(a).

DATED: June 16, 2014

Jerry Cody
Hearing Officer

[4] In its Motion to Dismiss, Respondent raised objections to the Notice of Mediation and the Interim Order Referring Case For Investigation, which were issued by the Hearing Officer prior to this ruling. Given that the present Order will dismiss the case, those objections are deemed moot; therefore, they shall not be addressed. Similarly, Complainant's Motion To Have This Matter Sent To The Department Of Labor Attorney General's Office, filed on 4/07/14, raised issues that are deemed moot, and therefore, shall not be addressed.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Stevens, Carlton T., (500926) Complainant, **v.** Asia Pacific Hotels, Inc. *dba* Kanoa Resort Saipan, Respondent.	)	Labor Case No. 14-1164 **ADMINISTRATIVE ORDER**

This case was heard on May 22, 2014, in the Administrative Hearing Office of the CNMI Department of Labor. Complainant Carlton T. Stevens appeared without counsel. Respondent Asia Pacific Hotels, Inc., *dba* Kanoa Resport Saipan, appeared through its General Manager Mark Ratliff, Human Resources Manager Joe Ada and counsel Steven Pixley. The Department of Labor appeared through investigator Jeff Camacho. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This labor complaint was brought by a U.S. citizen job applicant, Carlton T. Stevens ("Complainant"), against Asia Pacific Hotels, Inc., *dba* Kanoa Resort Saipan ("Employer"), alleging that the Employer rejected Complainant's job application without just cause. Complainant's complaint is based on an alleged violation of 3 CMC § 4528(a).

The Commonwealth Employment Act of 2007, 3 CMC § 4528(a), states, in part, that "[a] citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job may make a claim for damages if ...the employer rejects an application for the job without just cause, and the employer employs a person who is not a citizen, CNMI permanent resident, or U.S. permanent resident for the job."

FINDINGS OF FACT

In October 2013, Employer posted a job announcement on the Department's website advertising the position of Maintenance Manager of the Kanoa Resort Saipan. [Hearing Exhibit 3 (print-out of job announcement).] Complainant viewed the job announcement on the website and decided to contact the Employer directly to apply for the job.

On about October 9, 2013, Complainant sent an e-mail to Employer's Human Resources Manager Joe Ada at the e-mail address listed on the job announcement. Complainant stated that he wanted to apply for the Maintenance Manager position and attached his resume. [Testimony of Mr. Stevens; Hearing Exhibit 4 (copy of Complainant's resume).]

Mr. Ada received complainant's e-mail and forwarded it to Employer's General Manager, Mark Ratliff, who was on vacation in the Philippines. General Manager ("GM") Ratliff testified that he gets directly involved in the hiring of managerial positions at the Kanoa Resort Saipan. [Testimony of Mr. Ada and Mr. Ratliff and Hearing Exhibit 6 (copy of e-mail from Ada to Ratliff, dated 10/17/2013).]

General Manager Ratliff reviewed Complainant's resume and concluded that he lacked the experience required to be Maintenance Manager at the Kanoa Resort Saipan. On October 21, 2013, Mr. Ratliff informed Mr. Ada via e-mail that Complainant did not have the "experience needed" for the job and instructed Ada to proceed with the renewal of the present Maintenance Manager. Hearing Exhibit 6 (e-mail from Mr. Ratliff to Mr. Ada, dated 10/21/2013).[1]

Employer's current Maintenance Manager (Zaldy) has extensive work experience in hotel maintenance. Zaldy worked for 16 years (1993 to 2009) as an electrician and all-around maintenance person for Saipan Grand Hotel. Between 2009 to 2014, he worked as the resort's Maintenance Coordinator/Acting Supervisor, Maintenance Supervisor, Assistant Maintenance Manager and Maintenance Manager.[2] Employer's management found Zaldy to be qualified for the job of Maintenance Manager and recently renewed him. [Testimony of Mr. Ada based on his review of Zaldy's personnel file; and Hearing Exhibit 8.]

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[1] Mr. Ratliff's e-mail stated: "Hello Joe...I just reviewed Mr. Stevens Resume. You are correct, he does not have the experience needed. Please proceed with Zaldy's Paper Work ASAP." *Id.*

[2] It is noted that "Saipan Grand Hotel" changed its name to "Kanoa Resort Saipan" in 2012. [Testimony of Mr. Ada.]

Complainant's resume states that his work history is primarily in the area of wastewater management. Complainant's resume states his "Objective" as follows:

> I am seeking employment with your company as a Supervisor or Wastewater Operator with managerial responsibilities. Ideal position would include instruction of junior operators, troubleshooting of process control, and/or start up of new or retro-fitted facilities.

Complainant's resume summarizes his 24 years of experience as a Class II Wastewater Operator. In Saipan, he worked for two years (3/2011-3/2013) for the Commonwealth Utilities Commission as a Wastewater Facility Manager. Prior to coming to Saipan, he worked in wastewater operations from 1986 until 2010. Most of Complainant's jobs were in wastewater operations as an operator, supervisor, or consultant. Most of his jobs were for municipalities or the government of the U.S. Virgin Islands. [Hearing Exhibit 4.] [3]

The only hotel-related experience listed on Complainant's resume is his work as a "Contract Operator and Consultant" for 8 wastewater facilities located at various resorts in the U.S. Virgin Islands. As a consultant, his duties were to "[o]versee day to day operational procedures of client staff for federal compliance." He worked in this position for almost three years: January 2004 to November 2006.

Employer's job announcement listed a variety of job duties and skills associated with the Maintenance Manager position. These included: the ability to make general appliance repairs, carpet repairs, air-conditioning repairs and electrical repairs; the ability to perform carpentry work, welding, painting and plumbing duties as required; the ability to install appliances and electrical fixtures, and to install and repair deadbolt locks, etc. Employer listed that the job required a minimum of six years experience in hotel maintenance plus two years at a supervisory level. Hearing Exhibit 3 (print-out of Employer's job announcement posted on the Department's website).

General Manager Ratliff testified that he believes that it is essential for the Maintenance Manager to have all the skills listed in the job announcement. Mr. Ratliff opined that hotel/resorts are unique environments and that it is essential for a manager to have had prior experience in that environment in order to be able to

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[3] For example, Complainant listed his employment with the Southwest Water Company in Los Angeles, California; Loleta Community Services District in Loleta, California, the government of the U.S. Virgin Islands, the town of Collierville, Tennessee; and as "contract operator and consultant at 8 wastewater facilities within the U.S. Virgin Islands. *Id.*

operate effectively. The General Manager concluded that Complainant was not qualified as Maintenance Manager because he lacked years of experience in hotel maintenance operations. He stated that although he found Complainant's resume to be impressive in the field of wastewater operations, Employer's facility does not even have its own wastewater facility. Thus, Mr. Ratliff believed Complainant lacked the necessary experience to be hired as Maintenance Manager. Mr. Ratliffe stated that he made his decision based solely on a review of Complainant's resume.

The Department investigated this case and concluded that Complainant was "not fully qualified for the maintenance manager position" and therefore, Employer had not committed a violation by not hiring Complainant for the announced position. See Determination at pp. 1-2.[4]

CONCLUSIONS OF LAW

In order to commit a violation of 3 CMC § 4528(a), an employer must have rejected a job application from a citizen...who is **qualified** for a job...." [Emphasis added.] Thus, Complainant must establish, among other things, that he was qualified for the Maintenance Manager position in order to prevail on this claim.

Based on the evidence presented, the Hearing Officer finds that Complainant failed to meet his burden of establishing that he was qualified for the announced position. The job announcement stated the qualifications for the job as a minimum of six years of experience in hotel maintenance operations. Complainant lacked this experience. Complainant's resume listed only about three years of experience in dealing with hotel/resort operations and that experience was as a wastewater consultant, not in the broader category of hotel maintenance.

Complainant asserted that he could have proven himself capable in the job if he had been given the opportunity. The Hearing Officer does not have sufficient evidence to address that issue. But such an inquiry is beside the point. Even if, for the sake of argument, one accepts that Complainant could have learned the job after a period of on-the-job training, Section 4528(a) requires that the applicant be qualified – not simply capable of becoming qualified after a period of training.

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[4] The Determination also contained a charge that the Employer had failed to submit a declaration in violation of Departmental Regulations [Regs. at § 80-30.3-450]. See Hearing Exhibit 2 (Determination) at ¶ 5. At Hearing, the Enforcement Section representative made an oral motion to dismiss the charge as irrelevant to the underlying labor case. The Motion was granted by the Hearing Officer, whereupon paragraph no. 5 on page 1, and the requested sanction on page 2 were stricken.

Complainant also asserted that the only reason he was not considered for the position was because he is a U.S. citizen. Hearing Exhibit 1 (Complaint). The evidence establishes that Employer's General Manager did consider Complainant for the position, but found that his resume did not show sufficient work experience to make him qualified. There is no evidence that Employer made that decision based on Complainant's citizenship.

For the foregoing reasons, the Hearing Officer finds that Employer did not violate the Commonwealth Employment Act of 2007, 3 CMC § 4528(a), by rejecting Complainant's application for Maintenance Manager at the Kanoa Resort Saipan. Judgment shall be entered in favor of respondent Employer.[5]

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the findings above, judgment is entered in favor of Respondent Asia Pacific Hotels, Inc. and against Complainant with respect to the alleged violation of statute, 3 CMC § 4528(a), in this case.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 28, 2014

Jerry Cody
Hearing Officer

[5] On the day of Hearing (5/22/14), respondent filed a 4-page motion to dismiss this case based on the contention that "federal preemption prevents the enforcement of Commonwealth immigration related laws and regulations." See Asia Pacific Hotel's Motion To Dismiss The Department Of Labor's Determination Or, In The Alternative, Find That The Determination Cannot Be Legally Enforced ("Motion To Dismiss"), at p. 2. Normally, the Hearing Officer would afford opposing parties (including the Department of Labor) due process by giving them a minimum of 10 days to file a response or opposition to a party's Motion To Dismiss, then the Hearing Officer would issue a ruling on the Motion. In this case, however, respondent's counsel stated that if respondent prevailed on the merits of the case, it would dismiss its Motion To Dismiss or consider it moot. [Statement made by counsel Stephen Pixley at the conclusion of the Hearing.] As respondent has now prevailed, the Hearing Officer shall consider respondent's Motion to Dismiss to be withdrawn. Accordingly, no further briefing shall be ordered.

As to the legal argument that was raised in the Motion to Dismiss, I note that I previously addressed this identical legal issue in another Labor Case based on the same statute. For that ruling, see Labor Case No. 11-1124, Interlocutory Order Denying Motion To Dismiss, issued by J.Cody on 9/24/12.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DIVISION OF THE ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR

In the Matter of Eugene L. Foreman, Complainant, vs. Mariana Acquisition Corporation, *dba* IP&E Saipan, Respondent.	)	L.C. No. 14-1173 **ADMINISTRATIVE ORDER**

This case was heard on December 16, 2014, in the Administrative Hearing Office located on Capitol Hill, Saipan. Complainant Eugene L. Foreman appeared without counsel. Respondent Mariana Acquisition Corporation appeared through its Human Resources Manager, Anthony P. Benavente. The Department of Labor Enforcement Section was represented by labor investigator Ben Castro. Crispin M. Sablan testified by telephone. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Summary: This case arises out of Employer's termination of Employee after Employee failed a random drug test. Employee tested positive for marijuana residue in his system. Employer, citing company rules contained in the IP&E Employee Handbook, decided that the situation warranted Employee's immediate termination, effective April 17, 2014. On July 21, 2014, Employee filed a labor complaint at the Administrative Hearing Office, claiming that his termination was a breach of contract because Employer did not follow its own internal guidelines for disciplinary action. This Hearing followed.

Complainant Eugene L. Foreman ("Employee") worked for Mariana Acquisition Corporation, *dba* IP&E ("Employer") as a tanker driver from October 1999 until April 2014. There is no evidence that Employee had negative reviews in his thirteen years of employment with Employer.

On April 8, 2014, Employee was selected by Employer for a random drug test. In prior years, Employee had taken and passed other drug tests conducted on behalf of the Employer. On this occasion, Employee's drug test revealed traces of marijuana in his system. [Results of drug test were entered into evidence at Hearing Exhibit 4.]

Employer removed Employee from his work duties on April 17, 2014; then, upon being notified that Employee had tested positive for marijuana in his system, the Employer decided to terminate Employee. [Testimony of Mr. Benavente.] On April 23, 2014, Employer's Human Resources Manager Anthony P. Benavente met with Employee and handed him a written Notice of Termination. [Hearing Exhibit 2 (copy of the Notice of Termination).] The Notice of Termination stated:

> As you are well aware, your results of the recent drug test conducted on April 8, 2014 were confirmed as positive....[A] positive result deems you to be in violation of company policy as outlined in the employee handbook, page 36 "working under the influence of alcohol or illegal drugs." Ultimately, the company has made the decision to terminate your employment effective April 17, 2014, the date you were removed from duty.
>
> ...Eugene, as a long time employee of IP&E, we would encourage you to consider seeking assistance and participating in a substance abuse program. Resources are available on island, a list of them are attached for your reference. Should you complete a program and obtain a certification of completion of such a program, you may be considered for re-hiring if there is a vacant position.

Employer-employee relations are governed by the terms of the IP&E Employee Handbook ("Handbook"), the latest version of which was issued in June 2012. [A copy of excerpts of the Handbook was entered into evidence as Hearing Exhibit 3.] Employee testified that he had agreed to be subject to the terms of the Handbook during his employment. [Testimony of Mr. Foreman.]

The Handbook lists "working under the influence of alcohol or illegal drugs" as an infraction of rules of conduct "that may result in disciplinary action, up to and including termination of employment." *Id.* at p. 36.

Employee testified that he does not have a habit of smoking marijuana, but he admitted that he had smoked marijuana at a party on the weekend prior to being given the random drug test. Employee did not dispute that he had tested positive

for marijuana in his system. Employee argued, however, that in view of his years of service with the company and the fact that this drug result was "due to a slight misjudgment," he should be given a suspension rather than termination. [Testimony of Mr. Foreman.]

Employer's Human Resources Manager testified that Employer takes a strict stance on illegal drug use, particularly because the job of tanker driver involves the transport of flammable and potentially explosive materials over public streets and thoroughfares. [Testimony of Mr. Benavente.] Employer noted that its action was not unfair as it provided a simple means for Employee to rehabilitate his employment record by attending a substance abuse counseling session. Employee could then re-apply for employment with the company whenever the next vacancy arose.

Investigator Ben Castro investigated the Complaint and concluded that Employer had acted within the scope of its company policy and that no violation of law or company policy had occurred. Therefore, the investigator issued a Determination of No Violation.[1] [Hearing Exhibit 1; testimony of Mr. Castro.]

CONCLUSIONS OF LAW

Employer's termination of Employee did not breach any contract or violate Employer's policies or procedures. The Employer had good cause for its decision.

Employer's Handbook (Hearing Exhibit 3) states that if Employees are found under the influence of illegal drugs, management can exercise discretion to issue either a lesser or a more severe penalty, up to and including termination. Employer acted within that broad discretion and decided to issue a strict penalty based on the fact that Employee had been discovered with marijuana residue in his bloodstream. The Hearing Officer finds that Employer's decision was reasonable, particularly given the nature of Employee's job which entails driving flammable and potentially explosive liquids on Saipan's public roads. The evidence establishes that there was good cause for the termination.

Employer mitigated the harsh effects of its penalty by giving Employee an opportunity to re-apply for employment after completing a local substance abuse

[1] In his Complaint, Employee had cited a policy statement from a former Shell Marianas Handbook. That Handbook was replaced by IP&E Saipan's Employee Handbook, issued in June 2012, excerpts of which were entered into evidence at Hearing Exhibit 3. [Testimony of Mr. Benavente.]

counseling program. The counselor testified that the program would cost about $295 - a reasonable amount - and take a single weekend to complete. [Testimony of Mr. Sablan.] Employee never contacted the substance abuse counselor to pursue that opportunity.

Holding: Employee was working "at will," but both parties were subject to the terms of a so-called Employee Handbook (Hearing Exhibit 3) issued by Employer. The Employer exercised its right to terminate Employee based on the results of a random drug test, the results of which Employee does not dispute. Employer's decision was within the discretion afforded to it in the Handbook. Employee has presented no legal argument that would entitle him to retain his employment. Furthermore, Employee has shown no willingness to perform the counseling required by Employer to enable Employee to re-apply for employment. As of the Hearing date, Employer still maintains that Employee may re-apply for employment after he completes the suggested counseling. Based on the evidence presented at Hearing and for the reasons stated herein, the Hearing Officer finds that judgment should be entered in favor of Employer.

The Department, being fully advised and good cause having been shown, it is hereby ORDERED:

1. Judgment is entered in favor of respondent Mariana Acquisition Corporation on all claims.

2. Appeal: Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of this Order. 3 CMC § 4948(a). If no appeal is filed within this time the Order shall be unreviewable administratively or judicially.

DATED: January 12, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DIVISION OF THE ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR

In the Matter of:	)	
Shugal, Boris,	)	Labor Case No. 14-1174
Complainant,	)	
v.	)	**ADMINISTRATIVE ORDER**
Emerald City, LLC,	)	
Respondent.	)	
	)	

This case came on for hearing on February 9, 2015, in the Administrative Hearing Office located on Capitol Hill, Saipan. Complainant Boris Shugal appeared without counsel. Respondent Emerald City, LLC, appeared through its legal counsel, Brad Huesman, and its Food & Beverage Manager, Anita Go. The Department of Labor's Enforcement Section was represented by labor investigator Jeff Camacho. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

Complainant Boris Shugal ("Employee") worked for respondent Emerald City, LLC, *dba* Siberia Restaurant, which was later known as East-West Restaurant ("Employer"). Employee worked for Employer as an Executive Chef from about November 15, 2013 until June 30, 2014.

This employment was subject to the terms of the contract, entitled "One-Year Employment Agreement" (hereinafter, "Contract"), signed by the parties on November 15, 2013. [A copy of the executed Contract was entered into evidence at Hearing Exhibit 3.]

On August 12, 2014, Employee filed a Complaint for breach of contract and wrongful termination in the Hearing Office, alleging that he was owed one-month severance pay of $5,400, based on the terms of his contract with Employer. At Hearing, Employee requested a return airline ticket from Saipan to Florida, based on his contract. [The Complaint was entered into evidence at Hearing Exhibit 1; testimony of Boris Shugal.] The facts are set forth below.

The Contract was fully negotiated by the parties prior to Employee's arrival in Saipan. Owner and financier of Employer's operations in Saipan, Sergey Tkachev, negotiated and signed the Contract on behalf of the Employer. The Contract was signed in Saipan on November 15, 2013 - the day that Employee arrived in the CNMI to begin his employment. [Testimony of Mr. Shugal.]

Employee worked as Executive Chef at Siberia Restaurant, which later changed its name to East/West Restaurant. Employee was paid his monthly salary of $5,400 from November 15, 2013 until June 30, 2014.

Employer also owned the Coffee and Jazz Bar, which was located immediately adjacent to the Siberia Restaurant on the second floor of a building in Garapan. The kitchen for the Siberia Restaurant also cooked a limited menu for the Coffee and Jazz Bar. [Testimony of Mr. Shugal.]

During months of operation in 2014, Employer lost money in its operation of both the restaurant and the bar. [Testimony of Ms. Go.]

On about June 7, 2014, owner Sergey Tkachev visited the restaurant and met with Employee. During this meeting, Mr. Tkachev told Employee that due to the poor financial results of the business, Tkechev would "probably" close the restaurant at the end of June. [Testimony of Mr. Shugal.] After the meeting, Employee told Employer's Food & Beverage Manager, Anita Go, that she should begin looking for another job because the restaurant was going to close. [Testimony of Ms. Go.]

On June 27, 2014, Employee injured himself when he slipped and fell at the restaurant. He went to the hospital and later produced a doctor's slip that noted that he would not be fit to return to work until July 22, 2014. [See copy of the Illness Certification Slip, entered into evidence as Hearing Exhibit 2.] [1]

On June 28, 2014, Anita Go visited Employee at his apartment on the day after he was injured. Ms. Go had been told by Employer's General Manager, Marina Shevkunova, to deliver a letter to Employee. The signed letter, dated June 7, 2014, informs Employee that the restaurant is closing and that Employee is being terminated, effective June 30, 2014. [A copy of the letter, dated 6/07/14,

[1] The issue of Employee's possible entitlement to benefits under Workers' Compensation law is excluded from this case. The Hearing Officer understands that the parties may litigate that issue in a separate forum.

from Mr. Tkachev to Mr. Shugal, was entered into evidence at Hearing Exhibit 6.]

While at Employee's apartment on June 24, Ms. Go handed the letter (Hearing Exhibit 6) to Employee and he read it. Ms. Go asked Employee to sign the letter, acknowledging that he had received it, but he refused. Ms. Go left a copy of the letter with Employee before she left his apartment. [Testimony of Ms. Go.] [2] The letter was eventually filed at the Takagi Insurance Office on August 5, 2014. [See received stamp on Hearing Exhibit 6.]

On July 1, 2014, the East/West Restaurant (formerly, Siberia Restaurant) closed. Four its staff stopped working on that day. The staff had been given two weeks' notice of the closure prior to July 1, 2014. The only food service that continued was a limited menu of sandwiches served at the Coffee & Jazz Bar. The bar closed on about September 10, 2014. [Testimony of Ms. Go.]

On about July 4, 2014, owner Tkechev visited Employee at his apartment. The owner told Employee that he had already closed the restaurant. Employee claims that the owner offered to pay him two weeks' salary if Employee would sign some type of release of claims, but that Employee declined that offer. [Testimony of Mr. Shugal.]

On July 22, 2014, Employee arrived at the closed restaurant and met Ms. Go, who informed him that the restaurant had been closed already for a number of weeks. [Testimony of Ms. Go and Mr. Shugal.]

On July 22, 2014, Ms. Go handed Employee a copy of his travel itinerary, indicating that a return ticket had been scheduled for Employee's return ticket from Saipan to Florida, on September 15, 2014. [See a copy of Employee's travel itinerary at Hearing Exhibit 7.] This itinerary had been selected by the Employer at the time Employer originally booked Employee's round-trip ticket from Florida to Saipan in November 2014. [Testimony of Ms. Go.]

Employee's return airline ticket from Saipan to Florida became an issue between the parties in September 2014. It is not clear to the Hearing Officer who initiated contact with the travel agent, Century Tours Agency, Inc.

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[2] Employee denies that he was handed this letter by Ms. Go. Based on the substance of testimony and the demeanor of the witnesses, the Hearing Officer finds the testimony of Ms. Go to be more credible than the testimony of Employee on this issue.

Employee admitted that he did not want to use the return ticket in September 2014 because he had found a new job in Saipan. Employee wanted to reschedule the ticket for a later date. Employee's testimony was not entirely clear: he claimed that the travel agency wanted $300 to reschedule the ticket, but by the time he went to pay the $300, he was told the Employer had refunded the ticket. Employer claimed that it had waited past the September 15, 2014 date, and at some point, it was advised by the travel agent that it needed to apply for a refund or it would lose the remaining value of the ticket. [Testimony of Ms. Go.]

Employer admitted that it applied for and received a refund of $679 for the unused, return portion of Employee's ticket. [*Id.*; and statement of counsel, Brad Huesman.] At Hearing, Employer, through its counsel, offered to deposit the $679 refund into its Century Travel account for the benefit of Employee, to be used toward the purchase by Employee of either a one-way or round trip ticket to/from Florida. *Id.* Employee instead wanted to be provided with an actual ticket back to Florida for use on or before March 15, 2015. Employer declined but repeated its offer to provide the $679 refund (see above). The parties left the matter to be decided by the Hearing Officer.

Department investigator Jeff Camacho conducted an investigation and concluded that Employee is not entitled to any severance pay. [A copy of the Determination was entered into evidence as Hearing Exhibit 4.] The "return ticket" issue was not addressed by the investigator as it was not stated in the Complaint.

CONCLUSIONS OF LAW

1. ***Employer's termination of Employee constituted a termination for cause; therefore, Employee is not legally entitled to any severance pay.***

The Contract specified two types of terminations: termination for convenience and termination for cause. [Hearing Exhibit 3 at ¶¶ 11-12.]

> Under paragraph 12 (Convenience) of the Contract, either Employee or Employer could decide to terminate the Contract for "convenience." If Employer chose to terminate the Contract for convenience, Employee would be entitled to one month's "severance pay." *Id.* at ¶ 12.

> Under paragraph 11 (Cause) of the Contract, certain events were held to constitute termination for "cause." One of those events was the "closing of the Siberia Restaurant." *Id.* at ¶ 11(9). This paragraph states that "[t]here is no entitlement to severance pay due to a termination for Cause." *Id.* at ¶ 11.

Based on the express terms of the Contract, the closing of Siberia Restaurant, *aka* East/West Restaurant, appears to satisfy the "termination for cause" provision of the Contract. *Id.* at ¶ 11(9). According to the Contract's terms, such termination for cause would mean that Employee is not legally entitled to the severance pay he requests in this lawsuit.

Furthermore, the Contract contains no "Notice" provision requiring advance notice by the Employer in the event of a termination for cause. Thus, Employer was not required to give any "advance" notice of termination. Nevertheless, circumstantial evidence strongly suggests that Employer informed Employee of the impending termination three weeks before it occurred, during Mr. Tkachev's meeting with Employee on June 7, 2014. Again, on June 28, 2014, Employee was notified of the closure when the owner's letter (Hearing Exhibit 6) was handed to him by Ms. Go. Employee was also informed of the closure when Mr. Tkachev visited Employee's apartment on about July 4, 2014.

Employee admits that he received his salary from November 15, 2013 through June 30, 2014. No additional severance payment is required or due.

2. ***Employer should be required to pay Employee the refund of $679 it received for the return portion of the return ticket from Saipan to Florida, pursuant to the terms of the Contract.***

Under the terms of the Contract, the Employer agreed to provide Employee with a "round-trip airfare ticket, economy class, from Palm Beach International Airport to Saipan International Airport." *Id.* at ¶ 5 ("Basis of Pay and Benefits"). Employer provided a round trip ticket, the first half of which Employee used in November 2013 to come to Saipan. The travel itinerary indicated that Employee's return travel was scheduled for September 15, 2014. [Hearing Exhibit 7.]

On July 22, 2014, Ms. Go gave Employee a copy of the travel itinerary (Exh. 7) and told him that he could re-book the ticket prior to the date set for travel - September 15, 2014. Employee claims he attempted to reschedule the ticket;

however, Employee failed to present evidence that he had paid the rebooking fee prior to the date of travel – September 15, 2014. Moreover, Employee admitted that he had not wanted to use the return ticket to travel in 2014 because he had started working a new job in Saipan.

Employer was obligated under the terms of the Contract to provide a return ticket. The contract terminated on about July 1, 2014; the return ticket was scheduled more than two months later, on September 15, 2014. In accordance with the implied covenant of good faith and fair dealing which attaches to every contract, Employer had an obligation to make reasonable accommodation to Employee with respect to the return airline ticket.

At Hearing, Employer offered to place the refunded amount of $679 on account with the Century Travel Agency, Inc., to be used for the benefit of Employee in purchasing a one-way or round-trip ticket to Florida. The Hearing Officer finds that Employer's offer to apply the refund towards Employee's purchase of a new ticket, constitutes a reasonable accommodation that compensates Employee fairly and fulfills Employer's contractual obligation with respect to the "return ticket" issue. Accordingly, this result shall be ordered by the Hearing Officer.

The Department, being fully advised and good cause having been shown, it is hereby ORDERED:

1. On the issue of whether Respondent Emerald City LLC breached the Contract by failing to pay $5,400 severance pay to Complainant Boris Shugal, judgment is entered in favor of Respondent Emerald City LLC.

2. On the issue of whether Respondent Emerald City LLC breached the Contract by terminating Complainant Boris Shugal, judgment is entered in favor of Respondent Emerald City LLC.

3. On the issue of whether Complainant Boris Shugal is entitled to receive the return airline ticket claimed by Complainant to be owed to him, judgment is entered in favor of Complainant, in part, as set forth below.

4. Complainant is entitled to receive the $679 refund from Respondent, provided that the $679 shall be applied toward the purchase of a ticket between Saipan and Florida (either one-way or round-trip). Respondent Emerald City LLC is ORDERED to place the amount of $679 on account at the Century

Travel Agency, Inc. for the benefit of Mr. Boris Shugal, to be applied to the airline ticket described above. [The $679 placed on account at Century Travel Agency, Inc. may not be refunded by Complainant for cash.] Respondent is ORDERED to place the $679 on account at the Century Travel Agency no later than **fifteen (15) days** from the date of issuance of this Order. Complainant is ORDERED to purchase the ticket no later than **forty-five (45)** days from the date of issuance of this Order. If Complainant fails to purchase the required airline ticket within the 45-day time period specified above, the $679 shall revert back to Respondent with no further obligation for payment.

5. Appeal: Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of this Order. 3 CMC § 4948(a). If no appeal is filed within this time the Order shall be unreviewable administratively or judicially.

DATED: February 24, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	Labor Case Nos. 14-1178,
Batuigas, Nita D. (100249),	)	14-1179 and 14-1180
Altoveros, Marlon D. (289887),	)	
Bacani, Arnel B. (293586),	)	
Complainants,	)	**ADMINISTRATIVE ORDER**
v.	)	
Java Imports, Ltd.,	)	
dba Coffee Care Restaurant,	)	
Respondent.	)	
	)	

The above-captioned labor cases were heard in a consolidated hearing on March 31, 2015, in the Administrative Hearing Office located on Capitol Hill, Saipan. Investigator Ben Castro appeared on behalf of the Enforcement Section. All three Complainants - Nita D. Batuigas, Marlon D. Altoveros and Arnel B. Bacani - were present. Respondent Java Imports, Ltd. failed to appear at the Hearing despite being legally served by mail with the Amended Notice of Hearing on February 3, 2015. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer now makes the following Findings of Fact and Conclusions of Law.

This case involves claims for unpaid wages brought by three former employees of Java Imports, Ltd, *dba* Coffee Care Restaurant ("Employer"). The Complainants – Nita D. Batuigas, Marlon D. Altoveros and Arnel B. Bacani (collectively as "Employees" or individually as "Batuigas," "Altoveros," and "Bacani") each filed labor complaints in the Administrative Hearing Office on about October 3, 2014.

Each complainant alleged that he or she worked for Employer but was not paid during the period from April 11 to June 9, 2014. On June 9, 2014, Employees stopped working due to the non-payment of their wages. Employees told their supervisor that they would not continue working unless they were paid the wages owed to them. The Coffee Care Restaurant closed on that day and did not re-open. Somehow the property was leased to a new venture that has now opened a different restaurant on the premises. That new business is unrelated to this case.

I. The Employer Is In Default For Failing To Attend Hearing.

Employees filed their complaints on October 3, 2014. The case was set for Mediation on October 27, 2014. Employer was served by mail with the Notice of Mediation but did not appear on the mediation date. The Hearing Officer then issued a Notice of Hearing; Order Referring Parties For Investigation; Other Orders. Subsequently, investigator Ben Castro from the Enforcement Section investigated the case. Mr. Castro met with complainants and visited Employer's former manager, Kim, Suk Hyun, in the course of his investigation.

On November 24, 2014, the Enforcement Section issued its Determination, Notice of Violation and Notice of Hearing. Subsequently, the hearing date was continued and the Hearing Officer issued an Amended Notice of Hearing, setting the case for March 31, 2015.

Both the Notice of Mediation and the Amended Notice of Hearing were served by mail on the Employer through its Registered Agent for service of process, as listed in Employer's most recently filed Annual Corporate Report. [See copy of Annual Corporation Report at Hearing Exhibit 2.][1] The Hearing Officer finds such notice to be legally sufficient.

Employer never appeared at the scheduled hearing despite receiving legally sufficient notice of the hearing. Pursuant to the Department of Labor Employment Rules and Regulations ("Regs.") at § 80-50.4-760, the Hearing Officer finds that Employer is in default for failing to appear at the hearing of this case.

II. Complainants Are Entitled To Wage Awards And Liquidated Damages.

Although Employer is in default, Employees still must present a *prima facie* case in order to obtain a judgment in this case. All three Employees attended the Hearing and testified credibly as to the allegations in their complaints. The Hearing Officer finds the Employees to be credible and accepts their testimony as true. The facts, as testified, are summarized below.

In 2013 and 2014, the Coffee Care Restaurant was managed by Kim, Suk Hyun. Mr. Kim is related to the owner of the company, Kim, Woon Hwang, who appears to reside in Korea. [Testimony from Mr. Castro that during the investigation, Mr.

[1] A copy of Employer's Amended Annual Corporate Report, filed with the Registrar of Corporations on 11/1/2013, was entered into evidence as Hearing Exhibit 2. The Report lists Sung, Hee Kyeong (with a local post office box address) as Registered Agent for service of process. *Id.*

Kim admitted that he was a close relative of Ms. Kim, Woon Hwang.] The Annual Corporate Report lists Kim, Woong Hyang as President, Director and sole shareholder of Java Imports Ltd. [See Hearing Exhibit 2.]

Employees worked for Employer at the Coffee Care Restaurant from sometime before 2011 until June 9, 2014. The Manager, Kim Suk Hyun, stopped paying wages to Employees beginning in April 2014. Employees continued to work until June 9, 2014, but they were never paid for the hours they worked from April 11 to June 9, 2014. [Testimony of Batuigas, Altoveros, Bacani and investigator Castro.][2]

Shirley Monje served as Employer's waitress, cashier and company accountant. During 2014 while Coffee Care Restaurant was in operation, Ms. Monje prepared a "Salary Summary" that listed the wages owed to each Employee during particular pay periods in 2014. The Salary Summary was obtained by Employees in about June 2014; the document was entered into evidence as Hearing Exhibit 5. The wages listed in the Salary Summary for the period from April 11 to June 9, 2014, are as follows:

Mr. Batuigas -	$1,388.62
Mr. Altoveros -	$2,704.25
Ms. Bacani -	$1,117.04

Mr. Altoveros also made a claim to be reimbursed for an earlier pay check of $600.52 that was delivered to him but which the Bank would not cash due to insufficient funds in the account. [Testimony of Mr. Altoveros.[3]] The $600.52 amount, added to the wage award of $2,704.25, brings total wages owed to Mr. Altoveros to $3,304.77.

Employer closed the business after June 9, 2014, and never paid the above-listed wages to these Employees. Accordingly, judgment should be entered in favor of Employees in the amounts listed above.

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[2] Mr. Kim did not appear at the hearing and is believed to have left the CNMI; however, the investigator did speak with Mr. Kim about the case in December 2014. During that session, Mr. Kim admitted that the Employer had not paid Employees their unpaid wages for the period from April to June 2014. [Testimony of Mr. Castro.]

[3] The Salary Summary (Hearing Exhibit 5) lists $600.52 in wages owed to Mr. Altoveros for the pay period of March 14 to March 27, 2014. Mr. Altoveros testified that he received a paycheck for $600.52, but when he tried to cash the check, the bank informed him that there were insufficient funds in the account.

Liquidated Damages: The Commonwealth Employment Act of 2007, P.L. 15-108, as amended by P.L. 17-1 ("Employment Act"), provides for the imposition of liquidated damages on prevailing unpaid wage claims "unless the hearing officer finds extenuating circumstances." 3 CMC § 4947(d)(2). Based on the facts presented, the Hearing Officer finds that liquidated damages are justified and should be awarded to each Employee in amounts equal to the unpaid wages.

Sanctions: The Employment Act gives the Hearing Officer discretion to impose monetary sanctions for violations of provisions of the Employment Act. 3 CMC § 4947(d)(6). The investigator recommended in his Determination that Employer be sanctioned more than $5,000 for its nonpayment of wages to these complainants. [Hearing Exhibit 4, at pp. 2-3.] Based on the facts presented, the Hearing Officer finds that Employer should be sanctioned $1,500 for nonpayment of wages with respect to each complainant, for a total sanction of $4,500.

The Department, being fully advised and good cause having been shown, it is hereby ORDERED:

1. **Wage Award and Liquidated Damages:** Judgment is entered in favor of complainants Nita D. Batuigas, Marlon D. Altoveros and Arnel B. Bacani on their claims of unpaid wages in the following amounts listed below. Each complainant is also awarded an equal amount in liquidated damages pursuant to 3 CMC § 4947(d)(2):

- Mr. Batuigas is awarded $1,388.62 in unpaid wages, plus an equal amount ($1,388.62) in liquidated damages for a total of $2,777.24;
- Mr. Altoveros is awarded $3,304.77 in unpaid wages, plus an equal amount ($3,304.77) in liquidated damages for a total award of $6,609.54; and
- Ms. Bacani is awarded $1,117.04 in unpaid wages, plus an equal amount ($1,117.04) in liquidated damages for a total award of $2,234.08.

2. **Payment Terms:** Respondent Java Imports, Ltd. is ordered to pay the above amounts, by cashier's check or postal money order delivered to the Administrative Hearing Office, no later than **thirty (30) days** after the date of issuance of this Order.

3. **Sanctions:** Respondent Java Imports, Ltd. is ordered to pay sanctions of $1,500 per each complainant, for total sanctions of $4,500 for violations of the Commonwealth Employment Act of 2007, as set forth above. The sanctions shall be paid by cashier's check or postal money order, made payable to the CNMI

Treasurer, and delivered to the Administrative Hearing Office no later than **sixty (60) days** after the date of issuance of this Order.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of this Order. 3 CMC § 4948(a). If no appeal is filed within this time the Order shall be unreviewable administratively or judicially.

DATED: July 23, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DIVISION OF THE ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR

In the Matter of:	)	
Geronimo, Leonida N. (153246),	)	L.C. Nos. 13-1136 and 1137
Geronimo, Rodel N. (283340)	)	
Complainants,	)	**ADMINISTRATIVE ORDER**
	)	
vs.	)	
	)	
Castle Resorts and Hotels, Inc.,	)	
dba Aquarius Beach Tower (ER) and	)	
Aldrete, Jeanning (Gen. Manager),	)	
Respondents.	)	
	)	

This case was heard in the Administrative Hearing Office on April 29, 30 and May 1, 2013. Complainants Leonida and Rodel Geronimo appeared with a non-legal representative, Sheila Goto. Respondent Castle Resorts and Hotels, Inc., *dba* Aquarius Beach Tower, appeared through its General Manager, Jeanning Aldrete. Ms. Aldrete also appeared as a named respondent. The following witnesses testified: Leonida N. Geronimo, Rodel N. Geronimo, Jeanning Aldrete, Akira Aniya (by telephone), Imelda M. Valiente, Zenaida P. Galam, Araceli C. Anonuevo, Ana Marie Tibre and labor investigator Frank Aguon. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

This case involves two claims for wrongful termination brought by Leonida N. Geronimo and Rodel N. Geronimo, respectively. Both complainants are former employees of Castle Resorts and Hotels, Inc., *dba* Aquarius Beach Tower (hereinafter, "Employer"), located in Chalan Kanoa, Saipan. Both employees worked for the Employer for many years: Leonida began in 1998; Rodel began in 2004. Both employees were terminated by General Manager ("GM") Aldrete on January 29, 2013, essentially for the same reason.

The Employer asserts that both employees were terminated for violating company policies regarding "theft" and "dishonesty." The conduct that led to the termination consisted of Rodel leaving the hotel premises for about five to ten minutes, twice each week, without "timing off" the company time clock. Leonida lived only one block from the Aquarius Beach Tower, but she often asked her son, Rodel, to pick her up in the morning in his car and bring her back to work. This conduct began more than a year before January 2013.

Jeanning Aldrete, assumed her position as GM in early November 2012. Ms. Aldrete learned of Rodel's conduct of picking up his mother from other housekeeping employees. On January 6, 2013, five employees asked to speak to the GM in private, then told her about this conduct, as well as other allegedly improper acts of Leonida and Rodel. The following morning, the GM examined the company's security camera video of that morning's activities and found video showing Rodel leaving the premises before 8 a.m., then returning to the hotel about five minutes later. Rodel had not timed out. GM Aldrete immediately met with both employees and told them that such conduct violated long-standing company policy. The GM told Leonida that she expected Leonida, as Housekeeping Supervisor, to enforce company rules; therefore, the GM faulted her for disregarding the time clock guidelines.

Meeting on January 7, 2013: During the meeting, Rodel and Leonida admitted that Rodel had been picking up Leonida about twice each week for more than a year; however, they claimed that the former General Manager, Akira Aniya, had given them oral permission to do so. Rodel estimated that each pick-up had lasted about five minutes. The GM told these employees that she believed the former GM had not given his permission for Rodel to leave without timing off the clock, and that, in any event, she considered it to be unacceptable conduct. In response, both workers apologized and promised not to do it again. The GM then told Rodel that she planned to issue a written warning.

Notice of Warning: On January 11, 2013, the GM handed Rodel an Employee Warning Notice (Hearing Exhibit 9). The Notice cited the basic conduct ("Employee left premises without punching out."), and noted that the former GM had advised Rodel previously to punch out when helping his mother. The Notice also stated that "[h]e (Rodel) was given a final warning today and advised that any further occurrences will result in termination of employment." Finally, the Notice instructed Rodel to report directly to the Asst. Hskpg. Supervisor and/or the GM "until further notice, pending an investigation." The GM had no further dealings with Rodel until the day he was terminated.

Investigation: The Employee Warning Notice (Hearing Exhibit 9) contained a vague reference to a "pending investigation." That investigation consisted of GM Aldrete examining a year of Rodel's time cards. After examining the cards, the GM noted that Rodel had timed out seven times in the afternoon in the prior year; but that he had no time-outs in the morning schedule during that same period. [This should not have surprised the GM since Rodel had admitted that he never timed-out when he picked up his mother in the morning.] After examining the time cards and considering the matter for two weeks, GM Aldrete decided to terminate both Rodel and Leonida.

Incident on January 23, 2013: On January 23, 2013, a housekeeping employee approached the GM with a complaint about her work area being disturbed by construction workers at the hotel. Leonida came to the GM's office and an argument ensued between the GM and Leonida; whereupon, the GM told Leonida to time out for the day and go home. Leonida became angry, then distraught, and ultimately, went to her desk and tried to call 911, then slipped to the floor and appeared to be in distress. Concerned co-workers called an ambulance. Paramedics arrived and examined Leonida, but detected no apparent medical problem. Nevertheless, Leonida asked to be taken by ambulance to the hospital. Evidently, the CHC doctor found no serious injury, but the doctor issued a certification slip to excuse Leonida from work until January 26, 2013. Leonida returned to work on January 28, 2013; on the following day, she was terminated by the GM.

Termination: The GM prepared and issued Notices of Termination, alleging that the conduct of Rodel and Leonida had violated specific provisions of the Employer's "Associate Handbook" (Hearing Exhibit 12). First, the GM asserted that Rodel's failure to punch out violated a specific requirement spelled out in company guidelines at page 16(d), which states: "Only time worked may appear on a time card. Punching in/out for time not worked is prohibited and grounds for termination." *Id.* Additionally, the GM found that the conduct also constituted insubordination, misrepresentation and a general failure to comply with Aquarius Beach Tower's published policies and directives. See Hearing Exhibit 11 at page 19 (nos. 8, 5 and 18). [1]

On January 29, 2013, the General Manager called each employee, separately, to her office and handed each employee a written termination notice. [Hearing

[1] Hearing Exhibit 11 is the online version of the printed Handbook at Hearing Exhibit 12, except with slightly different pagination. Except for pagination, it appears to be identical to Exhibit 12..

Exhibits 7 and 8 (Rodel); and Exhibit 3 (Leonida).] In each case, there was no discussion, except that GM Aldrete read the contents of each termination notice to the employee. Each employee noted that he or she disagreed with the termination and refused to sign the document. Each employee was escorted out of the building by GM Aldrete and a witness.

Complaints: About a week after the termination, Rodel and Leonida came to the Administrative Hearing Office and each filed labor complaints against their Employer and General Manager for wrongful termination. Each complainant claimed the right to be paid through the end of his or her approved employment period.[2] Rodel's employment was approved via an I-94 form that was scheduled to expire on February 14, 2013. Leonida's employment was approved via an I-94 form that was scheduled to expire on August 22, 2013. [See copies of I-94 receipts at Hearing Exhibits 4A and 4B.]

CONCLUSIONS OF LAW

1. Respondent Jeanning Aldrete Should Be Dismissed From This Case As She Is Not A Party To The Employment Contracts.

Complainants' implied contracts for employment were not with Ms. Adrete but with the Employer, Castle Resorts and Hotels, Inc. Therefore, Jeanning Aldrete should be dismissed from this case, given that, as a legal matter, she is not properly named as a party to these breach of contract claims.

2. The Employment Relationship Between Employer And Employees Is Subject To The Terms Of The Company's Handbook.

The threshold question is whether the employment of Rodel and Leonida Geronimo should be characterized as "at will" or terminable only "for cause?" The employment history of both complainants spans a number of years and includes the era of local CNMI control over immigration as well as the current era of Federal control that began in November 2009. Before "federalization," complainants were employed under written one-year contracts that specified that the employee could be terminated only "for cause."[3] Since November

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[2] The filed complaints alleged damages until 2014; however, both complainants orally amended their damages claim during the Hearing. [Testimony of Rodel and Leonida Geronimo.]

[3] The Hearing Officer takes judicial notice of the standard, one-year contracts that were used by the

2011, however, Employer has employed these complainants under the Federal government's "CW" status without using written contracts.

The parties do not currently use a written contract; however, all parties admit that the Employer's "Associate Handbook" (hereinafter, "Handbook") is given to employees and that this Handbook sets forth rights and obligations for both Employer and its employees. [Testimony of Rodel Geronimo, Leonida Geronimo and GM Aldrete.][4] Indeed, GM Aldrete testified that she based her decision to terminate these employees on the Handbook's provisions and the GM made repeated references to the Handbook in her warning notice and termination notices, and in her testimony. [See copy of Handbook at Hearing Exhibit 12.]

Based on the evidence, the Hearing Officer finds that the employment relationship between these parties amounted to an implied contract to work under the rules and guidelines set forth in the Handbook. Additionally, the Employer was subject to the covenant of good faith and fair dealing in its dealing with its employees.

3. The Conduct of Rodel and Leonida Geronimo Violated the Time Clock Guidelines Set Forth In The Handbook.

The evidence establishes that complainants' conduct, in which Rodel made countless trips off hotel premises without "timing off" the clock, violated Employer's written policies and procedures. The Handbook section, entitled "Time Records," states that "[o]nly time worked may appear on a time card. Punching in/out for time not worked is prohibited and grounds for termination." [Hearing Exhibit 12, p. 16, p. d.]

Complainants admitted their conduct but claimed that former GM Aniya had given them oral permission to make the pick-ups without timing out. Former GM Aniya, who now lives in Hawaii and works for another company, testified at the hearing by telephone and categorically denied that he had given any permission for Rodel to leave the hotel premises without timing out. In the

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CNMI Department of Labor from 1998 through November 2009. These contracts contained a provision (Section L) which designated that the employee could only be terminated for cause. The internal record of Rodel and Leonida Geronimo (Hearing Exhs. 14 and 15) indicates they were issued one-year permits for a succession of years, until the Department stopped keeping records in 2009.

[4] The Handbook (Hearing Exhibit 12) was produced and distributed in 2006, and evidently, it has not been revised. [*Id.*; testimony of GM Aldrete and Leonida N. Geronimo.]

written statement he submitted prior to the Hearing (Hearing Exhibit 13), Aniya wrote that he had given Rodel permission to take his mother (Leonida) home in the afternoon provided that Rodel timed off the clock during those trips. Aniya testified that he did not authorize Rodel to make morning pick-ups while on company time, and that he had not even known that these morning pick-ups were occurring. Based on the demeanor of the witnesses and the substance of their testimony, the Hearing Officer finds the testimony of Mr. Aniya to be most credible on this issue.

4. The Employer Was Justified In Assessing A Penalty For The Conduct.

The Handbook states that employees who fail to comply with the "Company's stated or accepted policies and procedures, will be subject to corrective action." [See Handbook (Hearing Exh. 12) at page 20.] Given that complainants had violated the time clock guidelines for many months, or even years, GM Aldrete had good cause to take "corrective action" against these employees.

The Handbook states that the range of corrective action includes "any one or combination of the following: counseling, warnings (verbal and/or written), suspension (without pay), probationary status, termination of employment." The Handbook explains that "[t]he degree of discipline will depend upon the severity of the infraction, the effect of that infraction on others and on the Company, and the associate's overall employment record....[including his or her] record of performance, attendance, attitude, etc." *Id.*

In this case, the Employer chose the most severe corrective action: termination. The question is whether this action was so unjustified or inappropriate so as to constitute a breach of the implied contract (as governed by the Handbook) or a breach of the implied promise of an employer to act fairly and in good faith in dealing with its employees? Complainants have the burden to prove that this is the case.

5. Complainants Failed To Prove That Their Terminations Breached The Implied Contract or Covenant of Good Faith and Fair Dealing.

A. HOLDING:

The Hearing Officer finds that complainants failed to establish that the Employer breached an implied contract or implied covenant of good faith and

fair dealing in deciding that termination was the appropriate penalty for their conduct. In so ruling, I note that it is not the Hearing Officer's task to substitute his own judgment for that of the General Manager. The issue is not whether the Hearing Officer would have chosen the same penalty; but rather, whether the General Manager's decision was so contrary to the terms set forth in the Handbook that it constituted a breach of the implied contract and/or covenant of good faith and fair dealing.

Given the broad authority conferred by the Handbook, and the relative severity of the conduct involved, I find that the General Manager's decision to terminate these workers did not amount to a breach of implied contract or constitute bad faith in the employment context.

B. DISCUSSION:

It is undisputed that General Manager Aldrete took a strict view of discipline in this case. Aldrete decided that the conduct of Leonida and Rodel amounted to theft, insubordination and misrepresentation and that the only appropriate result could be termination. For support, she cited the Handbook provision stating that "[p]unching in/out for time not worked is prohibited and grounds for termination." Hearing Exhibit 12 at p. 16 ("Time Records") at paragraph (d).

When viewed from the financial standpoint, the amount of work time "stolen" by Rodel from the company was not substantial. Even assuming that Rodel spent 10 minutes off the clock two mornings each week, that would amount to 20 minutes per week or three work days (17.33 hours) per year. On the other hand, if each incident were to be treated separately, this conduct would amount to more than ***100 instances per year*** of violating company policy by leaving the hotel premises while still timed on the clock. The GM considered the ongoing, multiple nature of the violations.

The GM also viewed complainants' conduct as "insubordination;" namely, willful disregard of company policy, especially since that the company's Vice President of Operations had highlighted the problem of time record violations to the entire hotel staff, and to Leonida in particular, in March 2011. [See Memoranda at Hearing Exhibit 5 (signed by Leonida) and Exhibit 6 (posted on site).] Leonida testified that she could not recall signing the memorandum, but she recalled the conversation with Vice President Jeff Caminos. The Vice President's posted memorandum (Exhibit 6), quoting from the Handbook, stated: "At no time may an associate leave the property without signing out/

clocking out, unless it is work related and authorized by your supervisor or manager." In his memorandum that was addressed to all employees and posted at the work site, the Vice President noted:

> The policies in the Employee Handbook are developed to ensure that everyone follows the same rules....It is not fair to those who abide by the policies if there are other employees who do not."

Given such strong policy statements from upper management, it is understandable that GM Aldrete would consider Leonida's act of allowing her son to make regular trips off hotel property without timing out, as an act of insubordination; namely, conduct clearly against company policy.

The GM also focused on the degree to which Leonida's conduct amounted to blatant favoritism – and this was favoritism being shown by very supervisor who was supposed to be supervising the staff to prevent time-card violations. Indeed, the corrosive effect of such favoritism on employee morale was demonstrated when five employees approached the GM on January 6, 2013, and complained that Leonida and Rodel operated by their own rules. Several of these employees testified at the Hearing that they had become very dissatisfied with Leonida's management style and activities. Much of the resentment seemed to center on Leonida's habits, but her favoritism towards her son, Rodel, was also noted by the employees. [Testimony of Ms. Tibre and Ms. Anonuevo.]

Other factors also may have influenced the General Manager's decision to terminate. First, as noted above, five employees approached GM Aldrete and complained bitterly about Leonida's management style and her favoritism towards Rodel, as well as other complaints. [This occurred just one day before the GM confronted Leonida and Rodel about Rodel's going off premises in the morning without timing out.] Second, there was the argument that occurred on January 23, 2013, between GM Aldrete and Leonida, which quickly escalated as tempers flared. These two incidents may have convinced GM Aldrete that Leonida was an ineffective supervisor who had lost the trust and respect of her subordinates. Leonida's severe reaction in her argument with the GM may have convinced the GM that Leonida had a problem with the GM's assertion of her own authority. Although Aldrete denied that either of the incidents on January 6 and 23 influenced her decision in any way; the Hearing Officer does not find her testimony to be entirely believable on this issue.

The circumstantial evidence suggests that the General Manager had personality differences with Leonida and well-founded doubts about Leonida's management style by the end of January 2013. These factors seem to have played a roll in the GM's decision to terminate; but given the broad discretion afforded to management in the Handbook (see Hearing Exh. 12, p. 20), the GM had the right to consider the supervisor's "attitude" in determining the appropriate "corrective action" against her.

Notwithstanding the decision in the Employer's favor in this case, the Hearing Officer notes that this Employer was not blameless. General Manager Aldrete should be criticized for failing to contact the former GM during her investigation,[5] and for failing to give complainants an opportunity to present arguments against their termination prior to summarily terminating them. Aldrete gave little or no consideration to each employee's extensive period of employment – 14 years for Leonida and 8 years for Rodel – with the company. Furthermore, Aldrete seems to have given no consideration to the fact that Rodel had an otherwise good record of service, that he had been following instructions of his supervisor (Leonida) in going off premises, or that he had just two weeks left on his employment contract when he was terminated. Although these facts do not change the Hearing Officer's decision, they demonstrate a rigid management style that is not commendable.

* * * * * *

In conclusion, the evidence established that complainants committed multiple violations of the company policy over an extended period of time. The Handbook gave management broad authority to punish this conduct. The GM considered the multiple violations to be serious and insubordinate, especially in view of earlier warnings about time card violations by upper management in March 2011. Furthermore, complainants' conduct demonstrated pervasive favoritism on the part of Supervisor Leonida, which appeared to have already affected employee morale in a negative manner. As a result, the GM was authorized to choose the severe penalty of termination for this conduct.

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[5] GM Aldrete never fully investigated the only defense offered by Rodel and Leonida for their conduct in January 2013, before deciding to terminate them. After complainants asserted that the former GM had given them oral permission to disregard the time clock for the morning pick-ups, Aldrete had not contacted the former GM to double-check the facts. Given that this was the central charge against complainants, one would have expected the GM to check this assertion. [This deficiency was rectified by the fact that the former GM ultimately testified credibly at the Hearing that he had not given permission to the complainants to disregard the time clock.]

Based on the evidence presented, the Hearing Officer finds that complainants failed to meet their burden to prove that the Employer violated the terms and conditions of the implied contract of employment with Leonida and Rodel Geronimo. Likewise, complainants failed to prove that the Employer imposed a discipline in breach of the implied covenant of good faith and fair dealing.

The Department, being fully advised and good cause having been shown, it is hereby ORDERED:

1. Dismissal: For the reasons stated above, Jeanning Aldrete is hereby dismissed as a party from both Labor Cases (L.C. Nos. 13-1136 and 13-1137).

2. Judgment in L.C. No. 13-1136: For the reasons stated above, Judgment is entered in favor of respondent Castle Resorts and Hotels, Inc., *dba* Aquarius Beach Tower, as to the labor complaint (L.C. No. 13-1136) filed by Leonida N. Geronimo.

3. Judgment in L.C. No. 13-1137: For the reasons stated above, Judgment is entered in favor of respondent Castle Resorts and Hotels, Inc., *dba* Aquarius Beach Tower, as to the labor complaint (L.C. No. 13-1137) f led by Rodel N. Geronimo.

4. Appeal: Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of this Order. 3 CMC § 4948(a). If no appeal is filed within this time the Order shall be unreviewable administratively or judicially.

DATED this 3rd day of June 2013

Jerry Cody
Hearing Officer

DEPARTMENT OF LABOR
DIVISION OF ADMINISTRATIVE HEARING OFFICE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

In the Matter of Yao, BaoQing, Complainant, vs. New Pacifiasia Trading Inc., et al., Respondent	)	L.C. No. 11-1116 ADMINISTRATIVE ORDER

Complainant Yao, BaoQing (Yao), with the assistance of the Federal Ombudsman's Office, and Respondent New Pacifiasia Trading Inc., by former Corporate Secretary Shao Hong Walker (Walker), appeared at the scheduled hearings. Edwin Camacho and Frank Aguon appeared on behalf of the Department of Labor.

FINDINGS AND CONCLUSIONS:

This case was originally commenced as a Department of Labor Agency Case (CAC 08-043-02). The Agency Case was dismissed and the matter was ordered to proceed as a Labor Case.

The parties are in substantial agreement as follows:

An application for employment of Yao as an auto mechanic was submitted to the Department of Labor by Respondent on January 9, 2007. The application was approved by the Director of Labor on February 14, 2007. Complainant arrived in the CNMI on March 7, 2007. Complainant did not meet any representative of Respondent Corporation until approximately six months after his arrival. He then met Walker. Complainant never worked for Respondent. Complainant never received compensation from Respondent. Thereafter the testimony varies.

Yao states that he and his sister-in-law came to the CNMI together. He testified that they paid around 80,000 to 90,000 RMB ($12,000.00) each in recruitment fees to obtain a job. Yao's family paid his share. The recruiting

fees were paid to family friends in China, some of whom had previously worked in the CNMI. They were not licensed recruiters. Yao testified that he had previously heard reports about unlicensed recruiter scams but didn't pay any attention to them. He had no personal information that any of the recruitment fees were received by Respondent or Walker.

Walker testified that Respondent paid $500.00 in recruitment fees to find Yao. Walker denies receiving any of the recruitment fees paid by Yao. Walker testified that she learned that Yao was in the CNMI a couple of months after he arrived. She could not locate him until around September 2007. When she finally found him she testified that she asked him to report to work. Yao denies that he was offered work, but rather was asked, "What kind of work can you do." It is important to note that Respondent never reported Yao's failure to report to work to the CNMI Department of Labor.

Yao's position is that he intended to work for Respondent. His actions, however, are contrary to that stated intent. Yao picked up his permit from the Department of Labor soon after his arrival. In December 2007 Yao went to the Ombudsman's office for help. Yao came to the Department of Labor around January 2008. His intent at that time was not to seek compensation from Respondent, but rather to receive assistance in recovery of the recruitment fees that he paid in China.

Yao was asked why he waited so long to seek help. He testified that he didn't know where to go. Yao further testified that if he had not met Walker after six months he would have been willing to wait a year. Yao did not obtain his Social Security card until sometime between September 2007 and January 2008. **Yao testified that at the end of his contract in March 2008, even though he knew there was no work for him, he went to Walker and asked her to renew his contract so that he could maintain his immigration status in the CNMI.** Walker denies this ever occurred.

Walker testified that she also brought Yao's sister-in-law, Liu, Wenhuai (Liu), into the CNMI as a farmer. This employment was not through the Respondent Corporation but as an individual. Liu arrived with Yao. Walker likewise claimed that she could not find Liu after Liu arrived in the CNMI. Walker testified that Liu did not perform any work for her. Walker did not notify Department of Labor of Liu's failure to report for work.

Yao is intelligent and articulate. He realized within a month that he had been the victim of a recruiting scam yet he continued to reside with the individuals who were clearly part of the scam. He testified that, despite

limited resources and no work, he loaned one of the scammers $300.00 just a couple of months after his arrival in the CNMI. At the time that he made the loan he already knew that he had been scammed.

Yao brought $1,000.00 with him from China. Yao never received more from China. He testified that upon arrival he bought a cell phone for $100.00 and clothes for $200.00. When asked whether he brought clothes with him he testified that he had only winter clothes for China. He testified that he never made any inquiry as to what he would need in the CNMI. When the $300.00 loan is added in to these purchases it amounts to 60% of his total assets. Yao further testified that he paid $90.00 per month for rent and about $100.00 per month for food. There was no testimony about incidentals, but even the basics would result in depletion of all savings in just two months. This testimony is inconsistent with his testimony that he did not work for money.

Walker testified that at the time she decided to hire Yao she needed an auto mechanic. She was asked by her attorney whether she hired a replacement for Yao when he did not show up for work. Walker testified that she hired a replacement in 2008. That was approximately a year later. Walker further testified that she hired part-time mechanics during the year that Yao did not work. She stated that she paid salaries and withholding for those workers. The Hearing Officer kept the record open for Walker to produce the Employee Quarterly Withholding Tax returns for 2007. Those records did show some payments to additional workers. That does not resolve the pivotal issue in this case.

The question here is whether Yao's entry into the CNMI was intended to be a true employment relationship or whether it was a scheme to circumvent the then CNMI Immigration laws (sponsorship). The Hearing Officer finds that this employment arrangement was a sponsorship. The Hearing Officer finds that there was no intent to actually employ Yao. Likewise, the Hearing Officer finds that Yao merely sought entry into the CNMI and find work upon arrival. Yao's long delay in coming to Labor and his testimony that he sought to renew his permit with Respondent despite having been provided no work is strong evidence of the intent to merely obtain lawful status to remain in the CNMI. The fact that Yao went to Respondent after a year without employment and asked to have his contract renewed is believable. This testimony alone supports the contention that Yao's contract of employment was simply a tool to allow him to enter the CNMI and look for work. The timing of Yao's contact with Labor (around the time of

expiration of his permit) further suggests that his motive was simply to remain in the CNMI and look for work.

Respondent's failure to report to Department of Labor that Yao did not report to work is strong evidence as well. The fact that two workers (Yao and Liu) were brought in together and neither was provided work further supports the finding. Walker signed both employment contracts. (Note: Yao was brought into the CNMI as a corporate employee and Liu was brought in as a personal employee of Walker's.)

There is clear and convincing evidence that the parties engaged in Immigration fraud as defined by CNMI Immigration law at that time. Yao should not benefit from his participation in the fraudulent scheme.

IT IS HEREBY ORDERED:

Yao, BaoQing shall take nothing by this complaint.

Permission granted to Yao, BaoQing by the CNMI, authorizing him to work in the CNMI as a contract worker is hereby revoked.

This Order shall be forwarded to the Office of the Attorney General of the CNMI to determine if any further action is warranted.

A copy of this Order shall also be forwarded to USCIS and ICE.

Within fifteen days of issuance, any person or party affected by this decision may appeal to the Secretary of Labor by written notice filed with the Administrative Hearing Office. If no appeal is filed within this time the Order shall be unreviewable administratively or judicially. In the notice of appeal a party may make an application for a stay or for an injunction maintaining the status quo of the parties pending appeal.

DATED this 20th day of July 2011

Barry Hirshbein
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR
SAIPAN, NORTHERN MARIANA ISLANDS

In the Matter of David R. Jones and Department of Labor, Complainants, vs. Saipan Hotel Corporation, *dba* Hafadai Beach Hotel, Respondent.	)	Labor Case No. 11-1124 **ADMINISTRATIVE ORDER**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This case was heard on October 22, 23 and 24, 2012, in the Administrative Hearing Office of the CNMI Department of Labor. Complainant David R. Jones appeared without counsel; the Department of Labor was represented by Asst. Attorney General Reena J. Patel. Respondent Saipan Hotel Corporation, *dba* Hafadai Beach Hotel, appeared through its General Manager, Akira Takaoka, and was represented by counsel Marcia Schultz. Respondent's translator was Kantaro Imaya. The following witnesses testified: David R. Jones, Akira Takaoka, Toshio Obata, Juan I. Tenorio and Takatoshi Namima. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This labor complaint was brought by a U.S. citizen job applicant, David R. Jones ("Jones"), against an employer, Saipan Hotel Corporation, *dba* Hafadai Beach Hotel ("Employer"), alleging that the Employer rejected Jones's job application without just cause, in violation of 3 CMC § 4528(a). NMIAC § 50.4-230. This is a case of first impression, as it is the first case based on 3 CMC § 4528(a), to proceed to an evidentiary hearing in the Hearing Office.

The Commonwealth Employment Act of 2007, 3 CMC § 4528(a), states, in part, that a citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job may make a claim for damages if the employer rejects an application for the job without just cause, and the employer employs a person who is not a citizen, CNMI permanent resident, or U.S. permanent resident for the job. 3 CMC § 4528(a), NMIAC § 50.4-230.

FINDINGS OF FACT

In September 2011, Employer advertised in the Saipan Tribune that it was seeking to fill two jobs for its restaurant operations: Executive Chef and Sous Chef. (See copy of advertisement at Hearing Exhibit 12.)

As of October 2011, Employer already employed alien workers in those two positions, and the Employer was satisfied with continuing their employment.[1] However, in order to obtain "CW status" for such workers, USCIS regulations required the Employer to attest that no U.S. citizens or U.S. permanent residents were available for the positions. In preparation for filing the CW petitions, Employer advertised the positions and considered job applicants.

The Executive Chef at Hafadai Beach Hotel has a demanding job that includes more than 7 hours per day of actual cooking of both Japanese and Western food, as well as menu planning, training of subordinate chefs and restaurant staff, contacting suppliers in Japan for food items, and managing all phases of food delivery at the hotel's three restaurants. The Executive Chef also personally cooks food for the Chief Executive Officer ("CEO") of the Employer's parent company in Japan during the CEO's periodic visits to Saipan. The Sous Chef at Hafadai Beach Hotel cooks Japanese and Western food at the hotel and works under the direct supervision of the Executive Chef. [See testimony of Takaoka and Obata.]

Complainant David R. Jones read the advertisements and decided to apply for them. He filled out employment applications for both positions. Jones had years of prior experience in the food service business. He had worked at the Hyatt Regency in Saipan as a cook from 1982 until 1995, then as Executive Chef at the Hyatt from 1995 to 2005. He voluntarily left the Hyatt in 2005,

[1] Employer hired Toshio Obata as Executive Chef in 2002 and Samsong Tan as Sous Chef in September 2010. Both workers have worked in their positions from their date of hire until present. In November 2011, Employer intended to file CW petitions with USCIS for these workers.

then worked at several positions over the next several years, including a food catering business, one semester at Northern Marianas College, one month at the Saipan Trade Institute, and one year as Executive Chef and Food & Beverage Manager at Palm's Resort, until the resort went out of business. As of October 2011, Jones was unemployed. (Testimony of Jones, taken on 10/22/12.)

Employer's General Manager, Akira Takaoka, held the ultimate responsibility for deciding who would be hired for senior positions such as Executive Chef and Sous Chef. The Employer's HR Manager, Juan I. Tenorio, was involved in the hiring process but did not make any ultimate decisions about hiring for these positions.

HR Manager Tenorio conducted a job interview of Jones on November 8, 2011. General Manager Takaoka was present at the 20-minute interview, but asked no questions. During the interview, Jones's work history was reviewed and Takaoka learned that Jones had served as the Executive Chef at the Hyatt Regency in Saipan for ten years.

Takaoka decided that Jones should take a "cooking test" that would provide a demonstration of his ability to cook Japanese and international food. Takaoka testified that in his opinion, although an applicant's "resume" or "history of experience" is very important, "practical skills" are "more important." (Testimony of Takaoka, taken on 10/22/12 p.m.)

The cooking test was to be conducted on the Employer's premises using its kitchen. Takaoka decided that Jones would prepare seven dishes: rolled sushi, one fish dish, a tempura, a soba, a miso soup, a plain omelette, and a pasta dish. Takaoka chose to use four "food tasters" for the demonstration: Takaoka, himself, and three employees (Juan Tenorio, translator Namima and employee Marites Guerrero).

The cooking test was held on Employer's hotel premises on November 18, 2011. Takaoka assigned Executive Chef Toshio Obata to be available in the kitchen to provide Jones with any general assistance he might need. When Jones arrived at about 10 a.m., Obata informed him as to which dishes he was being asked to prepare. Obata showed Jones the ingredients available for the demonstration but did not assist in the actual cooking. [2]

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[2] Executive Chef Obata set out the ingredients and a cutting board and knife. Obata explained to Jones what items he was expected to prepare and instructed him to use the ingredients he had set out.

Jones prepared the food in the time between 10 a.m. and noon. When the dishes were ready, the employee "tasters" ate the food and filled out one-page evaluation forms. (See forms at Hearing Exhibits 1-4.) Takaoka observed the presentation, tasted the food, and filled out his own evaluation form (Hearing Exhibit 1). Although Takaoka briefly reviewed the evaluations of the other food tasters, he relied primarily on his own opinion of the food. Takaoka testified that he gave the other evaluations about 30% weight and his own opinion about 70% weight, in making the decision as to whether to hire Jones.

GM Takaoka testified that the results of the cooking test were below his expectations. On his evaluation form (Hearing Exhibit 1), Takaoka scored Jones's prepared dishes with mostly average grades (overall ratings of "3" on a scale of 1-5). He also added written comments critical of the tempura dish, sushi dish and the soba. [He stated: "tempura coating should be more crisp...the roll sushi is not rolled good...the soba is too soft." *Id.*]

After the cooking demonstration, Takaoka had a brief discussion with Jones, which has been referred to as the "second interview." Takaoka told Jones that he needed to discuss this hiring matter with the hotel's "head office" in Japan, and then he would contact him. (Testimony of Namima, taken on 10/24/12 p.m.)[3] In fact, Takaoka never contacted the head office about this matter. Later that day, he made the decision not to offer Jones either the Executive Chef or Sous Chef position. Several days later, Jones was informed of the decision by Namima and Juan Tenorio. Mr. Tenorio told Jones he did not know why Jones was not being offered either job. (Testimony of Tenorio and Namima.)

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In accordance with a one-page list given to Obata by the General Manager, Obata told Jones to prepare "maki mono sushi" but he never told Jones what items to put into the sushi, nor did Jones ask such a question. Obata told Jones to ask if he needed anything. Jones asked only for ajinomoto (MSG) and cream,. Obata observed Jones's cooking but he never described his impressions to GM Takaoka, nor was he asked to do so. [Testimony of Jones, Obata and Takaoka.]

[3] The parties dispute whether Takaoka told Jones in this interview that he was definitely going to be hired. Jones claims that Takaoka told him that he, Takaoka, needed to check with the parent company in Japan, but that he was planning to recommend Jones for the "Sous Chef" job. Takaoka did not recall making that statement. Namima, who was present at the time, recalled Takaoka stating that he needed to contact the head office in Japan, but Namima testified that Takaoka never stated that Jones would be hired or that he had decided to recommend him for the position. The Hearing Officer finds Mr. Namima's testimony to be the most credible on this issue, based on his demeanor and the substance of his testimony.

Shortly thereafter, Jones filed a labor complaint at the Department of Labor Hearing Office, under 3 CMC § 4528(a). Jones asserted that the Employer had rejected his job application without just cause, in favor of an alien worker.

In December 2011, several weeks after filing the case, Jones was offered a job as Executive Chef at the Outrigger Resort Hotel in Guam. He accepted the offer, moved to Guam immediately and began working as Executive Chef. As of the date of Hearing, Jones continues to be employed at the Outrigger Resort Hotel. In that position, he supervises about 100 employees, including about 50 chefs and waiters. His salary at the Outrigger Resort Hotel is more than twice the salary he would have received at the Hafadai Beach Hotel. Jones testified that although his salary is higher in Guam, he has made sacrifices in having to be separated from his family in Saipan.

Jones testified that if he were offered the Sous Chef job now, he would turn down the offer and continue working at the Outigger Resort Hotel in Guam. Nevertheless, Jones testified that if he had been offered the Sous Chef job back in November 2011, he would have taken the job at Hafadai Beach Hotel.

CONCLUSIONS OF LAW

This labor claim is based on the alleged violation of Section 4528(a) of the Employment Act of 2007. 3 CMC § 4528(a). That section imposes liability on an employer if "the employer rejects an application [of a citizen or permanent resident] for [a] job ***without just cause***, [then]...employs a person who is not a citizen or permanent resident for the job." 3 CMC § 4528(a) (emphasis added).

In order to prove a violation of Section 4528(a), complainants must prove the elements of a violation; namely, that Jones is a U.S. citizen who was qualified for the offered job; and the Employer rejected his application without just cause in favor of hiring an alien worker, who was then hired. The only disputed issue in the case concerns whether this Employer rejected Jones's job applications for the Executive Chef and/or Sous Chef positions "without just cause."

I. The Employer's Decision Not to Hire Mr. Jones As Executive Chef Was Justified; No Violation Was Proven.

The Hearing Officer finds that the Employer's decision not to hire Jones as Executive Chef was justified; thus, Jones's application was not rejected "without just cause" and no violation occurred. 3 CMC § 4528(a).

General Manager Takaoka testified credibly that management believes it is important to have an Executive Chef at Hafadai Beach Hotel who specializes in Japanese cooking, given that most of the hotel's guests are Japanese and they expect a superior quality of Japanese cuisine at the Hotel. The Executive Chef must have detailed knowledge of the preparation, methods, and ingredients necessary to produce excellent Japanese cuisine. The evidence established that Jones simply does not possess the level of expertise in Japanese cooking that the Executive Chef position requires. Jones, himself, testified that he was familiar with Japanese cuisine, but did not consider it to be his specialty; rather, his specialty is in the broader category of "international" cuisine.

The General Manager testified credibly regarding his opinion that Jones's Japanese dishes were of average, but not superior, quality: 3 on a scale of 1 to 5. Takaoka explained the reasons for his negative written evaluation of Jones's cooking. Takaoka's primary concern was with the sushi, which seemed to be rolled loosely in a manner that scattered the rice, rather than packed in tightly within the roll. Takaoka also found the tempura's coating to lack a "crispy" texture, and the soba noodles to be too soft. Given his assessment, it was reasonable for Takaoka to conclude that Jones's lack of specialized training in Japanese cuisine could negatively affect the Employer's goal of providing the highest quality Japanese cuisine to the hotel's niche market of Japanese tourists.[4]

As to the cooking test, it is particularly difficult to assess the "objective" truth of the General Manager's impressions of the quality of food cooked by Jones. In any event, the law does not call upon the Hearing Officer to substitute his own judgment for that of the Employer; but simply to determine whether the Employer's decision not to hire a U.S. applicant was reasonable and just under the circumstances, or a decision made without just cause.

The Hearing Officer concludes that (a) the General Manager made an honest attempt to assess Jones's expertise in Japanese cooking, and (b) he was dissatisfied with the quality of Jones's food. Given the nature of the hotel's clientele and the niche market in which the Hafadai Beach Hotel operates, the Employer had a legitimate reason to believe the hotel needed an "expert" in Japanese cuisine in this position. In view of these concerns, GM Takaoka's

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[4] Jones's lack of expertise in Japanese cuisine would also hamper his ability to train subordinate cooks in proper techniques for preparing Japanese dishes, as well as his ability to plan effective Japanese menus.

negative assessment of Jones's performance on the food test was a legitimate basis for him to decide not to hire Jones as Executive Chef.

Furthermore, Jones's inability to speak and understand the Japanese language would have hampered his performance as Executive Chef. Employer showed that proficiency in the Japanese language is important for this job, as the position involves interacting with Japanese hotel guests, contacting suppliers in Japan for Japanese food items, and personally preparing Japanese meals for the CEO of Employer's parent corporation during his periodic visits to Saipan. Indeed, the Employer's advertisement for Executive Chef included a requirement that the applicant speak Japanese. (See Hearing Exhibit 12.) Although the General Manager said he would have assigned a translator to assist Jones if he were hired, each of the above-noted tasks would have been more difficult to accomplish with an Executive Chef who was unable to communicate in the Japanese language.

For these reasons, this Hearing Officer finds that this Employer's decision to reject Jones's application for the Executive Chef position was justified and not made "without just cause."

In so ruling, the Hearing Officer rejects various arguments made by complainants:

- The Department argues that it was improper and prejudicial for the Employer to involve Executive Chef Obata in the cooking test. The Hearing Officer finds that Obata's involvement was minimal and appropriate, and in no way affected the outcome of the test.
- The Department criticizes the test as arbitrary and unfair in that Jones was not given complete control over the cooking ingredients. The Hearing Officer disagrees. During the cooking phase, Jones was able to request ingredients, and Jones never complained about the quality of the cooking oil or other variables.
- The Department stated or implied that Jones had been unfairly subjected to time pressure during the cooking test. The Hearing Officer disagrees. It appears that Jones had ample time to cook the food, under conditions that duplicated actual conditions on the job. Further, Jones neither complained to the Employer about not having enough time, nor asked for more time from the Employer, on the day of the test.

- The Department argues that Takaoka set unreasonably high standards for the test by expecting the Japanese dishes to be prepared perfectly. Takaoka acknowledged that his standards were high , but noted that as these were standard Japanese dishes, Japanese hotel guests would expect them to be cooked expertly. As explained above, the Hearing Officer finds that it was appropriate for the Employer to set such a high standard for the Executive Chef position based on the particular facts of this case. [*But see* discussion re Sous Chef position, below.]

Based on the evidence presented, the Hearing Officer finds that complainants failed to meet their burden to prove that Jones's application for the Executive Chef position was rejected without just cause. Accordingly, judgment shall be entered in favor of the Employer on this issue.

II. The Employer Rejected Jones's Application For The Sous Chef Position Without Just Cause and In Violation of 3 CMC § 4528(a).

The second portion of this claim involves Jones's application for Sous Chef. Complainants have the burden of proving that Jones's job application for Sous Chef was rejected by the Employer "without just cause." 3 CMC § 4528(a). The Department of Labor statute, 3 CMC § 4528(a), does not define the term "just cause;" however, the Department's Employment Rules and Regulations [Section 80-50.4-230(a)] discuss "just cause" as follows:

(a) Just cause. The term "just cause" for rejecting an application for employment includes the lawful criteria that an employer normally applies in making hiring decisions such as ...rejecting persons with an employment history indicating an inability to perform the job successfully, rejecting persons with an educational background making it unlikely that the necessary education or training to hold the position could be accomplished successfully within a reasonable time, and similar just causes.

(b) Criteria. Any criteria in making hiring decisions advanced in support of just cause must be consistent with the published job vacancy announcement for the job and must be a part of the employer's established hiring procedures.

See NMIAC § 50.4-230(a).

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First, Jones had an employment history – ten years of experience as an Executive Chef at the Hyatt Regency Hotel - that indicated his ability to perform the job of "Sous Chef" successfully.

Secondly, even if his skills in Japanese cooking were not perfect, Jones's job history made it likely that he could be successfully trained to perform the job duties of the Sous Chef position within a reasonable time. In fact, Employer's Employee Handbook directs that all employees have a "training period" for the first three months of their employment. As the Handbook states in a section entitled "Training Period:"

> All new employees are required to undergo a training period during the first three (3) months of their employment with the Hotel. During this period, *new employees will have an opportunity to learn more about* the Hotel and *their job*. At the same time, the Hotel will have the opportunity to observe and analyze the new employee's capabilities and performance.... [Emphasis added.]

Hafadai Beach Hotel "Employee Handbook" at p. 3 (Hearing Exhibit 15).

In this case, it appears that General Manager Takaoka never even considered whether Jones's cooking skills in Japanese cuisine could be improved through training by Executive Chef Obata. The Employer acted as if the Sous Chef works completely independently of the Executive Chef's supervision and training. This was erroneous.

Executive Chef Obata, himself, testified that he had given tips and guidance to the current Sous Chef, Samsong Tan, when Tan had begun working at the Hafadai Beach Hotel. Chef Obata testified that in the beginning, he would demonstrate to Tan how to properly make dishes such as tempura, sushi and soba. Chef Obata agreed that such demonstrations had helped Tan to adopt methods in line with how Obata wanted him to prepare the food. (Testimony of Obata, taken on 10/24/12 a.m.) Moreover, Chef Obata testified that based on his observation of Jones at the cooking demonstration, Obata believed he could have trained Jones in exactly the methods he wanted him to use. *Id.* [5]

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[5] Specifically, the Hearing Officer asked Obata: "Based on his (Obata's) observation of Mr. Jones at the time he cooked his demonstration food, do you (Obata) believe you could have trained him (Jones) in exactly the methods you wanted him to cook the food?" Obata replied: "I believe so. I believe he would have been able to." (Testimony of Obata, taken on 10/24/12 a.m.)

The Employer's evaluation of Jones by means of the "cooking test" took a snapshot view of Jones's skills as if he were required to cook perfectly on his first day of work. Such evaluation was unduly strict in that it ignored the Employer's own written policy establishing a 3-month training period for all employees. Secondly, it ignored the on-the-job training that had been given by the Executive Chef to the current Sous Chef when he began working in his job.

As stated previously, GM Takaoka testified in detail regarding his specific criticisms of Jones's cooking (soba was too soft, tempura coating was not crunchy, sushi was not rolled tightly, etc.). The Employer then elicited testimony from Executive Chef Obata who testified that these deficiencies were caused by not using the exact, correct method in preparing these dishes. [Interestingly, Obata was not even made aware on the day of the cooking test that Jones was applying for the Sous Chef position.] Given that Obata had previously trained Samsong Tan by means of a series of demonstrations, it is reasonable to conclude that Obata could have corrected any of Jones's allegedly incorrect methods through demonstration and instruction, as well. In short, Executive Chef Obata could have trained Jones to become an expertly skilled Sous Chef in Japanese cuisine.

The concept of a training period, as established in Employer's own handbook, would make no sense if employees were expected to perform to perfection on their first day of work. Yet, this Employer subjected Jones to just such a standard in evaluating his cooking skills. Such evaluation was unjust, and contrary to the Employer's *own stated policies* regarding training.

Based on the evidence presented, the Hearing Officer finds that Employer rejected Jones's job application for the Sous Chef position "without just cause" in violation of 3 CMC § 4528(a). Accordingly, judgment shall be entered in favor of the complainants on this issue.

III. DAMAGES

Under the Commonwealth Employment Act of 2007,[6] a Hearing Officer, who adjudicates a case pursuant to 3 CMC § 4528(a) and finds in favor of the complainant, is authorized to "[a]ward actual and liquidated damages in an

[6] The Commonwealth Employment Act of 2007 (Pub. L. 15-108), as amended by the Immigration Conformity Act of 2010 (Pub. L. 17-1).

amount up to six months' wages for the job for which a citizen or CNMI permanent resident or U.S. permanent resident applied...." *Id.* § 4528(f); NMIAC § 50.6-820.

In this case, complainant Jones did not suffer lost wages as a result of being rejected for the Sous Chef position because less than a month after his rejection, he was offered and accepted an Executive Chef position at the Outrigger Resort Hotel in Guam. The salary for that job was more than twice the salary that Jones would have been paid at the Hafadai Beach Hotel.

Complainants argue that damages under the statute are not actually based on "lost wages," but merely capped at an amount "based" on six months' wages. This interpretation makes no sense and, if applied, would result in speculative damages contrary to general contract law principles. Complainants have cited no law for this novel position and the Hearing Officer is not persuaded that the Legislature intended a complainant to be awarded "actual" damages where none were suffered.

Further, complainant made a vague request for "travel expenses" but never submitted documents to substantiate this request. Therefore, complainant's request for his travel expenses is denied.

For the foregoing reasons, the Hearing Officer finds that complainant David R. Jones is not entitled to, and shall not be awarded, damages for the Employer's violation of 3 CMC § 4528(a).

IV. FINES

Under the Commonwealth Employment Act of 2007, a Hearing Officer who adjudicates a case under 3 CMC § 4528(a), and finds in favor of complainant, is authorized to "[l]evy a fine not to exceed two-thousand dollars for each violation of any provision of this chapter." 3 CMC § 4528(f); NMIAC § 50.6-820.

In this case, the Employer has been found to have violated the statute [3 CMC § 4528(a)] by rejecting a U.S. citizen's job application without just cause. Based on these findings and conclusions, the Hearing Officer believes it is appropriate to assess a fine against this Employer.

Although the Employer was mistaken in its conduct, there was no evidence that the Employer acted in bad faith. Accordingly, the Hearing Officer believes the

appropriate fine should be in the middle range, rather than the maximum amount ($2,000) as requested by the Department of Labor at the conclusion of the Hearing. The Employer shall be ordered to pay a fine of one thousand dollars ($1,000) for this violation.

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment (1):** As to the claim regarding the Executive Chef position, judgment is entered in favor of Respondent Saipan Hotel Corporation and against Complainants with respect to Respondent's rejection of Complainant's job application for Executive Chef. 3 CMC §§ 4528(a) and (f).

2. **Judgment (2):** As to the claim regarding the Sous Chef position, judgment is entered in favor of Complainants David R. Jones and the Department of Labor and against Respondent Saipan Hotel Corporation with respect to Respondent's rejection of Complainant's job application for Sous Chef. *Id.*

3. **Damages:** For the reasons set forth herein, Complainants' request for damages allegedly owed to David R. Jones as a result of Respondent's violation of 3 CMC § 4528(a), is denied. 3 CMC § 4528(f)(1).

4. **Fines:** For the reasons set forth herein, Respondent Saipan Hotel Corporation is hereby FINED in the amount of one thousand dollars ($1,000). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay the fine no later than thirty (30) days after the date of service of this Order. Payment shall be made by cashier's check or postal money order, made payable to the CNMI Treasury and delivered to the Hearing Office on or before the due date for payment.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: January 18, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	**CAC No.: 19-001-03T**
CNMI Department of Labor, Labor Enforcement Section	)	**ORDER**
Complainant,	)	
v.	)	
Star Marianas Air, Inc.,	)	
Respondent.	)	

I. INTRODUCTION

This matter came for an Administrative Hearing on June 11, 2019 at 9:00 a.m. at the Administrative Hearing Office of the CNMI Department of Labor. CNMI Department of Labor, Labor Enforcement Section, (hereinafter, "Enforcement") appeared telephonically and was represented by Investigator R. Casandra P. Cabrera-Viches. Respondent Star Marianas Air, Inc. (hereinafter, "Respondent"), was physically present[1] and represented by Attorney Joey P. San Nicolas.

II. BACKGROUND

This matter concerns an alleged violation of NMIAC § 80-20.1-235(e). On April 10, 2019, Enforcement filed a Determination, Notice of Violation & Notice of Hearing at the Administrative Hearing Office. Therein, Enforcement alleged, in part, that in connection to Job Vacancy Announcement 19-02-67446, Respondent failed to provide Applicants

[1] Specifically, President Shaun R. Christian, HR Specialist Hilary San Nicolas, Administrative Associate Melanie B. Cruz, and Management Advisor William Ling were present.

Sara Frost and Berlyne P. Higgins with Employer Declarations, as required by NMIAC § 80-20.1-235(e). Enforcement is seeking a monetary fine of $2,000 per violation and that Respondent be ordered to comply with the Employer Declaration Requirement.

On May 14, 2019, Respondent, by and through their Attorney, filed a Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim. Therein, Respondent argued that there was no statutory jurisdiction and the Declaration was not required because the company hired a U.S. Citizen.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing on the Determination and Respondent's Motion to Dismiss was held on June 11, 2019 at the Administrative Hearing Office.[2] The matter was taken under advisement and the undersigned now issues the following Findings of Fact and Conclusions of Law.

A. Jurisdiction is established by 3 CMC § 4942.

"The Administrative Hearing Office shall have original jurisdiction to resolve all actions involving alleged violations of the labor and wage laws of the Commonwealth, including but not limited to any violation of this chapter and regulations promulgated thereunder." 3 CMC § 4942.

This matter concerns a violation of the Employer Declaration requirement promulgated under Title 80 of the NMI Administrative Code. Title 80 was promulgated, in part, due to the statutory authority cited above. Accordingly, subject matter jurisdiction is established by 3 CMC § 4942.

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[2] Enforcement did not file a response to the Motion to Dismiss. During the June 11 Administrative Hearing, Enforcement indicated that it did not wish to dismiss the matter and wanted to proceed with the Hearing.

B. Respondent's Motion to Dismiss pursuant to Lack of Subject Matter Jurisdiction is Denied.

Respondent argues that this matter should be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1) of the Commonwealth Rules of Civil Procedure.[3] Motions to dismiss are permissible under NMIAC § 80-20.2-130(c)(1). Thereunder, "[a] motion to dismiss may be filed on the following grounds: (A) Lack of jurisdiction over the subject matter; (B) Lack [of] jurisdiction over the person; (C) Insufficiency of process; (D) Insufficiency of service of process; [and] (E) Failure to state a claim upon which relief can be granted.

As discussed above, jurisdiction is established by 3 CMC § 4942. Accordingly, Respondent's Motion to Dismiss for lack of jurisdiction is denied.

C. Respondent Motion to Dismiss for Failure to State a Claim is Granted.

CNMI law requires employers to give qualified citizens, CNMI permanent residents, and U.S. permanent residents preference for employment in the Commonwealth over foreign national workers, transitional workers, and nonimmigrant aliens. *See* 4 CMC § 4928; *see also* NMIAC § 80-20.1-220(a). To effectuate this employment preference and ensure maximum participation, notice of every vacancy in a full-time job in the private sector in the Commonwealth for which any person other than a citizen, CNMI permanent resident, or U.S. permanent resident may be hired must be given . . . ." NMIAC § 80-20.1-220 (b)(c). Generally, the employer gives said notice by posting a job vacancy announcement on the Department's website, www.marianaslabor.net." NMIAC § 80-20.1-225(a). Employers must take appropriate actions on referrals or applications received in connection to the online job vacancy announcement. *See* NMIAC § 80-20.1-235(c).

[3] It is important to note that the Administrative Hearing Office has not adopted the CNMI Rules of Civil Procedure. Further, the undersigned knows of no other legal authority binding the Administrative Hearing Office to the CNMI Rules of Civil Procedure. Although the CNMI Rules of Civil Procedure, and its progeny of cases, are not binding in administrative adjudications at the Administrative Hearing Office, it may be instructive.

Further, in the event a citizen, CNMI permanent resident, or U.S. permanent resident is not hired for the announced position, employers must file a declaration.

Specifically,

> In the event that a citizen, CNMI permanent resident, or U.S. permanent resident was not hired, within fourteen days after publication, the employer shall file a declaration on a standard form in digital format with respect to citizens and permanent residents who applied for the job, the action taken on each application, and a short statement of the reasons for rejecting any applicant who was referred. ***No declaration is required if a citizen or permanent resident is hired.***

NMIAC § 80-20.1-235(e) (emphasis added).[4]

Here, the Enforcement's determination is silent on whether a citizen or permanent resident was hired—therefore it was unclear whether the Employer Declaration was required or whether NMIAC § 80-20.1-235(e) was violated by Respondent. Further, Respondent's Motion to Dismiss, as well as testimony and exhibits from the Hearing, demonstrate that a US Citizen was hired. Specifically, the undersigned finds:

1. On February 18, 2019, Respondent posted a Job Vacancy Announcement, JVA No. 19-02-67446 ("JVA 19"), on the CNMI Department of Labor website for the position of Customer Service Specialist.
2. JVA 19 advertised five openings for a Customer Service Specialist.
3. The opening date for JVA 19 was February 18, 2019.

[4] In consideration of the time it takes to interview and substantial good faith efforts to comply with the regulations, the Administrative Hearing Office previously interpreted the fourteen day to toll "after the date on which the hiring decision is made." *DOL v. Kan Pacific Saipan Ltd.*, CAC No. 14-047-09 (Administrative Order issued Dec. 5, 2014 at 2). However, upon consultation with the Citizen Job Placement Section, the fourteen day deadline was calculated to start "after the closing date listed on the website." *DOL v. Ganacias dba KWAW-FM*, CAC No. 14-067-11 (Administrative Order issued Dec. 31, 2014 at 2). The latter decision is consistent with the plain language of the text and computation of time periods under NMIAC § 80-20.1-605. Accordingly, the fourteen day deadline begins to toll the day after the closing date listed on the Job Vacancy Announcement.

4. There was a total of two online responses to JVA 19. On February 19, 2019, Applicant Sara Frost ("Frost") responded to JVA 19. On February 25, 2019, Applicant Berlyne P. Higgins ("Higgins") responded to JVA 19.
5. On March 4, 2019, Respondent hired Mr. Fradley Jepen for one of the open positions. Mr. Jepen is a United States Citizen.[5]
6. The closing date for JVA 19 was March 5, 2019.
7. Subsequently, Respondent's Human Resource Specialist Hilary San Nicolas ("HR"), began to call applicants to schedule an interview.
8. With respect to Frost, HR called to schedule an interview on two occasions. Despite being called on two different days and two different times, there was no answer on the contact number provided. Accordingly, Frost was never interviewed or hired.
9. With respect to Higgins, HR called three times to schedule an interview. On the third call, an interview was scheduled for March 21, 2019. Ultimately, Higgins did not show for the interview. Accordingly, Higgins was never interviewed or hired.
10. Before notice of Enforcement's Determination, Respondent responded to the online applicants using the Department's website. Specifically, on March 25, 2019, Respondent indicated both applicants were "not selected."[6]
11. According to HR's verbal testimony, no other hires were made in connection to JVA 19. However, the hiring process is ongoing.

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[5] The record does not indicate whether Mr. Jepen was a walk-in applicant, when Mr. Jepen applied for the job, or when Mr. Jepen interviewed for the position. While informative, it was not relevant to the present inquiry in this matter given Mr. Jepen's citizenship status.

[6] It is unclear whether the online reply as to "not selected" met the content requirements of the Employer Declaration pursuant to NMIAC § 80-20.1-235(e). Specifically, there is nothing in the record that the online reply indicated the following: (1) who applied for the job; (2) the action taken on each application; and (3) a short statement of the reasons for rejecting any applicant who was referred or responded to the JVA.

Accordingly, at this time, the Employer Declaration is not required to submit an Employer Declaration and there is no showing of a violation of NMIAC § 80-20.1-235(e). In consideration of above, dismissal is appropriate.[7]

IV. CONCLUSION

Based on the foregoing, the Respondent's Motion to Dismiss is hereby **GRANTED**.

So ordered this **14th** day of June, 2019.

/s/
Jacqueline A. Nicolas
Administrative Hearing Officer

[7] *See DOL v. Kan Pacific Saipan Ltd*, CAC No. 14-047-09 (Administrative Order issued Dec. 5, 2014 at 2-3).

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Labor Enforcement Section, Complainant, v. Tian Hong Corporation, Respondent.	)	CAC No. 18-001-02(T) **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on April 25, 2018, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by investigator Ramona Cabrera-Viches and investigator Earl Borja. Respondent Tian Hong Corporation appeared through its Manager, Li Yuhua. Hearing Officer Jerry Cody, presiding. The hearing was conducted via a Skype internet connection with the Hearing Officer located in Saipan and the parties located in Tinian.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on April 13, 2018, against respondent Tian Hong Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleged that Employer failed to post job vacancy announcements ("JVAs") for the position of "Consultant" for the years 2017 and 2018, in violation of the Employment Rules and Regulations ("Regs."), codified in the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a).

At Hearing, Employer's Manager admitted that in 2017 and early 2018, Employer did not post a JVA for the Consultant position, even though it proceeded to petition

the United States Citizenship and Immigration Services ("USCIS") to employ a foreign national worker (Li, Zhirong) as a consultant in CW-1 status. USCIS approved that Petition in 2017 and the foreign national worker, Li, Zhirong, has been working for Employer in that position from November 19, 2017 to the present. [Hearing Exhibit 1 (Determination) at ¶ 8.]

Employer owns and operates a grocery store on Tinian, named the Tian Hong Market. As of the 4th quarter of 2017, Employer employed 5 employees: 1 U.S. citizen, 1 U.S. permanent resident, 1 EAD and 2 CW-1 status workers. [Total Workforce Listing signed by Manager Li, Yuhua, on January 16, 2018.]

Manager Li testified that in about 2016, the company's agent, Liu, Guo Hua, advised the Employer that it could advertise jobs on a local radio station rather than on the Department's website. This advice was incorrect. The Employment Rules and Regulations, codified at NMIAC § 80-20.1-225(a), states in pertinent part:

> An employer who intends to employ a foreign national worker, transitional worker, or nonimmigrant alien on a full-time basis (under any new employment arrangement, any renewal of any existing employment arrangement, or any transfer) must post a job vacancy announcement on the Department's website, www.marianaslabor.net.

Employer's reliance on the advice of its agent, was misplaced. For several years, Employer ignored its obligation to post JVAs on DOL's website and submitted Petitions to hire foreign national worker for the consultant position. USCIS granted the CW-1 Petitions and the foreign national worker began working for Tian Hong Corporation.

Enforcement filed the Determination (Hearing Ex. 1) after it noticed that Employer was employing a CW-1 status worker for the consultant job even thought it had not posted a JVA for the position on DOL's website. [Test. of Ms. Cabrera-Viches.]

DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at NMIAC § 80-20.1-225(e).

In this case, it is undisputed that the Employer made a decision not to post job announcements on DOL's website. Evidently, the Employer's decision stemmed from Employer's reliance on incorrect advice given by a local agent. The advice – that posting JVAs on DOL's website was not required - was mistaken. Moreover, in July 2016, DOL had informed Employer of its obligation to post JVAs for full-time vacancies and Employer had signed an acknowledgement of this message on July 19, 2016. [The signed acknowledgement was entered into evidence as Hearing Exhibit 2.]

Based on the above facts and admissions, the evidence establishes that Employer violated Department Regulations when it failed to post the consultant job on DOL's website in 2017 and 2018.

Sanctions: At Hearing Enforcement asked that Employer be assessed a reasonable fine for its conduct. [Testimony of Ms. Cabrera-Viches.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC § 80-20.1-485(c)(14).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

This Employer did attempt to advertise the job vacancy, albeit in the wrong location, via a radio advertisement. Ms. Li testified that while the radio ad was running, she was prepared to receive calls of interested persons, but Employer received no calls expressing interest in the position. Furthermore, Manager Li has represented that she intends to comply with the Department Regulation regarding the posting of JVAs in the future. This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned five hundred dollars ($500) for this violation. If the violation is repeated in the future, the recommended sanction shall be increased.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings, Respondent Tian Hong Corporation is found to have violated Department Regulations regarding an employer's obligation to post Job Vacancy Announcements on the DOL website. Regulations at NMIAC § 80-20.1-225(a). For this conduct, Respondent is SANCTIONED as set forth below.

2. **Sanctions:** Respondent Tian Hong Corporation is hereby SANCTIONED five hundred dollars ($500) for its conduct. Respondent is ORDERED to pay the fine no later than **forty-five (45) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Tian Hong Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 31, 2018

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 18-002-02(T)
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Huachang Corporation,	)	
dba 168 Poker,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on June 4, 2018, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by investigator Ramona Cabrera-Viches and Earl Borja. Respondent Huachang Corporation appeared through its corporate Secretary, Lu, Xuanbo. Ms. Wu, Shao Wen served as translator for Respondent. Hearing Officer Jerry Cody, presiding. [The hearing was conducted via an internet connection with the Hearing Officer and Ms. Lu in Saipan and the remaining parties located in Tinian.]

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on May 11, 2018, against respondent Huachang Corporation, *dba* 168 Poker ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post job vacancy announcements ("JVAs") for two jobs in Gaming Service on the DOL website, in violation of Employment Rules and Regulations. See Regs. at NMIAC § 80-20.1-225(a).[1]

[1] Enforcement also charged that Employer had failed to pay a small amount of wages on September 30, 2017, the day the federally-mandated minimum wage increased to $7.05 per hour, but later Enforcement moved to strike its charges after Employer established that it had paid proper wages on that day. [Testimony of Ms. Cabrera-Viches.] At hearing, the Hearing Officer granted Enforcement's Motion to Strike ¶¶ 6-8 of the Determination.

Employer owns and operates a poker game room (168 Poker) located on Tinian. Employer currently employs 3 full-time employees: one U.S. citizen, one CW-1 worker and one holders of an EAD (Employment Authorization Document). In late 2017, Employer employed two CW-1 status workers; however one worker (Lin, Feiqiong) resigned from the company in January 2018. [See Respondent's Total Workforce Listing for the 4th Quarter of 2017, entered into evidence as Hearing Exhibit 3.]

I. Failure to Post Job Vacancy Announcements:

The Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on DOL's website. [Regs. codified at the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a).] [2] There are no waivers available with respect to this requirement. *Id.* at NMIAC § 80-20.1-225(e).

At hearing, Employer admitted that it failed to post JVAs for the two jobs that it filled with CW-1 status workers in 2016 and 2017, as alleged in the Determination. [Testimony of corporate Secretary Lu, Xuanbo.] In 2016 and 2017, Employer petitioned USCIS to employ two CW-1 workers – Lin, Feiqiong and Lie, Lou - for Gaming Service jobs and USCIS approved those Petitions. Employer went on to employ both workers from 2016 through all of 2017. [Respondent's Total Workforce Listings for all 4 quarters of 2017, were entered into evidence collectively as Hearing Exhibit 3.]

When Employer was asked why it failed to utilize the DOL website in 2016, Secretary Lu stated that she had not known that employers were required to use DOL's website at that time. Instead, Employer advertised the job vacancies in on a local radio station for 4 days in March 2017. [See Letter from KWAW FM100.3 to USCIS, dated March 20, 2017, which was entered into evidence as Hearing Exhibit 4.]

As has been the case for five years, DOL continues to take the position that employers are required to post job vacancies on DOL's website for full-time jobs

[2] NMIAC § 80-20.1-225(a) states: "An employer who intends to employ a foreign national worker, transitional worker, or nonimmigrant alien on a full-time basis (under any new employment arrangement, any renewal of any existing employment arrangement, or any transfer) must post a job vacancy announcement on the Department's website, www.marianaslabor.net."

that might be filled by CW1 workers. Enforcement filed the present Determination after it examined the Total Workforce Listings (Hearing Exhibit 3) that noticed that Employer was employing CW-1 status workers for who it had not posted JVAs on DOL's website. [Testimony of Ms. Cabrera-Viches.]

After Employer received the Determination from Enforcement, it began posting JVAs on the DOL website. At hearing, Employer noted that it plans to utilize the DOL website in the future. [Testimony of Ms. Lu.]

Holding: Employer violated DOL Regulations [NMIAC § 80-20.1-225(a)] by failing to post JVAs on DOL's website for positions filled by two CW1 workers in the years of 2016-17 and 2017-18. For this conduct, Employer should be sanctioned as set forth below.

II. Sanctions:

Enforcement's Determination recommended that Employer be sanctioned with the maximum fine of $2,000 for each of its violations. Department Regulations leave the decision on the amount of sanctions to the Hearing Officer's discretion. 3 CMC § 4528(f)(2). In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. *Id.*

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC § 80-20.1-485(c)(14).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

The evidence presented in this case established two counts of a basic violation: Employer's failure to post JVAs on DOL's website in violation of DOL Regulations at NMIAC § 80-20.1-225(a). Although Employer did not utilize the DOL website; it did advertise the jobs using a local radio advertisement. Employer

testified that her failure to use the DOL website was due to her lack of knowledge of local Regulations, rather than an intentional plan to evade following CNMI labor laws and regulations. Furthermore, Employer testified that in the future Employer would post all of its JVAs on DOL's website in accordance with DOL Regulations. Based on the evidence presented taken together with the above-noted mitigating factors, the Hearing Officer finds it appropriate to assess a sanction against the Employer of $750 for its failure to post JVAs for a two-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings, Respondent Huachang Corporation is found to have violated DOL Regulations by failing to post JVAs on the DOL website. [Regs. at NMIAC § 80-20.1-225(a).] For this conduct, Respondent is SANCTIONED as set forth below.

2. **Sanctions:** Respondent Huachang Corporation is hereby SANCTIONED seven hundred and fifty dollars ($750) for its conduct. Respondent is ORDERED to pay the fine (by check made payable to the CNMI Treasury) no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Huachang Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 5, 2018

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Labor Enforcement Section, Complainant, v. Yongchang Corporation, *dba* 668 Poker, Respondent.	)	CAC No. 18-003-02(T) **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on June 19, 2018, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by investigator Ramona Cabrera-Viches. Respondent Yongchang Corporation appeared through its corporate secretary, Xu Guorong, and its employee, Huang, Guangliang. Ms. Wu, Shao Wen served as translator. Hearing Officer Jerry Cody, presiding. The hearing was conducted via a Skype internet connection with the Hearing Officer, Ms. Xu and Mr. Huang located in Saipan and the Ms. Cabrera and Ms. Wu located in Tinian.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on May 11, 2018, against respondent Yongchang Corporation, *dba* 668 Poker ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post two job vacancy announcements ("JVAs") on the DOL website in 2017, in violation of CNMI

Employment Rules and Regulations, codified at the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a). [1]

I. Failure to Post Job Vacancy Announcements:

DOL Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on DOL's website. Regs. at NMIAC § 80-20.1-225(a).[2] There are no waivers available with respect to this requirement. *Id.* at NMIAC § 80-20.1-225(e).

Employer owns and operates a poker game room (668 Poker) on Tinian. Employer currently employs 7 employees, two of whom are CW-1 status workers. [See Total Workforce Listing at Hearing Exhibit 7.]

At Hearing, Employer admitted that it failed to post JVAs for two positions in Gaming Service in 2017. [Testimony of Ms. Xu.] Meanwhile, Employer petitioned USCIS to employ two CW-1 workers – Huang, Guangliang and Zhong, Wenqing - for these Gaming Service jobs. Evidently, the petitions were approved by USCIS and the workers were employed by Employer. [See Total Workforce Listing for the 4th Quarter of 2017, entered into evidence as Hearing Exhibit 6.]

Secretary Xu, Guorong, noted that in 2017, she had not realized that employers were required by regulation to advertise job vacancies on DOL's website. Instead, Employer advertised these two job openings in March 2017 on a local radio station, KWAW-FM. [See Hearing Exhibit 4 – letter from Mr. Ganacias of KWAW-FM, dated 3/27/2017, confirming that the radio advertisement ran for three days, from March 24 to 26, 2017.]

Since learning about the regulation, Employer has since advertised job vacancies on the DOL website. [Testimony of Ms. Xu and Mr. Huang. See Hearing Exhibit

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[1] Enforcement also charged that Employer had failed to pay a small amount of wages on the day the federally-mandated minimum wage increased to $7.05 per hour, but later Enforcement moved to strike its charges after Employer offered to pay the proper wages for that day. [Testimony of Ms. Cabrera-Viches.] The Hearing Officer granted Enforcement's Motion to Strike ¶¶ 6-9 of the Determination.

[2] NMIAC § 80-20.1-225(a) states: "An employer who intends to employ a foreign national worker, transitional worker, or nonimmigrant alien on a full-time basis (under any new employment arrangement, any renewal of any existing employment arrangement, or any transfer) must post a job vacancy announcement on the Department's website, www.marianaslabor.net."

5 (copy of JVA 18-03-57407 – posted on DOL website from March 13 to 28, 2018).]

DOL continues to take the position that employers are required to post job vacancies on DOL's website for full-time jobs that might be filled by CW-1 workers, notwithstanding the fact that USCIS has no specific requirement to that effect with respect to CW-1 Petitions. In this case, Enforcement asserts that Employer's failure to post JVAs for the full-time positions held by Employer's two CW-1 status workers, violated the Regulations at NMIAC § 80-20.1-225(a).

Holding: Employer violated DOL Regulations [NMIAC § 80-20.1-225(a)] by failing to post JVAs on DOL's website for two positions filled by two CW-1 workers in 2017. For this conduct, Employer should be sanctioned as set forth below.

II. Sanctions:

Enforcement recommended that Employer be sanctioned with an appropriate fine for each of its violations. At the conclusion of the Hearing, Enforcement appeared to leave the decision on the amount of sanctions to the Hearing Officer's discretion. [Testimony of Ms. Cabrera-Viches.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC § 80-20.1-485(c)(14).

The Hearing Officer finds that the facts here do not justify the maximum sanction. The evidence presented in this case establishes that Employer committed two counts of a basic violation. Employer failed to post JVAs on DOL's website in violation of DOL Regulations at NMIAC § 80-20.1-225(a). However, there are several facts that should be taken into consideration in mitigating the sanction. First, Employer did advertise the job vacancies in March 2017, even though it did not use the DOL website in 2017, but instead, used a local radio station (Hearing Exhibit 4). Second, in 2018, Employer self-corrected its conduct and posted JVAs

on the DOL website in accordance with DOL regulations. (See Hearing Exhibit 5). Third, Employer has promised that in the future, it will continue to abide by the DOL regulation and post its job vacancies on DOL's website. Taking all facts into consideration, the Hearing Officer finds it appropriate to sanction the Employer five hundred dollars ($500) for its failure to comply with DOL Regulations in 2017.

III. Power of Attorney Issue:

During this hearing, it was learned that in January 2017, Secretary Xu, Guorong, gave a Power of Attorney to employee Huang, Guangliang, authorizing Mr. Huang "to handle all the company-related documents including CUC, bank, etc." [A copy of the Power of Attorney issued to Huang, Guangliang from Secretary Xu, was entered into evidence as Hearing Exhibit 3.] This document authorizes Mr. Huang, in effect, to write his own paycheck, payable to himself, as well as other paychecks to Employer's other employees. Huang also writes other legal documents for the corporation. While this is not a violation of CNMI labor statutes *per se*, it is problematic for an employee to be serving as the *de-facto* Manager of a business while officially permitted to work under CW-1 status as its "poker machine mechanic." [3]

Resolution of this issue goes beyond the scope of the present case. The Hearing Officer recommends that Enforcement review this situation to determine whether the matter can be resolved expeditiously without involving the Hearing Office. If an Order is required, Enforcement should submit a request to the Hearing Office.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings, Respondent Yongchang Corporation is found to have violated DOL Regulations by failing to post two JVAs on the DOL website in 2017. [Regs. at NMIAC § 80-20.1-225(a).] For this conduct, Respondent is SANCTIONED as set forth below.

2. **Sanctions:** Respondent Yongchang Corporation is hereby SANCTIONED five hundred dollars ($500) for its conduct. Respondent is ORDERED to pay the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of

[3] An additional problem was identified in that a non-employee "supervisor," Thelma Carreon, has been signing the company's Total Workforce Listings. It is problematic to have a non-employee, who is neither an officer nor a director, signing such document under penalty of perjury. [See, e.g., Hearing Exhibits 6 and 7.] The Hearing Officer instructed Corporate Secretary Xu, Guorong, that she should sign the next Total Workforce Listing.

payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Yongchang Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 20, 2018

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 18-004-05(T)
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Evelyn F. David,	)	
dba E&M Beauty Salon,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on June 12, 2018, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by investigator Earl Marc E. Borja. Respondent Evelyn F. David appeared with her employee, Mercedes L. Wayacan. Hearing Officer Jerry Cody, presiding. [The hearing was conducted via an internet connection with the Hearing Officer in Saipan and the remaining parties located in Tinian.]

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on May 31, 2018, against respondent Evelyn F. David, *dba* E&M Beauty Salon ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a job vacancy announcement ("JVA") for a "beautician" job on the DOL website in 2017 and 2018, in violation of Employment Rules and Regulations. See Regulations, codified at the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a).

Employer owns and operates the "E&M Beauty Salon" on Tinian. Employer currently employs one full-time employee: a CW1 status worker named Mercedes L. Wayacan, who has worked as a beautician at E&M Beauty Salon since 2009. [Testimony of Ms. David and Ms. Wayacan.]

I. Failure to Post Job Vacancy Announcements:

The Regulations: The Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on DOL's website. [Regs. codified at the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a).] There are no waivers available with respect to this requirement. *Id.* at NMIAC § 80-20.1-225(e).

Employer Admission: At hearing, Employer admitted that she had failed to post a JVA on DOL's website for a beautician job for two consecutive years – 2017 and 2018, as alleged in the Determination. [Testimony of Ms. David.] In fact, Employer had posted the JVA for that position in 2015, but in 2017 and 2018, Employer instead chose to advertise the beautician job on a local radio station.

Radio Advertisements: Employer produced evidence of the radio advertisements by means of two letters issued by the radio station, KWAW-FM. Hearing Exhibit 3 is a letter from KWAW-FM, dated 4/06/2017, confirming that Employer placed a radio ad for one job vacancy for the job of beautician, which was announced on the radio from March 30 to April 5, 2017. Hearing Exhibit 4 is a letter from KWAW-FM, dated 2/28/2018, confirming that Employer placed a radio ad for one job vacancy for the job of beautician, which was announced on the radio from February 21 to 27, 2018. Employer testified that no job applicants applied for the job as a result of these radio advertisements. [Testimony of Ms. David.]

USCIS Approval of CW1 Status: Employer petitioned USCIS to employ this CW1 worker, Ms. Wayacan, for the job of beautician in 2015, then again on 2017 and 2018. Employer went on to employ Ms. Wayacan from 2015 until the present. Employer produced an Approval Notice of CW1 status, issued by USCIS with respect to Ms. Wayacan for the 2016-2017 period (11/07/2016 to 11/06/2017). This document, entitled "I-797A – USCIS Approval Notice," was entered into evidence as Hearing Exhibit 2.

As has been the case for five years, DOL continues to take the position that employers are required to post job vacancies on DOL's website for full-time jobs that might be filled by CW1 workers. Enforcement filed the present Determination after an investigator noticed that Employer was employing a CW1 status worker in a job which had not been posted on DOL's website for several years. [Hearing Exhibit 1 at ¶ 2.]

Holding: Employer violated DOL Regulations [NMIAC § 80-20.1-225(a)] by failing to post a JVA on DOL's website for a beautician job in the years of 2017 and 2018. The Employer went on to hire a foreign national worker for the position. For failing to post the JVA, Employer should be sanctioned as set forth below.

II. Sanctions:

Enforcement's Determination recommended that Employer be sanctioned with the maximum fine of $2,000 for each of its violations. Department Regulations leave the decision on the amount of sanctions to the Hearing Officer's discretion. 3 CMC § 4528(f)(2). In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. *Id.*

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC § 80-20.1-485(c)(14).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

The evidence presented in this case established two counts of a basic violation; namely, Employer's failure to post a JVA on DOL's website for a full-time job which was filled by a foreign national worker. The Employer did not post a JVA for the beautician job in 2017 and 2018, in violation of DOL Regulations at NMIAC § 80-20.1-225(a). Although Employer did not use the DOL website in 2017 and 2018; she did advertise the job using a local radio advertisement. Employer testified that her failure to use the DOL website was due to her lack of knowledge of local Regulations. Furthermore, Employer testified that in the future she would post JVAs for her job vacancies on DOL's website in accordance with DOL Regulations. Based on the evidence presented, taken together with the above-noted mitigating factors, the Hearing Officer finds it appropriate to sanction

this Employer with a $500 fine for its failure to post the beautician JVA for a two-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings, Respondent Evelyn F. David is found to have violated DOL Regulations [Regs. at NMIAC § 80-20.1-225(a)] by failing to post a JVA on the DOL website for two consecutive years – 2017 and 2018. For this conduct, Respondent is SANCTIONED as set forth below.

2. **Sanctions:** Respondent Evelyn F. David is hereby SANCTIONED five hundred dollars ($500) for her conduct. Respondent is ORDERED to pay the fine (by check made payable to the CNMI Treasury) no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Evelyn F. David is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 15, 2018

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, **v.** Saipan Marine Corporation, Respondent.	)	CAC No. 18-027-07 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on July 24, 2018, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. DOL's Enforcement and Compliance Section was represented by investigator Arlene Rafanan. Respondent Saipan Marine Corporation appeared through its Executive Assistant Michelle H. Tomokane. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Violation ("Determination") filed by DOL's Enforcement and Compliance Section ("Enforcement") in the Hearing Office on July 10, 2018, against respondent Saipan Marine Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post several job announcements in violation of CNMI Rules and Regulations ("Regs."). See Regs. at the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a). The relevant Regulations state that an employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

The facts of this case are straightforward. In the past, Employer has posted job vacancy announcements ("JVAs") on DOL's website with the assistance of its

Executive Assistant, Michelle H. Tomokane. In June 2018, while Ms. Tomokane was on a one-month leave from her job, Employer placed a newspaper advertisement in the Saipan Tribune that announced three job vacancies – for the jobs of master, engineer and deckhand. [A copy of the newspaper advertisement announcing the vacancies was entered into evidence as Hearing Exhibit 2.]

Employer advertised in the newspaper instead of posting on the DOL website because Ms. Tomokane, who was on leave, was the only employee with knowledge about how to post JVAs on the website. [Testimony of Ms. Tomokane.]

Employer received no responses from any job applicants as a result of its newspaper advertisement. Employer has not submitted any Petitions for CW-1 status workers to fill these positions. At Hearing, Employer stated that it would have no objection to re-posting these JVAs on DOL's website in the near future. [Testimony of Ms. Tomokane.]

In July 2018, Enforcement was notified by DOL's Employment Services Section that Employer had advertised the above-noted job vacancies in the local newspaper but had not posted those JVAs on DOL's website. Based on its belief that Employer had violated the Department's Rules and Regulations by failing to post the job on the website [Regs. at NMIAC § 80-20.1-225(a)], Enforcement filed its Determination. This hearing followed.

DISCUSSION

CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew the employment of a foreign national worker must post a job vacancy announcement on the Department's website. Regs. at NMIAC § 80-20.1-225(a). No waivers are available with respect to this requirement. *Id.* at NMIAC § 80-20.1-225(e).

Employer admits that it announced these three job vacancies in a local newspaper rather than filing JVAs on DOL's website. It further admits that it may hire foreign national workers if it cannot find U.S status-qualified workers to fill the positions. Based on the evidence presented, Employer appears to have violated the Regulations at NMIAC § 80-20.1-225(a), by failing to post the vacancies on the DOL website.

Sanctions: The Commonwealth Employment Act of 2007, as amended, notes with respect to job vacancy announcements that "[a]ny employer seeking permission to employ workers other than citizens or CNMI permanent residents and U.S. permanent residents shall utilize the Department as provided in this chapter. 3 CMC § 4522. As stated above, DOL Regulations require Employer to post JVAs on DOL's website as to any JVA that may result in full-time employment of a foreign national worker. [Regs. at NMIAC § 80-20.1-225(a).]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." [Regs. at § 80-50.4-820(h) and (o).]

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the Hearing Officer imposed a $2,000 sanction involved cases in which the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (*See, e.g.*, CAC No. 14-008-03, *Department of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

Several factors in this case justify mitigating the amount sanctions assessed in this case. First, Employer's conduct was not willful. This Employer simply assumed that it could use a local newspaper because its normal route of posting on the DOL website was frustrated by its Executive Assistant going on leave. Second, Employer has not finished its hiring process and has offered to remedy this error by re-posting the three JVAs on DOL's website in the near future. Third, unlike recent Agency cases in which employers failed to post JVA, but then hired CW-1 status workers, no foreign national worker has yet been hired for these positions.

Notwithstanding the above factors, Employer's claimed ignorance of the regulations should not absolve Employer from its responsibility to follow the law. Accordingly, having considered the matter carefully, the Hearing Officer finds that Employer should be ordered to pay a sanction of $300; and should be ordered to

re-post the JVAs for the three positions (master, engineer and deckhand) on DOL's website as ordered below.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings and conclusions, judgment is entered against Respondent Saipan Marine Corporation for failing to post job vacancy announcements on DOL's website in accordance with DOL's statutes and regulations. [Regs. at NMIAC § 80-20.1-225(a); 3 CMC §§ 4522 and 4528(f)(2).] Accordingly, Respondent shall be ordered to pay sanctions and re-post three job vacancy announcements, as set forth below. [3 CMC §§ 4528(f)(2) and 4947(11).]

2. **Sanctions:** Respondent Saipan Marine Corporation is SANCTIONED three hundred dollars ($300) for failing to post JVAs in violation of Regulations. Respondent is ORDERED to pay the fine no later than twenty (20) days after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website:** Respondent Saipan Marine Corporation is ORDERED to post three job vacancies for the positions of master, engineer and deckhand on the Department's website (www.marianaslabor.net) no later than fifteen (15) days after the date of issuance of this Order. Respondent shall submit proof of posting of the JVAs to the Hearing Office on or before the due date. [Regs. at NMIAC § 80-20.1-225(a) and 3 CMC § 4947(11).]

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to further sanctions after a due process hearing on the issue.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: July 25, 2018

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Zajradhara, Zaji O., Appellant, v. Department of Labor Enforcement And Compliance Section, Appellee.	)	C.A.C. Appeal No. 17-001 **ADMINISTRATIVE ORDER DISMISSING APPEAL OF DETERMINATION; AND REVISING CAPTION OF C.A.C. NO. 16-009-09**
Department of Labor Enforcement And Compliance Section, Complainant, v. ZY Corporation, Respondent.	)	C.A.C. No. 16-009-09

This Appeal came on for a Status Conference on May 25, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. Appellant Zaji O. Zajradhara appeared pro se. Appellee Department of Labor Enforcement and Compliance Section ("Enforcement") appeared through investigator Ben Castro. Respondent ZY Corporation appeared through its attorney, Robert T. Torres. Hearing Officer Jerry Cody, presiding.

After hearing the arguments of the parties and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This is an appeal of a Determination, Report of No Violation, issued by Enforcement on February 28, 2017, in connection with its Compliance Agency Case No. 16-009-09 (*Department of Labor Enforcement and Compliance Section v. ZY Corporation*) (hereinafter, "Agency Case").

Enforcement opened the Agency Case to investigate a complaint made by U.S. citizen, Zaji O. Zajradhara ("Zaji"). Zaji complained that ZY Corporation had

failed to afford Zaji his lawful preference in hiring in violation of CNMI preference laws and regulations. In its Determination, Report of No Violation ("Determination"), Enforcement concluded that ZY Corporation had not violated CNMI laws and regulations when it failed to hire Zaji for several job openings in 2016. [Determination, Findings at p. 3, ¶ 1.]

On March 3, 2017, Zaji filed this Appeal of the Determination (C.A.C. Appeal No. 17-001) to contest the findings and conclusions of the Determination. The Hearing Officer then scheduled this Status Conference to discuss certain procedural issues with respect to this Appeal.

During the Status Conference, Appellant, Appellee and ZY Corporation each agreed that Zaji and ZY Corporation should be afforded the right to present evidence in support of their respective claims or defenses. [1] The Hearing Officer finds that the best way to preserve the due process rights of all parties in this situation is to allow Appellant Zaji to be substituted in as a complainant in CAC No. 16-009-09; and then, hold an evidentiary hearing regarding that Compliance Agency Case to adjudicate the claims made by Zaji.

This procedural solution would ensure that Complainant's rights are protected. At the same time, Enforcement could still maintain its findings and conclusions, which will be given appropriate weight by the Hearing Officer, at his discretion, when the case is adjudicated. At the Status Conference, no party objected to this solution.

Based on the above revision of the Agency Case caption, the Appeal of the Determination shall be dismissed.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Revision of Caption (CAC No. 16-009-09):** Based on the foregoing, it is ORDERED that Appellant Zaji O. Zajradhara's name shall be added to CAC No. 16-009-09 as a complainant. This substitution shall allow Mr. Zadradhara to present evidence in support of his claim against ZY Corporation in an evidentiary hearing to be scheduled in the future.

[1] At the evidentiary hearing of CAC No. 16-009-09, Enforcement shall be allowed to present evidence in support of its Determination, and the Hearing Officer, as trier of fact, shall determine the appropriate weight to give the Determination, as he sees fit.

[C.A.C. Appeal No. 17-001, C.A.C. No. 16-009-09]

2. **Dismissal of Appeal:** The above-captioned appeal of the Determination, Report of No Violation is hereby DISMISSED.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 26, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 17-001-02
Department of Labor Enforcement	)	DC No. 17-001
and Compliance Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
YWA Human Resource CNMI Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case/Denial Case came on for hearing on March 9, March 28, and May 2, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent YWA Human Resource CNMI Corporation appeared through its President, Matthew S. Fejeran, its General Manager, Benigno T. Fejeran, and its accountant, Rogelio C. Valguna. Real Party In Interest Zaji Zajradhara testified in support of his claim. Employee Rosalee Abejo testified in support of Respondent. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

AGENCY CASE

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on February 17, 2017, against respondent YWA Human Resource CNMI Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination (Hearing Exhibit 1) alleges that Employer failed to comply with several labor regulations and statutes:

(1) Employer failed to post numerous Employer Declarations on the Department of Labor ("DOL") website in 2016, in connection with job

vacancy announcements ("JVAs") posted for 17 jobs in violation of CNMI Employment Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-235(e).

(2) Employer failed to make a good faith effort to hire U.S. status-qualified citizens for job vacancies in violation of Regulations at NMIAC § 80-20.1-235(d).

(3) Employer failed to give a citizen, Zaji Zajradhara, job preference for employment in the private sector. [Regs. at NMIAC § 80-20.1-220.] Moreover, Employer unjustly rejected that qualified U.S. citizen for a job, giving rise to damages under 3 CMC §§ 4528(a) and 4528(f)(1).

* * * * *

1. Employer Failed to Post "Employer Declarations" to Prospective Job Applicants.

The Department's "Employer Declaration" Regulation requires an employer to post an online "declaration" on the DOL website (www.marianaslabor.net) in cases where the employer posted a job vacancy, then failed to hire a U.S.-status qualified job applicant who was referred for that particular job. [Regulations at NMIAC § 80-20.1-235(e).] In such cases, the regulation requires the employer to post a short response to each responder, explaining: (1) the action it took with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. *Id.* If a U.S. citizen is hired for the position, the employer is not required to post a declaration to the other job applicants. *Id.*

In its Determination, Enforcement charged that Employer failed to post Employer Declarations with respect to 17 JVAs that Employer posted in 2016:

JVA No.	Job Title	JVA: Opening Date
16-10-42266	Kitchen Helper	10/21/16
16-10-42205	Childcare	10/15/16
16-10-42206	Childcare	10/15/16
16-10-42182	Carpenter	10/13/16
16-10-42101	Maid & Housekeeping	10/10/16
16-10-42094	Forman – Septic System Operation	10/08/16
16-10-42095	Carpenter	10/08/16
16-10-42096	Plumber	10/08/16

16-10-42019	Painter	10/05/16
16-10-41880	Greeters	9/29/16
16-10-41124	Hairstylist/Beautician	8/12/16
16-10-41106	Marketing Research Analyst	8/11/16
16-10-40802	Sales Representative-Org. Produce	7/23/16
16-10-39914	General Maintenance	6/15/16
16-10-38265	Greeters	5/20/16
16-10-37308	Maid & Housekeeping	4/07/16
16-10-36603	Childcare	3/04/16

At Hearing, Employer testified that the company had decided to cancel the first 10 of the above-listed JVAs (Kitchen Helper through Greeters) when it learned that the federal cap for hiring CW1-status workers for 2017 had been reached and that no further CW1 petitions for 2017 employment would be granted by USCIS. [Testimony of Mr. Benigno T. Fejeran.] Although Employer decided to abandon these JVAs, Employer never notified DOL or took steps to cancel the JVAs, and never posted declarations to the online responders for these jobs. (See further discussion of this conduct on page 4, item 2.)

As to the remaining 7 positions, Employer did not hire U.S. citizens or permanent residents for 6 of these positions (excepting Greeters), but instead hired CW1-status workers. Employer failed to post declarations to the online responders. At Hearing, Employer then admitted it had not posted declarations, but noted that it did consider the responders for these jobs. Employer sent each responder an invitation to appear for a job interview, yet none of them showed up. [Testimony of Ben T. Fejeran, Matthew S. Fejeran, and Rogelio Valguna.] Enforcement did not challenge Employer's assertions that it properly considered responders in 5 out of the 7 posted JVAs; however, two JVAs were contested. As to those two JVAs (Greeter and Events/ Marketing Coordinator), testimony was taken with respect to allegations made by a U.S. citizen, Zaji Zajradhara. (See discussion on pp. 5-8).

Holding: Employer violated the Regulation [NMIAC § 80-20.1-235(e)] by failing to send "declarations" to online responders of 16 of the above-listed JVAs, explaining why they had not been hired to those jobs.[1] As to the first 10 JVAs that Employer claims to have abandoned, a simple notification should have been sent, informing each applicant that Employer had decided not to proceed with the hiring.

[1] As to the JVA for Greeter (JVA 16-10-38265), Employer was not legally required to file declarations because it hired U.S. citizens to fill the positions. [See language of NMIAC § 80-20.1-235(e).]

As to the remaining JVAs, Employer should have sent "declarations" to each responder after it made its hiring decisions.

Enforcement recommended that Employer be sanctioned for its conduct. The Hearing Officer agrees that sanctions should be assessed. The amount of such sanctions will be addressed at the conclusion of this Order (see "Sanctions" at pp. 10-11).

2. Employer failed to make a good faith effort to hire U.S. status-qualified citizens for job vacancies in accordance with Regulations at NMIAC § 80-20.1-235(d).

Employer admitted that it abandoned 10 JVAs when it learned that the cap for CW1 Petitions had been reached for 2017. [Testimony of Ben Fejeran.] Mr. Fejeran's answer reveals an uncomfortable truth about this Employer's manpower operation – namely, that these manpower jobs were designed to protect employment for *particular CW1 workers*. The evidence demonstrates that Employer had no interest in opening up the field to possible employment of U.S. citizens. This is why Employer closed its job search for 10 positions as soon as it learned that the CW workers in these jobs could not be renewed.

Such conduct evidences a lack of good faith with respect to affording U.S. citizens and permanent residents their legal preference in employment. [Regs. at NMIAC § 80-20.1-220]. In addition, Employer's treatment of Zaji Zadradjara with respect to the Events/Marketing Coordinator job evidences a failure to make a good faith effort to hire U.S. citizens. [See discussion at pp. 6-7 regarding the Events and Marketing Coordinator job.]

3. Employer failed to give a U.S. citizen, Zaji Zajradhara, job preference for employment in the private sector, in violation of Regulations at NMIAC § 80-20.1-220. In addition, Employer unjustly rejected this qualified U.S. citizen for a job. 3 CMC § 4528(a).

Enforcement charged that Employer failed to give preference in employment to U.S. citizen, Zaji Zajradhara (hereinafter, "Zaji"), with respect to two jobs – Greeter and Events and Marketing Coordinator - for which Zaji claimed he had attempted to submit job applications. These two JVAs are discussed separately below.

A. **Greeter**

Employer posted a JVA (JVA No. 16-05-38265) from May 20 to June 4, 2016, advertising five positions for "Greeter." [A copy of the JVA was entered into evidence as Hearing Exhibit 3.]

On about May 25, 2016, Mr. Zaji emailed Employer about the JVA and attached his resume. Zaji stated that he was attaching his resume "for the JVA position 16-05-38265." [A correct copy of the JVA was entered into evidence as Hearing Exhibit 4.] Employer's staff, Rose Abejo, replied to Zaji about an "electrician position," stating that Employer had emailed Zaji back in April 2016, but he never showed up.[2] *Id.* Zaji replied that "this resume submission was for the position as advertised as 'greeters' (JVA) 16-05-38265." Employer's accountant, Mr. Valguna, then replied: "Oh, ok, but the hiring is filled up already. We will notify you next time hiring. Thanks, Roger." *Id.*

Employer testified that it posted this "Greeter" JVA for its client, Imperial Pacific International (CNMI) LLC, *dba* Best Sunshine International ("Best Sunshine"), which sought greeters for its casino operation. Employer's practice was to post the JVA, then contact the online responders and invite them to come to Employer's office on a certain date. On that date, Employer would send the applicants to Best Sunshine's office to be interviewed. Best Sunshine would choose which applicants it wished to employ; Employer would follow Best Sunshine's instructions and hire the individuals that its client had selected. [Testimony of Ben T. Fejeran and Matthew S. Fejeran.]

As to the Greeter position posted in May 2016, Employer testified that it sent two U.S. citizen walk-in applicants (Matthew Fejeran's nephew and a U.S. citizen named Ethan P. Reyes) to Best Sunshine to interview for the Greeter job; these two applicants were hired. After selecting the two applicants, Best Sunshine informed Employer that it did not need more Greeters. At that point, Employer considered the job search closed and it stopped sending applicants to Best Sunshine to be interviewed. Employer neglected to officially "cancel" the JVA by contacting DOL's Job Placement Section. [Testimony of Mr. Valguna and Ms. Abejo.]

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[2] At Hearing, Rose Abejo testified that when she received Zaji's email (Hearing Exhibit 4), she mistakenly thought he was re-applying for an electrician position that Employer had posted months earlier. In fact, Zaji was trying to apply for the "Greeter" job. [Testimony of Ms. Abejo.]

The evidence shows that by the time Zaji contacted Employer about the Greeter job on May 25, 2016, the two U.S. citizen applicants had already been hired and Employer had heard from Best Sunshine that it no longer needed Greeters. For that reason, Mr. Valguna informed Zaji that the position was closed. [Testimony of Mr. Valguna; Hearing Exhibit 4.]

Holding: The Department of Labor does not prohibit an employer from cancelling a JVA. Based on the facts presented, Employer acted reasonably in not forwarding Zaji's resume to Best Sunshine and in telling Zaji that the position was closed. After all, Best Sunshine had already selected two U.S. citizen greeters and informed Employer that it did not wish to hire any more. Employer can be faulted for failing to officially cancel the JVA, but otherwise, this conduct does not constitute a failure to abide by CNMI preference laws.

B. Events and Marketing Coordinator

In early June 2016, Employer's client, Best Sunshine, informed Employer that Best Sunshine had been using a CW1 worker (Joel Tagalicud) through a manpower arrangement with St. Trading and now, Best Sunshine wanted the worker transferred from St Trading to Employer. [Testimony of Mr. Valguna and Ms. Abejo.]

Obliging its client, Employer posted a JVA (JVA No. 16-06-40026) advertising the job of "Events and Marketing Coordinator." The JVA was posted on DOL's website from June 18 to July 3, 2016. [A correct copy of the JVA was entered into evidence as Hearing Exhibit 9.]

On June 19, 2016, Zaji sent an email to Employer with a subject line that read: "JVA No. 16-06-40026." Zaji attached his resume and stated: "Attached you shall find my resume for the position as advertised. I thank you in advance for your consideration." [A copy of this email was entered into evidence as Hearing Exhibit 10; Zaji's resume was entered into evidence as Hearing Exhibit 11.]

Employer received Zaji's email but never responded to it. Ms. Abejo testified that when she received the email, she paid no attention to the listed JVA number; instead, she searched Zaji's name in the company's records and believed he was applying for construction work. [Testimony of Ms. Abejo.]

Ms. Abejo testified that after posting the JVA, Employer sent an email to the five persons who had posted online responses to the JVA, inviting them to come to

Employer's office for interviews on June 24 and 27, 2016. Nobody showed up for the interview. Shortly thereafter, Employer hired the CW1-status worker (Joel Tagalicud) who had been referred by Best Sunshine for the position.

In its Determination, Enforcement charged that Employer had failed to give legal preference in employment to Zaji Zajradhara, a U.S. citizen, in violation of the Regulations. [Regs. at NMIAC § 80-20.1-220.] By oral motion, Enforcement also invoked the provisions of 3 CMC § 4528(a) and its damage provisions; and thereby recommended that Zaji be awarded damages amounting to six months of wages, based on the employer's unjust rejection of his application. [Hearing Exhibit 1 at p. 3, recommendation "b."]

(1) Mr. Zajradhara's Claim Under 3 CMC § 4528(a).

The four elements of an offense under 3 CMC § 4528(a) are: (1) the U.S. citizen is qualified for a job; (2) the employer has not met the requirements of 3 CMC § 4525; (3) the employer rejects the citizen's application for the job without just cause; and (4) the employer then hires a person who is not a U.S. citizen or permanent resident, such as a CW1-status worker, for the position.[3]

Based on the evidence presented, the Hearing Officer finds that each element of the offense has been met. First, Zaji appears qualified for the advertised job. The JVA (Hearing Exhibit 9) listed the job requirements as "With 2 years work experienced. Hardworking and can handles pressure. Can work night shift and flexible to any type of works." The JVA described the job duties using convoluted descriptions and obtuse phrases. One such example, taken from the job duties section, states: "Analyze research, data, or technology to understand user intent and measure outcomes for ongoing optimization." At Hearing, Employer's Accountant described the job duties in simpler terms. According to Mr. Valguna, the job of Events and Marketing Coordinator involved communicating with local hotels to do the promotion and marketing for the casino. This included distributing fliers, monitoring greeters who distribute fliers at the airport, talking to travel agents and interacting with hotel management to promote the casino operation. [Testimony of Mr. Valguna.]

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[3] 3 CMC § 4528(a) states: "A citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job may make a claim for damages if an employer has not met the requirements of Section 4525, the employer rejects an application for the job without just cause, and the employer employs a person who is not a citizen, CNMI permanent resident, or U.S. permanent resident for the job."

Zaji's resume (Hearing Exhibit 11) was not a model of clarity, but it did set forth nine separate jobs he claims to have held during the past 20 years. The jobs contained no dates of service, but Zaji testified as to those dates. According to Zaji, one job at "The Source, Blaze and Mixer Magazine(s)," held from 1995 to 1998 in New York City, involved supervising teams in the distribution of hip-hop promotional fliers. Zaji also worked as a research assistant, a bar owner, a part-time English instructor, a technician, and the co-owner of a rental leasing business. [*Id.* and Testimony of Mr. Zajradhara.] Zaji's work history, though eclectic, satisfies the vague requirement of two years of unspecified work experience that was listed in the JVA. Given Zaji's resume and the posted JVA requirements, he should have been interviewed, and he appeared qualified, for the advertised job.

The second element of a Section 4528(a) offense is that employer has not met the requirements of 3 CMC § 4525. That statute requires employers to maintain a minimum workforce participation goal of 30%, meaning that 30% of Employer's full-time workforce must consist of U.S. citizens or U.S. permanent residents. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(c)(3).] Employer currently employs 66 full-time employees, of which only 13 employees are U.S. citizens or permanent residents and 53 employees are CW1-status workers. [Total Workforce Listing submitted by Employer on 5/03/17.] Thus, Employer's current workforce participation percentage is 19.6%, well below the minimum requirement of 30%. Accordingly, this second element of the offense is met.

The third element of a Section 4528(a) offense is met if the employer rejects an application for the job without just cause. Employer, in effect, rejected Zaji's application without just cause when the Employer failed to respond to Zaji's clear attempt to apply for the position of Events and Marketing Coordinator.[4]

The fourth element of a Section 4528(a) offense is satisfied if the employer then hires a person who is not a citizen, etc., such as a CW1-status worker. That occurred in this case when Employer filed a CW1 Petition and hired the transfer employee from St. Trading (Joel O. Tagalicud) who had been referred to the Employer by Best Sunshine. [Testimony of Mr. Valguna.]

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[4] As stated earlier, Ms. Abejo testified that she simply made an "honest mistake" when she failed to read the JVA number in Zaji's email (Hearing Exhibit 10) and therefore, she failed to schedule Zaji for an interview for the Events and Marketing Coordinator job. The Hearing Officer finds that Ms. Abejo's testimony lacks credibility. Zaji expressly stated the JVA number in his simple, straightforward email (see Hearing Exhibit 10). Employer's failure to read the JVA number posted in the subject line, cannot be explained away as an "honest mistake."

(2) Damages under 3 CMC § 4528(f)(1):

For violations under 3 CMC § 4528(a), the Hearing Officer is authorized to "award actual and liquidated damages in an amount up to six months' wages for the job for which a citizen...applied." 3 CMC § 4528(f)(1). If Zaji had been properly interviewed and hired for the Events and Marketing Coordinator job, he would have been paid $9.00 per hour (Hearing Exhibit 9); total wages for six months (July through December 2016) would have amounted to $9,360.00. The Hearing Officer looks to whether Zaji was able to mitigate his damages by obtaining other employment during the six-month period following the JVA. Mr. Zaji reported that he remained unemployed from July 1, 2016, until November 28. 2016; however, on November 28, 2016, Zaji became employed and worked through December 31, 2016, earning a total of $1,960.12 in wages. [Email from Mr. Zajradhara, sent in response to question from Hearing Officer, on 5/04/17.]

Holding: The Hearing Officer finds that the appropriate damage award for this violation should be the maximum statutory amount (six months' wages totaling $9,360) minus the wages earned by Zaji during the six-month period ($1,960), for a total award of $7,400.00. In addition, Employer should be required to pay a monetary sanction for such conduct, pursuant to 3 CMC § 4528(f)(2). [See Discussion under Sanctions, at pp. 10-11.]

DENIAL CASE

On January 31, 2017, DOL's Job Placement Section issued a Notice of Denial ("Denial") of Employer's Request for a Certificate of Good Standing. This case is based on appellant YWA Human Resource CNMI Corporation's timely appeal of that Denial: D.C. No. 17-001. [The caption of the Denial Case should read: *YWA Human Resource CNMI Corporation (Appellant) vs. Department of Labor – Citizen Job Availability and Citizen Job Placement Section (Appellee).*]

The Department's Denial was based on the same charges that form the basis of the above adjudicated Agency Case. [See items 1-3, listed herein, on pp. 1-2.] As discussed in detail above, the Hearing Officer finds that Employer committed the offenses charged in the Compliance Agency Case and this Denial.

In the Compliance Agency case, Employer shall be ordered to pay both sanctions and damages, amounting to more than $10,000.00. [See Order at pp. 11-13, ¶¶ 1-7.] Employer testified that the jobs of its 66 full-time employees could be placed in jeopardy if Employer fails to obtain a Certificate of Good Standing. [Testimony

of Ben T. Fejeran and Rogelio Valguna.] Presumably, these employees are blameless with respect to the cited charges, yet they might bear the burden of the penalty by losing their jobs, if a Certificate of Good Standing were denied to this Employer.

Although Employer's conduct deserves to be sanctioned, no useful purpose would be served by denying it a Certificate, if Employer also pays substantial fines and damages for its conduct. For this reason, the Hearing Officer holds that as soon as Employer has paid the sanctions and damages ordered herein in the Compliance Agency Case (CAC No. 17-001-02), the Denial of the Certificate of Good Standing should be reversed, and a Certificate issued to Appellant YWA Human Resource CNMI Corporation. [Order at p. 12, ¶ 6.]

SANCTIONS

In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for *each* violation. [Hearing Ex. 1 at p. 3.] If sanctions were to be assessed for each separate JVA, it would result in a sanction of $34,000 against Respondent. At Hearing, Enforcement indicated that it would accept the Hearing Officer's discretionary ruling in this matter. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14). The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified.

In this case, the evidence established that Employer committed three violations. First, it failed to post employer declarations with respect to 16 JVAs, more than half of which were cancelled by Employer when the cap for CW1 workers was reached for 2017. [NMIAC § 80-20.1-235(e).] Employer noted that it attempted to schedule job interviews with the responders to many JVAs, but no one showed up. Nevertheless, Employer admitted that it neglected to send "declarations" to each responder. The Hearing Officer finds that for this first charge of failure to

post declarations, Employer should be ordered to pay sanctions of $2,000, with half suspended for a period of two years.

Second, Employer failed to make a good faith effort to employ U.S. citizens and permanent residents in violation of CNMI preference laws. [NMIAC § 80-20.1-235(d).] This violation was evidenced by Employer's admission that it cancelled 10 JVAs after it became known that the cap for the employment of CW1 workers in 2017 had been reached. The Hearing Officer finds that this violation should result in sanctions of $2,000, with half of that amount suspended for a period of two years.

Third, Employer failed to give job preference to a particular U.S. citizen, Zaji Zajradhara, who applied for the Events and Marketing Coordinator position. [Regs. at NMIAC § 80-20.1-220.] Moreover, Employer unjustly rejected that qualified U.S. citizen (Zaji) for a job for which he applied, thus justifying an award of damages and sanctions. 3 CMC §§ 4528(f)(1)-(2). For this conduct, Employer should be ordered to pay $1,000 in sanctions in addition to the $7,400 damage award.

In conclusion, Employer, for its various violations of law, shall be ordered to pay total sanctions of $5,000, with $2,000 of that fine suspended for a period of two years. In addition, Employer shall be ordered to pay $7,400 in damages to Mr. Zaji Zajradhara. Finally, the Denial of the Certificate of Good Standing shall be reversed, and a Certificate issued to Employer, as soon as Employer has fully paid the sanctions and damages, as ordered below.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent YWA Human Resource CNMI Corporation on the following charges: (1) failing to post employer declarations regarding 16 JVAs during 2016 [Regs. at NMIAC § 80-20.1-235(e)]; (2) failing to make a good faith effort to provide jobs to U.S. citizens and permanent residents [Regs. at NMIAC § 80-20.1-235(d)]; (3) failing to give preference in employment to a U.S. citizen for the position of Events and Marketing Coordinator [Regs. at NMIAC § 80-20.1-220]; and unjustly rejecting that qualified U.S. citizen for the job. 3 CMC § 4528(a). For these violations, Respondent shall be ordered to pay sanctions and damages, as set forth below.

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2. **Sanctions:** Respondent YWA Human Resource CNMI Corporation is hereby SANCTIONED a total of five thousand dollars ($5,000) for its conduct; however, $2,000 of the sanction shall be SUSPENDED for a period of TWO YEARS, then extinguished, provided that Respondent commits no violations of Labor regulations or statutes in that period. Respondent is ORDERED to pay the remaining $3,000 in sanctions no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Damages:** Respondent YWA Human Resource CNMI Corporation is hereby ORDERED to pay damages to Zaji Zajradhara in the amount of seven thousand and four hundred dollars **($7,400)** to compensate Mr. Zajradhara for the wages he would have earned working as Events and Marketing Coordinator. [3 CMC §§ 4528(f)(2).] Respondent is ORDERED to pay these damages by cashier's check or postal money order, made payable to Zaji Zajradhara. Payments shall be delivered to the Hearing Office in two installments, as follows: $3,400.00 due on or before June 15, 2017; and $4,000.00 due on or before July 15, 2017.

4. **Posting Employer Declarations:** Respondent is ORDERED to post employer declarations to each online responder for jobs posted in the future by Employer in accordance with Regulations at NMIAC § 80–20.1-235(a). Respondent shall hire U.S. citizen and permanent resident job applicants when they are qualified to work.

5. **Reinstatement of Suspended Fine:** The obligations described above are continuing obligations. If Respondent fails to comply with the terms of this Order, or commits further labor violations, it shall be subject to a possible reinstatement of the suspended sanctions ($2,000) plus additional monetary sanctions, after a due process hearing on this issue.

6. **Denial is reversed:** For the reasons stated above, the Department's Denial of a Certificate of Good Standing for Appellant YWA Human Resource CNMI Corporation is hereby REVERSED, provided that Appellant complies with all terms of this Order. The Department is instructed to issue the Certificate of Good Standing to Appellant as soon as Employer has paid $3,000 in sanctions and the $7,400 damage award.

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[CAC No. 17-001-02; DC No. 17-001]

7. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 11, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Silk Road Corporation, *dba* Saipan Country Club, Respondent.	)	CAC No. 17-002-02 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on March 20, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by Manny Iguel. Respondent Silk Road Corporation, *dba* Saipan Country Club, appeared through its agent's attorney, Jordan Sundell. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on February 22, 2017, against respondent Silk Road Corporation, *dba* Saipan Country Club ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to a post job vacancy announcements ("JVAs") on the Department of Labor website (www.marianaslabor.net) for the job of bookkeeper in 2017 in violation of CNMI Employment Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a). [Hearing Exhibit 1 at ¶ 2.]

(2) Employer failed to post numerous "Employer Declarations" on the DOL website in 2016, in connection with JVAs posted for the jobs of General Manager, Bookkeeper, Mechanic and Greenskeeper. Regs. at NMIAC at § 80-20.1-235(e). [Hearing Exhibit 1 at ¶ 5.]

(3) Employer failed to submit quarterly Total Workforce Listings for 2015 and 2016 to the Department in accordance with Regulations at NMIAC § 80-20.1-505(b). [Hearing Exhibit 1 at ¶ 8.]

(4) Employer failed to submit Workforce Plans to the Department in 2015, 2016 and 2017. Regs. at NMIAC § 80-20.1-510(c). [Hearing Ex. 1 at ¶ 9.]

Employer sent an attorney, Mr. Jordan Sundell, who works for Bridge Capital, LLC ("Bridge Capital") to represent Employer at the Hearing. Mr. Sundell reported that Silk Road Corporation was sold to MP Holdings LLC on June 3, 2016. Subsequently, Bridge Capital was hired to perform human resources functions, among other things, for Silk Road Corporation. Mr. Sundell confirmed that he is employed by Bridge Capital and that he and his staff manage certain human resources functions on behalf of Silk Road Corporation. [Testimony of Mr. Sundell.]

Employer operates a country club, known as "Saipan Country Club," on Saipan. In the latter half of 2016, Employer employed 8 full-time employees – 5 CW-1 status employees, 2 U.S. citizens and one U.S. permanent resident. [Hearing Exhibit 4 consists of Employer's Total Workforce Listings for all 4 quarters of 2016. These documents were submitted post-hearing on 3/27/2017.]

1. <u>Failure to Post Job Announcement on DOL's Website</u>.

Department Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the JVA on the DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-20.1-225(e).

In its Determination, Enforcement charged that in February 2017, Employer had failed to post a JVA on DOL's website for the job of bookkeeper. [Hearing Exhibit 1 at ¶ 2.] Enforcement decided to file this charge after reading a newspaper advertisement that Employer placed in the Saipan Tribune on February 15, 2017. [Testimony of Mr. Iguel; Hearing Exhibit 2 – a copy of the Saipan Tribune advertisement published online on 2/15/17.]

At Hearing, Employer testified that immediately after advertising the bookkeeper job in the Saipan Tribune, Employer decided not to fill the position. It was for this reason that Employer never posted the job on DOL's website. [Testimony of Mr. Sundell.] Mr. Sundell apologized for not notifying the Department of Labor after Employer decided not to pursue the hiring of a bookkeeper.

2. Failure to Post "Employer Declarations" As to Prospective Job Applicants.

The Department's "Employer Declaration" Regulation requires an employer to post an online "declaration" on the Department of Labor ("DOL") website (www.marianaslabor.net) in cases where the employer has rejected a U.S.-status qualified worker for a particular job and instead, hired a foreign national worker for the position. [Regs. at NMIAC § 80-20.1-235(e).] In such cases, the regulation requires the employer to post a short response on the website, explaining: (1) the action it took with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. *Id.*

In its Determination, Enforcement charged that Employer had failed to post Employer Declarations in connection with JVAs for four positions: General Manager, Bookkeeper, Mechanic and Greenskeeper. [Hearing Exhibit 1 at ¶ 5.]

On June 22, 2016, Employer posted JVAs on DOL's website for four jobs: General Manager, Bookkeeper, Mechanic and Greenskeeper. Department records show that Employer failed to post online responses or "declarations" to any of the four JVAs. [Printouts of these JVAs, listing the responses, were entered into evidence as Hearing Exhibits 3(a), 3(b), 3(c) and 3(d), respectively.]

At Hearing, Employer admitted that it never posted responses to the online responders; however, Mr. Sundell represented that his staff had reviewed all of the responses and found that none of the responders were qualified for the posted jobs. [Testimony of Mr. Sundell.] Mr. Sundell represented that Employer's agent, Bridge Capital, had not understood that after reviewing the JVA responses, it was required to file online responses to each responder, informing the responder of the reason why he or she had not been interviewed or hired for the position. *Id.*

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to post employer declarations as to each of these four JVAs. [Regs. at NMIAC § 80-20.1-235(e).]

3. Failure to Submit Quarterly Total Workforce Listings.

DOL Regulations require employers to submit information *on a quarterly basis* regarding "the number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505(b). This information is submitted in a document called the Total Workforce Listing. The Department requires employers to submit this information in order to qualify for a Certification of Compliance.

At Hearing, Employer admitted that it failed to submit Total Workforce Listings for all quarters of 2015 and 2016. Employer's response to this charge was that it was not aware until receiving the Determination that Total Workforce Listings are due on a **quarterly** basis. [Testimony of Mr. Sundell.]

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to submit any quarterly Total Workforce Listings in 2015 and 2016.

4. Failure to Submit Workforce Plans for 2015 and 2016.

DOL Regulations require employers to file an updated Workforce Plan once every 12 months. [Regs. at NMIAC § 80-20.1-510.] In this case, Enforcement charged that Employer has not filed a Workforce Plan in 2015, 2016 and 2017.

At Hearing, Employer admitted that it failed to submit Workforce Plans for 2015, 2016 and 2017. Again, Employer's response to this charge was that it had not known until it received the Determination, that Workforce Plans are due on an **annual** basis. [Testimony of Mr. Sundell.]

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to submit a Workforce Plan in 2015, 2016 and 2017. [Regs. at NMIAC § 80-20.1-510.]

After the Hearing, on March 27, 2017, Employer filed its Workforce Plan for 2016. It is hereby entered into evidence as Hearing Exhibit 5.

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DISCUSSION

Holding: As to the first charge that Employer failed to post a JVA for the bookkeeper position that was advertised in the Saipan Tribune in February 2017, the Hearing Officer accepts Mr. Sundell's representation that Employer decided to abandon this job search immediately after posting the advertisement. The Hearing Officer finds that Employer is not guilty of violating the "posting" Regulation as it never followed through with hiring for this position. [Regs at NMIAC §§ 80-20.1-225(a).]

Holding: As to the remaining charges, the evidence established that: (1) Employer failed to post responses with respect to four JVAs on DOL's website in 2016; (2) Employer failed to submit quarterly Total Workforce Listings in 2015 and 2016; and (3) Employer failed to submit Workforce Plans for 2015 and 2016.[1] [Regs at NMIAC §§ 80-20.1-235(e), 505(b) and 510.]

Given these violations, the Department asked that Employer be sanctioned with monetary penalties for its conduct. [Hearing Ex. 1, p. 3; testimony of Mr. Iguel.]

Employer's defense to these charges was that its agent, Bridge Capital, who now manages Human Resources and other functions at the company, was not aware it was required to file employer declarations, or Total Workforce Listings on a quarterly basis or Workforce Plans on an annual basis. [Test. of Mr. Sundell.]

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] If this were to be accepted, it would result in a sanction of $6,000 against Employer. At Hearing, Enforcement indicated that it would accept the Hearing Officer's discretionary ruling in this matter. [Testimony of Mr. Iguel.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is

[1] Given that it is only the third month of 2017, Employer should not be faulted (yet) with failing to file an annual Workforce Plan for 2017. But see Order on page 7, paragraph 3.

authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence established that Employer committed three basic violations. First, it failed to post employer declarations for responders to four JVAs. Second, Employer missed the deadlines for filing quarterly Total Workforce Listings in 2015 and 2016. Third, Employer missed several deadlines for filing annual Workforce Plans in 2015 and 2016.

The Hearing Officer finds that Employer's defense – that its agent was not aware of the regulatory requirements – explains, but does not excuse, Employer's failure to comply with the DOL regulations. Nevertheless, certain facts should be considered as mitigating factors. As to the employer declarations, Employer did not ignore, but actually reviewed the resumes (job history) of each of the responders to determine whether they were qualified. As to the missed deadlines to file census-related documents, Mr. Sundell made credible assurances that Employer's failure to file census-related documents was an oversight rather than a deliberate attempt to circumvent the laws. Mr. Sundell assured the Hearing Officer that Employer, and its agent, would comply with these Regulations in the future. Furthermore, Employer corrected a number of the deficiencies by producing the missing documents (the quarterly Total Workforce Listings for 2016 and the 2016 Workforce Plan) one week after the Hearing. The above factors shall be taken into account in mitigating the amount of the sanctions.

Holding: Based on the evidence presented and the considerations noted above, the Hearing Officer finds that Employer should be sanctioned collectively for the above-cited violations in the total amount of $2,000, with $1,200 to be paid and $800 suspended for a period of one year. The suspended sanctions shall remain in effect for a year, then they will be automatically extinguished, provided that no similar violations occur within the one-year period. Finally, Employer shall be ordered to file a Workforce Plan for 2017 within sixty (60) days.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Silk Road Corporation on the 2nd, 3rd and 4th charges of violating the Employment Rules and Regulations, as set forth in the Determination. Regs. at NMIAC §§ 80-20.1-235(e), 505(b) and 510. Judgment is entered in favor of Respondent on the 1st charge. For the violations, Respondent shall be sanctioned as set forth below.

2. **Sanctions:** Respondent Silk Road Corporation is hereby SANCTIONED a total of two thousand dollars ($2,000) for its conduct; however, a portion ($800) of the sanction shall be SUSPENDED for a period of ONE YEAR, then extinguished, provided that Respondent commits no violations of Department of Labor regulations or statutes in that period. Respondent is ORDERED to pay the remaining $1,200 in sanctions no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **2017 Workforce Plan:** Respondent Silk Road Corporation is ORDERED to submit a complete Workforce Plan for 2017, by delivering copies of the document to the Enforcement and Compliance Office (attn: Mr. Iguel) no later than **sixty (60) days** after the date of issuance of this Order. [Regs. at NMIAC § 80-20.1-510).]

4. **Reinstatement of Suspended Fine:** If Respondent fails to comply with the terms of this Order, or commits further processing-related or reporting violations, it shall be subject to a possible reinstatement of the suspended sanctions ($1,000) plus additional monetary sanctions, after a due process hearing on this issue.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 29, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 17-003-03
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Imperial Pacific International (CNMI), LLC,	)	
dba Best Sunshine International,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on March 21, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Imperial Pacific International (CNMI) LLC, *dba* Best Sunshine International, appeared through its Vice President for Human Resources, Bertha Leon Guerrero, and its legal counsel, Kelley Butcher. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on March 2, 2017. The Determination alleges that Respondent Imperial Pacific International (CNMI) LLC, *dba* Best Sunshine International ("Employer"), had failed to submit its quarterly Total Workforce Listing in a timely manner, as required by CNMI Employment Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-505(b-d). [Hearing Exhibit 1 at ¶ 1.]

At Hearing, Employer admitted that it had neglected to file its Total Workforce Listing for the 4th quarter of 2016, on or before the January 31, 2017 due date. Ms. Butcher explained that the delay in submitting the Total Workforce Listing was an oversight caused by the holidays and illnesses at the workforce rather than a deliberate attempt by Employer to circumvent the law.

Employer filed the Total Workforce Listing on March 10, 2017, about one week after being served with the Determination. Enforcement confirmed that it received Employer's Total Workforce Listing for the 4th quarter of 2016 on March 10, 2017. Enforcement found the document to be in acceptable form. [Testimony of Mr. Ulloa.]

Given that Respondent has already produced the document, the only remaining issue is the matter of requested sanctions.

DISCUSSION

It is undisputed that Respondent failed to submit its quarterly Total Workforce Listing by the deadline of January 31, 2017, in violation of the Employment Rules and Regulations at NMIAC § 80-20.1-505. Respondent noted that this was an oversight on its part rather than any deliberate attempt to circumvent the law. Respondent submitted the document to DOL on March 10, 2017, as soon as it realized that it was overdue. The Hearing Officer finds that Respondent violated the above-cited Regulation when it failed to submit the Total Workforce Listing on or before January 31, 2017.

Given the violation, the Department asked that Employer be sanctioned for its conduct. [Hearing Ex. 1, p. 3; testimony of Mr. Ulloa.]

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] However, at the conclusion of the Hearing, Enforcement recommended that the Hearing Officer issue a suspended sanction in order to give Respondent an opportunity to demonstrate good faith compliance. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, Employer admitted that it failed to submit its quarterly Total Workforce Listing by the deadline of January 31, 2017, but noted that this was an oversight on its part, rather than any deliberate attempt to circumvent the law. Employer submitted the document to DOL on March 10, 2017, as soon as it realized that it was overdue. Employer has a past record of submitting census-related documents in a timely manner. As stated above, Enforcement recommended that Employer be sanctioned with a suspended fine and, in effect, given an opportunity to demonstrate full compliance in the future.

The Hearing Officer agrees that a suspended sanction is the appropriate penalty based on the facts presented in this case. Having a suspended sanction, which may be reinstated if Employer again misses a deadline to file census-related documents, will serve to keep Employer mindful of the deadlines.

Holding: Based on the evidence presented and the considerations noted above, the Hearing Officer finds that Employer should be sanctioned monetarily for the above-cited violation in the amount of $1,000; however, the entire amount shall be suspended for a period of one year, then extinguished, provided that Employer does not violate any labor statutes or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Imperial Pacific International (CNMI) LLC on the charge of violating the Employment Rules and Regulations, as set forth in the Determination. [Regs. at NMIAC § 80-20.1-505.] For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Imperial Pacific International (CNMI) LLC is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, the entire sanction shall be SUSPENDED for a period of ONE YEAR, then extinguished, provided that Respondent commits no violations of Department of Labor regulations or statutes during that period. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Reinstatement of Suspended Fine:** If Respondent fails to comply with the terms of this Order, or commits further processing-related or reporting violations, it shall be subject to a possible reinstatement of the suspended sanctions ($1,000) plus additional monetary sanctions, after a due process hearing on this issue.

[CAC No. 17-003-03]

4. **Appeal: Any** person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 27, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: CNMI Department of Labor, Labor Enforcement Section, Complainant, v. Jesus P. Cruz, *dba* EJ Snack Mobile/EJ Auto Repair Shop, Respondent.	)	C.A.C. No. 17-003-04(T) **ADMINISTRATIVE ORDER**

This Agency Case came on for hearing on August 2, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Labor Enforcement Section was represented by Cassandra Cabrera. Respondent Jesus P. Cruz did not appear personally but sent his wife and Assistant General Manager, Edna O. Cruz, to represent him at the hearing. Hearing Officer Jerry Cody, presiding. The parties testified from the Tinian Labor Office via a Skype internet connection to the Hearing Officer who was in the Hearing Office in Saipan.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department's Enforcement Section (Tinian Labor Office) on June 27, 2017. [A copy of Determination was entered into evidence as Hearing Exhibit 1.] The Determination alleges that Respondent Jesus P. Cruz, *dba* EJ Snack Mobile and EJ Auto Repair Shop ("Employer"), committed the following regulatory violations: (1) Employer failed to submit his quarterly Total Workforce Listing as requested by the Enforcement Section in a document request served on Employer in April 2017; (2) Employer failed to file an annual Workplace Plan, as requested by Enforcement in a document request served on Employer in April 2017; and (3) Employer neglected to file Employer Declarations with respect to a Job Vacancy Announcement (JVA) posted by Employer in March 2017.

Employer owns a business called "EJ Snack Mobile" in Tinian. Mr. Cruz also holds a business license for "EJ Auto Repair Shop," but that shop is not in operation at this time. Employer Jesus P. Cruz is currently undergoing medical treatment in Saipan and is absent from Tinian part of every week. In his absence, his wife, Edna O. Cruz, serves as Assistant Manager and operates the business. Ms. Cruz was responsible for posting the JVAs in this case and she received the document request served by the Enforcement Section on April 7, 2017. [Testimony of Ms. Cruz.]

Employer currently employs two full-time employees - Russell Manalo and Alma Lacson, both of whom hold CW-1 status. Ms. Lacson's employment will end in October 2017 when her CW-1 status expires; however, Employer intends to renew Mr. Manalo's CW employment in 2018. [Testimony of Ms. Cruz.] Ms. Cruz, who holds permanent resident status, is a part-time employee of the business. *Id.*

Employer recently submitted a Petition to USCIS to renew the CW-1 employment of Mr. Manalo. Also, Employer submitted another Petition to employ a CW-1 status worker (Aman Ullah) to work at EJ's Auto Repair Shop in 2018. *Id.*

1. Failure to Submit Workforce Plan for First Quarter of 2017.

DOL Regulations require employers to file an updated Workforce Plan once every 12 months. [CNMI Employment Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-510.] In this case, Employer admitted that it had not filed Workforce Plans in 2016 or 2017. [Testimony of Ms. Cruz.]

On April 7, 2017, Enforcement served Employer with a Business Establishment Compliance and Monitoring Request (hereinafter, "Request") that instructed Employer to produce a number of business-related documents to Enforcement within 10 business days. [The Request was entered into evidence as Hearing Exhibit 2.] The Request asked Employer to produce a Workforce Plan, among other documents, within ten days of the date of the Request. Even after receiving the Request, Employer failed to submit a Workforce Plan to the Department of Labor. Employer brought a draft Workforce Plan to the Hearing but it was incomplete. [Ms. Cruz testified that since her husband has been ill, she has been too busy to complete the form.]

Based on the evidence, Enforcement asked that Employer be sanctioned for failing to file a Workforce Plan for 2017, as requested in April 2017, and as required by labor Regulations. [Regs. at NMIAC § 80-20.1-510.]

2. **Failure to Submit Quarterly Total Workforce Listing for the First Quarter of 2017.**

DOL Regulations require employers to submit information *on a quarterly basis* regarding "the number and classification of employees for whom wages were paid during the quarter." [Regs. at NMIAC § 80-20.1-505(b).] This information is required to be submitted in a document called the "Total Workforce Listing," due on the last day of the month following each quarter [for example, the Listing for the 1st quarter (Jan. to March) is due on April 30; the Listing for the 2nd quarter (April to June) is due on July 31.]

At Hearing, Ms. Cruz admitted that Employer has never submitted a Total Workforce Listing to the Department of Labor. As stated above, on April 7, 2017, Enforcement served Employer with a Request (Hearing Exhibit 2) that asked Employer to produce a Total Workforce Listing. Employer's Asst. Manager, Ms. Cruz, received the Request and spoke with Enforcement officials about the Request; nevertheless, she later failed to submit the Total Workforce Listing for 2017, as requested. At Hearing, Ms. Cruz brought an unsigned, incomplete draft of Employer's Total Workforce Listing, but it was deemed incomplete by the Enforcement representative. [Testimony of Ms. Cabrera.]

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to file the quarterly Total Workforce Listing, as requested in April 2017, and as required by labor Regulations. [Regs. at NMIAC § 80-20.1-505(b).]

3. **Failure to Post "Employer Declarations" For Prospective Job Applicants.**

The Department requires employers to post online "declarations" to each online responder on the Department of Labor ("DOL") website (www.marianaslabor.net) in cases where the employer has rejected a U.S.-status qualified worker for a particular job and instead, hired a foreign national worker for the position. [Regs. at NMIAC § 80-20.1-235(e).] In such cases, the regulation requires the employer to post a short response on the website, explaining: (1) the action it took with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. *Id.*

In its Determination, Enforcement charged that Employer had failed to post timely Employer Declarations in connection with a JVA that Employer posted for a Maintenance and Repair job in March 2017. [Hearing Exhibit 1.]

In fact, Employer had posted an earlier JVA in October 2016 regarding the Maintenance and Repair Worker position. At that time, Employer had also failed to post Employer Declarations in response to numerous online responders. [Testimony of Ms. Cabrera.] On December 7, 2016, Ms. Cabrera of the Tinian Enforcement Section gave a verbal warning to Employer (Edna Cruz) regarding Employer's obligation to respond online to each JVA responder. At that time, Enforcement warned Employer that a future failure to post Employer Declarations could result in sanctions. *Id.*

In March 2017, Employer posted another JVA for a Maintenance and Repair job on the DOL website; the JVA ran from March 16 to 31, 2017. Department records show that two U.S. citizens responded to the posting, but that Employer failed to post any responses to these responders. [A printout of the JVA, JVA No. 17-03-47070, listing two responses, was entered into evidence as Hearing Ex. 3.]

At Hearing, Ms. Cruz admitted that *she never reviewed the DOL website* after she posted the JVA. Therefore, she never saw or acted upon the two responders' applications. Nevertheless, Employer then submitted a Petition to hire a CW-1 status worker for the Maintenance Worker job. As of the date of hearing, the Petition remains pending with USCIS. [Testimony of Mrs. Cruz.]

Based on the evidence, Enforcement requested an order sanctioning Employer for failing to post employer declarations to the two responders who responded to the JVA in March 2017. [Regs. at NMIAC § 80-20.1-235(e).]

DISCUSSION

The evidence established that: (1) Employer failed to submit a Workforce Plan for 2017, even after being served with a written Request to do so; (2) Employer failed to submit a quarterly Total Workforce Listing in 2017, even after being served with a written Request to do so; and (3) Employer failed to post Employer Declarations to responders of a JVA posted in March 2017, even though Employer had been warned by Enforcement in December 2016, of its obligation to post Employer Declarations. [Regs. at NMIAC §§ 80-20.1-235(e), 505(b) and 510.]

Sanctions:

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2). In its Determination, Enforcement asked the Hearing Officer to impose a monetary fine of $2,000 against Employer, plus any other sanctions that the Hearing Officer deemed appropriate. [Determination (Hearing Ex. 1) at p. 3 (recommendation).]

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

In this case, the Hearing Officer finds that a substantial fine should be assessed against this Employer, given the violations admitted to and proven at hearing. First, Employer failed to post employer declarations to responders of a JVA, even though Employer had been warned by Enforcement in December 2016, of its obligation to post such declarations. More importantly, Employer's Assistant Manager admitted that *she never even reviewed those responders* after the JVA was posted in March 2017. Employer's neglect in this regard is serious, given the fact that Employer evidently has petitioned USCIS to approve a CW-1 worker for the maintenance position. In the Petition for a CW-1 worker, an employer must attest under the penalty of perjury that no qualified U.S. workers are interested in the job. Yet, how could this Employer attest that there were no qualified U.S. workers interested in the maintenance worker position if it never checked its own JVA; thus, in essence, it ignored those citizens who responded to the job advertisement? For this violation, the Hearing Officer finds that Employer should be sanctioned the maximum sanction of $2,000. 3 CMC § 4528(f)(2).

In addition, Employer failed to file a current Workforce Plan and Total Workforce Listing, despite being served with a written Request in April 2017 to do so. Even without a request from DOL, such documents are required to be filed on an annual (Workforce Plan) or quarterly (Total Workforce Listing) basis. For this violation, Employer should be sanctioned an additional $500.

The one mitigating factor in this case is Mr. Cruz's health, which requires him to travel to Saipan on a weekly basis, leaving his wife, Ms. Cruz, to manage the business. The aggravating factors are that each of these violations could have been

avoided if Employer had complied with specific requests made by Enforcement. A further aggravating factor is that Employer remains well-below compliance with 3 CMC § 4525, which mandates that 30% of an employer's workforce should be comprised of U.S. citizens or permanent residents. Employer's business employs no full-time U.S. citizens or permanent residents; thus, Employer falls well below the statutory workforce participation goal.

In summary, the Employer shall be sanctioned a total of $2,500 for these violations. In view of the Employer's current illness, the sanction shall be payable in monthly installments of $500 each, as specified below.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** For the reasons stated above, judgment is entered against Respondent Jesus P. Cruz on the charges asserted in the Department's Determination, filed in this case on June 27, 2017. For his conduct, Respondent shall be sanctioned as set forth below.

2. **Sanctions:** For the reasons stated above, Respondent Jesus P. Cruz is hereby FINED a total sanction of two thousand five hundred dollars ($2,500). The sanction shall be payable in five installments of $500 each. The payments shall be due on or before the following dates: September 15, October 15, November 15, December 15, 2017, and January 15, 2018. Respondent shall pay the CNMI Treasury and present proof of payment to the Hearing Office on or before each payment date. [3 CMC §§ 4528(f)(2) and 4947(11).]

3. **Submit Documents:** Respondent is hereby ORDERED to submit a complete Total Workforce Listing and complete Workforce Plan for 2017, no later than September 15, 2017. Failure to produce these documents in a timely manner may result in further sanctions.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: August 25, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Misamis Construction (Saipan) Ltd., Respondent.	)	CAC No. 17-004-03 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on April 4, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement and Compliance Section ("Enforcement") was represented by Jeff Camacho. Hearing Office staff, Renita Camacho, testified in support of the Department of Labor. Respondent Misamis Construction (Saipan) Ltd. failed to appear at the Hearing despite the fact that it was served with the Notice of Hearing on March 14, 2017. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Enforcement Section on March 13, 2017, against Respondent Misamis Construction (Saipan) Ltd. ("Employer"). [A copy of the Determination and Proof of Service indicating service on 3/14/17, was entered into evidence as Hearing Exhibit 2.]

Respondent Failed To Appear At Hearing

Employer failed to appear at the Hearing on April 5, 2017, despite being served with the Determination and Notice of Hearing on March 14, 2017. [See Hearing Exhibit 1 (Proof of Service with acknowledgment signed by Barry Ladd on 3/14/17).]

On the morning of the Hearing (4/04/17), the Hearing Office received a letter from Employer, dated April 3, 2017, in which Employer's General Manager, Barry Ladd, stated:

> We have a hearing scheduled for 9:30 a.m. tomorrow morning regarding our employee information. We are currently completing our CW1 renewal application for the USCIS; also, we have no office staff due to them having to exit the CNMI because of the CW1 Cap. We request an extension of time to complete the required information to April 12, 2017.

[Hearing Exhibit 1 - copy of this email message.]

On April 4, 2017, at 9:18 a.m., the Hearing Office replied to Mr. Ladd by email, stating: "Mr. Ladd, Your request for a continuance is hereby DENIED by the Hearing Office as untimely. The hearing will take place as scheduled. Thank you." [A copy of this message was entered into evidence as Hearing Exhibit 1(a).]

The continuance was denied for two reasons. First, the request was untimely. The Determination states that "[a] request for continuance of the hearing must be made in writing to the Administrative Hearing Officer at least five (5) days before the scheduled hearing date." [Hearing Exhibit 2, p. 2.] Employer filed its request by fax on the morning of the Hearing.

Second, the request was not based on good cause. The reason given by General Manager Barry Ladd for not attending the Hearing was, in essence, that he was very busy and short-staffed. The Hearing Officer finds these reasons to be inadequate to justify a failure to attend a hearing that was scheduled weeks in advance. Accordingly, the last minute request for a continuance was denied. [Hearing Exhibits 1 and 1(a).]

Respondent failed to appear at the Hearing. As a result of its failure to attend the Hearing, Employer waived its right to present evidence in support of its position. [Employment Rules and Regulations ("Regs.") at NMIAC § 80-20.1-480(l).] [1]

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[1] NMIAC § 80-20.1-480(l) states: "Except for good cause shown, failure of a party to appear at a hearing after timely being served notice to appear shall be deemed to constitute a **waiver of any right to pursue or contest the allegations** in the complaint. If a party defaults, the hearing officer may enter a final order containing such findings and conclusions as may be appropriate." [Emphasis added.]

Respondent Failed To Produce Documents In A Timely Manner

On December 30, 2016, Employer was served a written document request, known as a "Business Establishment Compliance and Monitoring Request Form," which requested the production of certain business-related documents by January 17, 2017. [Hearing Exhibit 3 – copy of the Business Establishment Compliance and Monitoring Request Form, dated 12/30/16 (hereinafter, "Request").]

Enforcement's request for documentation in this case was part of a legitimate administrative inspection of payroll, business license, tax and census-related information. Under the Employment Rules and Regulations, the "Department may conduct investigations as necessary and appropriate to enforce provisions of the Commonwealth Employment Act of 2007, as amended...." Regs. at NMIAC § 80–20.1-445; see also 3 CMC § 4939(a) *et seq.* [2] Department Regulations require employers to keep and produce the information listed below, upon demand by the Secretary of Labor or her designee. [Regs. at NMIAC § 80–20.1-501(a-f).]

The Request asked Employer to produce copies of the following documents:

Total Workforce Listing
Workforce Plan
Employer's Quarterly Withholding Tax for 4 quarters
Payroll records for 4 quarters
Tax standing from Division of Revenue and Taxation
Copy of EAD, Green Card, CW, etc. of employees
Business License
Annual Corporate Report
Sketched map of business location

The above-noted documentation is required to be kept by employers and produced to the Department of Labor ("DOL" or "Department") upon demand. [Regs. at NMIAC § 80–20.1-501(a-f).] Regulations also require employers to submit Total Workforce Listings to DOL on a quarterly basis, whether or not the Department serves a written request for them. [Regs. at NMIAC § 80–20.1-505(b-d).] Likewise, Regulations require employers to submit updated Workforce Plans to DOL once every 12 months, regardless of whether DOL serves a written request for them. [Regs. at NMIAC § 80–20.1-510.]

[2] The Commonwealth Employment Act of 2007 notes that the Department may inspect: "The employer's payroll records,...worker contracts, or any other documents or business records the employer is required to collect, maintain or produce for inspection pursuant to this chapter, regulations and the Minimum Wage and Hour Act." 3 CMC § 4939(c)(3).

At Hearing, testimony from investigator Jeff Camacho established that Employer had been served with the Request on December 30, 2016, but Employer produced no responsive documents by the due date, January 17, 2017. On February 23, 2017, Mr. Camacho called Mr. Ladd by telephone to follow up on the request for documents. On that date, Mr. Ladd told Mr. Camacho that he would produce documents the next day; but no documents were produced the next day. On February 24, 2017, Mr. Camacho called Mr. Ladd, and Ladd promised to provide documents the following Monday, February 27, 2017. On February 27, Employer again failed to produce any documents. [Testimony of Mr. Camacho.]

Enforcement filed and served its Determination, on about March 15, 2017. Shortly thereafter, Employer produced certain documents: copies of CW permits, business license, annual corporate report, tax standing from the Division of Revenue and Taxation, a Total Workforce Listing and a Workforce Plan.

Payroll Records: Employer has produced no payroll records to date. Mr. Ladd stated that Employer cannot produce any payroll records as are with the corporate Secretary in the Philippines. Employer noted that the Secretary had to exit the CNMI because of the CW1 cap. [Hearing Exhibit 4 - Letter from Mr. Ladd to Department of Labor, dated 3/14/2017.]

The Hearing Officer notes that Regulations require employers to retain payroll records for each foreign national worker for at least two years and to present such documentation "immediately upon written request" by the Secretary or her designee. [Regs. at NMIAC §§ 80–20.1-501 and 501(b).]

Total Workforce Listing: The Total Workforce Listing produced by Employer is incomplete. First, it fails to identify which month and year are covered by this particular Listing; the quarter should be identified in the heading of the document. Second, the two right-hand columns (date hired and date resigned/terminated) were left blank. As produced, the document is incomplete.

As stated earlier, Employer is required to file this document each quarter, whether or not it is demanded by Enforcement. [Regs. at NMIAC § 80–20.1-505(b-d).] Employer is also required to produce this information immediately upon demand by the Secretary or her designee. [Regs. at NMIAC § 80–20.1-501.]

Workforce Plan: This Plan produced by Employer is incomplete. The last column (timetable in accomplishing replacement) was left blank. As produced, the document is incomplete.

As stated earlier, Employer is required to file this document on an annual basis, whether or not it is demanded by Enforcement. [See Regs. at NMIAC § 80–20.1-505(b-d).] Employer is also required to produce this information immediately upon demand by the Secretary or her designee. [Regs. at NMIAC § 80–20.1-501.]

CONCLUSIONS OF LAW

Employer received Enforcement's lawful Request on December 30, 2016, but failed to produce any responsive documents by the stated due date of January 17, 2017. Employer then received Mr. Camacho's reminder on February 23, 2017, and made repeated promises to DOL that it would produce documents the next day, yet it failed to produce documents until mid-March 2017, after it was served with the Determination.

Even after its limited document production, Employer failed to produce any payroll records and it produced an incomplete Workforce Plan and Total Workforce Listing. Employer offered little excuse for its delay and ultimate failure to produce all requested material.

As to payroll records, Employer should be faulted for allowing its Secretary to leave the CNMI in December 2016 with all payroll records. Employer is obligated to keep such records for at least two years, and must present them upon written request. [Regs. at NMIAC §§ 80–20.1-501 and 501(b).] Moreover, this does not explain why Employer cannot produce payroll records for the period from January 2017 until the present.

In its Determination, Enforcement requested that Employer be sanctioned the maximum administrative sanction of $2,000 for failing to produce documents in a timely manner. [Hearing Exhibit 2, p. 2.]

Sanctions: In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

Based on the facts presented, the Hearing Officer agrees that a sanction is justified. Employer missed the deadline to produce documents not once, but twice – or, a third time if one counts the fact that Employer failed to bring the remaining missing documents to the Hearing on April 4, 2017.

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." [Regs. at § 80- 50.4-820(h) and (o).]

The Hearing Officer finds that the facts here justify a monetary sanction, although not necessarily the maximum sanction. Employer appeared to simply ignore the first deadline to produce documents by January 17, 2017. Thereafter, Enforcement acted reasonably in contacting Employer and giving it extensions to provide the requested documents. Employer responded with missed promises that it would provide the documents on certain dates, then submitted nothing on those dates. Finally, in March 2017, Employer submitted some of the requested documents. Nevertheless, two of the most important documents – Total Workforce Listing and Workforce Plan – were incomplete and payroll records were completely missing from the document production. Finally, Employer neglected to attend the Hearing and thereby waived its chance to explain its failure to comply with the Request.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars ($2,000); however, $1,250 of that sanction shall be suspended for two years, then extinguished, provided that Employer complies with the other terms of this Order and commits no further violations of CNMI labor laws or regulations during the next two years. In addition, Employer shall be ordered (1) to submit a corrected Workforce Plan for 2017 and a corrected Total Workforce Listing for the 4th quarter of 2016 within 10 days; and (2) to submit all payroll records for the 1st quarter of 2017, within 20 days.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Misamis Construction (Saipan) Ltd. for failing to produce documents in a timely manner, and failing to produce other documents entirely, as requested by Enforcement as part of a lawful administrative inspection. [3 CMC § 4939(a) *et seq.*; and Regs. at NMIAC §§ 80–20.1-445 and 501(a-f).] For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Misamis Construction (Saipan) Ltd. is hereby SANCTIONED two thousand dollars ($2,000) for its conduct; however, $1,250 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no

further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$750** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. [3 CMC §§ 4528(f)(2) and 4947(11).]

3. **Order to Produce Corrected Documents:** Respondent Misamis Construction (Saipan) Ltd. is hereby ORDERED to produce a corrected Total Workforce Listing for the 4th Quarter of 2016, and a corrected Workforce Plan for 2017, by delivering copies of such documents to the Enforcement Section (attn: Mr. Camacho), no later than **ten (10) days** after the date of issuance of this Order.

4. **Order to Produce Payroll Records:** Respondent Misamis Construction (Saipan) Ltd.is hereby ORDERED to produce complete payroll records for the 1st Quarter of 2017, by delivering copies of such documents to the Enforcement Section (attn: Mr. Camacho) no later than **twenty (20) days** after the date of issuance of this Order.

5. **Reinstatement of Suspended Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to possible reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section and after a due process hearing on this issue.

6. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. [3 CMC §§ 4948(a) and 4528(g).]

DATED: April 6, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Noel M. Baitlon, *dba* Taga Security Agency, Respondent.	)	CAC No. 17-006-04 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on June 28, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement and Compliance Section was represented by Jack Deleon Guerrero. Respondent Noel M. Baitlon appeared without counsel and testified. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on June 6, 2017, against respondent Noel M. Baitlon, *dba* Taga Security Agency ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are as follows. Employer operates Taga Security Agency in Saipan. During the first quarter of 2017, Employer employed 9 full-time workers, consisting of 3 CW-1 status employees and 6 U.S. citizens. [Hearing Exhibit 2 – copy of Total Workforce Listing re 1st Quarter of 2017, signed on 4/10/17.]

Enforcement alleged in its Determination that Employer committed two basic violations of CNMI labor law:

(1) Employer failed to post job vacancy announcements on the Department's website (www.marianaslabor.net) for jobs he then filled with CW-1 status employees. Such conduct violated the Employment Rules and Regulations ("Regulations"), codified in the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a); and

(2) Employer failed to keep time or payroll records regarding any of his employees, in accordance with Regulations at NMIAC § 80-20.1-501(b).

Job Posting on DOL's Website: Departmental Regulations require employers who are hiring or sssssssssrenewing CW-1 status workers to post job announcements ("JVAs") on the Department of Labor ("DOL") website. [Regs. at NMIAC § 80-20.1-225(a).] In this case, Employer admitted that he had not posted JVAs on DOL's website for his CW-1 status workers since the CW Regulations went into effect (2011). Employer testified that as to his three CW-1 status employees (security guards), he advertised the jobs in local newspapers rather than posting JVAs on DOL's website.

At the hearing, Employer testified that he had not posted JVAs on the Labor website because he had not realized that he was required to use DOL's website by regulation. [Testimony of Mr. Baitlon.]

Keeping Written Employer Payroll and Time Records: Employer admitted that he has operated his business for the past several years by paying his employees in cash and keeping track of employee's hours without keeping written records. Such a practice violates labor Regulations [NMIAC at § 80-20.1-501(b)] as well as the CNMI Minimum Wage and Hour Act, 4 CMC § 9232(c). Moreover, the practice is problematic as it leaves an employer with no proof that he actually paid full wages to his employees. This may cause further problems when computing taxes on such payroll.

At the conclusion of testimony, Employer testified that he intends to post all future job announcements on DOL's website. Employer presented evidence that he has already begun to keep detailed time and payroll records for all of his employees in compliance with labor Regulations. [See Hearing Exhibit 4 - copies of payroll records, showing deductions taken, regular or overtime hours worked, etc.]

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DISCUSSION

Employer gave credible testimony in which he admitted that he had failed to post JVAs on DOL's website and failed to keep proper time and payroll records for all of his employees. Employer expressed genuine remorse for his conduct and he has taken immediate steps to correct these violations. Employer agreed to pay a substantial fine for past conduct and agreed to comply with the DOL's regulations in the future.

Recent Total Workforce Listing documents produced by Employer (Hearing Exhibit 2) reveal that more than 30% of Employer's workforce is comprised of U.S. citizens or permanent residents. This exceeds the minimum 30% ratio that is required in the Regulations [NMIAC § 80-20.1-210(c)(3)].

Based on the above-noted facts, Enforcement argued that Employer's deficient conduct justifies assessing sanctions against this Employer.

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." [Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).]

The evidence in this case establishes that Employer violated several Regulations, as set forth above. In mitigation, Employer has taken steps already to correct the deficiencies charged in the Determination. For this conduct, the Hearing Officer finds that Employer should be sanctioned with a $1,000 fine; however, half of the fine shall be suspended for a year, then extinguished, provided that Employer pays the unsuspended ($500) portion of the sanction and commits no further violations of CNMI labor law during the one-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** For the reasons stated above, Judgment is entered against Respondent Noel M. Baitlon for failing to post numerous JVAs on the Department's website and failing to keep adequate time and payroll records and to produce them on demand. [NMIAC §§ 80-20.1-225(a) and 501(b).] For these multiple violations, respondent shall be sanctioned as set forth below.

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2. **Sanctions:** For the reasons stated above, Respondent Noel M. Baitlon is hereby SANCTIONED one thousand dollars ($1,000); however, $500 of the fine shall be SUSPENDED for ONE YEAR, then extinguished, provided that Respondent pays the remaining $500 portion of the sanction as ordered and commits no further violations of CNMI labor law during the one-year period. 3 CMC §§ 4528(f)(2) and 4947(11). Payment terms are specified below.

3. **Payment Terms:** Respondent is ORDERED to pay the $500 portion of the fine no later than thirty (30) days after the date of issuance of this Order. Payment shall be made to the CNMI Treasury; a copy of the payment receipt shall be filed with the Hearing Office on or before the payment deadline.

4. **Posting on Website:** Respondent is reminded to post future job vacancies and renewals on DOL's website (www.marianaslabor.net) for those positions held by CW-1 status employees, in accordance with Regulations at NMIAC § 80–20.1-225(a). Respondent shall hire U.S. citizen and permanent resident job applicants when they are qualified to work.

5. **Warning:** The obligations described above are continuing obligations. If Respondent fails to comply with the terms of this Order he shall be subject to a possible reinstatement of the suspended sanction plus additional monetary sanctions, after a due process hearing on this issue.

6. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: July 7, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 17-011-05
Department of Labor Enforcement	)	
and Compliance Section, on behalf of	)	
Five Former Employees,	)	
Complainants,	)	ADMINISTRATIVE ORDER
v.	)	
Femina T. Martinez,	)	
dba JHP Construction,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on May 31, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by Ben Castro. Also appearing were four of the five employee-complainants: Ricky C. Calisaan, Elmer R. Consul, Jr., Kerwin M. Dayao, and Joselito C. Carreon. (Moises E. Cardona returned to the Philippines after filing the complaint and meeting with the investigator.) Respondent Femina T. Martinez, *dba* JHP Construction, appeared with her common-law husband, Pepito Lorenzo. Pablo Medina testified as a witness. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on May 19, 2017, against respondent Femina T. Martinez, *dba* JHP Construction ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

This case arises out of Employer's alleged failure to pay wages to five former employees: Moises E. Cardona, Ricky C. Calisaan, Elmer R. Consul, Jr., Kerwin M. Dayao and Joselito C. Carreon (collectively, "Employees"). The facts are as follows:

In 2016, Employer obtained a business license to operate JHP Construction and submitted CW-1 petitions to hire these Employees, who were living in the Philippines, to work in Saipan as construction workers. Each of the five employees entered into a written contract with Employer, called "Employment Contract For CW-1 Petition." (Copies of these 5 contracts were entered into evidence as Hearing Exhibits 2 to 6, respectively.) Each contract states that "regular hours" of work shall total 40 hours per week and that any hours worked more than 40 hours shall be considered overtime and paid at 1.5 times the regular rate. The contract's duration is "one year commencing from October 1, 2016 to September 30, 2017." *Id.*

Ultimately, the petitions were approved and Employees entered the CNMI in early January 2017; Employees began working at Employer's construction site in Dandan on January 23, 2017. Employees worked full-time, and often overtime, constructing a house in Dandan, from January 23 until the end of April 2017. At the end of April, Employer informed Employees that she did not have the money to pay their wages for the last two weeks of April, or thereafter. [Testimony of four present Employees and Ms. Martinez.] At that point, Employees stopped working and sought assistant at the Department of Labor.

The former Secretary of Labor Edith Deleon Guerrero assigned the case to the Enforcement Section. [Testimony of Mr. Castro.] Investigator Ben Castro investigated the matter by interviewing all parties. Mr. Castro issued his Determination on May 19, 2017. During the investigation and at the Hearing that followed, Employees raised the following complaints about the Employer.

Payroll Less Than the Contractual Wage: For about three weeks, beginning in January 2017, Employer paid Employees at the rate of $6.05 per hour instead of the $6.55 rate that was stated in their contracts. After about three weeks, Employer discovered her mistake and began paying Employees their agreed-upon salary of $6.55 per hour, but she never reimbursed Employees for her earlier mistake. **Holding:** The wage rate of $6.55 per hour is stated in each employment contract (Hearing Exhibits 2-6); therefore, each Employee is entitled to be reimbursed for all regular hours in which he was paid $6.05 instead of $6.55.

Deductions: Employer deducted $50 per pay period from each of Employees' salaries. Employer testified that she did this to reimburse herself for the cost of processing the CW-1 Petitions to bring these workers to the CNMI. [Testimony of Ms. Martinez.] **Holding:** The Hearing Officer notes that USCIS regulations regarding CW-1 status state that employers – not employees - shall pay fees for

petitions. [8 CFR 214.2(w)(5).] Furthermore, such unauthorized deductions would, in effect, drive each employee's wages below the stated contractual wage of $6.55 per hour. There is no mention of such deductions in the contracts, which state that "the foregoing terms and conditions constitute the entire agreement of the parties." [Hearing Exhibits 2-7, at p. 3, ¶ 20.] For these reasons, the Hearing Officer finds that the deductions were unauthorized and improper, and that Employees should be reimbursed for all amounts deducted by Employer for processing fees.

Additional Deduction for Mr. Dayao: Mr. Dayao claimed that Employer pressured him to pay $1,150, in addition to deducting $100 one time from his paycheck, as reimbursement for processing fees. Dayao testified that his mother in Saipan paid $750 in cash to Employer's common law husband, Pepito Lorenzo, to satisfy this "debt;" Dayao testified that he paid $400 in cash directly to Mr. Lorenzo, sometime in February-April 2017, after he was told by Lorenzo that such amount was due for processing fees. [Testimony of Mr. Dayao and Mr. Lorenzo.] Employer testified that Pepito Lorenzo is her common-law husband who worked as construction supervisor at the construction site. [Testimony of Ms. Martinez.] Neither Employer nor Mr. Lorenzo denied that Lorenzo received $400 from Mr. Dayao to "reimburse" Employer for processing fees. **Holding:** This payment that Mr. Dayao was pressured to make, amounts to an unlawful deduction from his pay that drove Employee's wages below his contractual hourly wage of $6.55 per hour, as specified in his Employment Contract (Hearing Exhibit 2). Accordingly, the deduction is unauthorized and improper. Mr. Dayao should be reimbursed for the $400 that he paid to Mr. Lorenzo for Employer's benefit. [The money that Mr. Dayao's mother allegedly paid to Employer is not subject to this Order as that person is not a party to this lawsuit.]

Overtime: Employer paid Employees "straight" time (i.e., regular pay) rather than overtime (1 and ½ times the regular pay rate) for all hours they worked more than 40 hours per week. Employer asserted that all Employees had agreed to this arrangement. [Testimony of Ms. Martinez.] At Hearing, two employees (Calisaan and Dayao) admitted they had agreed to the arrangement; whereas two employees (Consul and Carreon) denied they had ever agreed to it. **Holding:** The Hearing Officer rejects Employer's attempt to compensate overtime hours with straight pay for several reasons. First and foremost, such an "arrangement" is contrary to the express contract terms: overtime pay of 1.5 times regular pay is set forth in clear terms in each of the contracts (see Hearing Exhibits 2-7 at p. 2, ¶ 6.) Secondly, there is a clear public policy that overtime compensation should be 1.5 times regular pay, as expressed in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

("FLSA").[1] Finally, even if some workers had "agreed" to be paid in that manner, the Hearing Officer would decline to enforce that agreement on the grounds that, given the unequal power relationship between Employer and Employees, such agreement would be inherently coercive and entered into under duress; therefore, as a matter or equity, it is unenforceable. Accordingly, Employees should be reimbursed for all "overtime" hours in which they were paid at regular wage rates.

Failure to pay wages in April 2017: It is undisputed that Employer failed to pay any wages to Employees for the time that Employees worked in the latter half of April 2017. Employer claimed that her client for the construction project had fallen behind in making scheduled payments to Employer. During investigation, Employer was still promising the investigator that she would pay the overdue amounts, but as of the date of hearing (5/31/2017), Employer claimed she still had not received funds from her client. [Testimony of Ms. Martinez.] **Holding:** Employer owes wages to each Employee for all hours worked, but not paid, including for work performed in April 2017.

Investigator's Calculations: Investigator Ben Castro carefully reviewed the various claims of Employees and detailed those claims in summaries that were entered into evidence as Hearing Exhibits 7a through 7e. Investigator's detailed calculations included: (1) wages owed for hours underpaid at $6.05 per hour; (2) reimbursement of all unauthorized deductions taken by Employer; (3) reimbursement of all overtime hours that had been paid based on "straight" time rather than overtime (1.5 x $6.55); and (4) wages for hours worked, but never paid, in April 2017. *Id.*

During the investigation, investigator Ben Castro met with each Employee and reviewed his detailed calculations with them. Employees told Mr. Castro that the totals were accurate. At Hearing, each Employee agreed with the amounts reported by the investigator. Notably, Employer raised no objections to Mr. Castro's calculations. **Holding:** The Hearing Officer has reviewed the investigator's calculations and finds them to be accurate. The Hearing Officer has relied on such calculations, as well as Employees' statements, in calculating unpaid wages and deductions in this case.

Unpaid Wages/Unauthorized Deductions: The total amounts owed to each Employee, are listed below:

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[1] Employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek of at least one and one-half times their regular rates of pay. 29 U.S.C. § 207(a).

Moises E. Cardona[2]	$1,690.74....plus liquidated and contractual damages;
Ricky C. Calisaan	$1,269.05....plus liquidated and contractual damages;
Elmer R. Consul, Jr.	$1,241.40....plus liquidated and contractual damages;
Kerwin M. Dayao	$738.63....plus liquidated and contractual damages;
Joselito C. Carreon	$1,493.70....plus liquidated and contractual damages.

For discussion of liquidated damages and contractual damages, see Conclusions of Law below.

CONCLUSIONS OF LAW

Unpaid Wages/Improper Deductions: The Hearing Officer finds that Employer committed various errors in her payroll involving these Employees in the period from January through April 2017: (1) Employer paid wages at the rate of $6.05 per hour instead of $6.55 per hour for three weeks; (2) Employer improperly deducted amounts to reimburse herself for processing of CW-1 petitions; (3) Employer improperly paid overtime hours using a straight time rate rather than the overtime rate (1.5 x $6.55 per hour) stated in the contract; and (4) Employer failed to pay Employees for the work performed by Employees in the last two weeks of April 2017.

The amounts owed to each Employee for the above violations were calculated by investigator Ben Castro, based on the representations made by each Employee during his interview at Enforcement. At Hearing, each Employee confirmed that he agreed with the exact amounts stated in the investigator's calculations. Employer did not object to the amounts stated in the investigator's calculations. [Copies of the investigators calculations appear at Hearing Exhibits 7(a-e).] The Hearing Officer finds such amounts to be accurate and supported by substantial evidence.

Contractual Damages: At Hearing, appearing without counsel, Employees were uncertain as to their legal rights to assert damage claims. Employees asked the Hearing Officer to consider their wage claims to extend "as far as the law allows." The Hearing Officer finds that, in addition to amounts already calculated by the investigator, Employees may make a claim for contractual damages, as follows.

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[2] During the investigation stage, Mr. Cardona informed the investigator that he intended to return to the Philippines as soon as possible. Mr. Cardona confirmed the totals included in the investigator's calculations. The investigator told Cardona that his name would be included in the case. [Testimony of Mr. Castro.] Accordingly, Mr. Cardona's claims were included in the Determination and Hearing and his claims are adjudicated in this Order. Prior to leaving the CNMI, Mr. Cardona provided his mailing address; this Administrative Order will be served on him by mail.

Each Employment Contract states that the term of the contract is from October 1, 2016 until September 30, 2017. In effect, Employees were promised work from the time of their entry into the CNMI through September 30, 2017. Employer announced in late April 2017, and again at Hearing, that she is financially unable to pay wages to Employees to finish the construction project. [Testimony of Ms. Martinez.] These facts establish that Employer has breached each Employment Contract by failing to provide Employees with work for five months, from May through September 2017.[3]

Contractual damages will serve to compensate Employees for wages lost as a result of Employer's failure to provide regular work from May through September 30, 2017.[4] Such contractual damages are calculated by multiplying weekly wages of $262 (40 x $6.55 = $262) times the number of weeks (22) remaining on the contract (May 1 through September 30, 2017). Contractual damages amount to $5,764 for each Employee (22 x $262 = $5,764). The Hearing Officer finds that each Employee is entitled to such contractual damages for wages lost due to Employer's breach of the Employment Contracts.

Liquidated Damages: The Commonwealth Employment Act of 2007 at 3 CMC § 4947(d)(2) authorizes an award of liquidated damages, amounting to twice the amount of unpaid wages, unless the Hearing Officer finds extenuating circumstances. Based on the evidence presented, the Hearing Officer finds that each Employee should be awarded liquidated damages equal to those amounts calculated by the investigator to be owed to each Employee for unpaid wages and unauthorized deductions.[5] [See Order at pp. 8-9. ¶ 4.]

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for <u>each</u> violation. [Hearing Exhibit 1 at p. 3.]

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[3] Employer testified that she does not have the financial funds needed to continue her construction project. [Testimony of Ms. Martinez.] According to Employer, her "client" has stopped paying into the project; therefore, she has no present ability to pay for Employees' wages or materials. *Id.*

[4] The contracts contain no provision allowing Employer to invoke an early termination of the agreement. [See Hearing Exhibits 2-6.]

[5] The investigator calculated (1) wages owed for those hours underpaid at $6.05 per hour, (2) reimbursement of all unauthorized deductions taken by Employer; (3) reimbursement for all overtime hours that had been paid based on "straight" time rather than overtime; and (4) wages for hours worked, but never paid, in April 2017. The investigator did not calculate contractual damages for work not provided from May through September 2017. Such contractual damages shall not be subject to liquidated damages.

At Hearing, Enforcement indicated that it would accept the Hearing Officer's discretionary ruling in this matter. [Testimony of Mr. Castro.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. The evidence in this case established that Employer committed multiple violations. First, Employer failed to pay the hourly wage specified in the Employment Contracts for about 3 weeks; Second, Employer took unauthorized deductions to reimburse herself for USCIS processing fees, thus lowering wages below the contracted amount. Third, Employer asked Employees to agree to be paid "straight time" for work over 40 hours per week and improperly paid such hours at the regular rate rather than overtime rates. Fourth, Employer failed to pay for work performed by Employees in April 2017. Of these violations, the Hearing Officer finds two to be particularly egregious: unauthorized deductions and failure to pay overtime. Such violations, committed against five employees, justify sanctions of $2,000 each, for a total of $4,000.[6] Employer's failure to pay wages in April was not willful, but caused by events beyond her control; therefore, no sanction will be issued for that conduct.

Holding: Based on the evidence presented and the considerations noted above, the Hearing Officer finds that Employer should be sanctioned in the total amount of $4,000. Half of the sanction shall be suspended on the condition that Employer complies with the payment terms of the Order; if Employer fails to do so, the suspended sanction will be reinstated without further hearing. 3 CMC §§ 4947(d)(6) and (d)(11).

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[6] Employer's defense to these charges was that she had mistakenly believed she was entitled to deduct processing fees and to make agreements with Employees to pay straight time instead of overtime. The Hearing Officer finds such excuses to be weak. Employer should have known that the terms of the Employment Contracts obligated Employer to pay overtime wages. Likewise, Employer should have known that deducting wages to pay processing fees was improper and coercive.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Femina T. Martinez, and in favor of complainant-Employees on the claims contained in the Determination, as detailed above. [3 CMC § 4947(d)(1) and Regs. at NMIAC § 80-20.1-485(c)(2).] Employees shall be issued awards reimbursing them for unpaid wages and unauthorized deductions, as well as liquidated and contractual damages, as set forth below.

2. **Liquidated Damages:** Respondent Femina T. Martinez is hereby assessed liquidated damages in amounts equaling the individual wage awards to each Employee, as set forth in paragraph no. 4. [3 CMC § 4947(d)(2) and Regs. at NMIAC § 80-20.1-485(c)(3).]

3. **Contractual Damages:** Each complainant-Employee is awarded $5,764 in contractual damages based on Respondent's failure to provide work in breach of each Employee's Employment Contract. [3 CMC §§ 4947(d)(1) and (d)(11); and Regs. at NMIAC §§ 80-20.1-485(c)(2) and 485(c)(13).]

4. **Awards for Unpaid Wages/Unauthorized Deductions, Liquidated Damages and Contractual Damages:** Judgment is entered against Respondent Femina T. Martinez and in favor of complainants in the following amounts:

Moises E. Cardona is awarded the following amounts:
$1,690.74 for unauthorized deductions and unpaid wages;
$1,690.74 in liquidated damages;
$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)
For a total of $9,145.48.

Ricky C. Calisaan is awarded the following amounts:
$1,269.05 for unauthorized deductions and unpaid wages;
$1,269.05 in liquidated damages;
$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)
For a total of $8,302.10.

Elmer R. Consul Jr. is awarded the following amounts:
$1,241.40 for unauthorized deductions and unpaid wages;
$1,241.40 in liquidated damages;
$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)
For a total of $8,246.80.

Kerwin M. Dayao is awarded the following amounts:
$1,138.63 for unauthorized deductions and unpaid wages;[7]
$1,138.63 in liquidated damages;
$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)
For a total of $8,041.26.

Joselito C. Carreon is awarded the following amounts:
$1,493.70 for unauthorized deductions and unpaid wages;
$1,493.70 in liquidated damages;
$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)
For a total of $8,751.40.

5. **Payment Schedule:** Respondent Femina T. Martinez is ORDERED to pay the above-noted amounts by cashier's check or postal money order, payable to each Employee by name, and delivered to the Administrative Hearing Office no later than **thirty (30) days** after the date of issuance of this Order. 3 CMC § 4947(d)(2). Any failure to make timely payment of these awards shall cause a penalty of $10 per day to be added to each award. 3 CMC § 4947(d)(11).

6. **Sanctions:** Respondent Femina T. Martinez is hereby SANCTIONED a total of four thousand dollars ($4,000) for her conduct; however, half of this sanction is SUSPENDED for two years, provided that Respondent fully complies with the terms of this Order and commits no further violations of labor laws during that period. Respondent is ORDERED to pay the remaining $2,000 in sanctions no later than **ninety (90) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4947(d)(6) and 4947(d)(11).

7. **Reinstatement of Suspended Fine:** If Respondent fails to comply with the terms of this Order, or commits further labor law violations during the two-year period, she shall be subject to a possible reinstatement of the suspended sanctions ($2,000) plus added monetary sanctions, after a due process hearing on this issue.

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[7] This amount includes the total calculated by investigator Ben Castro ($738.63) and the $400 "deduction" that Mr. Dayao paid to Mr. Lorenzo. [See Order on page 3 – discussion regarding "Additional Deduction for Mr. Dayao."]

[CAC No. 17-011-05]

8. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a).

DATED: June 14, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 17-015-08
Department of Labor Enforcement	)	
and Compliance Section, and	)	
Rolando M. Gacayan Jr.,	)	
Complainants,	)	ADMINISTRATIVE ORDER
v.	)	
	)	
Hector DLC Sablan,	)	
dba Pacific Island Cleaning Agency,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on September 6, September 29, and October 12, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by Patrick C. King. Complainant Rolando M. Gacayan, Jr. and Respondent Hector DLC Sablan appeared without counsel. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on August 16, 2017, against respondent Hector DLC Sablan, *dba* Pacific Island Cleaning Agency ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

This case concerns several issues regarding Employer's failure to pay wages and taking improper deductions. The detailed claims are discussed below.

Employer Failed to Pay Wages to Complainant Gacayan Jr. from June 5, to September 5, 2017.

Employer operated a manpower agency which contracted with Herman's Bakery to provide Employee's services as part of a manpower agreement. Complainant Roland M. Gacayan Jr. ("Employee") worked at Herman's Bakery under this manpower arrangement, but Employer continued to be obligated to pay Employee's wages. In about August 2017, Employee approached the Department of Labor ("DOL") and stated that his Employer had not paid his wages since June 5, 2017. Enforcement then began an Agency investigation of the matter, the results of which were summarized in its Determination. [Testimony of Mr. King.]

In its Determination, Enforcement charged that Employer had failed to pay wages to Employee for work performed by Employee at Herman's Bakery from June 5, 2017, through the date of the Determination – August 15, 2017. Employee stopped working for Employer on September 5, 2017.

At the first hearing on September 6, 2017, Enforcement amended the period of non-payment of wages to read: June 5 to September 5, 2017.

At the first hearing on September 6, 2017, Employer admitted that he owed back wages to Employee, but asked that he be given time to come up with the funds to pay the wages. Evidently, part of the problem was that Herman's Bakery had become concerned about Employee getting paid his salary, and thereafter, withheld certain payments to Employer. [Testimony of Mr. King and Mr. Sablan.]

Employer testified that he needed four weeks to gather the necessary funds and documents to pay Employee's back wages. The Hearing Officer agreed to give Employer time to arrange for payment and set a second hearing for September 29, 2017.

At the second hearing on September 29, 2017, Employer paid Employee **$1,905.85** in two U.S. postal money orders; this amount represented Employee's net pay for work he performed from June 5 to July 28, 2017. At the hearing, Employee accepted these money orders as the correct amounts owed to him for that period. [Testimony of Mr. Gacayan Jr.] The case was continued until October 12, 2017, and Employer was ordered to produce pay stubs for the entire period of Complainant's claim: June 5 to September 5, 2017. In addition, Employer was ordered to come to the next Hearing prepared to pay all remaining unpaid wages for the period from July 29 to September 5, 2017.

At the third hearing on October 12, 2017, Employer produced all of the requested pay stubs for Employee for the period from June 5 to September 5, 2017. [Copies of these paystubs were collectively entered into evidence as Hearing Exhibit 5.] These records showed that Employer still owed to Employee unpaid wages of $1,123.73 for the period from July 29 to September 5, 2017:

$438.55 – July 29 – August 11, 2017
$366.59 – August 12 - 25, 2017
$318.59 – August 26 – September 5, 2017
$1,123.73 – Total net wages owed to Employee (after deductions)

At Hearing on October 12, 2017, Employer admitted that he owed the above amounts but said he did not yet have the cash available to pay Employee. Employer noted that he expected to receive payment from another client on October 13, 2017, so he would be able to pay this debt within one day. The Hearing Officer gave Employer several extra days, ordering him to pay $1,208.23 no later than October 17, 2017. [The total of $1,208.23 represents $1,123.73 in unpaid wages plus $84.50 in reimbursement for improper deductions (see below).]

Subsequent to the hearing, Employer failed to deliver to the Hearing Office any portion of the owed wages by October 17, 2017. Employer also neglected to contact the Hearing Office to provide any explanation for his failure to pay any amounts to Employee.

Employer Improperly Deducted Amounts from Employee's Paychecks For Workmen Compensation Insurance.

It was discovered during the hearing that Employer had deducted $6.50 for Worker's Compensation insurance from each of Employee's pay periods. This deduction is improper; all employers are required to cover that expense without deducting anything from a worker's paycheck. [see P.L. 6-33, 4 CMC § 9301 *et seq.*] The Hearing Officer ordered reimbursement of the $6.50 amount to cover six months (13 paystubs) of wages. The amount to be reimbursed totaled **$84.50** (13 x $6.50 = $84.50).

Employer Failed to Pay Wages Recorded in One Pay Stub (2/26 – 3/12/2017).

In addition to the other claim for unpaid wages described above, Employee also alleged that Employer had given him a copy of one paystub for the period from 2/28/17 to 3/12/17, but never actually paid the wages recorded on that paystub. [A

copy of the paystub was entered into evidence as Hearing Exhibit 4.] Employee made an oral motion to add this claim to his case; the Hearing Officer granted the Motion and took evidence from both parties regarding this issue.

Employee testified that on March 30, 2017, he had approached Employer and asked for two signed paystubs so that he could submit them in support of his CW-1 Petition for transfer employment. According to Employee, on March 31, 2017, he went to Employer's home and Mrs. Sablan paid him for one paystub, but Employer still owed for the other paystub covering the period from February 28 to March 12, 2017, in the amount of $498.92. [Testimony of Mr. Gacayan Jr. and Exhibit 4.]

Employer admitted giving Employee the paystubs but claimed that he also paid all wages at the time the paystubs were signed by Employee. [See signed paystub at Hearing Exhibit 4.] Employer's wife, Elnora Sablan, testified that she did not recall ever paying any money to Employee. [Testimony of Mr. and Mrs. Sablan.]

Videotape evidence: In support of his claim, Employee produced a recording of a conversation that Employee had with Employer, which he had recorded surreptitiously on April 6, 2017, on his cell phone. The conversation between Employer and Employee was in the Ilocano language, a dialect of the Philippines. Employee produced a translated transcript of the recorded conversation, as well. [The digital recording and the translated transcript were entered into evidence as Hearing Exhibits 7 and 8, respectively.[1]]

The Hearing Officer finds the testimony of Employee more credible than that of Mr. Sablan and his wife, especially given certain statements by Mr. Sablan, recorded on April 6, 2017, in which Sablan is heard to state several times that "the other one (paystub) is already paid but ***the other one is for deposit***...(Gacayan says: "So, the 86 (hours) is not yet paid?...(Sablan answers) That is not yet paid." [Hearing Exhibits 7 and 8 (emphasis added).]

Based on the evidence presented, the Hearing Officer finds that Employer failed to pay **$498.92** in wages, as reflected in the paystub at Hearing Exhibit 4. Employer shall be ordered to pay this amount, plus an equal amount in liquidated damages.

[1] Employee initially testified that he had translated the Ilocano language to English and embedded the English text into the video. After the Hearing, Employee submitted an Affidavit, attesting under the penalty of perjury that he had submitted an accurate translation from Ilocano to English. This Affidavit was entered into evidence as Hearing Exhibit 8.

LIQUIDATED DAMAGES

Under the Commonwealth Employment Act of 2007, at 3 CMC § 4947(d) (1), the Hearing Officer is authorized to award to a complainant unpaid wages plus amounts unlawfully deducted from wages. In addition, the Hearing Officer is authorized to assess liquidated damages in twice the amount of unpaid wages in any case in which a foreign-national worker prevails on unpaid wages, unless the hearing officer finds extenuating circumstances. 3 CMC § 4947(d)(2).

In this case, after Employee waited two months to be paid for work performed in June 2017; by mid-August, Employee felt compelled to seek assistance from the Department of Labor to recover his unpaid wages. By the start of the hearing (September 6, 2017), unpaid wages amounted to $3,029.58.

During the hearing process, Employer repaid $1,905.85 in back wages for the period from June 5 to July 28, 2017; however, Employer still owes unpaid wages of $1,123.73 (wages from 7/29 – 9/05/2017) as of the date of this Order.[2] In addition, Employee claimed, then proved, that he had never been paid for a $498.12 pay stub (Exhibit 4) given to him in March 2017. This amount remains unpaid, as well. These two amounts total $1,622.65.

Based on the long delays that Employee has endured, as well as having to bring litigation to induce his Employer to pay back wages, the Hearing Officer finds that liquidated damages should be calculated, and awarded, as follows:

(1) For the wages ($1,905.85) paid at the second hearing on September 29, 2017, liquidated damages should amount to **25%** of those wages: $476.46.

(2) For the remaining unpaid wage amounts $1,123.73 (wages for 7/29/17 – 9/05/17) plus $498.92 (wages for 2/28/17 – 3/12/17), liquidated damages should be awarded for **100%** of these wages: $1,123.73 plus $498.92 = $1,622.65.

The total liquidated damage award ($476.46 plus $1,622.65) amounts to **$2,099.11**.

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[2] Although Employer promised during the third hearing to pay $1,123.73 in unpaid wages by October 17, 2017, he failed to pay and submitted no explanation for his failure to do so.

SANCTIONS

In its Determination, Enforcement asked that Employer be sanctioned for his conduct in failing to pay wages in a timely manner. [Hearing Exhibit 1 at p. 3.] In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. The evidence in this case established that Employer failed to pay about $3,000 in wages in a timely manner. Employer stopped paying wages in June, July and August 2017. This forced Employee to file litigation to recover his wages. Employer should be sanctioned for his long delay in paying earned wages. On the other hand, the Hearing Officer recognizes that Employer cooperated with the Department's investigation and never denied owing the wages. Employer attended all three hearing sessions, produced payroll records when asked to do so, and ultimately, paid a certain portion of the wages on September 29, 2017. Such conduct should mitigate against imposing the maximum sanction. Finally, the Hearing Officer acknowledges that the liquidated damages that are assessed against Employer in this Order already serve as a type of sanction for failing to pay wages.

Holding: Based on the facts and considerations noted above, the Hearing Officer finds that Employer should be sanctioned $1,500; however, half of the sanction shall be suspended for one year, then extinguished, on the condition that Employer fully complies with the payment terms of this Order. If Employer fails to pay the amounts as ordered, the suspended sanction may be reinstated. 3 CMC §§ 4947(d)(6) and (d)(11).

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Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Hector DLC Sablan, and in favor of complainant Department of Labor Enforcement and Compliance Section and complainant Rolando C. Gacayan Jr. [3 CMC § 4947(d)(1) and Regs. at NMIAC § 80-20.1-485(c)(2).] Complainant Gacayan Jr. shall be awarded unpaid wages, unauthorized deductions and liquidated damages; and Complainant DOL shall be granted its request for sanctions, as set forth below.

2. **Unpaid Wages:** Judgment is entered against Respondent and in favor of Complainants on the charge of failing to pay wages in a timely manner. As of the date of this Order, Respondent owes net wages to Employee (after deductions) in the total amount of $1,622.65, broken down as follows:

(1) $438.55 – [pay period: July 29 – August 11, 2017]
(2) $366.59 – [pay period: August 12 - 25, 2017]
(3) $318.59 – [pay period: August 26 – September 5, 2017]
(4) $498.92 – [pay period: February 26 – March 12, 2017]
$1,622.65 – TOTAL

Respondent is ORDERED to pay **$1,622.65** in unpaid wages to Complainant Gacayan, Jr., according to the Payment Schedule (below).

3. **Unauthorized Deductions:** For the reasons described above on page 3, Judgment is entered against Respondent Hector DLC Sablan and in favor of complainants in the following amount of **$84.50**.

4. **Liquidated Damages:** For the reasons set forth above on page 5, Respondent Hector DLC Sablan is hereby ORDERED to pay **$2,099.11** in liquidated damages to Complainant Gacayan Jr. [3 CMC § 4947(d)(2) and Regs. at NMIAC § 80-20.1-485(c)(3).]

5. **Payment Schedule:** Respondent Hector DLC Sablan is ORDERED to pay **$1,622.65** in unpaid wages, plus **$84.50** in unauthorized deductions, plus **$2,099.11** in liquidated damages, **for a total of $3,806,26**, by cashier's check or postal money order, payable to complainant Roland C. Gacayan Jr. and delivered to the Administrative Hearing Office no later than **thirty (30) days** after the date of issuance of this Order. 3 CMC § 4947(d)(2). 3 CMC § 4947(d)(11).

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6. **Sanctions:** Respondent Hector DLC Sablan is hereby SANCTIONED a total of one thousand five hundred dollars ($1,500) for his conduct; however, half of this sanction shall be SUSPENDED for one year, then extinguished provided that Respondent fully complies with the payment terms of this Order and commits no further violations of labor laws during that period. Respondent is ORDERED to pay the remaining **$750.00** in sanctions, payable to the CNMI Treasury, no later than **sixty (60) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4947(d)(6) and 4947(d)(11).

7. **Reinstatement of Suspended Fine:** If Respondent fails to comply with the terms of this Order, or commits further labor law violations during the one-year period, he shall be subject to a possible reinstatement of the suspended sanctions ($750.00) plus added monetary sanctions, after a due process hearing on this issue.

8. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a).

DATED: October 23, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Xiao Tang Sanchez, *dba* 24/7 Security Services, Respondent.	)	CAC No. 17-016-11 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on December 18, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section ("Enforcement") was represented by Jeff Camacho. Respondent Xiao Tang Sanchez, *dba* 24/7 Security Services, appeared with her Manager, Osman Gani. Respondent was represented by her counsel, Mark Scoggins. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by Enforcement on November 17, 2017, against Respondent Xiao Tang Sanchez, *dba* 24/7 Security Services ("Employer"). [A copy of the Determination and Proof of Service indicating service on 11/17/17, was entered into evidence as Hearing Exhibit 1.]

Respondent Failed To Produce Documents In A Timely Manner.

On September 26, 2017, Enforcement served Employer with a document request, known as a "Business Establishment Compliance and Monitoring Request Form," which instructed Employer to produce certain business-related documents within ten business days (i.e., by October 11, 2017). [A copy of the Business Establishment Compliance and Monitoring Request Form, dated 9/26/17 (hereinafter, "Request"), was entered into evidence as Hearing Exhibit 2.] The Request was delivered to Employer's Manager, Mr. Gani Osman, on 9/26/17. *Id.*

The Request was part of a legitimate administrative inspection of payroll, business license, tax and census-related information. Under the Employment Rules and Regulations ("Regulations" or "Regs."), the "Department may conduct investigations as necessary and appropriate to enforce provisions of the Commonwealth Employment Act of 2007, as amended...." [Regs. at NMIAC § 80–20.1-445; *see also* 3 CMC § 4939(a) *et seq.*] [1]

The Request asked Employer to produce copies of the following documents:

Total Workforce Listing
Workforce Plan
Employer's Quarterly Withholding Tax for the last 4 quarters
Payroll records for the last 4 quarters
Tax standing from the Division of Revenue and Taxation
Copy of employees' EAD, Green Card, CW, etc.
Business License
Annual Corporate Report
Sketched map of business location

Regulations of the Department of Labor require employers to keep and produce the information listed above, upon written request by the Secretary of Labor or a designee. [Regs. at NMIAC §§ 80-20.1-445 and 80–20.1-501(a-f).]

Even without a written request from the Department of Labor ("DOL" or "Department"), DOL Regulations require employers to submit Total Workforce Listings to the Department of Labor on a quarterly basis. [Regs. at NMIAC § 80–20.1-505(b-d).] The Regulations also require employers to submit an updated Workforce Plan to DOL once every 12 months, regardless of whether DOL serves a written request for it. [Regs. at NMIAC § 80–20.1-510.]

As stated, Employer was served with the Request on September 26, 2017, and instructed to produce requested documents by October 11, 2017. Employer produced no responsive documents by the due date. On October 23, 2017, investigator Jeff Camacho called Respondent's Manager, Mr. Gani, and left a message to follow up on the Request. Mr. Gani called back and requested an extension until the end of October to produce the documents. Mr. Camacho then

[1] The Commonwealth Employment Act of 2007 notes that the Department may inspect: "The employer's payroll records,...worker contracts, or any other documents or business records the employer is required to collect, maintain or produce for inspection pursuant to this chapter, regulations and the Minimum Wage and Hour Act." 3 CMC § 4939(c)(3).

gave Mr. Gani a one-day extension – until October 24, 2017 – to produce the documents. The next day (10/24/17), Employer did not produce any documents to Enforcement.

On October 25, 2017, Mr. Gani came to the Enforcement Section and asked for another extension of time to produce the documents. On October 27, 2017, Mr. Gani again called Mr. Camacho at Enforcement and asked for an extension of time to produce the requested documents. At this point, the parties' recollections differ: Mr. Camacho recalls Gani saying that he could not produce documents because Ms. Sanchez was off-island; Mr. Gani recalls that he said he needed more time because he was in the midst of an ongoing investigation conducted by the U.S. Department of Labor, [Testimony of Mr. Camacho and Mr. Gani.] In any case, Mr. Camacho denied the request for an extension of time to produce documents.

As of November 17, 2017, Employer still had not produced the requested documents to Enforcement. On that day, Mr. Camacho visited a local school where Employer works, and served her by hand with the Determination. (Hearing Exhibit 1). *Id.*

Respondent Waited Until the Day of Hearing to Produce the Documents.

At the Hearing on December 18, 2017, Employer produced most of the documents that were listed in the Request. Those documents included: Total Workforce Listing, Workforce Plan, the Employer's Quarterly Withholding Tax for the last 4 quarters, Payroll records for the last 4 quarters, Tax standing from the Division of Revenue and Taxation, copies of all EADs, Green Cards, CWs, etc. of employees, a copy of the Business License as well as a sketched map of the business location. [Note: no Annual Corporate Report exists as this is a sole proprietorship.]

Several documents were missing from Employer's production of documents on the day of Hearing. These were (1) payroll withholding tax records for the 4th quarter of 2016; and (2) a one-page list of employees missing from the payroll tax records. The Hearing Officer ordered Employer to provide these documents to Enforcement within 10 days of the Hearing. On January 2, 2018, Employer produced these documents to Mr. Camacho. These have been entered into evidence as Hearing Exhibit 4(a-g).

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Employer's Reasons For Not Producing Documents Were Erroneous.

Employer testified that she relied on her Manager, Mr. Osman Gani, to address the Request. Ms. Sanchez testified that she has given Mr. Gani a Power of Attorney over her security business and relies on him to run the business. [Testimony of Ms. Sanchez.] The Hearing Officer notes that Ms. Sanchez, as the employer of record, bears the ultimate responsibility for the business operated under her name.

Manager Osman Gani testified that he had been unable to produce the requested documents because, at the time of the request (September 26 through November 17, 2017), Gani was responding to an ongoing investigation conducted by the U.S. Department of Labor. Mr. Gani stated that, at about the same time that DOL requested documents from Employer, an investigator from the U.S. Department of Labor was also asking for company documents. Gani claimed that he told, or tried to tell, Mr. Camacho on October 23, 2017, that he could not provide the documents to Enforcement until he received them back from the U.S. Department of Labor. [Testimony of Mr. Gani.]

Post-Hearing evidence, received without objection, demonstrated that Mr. Gani's proffered excuse was erroneous. The U.S. Department investigator noted that he only met with Mr. Gani twice during October and November 2017, with both meetings occurring between October 30 and November 6, 2017. Furthermore, the investigator took no original documents from Gani but only made copies of certain documents. [See Emails of 12/19/17 and 12/20/17 from Jeff Camacho to Jerry Cody, entered into evidence as Hearing Exhibit 3.[2]

In short, company documents remained in Employer's custody and control during the entire period of October and November 2017 and the U.S. Dept. of Labor investigation should not have hindered Mr. Gani's task of producing the documents to DOL Enforcement.

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[2] At the Hearing, the Hearing Officer instructed Mr. Camacho to contact the U.S. Department of Labor investigator (Mr. Tamondong) Mr. Camacho was asked to gather the information and then send a written report to the Hearing Office with a copy to Respondent's counsel. Shortly after the Hearing, Mr. Camacho reported that he had contacted the investigator, Mr. Tamondong, who told him that Tamondong had met with Mr. Gani twice between October 31 and November 5, 2017; and that the investigator did not take Mr. Gani's original documents but only made copies of certain documents.

Respondent was given an opportunity to, but chose not to, contest the information given by Mr. Tamondong via Mr. Camacho. [Emails from Hearing Officer to Respondent on 12/21/2017 and 12/29/2017.] Therefore, the Hearing Officer accepts the information conveyed by Mr. Tamondong as credible and uncontested.

CONCLUSIONS OF LAW

It is uncontested that Employer was served with a Request to produce documents by Enforcement on September 26, 2017; that the Request required Employer to produce responsive documents to Enforcement by October 11, 2017; and that Employer failed to produce the documents or contact Enforcement by the due date, or even within a reasonable time thereafter. About two weeks after the due date, Employer's Manager asked for an extension of time to produce the documents, but in the end, failed to produce any documents to Enforcement by November 16, 2017 – more than a month after the original due date. On November 16, 2017, Enforcement issued its Determination and then served the document on Employer Xiao Tang Sanchez.

At Hearing, Ms. Sanchez offered no excuse for her failure to produce documents other than to note that she has signed a power of attorney which, in effect, enables Mr. Gani to manage and operate a security business under Ms. Sanchez's ownership and name. [Testimony of Ms. Sanchez.] As noted already, Ms. Sanchez, as owner of the security business, cannot avoid responsibility to provide documents to DOL by simply leaving all tasks in the hands of her agent.

Manager Osman Gani's sole excuse for failing to produce documents was that he was involved in responding to an investigation conducted by the U.S. Department of Labor. [Testimony of Mr. Gani.] However, information obtained from that U.S. Department of Labor investigator, Mr. Tamondong, reveals that the investigator only met twice with Mr. Gani and that the investigator took only copies of documents from Mr. Gani – not the documents themselves. Thus, the U.S. Department of Labor investigation did nothing to prevent or hinder Gani from responding to DOL's Request. This information demonstrates that Mr. Gani's excuse for not producing documents to Enforcement in October and November, was completely bogus.

In addition, the Hearing Officer notes that many of the documents requested by Enforcement were basic to the operation of a business, such as copies of business licenses and payroll records. Other documents, such as Total Workforce Listings and the Workforce Plan, are required to be filed periodically with DOL regardless of whether a specific document request is served. Thus, it should not have required a monumental effort on Employer's part to produce the documents. Clearly, Employer should have been more diligence in collecting and producing the documents in a timely manner.

Sanctions: Enforcement requested that Employer be sanctioned the maximum sanction of $2,000 for failing to produce documents in a timely manner. [Determination at Hearing Exhibit 1, p. 2.] In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." [Regs. at § 80- 50.4-820(h) and (o).]

The Hearing Officer finds that the facts here justify a substantial monetary sanction. Employer missed the deadline to produce documents by more than a month and only provided the documents after she was called to a hearing. Then, at hearing, Employer's manager provided completely inadequate reasons to justify his delay in producing the documents. Employer's delayed response to the Request wasted Departmental resources by requiring Enforcement to file the present case and attend a hearing to recover the documents. The DOL personnel's time and resources were spent in a case which could have been avoided if Employer had acted responsibly and produced the requested documents in a timely manner.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars ($2,000); however, $1,000 of that sanction shall be suspended for two years, then extinguished, provided that Employer complies with the other terms of this Order and commits no further violations of CNMI labor laws or regulations during the next two years.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Xiao Tang Sanchez, *dba* 24/7 Security Services, for failing to produce documents as requested by Enforcement as part of a lawful administrative inspection. [3 CMC §§ 4527, 4939(a) *et seq.*; and Regs. at NMIAC §§ 80–20.1-445 and 501(a-f).] For this violation, Respondent shall be sanctioned in the manner set forth below.

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[CAC No. 17-016-11]

2. **Sanctions:** Respondent Xiao Tang Sanchez is hereby SANCTIONED two thousand dollars ($2,000) for the above-described conduct; however, $1,000 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$1,000** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. [3 CMC §§ 4528(f)(2) and 4947(11).]

3. **Reinstatement of Suspended Sanctions:** If Respondent fails to comply with the terms of this Order, she shall be subject to possible reinstatement of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section and after a due process hearing on this issue.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. [3 CMC §§ 4948(a) and 4528(g).]

DATED: January 12, 2018

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 16-002-02
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Saipan City Taxi Association, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on April 26 and June 14, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by Ben Castro. Respondent Saipan City Taxi Association, Inc., was represented by its corporate Secretary, Ziaur Rahaman. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on March 28, 2016, against respondent Saipan City Taxi Association, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination charges that Employer failed to meet the threshold workforce participation percentage of 30%, as specified at 3 CMC § 4525(a) and in the Department's Employment Rules and Regulations at section 80-30.2-120(c); see NMIAC § 80-20.1-210(c)(3).[1] Enforcement sought sanctions of $2,000 against the Employer for failing to meet the 30% ratio and failing to interview job applicants.

[1] The first citation refers to the Employment Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Employer is in the business of providing taxi services in Saipan. In November 2015, Enforcement conducted an inspection of Employer's business operation. In connection with that investigation, Employer produced documents establishing that it employed 12 full-time workers: 11 CW-1 status taxi drivers and its President, who is a U.S citizen. (Testimony of Mr. Rahaman.)

Determination: In February 2016, the Department's Job Placement Section worked with Employer's corporate Secretary to assist Employer in seeking U.S. citizens or permanent residents for Employer's full-time work force. In March 2016, Employer posted four Job Vacancy Announcements on DOL's website, running from March 2-17, 2016. The website recorded 43 online responses to these JVAs.

As of March 28, 2016, Enforcement noted that Employer had still not responded online to any of the responses. Enforcement then filed an Agency Case, alleging that Employer had not taken "proper action" to comply "with violations of the 30% U.S. workforce participation hiring and/or objectives" as requested by DOL's Job Placement Center. [Determination at p. 2, ¶ 6.]

At hearing on April 26, 2016, Mr. Rahaman explained that his review of job applicants had been delayed because he had required emergency surgery in April; therefore, Mr. Rahaman requested more time to evaluate the job applicants. The Hearing Officer granted the request, continued the case until June 14, 2016, and instructed Mr. Rahaman to evaluate the job applicants during that period.

At the second hearing on June 14, 2016, Mr. Rahman testified that he had re-advertised the JVAs in May 2016, whereupon 37 online responses were recorded. Thereafter, Rahaman attempted to contact each and every job applicant, by telephoning them and inviting them to a job interview. Out of the group of 37 applicants, 24 applicants never answered their phones and two applicants' phones were "out of service." In 11 cases, Rahaman reached applicants or their family members and invited the applicants to interview for the position. Only one person appeared at the interview. (Testimony of Mr. Rahaman.)

The one person who was interviewed stated that he was not sure he wanted to work as a taxi driver. Also, that person's driver license had expired. Mr. Rahaman told him that if he renewed his driver's license, he could re-apply for the position. *Id.* Mr. Rahaman kept copious, detailed notes regarding his attempts to invite applicants to interview for the taxi driver positions. [A copy of Mr. Rahman's notes were entered into evidence as Hearing Exhibit 2.]

DISCUSSION

The credible testimony of Mr. Rahaman, corroborated by his detailed notes, establishes that Employer made a good faith effort in May 2016 to find and hire U.S. citizens and/or permanent residents for the taxi driver positions. That this effort has been unsuccessful does not appear to be the fault of Employer.

Department Regulations (section 80-30.3-460) state that if an employer cannot find a qualified citizen or permanent resident for a job vacancy, through posting on the website, referrals from the Department, or good faith efforts to hire, the "Department shall issue to the employer a certification of compliance" as to that job vacancy. *Id.*

In its Determination, Enforcement stated that Employer "failed to demonstrate good faith effort to hire status qualified citizens" and "they remain non-compliant with the Workforce Participation Requirement (30%)." [Determination at p. 3, ¶ 3.] Nevertheless, at Hearing, the Enforcement representative could not identify what additional efforts Employer should have made to hire status-qualified workers, beyond the efforts that the company had already demonstrated; namely, posting JVAs, and attempting to interview available, qualified citizens and permanent residents, including referrals from the Job Placement Section.

Enforcement seems to take the position that the mere fact that an employer has failed to employ a minimum of 30% of its full-time workforce with status-qualified workers, justifies imposing a severe sanction of $2,000 against the employer. Evidently, Enforcement believes this fine should be imposed regardless of whether Employer has made a good faith effort to find available, status-qualified job applicants to meet the 30% threshold. [Testimony of Mr. Castro; Determination at p. 3, Findings at ¶¶ 3-4.]

The Hearing Officer disagrees that this situation justifies imposing a severe fine. To impose an exorbitant fine on an employer simply because the workforce participation target of 30% has not been met, without evidence of bad faith conduct, would constitute an arbitrary and capricious sanction.

The Regulation that specifies the 30% minimum threshold does not set forth what penalty, if any, should be imposed on an employer who, despite its good faith efforts, cannot find available citizens or permanent residents to meet the 30% target. The Hearing Officer finds that the 30% level appears to serve as a goal as

opposed to an absolute bar to operating below that level. [See Regs. at § 80-20.1-200.]

Other Regulations in the Workplace Participation Subchapter 80-30, suggest that the overriding goal of the Department is to ensure that employers make **good faith efforts** to employ citizens and permanent residents when such workers are qualified and available to work. As stated above , Regulation section 80-30.3-460 states that where an employer has made a good faith effort to find qualified citizens and permanent residents for a particular job, but no citizens are available, the Department shall certify that JVA in any event.

The Hearing Office has never sanctioned an employer simply for operating below the 30% percent level of citizens and permanent residents in the employer's workforce. [3 CMC § 4525(a) and Regs. at § 80-30.2-120(c); NMIAC § 80-20.1-210(c)(3).]

In most Compliance Agency cases in which employers have been sanctioned, the sanction has been imposed based on a finding that employer had *failed to make good faith efforts* to hire citizens or permanent residents, either by failing to post on DOL's website, failing to contact known job applicants who met minimum job qualifications, or failing to cooperate to receive referrals from the Job Placement Section.[2] In short, sanctions have focused on the employer's conduct – not on a purely mathematical calculation of whether the employer met the thirty percent ratio set forth in labor statutes and regulations.

The Hearing Officer believes the above interpretation is in accordance with the purposes and provisions of Public Law 15-108, as amended by Public Law 17-1.

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[2] For example, see CAC No. 13-022-12, *DOL Enforcement v. KN Corp.*, Admin. Order by J.Cody on 1/27/14 (failure to receive job referrals and failure to post JVAs on website); CAC No. 13-021-12, *DOL Enforcement v. Himawari Saipan, Inc.*, Admin. Order by J.Cody on 2/25/14 (failure to cooperate with Job Placement Section to receive referrals for JVAs); CAC No. 14-008-03, *DOL Enforcement v. RJCL Corp.*, Admin. Order by J.Cody on 4/07/14, aff'd by Secretary of Labor on 4/29/14 (failure to interview known job applicants); CAC No. 13-023-12, *DOL Enforcement v. Gacayan*, Admin. Order by J.Cody on 1/27/14 (failure to cooperate with Job Placement Section); CAC No. 14-046-09, *DOL Enforcement v. TYW Corporation, dba 7 Star Market*, Admin. Order by J.Cody on 11/19/14 (faulty procedure to receive responses from interested job applicants); CAC 13-012-10, *DOL Enforcement v. Fu Kang Corp.*, Admin. Order by J.Cody on 11/08/13 (submission of false documents, false testimony).

CONCLUSIONS OF LAW

Employer has not met the Workforce Participation Objective of 30% of its full-time Workforce Consisting Of Status-Qualified Workers.

The evidence establishes that Employer has not achieved the minimum Workforce Participation Objective of 30% of its workers consisting of U.S. citizens, CNMI permanent residents, or U.S. permanent residents. [3 CMC § 4525(a) and Regs. at § 80-30.2-120(c); NMIAC § 80-20.1-210(c)(3).] Employer employs 12 full-time workers consisting of one U.S. citizen and 11 CW-1 status workers. (Testimony of Mr. Rahaman).

In May 2016, Employer Made A Good Faith Effort to Hire Status-Qualified Workers For its Workforce.

It appears that Employer did not advertise its JVAs on DOL's website in years prior to 2016. Nevertheless, Enforcement's case, as presented in the Hearing, focused exclusively on the present year and the fact that Employer had not interviewed any of the applicants who had responded to the JVAs posted by Employer in February 2016. At hearing, Employer presented a credible medical excuse and requested more time. Employer then met with DOL officials, re-advertised the JVAs in May 2016, and subsequently attempted to contact all 37 job applicants whose responses were posted on the DOL website. This process ultimately failed to identify any qualified U.S. citizens or permanent residents who wanted the job. (Testimony of Mr. Rahaman; Hearing Exhibit 2.]

No Sanction Is Warranted Against This Employer For Its Failure To Meet the Workforce Participation Objective.

The Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation of the Commonwealth Employment Act of 2007. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

In its Determination, Enforcement requested that the maximum sanction be imposed, yet it failed to identify what efforts Employer should have made to find

qualified citizens or permanent residents, that it failed to do. [Testimony of Mr. Castro. It would be unfair to sanction an employer for failing to employ a minimum percentage (30%) of status-qualified workers in the absence of evidence that employer failed to make good faith efforts to do so.

Based on the evidence presented, and in view of Employer's recent efforts to interview all respondees to its posted JVAs, the Hearing Officer finds that Employer should not be sanctioned in this case. Nevertheless, Employer should remember that it has a continuing obligation to attempt to find and hire available status-qualified workers and that such workers should be given job preference over CW-1 status job applicants at the time of hiring or renewal.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Respondent Saipan City Taxi Association, Inc., is not in compliance with the Workforce Participation Requirement of 30%, as set forth in 3 CMC § 4525(a) and Regulations at § 80-30.2-120(c). [Determination at p. 3, ¶¶ 3-4.]

2. **No Sanctions:** For the reasons stated above, the Hearing Officer finds that no monetary sanctions should be assessed against Respondent simply because it has not met the targeted percentage of status-qualified workers. Employer should be given additional time to hire status-qualified workers to bring itself into compliance with the Workforce Participation Requirement.

3. **Warning:** Respondent Saipan City Taxi Association, Inc., is WARNED that it has a continuing obligation to post vacancies and job renewals on the Department's website and to interview and hire any qualified U.S. citizen or permanent resident job applicants in accordance with Regulations at sections 80–30.3-105, 205, 460.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 17, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Labor Enforcement Section, Complainant, **v.** Lucky Qiang Corporation, *dba* Lucky Qiang Market, Respondent.	)	CAC No. 16-002-04(T) **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on July 18, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by investigator Ramona Cabrera-Viches. Respondent Lucky Qiang Corporation appeared through its General Manager, Lin Castro. Hearing Officer Jerry Cody, presiding. The hearing was conducted via a Skype internet connection with the Hearing Officer located in Saipan and the parties located in Tinian.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on June 3, 2016, against respondent Lucky Qiang Corporation, *dba* Lucky Qiang Market ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Departmental Regulations. First, Employer failed to produce documents in response to a written document request served by Enforcement within the deadline specified in the Request. Second, Employer failed to produce a Total Workforce Listing document required by regulation to be filed each quarter. Third, Employer failed to post two job vacancy announcements ("JVAs") on the DOL website, in violation of CNMI Rules and Regulations, NMIAC § 80-20.1-225(a). *Id.*

I. Untimely Production of Documents Re Document Request:

Employer owns and operates the Lucky Qiang Market in Tinian. On March 11, 2016, Enforcement visited Employer's place of business and served Employer with a document request, called a Business Compliance and Monitoring Request Form (hereinafter, "Request"). The Request instructed Employer to produce certain documents to Enforcement within ten business days following the service of the Request.[1] The deadline to produce the documents was March 29. 2016. [A copy of the Request was entered into evidence as Hearing Exhibit 2.]

Employer did not produce any documents to Enforcement by the March 29, 2016 deadline. Several days after the deadline, Enforcement telephoned Employer's General Manager and reminded him of the company's obligation to provide the requested documents. GM Lin Castro told Enforcement that he needed the input of the company's accountant, Lu Guo Hua, who was off-island, in order to gather and produce the requested documents. Mr. Lu returned to Tinian on April 10, 2016; Mr. Castro immediately met with the accountant, gathered the documents and provided them to Enforcement the next day – on April 11, 2016. [Testimony of Mr. Castro.]

At Hearing, Enforcement confirmed that the documents provided by Employer on April 11, 2016, complied with the Request. [Testimony of Ms. Cabrera-Viches.] Nevertheless, Enforcement brought this case and moved for sanctions against Employer for its untimely production of documents.

Holding: As to the charge that Employer was late in producing documents in response to Enforcement's Request, the Hearing Officer finds no violation. The facts establish that Employer's General Manager attempted to compile the documents but was hampered by the absence of its accountant. Employer remained in contact with Enforcement and, as soon as the accountant arrived in Tinian, Employer promptly produced the requested documents. Based on these facts, the Hearing Officer finds that Employer's late production of documents should be excused and no sanctions should be assessed against Employer for this charge.

[1] The requested documents included: a current Total Workforce Listing, a copy of Employer's 4th Quarter withholding tax reports, payroll records for October-December 2015, a letter of compliance issued by the Division of Revenue and Taxation, a business license, an annual corporate report, and a sketched map to the business location. [See Hearing Exhibit 2.]

II. Failure to File Quarterly Total Workforce Listing:

Enforcement alleged that, even aside from its Request, Employer failed to file an updated Total Workforce Listing at the end of each quarter, pursuant to Regulations at NMIAC § 80-20.1-505(b). [2] Pursuant to those Regulations, Employer should have filed a Total Workforce Listing for the 4th Quarter of 2015 by the end of January 2016. Employer failed to file its quarterly Total Workforce Listing in January 2016. At Hearing, Employer's General Manager admitted that he was unaware of the regulation requiring employer to file this document every quarter. [Testimony of Mr. Castro.]

Holding: The Hearing Officer finds that Employer failed to comply with the above-cited Regulation and should be given a suspended sanction for this conduct (see below). Employer is reminded, however, that this is an ongoing obligation and failure to file timely Total Workforce Listings ***on a quarterly basis*** in the future may cause the Department to deny a Certificate of Good Standing for this employer.

III. Failure to Post Job Vacancy Announcements:

DOL Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on DOL's website. Regs. at NMIAC § 80-20.1-225(a).[3] There are no waivers available with respect to this requirement. *Id.* at NMIAC § 80-20.1-225(e).

As stated above, Employer owns and operates the Lucky Qiang Market on Tinian. Employer currently employs 5 employees, two of whom are CW-1 status workers. The CW1 workers have both worked for the company since 2010. At Hearing, Mr.

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[2] NMIAC § 80-20.1-505(b) states: "Each business employer shall report ***quarterly, as of the last day of the calendar quarter and within the time limits for filing the business gross receipts tax return,*** the number and classification of employees for whom wages were paid during the quarter." NMIAC § 80-20.1-505(d) states: "Census reports shall be made on the form provided by the Department and filed according to the instructions on the form." The Total Workforce Listing form is available on the DOL website for the purpose of providing the format for employers to submit the above information.

[3] NMIAC § 80-20.1-225(a) states: "An employer who intends to employ a foreign national worker, transitional worker, or nonimmigrant alien on a full-time basis (under any new employment arrangement, any renewal of any existing employment arrangement, or any transfer) must post a job vacancy announcement on the Department's website, www.marianaslabor.net."

Castro admitted under oath that ***Employer has not posted any JVAs on DOL's website since 2010.*** [Testimony of Mr. Castro.]

Mr. Castro testified that the company's accountant, Liu, Guo Hua, advised the Employer that it could advertise the jobs held by CW1-status workers in a local newspaper rather than on the Department's website. This advice entirely ignored Employer's regulatory obligation to post the JVAs on DOL's website, as set forth in the Regulations at NMIAC § 80-20.1-225(a).

For several years, Employer ignored its obligation to post JVAs, and yet was granted CW1 petitions to employ two workers in CW1 status. Mr. Lin Castro, himself, is one of the CW1 workers whose Petition for CW1 renewal status is currently pending with USCIS. [Testimony of Mr. Castro.]

Enforcement filed the Determination after it noticed that Employer had not posted jobs on DOL's website. [Testimony of Ms. Cabrera-Viches.]

Discussion:

The Hearing Officer notes that agent Lu, Guo Hua is no stranger to the Hearing Office or Agency cases regarding employers' obligation to post JVAs on DOL's website. Mr. Lu was a "processing agent" for another company that was accused of failing to post JVAs on DOL's website. As Processing Agent for Z.Y. Li Corp., Mr. Lu attended the hearing in that company's Agency Case (CAC No. 14-051-09) on November 20. 2014. The Administrative Order in that case, issued by this Hearing Officer on December 1, 2014, stated:

> Employer did not post the above-listed job announcement on the Department of Labor...website. Employer's Processing Agent, Mr. Lu [**Lu, Guo Hua**], testified that he advised the Employer it was not necessary to use the DOL website because USCIS does not require a particular method of job advertisement to be used in CW status processing. [Testimony of Mr. Lu.] He gave this advice because he had believed employers no longer needed to comply with DOL's Regulations regarding posting of job announcements.
>
> The Processing Agent's belief was mistaken. DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Ulloa.]

Order at p. 2 (emphasis added).

> ***At Hearing, Employer, through its Agent, stated that it would resume its practice of posting JVAs on DOL's website in the future.*** This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Order at p. 4 (emphasis added).

Mr. Lu did not attend the present Hearing; therefore, the Hearing Officer makes no specific findings regarding his conduct here. Nevertheless, Lin Castro testified that he relied on advice from Mr. Lu to use radio advertising rather than post JVAs on DOL's website. Assuming that Mr. Lu gave such advice, he was mistaken. Moreover, Lu was on notice from the prior Agency Case, cited above, that the Department of Labor continues to require employers to post JVAs on the DOL website for jobs renewed by CW1 workers.

Indeed, Mr. Lu represented during the November 2014 hearing that he would advise his client (Z.Y. Li Corp.) to post such JVAs on DOL's website. It is unclear why Lu would advise one client to use the website, while advising another client that it had no obligation to do so.

As has been stated in numerous prior Administrative Orders, let it again be said: DOL continues to take the position that employers are required to post job vacancies on DOL's website for full-time jobs that might be filled by CW1 workers, notwithstanding the fact that USCIS has no specific requirement to that effect with respect to CW-1 Petitions. In this case, Enforcement asserts that Employer's failure to post JVAs for the full-time positions held by Employer's two CW1- status workers, violated the Regulation at NMIAC § 80-20.1-225(a).

Holding: Employer violated DOL Regulations [NMIAC § 80-20.1-225(a)] by failing to post job renewals on DOL's website for those positions filled by two CW1 workers. This failure occurred not only with respect to job renewals in 2016, but also the renewals applied for in 2014 and 2015. For this conduct, Employer should be sanctioned as set forth below.

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IV. Sanctions:

Enforcement recommended that Employer be sanctioned with the maximum fine of $2,000 for each of its violations. [Determination (Hearing Exhibit 1), at p. 3.] At the conclusion of the Hearing, Enforcement appeared to leave the decision on the amount of sanctions to the Hearing Officer's discretion. [Testimony of Ms. Cabrera-Viches.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, Dept. of Labor Enforcement Section v. RJCL Corporation, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In contrast, this Employer relied on its accountant's advice and assumed that it was allowed to utilize radio advertisements rather than posting JVAs on the Department's website. [Testimony of Mr. Castro.] Although Employer was mistaken in its assumption, the testimony suggests that this failure was the result of relying on mistaken advice from a negligent agent, rather than a willful attempt to circumvent the law. Employer should be sanctioned, but the monetary fine shall be modified based on the above considerations.

Summary: The evidence establishes that Employer failed to abide by two Regulations: (1) it failed to file Total Workforce Listing documents on a quarterly basis; and (2) it failed to post JVAs for jobs held by its CW1 status workers. For these violations, the Hearing Officer finds that Employer should be sanctioned $1,500 dollars; however, half of that sanction shall be suspended for two years, then extinguished, provided that Employer pays a sanction of $750 and commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings, Respondent Lucky Qiang Corporation is found to have violated DOL Regulations regarding employers' obligation to file quarterly Total Workforce Listings and failure to post JVAs on the DOL website. [Regs. at NMIAC § § § 80-20.1-505(b) and 80-20.1-225(a).] For this conduct, Respondent is SANCTIONED as set forth below.

2. **Sanctions:** Respondent Lucky Qiang Corporation is hereby SANCTIONED one thousand five hundred dollars ($1,500) for its conduct; however, $750 of the fine shall be SUSPENDED for a period of TWO YEARS, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$750** portion of the fine no later than **forty-five (45) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Lucky Qiang Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: July 21, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 16-003-03
Department of Labor	)	
Enforcement and Compliance Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Jonny's Corporation,	)	
dba Jonny's Bar & Grill,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on March 10, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement and Compliance Section was represented by James Ulloa. Respondent Jonny's Corporation was represented by its General Manager, Koji Takeda, and its agent, Rosalinda Guevarra. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on March 3, 2016, against respondent Jonny's Corporation, *dba* Jonny's Bar & Grill ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are as follows. Employer operates Jonny's Bar and Grill in Garapan, Saipan. Employer utilizes the services of J.T.M. Corp.'s Operations Manager, Rosalinda Guevarra, as its bookkeeper and document handler. As of March 2016, Employer employs 14 full-time workers, consisting of 7 CW-1 status employees, 2 EAD-status employees and 5 U.S. citizens. [Hearing Exhibit 5, consisting, in part, of theTotal Workforce Listing, submitted post-hearing, dated 3/14/2016.] All of Employer's CW-1 status workers were renewed by the Employer in the latter part of 2015.

Enforcement alleged in its Determination that Employer committed three regulatory violations:

(1) Employer failed to post job vacancy announcements for CW-1 status renewals on the Department's website (www.marianaslabor.net) in accordance with the Employment Rules and Regulations ("Regulations"), codified in the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-225(a);

(2) Employer failed to submit several quarterly Workforce Listing documents in accordance with the Regulations at NMIAC § 80-20.1-505; and

(3) Employer failed to submit a timely Workforce Plan for 2015 (Regulations at NMIAC § 80-20.1-510. Each alleged violation is discussed separately below.

Job Posting on DOL's Website: Departmental Regulations require employers who are renewing CW-1 status workers to post job announcements ("JVAs") on the Department of Labor ("DOL") website. [Regs. at NMIAC § 80-20.1-225(a).] In this case, Employer admitted that it had not posted the JVAs on DOL's website for six of its seven CW-1 workers who were renewed in 2015. Employer's CW-1 status employees (waitresses, cook and general manager) were renewed in 2015, yet the Employer completely bypassed the DOL website.

At the hearing, Employer's agent, Ms. Guevarra, claimed that she had not filed JVAs on the Labor website because she did not know that DOL was still in operation. Later, however, she recanted this testimony when evidence showed that the Employer had, in fact, posted one JVA on the DOL website in February 2015 for one cook's position. [See Hearing Exhibit 2 – printout showing Employer's February 2015 JVA posting; Hearing Exhibit 3 - printout of Employer's posting history; and testimony of Ms. Guevarra and Mr. Ulloa.]

At the conclusion of testimony, Employer's General Manager testified that Employer intended to post all future job announcements on DOL's website. [Testimony of Mr. Takeda and Ms. Guevarra.]

Quarterly Total Workforce Listings: Departmental Regulations require employers to submit information on a quarterly basis regarding "the number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC §§ 80-20.1-501, 505. This information which is found in a document called the Total Workforce Listing, which is required to be submitted by Employers at the end of each quarter. *Id.* [Testimony of Mr. Ulloa.]

Employer failed to submit its quarterly Total Workforce Listings for each quarter of 2015. In February 2016, Enforcement visited the business establishment and served Respondent with a request to produce documents. In response to this request, Employer produced its quarterly Total Workforce Listing documents for 2015. In short, these documents were not timely filed, but they have now been filed by the Employer. [See documents collectively marked as Hearing Exhibit 5.]

Workforce Plan for 2013: Department Regulations require employers to file an updated Workforce Plan once every 12 months. [Regs. at NMIAC § 80-20.1-510(c).] In this case, Employer produced proof that it had filed a Workforce Plan for 2015 to the Job Placement Section in February 2015. [See documents at Hearing Exhibit 5 and testimony of Ms. Guevarra.] The Hearing Officer notes, however, that the submitted Workforce Plan appears incomplete. *Id.*

DISCUSSION

Employer's General Manager and the company's agent gave credible testimony in which they admitted that Employer had failed to file timely consensus documents and failed to post job announcements on DOL's website. General Manager Takeda admitted these failures, agreed to pay a substantial fine for past conduct and agreed to comply with the DOL's regulations in the future.

Recent Total Workforce Listing documents produced by Employer (see Hearing Exhibit 4) reveal that more than 30% of Employer's workforce is comprised of U.S. citizens or permanent residents. This exceeds the minimum 30% ratio that is required in the Regulations [NMIAC § 80-20.1-210(c)(3)].

Based on the above-noted facts, the Hearing Officer finds that Employer's deficient conduct - its failure to produce numerous reporting documents and its failure to post JVAs on DOL's website – justifies assessing sanctions against this Employer.

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The evidence in this case establishes that Employer violated several Regulations, as set forth above. For this conduct, the Hearing Officer finds that Employer should be sanctioned with a $2,000 fine; however, half of the fine shall be suspended for a year, then extinguished, on the condition that Employer pays the remaining $1,000 portion and submits timely census documents (Total Workforce Listing, tax-related documents and Workforce Plans) to the Job Placement Section during the one-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** For the reasons stated above, Judgment is entered against Respondent Jonny's Corporation for asserted violations contained herein, which include: failing to post numerous JVAs on the Department's website, failing to file numerous Total Workforce Listing documents and failing to file a complete and timely Workforce Plan. For these multiple violations, respondent shall be sanctioned as set forth below.

2. **Sanctions:** For the reasons stated above, Respondent Jonny's Corporation is hereby SANCTIONED two thousand dollars ($2,000); however, $1,000 of the fine shall be SUSPENDED for ONE YEAR, then extinguished, provided that Respondent (1) pays the remaining $1,000 portion of the sanction as ordered; (2) submits timely census documents (Total Workforce Listing, tax-related documents and Workforce Plans) to the Job Placement Section; and (3) posts its JVAs on DOL's website during the one-year period. 3 CMC §§ 4528(f)(2) and 4947(11). Payment terms are specified below.

3. **Payment Terms:** Appellant is ORDERED to pay the $1,000 portion of the fine no later than thirty (30) days after the date of issuance of this Order. Payment shall be made to the CNMI Treasury; a copy of the payment receipt shall be filed with the Hearing Office on or before the payment deadline.

4. **Updated Total Workforce Listing:** Respondent is ORDERED to file updated, Total Workforce Listing documents with the Citizen Job Placement Section in a timely manner (at the end of each quarter) in accordance with Regulations at NMIAC § 80–20.1-505.

5. **Posting on Website:** Respondent is ORDERED to post future job vacancies and renewals on DOL's website (www.marianaslabor.net) in accordance with Regulations at NMIAC § 80–20.1-225(a). Appellant shall hire U.S. citizen and permanent resident job applicants when they are qualified to work.

6. **Warning:** The obligations described above are continuing obligations. If Appellant fails to comply with the terms of this Order it shall be subject to a possible reinstatement of the suspended sanction plus additional monetary sanctions, after a due process hearing on this issue.

7. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 17, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 16-003-06(T)
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Star Marianas Air, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on October 7, 2016, before the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ramona P. Cabrera-Viches. Respondent Star Marianas Air, Inc. appeared through its President, Shaun Christian, and its counsel, Timothy Bellas. Respondent's employees, Alma Canlas and Hilary San Nicolas, testified in support of Respondent. Peter H. Palacios testified in support of Complainant. [The parties appeared at the Tinian Labor Office; Hearing Officer Jerry Cody presided over the Hearing via Skype, from the Hearing Office in Saipan.]

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on an Amended Determination, Notice of Violation and Notice of Hearing ("Determination") filed by Tinian Labor's Enforcement Section ("Enforcement") in the Hearing Office on September 21, 2016, against respondent Star Marianas Air, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating two basic Departmental Regulations: one regarding Employer Declarations and the other regarding CNMI job preference laws. Each charge will be discussed separately below.

1. Failure to Post Employer Declarations

The Department's "Employer Declaration" Regulation requires an employer to post an online "declaration" on the Department of Labor ("DOL") website (www.marianaslabor.net) in cases where the employer has rejected a U.S.-status qualified worker for a particular job and instead, hired a foreign national worker for the position. [Employment Rules and Regulations, codified in the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-235(e).] In such cases, the regulation requires the employer to post a short response on the website, explaining: (1) the action it took with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. *Id.*

In its Determination, Enforcement charged that Employer violated the above-cited regulation by failing to issue "declarations" to two job applicants: Cynthia Santos and Peter H. Palacios. [Hearing Exhibit 1 at ¶¶ 5-6, 9.]

In its defense, Employer complained that it had experienced technical problems in 2015 when it tried to post responses on the DOL online response system. As demonstrated in the printout of the JVA for the Director of Customer Service job (Hearing Exhibit 2), DOL's website printed duplicates of certain names of job applicants, which then caused confusion between Employer and DOL. [Testimony of Mr. Christian.]

At Hearing, the parties discussed these technical issues and Enforcement (Ms. Cabrera) admitted that DOL's website and reporting system has had technical problems in the past. Enforcement then stated that it was willing to dismiss the charge against Employer for failing to issue a declaration as to Ms. Sanchez. [Testimony of Ms. Cabrera.] The Motion to Dismiss the charge was granted by the Hearing Officer.

As to Employer's failure to post a declaration for Mr. Palacios, the Hearing Officer notes that it is not altogether clear whether there was a violation of the regulation. The "Employer Declaration" Regulation [NMIAC § 80-20.1-235(e)] states, in part: "the employer shall file a declaration ...in digital format with respect to the citizens and permanent residents *who applied for the job*, the action taken on each application, and a short statement of the reasons for rejecting *any applicant who was referred*." *Id.* (emphases added). This Regulation is not a model of clarity. Its wording suggests that employers are required to respond to those applicants who post online responses for the job and/or were "referred" to the employer by

the DOL. In this case, Mr. Palacios did not apply online and he was not referred by DOL; rather, he was a walk-in applicant who approached DOL with his resume and then obtained Employer's application form and submitted it, himself, to the Employer. [Testimony of Mr. Palacios.]

Based on the wording of the Regulation, it is not clear whether an employer is required to issue online "declarations" to walk-in applicants; therefore, it appears that Employer has a technical defense to this alleged violation.

Whether Employer's conduct violated the letter of the law, it certainly violated the spirit of the regulation. Given that Mr. Palacios applied and was interviewed, Employer should have notified Mr. Palacios after it made its hiring decision, giving him the reasons why he was not hired for the position of Director of Customer Service. Indeed, at the time he was interviewed, the interviewer told Mr. Palacios that the company would notify him in the future about the position. [Testimony of Mr. Palacios.] In the end, Employer failed to notify Mr. Palacios that someone else had been hired.

Holding: The Hearing Officer finds that, given the wording of the Employer Declaration Regulation, Employer did not technically violate the regulation, and therefore, the charge is adjudged in favor of the Employer. [Regs. at NMIAC § 80-20.1-235(e).] Having said that, common decency and professionalism dictate that employers should notify interviewees about the results of their job interviews after the employer makes its hiring decision.

2. Failure to Comply with the Citizen Job Preference Requirement

Enforcement charged that Employer had rejected the job application of a qualified U.S. citizen (Mr. Palacios) without just cause and instead, hired a nonimmigrant alien, in violation of the CNMI's job preference statute and Regulations. [3 CMC § 4528(a) and Regs. at NMIAC §§ 80-20.1-220(a) and 455(i)(2).] Accordingly, the Department asked that Mr. Palacios be awarded actual and liquidated damages amounting to up to six months of wages. [3 CMC § 4528(f)(1); Regs. at §§ 80-20.1-455(i)(2) and 485(c)(1).[1]]

[1] Regulation Section 455(i)(2) states: "In the event that an employer...fails to hire a qualified applicant entitled to a preference and hires any nonimmigrant alien instead, the...Enforcement Section may file an administrative complaint with the Administrative Hearing Office on behalf of the applicant denied employment seeking damages, sanctions, and any other available relief."

Regulation Section 485(c)(1) authorizes the Hearing Officer in a job preference case to "award actual and liquidated damages in an amount up to six months' wages for the job for which a citizen...applied."

The Facts: The testimonial evidence established the following facts: In November 2015, Employer posted a JVA for the job of Director of Customer Service. A U.S. citizen named Peter H. Palacios obtained Employer's application form and applied for the job. Mr. Palacios believed he was qualified for the job because he had worked for 10 years (June 2003 – March 2014) as a Station Manager for Freedom Air in Tinian. Based on contacts made during his former job, Mr. Palacios was known both personally and professionally by Employer's President. Employer reviewed the application and Employer's Human Resources division interviewed Mr. Palacios for the position. Ultimately, Employer's President, Shaun Christian, decided to hire someone else – a CW-1 status worker - for the position. The person hired, Mr. Que, had worked as a VIP coordinator for the Tinian Dynasty; Mr. Que was also known personally and professionally by Employer's President.

Mr. Palacios interviewed for the DCS job in November 2015. Mr. Palacios waited several months after his job interview but heard nothing from Employer. When he learned in April 2016 that Employer had hired a CW-1 status worker for the position, Mr. Palacios complained to the Department of Labor, which opened an Agency investigation. [Testimony of Mr. Cabrera-Viches.]

After an investigation, the Department determined that Mr. Palacios had been qualified for the Director of Customer Service ("DCS") position and therefore, it charged that Employer had violated CNMI's job preference law [3 CMC § 4521; Regs. at NMIAC § 80-20.1-220(a)] by not giving Mr. Palacios preference for the job over the CW-1 status worker who was hired as Director of Customer Service. [Determination at Hearing Exhibit 1.]

The law: The preference laws of the CNMI require employers to give preference in hiring to all qualified U.S. citizens or permanent residents over foreign national workers. 3 CMC § 4521; Regs. at NMIAC § 80-20.1-220(a).[2] Under CNMI law, as well as USCIS Regulations, if a U.S. citizen applicant is "qualified" for a job vacancy, he or she should be given preference in hiring for the position over a

[2] DOL Regulations state: "It is the policy of the Commonwealth that citizens, CNMI permanent residents and U.S. permanent residents shall be given preference for employment in the private sector workforce in the Commonwealth. This requirement underlies all regulations with respect to the hiring, renewal, transfer and termination of employees everywhere in the private sector in the Commonwealth." Regs. at NMIAC § 80-20.1-101(a). See also NMIAC § 80-20.1-220(a)("No employer may hire a foreign national worker, transitional worker, or other nonimmigrant alien if a qualified citizen, CNMI permanent resident, or U.S. permanent resident applies for the job in a timely fashion.").

CW-1 status worker. Thus, one central question in this case is whether Mr. Palacios should be deemed "qualified" for the DCS position.

Furthermore, 3 CMC section 4528(a) creates a cause of action against an employer which the rejects the job application of a U.S. citizen **"without just cause"** and then proceeds to hire a foreign national worker for the position. 3 CMC § 4528(a); Regs. at § 80-20.1-485(c)(1).] The Regulations provide the following guidance with respect to the term "just cause:"

> **Just cause.** The term "just cause" for rejecting an application for employment includes the *lawful criteria that an employer normally applies in making hiring decisions* such as rejecting persons with criminal records for positions of trust, rejecting persons who present fraudulent or inaccurate documentation in support of the application, rejecting persons without an educational degree necessary for the position, rejecting persons with unfavorable recommendations from prior employment; rejecting persons with an employment history indicating an inability to perform the job successfully, rejecting persons with an educational background making it unlikely that the necessary education or training to hold the position could be accomplished successfully within a reasonable time, and *similar just causes*. [Regs. at NMIAC § 80-20.1-455(f)(1). Emphases added.]

As the moving party, Enforcement had the burden of proving by a preponderance of the evidence (a) that Mr. Palacios was "qualified" for the DCS job; and (b) that Employer rejected Mr. Palacios's job application "without just cause." As explained below, the Hearing Officer finds that Employer applied "lawful criteria" in making its hiring decision and that there was insufficient evidence to prove that Employer had rejected Mr. Palacios's job application without just cause.

Employer's Hiring Decision: Employer's Human Resources Department ("HR") consists of three employees: Alma Canlas, Hilary San Nicolas and Manuela Cing. HR schedules and conducts interviews of prospective job applicants, but it does not make recommendations to management as to whom should be hired. That decision is typically made by Employer's supervisors in the area of expertise. [Testimony of Ms. Canlas and Mr. Christian.]

Mr. Christian, as President of Star Marianas Air, Inc., is responsible for the day-to-day operations of the company; he reports directly to the Board of Directors. President Christian was the person responsible for making the hiring decision for the job of Director of Customer Service. [Testimony of Mr. Christian.]

The job announcement in this case concerned the position of Director of Customer Service ("DCS"). The DCS job is described as a high level, managerial position at the company. The DCS supervises line leaders who, in turn, supervise a sales force of "customer specialists." Additionally, the DCS teaches skills to the staff with the goal of improving the company's interaction with customers. According to Mr. Christian, the DCS deals with the "front side" of the airline business in areas such as checking-in, greeting customers, dealing with agents, dealing with customer complaints, etc. This contrasts with the "ramp" side of the business which deals with the more technical, operational issues such as maintenance, flight operations, etc. *Id.*

As for experience, Mr. Christian noted that Mr. Palacios's prior job experience as Station Manager of Freedom Air had been primarily involved with mechanical operations (the so-called "ramp" side) rather than with the customer relations side ("front" side) of the business. Thus, Christian noted that Palacios's prior job with Freedom Air had not involved him in that much direct customer contact.

The most important factor in Employer's hiring decision seemed to be the fact that Employer's management had had five or more years to observe Mr. Palacios's management style and temperament on the job while he worked at Freedom Air. Unlike other job searches where an Employer must evaluate an unknown applicant, this Employer had observed Palacios's demeanor and management style while he worked next to Employer's office at the Tinian International Airport for five years. President Christian testified that his first-hand experience of observing Mr. Palacios during his former job, had convinced him that Mr. Palacios would not perform adequately as the Director of Customer Service.

In particular, Mr. Christian testified that he found Palacios's verbal communication skills and his choice of language to be a "concern from a business standpoint." He explained that Mr. Palacios has a personal habit and reputation of frequently using four-letter curse words in normal conversation. (Christian noted that Palacios's cursing habit was so pronounced that it caused local FAA officials to give him the nickname of "F-ing Pete.") Indeed, this cursing habit was in evidence during the job interview. Ms. Canlas, who interviewed Mr. Palacios for the company on November 30, 2015, testified that Mr. Palacios used the "F" word at least three times in the course of responding to interview questions. [Testimony of Ms. Canlas.] Mr. Christian explained that he viewed this trait as extremely inappropriate for someone serving in a supervisory role at the company. [Testimony of Mr. Christian.]

In summing up his opinion of this candidate, Mr. Christian stated: "His inter-personal interactions with a variety of customers were observed by us [over a period of about five years] and they did not live up to a standard that we are looking for in a Director of Customer Service." [Testimony of Mr. Christian.]

Another negative evaluation point regarding Mr. Palacios was his writing skills, or lack thereof. Although no formal writing sample was required, Christian noted that numerous grammatical mistakes were made in the applicant's resume and in a short email that Palacios had sent to the company to attach a document. *Id.*

At Hearing, Employer argued several points of a defensive nature. First, Employer noted that the fact that Mr. Palacios had worked for its competitor, Freedom Air, had nothing to do with Employer's decision not to hire Palacios. Mr. Christian testified that his company had hired six former employees of Freedom Air in the recent past. Second, Employer stated that although the ability to speak Mandarin had been a "preferred" skill, it was not a mandatory requirement for the position. Christian noted that the person who had been management's first choice for the job in late November 2015, a U.S. citizen living on Saipan,[3] did not speak Mandarin.

Ultimately, in about late December 2015, Employer chose to hire a CW-1 status worker named George Que for the DCS position. Mr. Que had worked as the head of VIP Services for the Tinian Dynasty. In that position, Mr. Christian had observed Mr. Que interacting with customers in a positive manner. Christian concluded that Mr. Que's skills and experience would be a good fit for what management was seeking. Christian stated that the fact that Mr. Que speaks the Mandarin language and that about 60% of Employer's customers are from China, was an important factor, but not the primary or determinative factor, in making the decision to hire Mr. Que for the DCS position. [Testimony of Mr. Christian.]

Evaluating the Employer's Decision Not to Hire: The fact that this was an executive position does not exempt it from preference laws, but it does make the analysis more difficult than if it were a semi-skilled job.[4]

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[3] At Hearing, Mr. Christian characterized Mr. Hunter as Employer's "first choice" for the DCS job. Mr. Christian testified that in about October and November 2015, Star Marianas Air management had been very interested in pursuing Glen Hunter as a candidate for the DCS job. After some discussion with this candidate, in about mid-December 2015, Mr. Hunter informed management that he wanted to withdraw his name from consideration for the job. At that point, Employer turned to Mr. Que for the DCS position. [Testimony of Mr. Christian.]

[4] If a job requires a single basic skill (example: drill press operator) and the U.S. citizen has prior experience using that skill, it can be inferred that he is qualified for the position. On the other hand,

The Director of Customer Service is a multifaceted job that and entails supervising a large internal staff of sales people, handling a broad range of customer relations, and reporting to the highest level of corporate management. [Testimony of Mr. Christian.] The interpersonal skills required to succeed in such a position cannot necessarily be reduced to a simple checklist.

Employer's President and CEO observed Mr. Palacios's temperament and management style in a wide variety of situations over a five-year period and formed impressions of his capabilities and limitations. This assessment, which proved difficult for Mr. Christian to reduce to a simple formula, was largely negative. Ultimately, Employer's management concluded, based on their observations. that Mr. Palacios would not perform adequately as Director of Customer Service.

In particular, Employer disliked Palacios's habit of using curse words, such as the "F" word, on a regular basis in professional conversations. The use of curse words in casual conversation is, in some respects, routine, but Employer found it highly suspect for a job applicant to use such language in a job interview, as occurred in this case. Moreover, President Christian had personally observed Palacios using curse words constantly in his prior job while dealin```g with his staff. *Id.*

The Hearing Officer believes it was reasonable for management to be concerned about the "cursing" character trait in someone who was applying to be one of the company's primary public relations officers, assigned to interact with Employer's sales force and customer base. Again, the standard is whether the employer used "lawful criteria that an employer normally applies in making hiring decisions" to evaluate this job applicant. [Regs. at NMIAC § 80-20.1-455(f)(1).

Other reasons noted by Employer for not hiring of Mr. Palacios were his lack of experience in the "front" side (customer relations side) of the travel business, as well as his lack of writing skills. Standing alone, each of these factors may not have justified rejecting the application, but it was the totality of all factors combined that led Employer to reject this applicant.

Holding: Based on the foregoing, the Hearing Officer concludes that Complainant presented insufficient evidence to prove that Employer's rejection of Mr. Palacios for the DCS job was a decision made "without just cause." Likewise, there was

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certain jobs require multiple talents and interpersonal skills rather than mechanical abilities; such jobs will necessarily be more difficult to assess.

insufficient evidence that the citizen-applicant was "qualified" for the position. The evidence shows that Employer engaged in a careful review of Mr. Palacios's qualifications for this position and made a reasonable decision based on a totality of factors, as discussed above.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** For the reasons set forth above, judgment is hereby entered in favor of Respondent Star Marianas Air, Inc. on all charges brought under the Determination filed on September 21, 2016.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: March 7, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** China Yanbian Foreign Eco. And Tech Cooperation Corporation, *dba* Seoul One Restaurant and Shinsen Restaurant, Respondent.	)	CAC No. 16-006-04 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on June 15, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Jeff Camacho. Respondent China Yanbian Foreign Eco. And Tech Cooperation Corporation appeared through its counsel, Janet King. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on April 11, 2016, against China Yanbian Foreign Eco. And Tech Cooperation Corp., *dba* Seoul One Restaurant and Shinsen Restaurant ("Employer"). [The Determination was entered into evidence as Hearing Exhibit 1.]

At Hearing, investigator Jeff Camacho testified that Enforcement brought the case to compel Employer to produce all documents requested by the Enforcement Section in a written request, entitled "Business Establishment Compliance and

Monitoring Request Form." Mr. Camacho testified that he served the request at the Employer's place of business on February 16, 2016. The Request asked the Employer to provide copies of the following documents to Enforcement within ten working days:

(1) a total listing of workforce statement of compliance;
(2) copies of the last 4 quarterly employer's withholding tax statements;
(3) payroll records of the last 4 quarters
(3) business license(s);
(4) annual corporate report; and
(5) the last payroll check stubs.

[A copy of the request was entered into evidence as Hearing Exhibit 2.]

In particular, Enforcement sought production of payroll records for all employees of Employer's two restaurants for the period from February 19 to March 18, 2016. [Testimony of Jeff Camacho.]

Employer produced certain documents to Enforcement, but the production was not complete. Enforcement's attempts to obtain the documents through informal telephone requests were not successful.

At Hearing, Employer's counsel explained that part of the delay in compiling the documents involved communication difficulties with Employer's agent, Boo Boo office. At Hearing, Employer produced some of the missing documents and promised that the remaining documents would be produced on or before June 20, 2016. Enforcement agreed to withdraw its request for sanctions, provided that Employer produced the remaining documents by June 20, 2016.

DISCUSSION

The Employment Rules and Regulations affirm that "[t]he Department may conduct investigations as necessary and appropriate to enforce the provisions of the Commonwealth Employment Act of 2007." The present document request was served on Employer in the course of Enforcement's lawful investigation of payroll records regarding Employer's two restaurants. See Employment Rules and Regulations, codified in the Northern Mariana Islands Administrative Code (NMIAC) at § 80-20.1-445.

Departmental Regulations go on to state: "[a]n employer of a foreign national worker shall keep for at least two years, and present, immediately upon written

request by the Secretary or a designee, the following information: personnel records...payroll records..evidence of net payments made and received bi-weekly...receipts of payments of wages and overtime...tax payment records." [NMIAC § 80-20.1-501.]

The evidence establishes that Employer was served with a lawful request to produce documents on February 12, 2014, but never complied with the complete request. After making several phone calls to convince Employer to produce the documents, Enforcement decided to file the present case to compel production.

I. DOCUMENT REQUEST

At Hearing, Employer produced some of the documents listed in the Request, but stated that it still needed several days to complete its copying of payroll records. Employer's counsel promised that Employer would provide the documents to Enforcement no later than Monday, June 20, 2016. This arrangement was acceptable to both the Enforcement representative, Jeff Camacho, and the Hearing Officer. The only remaining issue is whether the Employer should be sanctioned for failing to respond to the Request at the time it was issued.

II. SANCTIONS

In its Determination, Enforcement requested that the Employer be sanctioned with a monetary fine of $2,000 for its failure to produce documents in response to the Request. After hearing the Employer's testimony, Enforcement simply asked that a decision on sanctions be left to the discretion of the Hearing Officer. (Testimony of Jeff Camacho.)

Enforcement's Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Based on the evidence presented, this Hearing Officer concludes that the Employer is at fault here in failing to produce documents in timely manner. However, the amount of the fine should be mitigated by the fact that Employer produced many of the requested documents at the Hearing and agreed to produce the remaining documents no later than Monday, June 20, 2016. The Hearing Officer finds that no sanction should be imposed, unless Employer fails to produce the documents, as promised, on June 20, 2016.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Order to Produce Documents:** Respondent China Yanbian Foreign Eco. And Tech Cooperation Corporation is hereby ORDERED to produce all documents responsive to Enforcement's document request (Hearing Exhibit 2) **on or before June 20, 2016.** ***The documents shall be delivered to the Enforcement Section (attention: Jeff Camacho).*** If Respondent fails to produce all responsive documents as ordered, it shall be SANCTIONED without further hearing in the amount of five hundred dollars ($500). 3 CMC §§ 4528(a) and (f)(2). In that event, the Hearing Officer shall issue a follow-up Order assessing the $500 sanction.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 17, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement And Compliance Section, Complainant, v. JACEM TJT Corporation, Respondent.	)	CAC No. 16-008-09 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on September 21 and 28, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent JACEM TJT Corporation appeared through its Vice President, Maria Cristina S. Tambiga, and Secretary, Erwin A. Tambiga. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on September 12, 2016, against respondent JACEM TJT Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to post a number of job vacancies in 2015 in violation of CNMI Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a).

(2) Employer failed to file an employer declaration with respect to JVAs that Employer posted in 2016 on the DOL website. NMIAC § 80-20.1-235(e).

(3) Employer failed to file quarterly Total Workforce Listings for four quarters in 2015 and two quarters in 2016. NMIAC § 80-20.1-505.

(4) Employer failed to file a Workforce Plan with the Department for 2015 and 2016. NMIAC § 80-20.1-510.

Employer operates a digital printing company and a manpower supply company, employing a total of 14 employees: 10 full-time and 4 part-time employees. The 10 full-time employees all hold CW-1 status. The digital printing business consists of two digital operators, a sales representative and a Manager (V.Pres. Tambiga); the manpower business consists of 6 full-time janitorial/commercial cleaner positions. [Testimony of Mrs. Tambiga.]

Ms. Tambiga, who appeared at the Hearing as Employer's representative, is corporate Vice President and Treasurer, as well as a member of the Board of Directors. [See "Amended Annual Corporation Report" for 2014, entered into evidence as Hearing Exhibit 8.] Ms. Tambiga manages both of Employer's businesses under her CW-1 status. Mr. Erwin Tambiga, serves as corporate Secretary and works for Employer under CW-1 status as a digital offset printer.

Job Posting on DOL's Website: Department Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on the Department's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at NMIAC § 80-20.1-225(e).

Enforcement established that Employer posted JVAs for two "offset printer" jobs in 2014 and 2016, but Employer failed to post JVAs for these positions in 2015. Manager Tambiga testified that her memory was somewhat vague, however, she believed she had not posted these JVAs on DOL's website in 2015 because of the technical problems that hit Saipan in July and August of 2015.[1] However, later produced documents (Hearing Exhibit 15) showed that Employer ran job advertisements on a local radio station in early November 2015. By November 2015, the DOL website and Job Placement Section were fully functional again,

[1] The Department of Labor website and Job Placement Section were fully or partially disfunctional for nearly the entire month of July 2015 when the undersea communications cable was severed, leading to major interruption of internet communications on Saipan. Then, on August 2, 2015, Saipan was hit by Typhoon Soudelor which knocked out electricity at the Department of Labor from August until mid-October 2015. By November 2015, the Job Placement Section and website were functioning. [Testimony of Mr. Ulloa.]

having recovered from the international cable disruption and the power outage caused by Typhoon Soudelor. Thus, despite the disruption and calamity that occurred in the summer of 2015, Employer could have used the Department's website by November 2015, even while it was placing radio advertisements for the same purpose. Based on the evidence, Employer should be sanctioned for neglecting to post the JVA for the offset printer positions in 2015.

Furthermore, evidence produced at Hearing showed that Vice President Tambiga posted an inaccurate JVA in July 2016 for her own job, listing her position as an "operational service worker" with no reference to her extensive managerial responsibilities at the company. [A copy of the JVA was entered into evidence as Hearing Exhibit 7.] Enforcement noted correctly that Employer should have used a managerial title and description for Ms. Tambiga's job, given that she is responsible for all hiring and firing decisions, CW-1 petitions, company payroll, company banking, corporate tax filings, etc. [Testimony of Mr. Ulloa and Ms. Tambiga.] Enforcement moved for sanctions against Employer for this conduct. [2]

Employer's Declaration: Department Regulations require an employer to post responses to each online applicant who notes interest in a posted JVA. Regs. at NMIAC § 80-20.235(e). In each response, the employer is expected to explain the reason why a U.S. citizen or permanent resident was not hired in place of a foreign national worker. (This requirement is waived if the employer hired a U.S. citizen or permanent resident for the offered position.) *Id.*

In its Determination, Enforcement noted that Employer had failed to file employer declarations as to 5 positions in 2016 and one position in 2015. Manager Tambiga admitted that she had not posted "declarations" to each response; nevertheless, she testified that she had considered all applicants who responded online to the JVAs. Ms. Tambiga testified credibly that she had attempted to interview the applicants, but some applicants had been impossible to reach, or else failed to appear for interviews. In the case of commercial cleaner positions, no U.S. citizens or permanent residents had posted online responses. [Testimony of Ms. Tambiga.]

Ms. Tambiga explained that she had not understood employers' obligation to post a response to each applicant. Now that she understands, Ms. Tambiga promised to comply with this requirement for each posted JVA in the future.

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[2] At Hearing, Enforcement made an oral motion to add a request for sanctions against Employer for posting an erroneous job vacancy announcement. The request was granted by the Hearing Officer.

Quarterly Total Workforce Listings: DOL Regulations require employers to submit quarterly Total Workforce Listings that detail the "total number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505 *et seq.* [Testimony of Mr. Ulloa.]

Employer admitted that it did not submit quarterly Total Workforce Listings for all four quarters in 2015 and the first two quarters of 2016. Manager Tambiga testified that she had been unaware that employers were required to file this document with DOL on a quarterly basis. [Testimony of Ms. Tambiga.]

Between the first and second hearings, Employer submitted its current Total Workforce Listing, using the form provided by the Department. Mr. Ulloa reviewed the document and found it to be "acceptable." [A correct copy of the current Total Workforce Listing was entered into evidence as Hearing Exhibit 13.]

Workforce Plan for 2015 and 2016: DOL Regulations require employers to file an updated Workforce Plan once every 12 months. Regs. at NMIAC § 80-20.1-510. Employer never submitted a Workforce Plan to DOL in 2015 and 2016, thus violating the Regulation. Manager Tambiga admitted that she had not filed the document. Again, the Manager claimed she had not been aware that this was a requirement. [Testimony of Mrs. Tambiga.]

Between the first and second hearings, Employer submitted its Workforce Plan for 2016, using the form provided by the Department. Mr. Ulloa reviewed the document and found it to be "acceptable." [A correct copy of Employer's Workforce Plan for 2016 was entered into evidence as Hearing Exhibit 13.]

DISCUSSION

The evidence established that Employer: (1) failed to post job announcements on DOL's website for several positions in 2015; (2) failed to file employer declarations for each JVA posted in 2016; (3) failed to file quarterly Total Workforce Listings in 2015 and 2016; and (4) failed to submit timely Workforce Plans for 2015 and 2016. In addition, the evidence showed that Employer had posted an inaccurate JVA for Manager Tambiga's job in July 2016, describing it as an operational "service" position rather than a "managerial" position.

Given that these numerous failures constitute violations of the Employment Rules and Regulations, the Department asked that the Employer be sanctioned with a substantial monetary penalty for its conduct.

As mitigating factors, Employer argued that its failures were caused by the Manager's lack of familiarity with Departmental Regulations rather than a willful plan to violate the law. Second, Employer attempted to show its good faith by promptly compiling and submitting a Total Workforce Listing for the 2nd Quarter of 2016; and a Workforce Plan for 2016 – both of which documents were found to be acceptable by Enforcement. Third, V.P. Tambiga expressed genuine remorse for failing to comply with all Departmental Regulations. Ms. Tambiga pledged to abide by all regulatory obligations in the future by filing timely census-related documents, posting valid JVAs and considering all qualified U.S. citizens and permanent residents for vacant or renewed positions.

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] After hearing the testimony, Enforcement modified its request by asking for a total sanction of $2,000 for all violations combined. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence established that Employer violated numerous regulations – failing to post JVAs in 2015, failing to post employment declarations in connection with its posted JVAs in 2016, recently filing a grossly inaccurate JVA for the Manager's own job, and failing to provide the Department with numerous census-related documents over a period of two years. These numerous deficiencies justify a substantial sanction. In mitigation, Employer moved quickly to produce current documentation and made a credible promise to correct its conduct in the future.

Based on the above facts and circumstances, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars ($2,000) for its conduct, as requested by Enforcement. Employer asked that it be given time to pay the

sanction and Enforcement had no objection to that request. Therefore, Employer shall be allowed to pay the sanction in four installments, as set forth below.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent JACEM TJT Corporation for numerous violations of the Employment Rules and Regulations, as set forth above. For these violations, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent JACEM TJT Corporation is hereby SANCTIONED two thousand dollars ($2,000) for its conduct. Respondent is ORDERED to pay the sanction in four installments of $500 each, due on or before the following dates: October 31, 2016; November 30, 2016; December 30, 2016; and January 31, 2017. Proof of payment shall be submitted to the Hearing Office on or before the due dates. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Future Compliance with Regulations and Employer Obligations:** Respondent JACEM TJT Corporation is ORDERED to post accurate job vacancies and job renewals in the future on the Department's website in accordance with Regulations at NMIAC § 80-20.1-225(a). Further, Respondent is ORDERED to post all required employer declarations in accordance with Regulations at NMIAC § 80-20.235(e). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Workforce Participation Requirement:** The Hearing Officer notes that Respondent has not come close to meeting the minimum requisite percentage of 30% of U.S. status-qualified workers in its total workforce. [3 CMC § 4525 and Regs at NMIAC § 80-20.210(c)(3).] Respondent should increase its efforts to hire and employ U.S. citizen or permanent resident employees as part of its workforce.

5. **Warning:** Respondent is warned that the Regulations described in this order set forth *continuing* obligations of the employer. Respondent should be careful to provide accurate job descriptions in its posted job vacancy announcements. Respondent should file Census-related documents (Total Workforce Listing and Workforce Plans) on or before the required deadlines. Any failure by Respondent to comply with its filing obligations in the future may result in Agency requests for strict sanctions including, but not limited to, denial of future Certificates of Good Standing.

[CAC No. 16-008-09]

6. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: September 30, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Zaji O. Zajradhara, Complainant, v. ZY Corporation, Respondent.	)	C.A.C. No. 16-009-09 **INTERLOCUTORY ORDER REVISING CAPTION AND STAYING CASE**

On May 25, 2017, a Status Conference was held regarding C.A.C. Appeal No. 17-001 and C.A.C. No. 16-009-09, in the Administrative Hearing Office of the CNMI Department of Labor, Saipan. The Status Conference was attended by Ben Castro for the Department of Labor Enforcement and Compliance Section, complainant Zaji O. Zajradhara ("Zaji"), and attorney Robert T. Torres representing ZY Corporation. Hearing Officer Jerry Cody, presided.

During the conference, it was determined that the Appeal [C.A.C. Appeal No. 17-001] would be dismissed, provided that Zaji would be allowed to proceed in the above-captioned case [C.A.C. No. 16-009-09] as complainant.

During the conference, ZY Corporation's counsel informed the Hearing Officer that Zaji and ZY Corporation currently are named litigants in an 8 U.S.C. § 1324b Proceeding (OCAHO Case No. 17B00038) that is being litigated before Administrative Law Judge James R. McHenry, III, at the United States Department of Justice Executive Office For Immigration Review.

An Order For Prehearing Statements, issued by ALJ McHenry, indicates the nature of the complaint before that forum:

> "A complaint was filed on January 3, 2017, by Zaji Obatala Zajradhara against ZY Corporation. The complaint alleges that ZY Corporation refused to hire Mr. Zajradhara because of his citizenship status and national origin in

violation of 8 U.S.C. § 1324b(a)(1) and retaliated against him for asserting his rights under 8 U.S.C. § 1324g in violation of 8 U.S.C. § 1324b(a)(5)."[1]

The Hearing Officer believes that the above-cited immigration case involves the same nucleus of operative fact and law as C.A.C. 16-009-09. In the interests of judicial economy, and to avoid the risk of inconsistent judgments on nearly identical factual and legal contentions, the Hearing Officer finds that it is in the interest of justice to stay the evidentiary hearing in C.A.C. No. 16-009-09, pending resolution of the immigration case.

Good cause appearing therefor, IT IS HEREBY ORDERED:

1. **Change of Caption:** Pursuant to the Administrative Order Dismissing Appeal of Determination and Revising Caption of C.A.C. No. 16-009-09, entered on May 26, 2017 by this Hearing Officer, the complainant in the above-captioned Compliance Agency Case is hereby changed from "Department of Labor Enforcement and Compliance Section" to "Zaji O. Zajradhara." 3 CMC §§ 4947(c) and 4947(d)(11); Regs. at NMIAC §§ 80-20.1-485(13) and 485(14).

2. **Stay:** The above-captioned case (C.A.C. No. 16-009-09) is hereby STAYED until the parties' 8 U.S.C. § 1324b Proceeding (OCAHO Case No. 17B00038), that is being litigated before Administrative Law Judge James R. McHenry, III, at the Executive Office For Immigration Review, is resolved.[2] *Id.*

DATED: May 26, 2017

Jerry Cody
Hearing Officer

[1] See Order For Prehearing Statements at p. 1 (Procedural History), dated March 6, 2017, issued by Administrative Law Judge James R. McHenry, III, in OCAHO Case No. 17B00038.

[2] During the Status Conference, attorney Robert T. Torres represented that he will provide the Hearing Office with a copy of the Decision in the above-cited immigration case as soon as the Decision is issued by ALJ McHenry, III.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 16-010-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Marianas Taxi Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on October 18 and 21, 2016, and on December 9, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa and Manny Iguel. Respondent Marianas Taxi Corporation was represented by its President, Thongyai T. Carroll, and its Secretary, Anowar Hossain. Ms. Lorelai Vinas and Mr. Simion F. Rabauliman appeared and testified on behalf of Respondent; Jesse Chong appeared and testified on behalf of the Department of Commerce. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on September 19, 2016, against respondent Marianas Taxi Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to give citizens and status-qualified job seekers preference for employment and failed to make a good faith effort to hire such citizens and status-qualified applicants, as set forth in CNMI Employment Rules and Regulations ("Regs."), codified in the Northern Mariana Islands Administrative Code ("NMIAC") at §§ 80-20.1-220 and 235, respectively.

Department Regulations state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on

the Department's website, www.marianaslabor.net." Regs. at NMIAC § 80-20.1-225(a).

In this case, Employer posted a job vacancy announcement ("JVA") for the "taxi driver" job in compliance with DOL Regulations. *Id.* The posting ran on the DOL website (www.marianaslabor.net) from June 27, 2016, until July 12, 2016. (Hearing Ex. 1 at ¶ 3.)

In the JVA, Employer listed as qualifications for the position: "Must have a valid CNMI Taxi Driver's license, preferred speak Chinese, have at least a few days to a few months of experience as a taxi driver and tour guide...." [JVA re-printed at Hearing Exhibit 6; testimony of Mr. Hossain.]

There were 58 online responses to the JVA. [JVA re-printed with responses at Hearing Exhibit 6.] Employer informed the Department that none of the job applicants were qualified for the position. [Testimony of Mr. Ulloa and Mr. Hossain.]

The Department took issue with Employer's contention that none of the job applicants were qualified for the taxi driver job. In support of its position, the Department cited: (1) the O-NET job classification system; and (2) the CNMI Department of Commerce Regulations regarding licensing of taxicab operators.

O-NET: The Citizen Job Availability and Job Placement Section ("Job Placement") examines posted job qualifications based on the Occupational Information Network ("O-NET"), a job classification system that is the nation's primary source of occupational information. [Regs. at NMIAC § 80-20.1-205(a).] The ONET Summary Report for Taxi Drivers and Chauffeurs positions states that "little or no previous work-related skill, knowledge or experience is needed for these occupations." This means that one can qualify for the job "even if he/she has never worked before." [Hearing Exhibit 8 – copy of ONET Online Summary Report For 53-3041.00 – Taxi Drivers and Chauffeurs, at p.3.]

Department of Commerce: The job of taxicab driver is regulated in the CNMI by the Department of Commerce. Anyone who intends to operate a taxicab in the CNMI must apply for and obtain a Taxi Operator's License and Taxi Operator's ID. [Testimony of Jesse Chong, who works for the Enforcement and Compliance Division of the Department of Commerce, testified as to the basic requirements to become a taxicab operator in the CNMI. See Taxicab Regulation Act of 1991, at

P.L. 17-33, which took effect on 7/31/1991; see also 1 CMC §§ 2594-2596; and Taxicab Regulations at NMIAC § 20-80-001 *et seq.*]

In order to obtain the license, the applicant must submit an application for "Certification of Fitness" to the Department of Commerce Taxicab Section. [Regs. at NMIAC § 20-80-105.] Among other requirements, the applicant must submit an original printout showing the applicant's current criminal record (less than six months old), traffic history and traffic clearance, as well as a copy of a current CNMI driver's license. [Hearing Exhibit 3 – copy of Department of Commerce printout re "Certification of Fitness & Taxicab Operator's Identification Card Application."]

The Department of Commerce does not require applicants for a taxicab operator's license to have prior experience driving a taxi. [Testimony of Mr. Jesse Chong; Hearing Exhibit 3.]

Enforcement argued that it was incorrect of Employer to require job applicants to have prior experience driving a taxi in order to be hired as a taxi driver. Enforcement also disagreed that an applicant should be required to already hold a CNMI taxicab operator's license *before* being hired, since a job applicant would not be likely to go to the trouble of obtaining such a license unless and until he was hired. [Testimony of Mr. Ulloa.]

Holding: At the conclusion of Mr. Chong's testimony, the Hearing Officer stated that he agreed with the Department's position that it is unreasonable to require a job applicant to obtain a taxicab operator's license before hiring him to become a taxi driver. It is a sufficient qualification if the applicant appears capable of obtaining a taxi operator's license (i.e., the applicant does not have a problematic driving record or criminal record that might prevent him from obtaining the taxi driver license). Accordingly, the Hearing Officer found that Employer should not have rejected applicants simply because they lacked taxi driver experience.

Remedial Action By Employer

On October 21, 2016, Compliance Officer Jesse Chong testified in the Hearing Office on behalf of the Department of Commerce. Mr. Chong explained the Department of Commerce requirements for issuing a taxicab operator's license and ID; and verified that the Department does not require prior experience as a taxi driver in order to obtain the license. [Testimony of Mr. Chong.]

After his testimony, the Hearing Officer ordered Employer to re-examine the 58 posted responses on the JVA to determine whether any applicant was qualified for the job of taxi driver in light of the testimony of Mr. Chong. (In its prior review, Employer had rejected anyone who lacked prior job experience as a taxi driver. Now, this requirement would be removed from consideration.) On October 21, 2016, the Hearing Officer granted a one-month continuance with instructions to the Employer to contact, review and possibly interview every potentially qualified job applicant of the 58 posted responses on DOL's website.

In the Hearing on December 9, 2016, Employer's President, Ms. Carroll, testified that, with help from her assistant Lorelai Vinas, Employer had contacted and reviewed dozens of applicants for the taxi driver job, then hired a U.S. citizen, named Simion F. Rabauliman, for the position. [Testimony of Ms. Carroll and Ms. Vinas.] The new hire, Mr. Rabauliman, appeared and testified that he has been hired and is in the process of obtaining the taxicab operator's license so that he can begin this employment in the coming weeks. [Testimony of Mr. Rabauliman.]

Based on the remedial action of the Employer to review and consider all qualified applicants, and its decision to offer employment to a U.S. citizen, the Department announced it was withdrawing the Agency charges in this case. [Testimony of Mr. Iguel on 12/09/2016.] The Hearing Officer agrees that, based on the remedial action taken by Employer – namely, the review of dozens of job applicants and the hiring of a U.S. citizen for the taxi driver job – the Agency charges against Employer should be dismissed.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Dismissal:** Based on the corrective action taken by Respondent Marianas Taxi Corporation, which resulted in the hiring of a U.S. citizen for the job at issue, the Department has withdrawn its charges and requested the dismissal of this case. That dismissal is hereby granted. 3 CMC §§ 4528(f)(2) and 4947(11).

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 12, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Curtwill Corporation, *dba* Curtwill Enterprises, Respondent.	)	CAC No. 16-011-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on November 17, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Curtwill Corporation appeared through its President and General Manager, Arlene Silva, and its Manager, Luciann Arriola. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on October 7, 2016, against respondent Curtwill Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to post numerous job vacancy announcements ("JVAs") on the Department of Labor website (www.marianaslabor.net) in 2015 in violation of CNMI Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a).

(2) Employer failed to post numerous JVAs on the Department of Labor ("DOL") website in 2016, for jobs (housekeeping, general maintenance, landscape worker, custodian, generator operator) that were later filled by CW1-status employees. Regs. at NMIAC at § 80-20.1-225(a).

(3) Employer failed to file quarterly Total Workforce Listings for three quarters in 2015 and three quarters in 2016. Regs. at NMIAC § 80-20.1-505.

(4) Employer failed to update its Workforce Plan with DOL for 2016. Regs. at NMIAC § 80-20.1-510.

Employer operates a manpower supply company, employing 29 full-time employees. The work force consists of 8 U.S. citizens or permanent residents, 1 FAS-status worker and 20 CW1-status workers. [Testimony of President Silva.]

Job Posting on DOL's Website: Department Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the JVA on the DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-20.1-225(e).

Enforcement established that as of the date of the Determination, Employer was not a registered employer online at www.marianaslabor.net in order to post job vacancy announcements. [Determination (Hearing Exhibit 1) at ¶ 4; Regs. at NMIAC § 80-20.1-230.] Several days after receiving the Determination, on about October 9, 2016, Employer registered as an employer on the DOL website. [Testimony of Mr. Ulloa and Ms. Silva.]

At Hearing, President Silva admitted that Employer neglected to post any JVAs on DOL's website for all of the positions it filled with CW1-status workers in 2015 and 2016. [Testimony of Ms. Silva.] President Silva admitted that at some point in the past, she had heard or read that employers needed to post JVAs on the DOL website if they were going to hire CW1-status workers. Nevertheless, Employer kept advertising its jobs on local newspapers and kept getting its CW1 Petitions approved by USCIS with those advertisements, so Employer never registered on the DOL website and never posted JVAs on DOL's website. *Id.*

Quarterly Total Workforce Listings: DOL Regulations require employers to submit quarterly Total Workforce Listings that detail the "total number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505 *et seq.* [Testimony of Mr. Ulloa.]

Employer admitted that it did not submit quarterly Total Workforce Listings for three quarters in 2015 and three quarters in 2016. The only Total Workforce Listing filed by Employer in the last two years was filed on December 9, 2015. [See copy of Total Workforce Listing, signed on 12/09/2015, at Hearing Exh. 2.] President Silva testified that she had been unaware that employers were required to file this document with the Department of Labor on a quarterly basis.

Workforce Plan for 2016: DOL Regulations require employers to file an updated Workforce Plan once every 12 months. Regs. at NMIAC § 80-20.1-510(c). Employer last filed a Workforce Plan on December 11, 2015; therefore, it is required to update its Plan no later than December 11, 2016. [A copy of Employer's Workforce Plan, filed on 12/11/2015, was entered into evidence as Hearing Exhibit 3.]

As it has not yet been a full year since Employer last filed its Workforce Plan, Enforcement's charge that Employer has violated this Regulation, is incorrect. Employer has not violated the Regulation, and will not have violated the Regulation, unless it fails to file its updated plan on or before December 11, 2016.

DISCUSSION

The evidence established that Employer: (1) failed to post job announcements on DOL's website for more than a dozen jobs in 2015 and 2016; and (2) failed to file quarterly Total Workforce Listings in 2015 and 2016. The failure to post JVAs was particularly egregious as may have prevented qualified U.S. citizens and permanent residents from obtaining employment for which they had a preference over CW1-status workers.

Given this conduct, the Department asked that Employer be sanctioned with a substantial monetary penalty for its conduct. Employer admitted its failures and agreed to pay a monetary sanction. As a migrating factor, Employer's President noted that Employer has decided to stop employing all of its CW1-status workers after December 2016. Employer stated that its decision was due primarily to the difficulty it has experienced in getting its CW1 petitions approved by USCIS.

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] However, after hearing the testimony, Enforcement modified its request by asking for a total sanction of $2,000 for all violations combined. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. As stated above, the evidence established that Employer neglected to post more than a dozen JVAs in both 2015 and 2016 with respect to jobs that it then filled by employing CW1-status workers. Furthermore, Employer failed to file quarterly Total Workforce Listing documents for three quarters in 2015 and three quarters in 2016. These numerous deficiencies justify a substantial sanction of even more than $2,000, but Enforcement limited its request to one sanction of $2,000 for all violations combined. In mitigation, Employer's President testified that the company will stop hiring CW1-status workers at the end of 2016 and that it will instead concentrate on employing only U.S. citizens or permanent residents for its business. [Testimony of Mrs. Silva.]

Based on the above facts and circumstances, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars ($2,000) for its conduct, as requested by Enforcement.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Curtwill Corporation for numerous violations of the Employment Rules and Regulations, as set forth above. For these violations, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Curtwill Corporation is hereby SANCTIONED in the amount of two thousand dollars ($2,000) for its conduct. Respondent is ORDERED to pay the sanction no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Workforce Plan:** Respondent Curtwill Corporation is reminded that it is required to file its updated Workforce Plan with the Job Placement Section no later than December 11, 2016. Regs at NMIAC § 80-20.1-510(c).

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 21, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. C & F Corporation, *dba* Aqua Water, Respondent.	))))))))))	CAC No. 16-012-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on November 30, 2016, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent C&F Corporation appeared through its Vice President, Cui Xiang De, and its processing agent and translator, Byung Sin. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on October 27, 2016, against Respondent C&F Corporation, *dba* Aqua Water ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to post job vacancies on the Department's website in 2015 and 2016 for two positions that it filled with foreign national workers. The Department alleges that this conduct violated CNMI Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a).

(2) Employer failed to submit to the Department of Labor ("Department" or "DOL") quarterly Total Workforce Listings for four quarters in 2015 and two quarters in 2016. Regs. at NMIAC § 80-20.1-505(a-c).

(3) Employer failed to file a Workforce Plan with the Department in 2015 and 2016. Regs. at NMIAC § 80-20.1-510.

Employer operates a water purification company that has only two employees: a water purification system operator and a sales associate. Employer's Vice President, Cui, Xiang De, is the water purification system operator. Mr. Cui holds a CW-1 immigration status. Employer employs another CW-1 worker, Md, Khan, as a Sales Associate. Mr. Khan has worked with the company for the past eight years. [Testimony of Mr. Cui.]

1. **Posting JVAs on DOL's Website:**

Department Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on the Department's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at NMIAC § 80-20.1-225(e).

Enforcement established that Employer did not register in 2015 or 2016 as an employer at the Department's website (www.marianaslabor.net). In 2015 and 2016, Employer employed two foreign national (CW1-status) workers on a full-time basis as a Water Purification System Operator and a Sales Associate. In both 2015 and 2016, Employer did not post job vacancy announcements ("JVAs") on DOL's website for either position. [Testimony of Mr. Ulloa and Mr. Sin.]

Employer's Vice President, Cui Xiang De, testified that he knows nothing about the Department's Regulations and that he relied on his agent to prepare advertisements for these jobs. The agent, Byung Sin, admitted that he used newspaper advertisements instead of the Department's website, even though he had read local newspaper reports about employers being sanctioned for not posting JVAs on the DOL website. The Employer used those newspaper advertisements to support its CW-1 Petitions for the two positions. Employer has already submitted CW-1 petitions for 2017, and the petitions have been granted by USCIS. [Testimony of Mr. Cui.]

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2. **Quarterly Total Workforce Listings:**

Department Regulations require employers to submit quarterly Total Workforce Listings that detail the "total number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505 *et seq.* [Testimony of Mr. Ulloa.] Employers submit the information in a form called the "Total Workforce Listing," which is available on DOL's website. *Id.*

Employer admitted that it did not submit quarterly Total Workforce Listings for four quarters in 2015 and the first two quarters of 2016. V.P. Cui testified that he had been unaware that employers were required to file this document with DOL on a quarterly basis. [Testimony of Mr. Cui.]

Employer submitted a Total Workforce Listing, signed on 10/04/16, in response to a document request issued by Enforcement. Mr. Ulloa reviewed the document and found it to be "acceptable." [A correct copy of the current Total Workforce Listing was entered into evidence as Hearing Exhibit 2.]

Notwithstanding this recent filing, Employer is required to file a quarterly Total Workforce Listing for each quarter, regardless of whether it is requested by Enforcement to do so. Regs. at NMIAC § 80-20.1-505 *et seq.*

3. **Workforce Plans for 2015 and 2016:**

Department Regulations require employers to file an updated Workforce Plan once every 12 months. Regs. at NMIAC § 80-20.1-510. Employer never submitted a Workforce Plan to DOL in 2015. Employer submitted a Workforce Plan in October 2016, but Mr. Ulloa testified that the document does not adequately discuss a specific vocational plan for increasing the number of U.S. status-qualified employees working for the company. [Testimony of Mr. Ulloa. A correct copy of Employer's Workforce Plan for 2016 was entered into evidence as Hearing Ex. 3.]

DISCUSSION

First, the evidence established that Employer failed to post job announcements on DOL's website for two positions in 2015 and 2016, in violation of Department Regulations. Although the Employer relied on its agent, Mr. Sin, that fact does not excuse Employer from the violation, as the Employer is obligated to properly supervise its agent. Furthermore, the agent admitted that he was aware that employers who failed to post JVAs on the website could be sanctioned by the

Department. Thus, the agent made a conscious decision to bypass the Department's Regulations.

Second, the evidence shows that Employer failed to file numerous quarterly Total Workforce Listings in 2015 and 2016; failed to submit a Workforce Plan in 2015 and submitted an inadequate Workforce Plan in 2016. [Testimony of Mr. Sin and Mr. Ulloa.] These numerous failures constitute further violations of the Employment Rules and Regulations, as cited above.

Based on the evidence summarized above, the Department asked that Employer be sanctioned with a substantial monetary penalty for its conduct. In addition, Enforcement requested that Employer be required to post a job vacancy announcement for the Sales Associate position on DOL's website; and that Employer be ordered to submit an amended Workforce Plan for 2016 to Job Placement, containing specific plans for integrating U.S. citizens or permanent residents into Employer's workforce.

Employer and his agent admitted the failures, but noted that the mistakes were caused by their lack of familiarity with Departmental Regulations rather than a willful plan to violate the law. Employer agreed to pay a fine; to comply with Enforcement's requests to post a new JVA for the Sales Associate position; and to amend its Workforce Plan for 2016. [Testimony of Mr. Cui and Mr. Sin.]

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] After hearing the testimony, Enforcement modified its request by asking for a total sanction of $2,000 for all violations combined. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence established that Employer

violated numerous regulations – failing to post JVAs in 2015 and 2016, and failing to submit numerous census-related documents over a period of two years. These numerous deficiencies justify a substantial sanction. In mitigation, Employer recently produced a Total Workforce Listing and made a credible promise to correct its conduct in the future.

Based on the above facts and circumstances, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars ($2,000) for its conduct; however, $1,250 of the sanction shall be suspended, for two years, then extinguished, provided that Employer complies fully with the terms of this Order. Employer asked for additional time to pay the sanction and Enforcement had no objection to that request. Therefore, Employer shall be allowed to pay the sanction in three installments, as set forth below.

Finally, the Hearing Officer notes that Employer has not come close to meeting the minimum requisite percentage of 30% of U.S. status-qualified workers in its total workforce. [3 CMC § 4525 and Regs at NMIAC § 80-20.210(c)(3).] Employer should increase its efforts to hire and employ U.S. citizen or permanent resident employees as part of its workforce.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent C&F Corporation for violating the Department's Regulations, as set forth above. For these violations, Respondent shall be sanctioned, as set forth below.

2. **Sanctions:** Respondent C&F Corporation is hereby SANCTIONED in the amount of two thousand dollars ($2,000) for its conduct; however, $1,250 of the sanction shall be SUSPENDED for two years, then extinguished, provided that Respondent complies with the other terms of this Order and does not commit further violations of the labor statutes and regulations during the two-year period. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Payment of Sanctions:** Respondent is ORDERED to pay the remaining $750 portion of the sanction in three installments of $250 each, due on or before the following dates: **December 30, 2016; February 28, 2017; and April 28, 2017**. Proof of payment shall be submitted to the Hearing Office on or before the due dates.

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4. **Posting of JVA:** Respondent C&F is ORDERED to post a job vacancy announcement for the "Sales Associate" position on the DOL website **on or before December 30, 2016**. Respondent shall be required to interview and consider for hiring qualified U.S. citizens or permanent residents who apply for the job.

5. **Workforce Plan:** Respondent C&F Corporation is ORDERED to submit a revised Workforce Plan for 2016 to the Citizen Job Availability and Citizen Job Placement Section (attn: Mr. James Ulloa) that meets with the approval of the Department. The revised Workforce Plan shall be submitted to the Section **on or before December 30, 2016**.

6. **Warning:** Respondent is warned that the Regulations cited in this order set forth *continuing* obligations of the employer. Respondent shall be required to post job vacancy announcements on DOL's website and to file census-related documents (Total Workforce Listing and Workforce Plans) on or before the required deadlines. Any failure by Respondent to comply with these obligations in the future may result in Agency requests for reinstatement of the suspended sanctions, plus additional sanctions, including but not limited to, denial of future Certificates of Good Standing.

7. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 5, 2016

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Li's Limited Corporation, *dba* U Save Car Rental/Lucky Tour, Respondent.	)	CAC No. 16-013-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on January 31, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Li's Limited Corporation failed to appear despite being served with legally sufficient notice of the hearing. Mr. Rio S. Mostales testified in support of Complainant. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on December 6, 2016, against respondent Li's Limited Corporation, *dba* U Save Car Rental/Lucky Tour ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to post two job vacancy announcements in 2015 and 2016 in violation of CNMI Rules and Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a).

(2) Employer failed to file quarterly Total Workforce Listings for the 4th quarter of 2015 and the 2nd and 3rd quarters of 2016. Regs. at NMIAC § 80-20.1-505(a-c).

(3) Employer failed to submit a Workforce Plan with the Department for 2015. Regs. at NMIAC § 80-20.1-510.

Employer failed to appear at the Hearing and shall be deemed in default.

Enforcement served Employer with the Determination by mailing a copy of the Determination, Notice of Violation and Notice of Hearing to Employer's Registered Agent on December 7, 2016. [Testimony of Mr. Mostales.][1] The envelope was addressed to Registered Agent, Li Liang, who was listed as Employer's registered agent in the latest Annual Corporate Report on file at the Registrar of Corporations. Mr. Li, Liang is also listed on the Annual Corporate Report as the President/Secretary and sole shareholder of the corporation. [Proof of Service at Hearing Exhibit 2, and Annual Corporate Report at Hearing Exhibit 3.] This evidence establishes that Employer was properly served with legally sufficient notice.

Holding: Employer failed to appear at Hearing despite being properly served with legally sufficient notice. Based on the evidence presented, the Hearing Officer found Employer to be in default.[2] After making this finding, the Hearing Officer proceeded to take evidence to determine whether Enforcement could establish its prima facie case against Employer.

Based on Employer's latest filed Total Workforce Listing, Employer's workforce consists of three individuals: President Li Liang and two car rental agents, both of whom are CW-1 status workers who began working for Employer in October 2015. [Hearing Exhibit 4 (Total Workforce Listing, signed on 4/10/2016).]

[1] Mr. Mostales is an employee of the Department of Labor. He testified that he sent the Determination by mail to the Registered Agent on December 7, 2016, at the address listed on the copy of the envelope attached to the Proof of Service. (See Proof of Service and copy of attached envelope at Hearing Exhibit 2.)

[2] The Regulations regarding "default" state that: "Except for good cause shown, failure of a party to appear at a hearing after timely being served notice to appear shall be deemed to constitute a waiver of any right to pursue or contest the allegations in the complaint. If a party defaults, the hearing officer may enter a final order containing such findings and conclusions as may be appropriate. Regs. at NMIAC § 80-20.1-480(1).

1. **Posting JVAs on DOL's Website:**

Department Regulations state that an employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the job vacancy announcement on the Department's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at NMIAC § 80-20.1-225(e).

The evidence shows that Employer began employing two foreign national workers as full-time car rental agents in October 2015; however, Employer failed to post JVAs for those positions on DOL's website in 2015 and 2016. See Hearing Exhibit 4 (Total Workforce Listing, signed by Li, Liang on April 10, 2016).][3] See Hearing Exhibit 5 - a DOL printout showing all active or expired JVAs filed by Employer since 2011. This document shows that Employer posted no JVAs in 2015 and 2016.[4]

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to post JVAs for the car rental agent positions in 2015.

2. **Quarterly Total Workforce Listings:**

DOL Regulations require employers to submit information *on a quarterly basis* regarding "the number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505(b). This information is submitted in a document called the Total Workforce Listing. The Department requires employers to submit this information in order to qualify for a Certification of Compliance. [Testimony of Mr. Ulloa.]

Employer failed to submit Total Workforce Listings for the 4th quarter of 2015, as well as the first and second quarters in 2016. In response to a document request from DOL, Employer did submit a Total Workforce Listing for the 1st Quarter of 2016. [A copy of the Total Workforce Listing, signed by Li Liang on April 10, 2016, was entered into evidence at Hearing Exhibit 4.]

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[3] On this Total Workforce Listing, Employer listed that the two CW-1 workers began working in October 2015 and were still working as of April 2016. Id. It is not known whether these workers are still in the employ of Employer.

[4] Because Employer failed to submit more recent Total Workforce Lists later in 2016, and failed to attend the hearing, Enforcement does not know whether these two CW-1 status employees continued to work for Employer throughout 2016, whether they obtained a renewal of their CW-1 status in 2016, or whether they continue to work for Employer until the present.

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to file quarterly Total Workforce Listings in 2015 and 2016.

3. **Workforce Plan for 2015:**

DOL Regulations require employers to file an updated Workforce Plan once every 12 months. [Regs. at NMIAC § 80-20.1-510.] The evidence shows that Employer never submitted a Workforce Plan to DOL in 2015. Although the Employer did submit a Workforce Plan for 2016 on April 10, 2016, it is completely deficient given that half of the form is left blank. [Testimony of Mr. Ulloa; Hearing Exhibit 6 (copy of Employer's Workforce Plan for 2016).]

Based on the evidence, Enforcement moved for sanctions against Employer for failing to submit a Workforce Plan in 2015.

CONCLUSIONS OF LAW

The evidence established that: (1) Employer failed to post job announcements on DOL's website for two positions in 2015, which were then filled by CW-1 status employees; (2) Employer failed to file quarterly Total Workforce Listings in 2015 and 2016; and (3) Employer failed to submit a Workforce Plan for 2015. As stated, Employer failed to appear at this Hearing to provide testimony as to the reasons for its conduct. Enforcement presented evidence establishing its prima facie case against Employer. Accordingly, the Hearing Officer finds that Employer committed each of the three violations summarized above. [Regulations at NMIAC §§ 80-20.1-225(a), 505(b) and 510.]

Given that these numerous failures constitute multiple violations of DOL Regulations, the Department asked that Employer be sanctioned with the maximum monetary penalties for the conduct.

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence established that Employer violated numerous regulations – failing to post JVAs for two jobs in 2015, failing to submit numerous Total Workforce Listings in 2015 and 2016, and failing to update its annual Workforce Plan in 2015. The Hearing Officer agrees that these numerous deficiencies justify a substantial penalty. It is difficult for the Hearing Officer to consider any mitigating factors, given that Employer neglected to attend the Hearing. However, the Hearing Officer finds that these violations are of various levels of severity. The failure to post JVAs on DOL's website is particularly egregious as it has deprived the local work force of employment opportunities.

Based on the above facts and circumstances, the Hearing Officer concludes as follows: First, for failing to post two JVAs in 2015, Employer should be sanctioned the maximum penalty of two thousand dollars ($2,000). Second, for failing to submit various Total Workforce Listing Documents, Employer should be sanctioned two thousand dollars ($2,000); however, $1,000 of that amount shall be suspended for a one-year period, then extinguished, provided that Employer commits no further violations of labor statutes and regulations during the one-year period. Third, for failing to submit a Workforce Plan for 2015 and for submitting a deficient Workforce Plan for 2016, Employer shall be given a suspended sanction of five hundred dollars ($500). Total sanctions amount to $4,500 with $3,000 due and payable within 30 days and the remaining amounts suspended. Finally, Employer shall be ordered to file to submit its current Total Workforce Listing for the 4th Quarter of 2016, no later than 30 days after the date of issuance of this Order.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Li's Limited Corporation for numerous violations of the Employment Rules and Regulations, as set forth above. For these violations, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** For the above-described conduct, Respondent Li's Limited Corporation is hereby SANCTIONED in the total amount of four thousand, five hundred dollars ($4,500); however, $1,500 of that amount shall be SUSPENDED for one year, then extinguished, on the condition that Respondent commits no further violation of labor statutes and regulations in that one-year period, and complies with the terms of this Order as set forth herein. Respondent is ORDERED to pay the remaining sanctions of $3,000 within thirty (30) days after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due dates. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Total Workforce Listing:** Respondent Li's Limited Corporation is ORDERED to submit its Total Workforce Listing for the 4th quarter of 2016, by delivering copies of the document to the Enforcement and Compliance Office and to the Hearing Office no later than 30 days after the date of issuance of this Order. [Regs. at NMIAC § 80-20.1-505(b).]

4. **Updated Workforce Plan:** Respondent Li's Limited Corporation is ORDERED to submit an updated and complete Workforce Plan for 2017, by delivering copies of the document to the Enforcement and Compliance Office and to the Hearing Office no later than 30 days after the date of issuance of this Order. [Regs. at NMIAC § 80-20.1-510).]

5. **Future Compliance with DOL Regulations:** Respondent Li's Limited Corporation is ORDERED to post accurate job vacancies and job renewals in the future on the Department's website in accordance with Regulations at NMIAC § 80-20.1-225(a).

6. **Reinstated Sanctions:** Respondent is warned that the Regulations described in this order set forth *continuing* obligations of the Employer. Any failure by Respondent to comply with the terms of this Order, including a failure to file timely census-related documents (Total Workforce Listings) in the future, may result in the reinstatement of the suspended sanctions after a due process hearing.

7. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: February 1, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Xing Wang Development Corporation, *dba* Family Store, Respondent.	)	CAC No. 16-014-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on January 30, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Xing Wang Development Corporation appeared through its Manager, Hong Fei Wang-Rios. Mr. Tony Yen served as translator. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on November 1, 2016, against respondent Xing Wang Development Corporation, *dba* Family Store ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to post job vacancy announcements ("JVAs") on the Department of Labor website (www.marianaslabor.net) for five positions in 2015 in violation of CNMI Employment Rules and Regulations ("Regs."),

codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a). [Hearing Exhibit 1 at ¶ 2.]

(2) Employer failed to post JVAs on the Department of Labor ("DOL") website for two positions in 2016 in violation of CNMI Regulations. *Id.* [Hearing Exhibit 1 at ¶ 3.]

(3) Employer failed to post numerous Employer Declarations on the DOL website in 2016, in connection with JVAs posted for the jobs of Store Manager and Supervisor. Regs. at NMIAC at § 80-20.1-235(e). [Hearing Exhibit 1 at ¶ 7.]

(4) Employer failed to submit the three quarterly Total Workforce Listings for 2015 and three quarterly Total Workforce Listings for 2016 to the Department in accordance with Regulations at NMIAC § 80-20.1-505(b).

(5) Employer submitted a Workforce Plan to the Department in 2016, which was inadequate as it failed to include "a realistic timetable for accomplishing the replacement of nonimmigrant aliens with...qualified...citizens [or]... permanent residents." Regs. at NMIAC § 80-20.1-510(c). [Hearing Exhibit 1 at ¶ 9.]

Employer operates three businesses in Garapan: a grocery retail store named Family Store; a retail clothing store named Xing Long Fashion, and a bar\coffee shop named DZ Coffee Shop. Employer currently employs 7 full-time employees – 4 CW-1 status employees, 2 U.S. citizens and one foreign national worker holding an Employment Authorization Document ("EAD"). [Testimony of Ms. Wang; Hearing Exhibit 2 – a Total Workforce Listing signed on 2/26/2016.]

The testimony of Manager Hong Fei Wang-Rios revealed that she plays a major role in managing this business. Her father, YongLiang Wang, who resides in China, is President, Vice President, Director and sole shareholder of the company. [See Amended Annual Corporation Report for the year 2015, filed at the Registrar's Office on 4/27/16, at Hearing Exhibit 6.][1]

* * * * *

[1] Initially, Ms. Wang-Rios's husband, Benjamin Rangamar Rios, was President/Secretary and a Director of the company. [Hearing Exhibit 7 - Annual Corporation Report for the year 2015, filed at the Registrar's Office on 1/19/16.] A later Amended Annual Corporation Report (Hearing Exhibit 6) showed that Mr. Benjamin Rios was no longer either an officer or director of the company.

1. **Failure to Post Job Announcement on DOL's Website.**

Department Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the JVA on the DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-20.1-225(e).

In its Determination, Enforcement charged that in 2015, Employer had failed to post JVAs on DOL's website for five positions which it then filled with foreign national workers in CW-1 status. [Hearing Exhibit 1 at ¶ 2.] These included the jobs of bartender, store manager, salesperson and two supervisors. Second, Enforcement charged that in 2016, Employer had failed to post JVAs for two jobs – bartender and salesperson – even though Employer posted two JVAs for other positions in August 2016. At Hearing, Employer (Ms. Wang-Rios) admitted the charge. Employer's Manager, Ms. Wang-Rios, testified that in the course of hiring CW-1 workers, she relied on a local agent, Lu Guo Hua, to handle all aspects of the hiring. Ms. Wang-Rios claimed that she had been completely unaware of the Regulation requiring employers to post JVAs on the website. [Testimony of Ms. Wang-Rios.]

Based on the evidence, Enforcement argued that Employer should be sanctioned for failing to post five JVAs in 2015 and two JVAs in 2016 for positions which were then filled by CW-1 status workers. *Id.* at § 80-20.1-225(a). [Testimony of Mr. Ulloa.]

2. **Failure to Post "Employer Declarations" As to Prospective Job Applicants.**

Departmental Regulations require any employer who hires a foreign national worker to file a "declaration" on the Department's website, stating its reasons for rejecting each U.S. citizen or permanent resident who applied for the job. [See Regulations at NMIAC at § 80-20.1-235(e).] All citizens or permanent residents who post responses (or have their names posted) to JVAs on DOL's website are considered potential job applicants.

In its Determination, Enforcement charged that Employer had failed to post Employer Declarations in connection with two JVAs that Employer posted for the jobs of store manager and supervisor. [Hearing Exhibit 1 at ¶ 7.]

In August 2016, Employer posted two JVAs – one for "Store Manager" and one for "Supervisor" - on the DOL website with a closing date of September 4, 2016. Department records show that as to each JVA, 129 online responses were posted on the website.[2] [Printouts of these JVAs, listing the 129 listed responses, were entered into evidence as Hearing Exhibits 4 and 5, respectively.]

At Hearing, Employer admitted that it never reviewed those online responses and never posted any "employer declarations" to any responder. Employer's Manager explained that she had been unaware that after posting a JVA, Employer was required to first review the website to obtain the list of responders, and then review and consider those job seekers for the announced jobs. [Testimony of Ms. Wang-Rios.] Again, the Manager stated that she had left the matter completely in the hands of the agent, Lu Guo Hua.

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to post employer declarations with respect to the 129 responders who were listed as responding to each of the JVAs. [Regs. at NMIAC § 80-20.1-235(e).]

3. <u>Failure to Submit Quarterly Total Workforce Listings</u>.

DOL Regulations require employers to submit information *on a quarterly basis* regarding "the number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505(b). This information is submitted in a document called the Total Workforce Listing. The Department requires employers to submit this information in order to qualify for a Certification of Compliance. [Testimony of Mr. Ulloa.]

Employer failed to submit Total Workforce Listings for the 1st, 2nd and 3rd quarters of 2015, as well as the 1st, 2nd and 3rd quarters of 2016. Employer did submit a Total Workforce Listing for the 4th quarter of 2015 in February 2016. [This document was entered into evidence as Hearing Exhibit 2.] Employer's only response to this charge was that, once again, she relied on her local agent and that she had not realized that Total Workforce Listings were due on a quarterly basis.

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to file six quarterly Total Workforce Listings in 2015 and 2016.

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[2] These names were either posted on the website by the job seeker, himself, or else submitted automatically by the Citizen Job Placement computerized system that automatically refers persons to certain JVAs, based on pre-established, programmed criteria. [Testimony of Mr. Ulloa.]

4. **Failure to Submit Complete Workforce Plan for 2016:**

DOL Regulations require employers to file an updated Workforce Plan once every 12 months. [Regs. at NMIAC § 80-20.1-510.] In this case, the evidence shows that Employer submitted a Workforce Plan to DOL in February 2016; however, the Plan was inadequate in several respects. First, the Determination stated that Employer had failed to give a realistic timetable for replacing alien workers with U.S. status-qualified workers. [Hearing Exhibit 1 at ¶ 9.] Second, Mr. Ulloa testified at Hearing that Employer had failed to detail the specific vocational preparations or training that would be needed to increase the percentage of U.S. status-qualified workers in its workforce. [Testimony of Mr. Ulloa.]

Once again, Employer's only response was that she had relied on the services and advice of her local agent, Lu Guo Hua, and that she had no knowledge of the correct format and information that the Department required the employer to present in this form. [Testimony of Wang-Rios.]

Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to file a complete and correct Workforce Plan in 2016. [Regs. at NMIAC § 80-20.1-510.]

DISCUSSION

The evidence established that: (1) Employer failed to post job vacancy announcements on DOL's website for five jobs in 2015 and two jobs in 2016, which jobs were then filled by CW-1 status workers; (2) Employer posted two JVAs on DOL's website in 2016, but then neglected to post Employer Declarations to 129 online responders to each JVA; (3) Employer failed to submit three quarterly Total Workforce Listings in 2015 and three quarterly Listings in 2016; (4) Employer submitted an incomplete Workforce Plan for 2016.[3] [Regs at NMIAC §§ 80-20.1-225(a), 235(e), 505(b) and 510.]

Given these violations, the Department asked that Employer be assessed substantial monetary penalties for its conduct. [Hearing Ex. 1, p. 3.]

[3] As to the charge about the Workforce Plan, the Hearing Officer finds that the Determination's allegation (Determination at ¶ 9) about the 4th column of the Workforce Plan, was too vague to be actionable. At Hearing, Enforcement (Mr. Ulloa) did not explain that issue, but focused on the 3rd column of the Workforce Plan that deals with vocational training. The Hearing Officer amends the Determination according to proof and finds in favor of DOL on the charge that Employer submitted an incomplete Workforce Plan because of deficiencies with the 3rd column.

Employer's only defense to these charges was that its Manager, who appears to have no knowledge of local labor statutes or regulations, had used a local agent (Lu Guo Hua) as her advisor in "document handling" and labor processing matters; and the agent had given bad advice to the Manager. [Testimony of Ms. Wang-Rios.]

Employer's story is similar to that of many other local employers. It is the tale of a foreign owner, completely unfamiliar with local labor law, who hires a processing agent to "handle" all labor and immigration processing for her company. The owner relies completely on the agent's advice and efforts, but later discovers that the advice was wrong and the Employer is left to take the blame. Indeed, this has occurred on too many occasions.

At the risk of stating the obvious, it is the business owner's responsibility to understand and follow the law. This includes the employer's responsibility to become educated about CNMI labor laws and regulations. If an employer hires an agent to help with processing matters, that agent should be supervised to ensure that he/she is providing valid, lawful services. It is not a valid defense for the employer to remain ignorant about the law and then, simply blame its agent for inaction.

The Manager in this case, Ms. Wang-Rios, has been managing the company for the past ***ten years*** (see Hearing Exhibit 2). For at least some period of the relevant time period (2015), the Manager's husband, who is a local citizen, served as Employer's President and Secretary. In short, the Manager was not without resources to learn and understand the company's obligations under the local labor law (i.e, Commonwealth Employment Act of 2007, and its implementing Regulations), significant portions of which are posted on DOL's website.

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] If this were to be accepted, it would result in a sanction of $8,000 against Respondent. At Hearing, Enforcement indicated that it would accept the Hearing Officer's discretionary ruling in this matter. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is

authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14). The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified.

In this case, the evidence established that Employer committed three basic violations. First, it hired and renewed CW-1 workers in 2015 and 2016, without posting job vacancy announcements on DOL's website for their positions. Second, it failed to post employer declarations for 129 responders, and failed to even consider or review the job responders for the two jobs that Employer posted on DOL's website. Third, Employer missed numerous deadlines for filing census-related documents, either on a quarterly (Total Workforce Listings) or annual (Workforce Plan) basis.

As stated earlier, the Hearing Officer finds that Employer's defense – that it relied entirely on an agent to handle all processing matters – is inadequate and does not excuse this Employer from its responsibility for the above-noted violations.

Holding: Based on the evidence presented and the considerations noted above, the Hearing Officer finds as follows: as to each of the three violations cited above, Employer should be sanctioned $2,000, with $1,000 paid and $1,000 suspended. Total sanctions amount to $6,000, with $3,000 of that amount suspended for a period of two years. Finally, Employer shall be ordered to correct its Workforce Plan within 30 days.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Xing Wang Development Corporation on the charges of violating the Employment Rules and Regulations, as set forth in the Determination. Regs. at NMIAC §§ 80-20.1-225(a), 235(e), 505(b) and 510. For these violations, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Xing Wang Development Corporation is hereby SANCTIONED a total of six thousand dollars ($6,000) for its conduct; however, one half of the sanction ($3,000) shall be SUSPENDED for a period of TWO YEARS, then extinguished, provided that Respondent commits no violations of Department of Labor regulations or statutes in that period. The Respondent is ORDERED to pay the remaining $3,000 in sanctions no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the

Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Updated Workforce Plan:** Respondent Xing Wang Development Corporation is ORDERED to submit an updated and complete Workforce Plan for 2017, by delivering copies of the document to the Enforcement and Compliance Office (attn: Mr. Ulloa) and to the Hearing Office no later than **30 days** after the date of issuance of this Order. [Regs. at NMIAC § 80-20.1-510).]

4. **Posting on Website:** Respondent is ORDERED to post future job vacancies and renewals on DOL's website (www.marianaslabor.net) in accordance with Regulations at NMIAC § 80–20.1-225(a). Respondent shall hire U.S. citizen and permanent resident job applicants when they are qualified to work.

5. **Reinstatement of Suspended Fine:** The obligations described above are continuing obligations. If Respondent fails to comply with the terms of this Order, or commits further processing-related or reporting violations, it shall be subject to a possible reinstatement of the suspended sanctions ($3,000) plus additional monetary sanctions, after a due process hearing on this issue.

6. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: February 14, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Christopher G. Imbo, *dba* MGI Manpower Group International, Respondent.	)	CAC No. 16-015-11 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on February 2, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Christopher G. Imbo appeared without representation. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on November 3, 2016, against respondent Christopher G. Imbo, *dba* MGI Manpower Group International ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with four Departmental regulations:

(1) Employer failed to post job vacancy announcements ("JVAs") on the Department of Labor website (www.marianaslabor.net) in 2014, 2015 and 2016, for one accountant job and 7 jobs as construction workers in violation of CNMI Rules and Regulations ("Regs."), codified in the Northern

Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a). [Hearing Exhibit 1 at ¶¶ 1-2. But see Amended Determination on p. 3.]

(2) Employer failed to submit three quarterly Total Workforce Listings for 2015 and two quarterly Total Workforce Listings for 2016 to the Department of Labor ("DOL" or "Department") in accordance with Regulations at NMIAC § 80-20.1-505(b). [Hearing Exhibit 1 at ¶ 8.]

(3) Employer failed to submit a complete Workforce Plan for 2016 to the Department in accordance with Regulations at NMIAC § 80-20.1-510(c). [Hearing Exhibit 1 at ¶ 9.]

(4) Employer failed to comply with a Notice of Warning to Correct, issued on December 9, 2015, by contacting the Department's Citizen Job Placement Section; and Employer remains out of compliance with the private sector workforce participation requirement of 30% of U.S. status-qualified participants. Regs. at NMIAC §§ 80-20.1-210(c)(3) and 435. [Hearing Exhibit 1 at ¶¶ 10-11.]

Employer operates a manpower business that supplies commercial cleaners and construction workers to work with other employers in Saipan. According to Employer, most of his commercial cleaners have worked at the Fiesta Resort & Spa or the Grandvrio Resort Saipan and most of his construction employees have worked at a construction project in San Vicente that is operated by a company called "Black Construction." [Testimony of Mr. Imbo.]

New Evidence: At Hearing, new evidence surfaced that greatly expanded the scope of the hearing. [Hearing Exhibits 2 and 3.][1] Employer testified that after Typhoon Soudelor hit Saipan in early August 2015, he greatly expanded his manpower business, employing, at one time or another during 2015 and 2016, **99 CW-1 workers**.[2] *Id.*

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[1] Employer's Total Workforce Listing for the 3rd quarter of 2015 was entered into evidence as Hearing Exhibit 3. Employer's Total Workforce Listing for the 4th quarter of 2016 was entered into evidence as Hearing Exhibit 2.

[2] Mr. Imbo testified that he employed 76 CW-1 workers by the end of 2016. Hearing Exhibit 2 shows that out of 76 current full-time employees, 74 employees hold CW-1 status and 2 employees hold EAD status; none are U.S. citizens or permanent residents. Moreover, Hearing Exhibit 2 shows that, counting those employed ***at any time*** during 2015 or 2016, Employer hired a total of 103 full-time workers: 99 were foreign national workers with CW-1 status; 2 workers had EAD status and 2 workers were U.S. citizens. [Hearing Exhibit 2.]

Documents submitted by Employer show this expansion. Records show that Employer's full-time workforce went from 8 CW-1 status workers in the third quarter of 2015, to 74 CW-1 status workers in the fourth quarter of 2016. This signals more than a ten-fold increase in employment of foreign national workers during a one-year period. As stated, altogether in 2015 and 2016, Employer hired a total of 99 full-time, CW-1 status workers. *Id.*

1. **Failure to Post Job Announcements on DOL's Website:**

DOL Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the JVA on the DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-20.1-225(e).

Amended Determination: In its Determination, Enforcement charged that in 2014, 2015, and 2016, Employer had failed to post JVAs for one accountant position and 7 construction worker jobs, and then hired foreign national workers for those positions. ***At Hearing, Employer admitted that he never registered as an employer online on DOL's website in order to post JVAs. Employer testified that he had increased his workforce in 2016 from 8 CW-1 status workers to 74 CW-1 status workers, all without posting a single JVA on DOL's website.*** The most recent Total Workforce Listing, signed by Employer on January 17, 2017 (Hearing Exhibit 2), shows that *during 2015 and 2016, Employer employed, at one time or another, 99 CW-1 workers*. Based on this new evidence, Enforcement made an oral motion to amend its Determination according to proof. Employer did not oppose the motion, which was then granted by the Hearing Officer.

The Amended Determination asserts that Employer committed multiple violations of the Regulations when Employer hired and employed 99 full-time CW-1 workers without posting any JVAs for these positions on the Department's website.

At Hearing, Employer testified that he did not know that employers were required to publish JVAs or job vacancy/renewal announcements on the Department's website. Employer maintained that he had no idea that DOL's website even existed. Employer claims that he does not read local newspapers; therefore, he had never read or heard about employers getting sanctioned for failing to post JVAs. Employer, himself, prepared the CW-1 Petitions, which were approved based on job announcements published in local newspapers. Employer obtained full-time CW-1 status for 99 foreign national workers in the 2015-2016 time period. [Testimony of Mr. Imbo; see fn. 2.]

Based on the newly admitted evidence (Hearing Exhibit 2), Enforcement argued that Employer's employment of 99 full-time, CW-1 status workers without posting a single JVA on DOL's website, constitutes substantial, multiple violations of DOL's "posting" Regulation. *Id.* at § 80-20.1-225(a). [Testimony of Mr. Ulloa.]

2. Failure to Submit Quarterly Total Workforce Listings:

DOL Regulations require employers to submit information *on a quarterly basis* regarding "the number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505(b). This information is submitted in a document called the Total Workforce Listing. The Department requires employers to submit this information in order to qualify for a Certification of Compliance. [Testimony of Mr. Ulloa.]

Employer failed to submit Total Workforce Listings for the 1st, 2nd and 4th quarters of 2015, as well as the 1st, 2nd and 3rd quarters of 2016.[3] Employer did submit a Total Workforce Listing for the 3rd quarter of 2015 (Hearing Exhibit 3) in response to a document request from DOL in December 2015. Then, prior to the Hearing, Employer submitted a Total Workforce Listing for the 4th quarter of 2016, signed by Mr. Imbo on January 17, 2017. [This document was entered into evidence as Hearing Exhibit 2.] Employer's only response was that he had not realized that Total Workforce Listings were due on a quarterly basis.

Employer's failure to submit quarterly Total Workforce Listings explains how the Department remained unaware of the explosive growth of Employer's workforce in 2016. Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to file six quarterly Total Workforce Listings in 2015 and 2016.

3. Failure to Submit Workforce Plans for 2015 and 2016:

DOL Regulations require employers to file an updated Workforce Plan once every 12 months. [Regs. at NMIAC § 80-20.1-510.] In this case, the evidence shows that Employer never submitted a Workforce Plan to DOL in 2015 or 2016.[4] Again, Employer's conduct hindered DOL's efforts to enforce its preference regulations,

[3] At Hearing, Enforcement orally amended ¶8 of its Determination to add the "3rd quarter" of the 2016 Total Workforce Listing to the list of missing documents.

[4] At Hearing, Enforcement orally amended ¶9 of its Determination to add an allegation that Employer failed to file the 2015 Workforce Plans.

as it effectively hid the fact that Employer's hiring of foreign national workers over U.S. citizens had skyrocketed in a relatively short period from about 8 CW-1 workers to 76 CW-1 workers. Employer, having filed no Total Workforce Listing or Workforce Plan for his business in 2016, kept the Department largely in the dark about the extent of his business expansion.

Prior to the Hearing, Employer submitted a Workforce Plan for 2017. [A copy of the Workforce Plan for 2017 was entered into evidence as Hearing Exhibit 4.] A brief review of this document reveals that it is inadequate in that it fails to describe the means by which Employer intends to improve his percentage of U.S. status-qualified citizens and permanent residents. [Testimony of Mr. Ulloa; Hearing Exhibit 4.]

Based on the evidence, Enforcement moved for sanctions against Employer for failing to submit Workforce Plans in 2015 and 2016, in violation of Departmental Regulations. [Regs. at NMIAC § 80-20.1-510.]

4. **Failure to Respond to DOL's Notice of Warning:**

In December 2015, the Department had already noticed that Employer was operating below the statutory minimum workforce participation goal of 30% in violation of labor statutes and regulations. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(a).] On December 9, 2015, the Department served Employer with a "Notice of Warning to Correct" which informed Employer that he was out of compliance and instructed him to contact the Department's Citizen Job Placement Section within ten days of the date of the Notice to obtain referrals of U.S. citizen applicants. [Regs. at NMIAC § 80-20.1-435; see Hearing Exhibit 5 (copy of the Notice of Warning to Correct, dated 12/09/15.]

Employer never contacted Mr. Ulloa, as instructed, or made any other contact with the Citizen Job Placement Section. Employer testified that he "tried" to contact Mr. Ulloa by telephone several times but, after getting busy signals, he stopped trying. [Testimony of Mr. Imbo.] Once again, Employer's failure to contact the Department to discuss his workforce participation levels only served to allow him to go on ignoring local regulations regarding posting of jobs on DOL's website.

It is reasonable to suppose that if the Citizen Job Placement Section had known that Employer was in the process of hiring nearly ***one hundred*** CW-1 workers in early 2016, the Department would have moved aggressively to send citizen referrals to Employer to fill some of the job vacancies. [Testimony of Mr. Ulloa.]

The Hearing Officer notes Employer's dismal record of non-compliance with the minimum total workforce participation goals (30%) specified in CNMI's labor statutes and regulations. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(a).] Based on Employer's latest Total Workforce Listing (Hearing Exhibit 2), Employer currently employs 76 full-time employees, out of which 74 employees hold CW-1 status and 2 employees hold EAD[5] status. More than 97% of Employer's workforce consists of CW-1 workers; **none of Employer's 76 employees are U.S. citizens or permanent residents.** These statistics make it all the more egregious that this Employer never contacted the Department's Citizen Job Placement Section in 2015 or 2016 in an attempt to improve his percentage of U.S. workers (above zero percent) in his employ.

The Department asserts that Employer is at fault and should be sanctioned for failing to take appropriate steps to improve his workforce participation percentage of U.S. status-qualified workers in 2016, despite receiving a Notice of Warning to Correct from DOL.

CONCLUSIONS OF LAW

The evidence established that: (1) Employer failed to post job announcements on DOL's website for 99 full-time positions during 2015 and 2016, which were then filled by CW-1 status employees; (2) Employer failed to file six quarterly Total Workforce Listings in 2015 and 2016; (3) Employer failed to submit Workforce Plans for 2015 and 2016, and submitted an inadequate Workforce Plan on January 17, 2017; and (4) Employer failed to respond to a Notice of Warning to Correct and made no effort to obtain DOL referrals of U.S. status-qualified job seekers. Based on the evidence presented, the Hearing Officer finds that Employer committed each of the violations listed above. [Regs. at NMIAC §§ 80-20.1-225(a), 505(b) and 510.]

Sanctions: In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and

[5] "EAD" status refers to an "Employment Authorization Document" which is issued by the federal government. The EAD permits a foreign national worker to work without restriction, and without prior approval, in the CNMI.

fairness, in accordance with the general principle that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

In its Determination, Enforcement asked that Employer be sanctioned with the maximum sanction of $2,000 for "each violation." [Hearing Exhibit 1 at p. 3.] At Hearing, Enforcement clarified that it was asking for separate monetary penalties for each count, meaning that each missed JVA and each missed Total Workforce Listing would result in a separate penalty. [Testimony of Mr. Ulloa.]

If the failure to post each separate JVA were to be considered a violation, it could result in total sanctions well in excess of $100,000 for failure to post JVAs with respect to 99 jobs that then were given to CW-1 status workers (e.g.: 99 x $2,000 = $198,000). Obviously, such a fine would be completely excessive. On the other hand, the Hearing Officer is not required to group all counts together so that 5 missed JVAs and 50 missed JVAs result in the same penalty. Such a result would ignore the degrees of culpability that should be considered in determining an appropriate penalty.

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence showed that Employer failed to post JVAs on DOL's website over a two-year period concerning 99 full-time jobs that he then provided to CW-1 workers. Although every job would not have been filled by local U.S. citizens or permanent residents, it is reasonable to assume that, at least, some of these jobs would have been of interest to the U.S. citizens and permanent residents who are registered on the DOL website and looking for work. Employer's conduct showed an egregious disregard of CNMI labor regulations that are designed to ensure that employers give preference in hiring to U.S. citizens and permanent residents. The Hearing Officer finds that Employer's disregard of the "posting" of 99 jobs justifies imposing substantial sanctions.

Second, Employer's failure to file timely census-related documents kept DOL in the dark about Employer's great expansion of his CW-1 workforce in early 2016. Just as he was expanding the number of foreign national workers in his employ, Employer received DOL's Notice of Warning to increase his number of U.S status-qualified employees. Employer's only response was a half-hearted attempt to contact Mr. Ulloa, which he abandoned after getting a "busy" signal on several phone calls. [Testimony of Mr. Imbo.] This conduct amounts to bad-faith and further warrants a substantial penalty.

Finally, I take notice of Employer's dismal record of non-compliance with the minimum total workforce participation goals (30%) specified in labor statutes and regulations. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(a).] Out of a current workforce of 76 full-time workers, Employer employs no U.S. citizens or permanent residents. [Hearing Exhibit 2.] This fact alone makes it all the more egregious that Employer made no effort to contact the Department of Labor to obtain referrals of U.S. status-qualified job seekers.

Employer raised several points that he argued should mitigate his penalty. First, Employer noted that much of his company's manpower work has now ended or is downsizing. Second, Employer claims he is currently making arrangements to repatriate many CW-1 status employees at considerable expense to his company. Third, Employer promised that he will take steps to educate himself about applicable labor statutes and regulations so that he will not commit labor-related violations in the future. Finally, Employer asked to be allowed to pay the sanctions over an extended period of time, given that he is currently covering repatriation expenses and cannot afford to pay the full sanction within 30 days. [Testimony of Mr. Imbo.]

Holding: Based on the evidence presented and the considerations noted, the Hearing Officer finds as follows: For Employer's failure to post 99 JVA's over a two-year period, Employer shall be sanctioned $2,000 for each year of non-compliance with the posting regulations, for a combined sanction of **$4,000.** [NMIAC § 80-20.1-225(a)]. For Employer's failure to submit Total Workforce Listings for three quarters in 2015 and three quarters in 2016, Employer shall be sanctioned $200 per each deficient submission, amounting to a combined sanction of **$1,200.** For Employer's failure to submit Workforce Plans for 2015 and 2016, Employer shall be sanctioned $500 for each deficiency for a combined sanction of **$1,000.** In addition, Employer shall be required to submit a revised Workforce Plan for 2017 within the next 30 days. Finally, Employer's failure to respond to the Notice of Warning to Correct will not be separately sanctioned; rather, it will be treated as an aggravating factor that further justifies the substantial penalties, totaling $6,200 ($4,000 plus $1,200 plus $1,000), that are assessed in this Order.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Christopher G. Imbo on the charges of violating the Employment Rules and Regulations, NMIAC §§ 80-20.1-225(a), 505 and 510, as set forth in the amended Determination. For these violations, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Christopher G. Imbo is hereby SANCTIONED in the total sum of six thousand two hundred dollars ($6,200) for his conduct. The Respondent is ORDERED to pay the sanctions in three installments of $2,000; $2,000; and $2,200. The three installments shall be due on the 28th day of February, March and April, 2017, respectively. Proof of payment shall be submitted to the Hearing Office on or before the due dates. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Updated Workforce Plan:** Respondent Christopher G. Imbo is ORDERED to submit an updated and complete Workforce Plan for 2017, by delivering copies of the document to the Enforcement and Compliance Office (attn: Mr. Ulloa) and to the Hearing Office no later than 30 days after the date of issuance of this Order. [Regs. at NMIAC § 80-20.1-510).]

4. **Future Compliance with DOL Regulations:** Respondent Christopher G. Imbo is ORDERED to post job vacancies and job renewals in the future on the Department's website in accordance with Regulations at NMIAC § 80-20.1-225(a). Failure to comply with this requirement may result in Enforcement filing new Agency charges that would be adjudicated in a due process hearing.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: February 9, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Interpacific Resorts (Saipan) Corporation, *dba* Pacific Islands Club Saipan, Respondent.	)	CAC No. 16-016-11 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on January 19, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Interpacific Resorts (Saipan) Corporation appeared through its Human Resources Executive, Nhing B. Reyes, and its Human Resources Manager, Vanessa DL Guerrero. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on November 22, 2016, against respondent Interpacific Resorts (Saipan) Corporation, *dba* Pacific Islands Club Saipan ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with several Department regulations:

(1) Employer failed to post a job vacancy announcement ("JVA") on the Department of Labor website (www.marianaslabor.net) in February 2015 for the position of Director of Engineering in violation of CNMI Rules and

Regulations ("Regs."), codified in the Northern Marianas Administrative Code ("NMIAC") at § 80-20.1-225(a).

(2) Employer failed to post numerous Employer Declarations on the Department of Labor ("DOL") website in 2015 and 2016, in connection with JVAs posted for the jobs of Director of Engineering and Assistant Restaurant Manager. Regs. at NMIAC at § 80-20.1-235(e).

Employer operates a tourist resort in Saipan that employs a total workforce of about 400 employees, including 112 foreign national workers (CW-1 status employees). [Testimony of Ms. Guerrero.]

Failure to Post Job Announcement on DOL's Website: Department Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the JVA on the DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-20.1-225(e).

In its Determination, Enforcement charged that Employer had failed to post a JVA for the job of Director of Engineering when it promoted a foreign national worker into that position in February 2015. At Hearing, Employer admitted that, effective on February 1, 2015, Employer had promoted its Engineering Manager, Paulo B. Bea, to the position of Director of Engineering, a promotion that resulted in an increased salary of an additional $20,000 to Mr. Bea. Even though Employer's management was familiar with the "posting" regulation at the time, Employer did not post a JVA for the Director of Engineering job at the time of Mr. Bea's promotion.

In fact, Employer had already filed a CW-1 Petition in mid-2014 to renew Mr. Bea as Engineering Manager for 2015; this Petition had been approved by USCIS in December 2014. Within weeks of receiving that approval, Employer moved Mr. Bea into the new position (Director of Engineering), for which it had not sought a CW-1 permit. [Testimony of Ms. Reyes.] Ms. Reyes testified that the company felt pressured because it needed someone to serve in the Director's position and Mr. Bea had functioned as a de-factor Director for some months without being promoted. The company decided to secure Mr. Bea's CW-1 status in the manager's position, then promote him to the director's position. In so doing, Employer intentionally chose to forego any public announcement of a vacancy for the Director's job. This conduct clearly violated DOL's "posting" Regulation. *Id.* at § 80-20.1-225(a).

Failure to Post "Employer Declarations" As to Prospective Job Applicants. Departmental Regulations require any employer who hires a foreign national worker to file a "declaration" on the Department's website, stating its reasons for rejecting each U.S. citizen or permanent resident who applied for the job. [See Regulations at NMIAC at § 80-20.1-235(e).] All citizens or permanent residents who post responses (or have their names posted) to JVAs on DOL's website are considered potential job applicants.

In its Determination, Enforcement charged Employer with several counts of failing to post Employer Declarations in connection with posted JVAs. [Hearing Exhibit 1 at pp ¶¶ 5, 8 and 11.]

Count 1: Employer posted a JVA for the "Director of Engineering" job on the DOL website on July 15, 2015. Only one person responded online to the JVA. [A printout of the JVA with one listed response, was entered into evidence as Hearing Exhibit 3.] Employer admitted that it never posted an Employer Declaration with respect to that applicant. [Testimony of Ms. Reyes.]

At Hearing, Ms. Reyes testified that although Employer did not file an Employer Declaration, the company did contact the online job responder on two occasions, sending her a job application and inviting her to submit the job application to Employer. [Testimony of Ms. Reyes and Ms. Guerrero; copies of Employer's two email messages to the responder were entered into evidence as Hearing Exhibits 4(a) and 4(b).] Despite the two email messages from the Employer, the online job responder never submitted a written application. *Id.*

Count 2: In May 2016, Employer posted a JVA announcing the renewal of the "Director of Engineering" job. Again, only one person posted a response to the JVA. [Hearing Exhibit 5 - printout of the JVA with one listed response.] Employer admits that it never posted an Employer Declaration with respect to that applicant. But again, Employer's HR Manager, Ms. Guerrero, testified credibly that Employer's HR Department contacted the online responder and invited her to submit a company application, which was attached to the email. The responder never submitted an application. [Testimony of Ms. Guerrero.]

Count 3: In May 2016, Employer promoted Rochiela C. Valdizno, a foreign national worker, to the job of Assistant Restaurant Manager, effective May 21, 2016. At that time, Employer posted a JVA, announcing the job. Twenty persons

posted online responses to the position.[1] [See Hearing Exhibit 6 - a printout of the JVA showing a list of 20 responders.]

In its Determination, Enforcement charged that Employer failed to post Employer Declarations as to these 20 responders. Employer (Ms. Guerrero) admitted that Employer's HR Department had mistakenly failed to post online "declarations" on the DOL website; however, she testified that Employer's HR Department sent emails to each of the 20 responders, attaching Employer's application form and inviting each person to submit the application. Yet, none of the responders submitted a completed application. [Testimony of Ms. Guerrero; Hearing Exh. 7 - copies of each email that Employer sent to all 20 responders.]

DISCUSSION

The evidence established that: (1) Employer intentionally chose not to post a job announcement on DOL's website for the Director of Engineering job when it promoted a foreign national worker into that position in February 2015; and (2) Employer neglected to file Employer Declarations on three occasions in 2015 and 2016. The Hearing Officer finds that such conduct violated DOL Regulations that require employers to post JVAs and Employer Declarations. Regs at NMIAC §§ 80-20.1-225(a) and 80-20.1-235(e).

Given this conduct, the Department asked that Employer be sanctioned with a substantial monetary penalty for its conduct. Employer admitted its failures, but provided additional factual background to explain its actions.

As a migrating factor, HR Executive Nhing B. Reyes testified that her company employs a majority of U.S. citizens and permanent residents out of a total workforce of about 400 workers (i.e., 112 foreign national workers and 288 U.S. status-qualified workers). Ms. Reyes noted that Employer has, in general, an excellent record of complying with labor statutes and regulations involved in the hiring of foreign national workers. Not only does Employer hire and employ many U.S. citizens or permanent residents, it takes seriously its obligation to interview and consider citizens and permanent residents for announced positions. To this end, Employer employs HR Manager Vanessa DL Guerrero, who is assigned to oversee job hiring/renewals and JVA posting as to the 112 foreign national workers employed by Employer. [Testimony of Ms. Reyes and Ms. Guerrero.]

[1] These names were either posted on the website by the person, himself, or else submitted automatically by the Citizen Job Placement system that automatically refers persons to jobs, based on pre-established, programmed criteria. [Testimony of Mr. Ulloa.]

Employer noted that in the context of its overall posting of JVAs and Employer Declarations for more than a hundred CW-1 positions, the three instances cited in this case occurred as oversights, rather than as a pattern of misconduct. Moreover, in the cited instances where Employer neglected to post Employer Declarations online, the evidence shows that Employer did contact the online job responders and made an effort to consider those responders for jobs. In other words, failure to post the declarations did not mean that Employer had failed to consider those persons for positions.[2]

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for each violation. [Hearing Exhibit 1 at p. 3.] If this were to be accepted, it would result in a sanction of $8,000 against Respondent. At Hearing, Enforcement indicated that it would accept the Hearing Officer's discretionary ruling in this matter. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence established that Employer committed two basic violations. First, it promoted a foreign national worker into the management position of Director of Engineering without posting a JVA. Second, Employer neglected to post "employer declarations" with respect to JVAs on three occasions in 2015 and 2016. Of these violations, the Hearing Officer finds the first violation to be the most serious.

Employer admitted that it intentionally disregarded the JVA process by promoting a foreign national worker, Mr. Bea, into the Director of Engineering position in February 2015, without advertising the position, as required by regulation. [Testimony of Ms. Reyes.] The substance of this testimony is troubling as it shows

[2] As testified by Ms. Guerrero, in each of the cited instances, Employer sent the online responders a job application and invited them to fill out the application to participate in the hiring process; however, none of the responders ever submitted an employment application. [Testimony of Ms. Guerrero and Ms. Reyes; Hearing Exhibits 4(a-b) and 7.]

that Employer deliberately chose to ignore the DOL "posting" regulation [NMIAC § 80-20.1-225(a)]. In mitigation, Employer noted that when it did post a JVA for this job several months later (July 2015), only one person responded online and that person failed to submit an application. [See Hearing Exhibits 4(a-b); testimony of Ms. Guerrero and Ms. Reyes.]

As to Employer's failure to submit employer declarations, the Hearing Officer accepts Employer's explanation that these lapses were oversights and not deliberate attempts to circumvent the law. Further, the Hearing Officer notes Employer's overall record of compliance in submitting Employer Declarations.

Holding: Based on the evidence presented and the considerations noted above, the Hearing Officer finds as follows: As to Employer's failure to post a JVA for the Director of Engineering position when it promoted Mr. Bea, the Hearing Officer finds that Employer should be sanctioned $2,000, with $1,500 paid and $500 suspended. [NMIAC § 80-20.1-225(a)]. As to Employer's failure to submit employer declarations on several occasions, Employer shall be issued a suspended fine of $1,000 for these violations. The suspended sanctions shall remain in effect for a year, then they are automatically extinguished, provided that no similar violations occur within the one-year period. In summary, total sanctions amount to $3,000, with $1,500 of that amount suspended for a year.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Interpacific Resorts (Saipan) Corporation on the charges of violating the Employment Rules and Regulations, NMIAC §§ 80-20.1-225(a) and 235(e), as set forth in the Determination. For these violations, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Interpacific Resorts (Saipan) Corporation is hereby SANCTIONED a total of three thousand dollars ($3,000) for its conduct; however, one thousand five hundred dollars ($1,500) of the sanction shall be SUSPENDED for a period of one year, then extinguished, provided that Respondent commits no violations of Department of Labor regulations or statutes in that period. The Respondent is ORDERED to pay the remaining $1,500 in sanctions no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

[CAC 16-016-11]

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: January 24, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement and Compliance Section, Complainant, v. Japan Enterprises Corporation, Respondent.	)	CAC No. 16-019-11 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on February 16, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Japan Enterprises Corporation appeared through its Manager, Felipe Kalen,[1] and its representative, Ray P. Chrisostomo. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on December 7, 2016, against respondent Japan Enterprises Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 2.]

The Determination alleges that Employer failed to give job preference to U.S. citizens and permanent residents in violation of the Employment Rules and Regulations ("Regulations"), codified at the Northern Mariana Islands Administrative Code ("NMIAC") at section 80-20.1-220(a). Specifically, Enforcement alleged that Employer failed to properly review and consider 56

[1] The President of Japan Enterprises Corporation, Takaharu Komoda, signed a letter authorizing Mr. Kalen to represent the corporation in the Hearing of this case. Hearing Exhibit 1 (letter from Mr. Komoda, dated 2/15/17).

responders to a job vacancy announcement ("JVA") posted by Employer for five openings for the position of "Maintenance Cleaner." Hearing Exhibit 1 at ¶¶ 5-11.

At Hearing, testimony was taken and business licenses were submitted to establish the nature of Employer's business. According to Employer's authorized representative, Manager Felipe Kalen, Mr. Takaharu Komoda owns sole or controlling interest in three CNMI corporations: Japan Enterprises Corporation, Jaguar Limited Corporation and World International Corporation. [Test. of Mr. Kalen.]

Japan Enterprises Corporation (Employer) has two businesses: a nightclub called the "Micronesia Club" and a business consulting service. Jaguar Limited Corporation holds a business license for a nightclub called "Club Mermaid" and a business management service; World International Corporation is a general construction contractor. [Hearing Exhibit 10 – copies of business licenses.]

Based on a recently produced Total Workforce Listing document, Employer has a total of six full-time workers: 2 U.S. citizens, 3 CW-1 status workers and one employee (President Komoda) holding E2-visa status. [Hearing Exhibits 3 and 4.][2]

The facts of this case are as follows. On April 28, 2016, Manager Kalen visited the Department's Citizen Job Placement Section ("Job Placement") to post job vacancy announcements for Japan Enterprises Corporation and Jaguar Limited Corporation. Mr. Kalen had no experience posting JVAs, therefore he asked Job Placement staff Manny Iguel to assist him in filing the JVA. For Japan Enterprises Corp. (Employer), the JVA listed 5 openings for the position of "Maintenance Cleaner." For Jaguar Limited Corp., the JVA listed 5 openings for the position of "General Maintenance." About one week later, Mr. Kalen posted a JVA for World International Corporation, listing 5 openings for the position of "Building Maintenance Repairer." Mr. Kalen posted all of these JVAs based on the instructions of his boss, Mr. Komoda. [Testimony of Mr. Kalen. Copies of the three JVAs were entered into evidence as Hearing Exhibits 5, 6 and 7, respectively.]

The present case only concerns the JVA posted by Employer - Japan Enterprises Corporation. Department records show that 56 responses were posted to the JVA.

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[2] After appearing for the initial Hearing of this case on February 14, 2017, without having filed a Total Workforce Listing in 2016, Employer was given two days to produce the documents. On February 16, 2017, Employer produced Total Workforce Listings for the 3rd and 4th Quarters of 2016. (These documents were entered into evidence as Hearing Exhibits 3 and 4, respectively.)

The JVA closed on May 13, 2016, but Employer posted no response to those responses for five months. In October 2016, Employer posted the same response to each responder, stating that the responder had "no experience" to qualify for the job. [Hearing Exhibit 1 at ¶¶ 5, 7.]

Enforcement charged Employer with failing to give job preference to the citizen and permanent resident responders who sought employment as maintenance cleaners. Mr. Kalen admitted that in evaluating responders to the "maintenance cleaner" JVA, Kalen had applied a requirement of "2-3 years of experience in building maintenance" rather than "cleaning" experience.

After hearing Mr. Kalen's explanation, Enforcement contended that Employer applied the wrong "job experience" requirement for this position. The Department noted that 2-3 years of experience was not justified by the ONET entry for the position of "janitor or cleaner." [See ONET entry for "janitors and cleaners" at Hearing Exhibit 13.] Furthermore, the JVA filed by Employer had listed the required work experience for this job as: "a few months working with experienced employee." [See JVA at Hearing Exhibit 5.]

Employer offered a somewhat novel defense. Mr. Kalen testified that the job title of "maintenance cleaner" had been posted by mistake. Kalen claimed that when he met with the DOL employee (Manny Iguel) at Job Placement who helped him file the JVAs on April 28, 2016, Kalen had not requested the title of Maintenance Cleaner. He stated that Mr. Iguel must have mistakenly added that job title to the JVA without Kalen's knowledge.[3] Kalen testified that after filing the JVA, *he never reviewed the job title in the JVA*, but he did review and contact the responders by telephone and determined that none of them were experienced in building *maintenance*.[4] Based on Kalen's belief that the job required specific experience in building "maintenance," he rejected each of the online responders. [Testimony of Mr. Kalen.] Employer never hired anyone for the maintenance cleaner position.

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[3] Mr. Iguel testified that he had worked with Mr. Kalen, who was new to the system, to explain the website and post an accurate JVA. Iguel recalled that he input the job title that Mr. Kalen requested – "maintenance cleaner." Mr. Iguel did not recall there being any confusion about the job that was being advertised. [Testimony of Mr. Iguel.]

[4] Kalem claimed that out of the 56 responders posted on the JVA, he was able to contact about 46 people by telephone to confirm that they did not have the requisite experience in "building maintenance." The remaining 10 people could not be reached and were not located. [Testimony of Mr. Kalen.]

In support of its contention that Kalen never intended to post a JVA for a "cleaner," Employer introduced a copy of a newspaper ad that it took out in the Saipan Tribune on April 27, May 4 and 11, 2016, advertising a job in "General Maintenance." That advertisement stated that Employer was seeking someone with "at least 2-3 years experience as a Commercial Building Maintenance ...Preferably in Carpentry and Masonry." [Hearing Exhibit 9 (Certificate of Publication, issued by Saipan Tribune on 5/11/16).]

DISCUSSION

Departmental Regulations state that "Employers shall give qualified citizens, CNMI permanent residents and U.S. permanent residents preference in employment in the private sector workforce in the Commonwealth over foreign national workers, transitional workers, and nonimmigrant aliens." [Regs. at NMIAC at § 80-20.1-220(a).]

In order to ensure maximum participation of citizens and permanent residents, Employers are required to post job vacancy notices on the Department's website. *Id.* at §§ 80-20.1-220(b) and 225(a). In the event that the citizen or permanent resident is not hired, the Employer is required to file an online declaration on the Department's website, addressed to each responder, explaining the action taken on each application and a short statement on the reasons each applicant was not hired. *Id.* at § 80-20.1-235(e).

In its Determination, Enforcement charged that Employer had failed to give job preference to citizen and permanent residents who responded to Employer's JVA for maintenance cleaner. Testimony showed that Employer had improperly imposed a requirement of "building maintenance" experience that was not required for the "maintenance cleaner" position, then rejected job candidates who did not have such experience. Because Employer imposed a requirement on the maintenance cleaner job that was not listed in the JVA or the ONET, Enforcement alleged that Employer, in essence, had failed to give proper job preference to the U.S. citizen or permanent resident responders. [Determination at Hearing Exhibit 2.]

The Hearing Officer finds the testimony of Mr. Kalen, that he mistakenly allowed a JVA to be posted for the *wrong* job title, to be credible.[5] Indeed, the testimony

[5] The Hearing Officer believes that Mr. Iguel's testimony is credible as well. However it occurred, it appears that Mr. Kalen misunderstood that the job title for the posted position was going to read "maintenance cleaner." It is possible and, indeed, probable that Mr. Kalen caused the confusion in his description of the position. Moreover, Kalen should have reviewed the full text of the JVA as Mr. Iguel prepared to post it.

shows that Employer was grossly negligence in failing to properly review and manage its own job vacancy announcement, but the basic "story" that Mr. Kalen mistakenly allowed the wrong job title to be affixed to the JVA, is believable. Employer compounded the problem by not noticing the error in its job title; thus, it failed to inform Job Placement about the error and failed to change the JVA. Instead, Kalen simply pretended that the JVA had been for a "maintenance" job and then rejected all responders who did not have maintenance experience in their backgrounds.

Holding: The actions of Employer - listing an incorrect job title and rejecting responders based on unwritten job requirements - were completely negligent and wasteful of the Department's and the responders' time and effort. Technically, however, Employer's actions did not deprive citizens and/or permanent residents of job preference for the stated "maintenance cleaner" position because Employer never intended to hire anyone for that job and no foreign national workers, transitional workers or other nonimmigrant aliens were hired in place of citizens or permanent residents for that position. [Regs. at NMIAC at §§ 80-20.1-220(a) and 235(e).]

As to sanctions, there is no stated penalty for posting a bogus job that Employer does not actually intend to fill, then failing to correct the post through sheer negligence. Perhaps there should be a regulation that punishes an Employer for wasting the Department's time, but the Hearing Officer knows of no such regulation. Based on these facts, the Hearing Officer finds that this is not a "preference" violation, per se. Rather, this is an instance of sheer negligence on the part of Employer in arranging for a mistaken job announcement to be posted, then failing to read it. The employer declaration should have stated that the wrong job title had been listed and Employer should have apologized to responders for wasting their time and effort. Instead, Employer compounded its mistake by judging the responders by an unstated criteria of "maintenance experience" and rejecting them with the short notation of "no experience."

The Hearing Officer finds that Employer should not be sanctioned for its negligence, primarily because technically, no statute or Regulation has been violated. There was no "preference" violation as there was no intent to deprive citizens and permanent residents of jobs and nobody was hired for the maintenance cleaning position. Having said this, Employer is WARNED that it should carefully scrutinize all future JVAs to ensure that they accurately reflect the job that Employer intends to fill. Failure to do so may result in future sanctions, including but not limited to, the denial of a Certificate of Good Standing.

Finally, it is difficult to believe that these three corporations actually needed 15 maintenance-related jobs filled at about the same time, as Mr. Kalen claimed. However, a full examination of the hiring practices of all three of Mr. Komoda's companies lies beyond the scope of this case.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered in favor of Respondent Japan Enterprises Corporation on the charges of violating "preference rules" as set forth in the Determination. The Hearing Officer finds that Respondent acted negligently by posting an incorrect JVA, but Respondent shall not be sanctioned for its conduct.

2. **Posting on Website:** Respondent is WARNED to carefully scrutinize its future posts of job vacancies and renewals on DOL's website in accordance with Regulations at NMIAC § 80–20.1-225(a). Respondent shall be required to hire U.S. citizen and permanent resident job applicants when they are qualified to work.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: February 24, 2017

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-001-01
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
PSG Professional Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on March 12, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement Section was represented by Ben Castro. Respondent PSG Professional Corporation was represented by its General Manager, Jesus Pantaleon. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on March 2, 2015, against respondent PSG Professional Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination charges that Employer failed to meet the threshold workforce participation percentage of 30%, as specified at 3 CMC § 4525(a) and in the Department Employment Rules and Regulations ("Regs.") at Sections 80-30.2-120(c); see NMIAC § 80-20.1-210(c)(3).[1] Enforcement recommended that based on this Employer's failure to meet the 30% ratio, the Hearing Officer should impose the maximum sanction of $2,000. [Determination at p.3, ¶ (a).]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Employer offers various business services in Saipan, including accounting, insurance, document handling, real estate appraisal, and printing. [Testimony of Mr. Pantaleon.]

In December 2014, Employer advertised on DOL's website for a bookkeeper. No applicant responded to the job vacancy announcement ("JVA"). The Department admits there were no qualified applicants available for referral. [Determination at p.3, ¶ 2.)

The Department eventually certified the Employer's JVA for bookkeeper, pursuant to Regulation section 80-30.3-460. That regulation states that if an employer cannot find a qualified citizen or permanent resident for a job vacancy, through posting on the website, referrals from the Department, or good faith efforts to hire, the "Department shall issue to the employer a certification of compliance" as to that job vacancy. *Id.*

In December, Employer also submitted an updated Total Workforce Listing in which Employer noted that it employs 8 full-time workers: 1 U.S. citizen, 1 EAD holder, 2 H1B status workers and 4 CW-1 status workers. [See Total Workforce Listing, dated 12/18/14, entered into evidence as Hearing Exhibit 4.]

On January 6, 2015, Department personnel wrote a memorandum regarding Employer's failure to achieve the 30% ratio targeted in the Workforce Participation regulations.[2] The memorandum noted that Employer had recently posted a JVA on DOL's website for bookkeeper, but had been unable to find a status-qualified worker for the job. It was further noted that Employer had demonstrated a "good-faith effort to hire status-qualified citizen(s)" but, despite such efforts, Employer remained out of compliance with the 30% workforce participation threshold. *Id.*

In its Determination, Enforcement stated that Employer "did not make all effort to take proper action within the allowable time period...to comply with...the 30% U.S. Workforce participation ...objectives...." [Determination at ¶ 6.] However, at Hearing, the Enforcement representative could not identify what additional efforts Employer should have made to hire status-qualified workers, beyond the efforts that the company had already demonstrated (posting JVAs, interviewing available, qualified citizens and permanent residents, interviewing referrals from the Job Placement Section).

[2] The memorandum was labeled "[f]rom James M. Ulloa...[t]hrough Yvonne S. Taisacan (Acting Director of the Citizen Job Availability Section and Citizen Job Placement Section) to the Director of Enforcement, dated 1/06/2015. The Memorandum was entered into evidence as Hearing Exhibit 6.

DISCUSSION

Enforcement takes the position that the mere fact that an employer has failed to employ a minimum of 30% of its full-time workforce with status-qualified workers, justifies imposing a severe sanction of $2,000 against the employer. According to Enforcement, this fine should be imposed regardless of what efforts Employer may have made to find available, status-qualified job applicants to meet the 30% threshold. [Testimony of Mr. Castro; Determination at p. 3, Findings at ¶¶ 3-4.]

The Hearing Officer strongly disagrees with Enforcement's position. To impose an exorbitant fine on an employer simply because the workforce participation target of 30% has not been met, without evidence of bad faith conduct, would constitute an arbitrary and capricious sanction.

The Regulation that specifies the minimum threshold of 30% does not set forth what penalty, if any, should be imposed on an employer who, despite its good faith efforts, cannot find available citizens and permanent residents to meet the 30% target. Indeed, the 30% level appears to serve as a goal as opposed to an absolute bar to operating below that level. Thus, the DOL Regulations state:

> "...[T]he Commonwealth needs to draw portions of its workforce from beyond its borders. However, in doing so, the Commonwealth recognizes the need to ensure adequate and meaningful opportunities for its citizens, CNMI permanent residents, and U.S. permanent residents to participate in the local workforce. The workforce participation objective is a means for accomplishing that goal."

[Regs at § 80-20.1-200.]

Other Regulations in the Workplace Participation Subchapter 80-30, suggest that the overriding goal of the Department is to ensure that employers make **good faith efforts** to employ citizens and permanent residents when such workers are qualified and available to work. One regulation flatly states that "an employer must make a good faith effort to hire a citizen, CNMI permanent resident or U.S. permanent resident for a job vacancy apart from the referral service provided by the Department...." Regs. at § 80-30.3-440.

Other Regulations echo this "good faith" component. For example, Regulation section 80-30.3-460 states that where an employer has made a good faith effort to find qualified citizens and permanent residents for a particular job, but no citizens are available, the Department shall certify that JVA in any event.

The Hearing Office has never sanctioned an employer simply for operating below the 30% percent level of citizens and permanent residents in the employer's workforce. [3 CMC § 4525(a) and Regs. at § 80-30.2-120(c); NMIAC § 80-20.1-210(c)(3).]

In most Compliance Agency cases in which employers have been sanctioned, the sanction has been imposed based on a finding that employer had *failed to make good faith efforts* to hire citizens or permanent residents, either by failing to post on DOL's website, failing to contact known job applicants who met minimum job qualifications, or failing to cooperate to receive referrals from the Job Placement Section.[3] In short, sanctions have focused on the employer's conduct – not on a purely mathematical calculation of whether the employer met the thirty percent ratio set forth in labor statutes and regulations.

The Hearing Officer believes the above interpretation is in accordance with the purposes and provisions of Public Law 15-108, as amended by Public Law 17-1.

CONCLUSIONS OF LAW

1. *Employer failed to achieve the Workforce Participation Objective of 30% of its full-time Workforce Consisting Of Status-Qualified Workers.*

The evidence establishes that Employer failed to achieve the minimum Workforce Participation Objective of 30% of its workers consisting of U.S. citizens, CNMI permanent residents, or U.S. permanent residents. [3 CMC § 4525(a) and Regs. at § 80-30.2-120(c); NMIAC § 80-20.1-210(c)(3).] The evidence shows that Employer employs 8 full-time workers consisting of one U.S. citizen, one EAD

[3] For example, see CAC No. 13-022-12, *DOL Enforcement v. KN Corp.*, Admin. Order by J.Cody on 1/27/14 (failure to receive job referrals and failure to post JVAs on website); CAC No. 13-021-12, *DOL Enforcement v. Himawari Saipan, Inc.*, Admin. Order by J.Cody on 2/25/14 (failure to cooperate with Job Placement Section to receive referrals for JVAs); CAC No. 14-008-03, *DOL Enforcement v. RJCL Corp.*, Admin. Order by J.Cody on 4/07/14, aff'd by Secretary of Labor on 4/29/14 (failure to interview known job applicants); CAC No. 13-023-12, *DOL Enforcement v. Gacayan*, Admin. Order by J.Cody on 1/27/14 (failure to cooperate with Job Placement Section); CAC No. 14-046-09, *DOL Enforcement v. TYW Corporation, dba 7 Star Market*, Admin. Order by J.Cody on 11/19/14 (faulty procedure to receive responses from interested job applicants); CAC 13-012-10, *DOL Enforcement v. Fu Kang Corp.*, Admin. Order by J.Cody on 11/08/13 (submission of false documents, false testimony).

holder, two H1B-status workers and 4 CW-1 status workers. [Hearing Exhibit 4 (Total Workforce Listing, dated 12/18/2014).]

2. ***There is No Evidence That Employer Failed to Make Good Faith Efforts to Hire Status-Qualified Workers For its Workforce.***

Although Employer has not achieved the Workforce Participation Objective, Enforcement does not present evidence, or even assert, that Employer failed to make good faith efforts to hire status-qualified workers. On the contrary, Enforcement noted in its recent internal memorandum to the Director of Enforcement that Employer had demonstrated good faith efforts to hire "status-qualified citizens." [See discussion at page 2, footnote 2 regarding Hearing Exhibit 6 - Memorandum from Mr. Ulloa to Director of Enforcement Section.]

3. ***No Sanction Is Warranted Against This Employer For Its Failure To Meet the Workforce Participation Objective.***

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

In its Determination, Enforcement states that "Respondent did not make all effort to take proper action...to comply with...the 30% U.S. workforce participation... objectives...." However, Enforcement did not specify what efforts Employer should have made to find qualified citizens or permanent residents, that it failed to do. [Testimony of Mr. Castro.][4] It would be unfair to sanction an employer for failing to employ a minimum percentage (30%) of status-qualified workers in the absence of evidence that employer failed to make good faith efforts to do so.

Based on the evidence presented, and in view of Enforcement's own assessment in its internal memorandum (Hearing Exhibit 6) that Employer had made prior good-

[4] In other words, Enforcement failed to state what Employer should have been done in addition to posting JVAs on DOL's website, interviewing and hiring all qualified referrals from the Job Placement Section and otherwise attempting to find and hire status-qualified workers.

faith efforts to hire status-qualified workers for its business, the Hearing Officer finds that Employer should not be sanctioned in this case. Rather, Employer should be given a warning that it has a continuing obligation to attempt to find and hire available status-qualified workers and that such workers should be given job preference over CW-1 status job applicants.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent PSG Professional Corp. for failing to comply with the Workforce Participation Requirement of 30%, as set forth in 3 CMC § 4525(a) and Regulations at § 80-30.2-120(c). [Determination at p. 3, ¶¶ 3-4.]

2. **No Sanctions:** For the reasons stated above, the Hearing Officer finds that no monetary sanctions should be assessed against Respondent PSG Professional Corp. simply because it has not met the targeted percentage of status-qualfied workers. Employer shall be given additional time to hire status-qualified workers to bring itself into compliance with the Workforce Participation Requirement.

3. **Warning:** Respondent PSG Professional Corp. is WARNED that it has a continuing obligation to post vacancies and job renewals on the Department's website and to interview and hire any qualified U.S. citizen or permanent resident job applicants in accordance with Regulations at sections 80–30.3-105, 205, 460.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: April 1, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Marianas Taxi Corporation, *dba* Souwaree Car Rental, Respondent.	)	CAC No. 15-002-01 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on February 5, 2015, at 1:30 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Jeff Camacho and Arlene Rafanan. Respondent Marianas Taxi Corporation appeared through its President, Thongyai T. Carroll. Lorelei Vinas also appeared to assist Ms. Carroll. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") on January 26, 2015. The Determination notes that Marianas Taxi Corporation ("Employer") was served with a request to produce documents on December 1, 2014, but never complied with the request. At Hearing, Enforcement renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the document request in a timely manner.

Enforcement's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

The Request was served on the Employer at its business located in Gualo Rai, on December 1, 2014, by labor investigator Jeff Camacho. Mr. Camacho handed the Request to an employee who gave it to Employer's President, Ms. Carroll, on December 2, 2014. [Testimony of Mr. Camacho and Ms. Carroll.]

The Request asked Employer to produce a series of documents to the Enforcement Section within ten working days. In late December, when Enforcement still had not received any documents from Employer, Enforcement representative Arlene Rafanan telephoned the Employer and inquired about the documents. Again, on January 12, 2015, Enforcement (Ms. Rafanan) contacted Employer and stated that it needed the Employer's documents to be produced. Ms. Rafanan gave Ms. Carroll a two-week extension in which to produce the requested documents. When that deadline arrived and no documents had been produced, Enforcement filed its Determination (Hearing Exhibit 1) requesting that Employer be sanctioned monetarily for failing to produce the documents.

At Hearing, President Carroll admitted that she received the written Request on December 2, 2014, and that she spoke by telephone in early January with Ms. Rafanan. Ms. Carroll admitted that she had been informed that Enforcement would move for sanctions if Employer failed to produce the documents. In her defense, Ms. Carroll testified that she has a taxi business and a car rental business and that recently, she has been trying to re-organize her business, while also driving the taxi. Ms. Carroll had no legal assistance and failed to realize the importance of meeting the deadlines set by the Department.

Documents: Employer brought about half of the requested documents to the Hearing. President Carroll promised to diligently obtain and produce the remaining documents in the coming weeks. The documents that are needed are: (1) copies of two quarterly employers withholding tax documents; (2) payroll records for all four quarters of 2014; (3) a Letter of Compliance from the Division of Revenue and Taxation; and (4) written identification for employee Joaquin Pangelinan.

Sanctions: In the Determination, Enforcement asked the Hearing Officer to sanction Employer for its failure to produce documents in response to the Request.

After hearing the Employer's testimony, Enforcement stated that it did not seek a $2,000 sanction and that it would leave the amount of sanctions to the discretion of the Hearing Officer. [Testimony of Jeff Camacho.]

Enforcement's Document Request was issued as part of a Department investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Applying the above standards to the facts of this case, this Hearing Officer finds that a monetary sanction is warranted. Employer failed to deliver the requested documents despite repeated efforts by the Department to ask for their production. Evidently, Employer was focusing on reorganizing her business and she was working at the same time, driving her taxi. Employer should have produced the documents but she was preoccupied. Employer should be sanctioned, notwithstanding President Carroll's excuse, because she could have avoided this case and saved Enforcement much time and effort by being more diligent in producing the documents.

Based on these facts, the Hearing Officer concludes that this Employer should be sanctioned three hundred and fifty dollars ($350); however, $200 of that amount shall be suspended, then extinguished without further hearing, provided that Employer produces the missing documents to Enforcement no later than February 24, 2015, and pays the remaining portion of the fine ($150) by February 27, 2015.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanction:** For the reasons stated herein, Respondent Marianas Taxi Corporation is hereby FINED in the amount of three hundred and fifty dollars ($350); however $200 of the fine is hereby SUSPENDED for a period of two years, then extinguished, provided that Respondent complies with the terms of this Order and commits no further violations in that period. 3 CMC §§ 4528(a) and

(f)(2). Respondent is ORDERED to pay the remaining amount of **$150** no later than **February 27, 2015**. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. Respondent Marianas Taxi Corporation is ORDERED to produce the following documents to the Enforcement Section (attention: Jeff Camacho or Arlene Rafanan) no later than **February 24, 2015**: (1) copies of two quarterly employers withholding tax documents; (2) payroll records for all four quarters of 2014; (3) a Letter of Compliance from the Division of Revenue and Taxation; and (4) written identification for employee Joaquin Pangelinan.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: February 9, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-004-02
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Ye Seung Co., Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on March 12 and May 5, 2015, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by Ben Castro. The Department's Citizen Job Availability and Job Placement Section ("Job Placement Section") was represented by Yvonne S. Taisacan. Respondent Ye Seung Co., Inc. appeared through its President, Cha, Myung Bong. Mr. Cho, Jin Koo served as translator for Mr. Cha. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on March 3, 2015, against respondent Ye Seung Co., Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are as follows. On October 14, 2014, Enforcement conducted a "workforce participation inspection" to determine whether Employer employs a minimum percentage (30%) of U.S. citizens or permanent residents in its business in compliance with the Department's Employment Rules and Regulations ("Regs.") at section 80-30.2-120(c).

Enforcement requested documents and thereafter, the Employer submitted documents to DOL on about October 29, 2014. One document, a Total Workforce

Listing, listed that Employer had two full-time employees: one auto body repairer who had CW-1 status and President Cha, Myung Bong who holds a long-term investor (E2-C) visa. [A copy of the Total Workforce Listing was entered into evidence as Hearing Exhibit 2.]

On November 17, 2014, Enforcement issued a Notice of Warning to Correct, which was delivered by investigator Castro to Mr. Cha at his new shop in Chalan Laulau. [A copy of the Notice of Warning was entered into evidence as Hearing Exhibit 3; testimony of Mr. Castro.] The Notice of Warning instructed the Employer to contact the Department's Job Placement Section within ten days of the notice for "assistance in (1) obtaining referrals of U.S. citizen applicants or (2) making other arrangements to meet the 30% U.S. workforce requirement." *Id.* The Notice of Warning further stated that failure to comply with the notice could result in the issuance of a Notice of Violation being filed against Employer. *Id.*

Employer never contacted the Job Placement Section as instructed in the Notice of Warning.[1] On February 10, 2015, the Job Placement Section referred the matter to the Enforcement Section, who filed a Determination (Hearing Exhibit 1), alleging that Employer had failed to take action to comply with the 30% workforce participation requirement (3 CMC § 4525 and Regs. at § 80-30.2-120(c)). [Hearing Exhibit 1 at ¶ 6.]

President Cha testified that he could not recall receiving the Notice of Warning. He stated that he was willing to hire another auto body repairer if a U.S. citizen or permanent resident was interested in the job. At the first hearing on March 12, 2015, a continuance was granted to allow time for Employer to post a JVA for "auto body repairer" on DOL's website and possibly hire someone in that process.

At the second hearing on May 5, 2015, Employer reported that it had posted a JVA on DOL's website for an auto body repairer from March 13 through 27, 2015, but nobody responded to the posting. [A copy of the JVA was entered into evidence as Hearing Exhibit 4.] [2] As of May 5, 2015, Employer remains out of compliance with the 30% requirement with one CW-1 status worker and one foreign investor.

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[1] President Cha, Myung Bong testified that he could not recall whether he received the document. Mr. Cha stated that his practice is to show official documents to his translator, Cho Jin Koo, but he evidently did not do so in this case.

[2] President Cha testified that he intends to hire his son, a U.S. citizen, in June, but his son will attend Northern Marianas College in August, and work only part-time thereafter.

CONCLUSIONS OF LAW

Employer is not in compliance with the minimum Workforce Participation goal of thirty percent, as established in the CNMI by statute and regulation.

The minimum Workforce Participation goal of Thirty Percent, is established in the Commonwealth by statute (3 CMC § 4525) and regulation (Regs. at § 80-30.2-120(c). In this case, neither of the two company employees is a U.S. citizen or permanent resident; thus Employer is not in compliance with the above-cited statute and regulations. The hiring of one full-time employee who is a citizen or permanent resident would bring this Employer into compliance.

Employer should not be sanctioned for being out of compliance because it has made a good faith attempt to hire a qualified U.S. citizen or permanent resident to bring itself into compliance with the 30% Workforce Participation Goal.

Employer's past failure to respond to the Notice of Warning shall be excused based on President Cha's lack of English language ability, although Mr. Cha is warned that next time he receives official documents from the Department of Labor, he should take immediate steps to have them translated, then respond to them.

After the Determination was issued and the hearing began, Employer made a good faith attempt to find a U.S. citizen or permanent resident employee, but nobody responded to Employer's JVA (see Hearing Exhibit 4). Although technically out of compliance, Employer should not be sanctioned as long as it continues to try to increase its ratio of U.S. citizen or permanent residents within its workforce.

The Job Placement Section may continue to refer qualified, interested candidates to the Employer for possible hiring. For now, this matter may be deemed closed and the Employer found to be out of compliance, but in the process of attempting to correct.

In conclusion, the Hearing Officer finds that Employer while not in compliance with the minimum workforce participation percentage (30%), is making a good faith effort to find and hire a qualified U.S. citizen or permanent resident in order to bring itself into compliance with the 30% Workforce Participation goal. Based on the above facts, no sanction should be assessed against the Employer.

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Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Ye Seung Co., Inc. for being out of compliance with the minimum workforce participation percentage of 30%; however, no sanction shall be issued with respect to this violation.

2. **Warning:** Respondent is hereby WARNED that the obligation for an employer to meet the minimum workforce percentage is a continuing obligation, pursuant to statute (3 CMC § 4525) and regulation (Regs. at § 80-30.2-120(c). Therefore, Respondent should continue to attempt to employ U.S. citizens and permanent residents in its business. If the Job Placement Section refers an auto body repairer in the future, the employer should consider that job applicant and hire the applicant if he/she is qualified.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 11, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-008-02
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Magisland LLC, *dba* Paradise Hotel,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on March 12, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa and Frank Aguon. Respondent Magisland LLC was represented by its General Manager, Ekaterina Markova, and its head chef, Donald Gueniot. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on March 3, 2015, against respondent Magisland LLC, *dba* Paradise Hotel ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with the "posting" and "job preference" requirements set forth in the CNMI Employment Rules and Regulations ("Regs.") at Sections 80-30.3-105, 205; see NMIAC § 80-20.1-225(a) *et seq.*[1]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Department of Labor ("DOL") Regulations state that "[e]mployers shall give qualified citizens, CNMI permanent residents and U.S. permanent residents preference for employment in the private sector...." Regs at § 80-30.3-105.

DOL Regulations also state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

The facts of this case are as follows. Employer took over the operation of the Paradise Hotel in July 2014. Employer operates the Paradise Hotel, a restaurant within the Paradise Hotel, which re-opened on January 29, 2015, and a boutique hotel located on Navy Hill. [Testimony of Ms. Markova and Mr. Gueniot.]

On January 28, 2015, Enforcement conducted an on-site inspection of Employer's premises in Garapan. During inspection, certain documents were requested, which Employer then produced. Among other documents, Employer produced its Total Workforce Listing, signed by General Manager Ekaterina Markova on February 18, 2015. [A copy of the Listing was entered into evidence as Hearing Exhibit 2.]

The Total Workforce Listing showed that Employer currently employs 11 full-time workers. Of the 11 full-time employees, 7 workers are U.S. citizens, 3 employees hold EADs and one employee is a CW-1 status worker.[2] *Id.* Employer also employs 3 part-time employees: one U.S. citizen, one EAD-status worker and one CW-1 status worker. *Id.*

Enforcement filed this case after reviewing Employer's business-related documents. First, Enforcement noted that Employer had not registered as an employer on the Department's website and that had violated DOL Regulations by not posting JVAs for various positions on DOL's website. Determination (Hearing Exhibit 1) at ¶ 3. Second, Enforcement asserted that Employer had failed to give U.S. citizens and U.S. status qualified workers job preference. [*Id.* at ¶ 4.] Third, Enforcement alleged that Employer had "failed to show a good faith effort to employ U.S. citizens and status qualified citizens for the job titles" of building maintenance, front desk clerk, waitress, kitchen helper, housekeeping and commercial cleaner. [*Id.* at ¶¶ 2 and 5.]

[2] EAD is an acronym for Employment Authorization Document (Form I-765), which, when approved by USCIS, entitles the holder to work in the Commonwealth without further petition to USCIS.

The Employer's General Manager and head chef testified that they had only recently begun managing this business and they were not aware of DOL's regulations with respect to posting of job announcements. Employer's management admitted that they had not advertised job vacancies in the past on the DOL's website, but instead used either radio or newspaper advertisements. [Testimony of Ms. Markova.]

CONCLUSIONS OF LAW

1. ***There is insufficient evidence that Employer failed to give citizens and permanent residents preference in employment; or that Employer failed to make a good faith effort to hire citizens and/or permanent residents.***

In its Determination, Enforcement charged that Employer failed to give citizens job preference with respect to employment in the private sector. Enforcement also charged that Employer failed to make a "good faith effort to employ U.S. citizens and status qualified citizens" for a number of job titles, including building maintenance, front desk clerk, waitress, kitchen helper, housekeeping and commercial cleaner. [Determination (Hearing Exhibit 1) at ¶¶ 2, 4 and 5.]

Enforcement presented insufficient evidence to establish this allegation. If anything, the record suggests that Employer makes a good faith effort to hire U.S. citizens given that more than 50% of its full-time workforce consists of U.S. citizens. Of its full-time staff of 11 workers, only one full-time worker is a CW-1 status worker.

Enforcement presented no evidence establishing that Employer engaged in any bad faith practices with respect to hiring. Based on the credible testimony of Employer's General Manager and head chef, as well as information contained in Employer's Total Workforce Listing (Hearing Exhibit 2), it appears that Employer made a sincere effort to hire and employ U.S. citizens and permanent residents. Accordingly, judgment should be entered in favor of Employer as to the above-noted charges. [See Determination at ¶¶ 4 and 5, violation at (b).]

2. ***Employer failed to post a Job Vacancy Announcement with respect to Employer's "Commercial Cleaner" Position, in violation of the Employment Rules and Regulations at § 80-30.3-205.***

Employer violated DOL Regulations at § 80-30.3-205 by failing to post a job vacancy announcement on DOL's website for the job of "commercial cleaner."

Employer's management admitted that it advertised this position by newspaper or radio - not on the Department's website. Employer's management noted that they were new to Saipan and they had not realized that DOL Regulations required the employer to post job announcements on DOL's website before hiring CW-1 workers.

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

Based on the evidence presented, the Hearing Officer finds that Employer's failure to post this job on DOL's website, although incorrect, was not done in bad faith. In fact, a large percentage of Employer's full-time work force consists of U.S. citizens or EAD holders – not CW-1 status workers. The Hearing Officer finds that Employer should be given a warning rather than a monetary penalty in this case.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment re "posting" allegations:** Judgment is hereby entered against Respondent Magisland LLC for failing to comply with the posting requirement of Employment Rules and Regulations at section 80-30.3-205. [Determination at ¶¶ 1-3 and violation (a).]

2. **Judgment re "bad faith hiring" and "preference" allegations:** Judgment is hereby entered in favor of Respondent Magisland LLC with respect to the allegations that employer failed to make a good faith effort to hire, or give job preferences to, U.S. citizens and "status qualified" workers. [Determination at ¶¶ 4-5 and violation (b).]

3. **Warning:** Respondent Magisland LLC is WARNED that it has a continuing obligation to post vacancies and job renewals on the Department's website and to interview and hire any qualified U.S. citizen or permanent resident job applicants in accordance with Regulations at sections 80–30.3-105, 205, 460.

If a U.S. citizen or permanent resident job applicant applies but is not hired for a job, Employer should file its Employer Declaration in accordance with Regulations at section 80–30.3-240.[3]

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 17, 2015

Jerry Cody
Hearing Officer

[3] Employers who post job vacancies on DOL's website may receive responses from U.S. citizen or permanent resident job seekers. If those Employers then decide not to hire those applicants, the employers are required to post a so-called "Employer Declaration" (i.e., digital response) explaining: (1) what action the employer took as to each applicant who responded to the job vacancy; and (2) the employer's reason for not hiring that citizen or resident applicant. Regs. at § 80-30.3-450. If the employer hires a U.S. citizen or permanent resident, no Employer Declaration is required to be filed. *Id.*

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-008-10(T)
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Tinian Trading International, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on December 2, 2015, before the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ramona P. Cabrera-Viches. Respondent Tinian Trading International, Inc. appeared through its Manager for Manpower Services, Principia Monkeya. [The parties appeared at the Tinian Labor Office; Hearing Officer Jerry Cody presided over the Hearing via Skype, from the Hearing Office in Saipan.]

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Hearing and Notice of Violation ("Determination") filed by Tinian Labor's Enforcement Section ("Enforcement") in the Hearing Office on November 24, 2015, against respondent Tinian Trading International, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Department's so-called "employer declaration" Regulation. [See Employment Rules and Regulations ("Regs.") at § 80-30.3-450.] The Regulation requires an employer to file an online "declaration" to each U.S. status-qualified job applicant who posts a response on the Citizen Job Placement website (www.marianaslabor.net) if the employer rejects that applicant for the job. This requirement is met if the employer posts, in a timely fashion, a short response on the website, explaining: (1) the

action taken with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position.[1] *Id.*

Manager Principia Monkeya testified that she is the sole employee of Tinian Trading International, Inc. The company provides manpower services to Hong Kong Entertainment (Overseas) Investments, Ltd. ("HKE"), which owns the Tinian Dynasty Hotel and Casino ("Dynasty"). Ms. Monkeya has worked in her position from July 2015 until the present; she does not have knowledge of Employer's operations and management before she was hired.

The following facts, stated in the Determination, were established at the Hearing: In December 2014 and January 2015, Employer posted nine Job Vacancy Announcements ("JVAs") in an attempt to fill positions at the Dynasty.[2] After these JVAs were posted, interested U.S. citizen job applicants posted responses on the DOL website. [See list of applicants in Determination at paragraph no. 3.] Thereafter, Employer never posted any online declarations (responses) responding to these job applicants.

Employer's current Manager, Principia Monkeya, has only worked for Employer since July 2015. Ms. Monkeya testified that she does not know whether Employer ever contacted the above-referenced job applicants; however, she was informed that Employer never hired anyone for the jobs listed in the JVAs. Ms. Monkeya believes that this entire hiring effort was put on hold by the Employer as a result of various investigations into the Dynasty's banking and labor practices.[3] (Testimony of Ms. Monkeya.)

The Employer's former Manager, Margarita Hofschneider, who presumably would have knowledge of the filing of the above-noted JVAs, resigned from the company in March 2015 and was not available to testify at the Hearing.

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[1] The Citizen Job Placement Section calculates the 14-day deadline in the Regulation as meaning 14 days "after the closing date listed on the website." The so-called "declaration" is more in the nature of a digital response posted on the website, rather than a declaration signed under penalty of perjury. *Id.*

[2] The positions included: Assistant Financial Controller, Assistant Restaurant Manager, Personnel Manager, Director of Engineering, Electronic Gaming Supervisor, Surveillance Operator, Restaurant Supervisor, Customer Service Representative and Assistant Hotel General Manager. [Determination at ¶¶ 1-2.]

[3] The Hearing Officer takes judicial notice of the fact that in June 2015, the U.S. Department of the Treasury Financial Crimes Enforcement Network assessed a civil penalty of $75 million against HKE for "willful and egregious violations" of the Bank Secrecy Act. Also in 2015, the U.S. Department of Labor filed suit against HKE for allegedly committing "willful and repeat violations: of the overtime provisions of the Fair Labor Standards Act.

Holding: The evidence shows that Employer filed nine JVAs and received online responses from U.S. status-qualified job seekers, but Employer then failed to file online responses to those job seekers. The "Employer Declaration" Regulation requires an employer to follow up its hiring decisions by filing online declarations (responses) stating what action was taken and the reason why the applicant was not hired. [Regs. at § 80-30.3-450]. Evidently, Employer put the hiring for each of these positions "on hold" or cancelled the hiring entirely. Once the employer made the decision not to hire, it had an obligation to file declarations to each of the job seekers who had responded online. *Id.* Accordingly, judgment should be entered against Respondent for failing to file declarations under the above-cited regulation. Although there is little known about the timing of, or reasons for, the Employer's decision not to hire, the evidence is sufficient to render judgment against Employer for a violation of the "Employer Declaration" Regulation [Regs. at § 80-30.3-450].

Sanctions: Enforcement initially asked that a substantial fine be assessed against Employer for its failure to file nine Employer Declarations for these positions. The maximum fine, arguably, could have added up to $2,000 for each JVA for a total of $18,000.

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2). Nevertheless, the amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of *justice* and *fairness* in proceedings." Regs. at § 80- 50.4-820(h) and (o) (emphases added).

Given that the person responsible at the time of the violation no longer works for the company, and that it appears this hiring effort was suspended in its entirety, assessing a large fine would serve no useful purpose. Applying the above standards to the facts of this case, the Hearing Officer concludes that a suspended sanction is appropriate in this case rather than a monetary fine.

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Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Tinian Trading International, Inc., given that sufficient evidence was presented to establish that Employer failed to meet its legal obligation to post Employer Declarations under the Employment Rules and Regulations (Regs. at §80–30.3-450). For the reasons stated above, the Hearing Officer concludes that Employer should receive a suspended sanction, as set forth below. 3 CMC § 4947(d)(11).

2. **Suspended Fine:** For the violation stated above, Respondent is fined one thousand dollars ($1,000); however, the fine shall be SUSPENDED in full for ONE YEAR, then extinguished, provided that Respondent complies with Department of Labor laws and regulations during the one-year period. 3 CMC §§ 4528(f)(2) and 4947(11)

3. **Warning:** Respondent is WARNED that it has a legal obligation to file Employer Declarations in compliance with the Regulations at section 80–30.3-450. Failure to meet this obligation in the future may result in sanctions, after a due process hearing.

4. **Reinstatement of Sanction:** If Enforcement has reason to believe that Respondent has failed to comply with the terms of this Order, it may file a motion to reinstate all or part of the suspended fine. Upon receiving such motion, the Hearing Officer shall conduct a hearing on this issue.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: December 14, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-009-03
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Mirage Corporation,	)	
dba Mirage Massage Parlor and	)	
Mirage Beauty Shop,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on June 10, 2015, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by Frank Aguon. The Department's Citizen Job Availability and Job Placement Section ("Job Placement Section") was represented by James Ulloa. Respondent Mirage Corporation appeared through its General Manager, Li Li Kondo. Mr. Lu, Guo Hua served as translator for Ms. Kondo. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on May 14, 2015, against respondent Mirage Corporation, *dba* Mirage Massage Parlor and Mirage Beauty Shop ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are as follows. In July 2014, Enforcement conducted a "workforce participation inspection" to determine whether Employer employed a minimum percentage (30%) of U.S. citizens or permanent residents in its business in compliance with 3 CMC § 4525 and the Department's Employment Rules and Regulations ("Regs.") at section 80-30.2-120(c).

Enforcement asked Employer to submit documents, including Employer's Total Workforce Listing. In July 2014, Employer submitted documents to comply with Enforcement's request. Employer's Total Workforce Listing showed that Employer had 25 full-time employees, but only one U.S. status-qualified worker. [Testimony of Mr. Ulloa and Ms. Kondo.]

On August 7, 2014, Enforcement issued a Notice of Warning to Correct, which instructed Employer to contact the Job Placement Section and to take measures to bring up the percentage of U.S.-status qualified employees in its work force.[1] Based on the evidence presented, it is unclear whether Employer's General Manager received this Notice of Warning or ever acted on its instructions.

In March 2015, Enforcement again conducted a workforce participation inspection of Employer and again asked Employer to produce census-related documents. Employer produced documents in response to the request, which showed that Employer had 27 full-time employees, but only 4 U.S. status-qualified workers. [Testimony of Ms. Kondo and Mr. Ulloa.]

On March 26, 2015, Enforcement issued and served a new Notice of Warning to Correct (entered into evidenced as Hearing Exhibit 3). The Notice stated that Employer needed to hire four more U.S. citzens or permanent residents in order to meet the 30% threshold of 3 CMC § 4525 and Regs. at § 80-30.2-120(c). *Id.* After receiving the Notice, Employer's General Manager came to Enforcement's office to discuss the situation. Enforcement instructed the Manager to visit the Job Placement Section to develop a plan to hire more U.S. status-qualified workers. The testimony was somewhat confused as to whether Employer ever visited the Job Placement Section after meeting with Enforcement. In any event, Employer took measures to hire more U.S. citizens and/or permanent residents.

During April and May 2015, Employer hired four U.S. status-qualified workers: an accountant, a driver, a security guard and an office worker. [Testimony of Ms. Kondo.] At Hearing, Employer produced a current list of employees, which showed that Employer has increased the number of U.S. status-qualified (U.S.

[1] [A copy of the Notice of Warning to Correct, dated 8/7/14, was entered into evidence as Hearing Exhibit 2.] The Notice instructed the Employer to contact the Department's Job Placement Section within ten days of the notice for "assistance in (1) obtaining referrals of U.S. citizen applicants or (2) making other arrangements to meet the 30% U.S. workforce requirement." *Id.* The Notice of Warning further stated that failure to comply with the notice could result in the issuance of a Notice of Violation being filed against Employer. *Id.*

citizens and/or permanent residents) in its workforce from 4 to 8 employees. Employer's list of current employees was entered into evidence as Hearing Exhibit 4. The list was not in the proper format and was not signed under penalty of perjury, as required. The Total Workforce Listing form is available from the Department's website at www.marianaslabor.net. Employer should submit a revised, current Total Workforce Listing in the proper format.

The Determination also charged that Employer had failed to submit a Workforce Plan for 2015, as required by the Department's Regulations at § 80-60.2-210. In her testimony, Employer's General Manager admitted that she had not submitted the Workforce Plan, as she did not realize that the company was required to do so.

The Determination also charged that Employer had failed to submit Total Workforce Listing documents and Employer's quarterly Withholding Tax statements on a quarterly basis, as required by the Department. See Regs. at § 80-60.2-105. Again, Employer's General Manager admitted that she had not produced the above-noted documents on a quarterly basis. The GM testified that she was unaware that Regulations required employers to file certain census-related documents with DOL on a quarterly basis. The General Manager promised to comply with these reporting obligations in the future.

CONCLUSIONS OF LAW

1. ***Employer is currently in compliance with the minimum Workforce Participation goal of thirty percent, as established in the CNMI by statute and regulation.***

The minimum Workforce Participation goal of 30%, is established in the Commonwealth by statute (3 CMC § 4525) and regulation (Regs. at § 80-30.2-120(c)). Employer's workforce did not meet the workforce participation goal for much of 2014, but after receiving the Notice of Warning to Correct (Hearing Ex. 3) in March 2015, Employer hired four more U.S. status-qualified workers and brought itself into compliance with the above-cited statute and regulations.

Given these facts, the Hearing Officer finds that Employer should not be sanctioned as long as it continues to try to increase its ratio of U.S. citizen or permanent residents within its workforce.

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2. ***Employer failed to submit quarterly Total Workforce Listing Documents in Accordance With Department Regulations. [Regs. at § 80–60.2-105.]***

The testimony established that Employer failed to submit census-related documents, such as Total Workforce Listing and Employer's Quarterly Withholding Tax documents, on a quarterly basis. [Testimony of Mr. Ulloa and Ms. Kondo.] Employer testified that it had unaware of this requirement and promised to comply with the requirement in the future. The Hearing Officer shall issue a suspended fine in this case, provided that Employer submits the above-noted documents in a timely manner in the future.

3. ***Employer failed to submit a Workforce Plan for 2015 in Accordance With Departmental Regulations. [Regs. at §§ 80–60.2-205, 210.]***

The testimony established that Employer also failed to submit its Workforce Plan for 2015, in accordance with the Departmental Regulations at §§ 80–60.2-205, *210.* [Testimony of Mr. Ulloa and Ms. Kondo.] The Hearing Officer shall issue a suspended fine in this case, provided that Employer submits the above-noted documents in a timely manner in the future.

In conclusion, the Hearing Officer finds that although Employer remained out of compliance with the minimum workforce participation percentage (30%) for much of 2014, Employer has recently hired U.S. status-qualified workers to bring itself into compliance. It appears that Employer is making a good faith effort to find and hire a qualified U.S. citizen or permanent residents. Furthermore, Employer has promised to file timely census-related documents with the Citizen Job Placement Section in the future. Based on the above facts, the Hearing Officer shall issue a monetary sanction, but shall fully suspend it on the condition that Employer complies with its regulatory obligations in the future.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Mirage Corporation for failing to file timely census-related documents, as well as a Workforce Plan, in accordance with Department Regulations. Regs. at § 80–60.2-105. Respondent is hereby FINED five hundred dollars ($500); however, the fine shall be SUSPENDED for ONE YEAR, then extinguished, provided that Respondent complies with the requirements set forth below. 3 CMC §§ 4528(f)(2) and 4947(11).

2. **Updated Total Workforce Listing:** Respondent is ORDERED to file updated, quarterly Total Workforce Listing documents with the Citizen Job Placement Section within thirty (30) days of the date of issuance of this Order. Regs. at § 80–60.2-105. In the future, Respondent shall submit its Total Workforce Listing to the Citizen Job Placement Section on a quarterly basis.

3. **Workforce Plan for 2015:** Respondent is ORDERED to file a current Workforce Plan with the Citizen Job Placement Section within thirty (30) days of the date of issuance of this Order. Regs. at § 80–60.2-210.

4. **Warning:** Respondent is WARNED that it has a continuing obligation to maintain the minimum workforce percentage. 3 CMC § 4525 and Regs. at § 80-30.2-120(c). Therefore, Respondent should continue to attempt to employ an increasing number of U.S. citizens and permanent residents in its business. Likewise, Respondent has a continuing obligation to submit its Total Workforce Listing and its Withholding Tax Statements to the Job Placement Section on a quarterly basis. Failure to meet these obligations could result in a reinstatement of the suspended fine, as well as additional sanctions, after a due process hearing.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 22, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, v. LSG Lufthansa Services, Inc., *dba* LSG Sky Chefs, Respondent.	)	CAC No. 15-011-03 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on March 23, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. The Department's Citizen Job Placement Section ("Job Placement Section") was represented by Yvonne S. Taisacan. Respondent LSG Lufthansa Services, Inc. appeared through its Resident Manager, Rita M. Taitano. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on March 18, 2015, against respondent LSG Lufthansa Services, Inc., *dba* LSG Sky Chefs ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

Employer operates in both Guam and the CNMI, providing food services for airlines and school systems. Currently, Employer has 93 full-time employees, as well as 24 "manpower" employees. As of the date of hearing, 50 of Employer's 93 employees are U.S. citizens or permanent residents. [Testimony of Ms. Taitano.]

In its Determination, Enforcement charges that Employer failed to abide by several provisions of the CNMI Rules and Regulations ("Regs.") pertaining to the posting of job announcements and submission of census-related documents. Regs. at §§ 80–30.3-200 and 80–60.2-105, 210.

In early March 2015, Employer placed a newspaper advertisement in the Saipan Tribune, advertising the following job openings: QA clerk, purchasing clerk, sanitation worker, counter attendant, delivery driver, cook helper, butcher, baker and cook. Employer did not post these job vacancy announcements ("JVAs") on the Department of Labor ("DOL") website. [Testimony of Ms. Taitano.]

After noticing that Employer had not used the DOL website for its job announcements, Enforcement reviewed Department records and filed its Determination (Hearing Exhibit 1). Enforcement charged Employer with three violations, asserting that:

> (1) Employer had failed to use DOL's website to post JVAs. Regs. at § 80-30.3-205. [Determination at ¶ 7.]
>
> (2) Employer had failed to submit a Workforce Plan to DOL for 2013, 2014 and 2015. Regs. at §§ 80-60.2-200, 210. [Determination at ¶ 10.]
>
> (3) Employer had failed to submit Quarterly Workforce Listing documents for several years. Regs. at §§ 80-60.2-105, 120. [Determination at ¶ 11.] [1]

As to the first (failure to post) charge, Employer's Resident Manager testified that she had believed Employer was not required to advertise jobs on DOL's website unless Employer intended to hire CW-1 status workers. Employer argued that it had placed the newspaper advertisement to hire only citizens and permanent residents; therefore, it was not in violation of the Regulations. [Testimony of Ms. Taitano.]

As to the second and third charges, Employer admitted it had not filed the documents; however, Employer brought documents to the hearing that contained the information requested in Total Workforce Listings and Workforce Plans. Unfortunately, the documents were not in the proper form, as they did not contain an attestation clause signed by an authorized company representative under penalty

[1] Fourth, Enforcement charged that Employer had failed to make a good faith effort to hire citizens and status-qualified citizens for its job vacancies. [Determination at ¶ 9.] At Hearing, Enforcement made a motion to strike this charge and the Hearing Officer granted the motion to strike.

of perjury. The Hearing Officer ordered Employer to submit the documents in the proper format within 48 hours of the hearing. Employer produced the documents as ordered.

Employer submitted Total Workforce Listing documents for each quarter of 2014, and Workforce Plans for 2013 and 2014, in the format required by the Department. The Job Placement Section confirmed its receipt of the above-noted documents. [Confirmed by e-mail message from Yvonne Taisacan to Jerry Cody, dated 3/25/2015.]

Upon reviewing the documents, the Job Placement Section also confirmed that Employer had met the workforce participation percentage of 30%, as set forth in 3 CMC § 4525(a) and in Department Regulations at section 80-30.2-120(c).

CONCLUSIONS OF LAW

1. ***Employer Did Not Violate the DOL Regulation Requiring Posting of Job Vacancy Announcements. [Regs. at section 80-30.3-205.]***

Department's "posting" Regulation states that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

Employer did not post JVAs on DOL's website but instead, advertised the jobs in a local newspaper. The Resident Manager believed that she only needed to use the DOL website if Employer was hiring a CW-1 status worker. [Testimony of Ms. Taitano.] Employer had no intention of hiring a CW-1 status worker for these positions; therefore, it argued that the regulation was not applicable to these advertisements. The Hearing Officer agrees that under such circumstances, Employer's advertisement of the JVAs in the newspaper rather than DOL's website, did not violate DOL's Regulation.

2. ***Employer Failed to Comply with DOL Regulations Requiring Employers To Submit Census-Related Documents To Labor. [Regs. at section 80-60.2-105 et seq.]***

Department Regulations require all employers to submit census-related documents (Workforce Plan and Total Workforce Listing) to the Job Placement Section. Regs. at § 80-60.2-105, 210. The documents are required to be in the form

established by DOL. *Id.* at § 80-60.2-120. Examples of the two forms were entered into evidence at Hearing Exhibits 2 and 3, respectively.

Employer admitted that it failed to file census-related documents that would enable the Department to determine if Employer was meeting the workforce participation percentage. *Id.* at § 80-30.2-120(c). Employer had believed that DOL was no longer requiring employers to submit periodic reports. This was mistaken. DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to file quarterly updated documents detailing their full-time workforce. [Testimony of Mr. Ulloa.]

The Hearing Officer notes that the documents (Workforce Plans and Total Workforce Listings), once produced by Employer, showed that Employer had met the minimum workforce percentage (30%) during 2013, 2014, and 2015. [3 CMC § 4525(a) and Regs. at § 80-30.2-120(c); e-mail message from Yvonne Taisacan to Jerry Cody, dated 3/25/2015.] Furthermore, Employer confirmed on the day of hearing that 50 of its 93 full-time workers are U.S. citizens or permanent residents. [Testimony of Ms. Taitano.]

3. Employer Should Be Sanctioned For Its Violation of Regulations as set forth below.

Enforcement asked the Hearing Officer to impose the maximum fine of $2,000 against Employer for each violation. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement maintained its initial request for maximum sanctions. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation of any "provision of this chapter." 3 CMC § 4528(f)(2). However, the amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80-50.4-820(h) and (o).

The Hearing Officer finds that the facts in this case do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligation to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03,

Dept. of Labor Enforcement Section v. RJCL Corporation, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.) There is no evidence here that Employer engaged in any disregard of its obligation to hire citizens or permanent residents. In fact, more than half of Employer's full-time workforce consists of U.S. citizens or permanent residents.

In this case, the documents produced by Employer after the hearing established that Employer did not violate the workforce participation percentage (30%) mandated in 3 CMC § 4525(a) during 2013 and 2014. In effect, Employer's "violation" was in failing to submit census-related documents that would have shown that it was in compliance with the Department's targeted workforce participation percentage of thirty percent.

Once Employer realized its mistake, it compiled the necessary information and submitted it to the Job Placement Section. Employer also testified that it intends to comply with CNMI labor Regulations in the future. [Testimony of Ms. Taitano.] This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, a large portion of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment (a):** As to Enforcement's charge that Respondent violated Regulations by failing to utilize the DOL website to advertise job vacancies in March 2015, Judgment is hereby entered in favor of Respondent LSG Lufthansa Services, Inc. [Regs. at § 80-30.3-205; Determination at ¶ 7.]

2. **Judgment (b):** As to Enforcement's charge that Respondent violated Regulations by failing to submit census-related documents, Judgment is hereby entered against Respondent LSG Lufthansa Services, Inc. [Regs. at §§ 80-60.2-105 and 210; Determination at ¶¶ 10-11.] For these violations, Respondent shall be sanctioned in the manner set forth below.

3. **Sanctions:** Respondent LSG Lufthansa Services, Inc. is SANCTIONED one thousand dollars ($1,000) for its conduct; however, $750 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that

Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$250** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

4. **Posting on Website:** Respondent LSG Lufthansa Services, Inc. is ORDERED to submit annual Workforce Plans and quarterly Total Workforce Listings to the Job Placement Section in the future in accordance with Regulations at §§ 80–60.2-105 and 210.

5. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section and after a due process hearing on the request.

6. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 31, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-015-04
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
AC Pacific, LLC,	)	
dba Star Sands,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on June 9, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent AC Pacific, LLC, was represented by its Human Resources Manager, Leo Ruluked, and its counsel, Mark Scoggins. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on April 29, 2015, against respondent AC Pacific, LLC ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges, among other things, that Employer failed to comply with the job vacancy posting requirements as set forth in the CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205 *et seq.*; NMIAC § 80-20.1-225(a).[1] [Determination at ¶ 10.]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Department Regulations state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

The Determination also charges that Employer failed to post an Employer Declaration with respect to job vacancy announcements ("JVAs") that were posted on DOL's website in December 2014. [Determination at ¶ 5.] Employers who post job vacancies on DOL's website may receive responses from U.S. citizen or permanent resident job seekers. If those Employers then decide not to hire those applicants, the employers are required to post a so-called "Employer Declaration" (i.e., digital response) explaining: (1) what action the employer took as to each applicant who responded to the job vacancy; and (2) the employer's reason for not hiring that citizen or resident applicant. [Regs. at § 80-30.3-450.] If the employer hires the U.S. citizen or permanent resident, no Employer Declaration is required.

The facts of this case are as follows. Employer operates a retail store, called I Love Saipan, which operates its main store in Garapan. Employer maintains a relatively large percentage of U.S. status-qualified workers, who comprise 56% of its current workforce (51 out of 91 employees). [Testimony of HR Manager Ruluked.] Hiring for Employer's operations is conducted by the Human Resources Department, managed by Leo Ruluked.

In December 2014, Employer posted a JVA for three positions of "customer service coordinators." The JVA ran on DOL's website for two weeks in December 2014. Seven U.S. citizen job applicants posted online responses to the JVA. Thereafter, the Department received no responses from the Employer indicating whether or not Employer had considered, interviewed or hired those four job applicants. [Determination (Hearing Ex. 1) at ¶¶ 1-5.]

At Hearing, Employer's HR Manager testified that he had considered each of the "applicants" who posted responses to its JVA. Four of the applicants were found to have no experience in retail sales and therefore, were deemed unqualified for the job. Three others were called for an interview. Two of those U.S. citizen applicants were hired. The third person failed to return telephone messages left by Employer. [Testimony of Mr. Ruluked.]

Employer's HR Manager admitted that he did not post the Employer Declaration (online response) for this JVA. Mr. Ruluked testified that was unaware of the Regulation requiring employers to file an online response to each applicant. [Technically, no responses were required for the two persons hired by Employer.]

Several months after this posting, in February 2015, Employer advertised job vacancies in a local newspaper for six sales persons. For some reason, the Employer failed to post these job vacancies on the DOL website, as it had done in December 2014 with the other positions. [Determination at ¶ 10.] At Hearing, Employer's HR Manager failed to provide an explanation other than to state that he had not been aware of the Regulation requiring JVAs to be posted on DOL's website. [Testimony of Mr. Ruluked.]

CONCLUSIONS OF LAW

1. ***Employer did not fail to give citizens and permanent residents preference in employment; Employer did not fail to make a good faith effort to hire citizens and/or permanent residents for the job vacancy at issue.***

In the Determination, Enforcement charged that Employer failed to give citizens job preference with respect to employment in the private sector. Enforcement also charged that Employer "failed to make good faith effort to hire citizens and status qualified citizens for the job vacancy." [Determination (Hearing Ex. 1) at ¶ 9.]

The Hearing Officer finds in favor of Employer with respect to these charges. Employer established through credible testimony that it operated in good faith to post job vacancies for these "customer service coordinator" positions cited in the Determination. The Employer then reviewed, considered and interviewed citizen job applicants where it was able to reach them. Employer also considered walk-in applicants who applied for the jobs in person.

The Human Resources Manager gave detailed testimony regarding Employer's review of each of the responders to the Employer's posted job announcement.[2] In effect, Employer hired two of the six applicants, plus two walk-in applicants who possessed needed language skills. Based on the credible testimony of Employer's Human Resources Manager, there is no evidence here that Employer engaged in any bad faith practices with respect to hiring. Therefore, the Hearing Officer finds in favor of Employer with respect to this charge.

[2] The Human Resources Manager testified that his staff reviewed each of the applicants who posted responses on DOL's website. Several applicants were found to lack minimum qualifications based on their posted resumes. Three applicants were contacted and asked to come in for interviews. Employer hired one applicant for the position and placed another applicant in a special on-call status as preparation for a possible full-time position in the future. The third applicant failed to return phone messages left by Employer. [Testimony of Mr. Ruluked.]

2. ***Employer failed to post an Employer Declaration with respect to three responses to Employer's "customer service coordinator" Positions, in violation of the Employment Rules and Regulations at § 80-30.3-450.***

Employer violated the Regulations at § 80-30.3-450 by failing to post an online response (declaration) with respect to several applicants who posted responses to the "customer service coordinator" position. Employer's management admitted that it failed to file these online responses because the HR Manager was unaware that an online response was required by DOL's Regulations. Employer established that it did consider all responders and that it sought to interview the qualified job applicants where it was able to reach them. Employer actually hired two of the responders, tried to contact another responder and rejected three responders as unqualified for the position. The Hearing Officer finds that Employer's failure to post online responses here, although incorrect, was not done in bad faith. The Hearing Officer concludes that no useful purpose would be served by sanctioning Employer for this inadvertent oversight. Accordingly, Employer shall be given a warning rather than a monetary penalty, for this violation.

3. ***Employer failed to post a Job Vacancy Announcement for Six Salesperson Positions on the Department's Website, in violation of the Employment Rules and Regulations at § 80-30.3-205.***

Employer violated the Regulations at § 80-30.3-205 by failing to post the job vacancy announcement for six Salesperson positions on the Department's website in February 2015. [Determination (Hearing Ex. 1) at ¶ 10.] Employer's management admitted that it had failed to post the announcements online but claimed that it had not realized that such posting was required. Employer's response was not credible, given that Employer, itself, had used the Department's website just two months earlier and therefore, should have been aware of the requirement to do so. Furthermore, DOL has actively announced this requirement for nearly two years, and the Hearing Office has issued sanctions against Employers in publically reported decisions in more than a dozen cases during that time. Based on these facts, Employer's professed ignorance of the Regulation does not appear to be credible.

Job announcements which may result in the hiring of CW-status workers must be announced on DOL's website, pursuant to well-established, long-standing regulations. Regs. at § 80-30.3-205. Based on the evidence presented, the Hearing Officer finds that Employer should be sanctioned for failing to advertise the above-noted positions in February 2015 on DOL's website.

4. Employer Shall Be Sanctioned For Violations of the Employment Rules and Regulations at § 80-30.3-205.

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80-50.4-820(h) and (o).

The Department sought a sanction of $2,000 for this conduct. Based on the facts of this case, the Hearing Officer finds that Employer should be sanctioned in an amount less than that recommended by the Department in its Determination. The Employer has demonstrated that it has a good track record in hiring U.S. status-qualified workers: 51 out of Employer's 91 full-time work force consists of U.S. citizens or permanent residents. [Testimony of Mr. Ruluked.] That workforce participation percentage – 56% - is well above the minimum threshold of 30% as set forth in statute and regulations. [3 CMC § 4525 and Regulations at § 80-30.2-120(c).] This fact should mitigate the sanctions deemed appropriate in this case.

The Hearing Officer finds that Employer should be sanctioned in the amount of $1,000; however, half of the fine shall be suspended for a year, then extinguished, on the condition that Employer pays the remaining $500 portion of the fine and complies with its regulatory obligations with respect to posting JVAs and Employer Declarations.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Failure to Provide Job Preference or Good Faith Hiring:** As to Enforcement's charges that Respondent AC Pacific, LLC failed to give job preference and failed to make a good faith effort to hire citizens and permanent residents, judgment is entered in favor of Respondent.

2. **Failure to Post Employer Declarations:** Respondent AC Pacific, LLC violated Department Regulations at § 80-30.3-450 by failing to post an Employer Declaration with respect to the "customer service coordinator" positions posted on DOL's website in December 2014. Based on the considerations stated above, no sanction shall be issued for this violation. 3 CMC § 4947(11).

//

3. **Failure to Post Online Job Vacancy Announcements:** Respondent AC Pacific, LLC violated Department Regulations at § 80-30.3-205 by failing to post job vacancy announcements with respect to six "sales persons" positions that Employer advertised in a local newspaper in February 2015. For this conduct, Employer is sanctioned in the amount of $1,000; however, $500 of the fine is hereby SUSPENDED for a period of ONE YEAR, then extinguished, on the condition that Respondent complies with Departmental Regulations in the future with respect to posting JVAs on DOL's website. [Regs. at § 80-30.3-205.] Respondent is ORDERED to pay the fine of $500 within thirty days (30) of the date of issuance of this Order. A copy of the payment receipt shall be filed in the Hearing Office on or before the payment deadline. 3 CMC § 4947(11).

4. **Warning:** Respondent AC Pacific, LLC is WARNED that any failure in the future to post JVAs on the Department's website [Regs. at § 80-30.3-205] or failure to post the Employer's Declaration (online response) in a timely manner [Regulations at § 80–30.3-450] could result in reinstatement of the suspended sanction, as well as additional sanctions, after a due process hearing.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 22, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Long Feng Corporation, *dba* New XO Market/Tian Hong Market, Respondent.	)	CAC No. 15-017-05 **ADMINISTRATIVE ORDER OF DISMISSAL**

This Compliance Agency Case was heard on October 9 and 22, 2015, in the Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Long Feng Corporation, *dba* New XO Market and Tian Hong Market, appeared through its General Manager, Xu Gui Qing, and the company's agent and translator, Lu, Guo Hua. Employee Chelita B. Fejeran testified as a witness for the Complainant. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Enforcement Section ("Enforcement") in the Hearing Office on May 7, 2015, against respondent Long Feng Corporation, *dba* New XO Market and Tian Hong Market ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement alleged that Employer failed to provide job preference to one qualified job applicant, Chelita B. Fejeran, denying her the job preference for U.S. citizens codified in CNMI statutes and regulations. [Determination at p. 2, at ¶¶ 6-7 and p. 3, ¶ 1.]

The facts may be briefly summarized as follows: Employer operates a super-market in Saipan and another store on Tinian. In March 2015, Employer posted a job vacancy announcement ("JVA") on the Department of Labor ("DOL") website

(www.marianaslabor.net) for the position of Assistant Manager. One U.S-status qualified applicant, Chelita B. Fejeran, responded to the JVA and Employer arranged to interview Ms. Fejeran.

The Job Interview: The interview was conducted at the New XO Market on April 10, 2015, by General Manager Xu, Gui Qing and her agent and translator, Lu, Guo Hua. Ms. Fejeran testified that Mr. Lu started the interview before the General Manager ("GM") arrived and did most of the talking; GM Xu entered the interview room during the interview and did not say much. At one point, Mr. Lu told Employee that the company was looking to hire someone for a "commercial cleaner" position and he offered the job to complainant. Employee felt insulted to be offered a janitorial job instead of an assistant manager's job. Later in April, Employee complained to the Job Placement Section about her treatment by this employer.

Employer's Decision Not To Hire: Based on Ms. Fejeran's resume and her answers during the interview, Employer concluded that Fejeran was not qualified for the Assistant Manager position because she had no direct experience in working in a market or food retail business. Employer later posted an online response, stating that it had concluded that this applicant was not qualified for Assistant Manager job. [Testimony of GM Xu.]

Request for Dismissal: After conferring with Ms. Fejeran, Enforcement brought this case against Employer by filing the Determination (Hearing Exhibit 1). After Employer testified at the Hearing, Enforcement noted that Ms. Fejeran no longer wants to be considered for the Assistant Manager's position and Ms. Fejeran did not seek damages. Enforcement requested that the case be dismissed.

DISCUSSION

Ms. Fejeran's work history demonstrated a variety of supervisory positions, but no work in any food retail business or market. Her primary experience consisted of 7 years of experience as Operations Manager of a document handling business. [Determination at ¶ 8.]

Employer's JVA stated that "previous work-related skill, knowledge or experience is required" for the position. The approved JVA listed on-the-job training of one to two years as a requirement. [See copy of JVA at Hearing Exhibits 3 and 5.]

Much of the testimony at hearing centered on identifying the appropriate O-Net Summary Report for the position of Assistant Manager. One O-Net Summary concerned a position of "General and Operations Manager." (See Hearing Ex. 2.) Another O-Net Summary concerned the position of "First Line Supervisor." (See Hearing Ex. 4.) Employer believed that qualified applicants should have one to two years of on-the-job experience; Enforcement believed that appropriate experience should be anywhere from a few months to a year. [Testimony of Ms. Xu and Mr. Ulloa.]

Whether the Assistant Manager job at New XO Market required on-the-job experience of "a few months to one year" or "one to two years," remains an open question. In any event, Ms. Fejeran met neither standard as she has no on-the-job experience in the food retail or wholesale business. The Employer concluded that she lacked the on-the-job experience needed for the job.

Enforcement did not meet its burden to prove that Employer was mistaken in its assessment.

In any event, before the Hearing could be concluded Enforcement asked that the matter be dismissed. As no party had an objection, the Hearing Officer granted the request to dismiss the case.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Dismissal:** For the reasons stated above, this case is hereby dismissed with prejudice.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 9, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, v. KN Corporation, *dba* Sherwood, Respondent.	)	CAC No. 15-019-05 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on June 5, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent KN Corporation appeared through its President, Kim, Young Jin, and its agent/translator, Cho, Jin Koo. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on May 27, 2015. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

Enforcement conducts on-site compliance inspection of businesses in the CNMI in order to ensure that employers are in compliance with the 30% requirement of 3 CMC § 4525, which mandates that a minimum of 30% of Employer's workforce should consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents. [Testimony of James Ulloa.]

On March 30, 2015, Enforcement conducted an on-site compliance inspection of Employer's business and served Employer with a notice to produce business related documents. [Determination at paragraph 1; testimony of Mr. Ulloa.]

Subsequently, Employer provided Enforcement with the requested documents, including Employer's Total Workforce Listing. The workforce consisted of four employees: three electronic technicians and the President, who serves as manager and cashier of the business. None of these individuals is a U.S. citizen, U.S. permanent resident or CNMI permanent resident. [Testimony of Messrs. Ulloa, Aguon and Kim.]

On April 16, 2015, Enforcement served Employer with a Notice of Warning to Correct ("Notice of Warning") informing Employer that it was not in compliance with the 30% requirement of 3 CMC § 4525. [A copy of the Notice of Warning was entered into evidence as Hearing Exhibit 2.] The Notice of Warning instructed the Employer to contact the Citizen Job Placement Section for assistance in (1) obtaining referrals of U.S. citizen applicants or (2) making other arrangements to meet the 30% U.S. workforce requirement. *Id.*

After receiving it, Employer's President took the Notice of Warning to his agent and translator, Cho, Jin Koo. [Employer utilizes Mr. Cho's document handling business to handle Employer's CW petitions.] Mr. Cho's staff contacted the Job Placement Section and left a message for Mr. Ulloa. Unfortunately, Mr. Ulloa never got the message.[1] Therefore, Mr. Ulloa (Job Placement Section) believed the Employer had never responded to the Notice of Warning.

In January 2014, Employer was a respondent in Compliance Agency Case No. 13-022-12. In that case, Employer was fined $1,000 for failing to cooperate with the Job Placement Section in attempting to hire citizens and/or permanent residents. Employer was fined for, among other things, failing to post job announcements on the Department of Labor website, pursuant to the Labor Rules and Regulations at Section 80-30.3-105. [Administrative Order in CAC 13-022-12, issued by J.Cody on 1/27/14.]

Employer's latest CW renewal petitions were filed with USCIS In about July and August 2014. Respondent's President relied entirely on his agent, Cho Jin Koo, to prepare the petitions. Mr. Cho advertised the jobs in another media rather than the DOL website. [Testimony of Mr. Cho and Mr. Kim.] Such conduct completely

[1] Someone from Mr. Cho's staff telephoned an employee at the Citizen Job Placement Section and left a message for Mr. Ulloa, asking him to call Mr. Cho. The Job Placement employee neglected to tell Mr. Ulloa; therefore, he believed the Employer had never responded to the Notice of Warning. [Testimony of Mr. Ulloa.] During the hearing, Mr. Ulloa verified with the Job Placement employee that, indeed, she had promised Mr. Cho's staff to pass on his message to Mr. Ulloa, but then she forgot to do it.]

ignored and violated the terms of the Administrative Order issued by this Hearing Officer in CAC 13-022-12, In that Order, Employer was ordered to post all new jobs and job renewals on DOL's website. [Administrative Order in CAC 13-022-12, at page 5, ¶ 3.]

At Hearing, Enforcement produced from the DOL website a print-out of Employer's record of posting at the Job Placement Section. [This document was entered into evidence as Hearing Exhibit 3.] The record shows that Employer last posted a job vacancy announcement ("JVA") on the DOL website in 2010.

Enforcement examined the matter and concluded that Employer had failed to respond to its Notice of Warning and that Employer had violated the terms of the prior Administrative Order in CAC 13-022-12, issued on January 27, 2014, by failing to post its job renewals on DOL's website. This hearing followed.

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. 3 CMC § 4525(a) and Regs. at § 80-30.3-440.

Among other things, Department Regulations require that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." *Id.* at § 80-30.3-205; see also § 80-30.3-300. "There are no waivers available with respect to the job vacancy announcement requirement." *Id.* at § 80-30.3-230.

The Department recognizes that it may take some employers time and effort to achieve the goal of employing 30% of their workforce as U.S. citizens and/or permanent residents. Nevertheless, Employers who are not in compliance with the 30% target are expected to cooperate with the Job Placement Section to demonstrate that they are making a good faith effort to hire U.S. citizens, U.S. permanent residents and CNMI permanent residents. [Testimony of James Ulloa.]

An employer who fails to cooperate with the Citizen Job Placement Section, after it is requested to do so, creates the impression that it is ignoring or evading its legal responsibilities under CNMI law. 3 CMC § 4525(a) and Regs. at § 80-30.3-440.

In this case, the evidence shows that Employer's agent did attempt to contact the Job Placement Section after Employer received the Notice of Warning in April 2015. On the other hand, the evidence shows that Employer violated the terms of the prior Administrative Order by failing to post two job renewals of CW-1 status workers on DOL's website when it renewed two CW-1 status employees in July and August 2014.

At Hearing, Employer's agent admitted that his office had prepared the CW-1 renewal petitions in July 2014, and that it had not posted the renewals on DOL's website. This conduct is egregious, given that agent Cho had attended the prior Hearing against KN Corporation as the Employer's agent and translator. In fact, Mr. Cho had translated the Order to the Employer. Moreover, Mr. Cho owns and manages his own "document handling" business; thus, he should be fully aware of the DOL Regulation requiring all employers to post job announcements on DOL's website.

Findings: Hearing Officer finds that Employer failed to follow the instructions in the prior Administrative Order which ordered Employer to post all job renewals on DOL's website. This failure was largely the result of negligence on the part of the agent; however, the Employer cannot simply pass off its obligations on an agent and forget about them. Employer is also at fault in this situation for failing to follow the clear instructions in the Administrative Order issued in CAC 13-022-12.

There is no evidence that Employer has made any real effort to recruit or hire U.S. citizens or permanent residents. Furthermore, Employer's failure to post its job listings on the Department's website violates DOL's Regulations at § 80-30.3-205, as well as the prior Administrative Order.

Sanctions: Enforcement asked in its Determination that Employer be assessed the maximum fine of $2,000 for each missed posting plus $1,000 for its conduct. [Testimony of Mr. Ulloa.]

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and

fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

Applying the above standards to the facts of this case leads this Hearing Officer to conclude that a monetary sanction of two thousand dollars, with a portion of the fine suspended, is warranted against this Employer. [See details of sanction, below.]

Corrective Action: This Employer shall be ordered: (1) to post all of its future job vacancies on the Department's website (www.marianaslabor.net); and (2) to submit a Workforce Plan for 2015 that discusses a plan to meet with the 30% workforce participation target, as outlined in 3 CMC § 4525 and the Labor Rules and Regs. at section 80-30.2-120.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent KN Corporation is FINED two thousand dollars ($2,000) for the above-described conduct; however, $1,000 of the fine shall be suspended, then extinguished after one year, *provided that Respondent commits no further violations of CNMI labor law during that period.* 3 CMC §§ 4528(f)(2) and 4947(11). Respondent is ORDERED to pay the $1,000 portion of the fine within thirty (30) days of the issuance of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office by the payment deadline.

2. **Cooperation with Citizen Job Placement Section:** Respondent KN Corporation is ORDERED to submit a revised Workforce Plan to the Citizen Job Availability and Job Placement Section within thirty (30) days of the date of this Order. Regulations at § 80–60.2-205, 210. The purpose of the Workforce Plan is to outline how the Respondent plans to meet the 30% workforce participation threshold of 3 CMC § 4525(a). 3 CMC § 4947(11). To this end, respondent shall consider all referrals received from the Citizen Job Placement Section and hire such referrals when they are qualified and available to work.

3. **Posting on Website:** Respondent KN Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department of Labor website (www.marianaslabor.net), in accordance with Regulations at § 80–30.3-205.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to reinstatement of the suspended fine as well as possible additional monetary sanctions in an amount to be determined at a later hearing.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: June 22, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 15-020-05
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Magisland LLC, *dba* Paradise Hotel,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on October 26, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa and Ben Castro. Respondent Magisland LLC was represented by its General Manager, Ekaterina Markova. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on June 10, 2015, against respondent Magisland LLC, *dba* Paradise Hotel ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with the "Employer Declaration" requirement set forth in the CNMI Employment Rules and Regulations ("Regs.") at Section 80-30.3-450; see NMIAC § 80-20.1-235(e) *et seq.*[1]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Department Regulations state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

The Regulations also contain an "Employer Declaration" requirement. Employers who post job vacancies on DOL's website may receive responses from U.S. citizen or permanent resident job seekers. If those Employers then decide not to hire those applicants, the employers are required to post a so-called "Employer Declaration" (i.e., digital response) explaining: (1) what action the employer took as to each applicant who responded to the job vacancy; and (2) the employer's reason for not hiring that citizen or resident applicant. *Id.* at § 80-30.3-450. [Note: If an employer hires a U.S. citizen or permanent resident for the offered job, no Employer Declaration is required to be filed. *Id.*]

Employer was a respondent in another Agency case (CAC No. 15-008-02) which was heard by this Hearing officer on March 12, 2015. In that case, Employer was faulted for failing to post JVAs for various positions on DOL's website. During the hearing of that case, Employer's General Manager and the head chef testified that they had only recently begun managing this business and they were not aware of DOL's regulations with respect to posting of job announcements. The Administrative Order warned Employer that it had a continuing obligation to post vacancies and job renewals on the Department's website and to interview and hire any qualified U.S. citizen or permanent resident job applicants in accordance with Regulations. [Admin. Order issued by J.Cody on 3/17/15, at p.4, ¶ 3.]

Later in March 2015, "someone" created a new website for Paradise Hotel on DOL's Job Referral website, then announced Job Vacancy Announcements (JVAs) for a number of positions, including bartender, housekeeper, cook staff and wait staff. Determination at pp. 1-2. Subsequently, the Employer failed to post *any* responses to the responders to these JVAs.

On June 10, 2015, Enforcement opened the present Agency Case, alleging that Employer had violated Department Regulations by failing to provide Employer Declarations (i.e., responses) to the responders of the numerous JVAs published by Employer in March and April 2015. [Determination at Hearing Exhibit 1.]

Employer's General Manager defended against Enforcement's charges by asserting that she was not aware that (1) a second Job Referral website had been created by her co-worker; or (2) that JVAs had been posted on behalf of Paradise Hotel. [Testimony of Ms. Markova.] In about Mary 2015, Employer's head chef and GM

Markova had a labor dispute, which resulted in the chef leaving the company. The Hearing Officer notes that the former head chef was not subpoenaed to appear at the hearing and he did not testify. Ms. Markova testified that she had not known back in March 2015 that a new website had been opened or that JVAs had been advertised for the Paradise Hotel. Ms. Markova suspected that the chef had posted the JVAs because he was listed as the "contact person" in DOL Job Vacancy Announcements. [See copy of print-out of a JVA listing the chef as "contact person" at Hearing Exhibit 4.]

As of March 2015, Employer had two websites registered with the Job Placement Section: one official site that listed Katerina Markova as the contact person and another unauthorized site that listed the head chef as the contact person. The JVAs that are the subject of this case were filed from the unauthorized site.

DISCUSSION

Employer violated DOL Regulations at § 80-30.3-250 by failing to post an Employer Declaration describing why job applicants were not hired by the company for certain JVAs that were posted in the company's name in March and April 2015. At Hearing, Employer 's General Manager put forth the somewhat novel argument that her own staff (head chef) had posted the JVAs without getting her authorization to do so. [Testimony of Ms. Markova.]

GM Markova also noted that she had approached the Job Placement Section in May 2015 in an attempt to cancel all of the JVAs that she claimed to be unauthorized. *Id.* For some reason, the Job Placement Section had declined to accept the GM's explanation and instead, brought this Agency Case in response.

After the General Manager testified to the above facts, the parties conferred and decided on a mutually-agreed course of action. Under the agreement, Employer shall cancel the unauthorized site that led to the posting of JVAs in March and April 2015, and shall retain its official website connection with the Job Placement Section for use in posting JVAs on DOL's website in the future.

Without fully determining the veracity of GM Markova's version of events, the most expeditious solution is to shut down the unauthorized website connection and cancel those JVAs that were posted in March and April 2015.

The Hearing Officer finds that Employer should be fined $500, but the fine shall be suspended in full on the condition that Employer shall comply with CNMI labor

laws and regulations for a period of one year. If Employer fails to follow the law with respect to hiring and posting of JVAs, the sanction may be reinstated after due process notice and an opportunity to be heard.[2]

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Magisland LLC for failing to post Employer Declarations as required by Employment Rules and Regulations at section 80-30.3-450. Respondent is fined five hundred dollars ($500); however, the fine shall be SUSPENDED in full for ONE YEAR, then extinguished, provided that Respondent complies with Department of Labor laws and regulations during the one-year period. 3 CMC §§ 4528(f)(2) and 4947(11).

2. **Warning:** Respondent Magisland LLC is WARNED that it has a continuing obligation to post vacancies and job renewals on the Department's website and to interview and hire any qualified U.S. citizen or permanent resident job applicants in accordance with Regulations. [Regs. at §§ 80–30.3-105, 205, 460.] Additionally, Respondent has an obligation to file Employer Declarations in compliance with the Regulations at section 80–30.3-450. Failure to meet any of these obligations may result in reinstatement of the suspended fine, as well as additional sanctions, after a due process hearing.

3. **Reinstatement of Sanction:** If Enforcement has reason to believe that Respondent has failed to comply with the terms of this Order, it may file a motion to reinstate all or part of the suspended fine. Upon receiving such motion, the Hearing Officer shall conduct a hearing on this issue.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 29, 2015

Jerry Cody
Hearing Officer

[2] In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80-50.4-820(h) and (o).

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, v. OCM (Saipan) Corporation, *dba* Blue Haus and BH Janitorial Services, Respondent.	)	CAC No. 15-022-06 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on July 22 and October 27, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Ben Castro. Respondent OCM (Saipan) Corporation appeared through its sales representative Teresita Ramos and its President, Victoria C. Saures (attended on 10/27/2015). Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") on June 17, 2015. The Determination alleges that OCM (Saipan) Corporation ("Employer") was served with a request to produce documents on May 19, 2015, but failed to deliver the requested documents within the 10-day period specified in the document request.

Enforcement's document request was contained in a one-page document entitled "Business Establishment Compliances and Monitoring Report." [A copy of the document request (hereinafter, "Request") was entered into evidence as Hearing

Exhibit 3; a copy of the Determination was entered into evidence as Hearing Exhibit 1.] The Request directed the employer to produce a number of documents, including: a total listing of employees, business license, annual corporate report, quarterly Employer's Withholding Tax, and a Letter of Compliance issued by the Division of Revenue and Taxation.

Hearing on July 22, 2015: At the first Hearing on July 22, Employer brought all the requested documents and delivered them to the Enforcement representative, Ben Castro. Mr. Castro then confirmed that all documents were in compliance with Employment's Request.

Based on the credible testimony given by Employer's sales representative, Teresita Ramos, and President Saures, the following facts were established. After receiving the Request on May 19, 2015, Employer prepared copies of all requested documents except for the Letter of Compliance. That letter was delayed by the Division of Revenue and Taxation because of an outstanding tax issue. At some point, President Saures asked her employee, Ms. Ramos, to arrange for the document production. Ms. Ramos decided to wait until the Letter of Compliance was ready before delivering the complete set of documents to Enforcement. Ms. Ramos testified that she neglected to notice the 10-day deadline that was listed in the Request. [Testimony of Ms. Ramos and Ms. Saures.]

The Letter of Compliance was issued on June 10, 2015, and picked up by President Saures on June 18, 2015. On that day, Ms. Ramos attempted to deliver the complete set of documents to Enforcement; however, she was told by investigator Frank Aguon that an Agency case had already been opened and therefore, the Enforcement would no longer take the documents. [Testimony of Mr. Ramos.]

Hearing on October 27, 2015: Employer's President, Victoria C. Saures. testified that she had received the document request back on about May 19, 2015, and instructed her accountant to prepare the documents to be produced to the Enforcement Section. The Letter of Compliance was delayed because of an outstanding tax issue. Ms. Saures resolved the tax matter, assigned Ms. Ramos to deliver the documents to the Department of Labor, then left for a two-month vacation.

1. DOCUMENT PRODUCTION

As stated above, the Employer brought all requested documents to the first Hearing on July 22, 2015. Labor investigator Ben Castro reviewed the documents at the

Hearing and stated that they satisfied Enforcement's prior Request. Accordingly, the matter of document production is now closed. The only remaining issue is whether the Employer should be fined for failing to produce the documents within the "10 working days" requested by Enforcement. (See Request at Hearing Ex. 2.)

2. SANCTIONS

In its Determination, Enforcement requested that the Employer be sanctioned for its failure to produce documents in response to the Document Request. After hearing the Employer's testimony, Enforcement left the amount of sanctions to the discretion of the Hearing Officer. [Testimony of Ben Castro.]

The Enforcement's Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Imposing penalties may serve the purposes of the law, but excessive penalties should be avoided. Thus, the Regulations state with respect to discovery, "a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or *undue burden or expense*." Regs. at § 80- 50.4-550. [Emphases added.]

Applying the above standards to the facts of this case leads this Hearing Officer to conclude that a suspended sanction should be issued in this case.

This Employer gathered most of the documents requested by the Department, but mistakenly waited to produce the documents to Enforcement because it was missing the Letter of Compliance. After that letter was issued and retrieved by the Employer, the Employer attempted to produce all of the documents to Enforcement on June 18, 2015. At that point, the deadline had been missed by several weeks,

and investigator (Frank Aguon) refused to take the documents, noting that an Agency Case had been opened and the case had been set for hearing.

On one hand, it was a mistake for the Employer to withhold the entire set of documents simply because one document, the Letter of Compliance, was not yet available. The Employer should have produced as many documents as possible within the 10-day deadline stated in the Document Request (Hearing Exhibit 3). On the other hand, Enforcement should have allowed Employer to hand over the documents when it attempted to do so on June 18, 2015. Enforcement could have accepted the documents and still raised the issue of possible sanctions at a hearing.

As noted above, Employer produced all of the requested documents at the first Hearing on July 22, 2015.

Based on the above facts, the Hearing Officer concludes that the Employer should be sanctioned for its untimely delivery documents, the sanction should be suspended in full, on the condition that the Employer does not violate CNMI labor laws during the next year.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent OCM (Saipan) Corporation for failing to cooperate with a lawful investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. For this conduct, Respondent shall be sanctioned as set forth below.

2. **Sanction:** For the reasons stated herein, Respondent OCM (Saipan) Corporation is hereby SANCTIONED five hundred dollars ($500) for its conduct; however, the entire fine shall be SUSPENDED for a period of ONE year, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor statutes and regulations in that period. 3 CMC §§ 4528(a) and (f)(2) and Regs. at § 80-50.4-820(h).

3. **Reinstatement of Sanction:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

//

[CAC No. 15-022-06]

4. **Appeal:** Any person or party aggrieved by this Order may appeal in writing to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 28, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Sino-American Trading Corporation, *dba* Green Consume Market II, Respondent.	)	CAC No. 15-023-06 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 5, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by Jeff Camacho and Ben Castro. Respondent Sino-American Trading Corporation appeared through its President, Li Xiong, and its Processing Agent, Lin, Kaiqi. Mr. Lin also served as translator for Mr. Li. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on July 1, 2015, against Sino-American Trading Corporation, *dba* Green Consume Market II ("Employer"). The Determination alleges that Employer was served with two requests to produce documents on April and June 2015, but failed on both occasions to produce any documents within the designated time frames. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are nearly identical to those described in a similar case decided today, CAC No. 15-024-06, *Enforcement v. Double Lee Corporation, dba Green Consume Market.* Evidently, Li Xiong manages Green Consume Market, located in As Lito, under Double Lee Corporation and Green Consume Market II located in Chalan Laulau, under Sino-American Trading Corporation. Both employers were subject of Agency cases brought by the Enforcement Section.

The present case concerns the Sino-American Trading Corporation and its Green Consume Market II. Investigators from the Department of Labor Enforcement Section ("Enforcement") visited Employer's market on April 9, 2015, and served the Employer with the first document request. [Testimony of Mr. Castro.][1] The request, entitled the "Business Establishment Compliances and Monitoring Report" (hereinafter, "Request"), instructed Employer to produce eight types of documents within "10 business days;" i.e., by April 23, 2015.

The requested documents included: a current total workforce listing, copies of employer's quarterly withholding tax reports for 4 quarters, payroll records for 4 quarters, a letter of compliance issued by the Division of Revenue and Taxation, a business license, an annual corporate report, and a sketched map to the business location. [The Request was entered into evidence as Hearing Exhibit 2.]

Employer did not produce any documents to Enforcement in response to this Request in April 2015.

Two months later, Enforcement made a second attempt to convince Employer to produce documents. On June 4, 2015, Enforcement investigators again visited Employer's Green Consume Market and served Employer with a second document request ("Second Request") that was virtually identical to the Request served in April 2015. A copy of the Second Request was entered into evidence as Hearing Exhibit 3. [Testimony of Mr. Castro.]

The Second Request instructed Employer to produce documents to Enforcement within 10 business days; in other words, by June 19, 2015. Employer failed to provide any documents to Enforcement by the due date (June 19, 2015) or thereafter.

On July 1, 2015, Enforcement filed and served its Determination, noting that Employer had failed to produce documents requested in two separate document requests. [See Hearing Exhibit 1.] The Determination scheduled a hearing of this matter for August 4, 2015. As noted earlier, Enforcement also filed a Determination against Double Lee Corporation, operator of Green Consume Market, for failing to respond to document requests. (See CAC No. 15-024-06, Admin. Order issued by J. Cody on 10/08/15.) During the month of July 2015, Employer did not produce any responsive documents to Enforcement with respect to either company.

[1] Investigator Jeff Camacho testified that when he delivered the Request to the cashier at the Employer's work site on April 9, 2015, he instructed the cashier to give the document to the company's accountant.

On August 2, 2015, Typhoon Soudelor slammed into Saipan and knocked out power to the island for an extended period. As a result of the catastrophe, the Hearing Office postponed the hearing of this case for two months.

On September 21, 2015, an Amended Notice of Hearing was served on Employer at Employer's work site. Mr. Camacho served Employer's employee, Laura C. Daynos who identified herself as the company's accountant. [Testimony of Mr. Camacho.] The Amended Notice set the hearing for October 5, 2015. At Hearing, Employer appeared but failed to bring any documents responsive to the document Requests. Instead, President Li asked for several more days to collect and produce the requested documents.

When questioned at Hearing, President Li admitted that he had received one or both of the document requests (Exhibits 3 and 4) around the time they were served and that he had alerted his father, Vice Manager Li, Ren Wei, about the requests. President Li testified that he had been busy with other projects and had forgotten about the document requests. Also, at one point Li's entire family had vacationed in China. [Testimony of President Li, Xiong.]

Enforcement took the position in its Determination and at hearing that Employer should be sanctioned $4,000 for its failure on two occasions (April and June 2015) to produce requested documentation.

CONCLUSIONS OF LAW

Under the Employment Rules and Regulations ("Regs."), the "Department may conduct investigations as necessary and appropriate to enforce provisions of the Commonwealth Employment Act of 2007, as amended...." Regs. at § 80–50.3-400; 3 CMC § 4939(a) *et seq.* [2] Thus, Enforcement's request for documentation from the Employer in this case was part of a legitimate administrative inspection of payroll, business license and tax information. *Id.*

It is undisputed that Employer received two document requests from Enforcement and neglected to produce documents in response to either request. The Employer offered little excuse at Hearing, except for President Li saying that he was very

[2] The Commonwealth Employment Act of 2007 notes that the Department may inspect: "The employer's payroll records,...worker contracts, or any other documents or business records the employer is required to collect, maintain or produce for inspection pursuant to this chapter, regulations and the Minimum Wage and Hour Act." 3 CMC § 4939(c)(3).

busy with other matters and that he had forgotten to produce the documents to Enforcement.

Based on the facts presented, the Hearing Officer agrees that a substantial sanction is justified. Employer missed the deadline to produce documents not once, but twice – or, a third time if one counts the fact that Employer brought no responsive documents to the Hearing in October. There is no showing that Employer made a good faith effort to comply with the legitimate deadlines set by Enforcement.

Sanctions: Enforcement asked that Employer be assessed a fine of $4,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] The Hearing Officer noted that this violation centered around conduct that can be summarized as failing to produce documents. Notwithstanding the fact that two separate document requests were served, the matter concerns one basic violation.

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here justify a substantial sanction, although not necessarily the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In this case, Employer was certainly negligent in completely ignoring its obligation to produce documents. The failure to produce documents by the date of hearing was especially egregious given that the typhoon gave Employer an extra *two months* after the Determination was served in which to prepare documents to be produced. Yet, Employer attended the hearing in October without bringing any of the requested documentation.

The above-noted facts could justify imposing the full sanction of $2,000. One mitigating factor is that Employer produced full sets of similar documents to Enforcement in two prior years – 2013 and 2014. [Testimony of Mr. Castro.] Such conduct suggests that the current failure was more of a case of negligent conduct rather than a deliberate attempt to circumvent the law.

At Hearing, Employer stated that it could and would produce all requested documents if it were given about one week to gather the documents.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars; however, half of that sanction shall be suspended for two years, then extinguished, provided that Employer produces the requested documents within ten days, and commits no further violations of CNMI labor laws or regulations during the next two years.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Sino-American Trading Corporation for failing to produce documents requested as part of a lawful administrative inspection. [See 3 CMC § 4939(a) *et seq.*; Regulations at § 80-50.3-400.] For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Sino-American Trading Corporation is hereby SANCTIONED two thousand dollars ($2,000) for its conduct; however, $1,000 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$1,000** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Order to Produce Documents:** Respondent Sino-American Trading Corporation is hereby ORDERED to produce all documents requested in the Request and Second Request, noted above, no later than ten (10) days after the date of issuance of this Order.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 8, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, v. Double Lee Corporation, *dba* Green Consume Market, Respondent.	)	CAC No. 15-024-06 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 5, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by Jeff Camacho and Ben Castro. Respondent Double Lee Corporation appeared through its President, Li Xiong, and its Processing Agent, Lin, Kaiqi. Mr. Lin also served as translator for Mr. Li. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on July 1, 2015, against Double Lee Corporation ("Employer"). The Determination alleges that Employer was served with two requests to produce documents on April and June 2015, but failed on both occasions to produce any documents within the designated time frames. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are as follows. Employer operates a retail grocery store in As Lito in Saipan, known as Green Consume Market. Investigators from the Department of Labor Enforcement Section ("Enforcement") visited Employer's market on April 9, 2015, and served the Employer with the first document request. [Proof of Service at Hearing Exhibit 2.][1] The request, entitled the "Business

[1] Investigator Jeff Camacho testified that when he delivered the Request to the cashier at the Employer's work site on April 9, 2015, he instructed the cashier to give the document to the company's accountant.

Establishment Compliances and Monitoring Report" (hereinafter, "Request"), instructed Employer to produce eight types of documents within "10 business days;" i.e., by April 23, 2015. The requested documents included: a current total workforce listing, copies of employer's quarterly withholding tax reports for 4 quarters, payroll records for 4 quarters, a letter of compliance issued by the Division of Revenue and Taxation, a business license, an annual corporate report, and a sketched map to the business location. [The Request was entered into evidence as Hearing Exhibit 3.]

Employer did not produce any documents to Enforcement in response to this Request in April 2015.

Two months later, Enforcement made a second attempt to convince Employer to produce documents. On June 4, 2015, Enforcement investigators again visited Employer's Green Consume Market and served Employer with a second document request ("Second Request") that was virtually identical to the Request served in April 2015. [A copy of the Second Request was entered into evidence as Hearing Exhibit 4.] Investigators delivered the Second Request to Li, Ren Wei, the father of President Li, who Li describes as "Vice Manager" of the company. [Testimony of Mr. Camacho and Mr. Li.]

The Second Request instructed Employer to produce documents to Enforcement within 10 business days; in other words, by June 19, 2015. Employer failed to provide any documents to Enforcement by the due date (June 19, 2015) or thereafter.

On July 1, 2015, Enforcement filed and served its Determination, noting that Employer had failed to produce documents requested in two separate document requests. [See Hearing Exhibit 1.] The Determination scheduled a hearing of this matter for August 4, 2015. During the month of July 2015, Employer did not produce any responsive documents to Enforcement.

On August 2, 2015, Typhoon Soudelor slammed into Saipan and knocked out power to the island for an extended period. As a result of the catastrophe, the Hearing Office postponed the hearing of this case for two months.

On September 21, 2015, an Amended Notice of Hearing was served on Employer at Employer's work site. Mr. Camacho served Employer's employee, Laura C. Daynos who identified herself as the company's accountant. [Testimony of Mr. Camacho.] The Amended Notice set the hearing for October 5, 2015. At that

hearing, Employer appeared but failed to bring any documents responsive to Enforcement's document requests (Exhibits 3 and 4). Instead, President Li asked for several more days to collect and produce the requested documents.

President Li admitted that he had received one or both of the document requests (Exhibits 3 and 4) around the time they were served and that he had alerted his father, Vice Manager Li, Ren Wei, about the requests. President Li testified that he had been busy with other projects and had forgotten about the document requests. Also, at one point Li's entire family had vacationed in China. [Testimony of President Li, Xiong.]

Enforcement took the position in its Determination and at hearing that Employer should be sanctioned $4,000 for its failure on two occasions (April and June 2015) to produce requested documentation.

CONCLUSIONS OF LAW

Under the Employment Rules and Regulations ("Regs."), the "Department may conduct investigations as necessary and appropriate to enforce provisions of the Commonwealth Employment Act of 2007, as amended...." Regs. at § 80-50.3-400; 3 CMC § 4939(a) *et seq.* [2] Thus, Enforcement's request for documentation from the Employer in this case was part of a legitimate administrative inspection of payroll, business license and tax information. *Id.*

It is undisputed that Employer received two document requests (Exhibits 3 and 4) from Enforcement and neglected to produce documents in response to either request. The Employer offered little excuse at Hearing, except for President Li saying that he was very busy with other matters and that he had forgotten to produce the documents to Enforcement.

Based on the facts presented, the Hearing Officer agrees that a substantial sanction is justified. Employer missed the deadline to produce documents not once, but twice – or, a third time if one counts the fact that Employer brought no responsive documents to the Hearing in October. There is no showing that Employer made a good faith effort to comply with the legitimate deadlines set by Enforcement.

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[2] The Commonwealth Employment Act of 2007 notes that the Department may inspect: "The employer's payroll records,... worker contracts, or any other documents or business records the employer is required to collect, maintain or produce for inspection pursuant to this chapter, regulations and the Minimum Wage and Hour Act." 3 CMC § 4939(c)(3).

Sanctions: Enforcement asked that Employer be assessed a fine of $4,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] The Hearing Officer noted that this violation centered around a violation that can be summarized as failing to produce documents requested as part of a Departmental investigation. Even though two separate document requests were served, the matter concerns one basic violation.

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here justify a substantial sanction, although not necessarily the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In this case, Employer was certainly negligent in completely ignoring its obligation to produce documents. The failure to produce documents by the date of Hearing was especially egregious given that the typhoon gave Employer an extra *two months* after the Determination was served in which to produce documents to the Department of Labor. Instead, Employer attended the hearing in October without bringing any of the requested documentation.

The above-noted facts could justify imposing the full sanction of $2,000. One mitigating factor is that Employer produced full sets of similar documents to Enforcement in two prior years – 2013 and 2014. [Testimony of Mr. Castro.] Such conduct suggests that the current failure was more of a case of negligent conduct rather than a deliberate attempt to circumvent the law.

At Hearing, Employer stated that it could and would produce all requested documents if it were given about one week to gather the documents.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned two thousand dollars; however, half of that sanction shall be suspended for two years, then extinguished, provided that Employer produces the requested documents within ten days, and commits no further violations of CNMI labor laws or regulations during the next two years.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Double Lee Corporation for failing to produce documents requested as part of a lawful administrative inspection. [See 3 CMC § 4939(a) *et seq.*; and Regulations at § 80-50.3-400.] For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Double Lee Corporation is hereby SANCTIONED two thousand dollars ($2,000) for its conduct; however, $1,000 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$1,000** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Order to Produce Documents:** Respondent Double Lee Corporation is hereby ORDERED to produce all documents requested in the Request and Second Request, noted above, no later than ten (10) days after the date of issuance of this Order.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 8, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** 3 K Corporation, *dba* General Construction Contractor, Respondent.	)	CAC No. 14-001-01 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on March 3, April 2, and April 10, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ben Castro; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa and Yvonne S. Taisacan. Respondent 3 K Corporation appeared through its President, Paul S. Khang, and his assistant, Charmaine Joy Roquelara. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on January 29, 2014. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

On December 12, 2013, Employer submitted a request for a Good Standing Certification. As part of that process, Enforcement evaluates whether the employer is in compliance with CNMI Workplace Regulations by making a good faith effort to hire U.S. citizens, U.S. permanent residents or CNMI permanent residents. See Employment Rules and Regulations ("Regulations") at § 80-30.3-440.

As of mid-December 2013, Employer employed one U.S. citizen (the corporate President Mr. Zhang) and 6 CW-1 workers. Given these statistics, the Citizen Job Placement Section pressed Employer to hire more citizens and/or permanent residents.

On December 19, 2013, Employer's President, Paul S. Khang, met with the Director of Employment Services, James Ulloa, and the parties arranged that Employer would offer full-time employment to a U.S. citizen named James Aldan. Over the next three weeks, Employer employed Mr. Aldan as a construction helper for a total of 77.5 hours. [See summary of payroll in letter from Mr. Khang to Mr. Ulloa, entered into evidence as Hearing Exhibit 5.] Even given that two major holidays – Christmas and New Year's Day - occurred during this period, this schedule was somewhat less than full-time work.

In January 2014, Yvonne Taisacan of the Citizen Job Placement Section spoke with Mr. Aldan and heard that his schedule was "inconsistent." Thereafter, Ms. Taisacan made numerous attempts to contact Mr. Khang to discuss the matter but he appeared to be unavailable. At that point, the Enforcement Section was notified and this Agency case was brought, in essence, charging Employer with bad faith in hiring. [Determination (Hearing Exhibit 1) and testimony of Mr. Castro.]

At Hearing, Mr. Khang testified that in mid-January 2014, Mr. Aldan informed Employer that he intended to start attending the Northern Marianas College full-time. Mr. Aldan first asked for a part-time schedule that would allow him to work while attending school, but then he found a job as a security guard which suited his needs better for part-time work. Thereafter, he resigned his work with Employer. [Testimony of Mr. Khang.] The Hearing Officer finds Mr. Khang's testimony to be credible. Furthermore, Mr. Khang's testimony is uncontested, given that Mr. Aldan failed to appear for a scheduled hearing on April 10, 2014, in which he was to testify.

During the course of three hearing sessions (March 3 to April 10, 2014), President Zhang testified that his company was going to be awarded a large contract to renovate the Youth Center on Saipan. Mr. Zhang presented a letter from the Northern Marianas Housing Corporation ("NMHC") confirming that NMHC had selected his company to perform a sizeable renovation project. See Hearing Exhibit 4 [letter from NMHC Director Jesse S. Palacios to Mr. Khang, dated 3/26/14.] By the last hearing on April 10, 2014, the contract had been approved. [Testimony of Mr. Khang on 4/10/2014.]

At the April 10th Hearing, President Khang confirmed that the renovation project for NMHC is ready to begin and that his company needs additional workers for that project. Khang confirmed that he has already hired one U.S. citizen and he intends to hire one more U.S. citizen as a construction helper. That would give Employer 3 U.S. citizen workers out of a total work force of 7 people – well within the 30% target set by the Department as a minimum percentage of U.S. citizens in an Employer's workforce. See 3 CMC § 4525(a) and Employment Rules & Regulations at § 80-30.3-440.

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. 3 CMC § 4525(a) and Regs. at § 80-30.3-440.

The Department recognizes that it may take some employers time and effort to achieve the goal of employing 30% of their workforce as U.S. citizens and/or permanent residents. Nevertheless, Employers who are not in compliance with the 30% target are expected to cooperate with the Citizen Job Placement Section in order to demonstrate that they are making a good faith effort to hire U.S. citizens, U.S. permanent residents and CNMI permanent residents. [Testimony of Ben Castro.]

In this case, the Hearing Officer finds that insufficient evidence was presented to prove that Employer's hiring practices were in bad faith in December 2013 and January 2014. In December 2013, Employer hired one U.S worker (Aldan) who was referred by the Citizen Job Placement Section. Mr. Khang's uncontested testimony was that this employee decided to leave his employment in January 2014, not because he wasn't being given a full schedule, but because he was returning to college and needed a partial night-time job. As to other hires, Employer was holding up its hiring until its contract to perform a large renovation project was approved by the CNMI government. When that project was approved in April 2014, Employer immediately hired one citizen and indicated his willingness to work with the Citizen Job Placement Section to hire a second construction helper. Such conduct demonstrates a good faith effort to hire U.S. citizens or permanent residents. Accordingly, no sanctions are warranted.

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Good cause having been shown, IT IS HEREBY ORDERED:

1. **Holding:** Insufficient evidence was presented to prove that Respondent 3 K Corporation engaged in bad faith hiring practices in December 2013 and January 2014. Recent evidence shows that Respondent's hiring practices in April 2014 have improved its percentage of U.S. qualified workers and demonstrated a newly enhanced effort to hire and employ U.S. citizens for its business.

2. **Cooperation with Citizen Job Placement Section:** Respondent 3 K Corporation is WARNED that it has a continuing obligation to employ U.S. citizen workers and permanent residents when they are qualified and available to perform jobs offered by Respondent. Respondent's efforts should include posting all job vacancies and job renewals on the Department's website (www.marianaslabor.net) in accordance with Regulations at § 80 – 30.3-205. When vacancies or renewals occur, Respondent should evaluate all referrals received from the Citizen Job Placement Section and hire such referrals when they are qualified and available to work.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: April 15, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:) Department of Labor Enforcement Section,) Complainant,)) **v.**)) Triple J Saipan, Inc.,) *dba* Triple J Office, Triple J Motors,) Truong's Restaurant, Capricciosa,) Tony Romas, *et al.*,) Respondent.))	CAC No. 14-010-03 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on March 28, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ben Castro; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa. Respondent Triple J Saipan, Inc., appeared through its Corporate Director of Human Resources, Francisco S. Ada, Jr., and its Executive Administrative Assistant, Micah Parico-Acuovera. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on March 11, 2014, against respondent Triple J Saipan, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Departmental Regulation that requires an employer to file an "Employer Declaration" with the Citizen Job Placement Section within 14 days after publication of a job vacancy on the Department's website. [Regs. at § 80-30.3-450.] This requirement is met if the employer posts, in a timely fashion, a short response on the website, explaining: (1) the action taken with respect to each applicant who posted a

response to the job vacancy; and (2) the reason(s) why that person was not hired for the position.[1]

> § 80-30.3-450 Employer Declaration. In the event that a citizen, CNMI permanent resident, or U.S. permanent resident was not hired, within fourteen (14) days after publication, the employer shall file a declaration on a standard form in digital format with respect to the citizens and permanent residents who applied for the job, [stating] the action taken on each application, and a short statement of the reasons for rejecting any applicant who was referred. No declaration is required if a citizen or permanent resident is hired.

The basic facts, as stated in the Determination, were confirmed by the Employer at the Hearing. In the period from October 2013 through January 2014, Employer posted vacancy notices on the Department's website (www.marianaslabor.net) for several positions, including: executive administrative assistant, server, warehouse worker, inventory clerk, cook and accounting associate. [Determination at ¶¶ 2-3.] A number of applicants responded to the advertisements by posting their names, telephone numbers and resumes on the website. As of March 11, 2014, Employer had failed to post a response as to each of the job applicants.

Enforcement then filed this Agency case, charging Employer with violating the above-cited "Employer Declaration" Regulation. [Regs. § 80-30.3-450.] For this violation, Enforcement asked for the maximum sanction of $2,000 against this employer. [See Determination (Hearing Exhibit 1) at page 2.]

At Hearing, Employer's Corporate Director of Human Resources and his Executive Administrative Assistant appeared and testified. Employer admitted that it had not filed a timely Declaration (i.e., digital response) to the six job vacancy announcements listed in the Determination. [Recently, after receiving the Determination, Employer posted responses to some of the job vacancies.]

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[1] There may be some confusion as to the 14-day deadline. The Regulation states that an employer "shall file [the required declaration]..within fourteen (14) days after publication...." Reading the entire phrase in the context of the paragraph, "publication" seems to refer to the employer's posting of the job vacancy on the website. [Regs. at § 80-30.3-450.] On the website, each vacancy lists an "opening date" and "closing date." Mr. Ulloa testified that the Citizen Job Placement Section calculates the 14-day deadline as meaning 14 days after the closing date listed on the website. Mr. Ulloa also confirmed that the so-called "declaration" is more in the nature of a digital response posted on the website, rather than a declaration signed under penalty of perjury. [Testimony of James Ulloa.]

Director Ada testified that for the past several years, it has been his company's practice to post responses to job applicants on the website within the 14-day deadline. The Director noted that in recent months his Executive Assistant, Ms. Parico-Acuovera, has been assigned the task of posting the company's responses. The Executive Assistant admitted that in the latter part of 2013 (October-December 2013), she had neglected to post online responses due to her unusually heavy workload during that period. Ms. Parico-Acuovera noted that her conduct was an oversight rather than a deliberate attempt on the company's part to violate the law.

Beyond the issue of whether the Employer had posted its "declaration" on the website, the Hearing Officer sought evidence to determine whether the Employer had actually *contacted, interviewed and considered* local job applicants who responded to the online job vacancies. A full examination of Employer's hiring practices could establish whether Employer's violations were technical in nature, or rather, an indication of Employer's lack of good faith in hiring.[2]

Employer's management testified that they had contacted, or attempted to contact, every applicant who had posted an online response to the posted job vacancies. Whenever possible, Employer made arrangements for an interview, conducted the interview and followed up to inform the applicant of the company's decision. Several applicants were hired or, at least, offered a job. In one case, the applicant was not selected for the particular job, but she was offered an opportunity to interview for a different position. One or two applicants failed respond to numerous attempts by Employer to contact them. Employer's efforts included making several phone calls, leaving messages, and even sending letters to the applicant asking them to call to set up an interview.

Employer contended that it had considered and acted upon every applicant who had posted his or her name for the available positions. [Testimony of Mr. Ada and Ms. Parico-Acuovera.] Employer's testimony was uncontested.

The Hearing Officer finds the testimony of Employer's representatives to be credible. The uncontested testimony establishes that Employer acted in good faith

[2] An example of a "technical" violation would be an employer who neglected to post its "declaration" on the website, but who had actually contacted, interviewed and evaluated each local job applicant – in other words, who had made a good faith effort to hire the U.S. citizens and permanent residents who applied for the job. A more fundamental violation of CNMI Workplace regulations would be signified by an employer who not only failed to post a declaration, but also neglected to contact or consider any of the local job applicants who had posted online responses to the Employer's job vacancy. [See, e.g. *Enforcement v. RJCL Corporation*, C.A.C. No. 14-008-03 (Admin. Order issued by J.Cody on 4/07/14.]

to attempt to hire U.S. citizens and permanent residents for these job vacancies. The Employer demonstrated its good faith no only by posting available jobs on the Department's website, but by actually contacting, interviewing and evaluating the applicants to assess their qualifications and suitability for the available positions.

Finally, Director Ada noted that Employer has a long-standing record as a reputable employer that abides by local labor laws and regulations. The Director noted that about 48% of Employer's total, current work force consists of U.S. qualified workers, which is greater than the 30% target set by the Department of Labor. Director Ada stated that Employer remains fully committed to hiring a maximum number of qualified U.S. citizens or permanent residents. Director Ada and his Executive Assistant promised to take steps to ensure that Employer files timely declarations (i.e., responses) to each job vacancy posted in the future.

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. 3 CMC § 4525(a) and Regs. at § 80-30.3-440; see also § 80-30.3-300. In furtherance of this goal, the Department requires employers to post job vacancy announcements on the Department's website. [See, e.g. Regs. at §§ 80-30.3-205 and 230.]

In this case, Enforcement charged Employer with violating a Regulation that requires an employer to file a "declaration" with the Citizen Job Placement Section within 14 days after publication of a job vacancy on the Department's website. [Regs. at § 80-30.3-450.] As noted above, the Regulation requires an employer to post, in a timely fashion, a short response on the website, explaining: (1) the action taken with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. *Id.*

In its Determination, Enforcement moved for the maximum fine of $2,000 against Employer for its conduct. After hearing Employer's testimony, Enforcement stated that it would leave the decision on sanctions to the discretion of the Hearing Officer.

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed

$2,000 for each violation. 3 CMC § 4528(f)(2). Nevertheless, the amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of *justice* and *fairness* in proceedings." Regs. at § 80- 50.4-820(h) and (o) (emphases added).

Applying the above standards to this case, the Hearing Officer concludes that this Employer should not be ordered to pay a monetary sanction. Although Employer failed to file a declaration (i.e., online response) on the website, Employer's overall effort to evaluate and consider all local applicants, was exemplary. As stated above (p. 3), Employer's management contacted, or attempted to contact, every applicant who had posted an online response to the posted job vacancies. This fact, taken together with Employer's record of hiring many U.S. qualified employees, leads the Hearing Officer to conclude that it is appropriate in this case to issue a warning to the Employer rather than a monetary fine.

Employer's management admitted its mistake in failing to post a timely declaration or online response describing its efforts to evaluate U.S. qualified, online job applicants. Executive Assistant, Ms. Parico-Acuovera, acknowledged the oversight and promised to correct it in the future. The Employer is hereby warned that any failure to submit a timely declaration (online response) in the future may result in monetary sanctions.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Respondent Triple J Saipan, Inc. is found to have violated the Employment Rules and Regulations at § 80 – 30.3-450, by not filing timely responses to each job applicant for the applicable job vacancies. For the reasons stated above, the Hearing Officer concludes that Employer shall not be sanctioned with a monetary penalty in this case. 3 CMC §§ 4947(d)(11) and Regs. at § 80 – 50.4-820(o) .

2. **Warning:** Respondent is ORDERED to continue posting all job vacancies and job renewals on the Department of Labor website (www.marianaslabor.net), in accordance with Regulations at § 80 – 30.3-205. Furthermore, Respondent is warned that any failure in the future to post the required declaration (online response) in a timely manner (within 14 days of the publication of each job

vacancy), pursuant to Regulations at § 80 – 30.3-450, could subject Employer to monetary sanctions in an amount to be determined in a due process hearing.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: April 7, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:) Department of Labor Enforcement Section,) Complainant,)) **v.**)) Ken Aqua Hotel and Resort, Inc.,) *dba* Aqua Resort Club Saipan,) Respondent.))	CAC No. 14-012-03 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on March 21, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ben Castro; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa and Yvonne S. Taisacan. Respondent Ken Aqua Hotel and Resort, Inc., appeared through its Human Resources Manager, Becky Cruz, its Director of Operations, Sachiko Mafnas, and its General Manager, Hiroyuki Toyoshima. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on March 5, 2014, against respondent Ken Aqua hotel and Resort, Inc., *dba* Aqua Resort Club Saipan ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. 3 CMC § 4525(a) and Regs. at § 80-30.3-440; see also § 80-30.3-300.

Among other things, Department Rules and Regulations ("Regulations") state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis (under any new employment arrangement, any renewal of any existing employment arrangement, or any transfer) **must** post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regulations at § 80-30.3-205 (emphasis added). "There are no waivers available with respect to the job vacancy announcement requirement." *Id.* at § 80-30.3-230.

The Regulations also require employers to file a declaration:

> § 80-30.3-450 Employer Declaration. In the event that a citizen, CNMI permanent resident, or U.S. permanent resident was not hired, within fourteen (14) days after publication, the employer shall file a declaration on a standard form in digital format with respect to the citizens and permanent residents who applied for the job, [stating] the action taken on each application, and a short statement of the reasons for rejecting any applicant who was referred. No declaration is required if a citizen or permanent resident is hired.

In its Determination, Enforcement charged Employer with violating the above-noted Regulation [§ 80-30.3-450] by failing to file an Employer Declaration regarding its hiring process with respect to jobs posted by the Employer in October and November 2013.

The basic facts, as stated in the Determination, were confirmed by the Employer at the Hearing. In October and November 2013, the Employer posted vacancy notices on the Department's website (www.marianaslabor.net) for several positions: a lifeguard, a groundskeeper, an asst. front office manager, and two housekeeping cleaners. [Determination at ¶¶ 2-3.] A number of applicants had applied for each position by posting their name, telephone number and resume:

> Lifeguard – 1 position - 2 applicants applied;
> Grounds Cleaner – 1 position - 4 applicants applied;
> Asst. Front Office Manager: 1 position - 1 applicant applied;
> Housekeeping Cleaners: 2 positions - 7 applicants applied. [1]

[1] The Department moved into evidence written print-outs for each posted position. Each print-out contained the job description, qualification requirements, employer information and the names of the applicants who posted a response to the position. Print-outs for the lifeguard position were entered as Hearing Exhibit 2; print-outs for the groundskeeper position were entered as Hearing Exhibit 3; print-outs

After posting these available jobs on the website, Employer never submitted an Employer Declaration detailing its actions with respect to each of the job applicants. Enforcement brought this Agency case, charging the Employer with failure to follow the Regulations regarding the Declaration [Reg. at § 80-30.3-450]. For this violation, the Department asked the Hearing Officer to issue a sanction of $2,000 plus any other sanctions the Hearing Officer deemed appropriate.

At Hearing, Human Resources Manager, Becky Cruz, admitted that Employer had not prepared or sent a Declaration to the Department of Labor, detailing its action on these job applicants. Ms. Cruz testified that she had been unaware of the regulatory requirement to submit a Declaration. However, Cruz established through her credible testimony that Employer considered and acted upon every applicant who had posted his or her name for the available positions.

Many of the applicants had been rejected because they didn't have the required qualifications. For example, applicants for the lifeguard job did not hold a lifeguard certification; the applicant for the asst. front office manager job was not a college graduate, had no supervisory experience and was not fluent in Japanese. Other applicants voluntarily dropped out of the process after they were contacted by the Employer. Still other workers failed to respond or answer their phones when Ms. Cruz made numerous attempts to telephone them at the telephone number they had posted. [See testimony of Becky Cruz.]

The Hearing Officer finds the testimony of Ms. Cruz to be credible. The testimony demonstrates that Employer acted in good faith to attempt to hire U.S. citizens and permanent residents for these job vacancies. This was done by the Employer not only by utilizing the Department's website to post available jobs, but by actually considering and evaluating each applicant to assess their qualifications and suitability for the available positions.

The Employer pointed out that is has a long-standing record as a reputable employer that abides by local labor laws and regulations. Ms. Cruz repeated that her failure to post the Employer Declaration was an oversight rather than a deliberate attempt to circumvent the law. Ms. Cruz also noted that the Employer currently employs 41 citizens and/or permanent residents out of a total workforce of 91 employees, which percentage exceeds the 30% target set by the Department.

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for the asst. front office manager position were entered as Hearing Exhibit 4; print-outs for the two house-keeping cleaner positions were entered as Hearing Exhibits 5 and 5A, respectively.

DISCUSSION

In its Determination, Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. After hearing Employer's testimony, Enforcement left the decision on sanctions to the discretion of the Hearing Officer.

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

Applying the above standards to the facts of this case leads this Hearing Officer to conclude that a monetary sanction is not warranted against this Employer. The evidence shows that Employer, indeed, failed to file an Employer Declaration in violation of Departmental Regulations. [Regs. at § 80 – 30.3-450.] However, the Hearing Officer finds that Employer should be given a suspended fine for this violation.

The request for sanctions should be mitigated by the fact that Employer demonstrated good faith in attempting to hire citizens and permanent residents. It did this not only by posting job vacancies on the Department website, but then by *actually considering and evaluating* each applicant who posted a response on the website. Employer's only mistake was in not reporting its efforts in a Declaration. The company's HR Manager acknowledged the oversight and promised to correct it in the future. Further, evidence shows that this Employer has a good record in employing U.S. citizens and/or permanent residents. The Employer is warned to be mindful of the need to submit an Employer Declaration in the future.

Accordingly, the Hearing Officer shall issue a monetary sanction of $500, but it shall be suspended, and then extinguished automatically after one year, provided that Employer complies with the terms of the Order, set forth below.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanction:** For the reasons stated herein, Respondent is hereby FINED five hundred dollars ($500); however, the entire fine is hereby SUSPENDED for one year, and shall be automatically extinguished at the end of that time, provided that (1) Respondent posts its Employer Declaration as to the job vacancies at issue in this case within the next fifteen days; and (2) Respondent does not violate Department of Labor statutes or regulations during the next year. 3 CMC §§ 4528(a) and (f)(2).

2. **Posting Job Vacancies on Website:** Respondent is ORDERED to continue posting all job vacancies and job renewals in the future on the Department of Labor website (www.marianaslabor.net), in accordance with Regulations at § 80 – 30.3-205. Respondent shall consider all referrals received from the Citizen Job Placement Section and hire referrals when they are qualified and available to work.

3. **Posting Declaration:** Respondent is further reminded of its continuing obligation to post an Employer Declaration in digital format within 14 days of the publication of each job vacancy, pursuant to Regulations at § 80 – 30.3-450. Failure to do so in the future could subject Employer to sanctions, after a due process hearing.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 25, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Suwaso Corporation, *dba* Coral Ocean Point Resort Club, Respondent.	)	CAC No. 14-014-03 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on April 8, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ben Castro; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa. Respondent Suwaso Corporation appeared through its Acting Human Resources Manager, Bertha C. Leon Guerrero. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on March 25, 2014, against respondent Suwaso Corporation, *dba* Coral Ocean Point Resort Club ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Departmental Regulation that requires an employer to file a "declaration" (online response) with the Citizen Job Placement Section within 14 days after publication of a job vacancy on the Department's website. [Regs. at § 80-30.3-450.] This requirement is met if the employer posts, in a timely fashion, a short response on the website, explaining: (1) the action taken with respect to each applicant who

posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position.[1] *Id.*

The basic facts stated in the Determination were confirmed by the Employer at the Hearing. In the period from October through December 2013, Employer posted vacancy notices on the Department's website (www.marianaslabor.net) for several positions, including: food and beverage manager, propogation worker, purchasing clerk, accounts receivable clerk, and human resources assistant. [Determination at ¶¶ 2-3.] A number of applicants responded to the advertisements by posting their names, telephone numbers and resumes on the website. As of March 25, 2014, Employer had failed to post a response as to each of the job applicants. [Recently, after receiving the Determination, Employer posted responses to the job vacancies.]

At Hearing, Employer's Acting Human Resources Manager, Bertha C. Leon Guerrero, appeared and testified. Ms. Guerrero admitted that Employer had not filed a timely declaration (digital response) to the five job vacancy announcements listed in the Determination. Ms. Guerrero testified that no responses were filed because she had not known about the "Employer Declaration" Regulation. [Testimony of Ms. Guerrero.]

Beyond the issue of whether the Employer posted its "declaration" on the website, the Hearing Officer sought evidence to determine whether the Employer had actually *contacted, interviewed and considered* U.S.-qualified job applicants who responded to the online job vacancies. A full examination of Employer's hiring practices could establish whether Employer's violations were technical in nature, or rather, an indication of Employer's lack of good faith in hiring.

Employer's HR Manager gave detailed, credible testimony demonstrating that the company had contacted, interviewed or considered every applicant who had posted an online response to the posted job vacancies. The Employer reviewed all digitally posted resumes. If an applicant's resume established even minimum qualifications for the position, that person was interviewed. In two cases (F&B Manager and accounts receivable clerk), a walk-in, U.S. citizen candidate was hired over other applicants, due to the applicant's superior experience. In one case (purchasing clerk), the company decided to fill the position with an existing

[1] The Citizen Job Placement Section calculates the 14-day deadline in the Regulation as meaning 14 days "after the closing date listed on the website." [Testimony of Mr. Ulloa.] The so-called "declaration" is more in the nature of a digital response posted on the website, rather than a declaration signed under penalty of perjury. *Id.*

(U.S. citizen) worker by means of an internal transfer. In one case (propogation employee), none of the online applicants were deemed to be qualified and the position has yet to be filled. In one case (human resources assistant), none of the U.S. citizen applicants were found to be qualified and a CW-1 worker was renewed in the position.

The Employer notified every online applicant, in writing, informing the applicant that he or she had not been selected for the position. [An example of such a employer letter was entered into evidence at Hearing Exhibit 2.]

Note re Interviews: I note that the Employer in this case did not interview all online applicants. Employer first reviewed the applicants' posted resumes to determine whether they possessed the required level of education and job experience for the position; those persons who even marginally met the job qualifications were interviewed. This is acceptable practice according to the Citizen Job Placement Section. Mr. Ulloa confirmed that there is no CNMI statute or regulation that requires employers to interview *every* applicant, without regard to that person's experience. [Testimony of Mr. Ulloa.] It would waste both parties' time to require employers to interview job applicants who, on the face of their resumes, lack the required qualifications for the position.

HOLDING: Employer admitted that it did not file online responses within the 14 days required by "Employer Declaration" Regulation [Regs. at § 80-30.3-450]. Nevertheless, credible testimony establishes that Employer acted in good faith to attempt to hire U.S. citizens for these job vacancies. The Employer demonstrated its good faith not only by posting available jobs on the Department's website, but by reviewing all posted resumes and by interviewing and evaluating many U.S. citizen applicants to assess their qualifications and suitability for the available positions. In the end, Employer filled nearly all vacancies with U.S. citizens.

The evidence establishes that Employer's failure to post online responses was an oversight caused by the HR Manager's lack of knowledge of the Regulation, rather than a deliberate attempt to violate the law. The HR Manager promised to take steps to ensure that in the future the Employer files timely declarations (i.e., online responses) to each online applicant.

SANCTIONS: In the Determination, Enforcement requested a fine of $2,000 against Employer for its conduct. After hearing Employer's explanation of its efforts to consider all online applicants, Enforcement stated that it would leave the decision on sanctions to the discretion of the Hearing Officer.

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2). Nevertheless, the amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of *justice* and *fairness* in proceedings." Regs. at § 80- 50.4-820(h) and (o) (emphases added).

Applying the above standards to the facts of this case, the Hearing Officer concludes that a warning is appropriate in this case rather than a monetary fine. Although Employer failed to file online declarations, Employer's overall effort to evaluate and consider all local applicants, was exemplary. As stated above, Employer's management reviewed and evaluated all posted resumes, then interviewed all applicants who were deemed even minimally qualified for the announced positions. Employer also notified every online applicant as to the results of the hiring process after a decision had been made. Furthermore, Employer hired several U.S. citizens in this process, though they were walk-in applicants who had not posted on the website. Finally, the HR Manager has indicated that this conduct will be corrected in the future, now that she has been educated about the need to file the Employer Declaration. Taken together, these facts mitigate against imposing a monetary sanction. A warning will be sufficient to correct the Employer's failure to post declarations.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Respondent Suwaso Corporation is found to have violated the "Employer Declaration" Regulation [§ 80 – 30.3-450] by not filing timely declarations with respect to the above-described job vacancies. For the reasons stated above, the Hearing Officer concludes that Employer should receive a warning rather than a monetary penalty in this case. 3 CMC §§ 4947(d)(11) and Regs. at § 80 – 50.4-820(o) .

2. **Warning:** Respondent is hereby WARNED that any failure in the future to post the required declaration (online response) in a timely manner (within 14 days

of the closing date of each job vacancy), could subject Employer to monetary sanctions, in an amount to be determined after a due process hearing.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: April 9, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-015-04
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	**GRANTING REQUEST**
v.	)	**TO REINSTATE**
	)	**SUSPENDED SANCTION**
Sara Enterprises, Inc.,	)	
dba Sara Market II,	)	
Respondent.	)	
	)	

This Hearing was held on January 7, 2015, at 1:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor to consider the Request To Reinstate The Suspended Sanction, filed by the Department of Labor Enforcement Section on December 11, 2014 ("Request").

The Department's Enforcement Section was represented by James Ulloa. Respondent Sara Enterprises, Inc., *dba* Sara Market II ("Respondent"), was represented by its President, Ko, Eui Suk, and its agent/translator, Cho, Jin Koo. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

On July 11, 2014, this Hearing Officer issued an Administrative Order ("Order") that fined Respondent for submitting a series of Total Workforce Listing documents which were rife with errors and omissions. In the Order, the Hearing Officer noted that Respondent's habit of submitting inaccurate documents to Department officials had caused the Citizen Job Placement Section and the Enforcement Section to spend needless time and effort. Department officials struggled to decipher Respondent's confusing entries in order to determine whether Employer was submitting fraudulent documents. Ultimately, the Hearing Officer found there to be insufficient to conclude that Respondent's various mistakes were *deliberate* attempts to mislead. Nevertheless, the Hearing Officer sanctioned Respondent for its "careless misstatements" that wasted the Department's time, effort and resources. *Id.* at p. 6.

In the Order, the Hearing Officer fined Respondent one thousand dollars ($1,000) but suspended $300 of that fine for one year on the condition that "Respondent commits no further violations of CNMI labor law in that period." *Id.* at p. 7, ¶ 1. Additionally, the Order at page 8 contained two paragraphs reprinted below:

> 2. **Continuing Contact between Respondent and DOL's Citizen Job Placement Section:** Respondent Sara Enterprises, Inc. is ORDERED to submit an updated Total Workforce Listing to James Ulloa of the Citizen Job Placement Section **every four months** for one year from the date of this Order. [The Total Workforce Listings shall be due on November 15, 2014; March 15, 2015; and July 15, 2015. The Citizen Job Placement Section is directed to review each of the above-noted documents for the purpose of ensuring Employer's continued employment of U.S. citizens and/or permanent residents in its workforce.
>
> 4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of the suspended portion of the above-noted fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

In the Request filed in December 2014, Enforcement stated that as of that date - December 11, 2014 - Respondent had not submitted an updated Total Workforce Listing which had been ordered to be submitted by November 15, 2014. Order at p. 8, ¶ 2. This Hearing followed.

At Hearing, Respondent's President testified that he did not submit the updated Total Workforce Listing because *he had not read the Administrative Order* issued in July 2014, after he was served with it; therefore, he did not know that documents were required in the future. Ko explained that he had picked up the Order from the Hearing Office and understood that he needed to pay $700; however, President Ko never read the Order. Ko also never bothered to show the Order to his agent and translator, Cho, Jin Koo, so that he could translate the Order. This neglect was surprising, given that the President had used Mr. Cho as his translator during the hearing. (President Ko also used Mr. Cho as translator in the current hearing.)

The Hearing Officer is completely nonplused by President Ko's admission that he never read the Order; the Order which discussed the company's past inadequate

responses to Departmental requests; the Order which noted the President's cavalier signing of inaccurate documents under the *penalty of perjury*; the Order which set forth a specific schedule for Respondent's future production of specific documents. President Ko missed it all because he did not read the Order and did not bother to have it translated. The level of negligence displayed in this matter by the President (and General Manager), Ko Eun Suk, is difficult to fathom.

In short, Respondent has no valid excuse for missing the deadline to produce an updated Total Workforce Listing in November 2014. At Hearing, Respondent produced the document, which was entered into evidence as Hearing Exhibit 1.

Months after the last hearing in which Respondent was held to have wasted the Department's time and resources, Respondent's current conduct is once again causing Enforcement to expend time and effort simply to get Respondent to meet its obligation to produce documents. If Respondent needs a reminder to submit timely documents, perhaps a $300 fine will serve to jog Respondent's memory.

Based on the facts presented, the Hearing Officer finds good cause to reinstate the $300 portion of the prior Order, which continues to be in effect. ***Respondent is reminded that it has a continuing obligation to produce documents, pursuant to the terms of that Order.*** If Respondent fails to produce an updated Total Workforce Listing by either of the next two specified dates (March 15 and July, 2015), Enforcement may seek further sanctions against Respondent.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent Sara Enterprises, Inc. is hereby ORDERED to pay the previously suspended $300 fine for its failure to comply with the terms of the Administrative Order issued in this case on July 11, 2014. 3 CMC §§ 4528(f)(2) and 4947(11). Respondent is required to pay the fine **no later than January 30, 2015**. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. **Continuing Obligation:** Pursuant to the terms of the prior Administrative Order issued in this case on July 11, 2014, Respondent has a continuing obligation to provide updated Total Workforce Listing documents to James Ulloa of the Citizen Job Placement Section. According to the schedule listed in the prior Order, the documents are due on March 15, 2015, and July 15, 2015. Failure to comply with these deadlines may result in further sanctions against Respondent.

[CAC No. 14-015-04]

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: January 8, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-043-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Himawari Saipan, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on October 28, 2014, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa and Ben Castro. Respondent Himawari Saipan, Inc. appeared through its Vice President, Tatsuhito Suzuki, and its accountant, Anita Cornista. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on September 16, 2014, against respondent Himawari Saipan, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are as follows. In April 2014, Employer arranged for a radio advertisement to run on KWAW FM radio (MAGIC 100.3) advertising job openings for three positions: one baker, one waitress and one cook. Employer did not post the above-noted jobs on the Department of Labor website (www.marianaslabor.net). [Determination; testimony of Mr. Suzuki.]

No applicants responded to any of the radio advertisements. Employer did not hire anyone for these positions in response to the advertisements. A short while later, however, two permanent residents approached the restaurant looking for work and Employer hired them as waitresses.

The Department brought this Agency Case charging that Employer violated CNMI Rules and Regulations ("Regs.") by failing to post job announcements on the Department's website at wwwmarianaslabor.net. See Regs. at § 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state:

> An employer *who intends to hire or renew a foreign national worker*, transitional worker, or nonimmigrant alien on a full-time basis (under any new employment arrangement, any renewal of any existing employment arrangement, or any transfer) must post a job vacancy announcement on the Department's website, www.marianaslabor.net. [Emphasis added.]

At Hearing, Employer's representatives admitted that they had not posted the three jobs on DOL's website, but chose instead to use a radio advertisement. The representatives could not explain why they had opted for the radio ad. Accountant Anita Cornista testified that the company retrieved "certifications" from KWAW FM radio, certifying the dates on which the advertisements were run. Ms. Cornista said that these documents would have been needed if Employer hired a foreign national worker for these positions.[2] In the end, however, Employer did not hire anyone for the "baker" and "cook" positions and later, Employer hired two permanent residents for the "waitress" position.

In September, Employer resumed posting job announcements on DOL's website. Employer posted several job announcements on the website on the same day that Employer was served with this Determination. Employer claims it made the decision to post before it received the Determination, but again, the representatives could not explain why they stopped using the radio and resumed using the website. [Testimony of Ms. Cornista.]

The legal question that arises is whether Employer actually violated the above-cited Regulation, given that Employer *never actually hired* a foreign national worker for the vacant positions.

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[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

[2] The Hearing Officer takes judicial notice (Regs. at § 80 – 50.4-735) of the fact that these "certifications" issued by the radio station are used by employers who file CW-1 petitions, as proof that the employer made an attempt to find available, qualified U.S. citizens or permanent residents for the job at issue.

CONCLUSIONS OF LAW

Employer did not violate the Regulations by failing to post job announcements.

The Regulation requires an Employer to post a job announcement on the Department's website if the Employer "intends to hire a foreign national worker...." Regs. at § 80–30.3-205; NMIAC § 80-20.1-225(a). In this case, nobody responded to Employer's radio advertisements and no foreign national worker was hired by the Employer for the advertised positions. Based on the evidence, it is not entirely clear that Employer "intended to hire a foreign national worker" as stated in the Regulation.

Employer's accountant admitted that Employer would have considered hiring a foreign national worker if one had applied, but Employer might also have hired a U.S. worker or permanent resident if a citizen or permanent resident responded to the radio advertisement. This is proven by the fact that Employer did, in fact, hire two permanent residents who walked into the business and applied for the "waitress" position a short while after the advertisement stopped. [Testimony of Ms. Cornista.]

Based on the above facts and law, the Hearing Officer concludes that evidence is insufficient to establish that Employer had a specific intent to hire a foreign national worker at the time it posted the radio advertisement. Subsequent to the advertisement, Employer did not hire a foreign national worker but did hire two permanent residents. On these facts, there is insufficient evidence of Employer's "intent" and thus, all elements of the alleged violation are not proven. In short, Enforcement did not prove that Employer violated the provisions of Regulation section 80–30.3-205; NMIAC § 80-20.1-225(a). Accordingly, judgment should be entered in favor of respondent Himawari.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered in favor of Respondent Himawari Saipan, Inc.

2. **Warning:** Notwithstanding the above ruling, Respondent Himawari Saipan Inc. is WARNED that the terms of the prior Administrative Order, issued in Compliance Agency Case No. 13-021-12, on March 7, 2014, remain in effect. Employer must continue to comply with those terms or risk having the suspended sanction in that case reinstated.

[CAC No. 14-043-09]

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 1, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-018-04
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
World Corporation,	)	
dba Saipan World Resort,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on May 12, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ben Castro; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa. Respondent World Corporation, *dba* Saipan World Resort, appeared through its Acting Assistant Human Resources Manager Jun Ham, H.R. clerk Evelyn Crisostomo and its counsel, Rex Kosack. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on April 29, 2014, against respondent World Corporation, *dba* Saipan World Resort ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Departmental Regulation that requires an employer, under certain circumstances, to file a "declaration" on the Department's website (www.marianaslabor.net) within 14 days after publication of a job announcement. [Rules and Regulations ("Regs.") at § 80-30.3-450.]

The Determination noted that in October 2013 and March-April 2014, Employer posted job announcements on the Department's website for four positions: a "general affairs" position, one server, one landscaper and one housekeeping attendant. [Determination at ¶¶ 2-3.] A number of applicants responded to the announcements by posting their names, telephone numbers and resumes on the website. On the Department's website, the positions were listed as closing on April 5, 2014. As of April 20, 2014, Employer had not posted responses for any of the four positions. The Department charged that Employer violated the "Employer Declaration" regulation (§ 80-30.3-450) by not filing timely declarations for these four positions.

Employer presented two employees who provided credible testimony regarding its hiring practices: Human Resources ("HR") clerk Evelyn Crisostomo and Assistant HR Manager Jun Ham. Ms. Crisostomo posts the Employer's job announcements, reviews online responses and notifies online "applicants" about Employer's hiring procedures. Once someone is hired, Ms. Crisostomo posts the Employer's online responses (declaration) on the Department's website. Asst. HR Manager Ham conducts preliminary interviews and final interviews at the Employer's HR Department and participates in all hiring decisions. [Testimony of Ms. Crisostomo and Mr. Ham.]

Employer has designed a multi-step hiring process. First, Employer posts job announcements on the Department's website. Employer (Ms. Crisostomo) then contacts all online responders by telephone and e-mail and instructs them to visit the premises of Saipan World Resort to fill out a job application and submit proof of I.D. and a copy of a high school diploma or equivalent degree. The application and documentation are then reviewed by the HR Department and a "preliminary interview" is scheduled and conducted. After all eligible applicants have been interviewed, the top 2-3 applicants are selected for a "final" interview which is conducted by a management committee. The committee then votes on the applicants and the top choice is hired. At that point, Employer notifies the Department's Citizen Job Placement Section as well as each online applicant regarding its hiring decision. [Testimony of Ms. Crisostomo and Mr. Ham.]

Employer's hiring process usually takes 4 to 6 weeks from beginning to end: i.e., from receipt of the application to the hiring decision. Employer utilizes the Department's website but also places job announcements in the newspaper and on television, contacts the Northern Marianas College and the Northern Marianas Trade Institute, and accepts walk-in applicants. Employer has a policy of keeping all applications on file for three months. An applicant who is not chosen for one

position may be considered for a different position when one arises. Manager Ham estimates that Employer has about 5 positions opened monthly and hires 50 to 60 people each year. [Testimony of Asst. Manager Ham.]

As to the specific positions that are referenced in the Determination, the Employer presented the following uncontested evidence.

General Affairs position: Employer characterized this announcement as a mistake as it should have said "General Affairs *Manager*." Two local applicants responded to the announcement. The Employer contacted both applicants and told them about the mistake. The applicants also applied for other positions at the company. Prior to the closing date of the announcement (10/15/2013), Ms. Crisostomo contacted the Department of Labor and informed the staff of the company's mistake. [Testimony of Ms. Crisostomo.]

Server position: Eight applicants posted online responses to this job. Employer contacted each responder and told him or her to come to the resort and fill out applications and be interviewed. In the end, Employer hired a U.S. citizen who applied after learning of the position from another source. The Employer's hiring decision was made on April 28, 2014. *Id.*

Landscaper position: Two people responded online to the position. Employer contacted both applicants by e-mail and told them to come to the resort to fill out applications and be interviewed. The applicants did not fill out applications. Ms. Crisostomo then tried to contact them by telephone, but she was unable to reach them. Employer did not find anyone who was qualified and acceptable for the position; therefore, the job was not filled. Employer then decided to re-advertise the position; a job announcement ran from April 7 to 14, 2014. Interviews are on-going and, as of the date of Hearing, nobody had yet been hired for that position.\

Housekeeping Attendant position: Eight people responded online to the position. Employer contacted each person by e-mail and telephone to inform them to come to the resort to fill out an application for a possible interview. All 8 people were informed but only one person submitted an application. On the day of the preliminary interview, the applicant was not feeling well and left before the interview was conducted. Employer re-scheduled the preliminary interview in mid-May and the applicant was interviewed at that time. Meanwhile, Employer ran another job announcement from April 7 to 14, 2014. At about that time, Employer contacted each of the 8 original respondents again and informed them that there was a second opportunity to interview for the position. Two applicants submitted applications

for the position and the interview process was begun. As of the date of hearing, nobody had yet been hired and nobody had been rejected. In short, the position remains "open." *Id.*

DEFENSES: Employer raised several issues in its defense, asserting that it should not be penalized for failing to post declarations within 14 days of the closing dates.

First, Employer argued that if it hires a U.S. worker, it is not required to file a declaration, according to the plain language of the Regulation (§ 80-30.3-450).

Second, Employer argued that although the Regulation seems to require Employer to file a declaration "within 14 days after publication," it is unrealistic and unreasonable for the Department to expect an employer to make a hiring decision in that 14-day period. The Employer noted that after posting job announcements, the company takes active steps to review applications, schedule interviews and interview job applicants. This hiring process typically takes this Employer 50 to 60 days to complete. [Testimony of Mr. Ham.]

Third, Employer argued that it's obligation to file an Employer Declaration with the Department does not even arise unless the employer has already made the decision not to hire a U.S.-qualified worker. In other words, the "decision not to hire" a U.S. citizen or permanent resident is a condition precedent that triggers the employer's duty to file a declaration. If that decision has not been made, employer has no duty to notify the Department and nothing to report. [1]

CONCLUSIONS OF LAW

1. ***No violation occurred with respect to the first job announcement.*** The Department charged that Employer failed to file timely declarations with respect to four specific job announcements. As to the first job announcement, Employer admitted it had posted the wrong job title. Employer notified the Citizen Job Placement Section and the responders about this mistake before the announcement "closed." Based on these facts the Hearing Officer finds that the Employer provided proper notification and no further "declaration" was required to be filed; therefore, no violation of the Regulations occurred. [Regs. at § 80-30.3-450.]

[1] See Hearing Memorandum at pp. 4-5. In its Hearing Memorandum, Employer also raised a legal issue regarding monetary sanctions; however, given the Hearing Officer's findings in this case (see below), the "sanctions" issue is moot and shall not be addressed here.

2. ***No violation occurred with respect to the second job announcement.*** Employer hired a U.S. citizen (walk-in applicant) for the "server" position. At Hearing and in its Hearing Memorandum, Employer argued that under the plain language of the Regulation (§ 80-30.3-450), if it hires a U.S. citizen it is not required to file a declaration. The Regulation states:

> Employer Declaration. In the event that a citizen, CNMI permanent resident, or U.S. permanent resident ***was not hired***, within fourteen (14) days after publication, the employer shall file a declaration on a standard form in digital format with respect to the citizens and permanent residents who applied for the job, [stating] the action taken on each application, and a short statement of the reasons for rejecting any applicant who was referred. ***No declaration is required if a citizen or permanent resident is hired.***

Regs. at § 80-30.3-450 (emphases added).

The Hearing Officer agrees with the Employer's position on this issue. The plain language of the Regulation states that an employer who hires a citizen or permanent resident is not required to file a declaration with the Department. A U.S. citizen was hired for this job; therefore, no declaration was required to be filed.[2] Accordingly, the Employer did not violate the Regulation with respect to this job announcement.

3. ***No violation occurred with respect to the third job announcement.*** Employer attempted to contact online responders to the landscaper announcement to arrange interviews but neither responder could be reached. No final action has been taken on this position; no U.S. applicant has been rejected and no person has been hired for this job.

As stated above, Employer argued in its defense that if no hiring decision has yet been made and no applicant has been rejected, there is no "triggering event" obligating an employer to file an employer declaration. [See Hearing Memorandum at p. 4:9-11.] The Hearing Officer agrees with Employer's legal position on this issue.

[2] Employer's argument is further supported by other workforce regulations. For example, Regulation § 80-30.3-435(a) states that after receiving a referral from the Citizen Job Placement Section an employer may hire a citizen or permanent resident "rather than a person referred *without any justification required to be submitted to the Department.*" (Emphasis added)

The Employer Declaration Regulation (§ 80-30.3-450) is not a model of clarity. On one hand, the Regulation refers to the time for filing the declaration as "within fourteen (14) days after publication...." On the other hand, the Regulation begins: "In the event that a citizen, CNMI permanent resident or U.S. permanent resident *was not hired,...*" *Id.* (emphasis added). This language strongly implies that a declaration is only required if an applicant (a U.S. citizen, CNMI permanent resident or U.S. permanent resident) has already been rejected. If no hiring decision has been made by the 14th day, the "triggering event" has not occurred and the employer's obligation to file a declaration has not arisen. Indeed, it would serve no purpose for an employer to make a report to the Department before any employment decision has been made.

Given the ambiguity in the language of the Regulation, this Hearing Officer finds that the 14-day "deadline" should not be used as a basis for sanctions, at least in cases where the Employer had not made a hiring decision within the 14-day period after publication.

The Citizen Job Placement Section has stated that it expects each Employer to send a message to the Department within the 14-day period, indicating the current status of its hiring process. [Testimony of James Ulloa.][3] Although the Job Placement Section would prefer to receive such an update, this Hearing Officer does not read the Regulation as *requiring* an update. Thus, an employer's failure to send an update does not constitute a regulatory violation.

4. ***No violation occurred with respect to the fourth job announcement.*** As to the housekeeping attendant position, Employer instructed each applicant by e-mail to fill out and submit an application form, but only one did so. Employer attempted to interview the person, but the interview had to be postponed because the applicant became ill. Employer has re-advertised the position and is still reviewing applicants. No final action has been taken and there has been no decision not to hire an applicant; therefore, no triggering event has occurred that would obligate Employer to file a Declaration. Based on the above facts and analysis of the law, the Hearing Officer finds that Employer has not violated the Employer Declaration Regulation (§ 80-30.3-450) in this case.

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[3] *See, e.g., Enforcement Section v. Asia Pacific Hotels Inc., dba Kanoa Resort*, CAC No. 14-011-03, Admin. Order issued by J.Cody on 4/24/2014, at p. 3.

Summary:

Employer did not file online responses within 14 days of publication of the four job announcements at issue in this case. The Department of Labor alleged that this conduct violated the Employer Declaration Regulation [§ 80-30.3-450]. In one of the four positions, Employer notified the Department in a timely manner that the announcement was a mistake. In another instance, Employer hired a U.S. citizen. In two other instances, a hiring decision has not yet been made. Based on the evidence, the Hearing Officer finds that Employer has not violated the Employer Declaration Regulation.

In so ruling, the Hearing Officer accepts two legal arguments made by the Employer. First, the Hearing Officer affirms, pursuant to the Regulation, that if Employer hires a U.S. citizen, the employer is not required to file a declaration. Second, I find that the employer's obligation to file a declaration does not arise unless a decision not to hire a citizen or permanent resident has been made. If the hiring decision extends beyond the Regulation's 14-day period and the Employer promptly responds once its hiring decision has been made, the Employer should not be sanctioned for failing to provide a declaration within the 14-day period.

Finally, the evidence shows that Employer attempted in good faith to hire U.S. citizens for these job vacancies. Employer reviewed all posted resumes, then interviewed and evaluated the U.S. citizen applicants to assess their qualifications and suitability for the available positions. Such practices demonstrate good faith in hiring. Judgment shall be rendered in favor of Respondent.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings and conclusions, judgment is entered in favor of Respondent World Corporation, *dba* Saipan World Resort.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: June 30, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** InterPacific Resorts (Saipan) Corp., Respondent.	)	CAC No. 14-038-09 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 8, 2014, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by its acting Director, James Ulloa. Respondent InterPacific Resorts (Saipan) Corporation appeared through its General Manager, Hiroki Sugie, and its Controller and Human Resources chief, Nhing B. Reyes. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on September 10, 2014, against respondent InterPacific Resorts (Saipan) Corporation, *dba* PIC ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The facts of this case are fairly straightforward. In July 2014, Employer posted a job announcement for the position of Purchasing Manager on the Department of Labor website (www.marianaslabor.net). The job was posted from July 17 to August 16, 2014. After the August 16th closing date, the website listed the job as "expired." [A copy of the printout from DOL's website was entered into evidence as Hearing Exhibit 3.]

The Employer received three responses to the job posting. Employer's Controller, Nhing B. Reyes, who also supervises the company's Human Resources, reviewed

the applicants' job records by examining their resumes and/or through telephone conversations with the applicants. Ms. Reyes determined that no one was qualified for the position. [Testimony of Ms. Reyes.]

In September 2014, Employer decided to advertise the same Purchasing Manager position in the Saipan Tribune. The advertisement, which was published for one day only (September 4, 2014), opened a one-month period in which to apply. [The advertisement stated that "[c]ompleted applications must be received by 5:00 p.m. on October 4, 2014." A copy of the advertisement was entered into evidence as Hearing Exhibit 2.]

Although the Employer re-opened the Purchasing Manager position for an entire month, Employer failed to notify DOL of the re-opening and failed to post a job announcement for the re-opened job on the Department's website. After Enforcement learned of this fact, it filed its Determination (Hearing Exhibit 1), alleging that Employer had failed to post the re-opened position in violation of Department Regulations.

DISCUSSION

The CNMI Employment Rules and Regulations ("Regs.") state that an Employer who intends to hire or renew the employment of a foreign national worker is required to post a job vacancy announcement on the Department's website. Regs. at § 80-30.3-205. There are no waivers available with respect to this requirement. *Id.* at § 80-30.3-230.

The Acting Director of Enforcement notes that one of the purposes of requiring employers to post job vacancies on the Department's website is to ensure that both the local and off-island U.S. citizen and permanent resident populations are able to learn that a job vacancy is available in the CNMI. [Testimony of James Ulloa.]

In this case, it is undisputed that Employer made the decision not to re-post the job announcement even after it decided to re-advertise the position in a local newspaper. [Testimony of Ms. Reyes.] Employer's Controller testified that Employer was not intentionally trying to avoid its obligations when it failed to re-post; rather, Employer's management believed the company had already satisfied the "posting" requirement when it first posted the job announcement for the position from July 17 to Aug. 16, 2014. *Id.*

The Employment Regulations do not directly address the situation posed here; i.e., where an Employer posts a job announcement, then closes that announcement but later re-opens and advertises the job vacancy. Although this exact scenario is not discussed in the Regulations, the Hearing Officer believes that common sense would dictate that if an Employer decides to re-open and re-advertise a job, the employer has a new obligation to re-post that job on the Department's website.

The Employer's failure to re-post the job in this case was misleading to those who viewed job announcements on the website in September 2014: anyone viewing the "Purchasing Manager" job on the website that month would have seen the job listed as "expired" even though Employer was actually accepting applications in September pursuant to the September 4th advertisement. See Hearing Exhibit 3.

Employer's re-advertisement of this position is suspect, as the advertisement was run only for a *single day*, on Thursday, September 4, 2014. At the Hearing, Employer's representatives could give no adequate explanation as to why the company would decide to re-open the application period for that job for an entire month, yet only announce the re-opening in the newspaper for a single day.

A cynical might suspect that the Employer wished only to meet a requirement to advertise the job but did not actually want to receive applications regarding this position. After all, Employer already employs a foreign worker in the job who has held the Purchasing Manager position for 7 years and has worked for the Employer for a total of 19 years. Employer denies that it was merely "going through the motions" and notes that it initially posted the job on the Department's website for 30 days which exceeded the required 14-day period.[1]

Sanctions: In its Determination, Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. After hearing the testimony, the Enforcement representative repeated the request that Employer be ordered to pay the maximum fine for its conduct. [Hearing Exhibit 1; testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

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[1] The Regulations do not state a specific required time period for posting a job vacancy. The Enforcement and Job Placement Sections currently take the position that employers must post job vacancies for a minimum of 14 days. Mr Ulloa notes that the statute regarding job referral and advertising, 3 CMC § 4523, states that the job vacancy announcement "shall be published for no less than two consecutive days in each of two weeks or equivalent." For that reason, DOL now requires a minimum posting of 14 days.

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80-50.4-820(h) and (o).

The Hearing Officer finds that Employer's conduct here does not justify imposing the maximum fine. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligation to search for available U.S. citizens or permanent residents. For example, in CAC No. 14-008-03, the employer posted a job announcement but then deliberately failed to contact or review the qualifications of the four applicants who responded to the announcement. The Hearing Officer found that the employer had engaged in bad faith hiring practices and fined the employer the maximum fine of $2,000. [See CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order issued by J.Cody on 4/07/2014, aff'd in Secretary's Order On Appeal issued by CNMI Secretary of Labor Edith E. DeLeon Guerrero on 4/29/2014.]

In contrast, the Employer in this case posted an initial job vacancy announcement for an entire month and reviewed the resumes of those who responded to the posting. [Testimony of Ms. Reyes.] Employer made a mistake in assuming that it was not required to re-post a second announcement in September 2014 when it re-advertised the position. However, the testimony suggests that this failure was the result of a misreading of the Regulations rather than a willful attempt in bad faith to circumvent the law.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned in the amount of one thousand dollars ($1,000); however, half of that sanction shall be suspended for a year, then extinguished provided that Employer commits no further violations of CNMI labor laws or regulations in that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent employer InterPacific Resorts (Saipan) Corporation is SANCTIONED one thousand dollars ($1,000) for failing to post a JVA in violation of Regulations (Regs. at § 80-30.3-205); however, $500 of the amount shall be SUSPENDED for a period of one year, then extinguished provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the $500

portion of the fine no later than twenty (20) days after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

2. **Posting on Website and Interview of Referrals:** Respondent InterPacific Resorts (Saipan) Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)* in accordance with Regulations at § 80–30.3-205. Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

3. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 14, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-040-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
PSG Professional Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on October 15 and 24, 2014, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by its acting Director, James Ulloa, and investigator Ben Castro. Respondent PSG Professional Corporation appeared through its General Manager, Jesus Pantaleon, and its bookkeeper, Ofelia T. Soguilon. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on September 12, 2014, against respondent PSG Professional Corporation ("Respondent"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

Respondent operates several businesses, including a business, known as "PSG Document Handling Services," which assists employers to prepare and file CW-1 Petitions, among other documents. [Testimony of Mr. Pantaleon.]

In April 2014, Respondent arranged for certain radio advertisements to run on KWAW FM radio (MAGIC 100.3) advertising job openings for a number of jobs, including a general manager, an assistant manager, a poker manager and a mason. [Determination (Hearing Exhibit 1) at ¶ 1.] Respondent sent the forms to KWAW FM to order radio advertisements for these positions. Mr. Pantaleon gave credible testimony that the advertisements were ordered on behalf of Respondent's clients – not for Respondent's own business. [Testimony of Mr. Pantaleon.]

Respondent produced copies of Job Vacancy Announcement Certifications ("Certifications"), issued by KWAW FM radio with respect to the jobs noted in the Determination. *Id.* Copies of these Certifications, produced on October 23, 2014, were entered into evidence as Hearing Exhibit 6. The Certifications list the following employers and jobs: AC USA Inc. Corporation (general manager), Pacific ABC Corporation (assistant manager) and Huang Shun Corporation (poker manager and mason). *Id.*

The above-noted evidence supports Respondent's contention that it is not the employer for the job advertisements advertised on KWAW KM radio, as listed in the Determination at paragraph no. 1 (Hearing Exhibit 1 at ¶ 1).

Enforcement brought this case alleging that Respondent violated the "posting" requirement of CNMI Employment Rules and Regulations ("Regs."). The Regulation states that an Employer who intends to hire or renew the employment of a foreign national worker must post a job vacancy announcement on the Department's website. Regs. at § 80-30.3-205; also NMIAC § 80-20.1-225(a).

Findings: Given that Respondent is not the "employer" for the jobs listed in the Determination, Respondent had no legal duty to post job listings for those jobs on DOL's website; therefore, Respondent did not violate Regulation § 80-30.3-205, as alleged. Accordingly, this Agency Case should be dismissed. [At Hearing, Enforcement's representative, James Ulloa, stated that he accepted the Hearing Officer's findings and that Enforcement wished to dismiss the case.]

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings, judgment is hereby entered in favor of Respondent PSG Professional Corporation.

2. **Dismissal:** This Compliance Agency Case against Respondent PSG Professional Corporation is hereby dismissed with prejudice.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 24, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-044-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Sun and Surf Ltd.,	)	
dba National Office Supply,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on October 29, 2014, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by acting Director James Ulloa and investigator Ben Castro. Respondent Sun and Surf Ltd., *dba* National Office Supply, appeared through its Accountant and Office Manager, Emie Ito. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on September 16, 2014, against respondent Sun and Surf Ltd., *dba* National Office Supply ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post several job announcements in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Employment Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. In May 2014, Employer arranged for radio advertisements to run on KWAW FM radio (MAGIC 100.3) advertising the following job openings: one bid/contract specialist, one inventory control specialist, one office machine servicer and two warehouse workers. Employer's Office Manager testified that Employer received no response from any interested applicants as a result of these radio advertisements.

Employer did not post any of the above-noted jobs on the Department of Labor website (www.marianaslabor.net). [Determination; testimony of Ms. Ito.]

Subsequent to the advertisements, Employer submitted CW-1 Petitions to USCIS to renew the employment of foreign national workers who Employer was already employing in each of the advertised positions. [Testimony of Ms. Ito.]

In September 2014, Enforcement filed the Determination alleging that Employer had violated the Department's Rules and Regulations by failing to post the job on the website. See Regs. at Section 80-30.3-205; NMIAC § 80-20.1-225(a). This hearing followed.

At Hearing, Employer's Office Manager admitted that Employer had not posted job announcements with DOL for several years. In prior years – from 2008 through 2010, Employer had registered on DOL's website and posted jobs on the website, but then stopped posting. [See Hearing Exhibit 2 (printout from DOL website establishing registration) and Hearing Exhibit 3 (printout from DOL website detailing Employer's history of posting on the site).]

Employer recently filed renewal CW-1 Petitions for all 16 of its foreign national employees. [Employer also employs 6 U.S. citizens and one permanent resident.] Ms. Ito testified that Employer had used radio advertisements for each of its CW-1 petitions and each had been approved by USCIS.

Ms. Ito had consulted legal counsel to prepare the CW-1 petitions. She testified that her counsel never mentioned anything about CNMI Department of Labor Regulations requiring online posting of job announcements. Ms. Ito relied on that legal advice and therefore, never considered that she needed to comply, as well, with the local DOL Regulations regarding posting of job announcements. In fact, Employer's Office Manager claimed that she was completely unaware that the CNMI Department of Labor still existed or that its website had continued to be used after 2010. [Testimony of Ms. Ito.]

DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew the employment of a foreign national worker must post a job vacancy announcement on the Department's website. Regs. at § 80-30.3-205; NMIAC § 80-20.1-225(a). No waivers are available with respect to this requirement. *Id.* at § 80-30.3-230; NMIAC § 80-20.1-225(e).

The Acting Director of Enforcement notes that one of the purposes of requiring employers to post job vacancies on the Department's website is to ensure that both local and off-island U.S. citizens and permanent residents are able to learn that a job vacancy is available in the CNMI. [Testimony of James Ulloa.]

In this case, Employer made a decision to advertise jobs on the radio; it did not post job announcements on DOL's website. Employer then filled the positions with foreign national workers. This conduct clearly violated the Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a).

At hearing, testimony was taken to determine why Employer failed to comply with DOL's regulations. Employer's Office Manager testified that although she had posted jobs on the website in 2008 through 2010, she stopped doing so in 2011. Ms. Ito testified that she had consulted legal counsel to assist the company in submitting CW-1 petitions and that counsel never mentioned CNMI Department of Labor regulations or the need to comply with them. The Office Manager claimed did not even realize the CNMI Department of Labor still existed until she received the Determination.

DOL continues to take the position that CNMI Labor regulations requiring employers to post job announcements remain in effect, notwithstanding the fact that USCIS does not specifically require such posting in its evaluation of CW-1 permits. [Testimony of James Ulloa.]

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for its conduct. After hearing the testimony, the Enforcement repeated its request that Employer be ordered to pay the maximum fine for its conduct. [Hearing Exhibit 1; testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the Hearing Officer imposed a $2,000 sanction involved cases in which the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (*See, e.g.*, CAC No. 14-008-03, *Department of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

Employer's conduct was not willful. This Employer simply assumed that local Labor Regulations regarding the posting of job announcements did not apply to employment of CW workers. Evidently, Employer's mistaken belief was encouraged by Employer's legal counsel who, according to the Office Manager, never mentioned DOL regulations, or the need to comply with them, while they were preparing the company's CW petitions.

Even though Employer's conduct was not willful, the manager's claimed ignorance of the regulations should not absolve Employer from its responsibility to follow the law. Employer's failure to post jobs on DOL's website prevented the website's 4,000 registered job seekers (Mr. Ulloa's estimate) from receiving online notices about these available jobs. We will never know if any U.S. citizens or permanent residents would have responded to the job openings. The open period to apply for the five positions has passed and once again, Employer has renewed the positions with five foreign national workers.[2] Another year will pass before these positions are subjected to any scrutiny as to whether any qualified, U.S. workers are available and want these jobs. Frankly, at this stage, sanctioning the Employer with a monetary fine provides little or no consolation to an unemployed, qualified U.S. citizen or permanent resident who may have wanted one of these jobs and would have applied for it.

Any employer who wants to reach the maximum pool of available U.S. citizens or permanent residents should utilize DOL's website as it conceivably reaches thousands of citizens and costs nothing to use. During the past year, both local

[2] In fact, Employer's Office Manager testified that she did not post job announcements on DOL's website for sixteen positions, which were later filled by CW-1 workers. However, this case concerns only the five positions that were noted in the Determination (Hearing Exhibit 1, ¶ 1).

newspapers have published numerous articles about Agency cases similar to the present case. Yet, dozens of employers still insist they have never heard of the DOL website. The claim of ignorance rings hollow after a full year of publicity about this subject.

At the conclusion of the hearing, Employer's Office Manager promised *in the future* to post Employer's job openings on DOL's website. Ms. Ito stated that National Office Supply is "struggling" in its business and asked that any fine be reduced in consideration of the company's financial condition.

Having considered the matter carefully, the Hearing Officer finds that Employer should be sanctioned $1,500; however, S750 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that two-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent Sun and Surf Ltd., *dba* National Office Supply, is SANCTIONED one thousand, five hundred dollars ($1,500) for failing to post a JVA in violation of Regulations; however, seven hundred and fifty dollars ($750) of the amount shall be SUSPENDED for a period of TWO YEARS, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the $750 portion of the fine no later than forty-five (45) days after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

2. **Posting on Website and Interview of Referrals:** Respondent Sun and Surf Ltd. is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80--30.3-205; NMIAC § 80-20.1-225(a).

3. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

//

[CAC No. 14-044-09]

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 3, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-045-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
USA Fanter Corporation Ltd.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 14, 2014, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"), located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa and Ben Castro. Respondent USA Fanter Corporation Ltd. appeared through its President, Qian, Guo Cao. Respondent's current agent, Rito Doca, and its adviser, Diego C. Blanco, also appeared. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by DOL's Enforcement Section ("Enforcement") in the Hearing Office on September 16, 2014, against respondent USA Fanter Corporation Ltd. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post several job announcements in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Employment Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. In May 2014, Employer arranged for a radio advertisement to run on KWAW FM radio (MAGIC 100.3) advertising the job of plumber. Employer received no response from any interested applicants as a result of this radio advertisement. [Testimony of Mr. Qian.]

Employer did not post the above-noted job on the Department of Labor website (www.marianaslabor.net). [Determination; testimony of Mr. Qian.]

Subsequent to running the advertisement, Employer submitted a CW-1 Petition to USCIS to renew the employment of the foreign national worker who Employer was already employing in the advertised position. [Testimony of Mr. Qian.]

In September 2014, Enforcement filed the Determination alleging that Employer had violated the Department's Rules and Regulations by failing to post the job on the website. Regs. at § 80-30.3-205; NMIAC § 80-20.1-225(a). This hearing followed.

At Hearing, Employer's President testified that Employer is a construction business employing 15 full-time employees. Twelve of the 15 employees hold CW status, and all of those workers have been renewed in recent months. President Qian admitted that he has relied on agents to handle the processing of CW status documents for his company's workers. Qian does not know about the Department website and the obligations to post job announcements on the website. Qian stated that now that he knows, he intends to post all future job announcements on DOL's website in accordance with the cited Regulations. [Testimony of President Qian.]

Enforcement produced evidence that Employer had registered on DOL's website and posted jobs on the website in prior years, but then stopped posting after 2009.

DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew the employment of a foreign national worker must post a job vacancy announcement on the Department's website. Regs. at § 80-30.3-205; NMIAC § 80-20.1-225(a). No waivers are available with respect to this requirement. *Id.* at § 80-30.3-230; NMIAC § 80-20.1-225(e).

Enforcement notes that one of the purposes of requiring employers to post job vacancies on the Department's website is to ensure that both local and off-island

U.S. citizens and permanent residents are able to learn that a job vacancy is available in the CNMI. [Testimony of Mr. Ulloa.]

In this case, Employer used an agent to handle a renewal application for a plumber who was already employed by the company but needed to renew his CW status. The Employer was not aware of the Department regulations that require an employer to post a job announcement on the Department's website. The agent hired by President Qian never mentioned such a requirement to him. [Note: The current agent who appeared at hearing, Rito Doca, was not the agent that had handled the job announcement at issue in this case.] A radio advertisement was run and nobody responded. Employer then filled the position with the foreign national worker who already held the position. This conduct clearly violated the Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a).

Sanctions: In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of $2,000 for its conduct. After hearing the testimony, the Enforcement repeated its request that Employer be ordered to pay the maximum fine for its conduct. [Hearing Exhibit 1; testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the Hearing Officer imposed a $2,000 sanction involved cases in which the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (*See, e.g.*, CAC No. 14-008-03, *Department of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In the present case, Employer's conduct was not willful. At stated earlier, President Qian claimed he had no knowledge of local labor requirements for processing foreign national workers. The President explained that he had simply delegated the task of obtaining CW status to several different agents. Such

delegation of responsibility is not a complete legal defense but it does tend to support Employer's contention that its conduct was not intentional.

Employer noted that it takes the obligation to hire local workers seriously. Any employer who wants to reach the maximum pool of available U.S. citizens or permanent residents should utilize DOL's website as it conceivably reaches thousands of citizens and costs nothing to use. During the past year, both local newspapers have published numerous articles about Agency cases similar to the present case. Yet, dozens of employers still insist they have never heard of the DOL website. The claim of ignorance rings hollow after a full year of publicity about this subject.

At the conclusion of the hearing, Employer's President promised *in the future* to post Employer's job openings on DOL's website. This is encouraging, but we shall never know if there was a local, unemployed person who might have applied for the plumber position if he had known about the position. That position is now closed for another year, until the CW status worker once again is up for renewal.

Having considered the matter carefully, the Hearing Officer finds that Employer should be fined for this conduct, although the amount assessed should be reduced from the maximum amount requested. Employer shall be sanctioned $1,000; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that two-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent USA Fanter Corporation Ltd., is SANCTIONED one thousand dollars ($1,000) for failing to post a JVA in violation of Regulations; however, five hundred dollars ($500) of the amount shall be SUSPENDED for a period of TWO YEARS, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the $500 portion of the fine no later than thirty (30) days after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

2. **Posting on Website and Interview of Referrals:** Respondent USA Fanter Corporation Ltd. is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with

Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a).

3. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 18, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-046-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
TYW Corporation, *dba* 7 Star Market,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 6, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent TYW Corporation, *dba* 7 Star Market, appeared through its corporate Secretary, Yu, Shu Li, and its cashier, Tang, Li Wen. Ms. Yu also served as translator for Ms. Tang. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on September 19, 2014, against respondent TYW Corporation, *dba* 7 Star Market ("Employer"). A copy of the Determination was entered into evidence as Hearing Exhibit 1.

The Determination alleges that Employer failed to post a job vacancy in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; also NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. In May 2014, Employer arranged for a radio advertisement to run on KWAW FM radio (MAGIC 100.3) advertising the position of manager of the 7 Star Market. Employer did not post any job announcement for this position on the Department of Labor website. [Determination; testimony of Ms. Yu.]

Employer's business, 7 Star Market, is a small business that employs only three employees: a manager, a cashier and a stock clerk. Employer already had a CW-1 status worker employed as manager, named Tang, Li Gang. Mr. Tang's sister works for Employer as a cashier; the stock clerk is a U.S. citizen.

Employer intended to renew Mr. Tang as manager when it advertised the position. [Testimony of Ms. Yu.] After the advertisement ran, Employer submitted a CW-1 petition to renew Tang's employment; the petition was approved by USCIS.

The radio advertisement used the phone number for the 7 Star Market as the Employer's contact number. Ms. Tang, the cashier who speaks very little English, regularly answers the phone. Ms. Tang testified that in the weeks following the radio announcement she received several telephone calls but could not understand what the callers were saying. [At Hearing, Ms. Tang spoke little English and needed translation services in order to testify.] Given the situation, Employer is unable to know whether anyone attempted to apply for the manager's job.

The Department of Labor ("DOL") filed the Determination after it noticed that Employer had advertised in the newspaper, but had not posted the job on DOL's website. Prior to filing the Determination, Mr. Ulloa himself telephoned the market and had a confusing conversation with Ms. Tang in which she seemed to give the name of the corporation as "CYC." Ms. Tang testified that she recalls the phone call and remembers not understanding Mr. Ulloa's question so she just answered "yes." [Testimony of Mr. Ulloa and Ms. Tang.]

At the Hearing, corporate Secretary Yu, Shun Li, confirmed that the company's correct name is TYW Corporation. Ms. Yu produced Employer's Annual Corporation Report for 2013, which was entered into evidence as Hearing Exhibit 2.

Employer's Secretary noted that she had attempted to follow all rules necessary so that Mr. Tang could obtain a renewal of his CW-1 status. It was not clear how Ms. Yu decided on the radio, but she had received some advice that this was a method for obtaining the renewal. Secretary Yu apologized for not posting the job on the Department's website. She stated that if she had known about this requirement,

she would have complied with it. Ms. Yu promised to post future job announcements on DOL's website. [Testimony of Ms. Yu.]

DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at § 80-30.3-205; also NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-30.3-230; NMIAC § 80-20.1-225(e).

In this case, Employer advertised the job on the radio because Employer's management was unaware that DOL Regulations require employers to post job announcements on DOL's website. Employer's corporate Secretary testified that she does not read local newspapers and therefore, has never read any newspaper article reporting employers being sanctioned for failing to post job announcements at DOL's website. Further, Ms. Yu admits she never reviewed labor laws and regulations and was involved in this job search, except to place the advertisement.

The Employer's method of seeking interested job applicants was completely flawed. The radio advertisement was posted in a manner that made it look legitimate; yet, in reality, the Employer was not open to accepting applications. This is highlighted by the fact that Ms. Tang was given the task of receiving responses to the advertisement, yet *she could not understand English-speaking callers* who may have responded to the ad by calling the store number. Furthermore, Ms. Tang, as cashier and sister of the foreign national worker who would lose his job if a citizen were hired for the Manager position, was not the appropriate person to handle jobs calls for the position.

Department Regulations highlight an employer's obligation to make a "good faith effort" to hire a citizen or permanent resident if a qualified applicant is available and wants the job. [Regs. at § 80-30.3-440.] This Employer sabotaged any effort by interested parties to follow up on the radio announcement, by referring them to someone who spoke no English. Clearly, Employer did not intend to consider new applicants for the manager's job and its hiring effort was done in bad faith.

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1, at p. 3.] After hearing the testimony, Enforcement repeated its request. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here justify a substantial sanction. First, Employer failed to post a job announcement as required by CNMI Regulations. Second, Employer engaged in bad faith hiring practices by adopting an approach that appeared to be seeking job applicants, but was not actually designed or intended to consider any potential job seekers. We shall never know if anyone attempted to apply for the manager's job because Ms. Tang was answering the phone and did not speak English.

Once the Employer's Secretary realized the mistake, she immediately agreed to post all job vacancies *in the future* on DOL's website. [Testimony of Ms. Yu.] Employer's promise does not erase the harm already done through failure to properly advertise the manager's job, but it may be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand five hundred dollars ($1,500); however, $750 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that two-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent TYW Corporation, *dba* 7 Star Market, for violation of Employment Rules and Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent TYW Corporation is hereby SANCTIONED one thousand five hundred dollars ($1,500) for its conduct; however, $750 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that

Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$750** portion of the fine no later than **forty-five (45) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent TYW Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 19, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-046-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**AMENDMENT TO THE**
	)	**ADMINISTRATIVE ORDER**
v.	)	**ISSUED ON NOVEMBER 19,**
	)	**2014**
TYW Corporation, *dba* 7 Star Market,	)	
Respondent.	)	
	)	

The Hearing Officer issued an Administrative Order in the above-captioned case on November 19, 2014. Evidently, the Administrative Order was never served on Respondent TYW Corporation due to a clerical error by the Hearing Office.

The above-noted error in service affects Respondent in two ways. First, the Administrative Order imposes a fine on Respondent and sets a deadline for payment of a $750 portion of the fine, based on the day of issuance of the Order (i.e., 45 days from November 19, 2014). [Order at pp. 4-5, paragraph 2.] Secondly, the Order sets the deadline to appeal the decision at 15 days following the date of issuance of the Order (i.e., 15 days from November 19, 2014). *Id.* at paragraph 5. As a result of the late service of the Administrative Order, these dates would prejudice Respondent's appeal rights. Accordingly, good cause is shown for amending the Order to preserve Respondent's rights.

The Employment Rules and Regulations set forth the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(o). Additionally, the Regulations authorize the Hearing Officer to "[i]mpose such other...order or relief as may reasonably give effect to the requirements of Commonwealth law...." Id. at § 80- 50.4-820(n).

Pursuant to the above-cited Regulations, this Hearing Officer shall issue this Amendment to correct the error caused by the Hearing Office's failure to serve the Administrative Order on Respondent in a timely manner. Such amendment shall preserve the appeal rights of the Respondent.

Good cause having been shown, IT IS HEREBY ORDERED:

The Administrative Order in this case, issued by this Hearing Officer on November 19, 2014, is hereby AMENDED at pages 4-5, paragraph nos. 2 and 5. In both paragraphs, the word "issuance" shall be replaced with the word "service." The new paragraphs shall read as follows:

2. **Sanctions:** Respondent TYW Corporation is hereby SANCTIONED one thousand five hundred dollars ($1,500) for its conduct; however, $750 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$750** portion of the fine no later than **forty-five (45) days** after the date of **service** of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of **service** of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 15, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-047-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Kan Pacific Saipan Ltd.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 25, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Kan Pacific Saipan Ltd. appeared through its General Manager, Gloria Cavanagh, and its counsel, Marcia K. Schultz. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on September 19, 2014, against respondent Kan Pacific Saipan Ltd. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Departmental Regulation that requires an employer to file a "declaration" (online response) on the Department's website within 14 days after publication of a job vacancy. [Rules and Regulations ("Regs.") at § 80-30.3-450.] This requirement is met if the employer posts a response on the website, within 14 days of the publication, explaining: (1) the action taken with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not

hired for the position.[1] "No declaration is required if a citizen or permanent resident is hired." *Id.*

Certain basic facts stated in the Determination were confirmed by the Employer at the Hearing. On about July 21, 2014, Employer posted a job vacancy announcement on the Department's website (www.marianaslabor.net) for the position of front desk/ guest relations clerk. [Determination at ¶¶ 1-2.] Two local job seekers responded to the advertisement by posting their names, telephone numbers and resumes on the website. Employer never submitted a "declaration" (digital response) to the applicants or the Department.

The Department brought this case after it noticed that no response had been posted by the Employer. The Department charged Employer with failing to post an employer declaration in violation of Regulation section 80-30.3-450.

At Hearing, General Manager Cavanagh explained that Employer had experienced a delay in acting on the job interviews for the front desk position; however, the Employer ultimately interviewed and hired one of the two job seekers who posted responses to the JVA. The person hired is a U.S. citizen. [Testimony of Ms. Cavanagh.]

CONCLUSIONS OF LAW

Employer committed no violation of statute or Regulation as a result of its conduct in this matter.

Based on the evidence presented, the Hearing Officer finds that Employer committed no violation of statute or Regulation as a result of its conduct in this matter. Enforcement alleged that Employer violated the "Employer Declaration" Regulation [Regs. at § 80-30.3-450] by not filing online responses to two job seekers who had posted responses to Employer's job vacancy announcement for front desk clerk. [Determination at ¶¶ 1-6.] Enforcement concluded that Employer had failed to follow the preference for citizens and permanent residents codified in CNMI labor regulations. *Id.* at ¶ 5.

[1] The 14-day deadline in the Regulation has been interpreted by this Hearing Officer to mean, in essence, 14 days after the date on which the hiring decision is made. [CITE?.] The so-called "declaration" is more in the nature of a digital response posted on the website, rather than a declaration signed under penalty of perjury. *Id.*

Although Employer did not file online responses with respect to the two noted job seekers, Employer actually hired one of the responders to the posted JVA for the front desk position. As noted above, the Regulation at issue states that "[n]o declaration is required if a citizen or permanent resident is hired." [Regs. at § 80-30.3-450.] Thus, as a matter of law, Employer was not required to file an online response after it made its decision to hire one of the citizen job applicants.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered in favor of Respondent Kan Pacific Saipan Ltd. Respondent is found to have not violated Employment Rules and Regulations regarding the "Employer Declaration" [§ 80 – 30.3-450], as alleged by the Enforcement Section.

2. **Recommendation:** In future Agency cases in which Enforcement plans to allege that an employer failed to post an Employer Declaration in response to a posted JVA, Enforcement should contact the respondent-employer *before filing its Determination* to determine whether the employer hired a U.S. citizen or permanent resident for the announced position, as such hiring would constitute a defense to the charge and thus, remove the basis for the Agency Case.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: December 5, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-048-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Marianas Napa, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on November 24, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Marianas Napa, Inc., was represented by its Vice President for Human Resources, Priscilla T. Tenorio, Human Resources Assistant Carmen Benavente, and employee Patty McDonald. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on September 23, 2014, against respondent Marianas Napa, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with the "Employer Declaration" and "Job Preference" requirements set forth in the CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205 *et seq.*; NMIAC § 80-20.1-225(a).[1]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Department Regulations state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

Employers who post job vacancies on DOL's website may receive responses from U.S. citizen or permanent resident job seekers. If those Employers then decide not to hire those applicants, the employers are required to post a so-called "Employer Declaration" (i.e., digital response) explaining: (1) what action the employer took as to each applicant who responded to the job vacancy; and (2) the employer's reason for not hiring that citizen or resident applicant. *Id.* at § 80-30.3-450. If the employer hires the U.S. citizen or permanent resident, no Employer Declaration is required to be filed. *Id.*

The facts of this case are as follows. Employer operates a retail automobile parts store within Joeten Motors. Hiring for Employer's operations is conducted by the Human Resources Department of its parent corporation, Joeten Enterprises ("Joeten"). Joeten's HR Department supports 12 affiliated companies under the Joeten organization. It is a busy HR Department, handling dozens of job vacancy announcements ("JVAs") each week. For example, during the relevant month in this case – July 2014 – Joeten's HR Department posted 70 JVAs, dealt with 173 online job applicants and 92 walk-in applicants, and offered jobs to 13 individuals. [See Joeten's List of July 2014 JVAs at Hearing Exhibit 2; testimony of Ms. Tenorio.]

This case concerns Employer's posting of a JVA for the position of "auto parts clerk." Employer posted the JVA on DOL's website from July 10 to 24, 2014. Four U.S. citizen job applicants posted online responses to the JVA. Thereafter, the Department received no responses from the Employer indicating whether or not Employer had considered, interviewed or hired those four job applicants. [Hearing Exhibit 1 (Determination) at ¶¶ 3-4.]

At Hearing, Employer testified that it had considered each of the "applicants" who posted responses to its auto parts clerk JVA. Two of the applicants provided telephone numbers that turned out to be "out of service." The third applicant was interviewed and found to be unqualified for the position. The fourth applicant was interviewed and hired for a "cashier" position. [Testimony of Ms. Benavente.] Employer's HR Assistant admitted that she neglected to post the Employer Declaration (online response) for the auto parts clerk position. Ms. Benavente testified that although it was her practice to regularly post online responses to job applicants, July 2014 had been a particularly busy month and Joeten's HR

department was short staffed; so she simply had missed this task. [Testimony of Ms. Benavente.] This was an oversight rather than a deliberate attempt to ignore or circumvent the law.

At the time of the announcement in July 2014, Employer already employed a foreign national worker in the auto parts clerk job. Ultimately, the Employer filed a petition to renew the CW-1 status of that worker. *Id.*

CONCLUSIONS OF LAW

1. ***Employer did not fail to give citizens and permanent residents preference in employment; Employer did not fail to make a good faith effort to hire citizens and/or permanent residents for the job vacancy at issue.***

In the Determination, Enforcement charged that Employer failed to give citizens job preference with respect to employment in the private sector. Enforcement also charged that Employer "failed to make good faith effort to hire citizens and status qualified citizens for the job vacancy." [Hearing Exhibit 1 (Determ.) at ¶¶ 5-6.]

The Hearing Officer finds in favor of Employer with respect to these charges. Employer established through credible testimony that it operates in good faith to post job vacancies, and then it reviews, considers and interviews citizen job applicants where it is able to reach them. Employer also considers dozens of walk-in applicants who apply for jobs in person rather than responding to an online post. Based on the credible testimony of the Joeten personnel from Joeten's Human Resources Department, there is no evidence here that Employer engaged in any bad faith practices with respect to hiring. Therefore, the Hearing Officer finds in favor of Employer in this case.

2. ***Employer failed to post an Employer Declaration with respect to three responses to Employer's "Auto Parts Clerk" Position, in violation of the Employment Rules and Regulations at § 80-30.3-450.***

Employer violated the Regulations at § 80-30.3-450 by failing to post an online response (declaration) to three applicants who posted responses to the auto parts clerk position. Employer's management admitted that it failed to file these online responses; however, the testimony established that this failure was an oversight in the nature of a clerical error. More importantly, Employer established that it did consider and interview these applicants where it was able to reach them. Employer actually hired one of the four responders, although the person was hired to fill a

different position than auto parts clerk. Based on the evidence presented, the Hearing Officer finds that Employer's failure to post online responses here, although incorrect, was not done in bad faith. The Hearing Officer concludes that no useful purpose would be served by sanctioning Employer for this inadvertent oversight. Accordingly, Employer shall be given a warning rather than a monetary penalty in this case.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** As to Enforcement's charges that Respondent failed to give job preference and failed to make a good faith effort to hire citizens and permanent residents (Determination at ¶¶ 5-6), judgment is entered in favor of Respondent Marianas Napa, Inc.

2. **Failure to Post Online Declaration:** Respondent Marianas Napa, Inc. violated the Regulations at § 80-30.3-450 by failing to post an Employer Declaration with respect to the "auto parts clerk" position posted on DOL's website in July 2014. Based on the facts and considerations stated above, no fine or sanction shall be issued for this violation. 3 CMC § 4947(11).

3. **Warning:** Respondent Marianas Napa, Inc. is WARNED that any failure in the future to post the required declaration (online response) in a timely manner, pursuant to Regulations at § 80–30.3-450, could subject Employer to monetary sanctions in an amount to be determined in a due process hearing.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 5, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-049-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
J.E.T. Holding Co., Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 19, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent J.E.T. Holding Co., Inc. appeared through its General Manager, Juan K. Tenorio, and its accountant, Lorena B. Trinidad. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on September 23, 2014, against respondent J.E.T. Holding Co., Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a number of job vacancies in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; also NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Employer operates two restaurants on Saipan, both known as Jay's Restaurant, as well as the Saipan Bowling Center. Employer employs 58 full-time employees consisting of 18 citizens and permanent residents, as well as 40 CW-status employees. [Testimony of Mr. Tenorio.]

The facts of this case are as follows. In May 2014, Employer arranged for radio advertisements to run on KWAW FM radio (MAGIC 100.3) advertising the following jobs: one position of Head Waitress, 9 positions of Wait Staff and 3 positions of ground maintenance. The advertisements ran between May 1 and 15, 2014. Evidently, nobody responded to the advertisements. *Id.*

Employer did not post the above-listed job announcements on the Department of Labor ("DOL") website. DOL filed the Determination after it noticed that Employer had advertised on the radio but had not posted the job on DOL's website.

Employer had posted other job announcements on the DOL website in March 2014, but then decided it was not necessary to post on the website because USCIS does not require a particular method of job advertisement to be used in support of CW-1 petitions. [Testimony of Mr. Tenorio; and Hearing Exhibit 2 - copy of printout from DOL website listing Employer's posted job vacancy announcements ("JVAs").]

At the time of the radio advertisement, each advertised position was already filled by a CW-1 worker. After the advertisement ran, Employer submitted CW-1 petitions to renew each of these CW-status employees. Subsequently, each of those petitions was approved by USCIS.

As soon as Mr. Tenorio realized that DOL was still requiring job announcements to be posted, he arranged for the Employer to resume posting JVAs on DOL's website. On September 15, 2014 – *prior* to being served with the Determination – Employer resumed posting JVAs on DOL's website. Testimony of Mr. Tenorio; Hearing Exhibit 3 (copy of printout from DOL website showing three positions posted on 9/15/14).

DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at § 80-30.3-205; also NMIAC § 80-

20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-30.3-230; NMIAC § 80-20.1-225(e).

In this case, it is undisputed that the Employer made a decision to stop posting job announcements on DOL's website in May 2014. Employer's decision stemmed from its General Manager's belief that the local Department of Labor was no longer requiring employers to comply with its Regulation directing employers to post job announcements on DOL's website. That belief was mistaken. DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Ulloa.]

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In this case, Employer did advertise for job applicants but failed to use the online method required by the Department of Labor. This Employer simply assumed that local Labor Regulations regarding the posting of job announcements did not apply to employment of CW workers. [Testimony of Mr. Tenorio.] Although Employer was mistaken in its assumption, the testimony suggests that this failure was the

result of a misreading of the role of the local Department of Labor in enforcing workforce participation rules rather than a willful attempt to circumvent the law.

Furthermore, once the Employer realized its mistake, it resumed its practice of posting JVAs on DOL's website. Such conduct indicates Employer's intention to comply with CNMI labor Regulations in the future. This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent J.E.T. Holding Co., Inc. for violation of Employment Rules and Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent J.E.T. Holding Co., Inc. is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, $500 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent J.E.T. Holding Co., Inc. is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section. Upon receiving a request for reinstatement, the Hearing Officer shall schedule an Order

to Show Cause Hearing to provide parties with notice and an opportunity to be heard prior to making a decision on the reinstatement.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 24, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-050-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
YWA Human Resource CNMI Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 20, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent YWA Human Resource CNMI Corporation appeared through its President, Benigno J. Fejeren, and its accountant, Rogelio C. Valguna. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on September 23, 2014, against respondent YWA Human Resource CNMI Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a number of job vacancies in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; also NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Employer operates a manpower supply company that employs 154 employees, including 80-90 housekeepers. Employer claims to employ two citizens or permanent residents and 152 CW-status employees. [Testimony of Mr. Fejeren.]

The facts of this case are as follows. In May 2014, Employer arranged for radio advertisements to run on KWAW FM radio (MAGIC 100.3) advertising seven housekeeper positions. The advertisements ran between May 1 and 15, 2014. Evidently, nobody responded to the advertisements. *Id.*

Employer did not post the above-listed job announcements on the Department of Labor ("DOL") website. Employer's President testified that he decided it was not necessary to use the DOL website because USCIS does not require a particular method of job advertisement to be used in CW status processing. *Id.*

At the time of the radio advertisement, each of the advertised positions was already filled by a CW-1 worker. After the advertisement ran, Employer submitted CW-1 petitions to renew each of these CW-status employees. Subsequently, each of those petitions was approved by USCIS.

The Department of Labor filed the Determination after it noticed that Employer had advertised on the radio, but had not posted the job on DOL's website.

Although Employer did not post these JVAs on DOL's website in May 2014. Employer resumed posting JVAs on DOL's website in June 2014 – prior to being served with the Determination. [Testimony of Mr. Fejeren and Mr. Valguna; Hearing Exhibit 3 (copy of printout from DOL website showing seven positions posted in June 2014).]

At Hearing, Employer's President, Ben Fejeren, testified that he had believed Employer no longer needed to comply with DOL's Regulations regarding posting of job announcements. Mr. Fejeren noted that USCIS Regulations regarding CW-1 permits did not mention any specific requirement to post online announcements on DOL's website. Nevertheless, as soon as Mr. Fejeren realized that DOL was still requiring job announcements to be posted, he arranged for the Employer to resume posting JVAs on DOL's website.

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DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at § 80-30.3-205; also NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-30.3-230; NMIAC § 80-20.1-225(e).

In this case, it is undisputed that the Employer neglected to post job announcements on DOL's website. Employer's conduct stemmed from its President's belief that the local Department of Labor Regulations were no longer in effect. That belief was mistaken. DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Ulloa.]

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (*See, e.g., CAC No. 14-008-03, Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In this case, Employer searched for job applicants but failed to utilize the method required by the Department of Labor. This Employer simply assumed that local

Labor Regulations regarding the posting of job announcements did not apply to employment of CW workers. [Testimony of Mr. Fejeren.] Although Employer was mistaken in its assumption, the testimony suggests that this failure was the result of a misreading of the role of the local Department of Labor in enforcing workforce participation rules rather than a willful attempt to circumvent the law.

Furthermore, once the Employer realized its mistake, it resumed its practice of posting JVAs on DOL's website. Such conduct indicates Employer's intention to comply with CNMI labor Regulations in the future. This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent YWA Human Resource CNMI Corporation for violation of Employment Rules and Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent YWA Human Resource CNMI Corporation is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, $500 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent YWA Human Resource CNMI Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

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4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 1, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-051-09
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Z.Y. Li Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 20, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Z.Y. Li Corporation appeared through its Manager, Li, Zhi Yuan, and its Processing Agent, Lu, Guo Hua. Mr. Lu also served as translator for Mr. Li. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on September 25, 2014, against respondent Z.Y. Li Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a job vacancy in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. Employer operates a vegetable produce business that employs 4-5 employees. In July 2014, Employer, through its agent, Lu, Guo Hua, arranged for job advertisements to be published in the Marianas Variety, advertising the positions of supervisor (2 positions), manager and office clerk. The advertisement was published beginning on July 24, 2014. Evidently, nobody responded to the advertisements. [Testimony of Mr. Li and Mr. Lu.]

Employer did not post the above-listed job announcement on the Department of Labor ("DOL") website. Employer's Processing Agent, Mr. Lu, testified that he advised the Employer it was not necessary to use the DOL website because USCIS does not require a particular method of job advertisement to be used in CW status processing. [Testimony of Mr. Lu.] He gave this advice because he had believed employers no longer needed to comply with DOL's Regulations regarding posting of job announcements.

The Processing Agent's belief was mistaken. DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Ulloa.]

At the time of the radio advertisement, the advertised positions were already filled by CW-1 workers. After the advertisement ran, Employer submitted CW-1 petitions to renew the CW-status employees. Subsequently, USCIS approved the petitions.

As soon as Enforcement served the Employer with its Determination, Agent Lu realized that DOL was still requiring job announcements to be posted on DOL's website. On that same day, Employer resumed its online posting of the JVAs. The job announcements were posted on September 25, 2014.[2] However, by that date Employer had already submitted its CW-1 renewal petitions to USCIS.

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[2] The Office Clerk position was listed as Announcement No. 14-09-29118; the Supervisor positions were listed as Announcement Nos. 14-09-29117; and the Manager's position was listed as Announcement No. 14-09-29116. {Hearing Exhibits 5-7.]

DISCUSSION

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at 80 – 30.3-205; NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at § 80-30.3-230; NMIAC § 80-20.1-225(e).

It is undisputed that the Employer in this case failed to post a job announcement on DOL's website in violation of DOL's Regulations. *Id.* Employer's conduct stemmed from its Processing Agent's belief that the local DOL Regulations were no longer in effect. That belief was mistaken. As stated, DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website. [Testimony of Mr. Ulloa.]

Employer's attempt to correct its conduct by posting JVA's in September 2014 was ineffective, given that Employer had already filed its renewal CW Petitions to renew the foreign national workers in the advertised positions.

The Hearing Officer notes several problems with these announcements. First, Employer evidently authorized Manager Li, Zhi Yuan to hire individuals for the advertised positions. However, one of those positions was a renewal of Manager Li's *own job.* Obviously, there is a conflict in asking an employee to interview job applicants for that employee's own position. If Manager Li found a job applicant to be qualified and acceptable for the manager's position, that finding would put Manager Li out of a job. It is inappropriate for company management to ask a Manager to interview his possible replacement. Corporate President, Sidney Gustur Stephanson, should remedy this situation so it does not happen again.

Second, the job of "office clerk" appears to have been mislabeled. Based on Manager Li's testimony, this person works in the produce store doing cashier work and other odd jobs. There really is no office in which to work. Therefore, to characterize this job as "office work" is a misnomer.

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In this case, Employer placed a newspaper advertisement to announce a job vacancy but failed to use the method required by the Department of Labor. This Employer's Processing Agent assumed that local Labor Regulations regarding the posting of job announcements did not apply to employment of CW-1 workers. [Testimony of Mr. Lu.] Although Agent and Employer were mistaken in their assumption, the testimony suggests that this failure was the result of a misreading of the role of the local Department of Labor in enforcing workforce participation rules rather than a willful attempt to circumvent the law.

At Hearing, Employer, through its Agent, stated that it would resume its practice of posting JVAs on DOL's website in the future. This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Z.Y. Li Corporation for violation of Employment Rules and Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned in

the manner set forth below.

2. **Sanctions:** Respondent Z.Y.Li Corporation is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, $500 of tbe fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Z.Y.Li Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 1, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-056-10
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Huang Shun Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on December 5, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa and Ben Castro. Respondent Huang Shun Corporation appeared through its General Manager, Huang, Yuren. Mr. Min, Jianhua served as translator for Mr. Huang. Respondent's agent, Jess Pantaleon, and its employee, Jayleen Dimalanta, testified in support of Huang Shun Corporation. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on November 6, 2014, against respondent Huang Shun Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a job vacancy in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

The facts of this case are as follows. Employer operates several businesses on Tinian and Saipan, including three poker rooms, two markets, and a construction business. In April 2014, Employer arranged for radio advertisements to run on KWAW FM radio (MAGIC 100.3) advertising three positions: poker attendant, poker manager and mason. The advertisements ran between April 15 and 28, 2014. [See certifications issued by KWAW-FM, entered into evidence at Hearing Exhibit 1A.] Nobody responded to the radio advertisements. [Testimony of Employer's bookkeeper, Ms. Dimalanta.]

Employer did not post the above-listed job announcements on the Department of Labor ("DOL") website in April 2014. Although it appears the advertisements may have been published to prepare for CW-1 renewal petitions, the Employer took no action to file petitions in the months after April 2014. [At Hearing, neither Employer's General Manager nor its processing agent was able to explain precisely why Employer had placed radio advertisements for positions that were already filled by foreign national workers. Agent Jess Pantaleon testified that he was off-island from March to June 2014, but he understood that no CW Petitions had been filed in his absence.]

In October 2014, Employer filed CW-1 Petitions to renew foreign national workers in the above-listed positions. Prior to filing the CW-1 Petitions, Employer posted job announcements for five poker attendants, a gaming manager and a mason. [Copies of the JVAs for these positions were entered into evidence as Hearing Exhibits 2, 3 and 4, respectively.]

As to the poker attendant job, Employer's JVA listed 5 openings for that position. Hearing Exhibit 2. According to the agent, Jess Pantaleon, Employer received 10-13 applicants and attempted to interview 6 or 7 of the applicants. Only one applicant showed up for the interview; that person – a U.S. citizen - was hired. [Testimony of Mr. Pantaleon.] Employer then renewed four foreign national workers who already were working for Employer as poker attendants. [Total Workforce Listing at Hearing Exhibit 5 – employee numbers 18, 30, 37 and 43.]

As to the JVAs for gaming manager and mason, no one responded to the JVAs for these positions. Soon after posting the JVA, Employer filed CW-1 Petitions to renew the foreign national workers already working in those jobs. As of the date of hearing, the renewal applications were still pending with the USCIS. *Id.*

In its Determination, DOL charged that Employer violated DOL Regulations when it advertised three jobs on the radio in April 2014, but did not post the job announcements on DOL's website. [Hearing Exhibit 1 (Determination) at ¶ 6; testimony of Mr. Ulloa.] At Hearing, Enforcement also questioned the Employer's JVA for five poker attendant jobs in October 2014. Enforcement alleged that Employer was overstating the number of "poker attendant" positions it needed to fill so that it could retain its four CW-1 workers even if it needed to hire a U.S. citizen. [Testimony of Mr. Ulloa.]

Employer argued that any deficiency in its radio advertisement in April 2014, was corrected in October 2014, when it posted these jobs on the DOL website prior to filing CW renewal petitions. Employer denied that it inflated the number of poker attendants it needed in order to retain foreign national employees. [Testimony of Mr. Huang and Mr. Pantaleon.]

DISCUSSION

CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at § 80–30.3-205. The question presented here is whether an employer violates this regulation when it advertises a job without using DOL's website, but then does not "hire or renew" a foreign national worker after advertising the job. This Employer already employed four poker attendants who were CW-1 status workers. The Employer ran radio advertisements in April 2014, but never followed through by renewing the foreign national employees. Months later, in October 2014, when Employer got ready to renew its foreign national workers, it posted JVAs on DOL's website in accordance with the above-cited Regulation.

The facts of this case present a close case. When Employer ran the radio ad, it did not "hire and renew;" when it did prepare to renew its CW-1 employees, it utilized the DOL website to advertise the positions in accordance with Regulations. On balance, I find that Employer should not be found in violation for its conduct. There is no evidence of bad faith on the Employer's part. In fact, Employer hired a U.S. citizen applicant for the poker attendant job.

To the extent that the April 2014 radio ads were not in compliance with DOL Regulations, the Hearing Officer finds that Employer corrected this deficiency by posting the job announcements in October 2014, prior to filing to renew its CW-1 status workers.

Notwithstanding the above holding, Employer should be warned that in the future, it should post its JVAs on DOL's website and consider all qualified U.S. citizens or permanent residents for offered positions.

As to Enforcement's charge that Employer inflated the number of poker attendant positions it advertised in order to avoid having to terminate a foreign national worker, the Hearing Officer finds there was insufficient evidence on this issue to establish Enforcement's allegation.[2]

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** As to Enforcement's charge that Respondent violated Regulations by failing to utilize the DOL website to advertise job vacancies in April 2014, Judgment is hereby entered in favor of Respondent Huang Shun Corporation.

2. **WARNING re Posting on Website:** Respondent Huang Shun Corporation is WARNED that it should post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). Respondent is also required to consider, interview and hire any U.S. citizen or permanent resident job applicant who is qualified for an offered job and available to work.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 6, 2015

Jerry Cody
Hearing Officer

[2] This allegation was not contained in the Determination, but was raised during the course of the hearing by Mr. Ulloa.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-058-10
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
GR Construction Co., Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 17 and 24, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent GR Construction Co., Inc. appeared through its supervisor, Sherwin Sacayan, and office secretary Kim, Hyung Ji. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on April 24, 2014, against respondent GR Construction Co. Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Departmental Regulation that requires an employer to file a "declaration" (online response) on the Department's website within 14 days after publication of a job vacancy. [Rules and Regulations ("Regs.") at § 80-30.3-450.] This requirement is met if the employer posts a response on the website, within 14 days of the publication, explaining: (1) the action taken with respect to each applicant who

posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position.[1] *Id.*

Certain basic facts stated in the Determination were confirmed by the Employer at the Hearing. On about April 15, 2014, Employer posted a job announcement on the Department's website (www.marianaslabor.net) for the position of mason. [Determination at ¶¶ 2-4.] Employer already employed a mason and planned to renew him in the position if nobody else applied. [Testimony of Ms. Kim.]

One local job seeker responded to the advertisement by posting his name, telephone number and resume on the website. Employer never submitted a "declaration" (digital response) to the applicant or the Department. The Department brought this case after it noticed that no response had been posted by the Employer. The Department charged Employer with failing to post an employer declaration in violation of DOL Regulation section 80-30.3-450.

At Hearing, Employer's secretary, Kim Hyung Ji, explained that she is responsible for posting information on DOL's website on behalf of the company. Ms. Kim testified that she made a trip to Korea from April 7 to 17, 2014, and that, knowing she was going to be travelling, she had planned to review the DOL website from Korea. After Ms. Kim arrived in Korea, however, she experienced technical difficulties in accessing the responses from the DOL website. When she returned to Saipan, Ms. Kim forgot to check the website. Thus, the Employer never realized there was a job applicant who had posted his interest, and never filed a response (declaration) with respect to that applicant. [Testimony of Ms. Kim.]

Employer reviewed the online applicant's resume in preparation for the hearing. At Hearing, Employer noted that the online applicant had no construction experience whatsoever listed on his resume; thus, he was not qualified for the position of mason and would not have been hired back in April 2014, even if the Employer had reviewed his response.

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[1] The Citizen Job Placement Section calculates the 14-day deadline in the Regulation as meaning 14 days "after the closing date listed on the website." [Testimony of Mr. Ulloa.] The so-called "declaration" is more in the nature of a digital response posted on the website, rather than a declaration signed under penalty of perjury. *Id.*

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit qualified U.S. workers, U.S. permanent residents and CNMI permanent residents. Regs. at § 80-30.3-440. To this end, Department Regulations require that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." *Id.* at § 80-30.3-205; see also § 80-30.3-300. In the event that a citizen, CNMI permanent resident, or U.S. permanent resident was not hired, the Employer must file a response on the website, within 14 days after the advertisement is closed, to indicate what action was taken and the reasons for not hiring the citizen or permanent resident. *Id.* at § 80-30.3-450.

In this case, the Employer posted the job on DOL's website, but Employer's secretary forgot to search the website to see if anyone had responded. It appears that this was an oversight, rather than a deliberate attempt by the Employer to circumvent the law.

The testimony supports a finding that Employer did not file online declaration as required by Regulation section 80-30.3-450; however, the Employer's conduct was the result of a mistake of its secretary, rather than an intentional act to disregard the law. In the end, Employer filled the announced position by renewing the foreign national (CW- status) employee who already held the position. Further review by Employer uncovered the fact that the online responder had not been qualified for the job.

Sanctions: In the Determination, Enforcement requested a fine of $2,000 against Employer for its conduct. Enforcement's review of Employer's website postings was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2). The amount of fines is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of *justice* and *fairness* in proceedings." Regs. at § 80- 50.4-820(h) and (o) (emphases added).

Applying the above standards to the facts of this case, the Hearing Officer concludes that a reduced monetary fine is appropriate in this case. The credible testimony of Employer's secretary supports a finding that Employer's failure to respond to a job seeker was an inadvertent mistake. Further, evidence established that the job seeker who had posted a response and resume had no experience in masonry or construction; thus, he was not qualified for the "mason" position. Therefore, as a practical matter, Employer's conduct did not deprive a citizen from obtaining a job. Given these facts, the Hearing Officer finds that a $500 sanction is appropriate; however, a portion of the sanction shall be suspended for two years, then extinguished, provided that the Employer continues to comply with Departmental regulations with respect to hiring practices.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Respondent GR Construction Co., Inc. is found in violation of the "Employer Declaration" Regulation [§ 80 – 30.3-450] for not filing timely declarations to the listed job vacancies. For the reasons stated above, the Hearing Officer concludes that Employer should be ordered to pay a monetary penalty for this conduct, as set forth below. 3 CMC § 4947(d)(11); Regs. at § 80–50.4-820(o).

2. **Sanctions:** Respondent GR Construction Co., Inc. is SANCTIONED five hundred dollars ($500) for its conduct; however, $300 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$200** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent GR Construction Co., Inc. is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

[CAC No. 14-058-10]

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: December 1, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-060-10
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Commonwealth Pacific International, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on November 17 and December 2, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Commonwealth Pacific International, Inc. appeared through its Manager, John Cabrera, and Assistant Manager, Tony Sablan. Dennis Cabrera of the Citizen Job Placement Section testified in support of the Enforcement Section. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on October 28, 2014, against respondent Commonwealth Pacific International, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with the "Employer Declaration" and "Job Preference" requirements set forth in the CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Department Regulations state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

Employers who post job vacancies on DOL's website may receive responses from U.S. citizen or permanent resident job seekers. If those Employers then decide not to hire those applicants, the employers are required to post a so-called "Employer Declaration" (i.e., digital response) explaining: (1) what action the employer took as to each applicant who responded to the job vacancy; and (2) the employer's reason for not hiring that citizen or resident applicant. *Id.* at § 80-30.3-240.

The facts of this case are as follows. Employer operates several businesses on Saipan, including a gift shop and a commercial rental business. In May 2014, Employer posted two job vacancy announcements ("JVAs") on the Department of Labor ("DOL") website for the position of maintenance and repair worker. [Announcement No. 14-05-27430 was entered into evidence as Hearing Exhibit 2; Announcement No. 14-05-27429 was entered into evidence as Hearing Exhibit 4.] Each JVA received a single response from an interested job applicant. [Testimony of Mr. Sablan.]

On about May 12, 2014, Employer decided to cancel the JVAs and re-issue them. One reason for the change was that one JVA had mistakenly labeled the job as part-time. Employer's Assistant Manager, Tony Sablan, was uncertain how to cancel the JVAs and sought advice from Dennis Cabrera of the Job Placement Section.[2] *Id.*

At the time that Mr. Sablan asked to cancel the Employer's JVAs and replace them with new JVAs, he sent an email to Mr. Cabrera, stating that "[b]oth JVAs have one applicant and I would entertain them upon the closing date of the JVA 14-95027472." [A copy of Mr. Sablan's email to Dennis Cabrera, dated 5/09/14, was entered into evidence as Hearing Exhibit 5.]

[2] Dennis Cabrera testified that Tony Sablan had contacted him in May 2014 to ask how to cancel two JVAs. Mr. Cabrera gave Mr. Sablan instructions regarding how to cancel. Mr. Sablan's first attempt to cancel the JVA was unsuccessful so he again contacted Mr. Cabera and, on the second attempt, the cancellation was completed. [Testimony of Mr. Cabrera.] Mr. Ulloa noted that one announcement (No. 14-05-274229) was cancelled, but one announcement (No. 14-05-27430) was never officially cancelled. [Testimony of Mr. Ulloa.] Mr. Sablan testified that he had intended to cancel both JVAs and he did not realize that only one had been cancelled. [Testimony of Mr. Sablan.]

Despite Asst. Manager Sablan's promise to consider two job applicants, Employer never contacted or considered those two applicants who had posted responses to the above-listed JVAs.

When Employer published a new posting of the job on DOL's website from September 1 to 15, 2014 (see Hearing Exhibit 3), no job applicants responded to the announcement.

DISCUSSION

At Hearing, much of the testimony concerned (1) whether Asst. Manager Tony Sablan had cancelled both of Employer's JVAs in May 2014, or only one; and (2) whether Mr. Sablan had interviewed the two job applicants who responded to the first JVAs, as he had promised to do. Mr. Sablan's testimony was inconsistent on both points. In the first hearing session, he testified that he had not been aware that any local job applicant had responded to JVAs posted by Employer in May 2014. In the second hearing session, however, Enforcement produced Mr. Sablan's email of May 12, 2014, in which he promised to "entertain" two applicants who had posted responses before the JVAs were cancelled. [Hearing Exhibit 5 - email from Tony Sablan to Dennis Cabrera, dated May 12, 2014.] After re-reading his May 12th email, Mr. Sablan admitted that he now recalled the email and that he had later forgotten to contact or consider the two job applicants.

In his defense, Asst. Manager Sablan testified that his failure to consider these applicants was a mistake rather than a deliberate attempt to circumvent the law. Second, he argued that the two applicants' resumes show that they would not have been qualified to work for Employer as maintenance workers. [The applicant's posted resumes were entered into evidence at Hearing Exhibits 7 and 8.]

Holding: The Hearing Officer finds that Employer's failure to post a declaration regarding the two job applicants constituted a violation of the Regulations at section 80-30.3-240. It is undisputed that the Employer's Assistant Manager promised the Job Placement Section that Employer would consider two job applicants who had responded to the posted JVAs. [Email at Hearing Exhibit 5.] However, Employer failed to consider, evaluate or interview those job applicants. Furthermore, Employer failed to post a response or declaration stating its reasons for not hiring the applicants.

As to Employer's argument that the applicants' resumes demonstrate that they are not qualified, the Hearing Officer finds it impossible to determine without an

interview whether these individuals are able to perform maintenance at the level required by Employer. Employer could not make that judgment as well without interviewing these applicants, which it failed to do. Therefore, this argument is rejected.

Employer should be sanctioned for failing to consider these U.S. citizen job applicants and for failing to file a declaration giving the reasons for not hiring them, pursuant to Department Regulations at section 80-30.3-240.

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J. Cody on 4/07/2014, affirmed by Secretary of Labor on 4/29/2014.)

Although Employer's Asst. Manager was mistaken in failing to interview the two job applicants noted above, the testimony suggests that this failure was the result of simple negligence rather than a deliberate attempt to circumvent the law and violate the work preference rules. At Hearing, Employer stated that it would resume its practice of posting JVAs on DOL's website in the future and that it would interview all candidates who are arguably qualified to work in offered positions. [Testimony of John Cabera and Tony Sablan.] This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Commonwealth Pacific International Inc. for failing to comply with Employment Rules and Regulations at §§ 80-30.3-205 and 240. For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Commonwealth Pacific International Inc. is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, $500 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: February 10, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-065-11
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Pacific Taxi Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on November 25, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Pacific Taxi Corporation appeared through its President, Md. Nurul I. Bhuiyan. Respondent's sole employee, Md. Shazedur Rahman, also appeared and testified. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on November 6, 2014, against respondent Pacific Taxi Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a job vacancy in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. Employer operates a taxi company that employs only one employee – Md. Shazedur Rahman. In April 2014, Employer's President arranged for a radio advertisement to run on KWAW FM radio (MAGIC 100.3) advertising the position of taxi driver. The advertisement ran between April 21 and 25, 2014. Evidently, nobody responded to the advertisement. [Testimony of Mr. Bhuiyan.]

Employer did not post the above-listed job announcement on the Department of Labor ("DOL") website. At the time of the radio advertisement, the advertised position was already filled by a CW-1 worker named Md. Shazedur Rahman. Employer's President used the services of an agent to prepare the renewal CW Petition for his sole employee. After the advertisement ran, Employer submitted a CW-1 petition to renew the CW-status employee. Subsequently, USCIS approved the petition.

President Bhuiyan admitted that he was entirely unaware of the local Department regulations that require the posting of job announcements on DOL's website. [Testimony of Mr. Bhuiyan.]

DOL takes the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Ulloa.]

CONCLUSIONS OF LAW

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at 80 – 30.3-205; NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at § 80-30.3-230; NMIAC § 80-20.1-225(e).

It is undisputed that this Employer failed to post a job announcement on DOL's website in violation of DOL's Regulations. *Id.* Employer's conduct stemmed from its President's ignorance of local DOL Regulations. Mr. Ulloa noted that if this job announcement had been posted, this unskilled position might have generated a considerable amount of interest among the job seekers registered on DOL's website. [Testimony of Mr. Ulloa.] Unfortunately, we will never know if one of those registered, unemployed job seekers would have applied, as the job was not posted. The Employer should be sanctioned for this conduct.

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. Past cases in which the $2,000 sanction was imposed have involved evidence that the Employer had willfully disregarded its legal obligations to search for available U.S. citizens or permanent residents. (See, e.g., CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.)

In this case, Employer placed a radio advertisement to announce a job vacancy but failed to use the method required by the Department of Labor. This Employer claimed to have no knowledge of Department of Labor Regulations; however, this ignorance does not absolve the Employer from responsibility to follow the law.

At Hearing, Employer's President promised that he would post JVAs on DOL's website in the future. The President's representation and the size of this business should be considered mitigating factors in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Pacific Taxi Corporation for violation of Employment Rules and Regulations at § 80-30.3-205;

NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned in the manner set forth below.

2. **Sanctions:** Respondent Pacific Taxi Corporation is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, $500 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **forty-five (45) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Pacific Taxi Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 1, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-067-11
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Leon P. Ganacias,	)	
dba KWAW-FM,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on December 30, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Leon P. Ganacias, *dba* KWAW-FM, was represented by his son, Leo Ganacias, Managing Director of KWAW-FM. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on November 18, 2014, against respondent Leon P. Ganacias, *dba* KWAW-FM ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating the Departmental Regulation that requires an employer to file a "declaration" (i.e., online response) with the Citizen Job Placement Section within 14 days after publication of a job announcement on the Department's website. [Regs. at § 80-30.3-450.] This requirement is met if the employer posts a timely, short response on the website, explaining: (1) the action taken with respect to each applicant who posted

a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. [1]

On about June 12, 2014, Employer posted job announcements on the Department's website (www.marianaslabor.net) for three positions as radio announcer and one job as domestic helper. Each announcement received one online response from a U.S.-qualified job applicant. Employer's Managing Director acknowledged that he saw the responses on the website. [Testimony of Mr. Granacias.]

As to the domestic helper position, the Director telephoned the job applicant to discuss the job, but after a brief discussion, the applicant stated that she was not interested in the position. As to the radio announcer position, the Director contacted a prior employer of the applicant and received negative reports about the applicant's work and character. On that basis, Employer decided not to interview the applicant. Employer did not file any written responses online to the posting. *Id.*

At the time of the announcements, Employer already employed foreign national workers in the posted jobs. Ultimately, the Employer filed petitions to renew CW-1 workers for the radio announcer and domestic helper positions. *Id.*

Employer's online responses were required to be posted within 14 days after the closing date of the job announcement. [Regs. at § 80-30.3-450.] That deadline fell in about early July, 2014. As of October 2014, Employer had not posted responses to the Department or the online job applicants. [Testimony of Mr. Ulloa.]

Employer's Managing Director stated that he would have filed online responses to the job applicants, but he was unaware of that requirement until this case. [Testimony of Mr. Ganacias.]

DISCUSSION

In this case, Enforcement charged that Employer violated the Regulations at § 80-30.3-450 by failing to post timely declarations. Employer admitted that it did not post online declarations with respect to its announcements for radio announcer and domestic helper. Employer's Managing Director testified credibly that he had been unaware that Employer was obligated to file written responses to job applicants, but promised to do so in the future. [Testimony of Mr. Ganacias.]

[1] The Citizen Job Placement Section calculates the 14-day deadline in the Regulation as meaning 14 days "after the closing date listed on the website." The so-called "declaration" is more in the nature of a digital response posted on the website, rather than a declaration signed under penalty of perjury.

Furthermore, Enforcement alleged that Employer engaged in bad faith conduct when Director Ganacias decided not to interview the applicant for the radio announcer position based on that applicant's previous employer's comments about her. *Id.*

The Hearing Officer has previously ruled that it is a bad faith practice for an employer to simply neglect to interview or even consider the resume of a local job applicant who responds to a posted job announcement. [*See, e.g.*, CAC No. 14-008-03, *Dept. of Labor Enforcement Section v. RJCL Corporation*, Admin. Order by J.Cody on 4/07/2014, aff'd by Secretary of Labor on 4/29/2014.] In the present case, Employer did not ignore the applicant; rather, he reviewed the resume and job history of the applicant and contacted a former employer for a reference. Upon receiving that employer's negative comments about the worker, Employer made the decision not to interview or hire the worker.

The Hearing Officer finds that Employer's decision not to interview the applicant was misguided, but not indicative of bad faith. Employer should have interviewed the applicant and given her an opportunity to explain her experience in her former job, instead of simply relying on the prior employer's assessment. Nevertheless, the facts show that the Employer made an effort to *consider* the job applicant, even though he made an unfortunate decision to shortcut the process when he relied on the prior employer's negative comments and neglected to interview the applicant.

Sanctions:

In its Determination, Enforcement moved for the maximum level of $2,000 in monetary sanctions against Employer, both for its alleged bad faith conduct as well as its failure to post responses on the DOL website.

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2). Nevertheless, the amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing

officer...to further the interests of *justice* and *fairness* in proceedings." Regs. at § 80- 50.4-820(h) and (o) (emphases added).

Applying the above standards to this case, the Hearing Officer concludes that this Employer should be given a partially suspended monetary sanction and a warning against future violations. Employer's management admitted that it failed to file an online declaration detailing its reasons for not hiring two applicants. Employer's Managing Director testified credibly that his failure was due to his ignorance of the Regulation and Employer promised not to repeat the failure in the future. As to the bad faith charge, for the reasons stated above, the Hearing Officer finds that Employer's conduct, although incorrect, was not done in bad faith. Accordingly, Employer's penalty should not be aggravated by any charge of bad faith conduct.

The Hearing Officer finds that the appropriate fine for the violation in this case should be five hundred dollars with half of that fine suspended, on the condition that Employer complies with DOL Regulations over the next two years.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent Leon P. Ganacias is hereby FINED five hundred dollars ($500); however, half of the fine shall be suspended for a period of two years, then extinguished, provided that Employer complies with all applicable DOL Regulations during that period. 3 CMC §§ 4528(f)(2) and 4947(11). Respondent is ORDERED to pay the remaining $250 fine on or before **January 30, 2015**. Payments shall be made to the CNMI Treasury; a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. **Warning:** Respondent is WARNED that any failure in the future to review and consider online job applicants, or failure to post the required declaration (online response) in a timely manner, pursuant to Regulations at § 80 – 30.3-450, could subject Employer to monetary sanctions in an amount to be determined in a due process hearing.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 31, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-068-11
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Hemine Ipwan Islam,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on December 3, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Hemine Ipwan Islam appeared through her manager and husband, Md. Kamrul Islam. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on November 19, 2014, against respondent Hemine Ipwan Islam ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a job vacancy in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. Employer operates a security guard business known as Ipwan Security Services. Employer has five employees: two workers with EADs (Employment Authorization Documents issued by USCIS), two CW-1 workers and one permanent resident. Employer's husband, Md. Kamrul Islam, manages the business. [Testimony of Mr. Islam.] In April 2014, Employer, through its agent, Friendship Enterprises, arranged for a radio advertisement to run on KWAW FM radio (MAGIC 100.3) advertising the position of security guard. The advertisement ran between April 16 and 22, 2014. Evidently, nobody responded to the advertisement. *Id.*

Employer did not post the above-listed job announcement on the Department of Labor ("DOL") website. Employer's manager testified that he was not aware of the DOL Regulations that require posting of job announcements on the DOL website. Employer's manager relied on information from an agent who led him to believe that a radio advertisement would be sufficient support for a CW Petition to renew his security guard. *Id.*

At the time of the radio advertisement, the advertised position was already filled by a CW-1 worker. After the advertisement ran, Employer submitted a CW-1 petition to renew the CW-status employee. Subsequently, USCIS approved the petition.

DOL continues to take the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Ulloa.]

Employer's manager testified that now that he understands that DOL Regulations require employers to post job announcements on DOL's website when renewing foreign national workers, he will ensure that Employer posts such announcements on DOL's website in the future.

CONCLUSIONS OF LAW

Employer violated Regulation § 80-30.3-205 by failing to post the job announcement for security guard on the DOL website.

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at 80 – 30.3-205; NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at

§ 80-30.3-230; NMIAC § 80-20.1-225(e). Employer's manager testified that he did not post the job announcement on the DOL website; thus, it is undisputed that Employer failed to comply with the above-cited regulation.

Sanctions: The Determination requested that Employer be fined the maximum fine of $2,000 for its conduct. [Hearing Exhibit 1 at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Ulloa.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction. This Employer placed a radio advertisement to announce the available job but failed to use the method required by the Department of Labor. Employer's manager testified credibly that he was ignorant of the local labor regulations and that he acted upon advice from his Processing Agent whom, he claims, did not inform him that he was required to post the job announcement on DOL's website. [Testimony of Mr. Islam.] In short, Employer's conduct was the result of a lack of knowledge of local labor law as well as Employer's reliance on incorrect advice from a processing agent, rather than a willful attempt to circumvent the law.

At the conclusion of the Hearing, Employer's manager testified that he planned to post JVAs on DOL's website in the future. This conduct should be considered a mitigating factor in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned one thousand dollars; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

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Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent Hemine Ipwan Islam for violation of Employment Rules and Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned as set forth below.

2. **Sanctions:** Respondent Hemine Ipwan Islam is hereby SANCTIONED one thousand dollars ($1,000) for her conduct; however, $500 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **forty-five (45) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent Hemine Ipwan Islam is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 11, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-069-11
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
K.C.A. Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on December 3, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by Jeff Camacho and Yvonne Taisacan. Respondent K.C.A. Corporation appeared through its President, Mizanur R. Khan. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on November 6, 2014, against respondent K.C.A. Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to post a job vacancy in violation of CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1] Those Regulations state that an Employer who intends to hire or renew a foreign national worker for employment "must" post the job vacancy announcement on the Department's website. *Id.*

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

The facts of this case are as follows. Employer operates a retail store, known as K&K Market. In about January 2014, Employer's President arranged for a job announcement for the position of cashier to be published in the Marianas Variety newspaper. The advertisement was published, but nobody responded to the advertisement. [Testimony of Mr. Khan.]

Employer did not post the above-listed job announcement on the Department of Labor ("DOL") website.

Months later, in August 2014, Employer decided to hire a foreign national worker for the cashier position. Mr. Khan, with the help of a friend, prepared and submitted a CW-1 Petition to hire a foreign national worker as a cashier. USCIS approved the petition in about October 2014. [Testimony of Mr. Khan.]

Employer's President, Mizanur R. Khan, testified that he was entirely unaware of the local Department regulations that require the posting of job announcements on DOL's website. *Id.*

DOL takes the position that CNMI Labor regulations remain in effect and that employers are required to post job vacancies on DOL's website notwithstanding the fact that USCIS has no specific requirement regarding such posting with respect to CW-1 petitions. [Testimony of Mr. Camacho.]

CONCLUSIONS OF LAW

As stated above, CNMI Employment Rules and Regulations state that an Employer who intends to hire or renew a foreign national worker "must" post the job vacancy announcement on DOL's website. Regs. at 80 – 30.3-205; NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. Regs. at § 80-30.3-230; NMIAC § 80-20.1-225(e).

It is undisputed that this Employer failed to post a job announcement on DOL's website in violation of DOL's Regulations. *Id.* Employer's conduct stemmed from its President's ignorance of local DOL Regulations. The Hearing Officer notes that if this job announcement had been posted, this unskilled position might have generated a considerable amount of interest among the job seekers registered on DOL's website. Unfortunately, we will never know if one of those registered, unemployed job seekers would have applied, as the job was not posted on the site. The Employer should be sanctioned for this conduct.

Sanctions: Enforcement asked that Employer be assessed the maximum fine of $2,000 for its conduct. [Determination (Hearing Exhibit 1), at p. 3.] After hearing the testimony, Enforcement noted that the decision lies in the discretion of the Hearing Officer. [Testimony of Mr. Camacho.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se the inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

The Hearing Officer finds that the facts here do not justify the maximum sanction; however, a substantial monetary sanction is warranted. In this case, Employer placed a newspaper advertisement to announce a job vacancy but failed to use the method required by the Department of Labor. This Employer claimed to have no knowledge of Department of Labor Regulations; however, this ignorance does not absolve the Employer from responsibility to follow the law.

At Hearing, Employer's President promised that he would post JVAs on DOL's website in the future. The President's representation should be considered mitigating factors in assessing the appropriate sanctions.

Based on the above facts, the Hearing Officer concludes that Employer should be sanctioned $1,000; however, $500 of that sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of CNMI labor laws or regulations during that period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered against Respondent K.C.A. Corporation for violation of Employment Rules and Regulations at § 80-30.3-205; NMIAC § 80-20.1-225(a). For this violation, Respondent shall be sanctioned in the manner set forth below.

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2. **Sanctions:** Respondent K.C.A. Corporation is hereby SANCTIONED one thousand dollars ($1,000) for its conduct; however, $500 of the fine shall be SUSPENDED for a period of TWO years, then extinguished, provided that Employer complies with the terms of this Order and commits no further violations of CNMI labor law in that period. Respondent is ORDERED to pay the **$500** portion of the fine no later than **forty-five (45) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Posting on Website and Interview of Referrals:** Respondent K.C.A. Corporation is ORDERED to post all job vacancies and job renewals in the future on the Department's website *(www.marianaslabor.net)*, in accordance with Regulations at § 80–30.3-205; NMIAC § 80-20.1-225(a). Respondent shall be required to interview and consider for hiring any referrals of U.S. citizens or permanent residents when they are qualified and available to work.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, it shall be subject to a reinstatement of all or part of the suspended fine, pursuant to a request for reinstatement filed by the Enforcement Section.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: December 22, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-070-12
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Rong Hua Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on February 5 and 11, 2015, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. Respondent Rong Hua Corporation appeared through its General Manager, Liu Yanquiong, and Manager, Tony Sablan. Ms. Betty Bai served as translator for Ms. Liu. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement Section ("Enforcement") in the Hearing Office on December 18, 2014, against respondent Rong Hua Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

The Determination alleges that Employer failed to comply with the "Employer Declaration" and "Job Preference" requirements set forth in the CNMI Rules and Regulations ("Regs.") at Section 80 – 30.3-205; NMIAC § 80-20.1-225(a).[1]

[1] The first citation refers to the Department's Rules and Regulations that were published in the Commonwealth Register in May 2010; the NMIAC citation refers to the Northern Mariana Islands Administrative Code ("NMIAC") which published the identical text of the regulations, but renumbered some of the sections.

Department Regulations state that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." Regs. at § 80-30.3-205.

Employers who post job vacancies on DOL's website may receive responses from U.S. citizen or permanent resident job seekers. If those Employers then decide not to hire those applicants, the employers are required to post a so-called "Employer Declaration" (i.e., digital response) explaining: (1) what action the employer took as to each applicant who responded to the job vacancy; and (2) the employer's reason for not hiring that citizen or resident applicant. *Id.* at § 80-30.3-240. If the employer hires the U.S. citizen or permanent resident, no Employer Declaration is required to be filed. *Id.*

The facts of this case are as follows. Employer operates a Chinese restaurant in Garapan, known as Dakeyi Restaurant. In August 2014, Employer posted a job vacancy announcement ("JVA") on the Department of Labor ("DOL") website for two positions as waitress. The JVAs were published on the website from August 13 to August 27, 2014. Enforcement notes that four individuals responded online to the JVAs. [Determination (Hearing Exhibit 1) at paragraph 2.] Subsequently, Employer filed responses, simply stating that the applicants were "not selected." [Response printed from website, listed as Hearing Exhibit 2; testimony of Tony Sablan.]

Prior to posting the JVA, Employer employed one foreign national worker in a waitress position. One of the purposes of posting the JVAs was to meet USCIS requirements for renewing that worker's CW-1 status. [Testimony of Mr. Sablan.] In about November 2014, that foreign national worker informed Employer that she did not want to renew her employment with Employer. In early November 2014, Mr. Sablan prepared a letter from Employer to the Job Placement Section, cancelling the JVAs. The letter, dated November 12, 2014, was not submitted to the Job Placement Section (Mr. Ulloa) until about December 2, 2014.

Enforcement asserted that Employer's failure to hire any of the four applicants who responded online, and its subsequent cancellation of the JVAs, demonstrates Employer's disregard of the preference rules set forth in DOL's Rules and Regulations ("Regulations") at section 80-30.3-105 *et seq.* At Hearing, Employer contended that none of the job applicants were qualified and that its cancellation of the job was not wrongful and did not violate any statute or regulation of DOL.

Four applicants had responded online to the JVA posted by Employer in August 2014. Employer's Manager testified that he had been unable to contact two of the applicants because they did not answer their telephones; he found that the other two other applicants had no prior restaurant experience. Testimony of Mr. Sablan.

Enforcement noted that according to the O-NET database, little or no prior experience should be required for a waiter/waitress position. [See copy of the O-NET Summary Report for Waiters and Waitresses, p. 4, at Hearing Exhibit 3.] However, Employer's JVA said the applicants needed "anywhere from a few days to a few months of training in Chinese dishes and preferred Chinese speaking." [Hearing Exhibit 2 – "qualification requirements."] The Hearing Officer finds that this statement was ambiguous as it implied that prior experience was essential for this job.

At the first hearing session, the Hearing Officer set a continued hearing date and instructed Enforcement to determine whether any of the job applicants were still interested in the waitress position at Employer's restaurant. Enforcement (Mr. Ulloa) later reported that one of the applicants, Christina de la Cruz, was still interested in working as a waitress for the Employer. [Testimony of Mr. Ulloa.]

Enforcement asked Ms. Dela Cruz to appear at the second Hearing but she did not show up. Nevertheless, Employer's General Manager stated that she was willing to hire and train Ms. Dela Cruz for the waitress position. After the hearing, further arrangements were made and Employer hired Ms. Dela Cruz, who began working full-time at the restaurant on February 27, 2015. [Letter from Asst. Manager Tony Sablan to Hearing Office, dated March 3, 2015, entered into evidence as Hearing Exhibit 5].

Employer's act of hiring the U.S. citizen-applicant as a waitress demonstrates good faith on the part of Employer in meeting its obligation to employ qualified U.S. citizens in its business. Based on its recent hiring of a U.S. citizen, the Hearing Officer finds that the case should be dismissed and Employer should be given a warning but no sanction.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Dismissal:** Given that Respondent Rong Hua Corporation has now hired the U.S. citizen job applicant who was one of the original responders to Employer's posted JVA, this case is hereby dismissed.

2. **Posting on Website and Interview of Referrals:** Respondent Rong Hua Corporation is WARNED of its continuing obligation to post all job vacancies and job renewals in the future on the Department's website and to interview and hire any qualified U.S. citizen or permanent resident job applicants in accordance with Regulations at § 80–30.3-205. If a U.S. citizen or permanent resident job applicant applies but is not hired for a job, Employer should file its Employer Declaration in accordance with Regulations at § 80–30.3-240.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 4, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 14-072-12
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Pacific Bellwether LLC,	)	
dba Shenanigans Restaurant,	)	
Respondent.	)	
	)	

This Compliance Agency Case was heard on January 8, 2015, in the Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by James Ulloa. The Citizen Job Availability and Job Placement Section ("Job Placement") was represented by Yvonne S. Taisacan. Respondent Pacific Bellwether LLC, *dba* Shenanigans Restaurant, appeared through its General Manager, Bel Busby, and the company's attorney, Jennifer Dockter. Employee Rosemarie Libreja testified as a witness for the respondent. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Enforcement Section ("Enforcement") in the Hearing Office on December 22, 2014, against respondent Pacific Bellwether LLC, *dba* Shenanigans Restaurant ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, as amended during the Hearing, Enforcement alleged that Employer failed to provide job preference to two qualified job applicants, denying them the job preference for U.S. citizens codified in CNMI statutes and regulations. [Determination at p. 2, at ¶¶ 6-7 and p. 3, ¶ 1.]

The facts may be briefly summarized as follows: In November 2014, Employer posted job announcements on the Department of Labor ("DOL") website

(www.marianaslabor.net) for kitchen helpers (3 positions) and waitresses/waiters (2 positions). The job vacancy announcements ("JVA's") were posted on DOL's website from November 1 to 15, 2014. Employer received numerous responses for each position. After narrowing the field of applicants, Employer interviewed two U.S. citizens - one for each position, but decided not to hire either applicant. Employer then filed CW-1 Petitions with USCIS to renew the CW-1 status workers who already held the posted jobs prior to the posting of JVAs.

DOL's Revision of the Employer's Job Announcements:

The JVAs drafted by the Employer required job applicants to have 2 years of prior job experience for the "waitress/waiter" position and 5 years of job experience for kitchen helper. Employer posted the JVAs to DOL's website on October 30, 2014.

In accordance with its standard practice, the Job Placement Section reviewed each posted JVA to ensure that it conformed with applicable provisions of the O-NET system.[1] Job Placement's then-Acting Director, Ms. Yvonne Taisacan, compared the contents of Employer's posts to O-NET entries that she believed fit the job vacancies. She concluded that the job experience level should be less than the levels set by the Employer: the experience level set by O-NET was "at least three months of experience" for the waitress and kitchen helper positions.[2] Based on the O-NET, Job Placement (Taisacan) decreased the amount of prior job experience required for the waiter/waitress position from 2 years to 3 months for the kitchen helper position from 5 years to 3 months. [Testimony of Ms. Taisacan.]

Before changing the experience level on the JVAs, Ms. Taisacan made one attempt to contact Employer by telephone. When she was unable to reach Employer, Ms. Taisacan went ahead and changed the JVAs and "approved" them for publication on the website. *Id.*

At the Hearing, Employer objected that the Job Placement Section made substantial changes to the experience level of each JVA without discussing the change with the Employer. Employer also noted that for the kitchen helper

[1] Department Regulations state that "[j]obs performed in the Commonwealth shall be classified under the O-NET classification for each job...." Regs at § 80-30.1-200. "The Occupational Information Network (O-NET) is a program of the U.S. Department of Labor Employment and Training Administration that is the nation's primary source of occupational information." *Id.*

[2] The revised JVA's for waitress and kitchen helper positions were entered into evidence as Hearing Exhibits 2 and 3, respectively.

position, Job Placement used the O-NET designation for "dishwasher" (Hearing Exhibit 5), whereas there was a different O-NET designation for "cooks, restaurant" (Hearing Exhibit 6) that would have yielded a slightly higher level of experience (3 months to one year rather than 0-3 months). In any event, neither O-NET designation would have been close to Employer's designation of five years' experience for kitchen helper and two years' experience for waiter/waitress. Moreover, Employer never appealed the Job Placement Section's decision but instead, went along with the experience level set by the Job Placement Section.

Much testimony was presented at hearing about this issue of the appropriate O-NET designation. However, this issue is peripheral to the central charges of the Determination. Moreover, Employer could have appealed Job Placement Section's decision to alter the JVA at that time, but it chose not to do so. [Regs. at §§ 80-30.2-210 and 80-50.4-240.] Because Employer did not contest the changes to the JVAs in November 2014 and never sought appeal of that decision, Employer failed to exhaust its administrative remedies and should be estopped from objecting to the "experience level" at this point.

* * * * * *

In essence, this case concerns Employer's decision not to hire two particular U.S. citizen applicants – one for each offered job. The remaining applicants who posted responses to the job announcements were either rejected by Employer based on their posted work histories, or else, failed to show up for interviews. At Hearing, Enforcement stated that it did not take issue with Employer's rejection of those applicants – but only with those two applicants who had been interviewed and not hired. [Testimony of Mr. Ulloa and Ms. Taisacan.]

The Kitchen Helper Position:

There were 22 online responses to this posted job announcement (24 minus two repeats). Employer reviewed the posted job histories and found only one applicant who arguably had the requisite job experience. That applicant came to the restaurant to be interviewed by the General Manager ("GM"), Bel Busby.

The interview did not go well. Two issues led to Employer's rejection of this applicant. First, the job applicant arrived chewing betel nut and holding a small bottle to catch the betel nut-saliva residue. During the interview, the applicant set the bottle down on the table but continued chewing. The GM was immediately concerned about the sanitation problem of a betel nut chewer working in the

restaurant kitchen, but she said nothing about this to the applicant. The GM was also dissatisfied that a person would go to a job interview, setting down his portable spittoon in a casual manner, while meeting with his potential employer. The GM did not inform the applicant that if he were to be hired, he would not be allowed to chew betel nut during work due to sanitation concerns.

The second issue concerned job experience. The applicant explained that he had no formal cooking training but he had helped at home, cooking for his family for years. The GM was concerned about this applicant's lack of formal restaurant experience; she did not consider family meals to be the equivalent of international restaurant meals. For these two reasons, Employer decided that the applicant lacked the requisite experience and was not suitable for the job. [Testimony of GM Busby.] The applicant was not hired.[3]

The Waitress/Waiter Position:

There were 12 online responses to this posted job announcement (14 minus two repeats). Employer reviewed all posted job histories and found that only four of the online applicants had the required amount - a minimum of 3 months - of work experience. Employer's staff called or e-mailed all four applicants to arrange for them to come to the restaurant for interviews, but 3 out of 4 applicants failed to appear. One interviewee appeared and was interviewed by the General Manager.

The interview went well. The GM decided that the applicant was qualified and that Employer would hire her. The GM then asked the applicant to bring a police clearance and letter verifying her prior employment to the GM at Shenanigan's Restaurant. The GM indicated that she would be in the restaurant on a Tuesday and wanted the documents delivered then. On that day, the applicant neither brought the documents nor telephoned the GM to explain her absence. On the next day, the applicant telephoned and asked if she could still bring in the documents, but the GM told her that the position was closed.

At Hearing, the GM explained that she was very dissatisfied when the applicant failed to appear or call on that Tuesday, the day set by the GM for delivery of documents. When the applicant failed to appear at the restaurant and did not call to explain her absence, the GM concluded that the applicant was an "unreliable" person and therefore, she decided not to hire her. The GM testified that this one

[3] Both interviewees described in this Order were named on the record during the Hearing, but the Hearing Officer is leaving the names out of this Order to protect the privacy of those individuals.

"event" had changed her mind about hiring the applicant. The GM admitted that she never asked the applicant during the phone call why the applicant had not appeared or called on Tuesday. The GM did not tell the applicant the reason why she was not being hired; she simply stated that the position was "closed." [Testimony of GM Bel Busby.]

CONCLUSIONS OF LAW

1. The Legal Standards Applicable To This Case.

Under Commonwealth law, every employer is required to give citizens and status-qualified citizens preference for employment in the private sector. 3 CMC § 4521; Regs. at § 80-30.3-100 *et seq.* Furthermore, every employer is required to make good faith efforts to recruit qualified U.S. workers, U.S. permanent residents and CNMI permanent residents. Regs. at § 80-30.3-440. To this end, Department Regulations require that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." *Id.* at § 80-30.3-205; see also § 80-30.3-300. An employer who rejects a U.S. citizen applicant in favor of a CW-1 status worker is required to inform the Department as to the reasons for its decision. *Id.* at § 80-30.3-450.

The law- both federal and local – requires that if a U.S. citizen is qualified for an offered job and wants the job, he or she should be given job preference over a CW-1 status worker.[4]

In this case, Enforcement took issue with Employer's rejection of two applicants who interviewed for the positions of kitchen helper and waitress. Enforcement charged that Employer failed to give two U.S. citizen applicants preference for employment in the private sector, in accordance with the Regulations at § 80-30.3-105. Furthermore, Enforcement charged that Employer failed to engage in a good faith effort to employ citizens who were qualified and available to take the job offered by Employer. *Id.* at § 80-30.3-440 [Determination (Exhibit 1) at ¶¶ 6-7.]

[4] The CNMI requirement that employers make good faith efforts to hire U.S. citizens and permanent residents mirrors the federal requirements for petitioning to hire foreign workers under CW-1 status. The USCIS requires a Petition for a CW-1 worker to include Employer's "attestation...certified true and accurate....[that]... no qualified United States worker is available to fill the position." 8 C.F.R. § 214.2(w)(6)(ii)(A).

The Hearing Officer examined evidence to determine whether the Employer actually *reviewed, interviewed and/or considered* the job applicants who responded to the online JVAs. Such examination can reveal whether an employer has given preference in hiring to citizens and permanent residents, or else, ignored the preference in favor of renewing existing foreign national workers. Alleged violations may be technical, or more fundamental in nature, indicating a lack of good faith in hiring.

In examining the evidence, it is not appropriate for a Hearing Officer to substitute his own personal judgment into the business decisions of the employer. The question is not whether the Hearing Officer would have hired an applicant, but rather, whether an applicant was qualified such that the employer's rejection of that applicant cannot be justified and amounts to a bad faith denial of a lawful job preference. The underlying question is whether the facts establish that the Employer failed to give job preference, or failed to make a good faith effort to employ, qualified citizens and/or permanent residents.

2. ***Employer Failed To Give Job Preference or Exercise Good Faith With Respect To Hiring For Its "Waiter/Waitress" Position. [3 CMC § 4521; Regs. at §§ 80-30.3-105, 400.]***

As presented during the Hearing, Enforcement's charges concerned two specific hiring situations: one for kitchen helper and one for waitress:

(1) In the case of the "kitchen helper" applicant, the Hearing Officer finds that Employer had sufficient reason to find the applicant's experience level to be lacking and the applicant to be unsuitable for the job. The Employer made a reasonable decision that the job applicant was not qualified or suitable for the offered position, based on an interview conducted in good faith.

(2) In the case of the "waitress" applicant, the Hearing Officer finds that Employer ignored the citizen job preference arbitrarily and in bad faith. Employer rejected an applicant who, Employer admitted, was qualified in terms of her job experience. Employer suddenly discerned a serious character flaw in the applicant based the fact that the applicant did not show up on the day requested, then needed an extra day to produce documents. Employer never asked the applicant to explain why she had not delivered the documents or telephoned the GM on the previous day. Instead, the GM simply leapt to the conclusion that this one-day delay was inexcusable and proof of a serious character flaw, which justified an immediate decision not to hire this qualified, U.S. citizen applicant.

Employer's sudden rejection of this applicant after the interview, was unjustified under the circumstances. Employer was obligated to employ this qualified citizen who was available to work and clearly wanted the job. Employer failed to offer job preference to the citizen applicant for the waitress position. 3 CMC § 4521; Regs. at §§ 80-30.3-105, 440.[5]

3. *Employer Should Be Sanctioned For the Above-Described Conduct In Accordance With Labor Statutes and Regulations.*

In its Determination, Enforcement moved for monetary sanctions of $2,000 against Employer for its conduct. At the conclusion of the testimony, Enforcement stated that it would leave the decision to the discretion of the Hearing Officer.

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2) and Regs. at § 80-50.4-820(h). Nevertheless, the amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of *justice* and *fairness* in proceedings." Regs. at § 80-50.4-820(o) (emphases added).

Applying the above standards to this case, the Hearing Officer concludes that this Employer should be assessed a $1,000 monetary sanction, partially suspended, with a warning against future violations. Employer's management failed to give preference to a qualified U.S. citizen in violation of Departmental regulations. Nevertheless, Employer posted JVAs, reviewed responses and conducted interviews of those candidates who were arguably qualified for the positions.

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[5] Further, the Employer's decision may be put in context. The GM knew that if she rejected the applicant, she could proceed to renew her existing CW-1 worker; if she hired the applicant, she would have to terminate her long-standing worker. Do we ask too much when we require an employer to reject a valued CW-1 status worker for a (citizen) job applicant who, after all, is an unknown entity? Such considerations may present a dilemma to the employer, but they are not relevant to the legal obligation. As stated above, the law requires that if a U.S. citizen is qualified for the position and wants the job, he or she should be given job preference over a CW-1 status worker. (See fn. 4.)

Such conduct indicates a certain level of good faith, even though Employer ultimately rejected a qualified citizen applicant for the "waitress" job without just cause.

For its conduct as described above, the Hearing Officer finds that Employer should be sanctioned one thousand dollars ($1,000); however, half of the sanction shall be suspended for two years, then extinguished, provided that Employer commits no further violations of labor law within that period. Employer is warned in the future to review and consider all qualified candidates, and offer preference in hiring to any qualified U.S. citizen or permanent resident in accordance with the law.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** For the reasons stated above, judgment is entered against Respondent Pacific Bellwether LLC, *dba* Shenanigan's Restaurant, for failing to give job preference to a U.S. citizen, and failing to make a good faith effort to hire a qualified citizen, for the waitress/waiter position. (Determination at ¶¶ 5-6).

2. **Sanctions:** Respondent Pacific Bellwether LLC is hereby FINED one thousand dollars ($1,000) for its conduct; however, $500 of the sanction shall be SUSPENDED for a period of TWO YEARS, then extinguished, provided that Respondent commits no further violations within that period. 3 CMC §§ 4528(f)(2) and 4947(11). Respondent is ORDERED to pay the remaining $500 portion of the fine no later than forty-five (45) days after the date of issuance of this Order. Payments shall be made to the CNMI Treasury; a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: April 6, 2015

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 13-001-09
Department of Labor,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Marianas Star Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on September 26, 2013, at 1:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by Jeffrey Camacho, supervisor of the Enforcement Section, and by Asst. Attorney General Reena J. Patel. Respondent Marianas Star Corporation appeared through its President, Jun, Byung Soo. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on September 16, 2013. The Determination notes that Marianas Star Corporation ("Employer") was served with a request to produce documents back in October 2012, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring Report." [A copy of the Request was entered into evidence as Hearing Exhibit 3; the Determination was entered into evidence as Hearing Exhibit 1.]

Mr. Camacho testified that the Request was served on the Employer at the Employer's office on or about January 15, 2013, by labor enforcement investigator Frank Aguon. It was received by the Employer's President, Jun, Byung Soo. [See Request at Hearing Exhibit 3.] Mr. Jun testified that he believed the company provided some documents but he had no specific information regarding what was produced, if anything. [Testimony of Mr. Jun.] Ultimately, the Employer offered no evidence that anyone at the Employer's offices made any effort to comply with the Request and produce documents.

1. DOCUMENT PRODUCTION

At Hearing, the Department renewed its request that the Employer produce the same documents contained in the Request served on the Employer in January 2013. The request entails the following documents:

(a) a total listing of workforce statement of compliance;
(b) copy of Employer's business license;
(c) copy of Employer's latest annual corporate report;
(d) a payroll summary for the past two months (August and September 2013);
(e) a copy of the latest two Employer's Quarterly Withholding Tax Returns.

At Hearing, the Employer agreed to produce the documents but asked for a short amount of time to compile the information. The Hearing Officer gave the Employer until October 3, 2013, to produce the documents; however, that deadline is hereby extended to October 7, 2013. The October 7, 2013 deadline is set forth in the order (below).

2. SANCTIONS

In its Determination, the Department requested that Employer be sanctioned $2,000 for its failure to produce documents in response to the Request. After hearing the Employer's testimony, the Department repeated that it still wanted monetary sanctions of at least $1,000 or $500, but it left the decision to the discretion of the Hearing Officer. [Testimony of Jeff Camacho.]

The Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The above-cited statute and its implementing Regulations [1] do not specify standards upon which to assess applicable fines. Clearly, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

The Regulations also state with respect to "discovery," that appropriate methods of discovery include "production of documents or other evidence for inspection" and that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 80- 50.4-550. [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

The Employer testified that his company may have produced some documents to the Department in 2012, but he could not be certain they were delivered to the Enforcement Section. Even during the Hearing, the employer appeared confused as to which section of the Department he was dealing with. Certain problems may have been caused by language differences and the fact that English is not President Jun's primary language. Although linguistic difficulties are not an absolute defense or excuse to meeting Employer obligations, these difficulties may be factored into a decision on sanctions. In short, this Employer's failure to produce documents appears to have been caused more by negligence and confusion than by any deliberate attempt to withhold documents or information from the Department.

Based on the facts presented, the Hearing Officer finds that a $400 fine is significant enough to impress upon the Employer the need to respond to future Requests made by the Department. No useful purpose would be served by imposing any greater sanction, and the imposed fine is not overly lenient. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

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[1] See Employment Rules and Regulations (hereinafter, "Regulations") at 32 Com. Reg. 30254 (May 21, 2010).

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Document Production:** Respondent is ORDERED to produce the documents specified above in Section 1 (items a-e), to the Enforcement Section of the Department of Labor, no later than **October 7, 2013**, at 3 p.m. 3 CMC § 4527.

2. **Sanctions:** For the reasons stated herein, Respondent Marianas Star Corp. is hereby FINED in the amount of four hundred dollars ($400). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Added Sanction:** If Respondent fails to comply with the document production ordered in paragraph no 1 of this Order, Respondent shall be required to pay an additional sanction of $300, without further Order. In that event, the entire sanction amount ($700) shall be due on the same date as indicated above in paragraph no. 2.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 4, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 13-002-09
Department of Labor,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
RJCL Corporation,	)	
dba RNV Construction,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on September 26, 2013, at 2:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by Jeffrey Camacho, supervisor of the Enforcement Section, and by Asst. Attorney General Reena J. Patel. Respondent RJCL Corporation, appeared through its General Manager, Ruel R. Villacrusis. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on September 16, 2013. The Determination notes that RJCL Corporation ("Employer") was served with a request to produce documents back in October 2012, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

Mr. Camacho testified that the Request was served on the Employer at the Employer's office on or about October 9, 2012, by labor enforcement investigator James Ulloa. It was received by the Employer's Bookkeeper, Janet Sacramento. The Employer's General Manager, Ruel R. Villacrusis, testified that he was aware of the Department's visit and that he had spoken with the investigators at that time. They led Villacrusis to believe that the Department was concerned about the company's inability to hire 30% local workers (citizens or permanent residents). Based on his past experience with the Department of Labor, Mr. Villacrusis believed he should arrange a meeting with Alfred Pangelinan of the Employment Services Section. Shortly thereafter, Villacrusis visited Mr. Pangelinan in Employment Services to ask about his advice of how to hire more local workers. Mr. Villacrusis testified that he mentioned to Mr. Pangelinan that his company had recently been visited by two labor investigators; however, he did not show the written Request to Mr. Pangelinan. After that meeting, Mr. Villacrusis said he expected some feedback from the Department. When he did not hear anything further, he assumed there was no problem. [Testimony of Mr. Villacrusis.]

It is undisputed that after receiving the Request, Mr. Villacrusis did not seek out the Enforcement investigators, (Aguon or Ulloa) or produce any documents to the Enforcement Section.

1. DOCUMENT PRODUCTION

The Employer brought documents to the Hearing and presented them to the Enforcement Supervisor, Jeff Camacho. After reviewing the documents, Mr. Camacho confirmed that these documents fully complied with the Request that had been served in October 2012. The only remaining issue was whether the Employer should be sanctioned for failing to produce the documents on or about the date of the request (i.e, in 2012).

2. SANCTIONS

In its Determination, the Department requested that the Employer be sanctioned $2,000 for its failure to produce documents in response to the Document Request. After hearing the Employer's testimony and receiving the documents at hearing, the Department repeated that it still wanted monetary sanctions imposed but it left the amount to the discretion of the Hearing Officer. [Testimony of Jeff Camacho.]

The Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The above-cited statute and its implementing Regulations do not specify standards upon which to assess applicable fines. Clearly, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

The Regulations also state with respect to "discovery," that appropriate methods of discovery include "production of documents or other evidence for inspection" and that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 80- 50.4-550. [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

The Employer testified that after his discussion with investigators, he believed the Department was concerned with his company's failure to employ 30% of its workforce with U.S. citizens, CNMI permanent residents and U.S. residents. In the General Manager's past experience, this issue had been handled by Alfred Pangelinan of the Employment Services Section. Thereafter, the General Manager decided to meet directly with Mr. Pangelinan to resolve this issue.

Obviously, it was incorrect for the Employer to attempt satisfy a document request from the Enforcement Section by discussing the matter with a <u>different</u> section of the Department of Labor. Nevertheless, the Hearing Officer finds that it was an honest mistake and not a willful attempt to avoid the Employer's responsibility.

The Employer's explanation is believable and it establishes that his actions, albeit misguided, were taken in good faith. The Employer has now produced the

requested documents and satisfied the Enforcement Section demand. The General Manager requested leniency in this one instance and noted that the company would not make the same mistake again.

Based on the evidence presented, the Hearing Officer believes that no useful purpose would be served by imposing an unduly burdensome fine. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Document Production:** Respondent has produced the requested documents and satisfied the Request previously served upon Respondent. 3 CMC § 4527.

2. **Sanctions:** For the reasons stated above, Respondent RJCL Corp. is hereby FINED in the amount of one hundred and fifty dollars ($150). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made by cash or postal money order to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 3, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 13-003-09
Department of Labor,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Island Wings, Inc.,	)	
dba Wings Travel,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on September 26, 2013, at 3:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by Jeffrey Camacho, supervisor of the Enforcement Section, and by Asst. Attorney General Reena J. Patel. Respondent Island Wings, Inc., appeared through its President, Mariko Lizama. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on September 16, 2013. The Determination notes that Island Wings, Inc. ("Employer") was served with a request to produce documents back in January 2013, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

The Request was served on the Employer at the Employer's office on January 15, 2013, by Enforcement Supervisor Jeff Camacho and labor enforcement investigator Arlene Rafanan. These two representatives personally handed the Request to travel agent, Myra M. Santos, who received it on behalf of her Employer, and indicated that she would forward the request to her Office Manager. No evidence was presented by Employer to explain why the company never produced the requested documents. In September 2013, the Employer's Office Manager, Ed Camacho, told Jeff Camacho that he, Ed, had never seen the Request before. [Testimony of Jeff Camacho.] The President, Mariko Lizama, supposed that perhaps the travel agent became busy with other pressing business matters and neglected to pass along the Request to the Office Manager. In any event, no definitive explanation was given as the Employer did not bring its employee, Myra Santos, to testify at the Hearing.

It is undisputed is that the Employer received the Request in January 2013. but never produced documents to the Enforcement Section in response.

1. DOCUMENT PRODUCTION

At Hearing, the Department renewed its request that the Employer produce the same documents contained in the Request served on the Employer in January 2013. The Request entails the following documents:

(a) a total listing of workforce statement of compliance;
(b) copy of Employer's business license;
(c) copy of Employer's latest annual corporate report;
(d) a payroll summary for the past two months (August and September 2013);
(e) a copy of the latest two Employer's Quarterly Withholding Tax Returns.

At Hearing, the Employer did not object to producing the documents but asked for a short amount of time to compile the information. [Testimony of Mariko Lizama.] The Hearing Officer notified Employer in the Hearing that he would order the Employer to produce the documents to the Enforcement Section by October 7, 2013.

2. SANCTIONS

In its Determination, the Department requested that the Employer be sanctioned $2,000 for its failure to produce documents in response to the Document Request.

After hearing the Employer's testimony, the Department reduced its request for sanctions to $750. [Testimony of Jeff Camacho.]

The Department's Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The above-cited statute and its implementing Regulations [1] do not specify standards upon which to assess applicable fines. Clearly, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

The Regulations also state with respect to "discovery," that appropriate methods of discovery include "production of documents or other evidence for inspection" and that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 80- 50.4-550. [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

Although the Employer offered no specific explanation for its failure to produce documents, its failure to respond appears to be a matter of negligence in putting aside the Request and then forgetting it in the midst of handling its busy travel office business. The President requested leniency in this one instance and noted that the company would immediately produce the documents in response to this order.

[1] See Employment Rules and Regulations (hereinafter, "Regulations") at Com. Reg. 30254 (May 21, 2010).

The Employer has no history of labor violations and the Hearing Officer finds that no useful purpose would be served by imposing an unduly burdensome fine at this stage. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Document Production:** Respondent is ORDERED to produce the documents specified above in Section 1 (items a-e), to the Enforcement Section of the Department of Labor, no later than October 7, 2013, at 3 p.m. 3 CMC § 4527.

2. **Sanction:** For the reasons stated herein, Respondent Island Wings, Inc. is hereby FINED in the amount of three hundred dollars ($300). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Added Sanction:** If Respondent fails to comply with the document production ordered in paragraph no 1 of this Order, Respondent shall be required to pay an additional sanction of $450, without further Order. In that event, the entire sanction amount ($750) shall be due on the same date as indicated above in paragraph no. 2.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 3, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor, Complainant, **v.** Mode Tour Corporation, *dba* Mode Tour/Limo Service, Respondent.	)	CAC No. 13-004-09 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on September 27, 2013, at 9:00 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by Jeffrey Camacho, supervisor of the Enforcement Section. Respondent Mode Tour Corporation, appeared through its corporate Secretary, Jojo Savellano. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on September 16, 2013. The Determination notes that Mode Tour Corporation ("Employer") was served with a request to produce documents back in January 2013, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

Mr. Camacho testified that the Request was served on the Employer at the Employer's office on or about January 15, 2013, by labor enforcement investigator Arlene Rafanan. It was received by the Employer's tour counselor, Susan Paek. Within several days, the Request was forwarded to the Employer's General Manager, Jang Yong Chul. However, several weeks later - in late January – that General Manager was suspended by Mode Tour's corporate officers for alleged financial improprieties and irregularities. [Testimony of Mr. Savellano.] Mr. Savellano testified that the controversy in late January 2013 regarding the General Manager distracted and disturbed the company's management, and that perhaps as a result, nobody took steps to comply with the Request and produce documents.

1. DOCUMENT PRODUCTION

At Hearing, the Department renewed its request that the Employer produce the same documents contained in the Request served on the Employer in January 2013. The request entails the following documents:

(a) a total listing of workforce statement of compliance;
(b) copy of Employer's business license;
(c) copy of Employer's latest annual corporate report;
(d) a payroll summary for the past two months (August and September 2013);
(e) a copy of the latest two Employer's Quarterly Withholding Tax Returns.

At Hearing, the Employer agreed to produce the documents to the Enforcement Section no later than October 7, 2013 at 3:00 p.m. That deadline is set forth in this Order (below).

2. SANCTIONS

In its Determination, the Department requested that Employer be sanctioned $2,000 for its failure to produce documents in response to the Request. After hearing the Employer's testimony, the Department reduced its request for sanctions to $750. [Testimony of Jeff Camacho.]

The Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that

chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The above-cited statute and its implementing Regulations [1] do not specify standards upon which to assess applicable fines. Clearly, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

The Regulations also state with respect to "discovery," that appropriate methods of discovery include "production of documents or other evidence for inspection" and that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 80- 50.4-550. [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

Although the Employer failed to produce the requested documents, its failure to respond was caused by the shake-up in the company's management in January 2013. The Employer requested leniency in this one instance and noted that the company would immediately produce the documents in response to this order.

Based on these facts and the unique challenges faced this year by this Employer in suspending its own General Manager, the Hearing Officer believes no useful purpose would be served by imposing a severe fine in this instance. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

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[1] See Employment Rules and Regulations (hereinafter, "Regulations") at 32 Com. Reg. 30254 (May 21, 2010).

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Document Production:** Respondent is ORDERED to produce the documents specified above in Section 1 (items a-e), to the Enforcement Section of the Department of Labor, no later than October 7, 2013, at 3 p.m. 3 CMC § 4527.

2. **Sanctions:** For the reasons stated herein, Respondent Mode Tour Corp. is hereby FINED in the amount of three hundred dollars ($300). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Added Sanction:** If Respondent fails to comply with the document production ordered in paragraph no 1 of this Order, Respondent shall be required to pay an additional sanction of $400, without further Order. In that event, the entire sanction amount ($700) shall be due on the same date as indicated above in paragraph no. 2.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 4, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 13-005-09
Department of Labor,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Jin Li Foods Corporation,	)	
dba Jin Li Store,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on September 27, 2013, at 10:00 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by Jeffrey Camacho, supervisor of the Enforcement Section. Respondent Jin Li Foods Corporation, appeared through its Store Manager, Chen, Mei Er,[1] and its Agent/translator, Lin, Kaiqi. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on September 16, 2013. In its Determination, the Department contends that Jin Li Foods Corp. ("Employer") was served with a request to produce documents back in January 2013, but never complied with the request. At Hearing, the Department moved for an order requiring the Employer to produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

[1] Ms. Chen testified that she had been authorized by the corporation's President, Xiao, Rong Kun, to represent the company at this Hearing. {See testimony of Chen, Mei Er.]

The Department's document request (hereinafter, "Document Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered as Hearing Exhibit 1.]

The Document Request was served on the Employer at the Employer's store in Dandan, on or about January 16, 2013, by labor enforcement investigator James Ulloa. The Store Manager, Chen Mei Er, received the Document Request on the next day,[2] and shortly thereafter telephoned the company's "document handler," Lin, Kaiqi, and asked him to handle the matter. [Testimony of Mr. Camacho, Ms. Chen and Mr. Lin.]

Agent Lin Kaiqi received Manager Chen's call and prepared the documents. Lin never asked to see the written Document Request served on Jin Li Foods Corp. because, as he testified, he had assisted other clients and already knew which documents were being requested. Lin claims he brought copies of all requested documents to the Department of Labor in late January 2013. Lin stated that he left the documents with the staff of the Employment Services Section because he could not find the Enforcement Section building.[3] The Enforcement Section asserts that it never received this Employer's documents from Employment Services. [Testimony of Mr. Camacho.]

1. DOCUMENT PRODUCTION

The Department's Document Request was issued as part of an investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. The Administrative Hearing Office has the general power to require production of employer documents and records as may be necessary to implement that chapter effectively. 3 CMC § 4528(c).

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[2] The Request was received by the Employer's cashier, Shan Jib Halder, who signed the Request. [See Hearing Exhibit 2.] Store Manager, Chen Mei Er, testified that she received the Request from Mr. Halder the next day.

[3] Lin testified that he first brought the documents to the Employment Services building on Capitol Hill with which he was familiar. The staff instructed Lin to take the documents to the Enforcement Section. Lin claims that he drove around the block, traveling the length of Mednilla Avenue, but he still could not locate the Enforcement building. Lin then returned to the Enforcement Services building and asked the staff there to forward the documents to the Enforcement Section. [Testimony of Mr. Lin.]

At Hearing, the Department renewed its request that the Employer produce the same documents contained in the Document Request served on the Employer in January 2013. The request entails the following documents:

(a) A total listing of workforce statement of compliance;
(b) A copy of Employer's business license;
(c) A copy of Employer's latest annual corporate report;
(d)A payroll summary for the past two months (August and September 2013);
(e) A copy of the latest two Employer's Quarterly Withholding Tax Returns.

In the Hearing, the Employer did not object to producing the documents but asked for a short amount of time to compile the information. The Hearing Officer shall give the Employer until October 7, 2013, to produce the documents to the Enforcement Section.

2. **SANCTIONS**

In its Determination, the Department requested that the Employer be sanctioned $2,000 for its failure to produce documents in response to the Document Request. After hearing the Employer's testimony, the Department reduced its request for sanctions to $1,000. [Testimony of Jeff Camacho.]

As stated above, the Department's Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The above-cited statute and its implementing Regulations [4] do not specify standards upon which to assess applicable fines. Clearly, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 50.4-820(h) and (o). [Emphasis added.]

[4] See Employment Rules and Regulations (hereinafter, "Regulations"). See 32 Com. Reg. 30254 (May 21, 2010).

The Regulations also state with respect to "discovery," that appropriate methods of discovery include "production of documents or other evidence for inspection" and that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 50.4-550. [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

The evidence establishes that the Employer's Manager promptly delegated to its agent, Lin Kaiqi, the task of delivering the requested documents to the Department of Labor. The agent was at fault in not delivering the company's documents directly to the Enforcement Section. Indeed, Mr. Lin, himself, admitted to this fault during the Hearing.[5] However, the evidence shows that the Employer's Manager made a good faith effort to comply with the request and this factor should mitigate against an unusually steep fine. The Employer believed its agent had complied with the request. The Manager did not realize that there was a problem until the Department filed and served its Determination in September 2013.

Given these facts, the Hearing Officer finds that the appropriate sanction in this matter should be three hundred dollars ($300). An additional fine will be applied only if the Employer fails to provide the requested documents to the Enforcement Section on or before the new deadline, as set forth below.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Document Production:** Respondent is ORDERED to produce the documents specified above in Section 1 (items a-e), to the Enforcement Section of the Department of Labor, no later than **October 7, 2013**, at 3 p.m. 3 CMC § 4527.

2. **Sanction:** For the reasons stated herein, Respondent Jin Li Foods Corp. is hereby FINED in the amount of three hundred dollars ($300). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI

[5] Lin's claim that he could not find the Enforcement Section building on Mednilla Avenue, is questionable at best, given that the building in question is around the corner from the Enforcement Section building. Moreover, if Lin had bothered to actually read the Document Request, he would have seen (1) the building number and street address for the Enforcement Section; and (2) the name of the investigator (James Ulloa) who had issued the Document Request. Thus, Lin could have asked to see Mr. Ulloa upon arriving at Labor and given the documents directly to him.

Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Added Sanction:** If Respondent fails to comply with the document production ordered in paragraph no 1 of this Order, Respondent shall be required to pay an additional sanction of $450, without further Order. In that event, the entire sanction amount ($750) shall be due on the same date as indicated above in paragraph no. 2.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 3, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 13-006-09
Department of Labor,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Advance Language & Academic, Inc.,	)	
dba ALAI,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on September 27, 2013, at 1:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by Jeffrey Camacho, supervisor of the Enforcement Section. Respondent Advance Language & Academic, Inc., appeared through its President, Nina Rivera, Vice President David Baker, and Tony Muna, an employee of the company's legal counsel. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section on September 16, 2013. The Determination notes that Advance Language & Academic, Inc. ("Employer") was served with a request to produce documents back in February 2013, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

Mr. Camacho testified that he personally served the Request on the Employer's Vice President, David Baker, at the Employer's offices on February 27, 2013. Mr. Baker admitted that he received the Request and had intended to comply with it, but shortly thereafter, he "shelved" the document and, in the press of handling other urgent business matters, forgot about the Request. The Employer was required to vacate its business premises in March 2013, and moved to the Marianas Business Plaza, where it underwent several moves within that building. The Employer totally forgot about the Request and never produced the requested documents, until it received the recent Determination in mid-September 2013.

1. DOCUMENT PRODUCTION

At Hearing, the Department renewed its request that the Employer produce the same documents contained in the Request served on the Employer in February 2013. The request entails the following documents:

(a) a total listing of workforce statement of compliance;
(b) copy of Employer's business license;
(c) copy of Employer's latest annual corporate report;
(d) a payroll summary for the past two months (August and September 2013);
(e) a copy of the latest two Employer's Quarterly Withholding Tax Returns.

The Employer brought several of the requested documents to the Hearing and agreed to produce all requested documents to the Enforcement Section no later than October 7, 2013. That deadline shall be set forth in this Order (below).

2. SANCTIONS

In its Determination, the Department requested that Employer be sanctioned $2,000 for its failure to produce documents in response to the Request. After hearing the Employer's testimony, the Department reduced its request for sanctions to $750. [Testimony of Jeff Camacho.]

The Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that

chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The above-cited statute and its implementing Regulations [1] do not specify standards upon which to assess applicable fines. Clearly, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

The Regulations also state with respect to "discovery," that appropriate methods of discovery include "production of documents or other evidence for inspection" and that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 80- 50.4-550. [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

Although the Employer failed to produce the requested documents, its failure to respond was caused by its V.P.'s oversight in putting aside the Request and then forgetting about it in the midst of handling other pressing business matters. In short, the evidence shows that this was an honest mistake and not a willful attempt to avoid the Employer's responsibility. The Employer requested leniency in this one instance and noted that the company would immediately produce the documents in response to this order.

Based on these facts and the unique challenges faced this year by this Employer, the Hearing Officer believes no useful purpose would be served by imposing a severe fine in this instance. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

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[1] See Employment Rules and Regulations (hereinafter, "Regulations") at 32 Com. Reg. 30254 (May 21, 2010).

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Document Production:** Respondent is ORDERED to produce the documents specified above in Section 1 (items a-e), to the Enforcement Section of the Department of Labor, no later than **October 7, 2013**, at 3 p.m. 3 CMC § 4527.

2. **Sanctions:** For the reasons stated herein, Respondent Advance Language & Academic, Inc. is hereby FINED in the amount of two hundred and fifty dollars ($250). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

3. **Added Sanction:** If Respondent fails to comply with the document production ordered in paragraph no 1 of this Order, Respondent shall be required to pay an additional sanction of $400, without further Order. In that event, the entire sanction amount ($650) shall be due on the same date as indicated above in paragraph no. 2.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 4, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Dong Rim Corporation, *dba* Downtown Market, Respondent.	)	CAC No. 13-007-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 16, 2013, at 9:00 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Frank Aguon. Respondent Dong Rim Corporation appeared through its President, Kim Samkweon. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on October 9, 2013. The Determination notes that Dong Rim Corporation ("Employer") was served with a request to produce documents back in May 6, 2013, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

Enforcement's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

The Request was served on the Employer at the Employer's business, the Downtown Market on May 6, 2013, by labor investigators James Ulloa, Ben Castro and Frank Aguon. These representatives handed the Request to a butcher at the market, named Abdul Motalab. (See Request at Hearing Exhibit 2.) Evidently, that employee forwarded the document to the company's accountant. President Kim testified that at the time (May 2013), he never saw the document, or knew it had been issued. After he received the Determination, President Kim researched the matter and found the Request in his accountant's office.

It is undisputed is that the Employer received the Request at its place of business in May 2013. but never produced documents to the Enforcement Section in response.

I. DOCUMENT REQUEST

At Hearing, Employer produced all documents that had been listed in the Request. The only issue remaining was whether the Employer should be sanctioned for failing to respond to the Request at the time it was issued.

II. SANCTIONS

In its Determination, Enforcement requested that the Employer be sanctioned with a monetary fine for its failure to produce documents in response to the Request. After hearing the Employer's testimony, Enforcement asked that sanctions be issued in the amount of $500. (Testimony of Frank Aguon.)

The Department's Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Imposing penalties may serve the purposes of the law, but excessive penalties should be avoided. Thus, the Regulations state with respect to discovery, "a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or *undue burden or expense.*" Regs. at § 80- 50.4-550. [Emphases added.]

The evidence in this case shows that Employer's failure to respond was caused by the company accountant, who received the Request, but then negligently set it aside and forgot about it. President Kim testified that he was unaware of the Request until he received the Determination.

The Employer argued that service of the Request was defective. President Kim contended that the Department should have served the corporation by mail to its registered agent's address, rather than handing the Request to a butcher at the company's market, who passed the Request to the accountant. (See copy of Annual Corporation Report at Hearing Exhibit 3.) I disagree.

I acknowledge that the Regulations do state that "[i]f a party is represented by an agent authorized by appointment or by law to receive service of process, personal service *may* be made on the agent." (See Regs. at § 80- 50.4-620(a) (Emphasis added). On the other hand, the Regulations also state:

> Employers...are responsible for keeping contact information in the Department's records up to date and accurate. Service may be made at the address currently shown on the records of the Department unless a party knows of an actual current address. *Id* at § 80- 50.4-615.

In this case, Department of Labor records contained the business location of Dong Kim Corporation – namely, the "Downtown Market." I find that hand delivery of a document request by Department personnel to an employee at the Downtown Market, with oral instructions to give the request to a manager or supervisor, constituted valid service. Such method of service was constitutional as it was reasonably calculated to give actual notice to the employer. *See Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 315 (1950);[1] *Jones v. Flowers*, 547 U.S. 220, 221 (2006).

[1] "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected...." Id. [citations omitted.]

In the future, Enforcement should note that it has the option of serving the Request either (a) by mail to a corporation's registered agent, listed on the latest Annual Corporate Report on file with the Registrar of Corporations; or (b) at the business location listed in the files of the Department of Labor.

In conclusion, the Employer should be found at fault here in failing to produce documents within the prescribed time. The failure to produce documents was due to negligent conduct of the company's accountant. However, the amount of the fine should be mitigated, as set forth below, by the fact that Employer produced all requested documents once the President discovered the mistake. This Employer has no known history of labor violations and the Hearing Officer finds that no useful purpose would be served by imposing an unduly burdensome fine in this matter. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanction:** For the reasons stated herein, Respondent Dong Rim Corporation is hereby FINED in the amount of three hundred dollars ($300). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor **within fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 21, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** J.C. Marketing, Inc., Respondent.	)	CAC No. 13-008-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 16, 2013, at 10:00 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section ("Enforcement") was represented by labor investigator Frank Aguon. Respondent J.C. Marketing, Inc. appeared through its President Enrique A. Canovas, Treasurer Christine Canovas and Administrative Assistant Michelle Dela Paz. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by Enforcement on October 9, 2013. The Determination notes that J.C. Marketing, Inc. ("Employer") was served with a request to produce documents back on May 15, 2013, but never complied with the request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

At Hearing, Enforcement representative Frank Aguon testified that Employer had, in fact, notified the Enforcement by telephone, several times within 10 days of being served with the Request. During those telephone calls, the Employer told

Enforcement that the Employer was ready to produce the requested documents. The Enforcement Section inadvertently failed to note the name of the caller and, therefore, never followed up to retrieve the documents being offered by the Employer. Mr. Aguon acknowledged that, in his view, Enforcement should be held to be negligent for not responding to the Employer's messages.

As to the Request, Employer produced all requested documents prior to and during the Hearing.

At Hearing, Enforcement requested that the Employer not be fined in connection with this matter, given the Department's own responsibility in not retrieving the documents. (Testimony of Frank Aguon.) The Hearing Officer agrees and will issue no sanction against this Employer. Given that all requested documents have now been produced, Enforcement requested that this case be closed.

Good cause having been shown, IT IS HEREBY ORDERED:

The above-captioned case is hereby DISMISSED.

DATED: October 16, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Kyung An Corporation, *dba* Viva Casino, Respondent.	)	CAC No. 13-009-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 16, 2013, at 2:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigators Frank Aguon and James Ulloa. Respondent Kyung An Corporation appeared through its Supervisor Janette Magat and its document handler, Shielyna Sanarez. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on October 9, 2013. The Determination notes that Kyung An Corporation ("Employer") was served with a request to produce documents back in July 24, 2013, but never complied with the request. At Hearing, Enforcement renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

Enforcement's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

The Request was served on the Employer at the Employer's business, Viva Casino, on July 24, 2013, by labor investigators Frank Aguon and James Ulloa. Mr. Ulloa personally handed the Request to respondent's employee, Su Xin Guo, who received it on behalf of her Employer, and indicated that she would forward the request to her supervisor. Mr. Ulloa told Ms. Su that the Enforcement Section was willing to pick up the documents once the Employer had compiled the complete set. (Testimony of James Ulloa.)

Supervisor Janette Magat received the Request from Ms. Su and compiled the documents. Then, the Supervisor called the Enforcement Section once and asked to speak with Mr. Ulloa. Ms. Magat testified that on that occasion, she did not leave her telephone number or ask for a call back. The Supervisor never called the Enforcement Section again; therefore, Enforcement did not realize that the documents had been gathered together and were ready to be retrieved.

It is undisputed is that the Employer received the Request in July 2013. but never produced documents to the Enforcement Section in response.

1. **DOCUMENT PRODUCTION**

At Hearing, the Employer brought all documents that had been requested by Enforcement in its Request. Labor investigator James Ulloa reviewed the documents at the Hearing and stated that they satisfied Enforcement's prior Request. Accordingly, the matter of document production is now closed. The only remaining issue is whether the Employer should be fined for failing to produce the documents within the "10 working days" requested by Enforcement. (See Request at Hearing Exhibit 2.)

2. **SANCTIONS**

In its Determination, Enforcement requested that the Employer be sanctioned for its failure to produce documents in response to the Document Request. After hearing the Employer's testimony, the Department reduced its request for sanctions to $500. [Testimony of Frank Aguon.]

The Enforcement's Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act

of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Imposing penalties may serve the purposes of the law, but excessive penalties should be avoided. Thus, the Regulations state with respect to discovery, "a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or *undue burden or expense.*" Regs. at § 80- 50.4-550. [Emphases added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

The Employer in this case actually gathered the documents as requested by the Department, but then was entirely negligent in failing to follow through on efforts to inform the Department that the documents were ready to be picked up. The Supervisor could have avoided the current case, and saved the Enforcement section much time, merely by leaving her telephone number and a detailed message when she telephoned the Enforcement Section.

Based on these facts, the Hearing Officer concludes that it is appropriate to fine this company for its failure to produce the documents, as requested. The Hearing Officer believes the appropriate amount to serve as a future deterrent, is four hundred dollars ($400).

The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanction:** For the reasons stated herein, Respondent Kyung An Corporation is hereby FINED in the amount of four hundred dollars ($400). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30)**

days after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 18, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** L&Q Corporation, *dba* Ming Li Supermarket, Respondent.	)	CAC No. 13-010-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 17, 2013, at 1:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor's Enforcement Section was represented by labor investigators Frank Aguon and James Ulloa. Respondent L&Q Corporation appeared through its Managers, Ming Qiang Liang and Su, Jie Xian. Ms. Yu Feng Tekopus served as translator for Mr. Ming and Ms. Su. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on October 9, 2013. The Determination notes that L&Q Corporation ("Employer") was served with a request to produce documents back in August 15, 2013, but never complied with the request. At Hearing, Enforcement renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

Enforcement's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

First Visit: The Request was served on the Employer at the Employer's supermarket on August 15, 2013, by labor investigators Frank Aguon and James Ulloa. These two representatives handed the Request to Manager Su, Jie Xian. Ms. Su then notified Manager Ming, Qiang Lian. At the time of the visit, Mr. Ulloa told the Employer that Enforcement was willing to pick up the documents after the Employer had gathered all the documents together.

Second Visit: About ten days later, Enforcement (Mr. Ulloa) returned to the store for a second visit, but the Employer's documents were not complete. Mr. Ulloa told Employer (Ms. Su) that he would return to pick up the documents in the near future. Several days later, Ms. Su left the CNMI for a two-week vacation. She returned to work about September 19, 2013.

Third Visit: At the end of September 2013, James Ulloa and Frank Aguon returned to the store for a third visit. Two documents were still missing. Mr. Ulloa told Ms. Su to telephone him when the documents were complete. Mr. Ulloa gave credible testimony that at this time, he explained that failure to contact the Department in the near future could result in sanctions against the Employer. [Testimony of James Ulloa.] Ms. Su testified that, in fact, after Mr. Ulloa had left that day, she actually found the missing documents. However, Ms. Su did not contact Mr. Ulloa again to inform him that the documents were ready for pick up. [Testimony of Ms. Su.]

It is undisputed is that the Employer received the Request in August 2013, but never produced documents to the Enforcement Section in response.

1. DOCUMENT PRODUCTION

At Hearing, the Employer brought all documents that had been requested by Enforcement in its Request. Labor investigator James Ulloa reviewed the documents and stated that they satisfied Enforcement's prior Request. Accordingly, the matter of document production is now closed. The only remaining issue is whether the Employer should be fined for failing to produce the documents within the "10 working days" requested by Enforcement. (See Request at Hearing Exhibit 2.)

2. **SANCTIONS**

In its Determination, Enforcement requested that the Employer be assessed a monetary fine for its failure to produce documents in response to the Request. After hearing the Employer's testimony, Enforcement reduced its request for sanctions to $500. [Testimony of Frank Aguon.]

Enforcement's Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Imposing penalties may serve the purposes of the law, but excessive penalties should be avoided. Thus, the Regulations state with respect to discovery, "a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or *undue burden or expense.*" Regs. at § 80- 50.4-550. [Emphases added.]

Based on the above standards and the facts of this case, this Hearing Officer finds that the Employer should be fined a substantial amount, as set forth below.

The evidence demonstrates that the Employer understood Enforcement's Request and made certain efforts to comply with it. However, the Employer then failed to focus its efforts on completing the task as gathering the documents. In the midst of the effort, Manager Su left for vacation and, in her absence, Manager Ming did nothing to complete the task. At the end of Enforcement's third visit to the Employer's supermarket, after Mr. Ulloa left the establishment and Ms. Su realized she had found all the documents, she did not bother to contact the investigator to tell him the documents were complete.

Employer's conduct wasted Departmental resources and needlessly extended a simple process. The Enforcement Section was patient in responding to the

Employer's delay, but eventually, investigators presumed that the Employer would only produce all documents if ordered through an Agency Determination. These facts justify the imposition of a substantial sanction. The Hearing Office will reduce the requested sanction by a small amount to reflect the fact that the Employer did make an attempt, however unsuccessful, to gather its documents in response to the Request. Additionally, the Employer demonstrated good faith by bringing all documents to the Hearing.

The Employer is warned to be more diligent in the future in complying with Department of Labor requests.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanction:** For the reasons stated herein, Respondent L&Q Corporation is hereby FINED in the amount of four hundred dollars ($400). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 22, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** L&Q Corporation, *dba* Ming Li Supermarket, Respondent.	)	CAC No. 13-010-10 **ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION**

On October 17, 2013, a hearing was held in the above-captioned case in the Administrative Hearing Office, to hear evidence and oral argument with respect to complainant's Determination. Both parties appeared through representatives and presented evidence in support of their positions.

On October 22, 2013, the Hearing Officer issued an Administrative Order that fined L&Q Corporation the sum of four hundred dollars ($400) for its conduct in neglecting to provide documents to the Enforcement Section over a period of months. [See Administrative Order issued and served on 10/22/13.]

On November 1, 2013, Respondent submitted a one-page document, entitled "Request Waiver Sanction," in which Respondent asked the Hearing Officer to reconsider his order of sanctions, presumably by reducing or withdrawing the sanction. [See Request Waiver Sanction, filed by Ming, Qiang Liang on 11/01/13.] On November 5, 2013, Complainant submitted a response, recommending that the sanction not be reduced or waived. [See Response, filed by Frank Aguon on 11/05/13.]

Respondent's request shall be construed as a Motion For Reconsideration of the above-cited Administrative Order and determined on the basis. [Rules and Regulations at Section 80 – 50.4-850 ("Motion for reconsideration").] The Regulation on motions for reconsideration states the grounds for the motion, as follows:

A motion for reconsideration may be granted for mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which, by due diligence, could not have been discovered in time to move into evidence at the hearing; fraud, misrepresentation, or misconduct of an adverse party; the judgment is void, has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed; or other reason justifying relief. *Id.*

I. The Motion For Reconsideration Should Be Denied.

Having reviewed Respondent's Motion for Reconsideration, the Hearing Officer finds that the Motion should be denied. Respondent's Motion states that Respondent (a) acknowledges that "miscommunications" between respondent's employees caused this situation to occur; and (b) apologizes for any inconvenience it caused through its conduct. First, these arguments were already addressed at the hearing.[1] Moreover, they do not constitute requisite grounds for reconsideration, as set forth in the Regulations. The Hearing Officer continues to believe that a sanction is appropriate and will remind Respondent in the future that Departmental requests for documents should be complied with in a reasonable time period.

II. The Appeal Period For The Administrative Order Should Be Extended For 15 Days From Date Of Issuance Of This Order.

The Commonwealth Employment Act of 2007 (the "Act"), as amended, provides that an appeal of the Administrative Order to the Secretary of Labor must be filed within 15 days of issuance of the Order. 3 CMC § 4948(a). The Regulations regarding Motions to reconsider do not state that filing a motion to reconsider automatically stays the 15-day appeal period with respect to the original Administrative Order. [See Regs. at § 80 – 50.4-850.] As the original Administrative Order was issued and served in this case on October 22, 2013, the 15-day appeal period is scheduled to expire today – November 5, 2013.

The Act, as amended, also provides that the Hearing Officer may "[i]mpose such other sanction, order or relief as may reasonably give effect to Division 4, Title 3 [i.e., the Act]." 3 CMC § 4947(11). Given that Regulations allow a party 15 days

[1] Evidence of respondent employees' "miscommunications" was presented at length in the hearing. Respondent also apologized at the conclusion of the hearing and asked for leniency in assessing fines. [See testimony of Ming Qiang Liang on 10/17/13, afternoon session.] In short, these "issues" were addressed in the hearing and considered by the Hearing Officer when he issued the Administrative Order, and nothing new is presented by Respondent's Motion.

after issuance of the Administrative Order to file a motion to reconsider and 5 days for the other party to respond, that timing would make no sense if the appeal period on the original Administrative Order continued to run during the reconsideration procedure. I find that equity demands that the time to file an appeal under 3 CMC § 4948(a) should be deemed "stayed" until an Order on a Motion to Reconsider is issued.

The Order Den ing Respondent's Motion For Reconsideration shall be issued herein, on November 5, 2013. Accordingly, the 15-day time period for Respondent to file an appeal of the original Administrative Order, pursuant to 3 CMC 4948(a), shall be deemed to begin on November 5, 2013, and run for the next 15 days. The new deadline to appeal the original Administrative Order shall be November 20, 2013.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Motion is Denied:** The Motion for Reconsideration, filed by Respondent L&Q Corporation, is hereby DENIED. [NOTE: the Regulations state that "[a]fter a decision on a motion for reconsideration is signed, no further motions or filing may be made with the Administrative Hearing Office other than a notice of appeal. [Regs. at § 80 – 50.4-850]

2. **Appeal of the original Administrative Order is extended:** Any person or party aggrieved by this initial Administrative Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order Denying Respondent's Motion For Reconsideration. 3 CMC §§ 4947(11) and 4948(a). In effect, Respondent's deadline to file an appeal of the original Administrative Order is hereby extended to November 20, 2013.

DATED: November 5, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Byung, Gon Huang, *dba* EZ Mart, Respondent.	)	CAC No. 13-011-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 17, 2013, at 2:00 p.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor ("Complainant") was represented by labor investigators Frank Aguon and James Ulloa. Respondent Byung, Gon Huang appeared through his daughter, Hwang Sung Ae. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

INTRODUCTION

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on October 9, 2013. The Determination notes that Byung, Gon Huang ("Employer") was served with a request to produce documents on August 27, 2013, but never complied with the request. At Hearing, the Department renewed its request that the Employer produce the requested documents. The Department also asked the Hearing Officer to impose monetary sanctions against the Employer for its failure to respond to the prior document request.

The Department's document request (hereinafter, "Request") was contained in a one-page document entitled "Business Establishment Compliances and Monitoring

Report." [A copy of the Request was entered into evidence as Hearing Exhibit 2; the Determination was entered into evidence as Hearing Exhibit 1.]

The Request was served on the Employer at the Employer's business on August 27, 2013, by labor investigators James Ulloa and Frank Aguon. These two representatives handed the Request to respondent's employee, Han Kyung Rae, who received it on behalf of her Employer, and then gave it to his employer, Mr. Byung. Byung passed the Request to his daughter, Hwang Sung Ae, and asked her to deal with the Request. [Testimony of Ms. Hwang.] Ms. Hwang testified that she misplaced the Request, then forgot about it, while tending to her two other businesses on Saipan. *Id.*

It is undisputed is that the Employer received the Request in January 2013. but never produced documents to the Enforcement Section in response.

1. DOCUMENT PRODUCTION

At Hearing, the Employer brought all documents that had been requested by Enforcement in its Request. Labor investigator James Ulloa reviewed the documents at the Hearing and stated that they satisfied Enforcement's prior Request. Accordingly, the matter of document production is now closed. The only remaining issue is whether the Employer should be fined for failing to produce the documents within the "10 working days" requested by Enforcement. (See Request at Hearing Exhibit 2.)

2. SANCTIONS

In its Determination, Enforcement requested that the Employer be fined for its failure to produce documents in response to the Document Request. After hearing the Employer's testimony, the Department reduced its request for sanctions to $500. [Testimony of Frank Aguon.]

Enforcement's Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and

fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Imposing penalties may serve the purposes of the law, but excessive penalties should be avoided. Thus, the Regulations state with respect to discovery, "a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or *undue burden or expense.*" Regs. at § 80- 50.4-550. [Emphases added.]

Applying the above standards to the facts of this case leads this Hearing Officer to find that the amount of the requested sanctions should be reduced.

The evidence shows that Employer's failure to produce documents in this case was caused by the negligence of Employer's daughter, who took responsibility for handling the matter, but then misplaced the Request and forgot about it. At Hearing, Ms. Hwang admitted the fault was entirely her own. She testified that she forgot to attend to this matter as an oversight, because she is so busy managing her own two businesses, while assisting her father with his business. Ms. Hwang requested leniency in this matter, noting that she has now produced all requested documents.

The Employer has no history of labor violations and the Hearing Officer finds that no useful purpose would be served by imposing an unduly burdensome fine at this stage. The Employer is warned to be mindful of future requests from the Department and the need to deal with such requests diligently.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanction:** For the reasons stated herein, Respondent Byung, Gon Huang is hereby FINED in the amount of three hundred dollars ($300). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

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[CAC No. 13-011-10]

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 18, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Fu Kang Corporation, *dba* Welcome Super Market, Respondent.	)	CAC No. 13-012-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 29 and 30, 2013, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigators Ben Castro and James Ulloa. Respondent Fu Kang Corporation appeared through its Manager, Xu, Xing Bin.[1] Lin, Kai Qi served as Mr. Xu's translator. Jose C. Sablan and Donya Q. Borja each testified at the request of the Hearing Officer. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") on October 21, 2013. The Determination notes that Fu Kang Corporation, *dba* Welcome Super Market ("Employer"), was served with a request to produce documents in December 12, 2012. At about that time, the Employer submitted a Total Workforce Listing ("Workforce Listing") showing that the Employer was employing six employees: two U.S. citizens and four CW workers. (The Workforce Listing was entered into evidence as Hearing Exhibit 3.)

[1] Mr. Xu presented a written Resolution of the Board of Directors of Fu Kang Corporation, authorizing him to "take care of all the concerns of the corporation including to represent the corporation in matters of dispute...." The Resolution, in essence, authorizes Xu, Xing Bin to represent the corporation in this case. (The Resolution was entered into evidence as Hearing Exhibit 2.)

During the Hearing, Enforcement challenged the veracity of the Workforce Listing (Hearing Exhibit 3) that had been signed by Manager Xu, Xing Bin, under penalty of perjury, on December 17, 2012. In that document, Manager Xu represented that the Employer was employing two U.S. citizens as well as four CW workers. The two citizens were listed as Derrick Babauta and Jose C. Sablan.

Manager Xu testified that Derrick Babauta left the company in September 2013 and had just been replaced by Donya Q. Borja, two days before the hearing. Ms. Borja later testified credibly that she just been hired; she began working on October 27, 2013 for Employer on a five day, 30 hour-per-week schedule. [Testimony of Ms. Borja, taken on 10/30/13,]

The second U.S. citizen employee, Jose C. Sablan, was identified as Employer's corporate Secretary. On October 29, 2013, Manager Xu testified, under oath, that Mr. Sablan is an employee of the company who works full-time, Monday to Friday, and that Sablan is paid wages for his services, which include helping the company with paperwork, including CW permits. The Employer produced Employer's Quarterly Tax Returns for the first three quarters of 2013, which list Jose C. Sablan as receiving gross wages of $2,131.20 per quarter from Employer.[2]

In order to explore the veracity of the Employer's testimony and documentation, the Hearing Officer asked Employer to produce both citizen employees (Jose C. Sablan and Donya Q. Borja) to testify the next day, on October 30, 2013.

On October 30, 2013, Mr. Sablan appeared and testified that he is not an employee, nor has he ever been an employee, of Fu Kang Corporation. Sablan testified that he never took any salary from the Employer and that he expressly turned down Mr. Xu's offer to make him an "employee" of Fu Kang Corporation. The Hearing Officer finds Mr. Sablan's testimony to be credible, and notes that Mr. Sablan's testimony was never challenged by Manager Xu.

1. HIRING PRACTICES

The evidence establishes that Employer has five employees, not six, as claimed by Manager Xu. Only one of the five employees - Donya Q. Borja - is a U.S. citizen. Therefore, the Employer is not in compliance with 3 CMC § 4525, and its implementing regulations, which mandate that a minimum of 30% of an

[2] Employer's Quarterly Tax Returns and amended Employer's Quarterly Tax Returns were admitted into evidence as Hearing Exhibits 5 and 6, respectively.

Employer's total work force must consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents.

First, employment of Ms. Borja will not be considered "full-time" unless she works 32 hours per week. [See Regs. at Section 80 – 40.2-305.] Borja's current schedule amounts to 30 hours per week; therefore, the Employer must provide her with two more hours per week of work for her to be counted as "full-time." At Hearing, both Employer and Ms. Borja agreed to make the necessary changes to Ms. Borja's schedule to qualify her for "full-time" (32 hours per week) status.

Second, the Employer needs to hire an additional U.S. citizen or permanent resident worker in order to meet the 30% level required by 3 CMC § 4525. At Hearing, Enforcement recommended that Employer be ordered to visit the Department's Citizen Job Placement Section so that they may refer citizens and permanent residents to Employer for possible employment. The Employer agreed to visit the Job Placement Section and to hire a qualified worker referred by that Section. [Testimony of Xu, Xing Bin, taken on 10/30/13.] The Hearing Officer shall order the Employer to do so (see below).

2. SANCTIONS

In its Determination, Enforcement requested that the Employer be sanctioned $2,000 for each violation. At the conclusion of the hearing, the Enforcement officer repeated his request for $2,000 in sanctions. [Testimony of Ben Castro.]

The Enforcement's initial Document Request was issued as part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to conclude that a substantial sanction of two thousand dollars ($2,000) is warranted against this Employer.

First, this Employer submitted documents to the Department of Labor and the Division of Revenue and Taxation that contained blatantly *false* information. In the Workforce Listing (Hearing Exhibit 3), Manager Xu represented that Mr. Sablan was a full-time employee. In the Employer's Quarterly Withholding Tax documents (Hearing Exhibits 5 and 6), Manager Xu represented that the company had paid Mr. Sablan gross wages, every quarter, amounting to $2,131.20. Both representations were false and Mr. Xu knew them to be false when he signed the documents, *under the penalty of perjury*. [Both documents contained declarations requiring the signatory to attest, under the penalty of perjury, that the information contained therein was true and correct.[3]]

Second, Manager Xu testified under oath at the hearing that Jose C. Sablan is a full-time employee of Fu Kang Corporation, working full-time and paid by the company for his services. [Testimony of Mr. Xu, taken on 10/29/13.] This testimony was false. Mr. Sablan testified credibly that he has never been an employee of Fu Kang Corporation. In fact, Mr. Sablan testified that some time ago, Manager Xu had offered to make Sablan an "employee," but he declined the offer, as well as an offer to pay him monetary compensation. [Testimony of Jose C. Sablan, taken on 10/30/13.] During the hearing, Mr. Xu was reminded that he was under oath and that his testimony must be truthful. Despite these instructions, Manager Xu falsely testified that Sablan was an employee who was working full-time for the company and receiving a salary from the company. [Testimony of Mr. Xu, taken on 10/29/13.]

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[3] The Total Workforce Listing states that the signatory (Xu, Xing Bin) "declares under penalty of perjury that the employer named herein has __ nonresident workers and __ resident worker(s)...." The form calls upon the declarant to list the workers as "full time or part time." Mr. Xu signed the Declaration and listed Jose C. Sablan as a full-time employee. (Hearing Exhibit 3.)

The Employer's Quarterly Tax Return contains a declaration, to be signed under penalties of perjury, declaring that the return is, to the best of the declarant's knowledge and belief, "true and correct." Mr. Xu signed each declaration in these Tax Returns, declaring that Mr. Sablan had been paid thousands of dollars in wages, when, in fact, Mr. Xu knew that Sablan never accepted any wages whatsoever. (See Hearing Exhibits 5 and 6.)

Manager Xu made these false and misleading representations in documents he submitted to Enforcement (see, e.g., Hearing Exhibit 3) as well as in testimony he gave, under oath, at the Hearing. His false statements needlessly extended the time of hearing as it required additional witnesses to testify in order to uncover the truth. Moreover, Mr. Xu's conduct amounted to "perjury," which is punishable as a crime under Commonwealth law. 6 CMC § 3306.

Indeed, this Employer engaged in systematic fraud by listing its corporate secretary as a paid employee, to be counted as a citizen employee for purposes of the workforce participation percentage of 3 CMC § 4525. This false information made it appear that the Employer was in compliance with the 30% requirement of 3 CMC § 4525, when, in fact, Employer operated out of compliance with the 30% requirement for the first 10 months of 2013 (or longer), as it employed only one U.S. citizen out of a workforce of five people.

For the above-described conduct, the Hearing Officer finds that the Employer should be sanctioned with a $2,000 fine, as requested by Enforcement. 3 CMC §§ 4528(f)(2) and 4947(11).[4] The Employer requested, and shall be given, several months to pay the sanction in installments, as set forth below.

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[4] 3 CMC § 4528(c) states that a hearing officer has the general power to summon witnesses and administer oaths, "and such other powers as may be necessary to implement this chapter effectively." 3 CMC § 4528(f)(2) authorizes a hearing officer to levy a fine of up to "$2,000 for each violation of any provision of the chapter." Department Regulations also authorize a hearing officer to "impose such other sanction, order or relief as may reasonably give effect to the requirements of Commonwealth law." [Regs. at § 80 – 50.4-820(n).] It is a requirement of Commonwealth law to provide truthful testimony or information when testifying under oath "before a competent tribunal, officer, or person," as set forth in the "perjury" statute at 6 CMC § 3306.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Job Referrals:** Respondent Fu Kang Corporation is ORDERED to report to the Department's Citizen Job Placement Section within fifteen (15) days from the date of issuance of this Order, to register a job vacancy with that Section. Thereafter, respondent shall be required to cooperate with that section by making a good faith effort to interview, hire and employ a qualified U.S. citizen or permanent resident for the vacant position.

2. **Sanctions:** Respondent Fu Kang Corporation is hereby FINED in the amount of **two thousand dollars ($2,000)** for the conduct described above. 3 CMC §§ 4528(f)(2) and 4947(11). Respondent is ORDERED to pay this fine in four monthly installments of $500 each, commencing on **December 1, 2013**, and continuing on or before the 1st day of each month thereafter, until fully paid. Payments shall be made to the CNMI Treasury; and a copy of each payment receipt shall be delivered to the Hearing Office on or before each payment deadline. [NOTE: When payment due dates fall on a weekend or holiday, the due date shall be on the next business day in which the Hearing Office is open.]

3. **Late Fees:** If Employer fails to pay any installment of the above sanction in a timely manner, Employer shall be assessed an automatic late penalty of $20 per day, for each day in which the payment is late. Such additional late fees will be due on the 1st day of the month following the late payment.

4. **Continuing Jurisdiction:** The Hearing Office retains inherent jurisdiction over this case in order to monitor compliance with this Order.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 8, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Han Nam Corporation, *dba* Han Nam Super Market, Respondent.	)	CAC No. 13-013-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on October 29, 2013, at 9:30 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Ben Castro. Respondent Han Nam Corporation appeared through its President, Park, Jun Soo, its Store Manager, Ju, Il Nam, and its counsel, Robert T. Torres. Mr. Kim, Young served as translator. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on October 21, 2013. (See Determination at Hearing Exhibit 1.) The gist of the Determination was that Han Nam Corporation, *dba* Han Nam Super Market ("Employer"), had failed to comply with the "30% requirement" specified at 3 CMC § 4525.[1]

At Hearing, Enforcement established that in November 2012, it had requested documentation from the Employer detailing the Employer's complete full-time

[1] Section 4525 states: "In the full-time work force of any employer, the number of citizens and permanent residents employed shall be at least thirty percent (30%) of all employees within five years of the enactment of this Act, as provided by regulation. [Note: the Commonwealth Employment Act of 2007, 3 CMC § 4401 *et seq.*, was enacted in November 2007.]

workforce. In December 2012, Employer produced to the Department a Total Workforce Listing, which showed the Employer was not in compliance with 3 CMC § 4525 (i.e., less than 30% of Employer's total work force were citizens or permanent residents). (See Listing, signed on 12/10/12, at Hearing Exhibit 4.)

Employer's Store Manager admitted that in January 2013, Enforcement had informed him that the company was not in compliance with the 30% requirement and that the Department expected the Employer to take steps to bring the company into compliance.

Enforcement alleged, but did not prove, that Employment Services attempted to schedule a meeting with Employer in June 2013, to discuss bringing the company into compliance by hiring more citizens or permanent residents.[2]

At Hearing, the Employer produced an undated Total Workforce Listing that contains current information, updated to the date of the Hearing - October 29, 2013. (See Total Workforce Listing, signed by President Park, Jun Soo on 10/29/13, at Hearing Exhibit 5.) Mr. Park testified that the information contained on the current Total Workforce Listing is accurate: the company now employs 4 citizens and 1 lawful permanent resident out of total workforce of 16 employees. This means that more than 30% of the Employer's present work force consists of citizens or permanent residents.

Based on the new evidence presented, the Enforcement representative made an oral motion to dismiss the case without sanctions. The Hearing Officer accepts Enforcement's position that no sanctions are warranted, and finds that Employer is now in compliance with the "30% requirement" of 3 CMC § 4525; therefore, the case should be dismissed.

Good cause having been shown, IT IS HEREBY ORDERED:

Compliance Agency Case No. 13-013-10 is hereby DISMISSED.

DATED: October 29, 2013

Jerry Cody
Hearing Officer

[2] Enforcement did not produce witnesses to testify from their own personal knowledge that a meeting was scheduled. Employer's Manager did not expressly deny that an attempt had been made to set up a meeting; rather, he stated that he could not recall clearly. See Testimony of Manager Ju, Il Nam.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** ASC Arch Structure Corp., *dba* ASC Construction, Respondent.	)	CAC No. 13-014-10 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on November 19, 2013, at 9:30 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Ben Castro and Yvonne S. Taisacan from the Job Availability and Citizen Placement Section. Respondent ASC Arch Structure Corp. appeared through its President, Xu, Hao, and consultant, Joseph C. Reyes. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on November 6, 2013. (See Determination at Hearing Exhibit 1.) The gist of the Determination was that ASC Arch Structure Corp., *dba* ASC Construction ("Employer"), had failed to comply with the "30% requirement" specified at 3 CMC § 4525.[1]

At Hearing, Enforcement established that in October 2012, it had requested documentation from the Employer detailing the Employer's complete full-time

[1] Section 4525 states: "In the full-time work force of any employer, the number of citizens and permanent residents employed shall be at least thirty percent (30%) of all employees within five years of the enactment of this Act, as provided by regulation. [Note: the Commonwealth Employment Act of 2007, 3 CMC § 4401 *et seq.*, was enacted in November 2007.]

workforce. In about October 2012, Employer produced to the Department a Total Workforce Listing, which showed the Employer was not in compliance with 3 CMC § 4525 (i.e., less than 30% of Employer's total work force were citizens or permanent residents). (See Listing, signed on 9/27/12, at Hearing Exhibit 3.)

At Hearing, the Employer produced an undated Total Workforce Listing that contains current information, updated to November 18, 2013. (See Total Workforce Listing, signed by President Xu, Hao on 11/18/13, at Hearing Exhibit 5.) Mr. Xu testified that the information contained on the current Total Workforce Listing is accurate (with handwritten corrections made on the document at the Hearing). The Employer's work force has been greatly reduced from 2012. The Employer now employs 3 full-time workers: one Immediate Relative of a U.S. citizen, one CNMI permanent resident and one CW worker. This means that more than 30% of the Employer's present work force consists of citizens or permanent residents.

Based on the new evidence presented, the Enforcement representative made an oral motion to dismiss the case without sanctions. The Hearing Officer accepts Enforcement's position that no sanctions are warranted, and finds that Employer is now in compliance with the "30% requirement" of 3 CMC § 4525. Therefore, the case should be dismissed.

Good cause having been shown, IT IS HEREBY ORDERED:

Compliance Agency Case No. 13-014-10 is hereby DISMISSED.

DATED: November 19, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Living Rock Construction, Inc., *dba* Konstrak Builders, H&R Block, Viva Beauty Salon and LJ Fish Dealer, Respondent.	)	CAC No. 13-017-11 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on November 19, 2013, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by labor investigator Frank Aguon; the Citizen Job Availability and Job Placement Section was represented by James Ulloa. Respondent Living Rock Construction, Inc. appeared through its Project Manager, Manuel Cisnero. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination") filed by the Department's Enforcement Section ("Enforcement") on November 8, 2013. On October 2, 2012, Living Rock Construction, Inc., *dba* Konstrak Builders, H&R Block, Viva Beauty Salon and LJ Fish Dealer ("Employer"), was served with a request to produce documents.

On October 23, 2012, Employer produced the requested documents, including: (1) a total listing of workforce statement of compliance; (2) a copy of two latest quarterly employer's withholding tax; (3) payroll summary; (4) sketched map to business location; (5) business license; and (6) annual corporate report.

The Employer's Business Establishment Employee Listing, signed by Mr. Cisnero on October 12, 2012, identified 19 full-time employees. Of this group, two are U.S. citizens and 17 are CW1 employees. [See Business Establishment Employee Listing, dated 10/12/12, at Hearing Exhibit 4.]

On October 30, 2012, Enforcement served Employer with a Notice of Warning, informing Employer that it was not in compliance with the requirement of 3 CMC § 4525, that a minimum of 30% of Employer's workforce should consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents. [A copy of Notice of Warning was entered into evidence at Hearing Exhibit 3.]

Subsequently, Employer was asked to confer with the Department's Citizen Job Availability and Job Placement Section. In December 2012, Mr. Cisnero met with Manny Iguel of the Job Placement Section to discuss the need for the Employer to make a good faith attempt to increase its percentage of U.S. citizen or permanent resident employees. [Testimony of Manuel Cisnero.]

At Hearing, Employer produced an updated Business Establishment Employee Listing that shows Employer currently employs 13 full-time employees, of which four are U.S. citizens and 9 are CW1 workers. [See Listing at Hearing Exhibit 5.] This means that more than 30% of the Employer's present work force consists of U.S. citizens or U.S. or CNMI permanent residents.

Based on the new evidence presented, the Enforcement representative made an oral motion to dismiss the case without sanctions. The Hearing Officer accepts Enforcement's position that no sanctions are warranted, and finds that Employer is now in compliance with the "30% requirement" of 3 CMC § 4525. Therefore, the case should be dismissed.

Good cause having been shown, IT IS HEREBY ORDERED:

1. Respondent is ORDERED to re-submit a properly signed Business Establishment Employee Listing (see Hearing Exhibit 5) to the Enforcement Section within 10 days of the date of issuance of this Order.

2. Compliance Agency Case No. 13-017-11 is hereby DISMISSED.

DATED: November 20, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, v. Long Feng Corporation, *dba* New XO Market, Respondent.	)	CAC No. 13-018-11 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on November 20, 2013, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ben Castro; the Job Availability and Citizen Placement Section was represented by Yvonne S. Taisacan. Respondent Long Feng Corporation appeared through its Manager, Xu, Gui Qing,[1] and its bookkeeper, Jonabel Fabian. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") on November 13, 2013. (See Determination at Hearing Exhibit 1.) In its Determination, Enforcement alleges that during the past year, Long Feng Corp., *dba* New XO Market ("Employer"), has failed to comply with the "30% requirement" specified at 3 CMC § 4525, and failed to cooperate with Department efforts to assist the company to meet the 30% requirement.[2]

[1] Ms. Xu testified that she had been given authority to represent the company by its President, Li, Guo Wu, who is presently in Hong Kong.

[2] Section 4525 states: "In the full-time work force of any employer, the number of citizens and permanent residents employed shall be at least thirty percent (30%) of all employees within five years of the enactment of this Act, as provided by regulation. [Note: the Commonwealth Employment Act of 2007, 3 CMC § 4401 *et seq.*, was enacted in November 2007.]

On December 5, 2012, Enforcement requested documentation from the Employer detailing the Employer's complete full-time workforce. [A copy of the Business Establishment Compliances and Monitoring Report, dated 12/05/12, was entered into evidence as Hearing Exhibit 2.]

In mid-December 2012, Employer produced a Total Workforce Listing, which showed the Employer was employing 20 employees: 3 permanent residents and 17 CW1 workers. The Listing indicated that Employer was not in compliance with 3 CMC § 4525. [Total Workforce Listing, dated 12/17/12, at Hearing Exhibit 3.]

On January 7, 2013, Enforcement served Employer with a Notice of Warning, stating that Employer was not in compliance with 3 CMC § 4525, and instructing Employer to contact Manny Iguel of the Department's Citizen Job Placement Section within 10 days of the issuance of the Notice. [A copy of the Notice of Warning was entered into evidence as Hearing Exhibit 4.]

On January 23, 2013, Employer's bookkeeper, Jonabel Fabian, informed the Department that the Employer had hired three U.S. citizens and that the Employer would be submitting the names of the new workers to the Department. However, the Employer never submitted those names. [At Hearing, Ms. Fabian testified that she telephoned the Department once, but Manny Iguel was in a meeting. Fabian never again tried to telephone Mr. Iguel to provide him with the information.]

In November 2013, Enforcement filed its Determination and requested $2,000 in sanctions against Employer for its failure (a) to meet the 30% in accordance with 3 CMC § 4525; and (b) to cooperate with the Department to attempt to improve the percentage of Employer's work force who are U.S. citizens or permanent residents. [Determination at Hearing Exhibit 1; testimony of Ben Castro.]

At Hearing, the Employer produced a new "Total Workforce Listing" based on current information, updated to November 18, 2013. [Total Workforce Listing, dated 11/12/13, was entered into evidence as Hearing Exhibit 5.] The new Listing shows that the Employer currently employs 25 full-time workers, out of which 5 workers are U.S. citizens or permanent resident workers. This means that Employer is still not in compliance with the 30% requirement of 3 CMC § 4525.

At the conclusion of the Hearing , Enforcement moved for an order requiring Employer to cooperate with the Department to hire and employ U.S. citizens, U.S. permanent residents or CNMI permanent residents. One means of demonstrating cooperation is for Employer to post all job vacancies on the Department's website

(www.marianaslabor.net). The Enforcement representative also repeated that Enforcement believes the Employer should be sanctioned for failing to meet the applicable percentage and failing to cooperate with the Department during the past year.

1. REMEDIAL ACTION TO BRING EMPLOYER INTO COMPLIANCE

The Department's Regulations state that an employer must make a good faith effort to hire U.S. citizens, U.S. permanent residents or CNMI permanent residents. Regs. at § 80 – 30.3-440. To that end, Regulations require an employer to post job vacancy announcements at the Department's website (www.marianaslabor.net). *Id.* at § 80 – 30.3-205.

This Employer has not posted any job vacancies on the Department website for at least the past year. [Testimony of Manager Xu.] Given that the Employer employs 20 CW1 workers, each of whom will come up for renewal from time to time, the Employer should be posting its available jobs and renewals on the Department website in order to ensure that it is making a good faith effort to place U.S. citizens and permanent residents into all available jobs.

In order to remedy this situation, the Hearing Officer shall order the following: (1) Employer shall be ordered to post all future job vacancies and job renewals on the Department website; and (2) Employer shall be ordered to attend a training session on the use of the job placement website at the Citizen Job Availability and Job Placement Section. Yvonne S. Taisacan shall conduct the training for Employer (Xu, Guo Qing and Jonabel Fabian) on November 26, 2013 at 2:00 p.m.

The above-noted orders are supported by 3 CMC § 4947(11), which authorizes a hearing officer to "impose such other sanction, order or relief as may reasonably give effect to Division 4, Title 3 [the "Employment and Registration" statutes]." Additionally, Department Regulations authorize a hearing officer to "impose such other sanction, order or relief as may reasonably give effect to the requirements of Commonwealth law." Regs. at § 80 – 50.4-820(n).

2. SANCTIONS

The Department's investigation was conducted under 3 CMC § 4527 [Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1]. In cases of violations under that chapter, the hearing officer is authorized to levy a fine not to exceed $2,000. 3 CMC § 4528(f)(2).

Enforcement requested that the Employer be sanctioned $2,000 for its failure to comply with laws and regulations regarding its obligation to maintain a minimum of 30% of it's workforce with U.S. citizens, U.S. permanent residents or CNMI permanent residents, pursuant to 3 CMC § 4525. [Determination at Hearing Exhibit 1; and Testimony of Ben Castro.]

The above-cited statute and its implementing Regulations [3] do not specify standards upon which to assess applicable fines. Rather, the amount of fines in this area is left to the discretion of the Hearing Officer. This Hearing Officer applies a standard of reasonableness and fairness in assessing sanctions, in accordance with general principle stated in the Regulations, that:

> The hearing officer is authorized to...[u]se the inherent powers of a hearing officer...*to further the interests of justice and fairness* in proceedings. Regs. at § 80 - 50.4-820(h) and (o). [Emphasis added.]

The Regulations also state that "[u]pon motion and good cause shown, a hearing officer may make any order that *justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Regs. at § 50.4-550. [Emphasis added.]

Applying the above standards to this case, this Hearing Officer concludes that the Employer should be fined, but the amount of the requested sanctions should be reduced to $500.

The evidence establishes that the Employer did respond to Enforcement's document request and Employer did hire several U.S. citizens during the past year. Nevertheless, the Employer's bookkeeper later failed to deliver information to the Department and, more importantly, the Employer ignored its obligation to post job vacancies on the Department's website. [Regs. at Section 30.3 – 205.]

The Employer's Manager, Xu, Gui Qing, made some effort to cooperate with Enforcement and this factor should mitigate against imposing the maximum fine. The Employer appears to have been ignorant of the Department's website or how to use it. The Manager did not realize there was a serious problem until the Department filed and served its Determination in November 2013.

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[3] See Employment Rules and Regulations (hereinafter, "Regulations"). See 32 Com. Reg. 30254 (May 21, 2010).

Given these facts, the Hearing Officer finds that the appropriate sanction in this matter is five hundred dollars ($500). Further sanctions may be applied if the Employer (1) fails to attend the orientation session at the Citizen Job Availability and Job Placement Section, or (2) fails to post its future job vacancies and renewals on the Department's website.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Attendance at Tutorial Session:** Respondent Long Feng Corporation is ORDERED to attend a training session to be conducted by Yvonne S. Taisican at the Citizen Job Availability and Job Placement Section, on November 26, 2013, at 2:00 p.m. Xu, Gui Qing and Jonabel Fabian shall attend the training on behalf of the Respondent. 3 CMC § 4947(11).

2. **Posting on Website:** Respondent Long Feng Corporation is ORDERED to post all job vacancies and job renewals on the Department of Labor website (www.marianaslabor.net), in accordance with Regulations at § 80 – 30.3-205.

3. **Sanction:** For the reasons stated herein, Respondent Long Feng Corp. is hereby FINED five hundred dollars ($500). 3 CMC §§ 4528(a) and (f)(2). Respondent is ORDERED to pay this fine no later than **thirty (30) days** after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

4. **Added Sanction:** If Respondent fails to comply with the terms of this Order, Respondent shall be subject to further monetary sanctions in an amount to be determined at a later hearing.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: November 21, 2013

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Korea Tourism, Inc., *dba* Korea Tours Bureau, Respondent.	)	CAC No. 13-019-12 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on March 6, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Frank Aguon; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa. Respondent Korea Tourism Inc., *dba* "Korea Tours Bureau" or "KTB," appeared through its Vice President, Lim, Hyung Joom, and its General Manager, Ms. Kim, Hae Ja. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Violation ("Determination"), filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on December 19, 2013. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.] The Determination concerns the activities of respondent Korea Tourism, Inc. (hereinafter, "Employer").

Employer changed its management in January 2014. The current General Manager is Ms. Kim, Hae Ja, who assumed her position on January 2, 2014, pursuant to an Operations Management Partnership Agreement. [The Agreement was entered into evidence at Hearing Exhibit 3.] The former General Manager was Ms. Kim, Jee Yon Jeaung. Many of the events recited in the Determination took place in

2013, when the former General Manager was in charge. The former General Manager did not attend the hearing.

On January 15, 2013, Enforcement conducted an on-site compliance inspection of Employer's business as part of its effort to ensure that employers are making good faith efforts to comply with the "30% U.S. workforce requirement" specified in Department regulations. This regulation mandates that a minimum of 30% of an employer's workforce should consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents. [See Employment Rules and Regulations ("Regs.") at §§ 80-30.2-120(c) and 80-30.3-440; testimony of Frank Aguon and James Ulloa.]

On January 15, 2013, Enforcement served Employer with a document request, and shortly thereafter, Employer provided Enforcement with the requested documents, including documents that listed Employer's total workforce.

The documents showed that Employer had a workforce of 7 employees, consisting entirely of CW-1 workers, working as tour guides. None of Employer's workforce were U.S. citizens, U.S. permanent residents or CNMI permanent residents. [Testimony of Mr. Ulloa and Ms. Kim.]

On February 4, 2013, Enforcement served Employer with a "Notice of Warning," informing Employer that it was not in compliance with the "30% U.S. workforce requirement." [See Notice of Warning at Hearing Exhibit 5.] The Notice of Warning instructed the Employer to contact the Citizen Job Placement Section for assistance in (1) obtaining referrals of U.S. citizen applicants or (2) making other arrangements to meet the 30% U.S. workforce requirement. *Id.*

It is unknown whether Employer ever responded to the Notice of Warning and/or contacted the Department between February and October 2013.[1] It is clear, however, that Employer never registered at the Department's website and never posted any available jobs on the site. [Testimony of Mr. Ulloa.]

In August and November 2013, Employer advertised the above-noted positions on a local radio station. [Copies of two certifications from the KWAW-FM radio station were entered into evidence as Hearing Exhibit 7.] Job advertisements were announced on the radio on 7 consecutive days in August 2013 and 14 consecutive

[1] Neither the Department nor the Employer could testify as to whether any communication occurred between the parties. Employer's current General Manager was not working for Employer in 2013 and Mr. Ulloa was not working at the Citizen Job Placement Section until October 2013.

days in November 2013. According to Employer, no U.S. citizens or permanent residents responded to these advertisements.

In November 2013, the Citizen Job Placement Section made two unsuccessful attempts to contact Employer regarding the Notice of Warning. Employer's friend or agent, Gina Bacani, informed the Department that Employer's General Manager was off-island. [Testimony of Mr. Ulloa.] The Citizen Job Placement Section then referred the matter to Enforcement.

Enforcement concluded that Employer had failed to make good faith efforts to recruit U.S. eligible workers and that Employer had been "uncooperative and non-compliant" with the labor laws, rules and regulations with respect to recruiting U.S. workers and permanent residents. [Determination (Hearing Exhibit 1) at ¶ 6.] The Determination set this case for Hearing; the Hearing was continued until March 2014 at the request of Employer.

At Hearing, Employer's new General Manager, Kim, Hae Ja, testified that as of March 2014, Employer employs 6 persons, all of whom are CW-1 workers.

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. Regs. at §§ 80-30.2-120(c) and 80-30.3-440.

Among other things, Departmental Regulations require that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." *Id.* at § 80-30.3-205; see also § 80-30.3-300. "There are no waivers available with respect to the job vacancy announcement requirement." *Id.* at § 80-30.3-230.

The Department recognizes that it may take some employers time and effort to achieve the goal of employing 30% of their workforce as U.S. citizens and/or permanent residents. Nevertheless, Employers who are not in compliance with the 30% target are expected to cooperate with the Citizen Job Placement Section in order to demonstrate that they are making a good faith effort to meet the requirement. [Testimony of James Ulloa.]

In this case, Employer's tour guide positions may require fluency in the Korean language, as these guides deal directly with Korean tourist-clients of the Employer. [Testimony of Ms. Kim.] These positions may be difficult to fill with U.S. citizens or permanent residents, given the language requirement. Nevertheless, it is possible that there are local U.S. citizens or permanent residents who are bilingual in English and Korean and would be interested in working as guides. Employer should use the Citizen Job Placement Section as a resource to find such bilingual individuals and offer them employment.

The Determination:

In its Determination, Enforcement made two recommendations: (1) that Employer be ordered to cooperate with the Citizen Job Placement Section, so that it could be brought into compliance with workforce objectives identified in CNMI statutes and regulations; and (2) that Employer be ordered to pay a $2,000 fine for its past non-compliance with the workforce statutes and regulations.

Citizen Job Placement Section:

The evidence shows that Employer has not met the 30% requirement [Regs. at § 80-30.2-120(c).] as it employs no U.S. citizens or permanent residents. To date, Employer has failed to register or post vacancies on the Department's website to find employees. Evidently, Employer was unaware of the Department's Regulation requiring employers to register and post available jobs on the website.

Despite the difficulty in finding bilingual employees, Employer has a continuing obligation to cooperate with the Department by (1) posting all available job openings on the Department's website; and (2) hiring all qualified U.S. citizens and permanent residents for available jobs. Employer shall be ordered (see below) to register and post all future job vacancies and renewals of CW-1 positions on the website.

Finally, Departmental Regulations provide that if no qualified U.S. citizen, U.S. permanent resident or CNMI permanent resident is identified through posting on the website, referral by the Department, or good faith efforts to hire, the Department shall issue a certification of compliance to the Employer. Regs. at § 80-30.3-460. In other words, if an employer takes all the above-noted steps to find qualified citizens and/or permanent residents and still cannot find them, the Department will not consider the employer in violation of the CNMI workplace Regulations.

Sanctions:

The Hearing Officer is authorized to levy a fine of up to $2,000 for each violation of the Commonwealth Employment Act of 2007. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer.

The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80-50.4-820(h) and (o).

In this case, after hearing the testimony of the Employer, Enforcement withdrew its request for a monetary sanction. [Testimony of Mr. Aguon.] The Hearing Officer agrees that no useful purpose would be served by sanctioning this employer, particularly given that it is under new management. Nevertheless, Employer is warned that any failure on its part to comply with the terms of this Order, as specified below, could subject the company to sanctions in the future.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Corrective Action:** Respondent Korean Tourism Inc. is ORDERED to post all future job vacancies and job renewals on the Department of Labor website (www.marianaslabor.net), in accordance with Regulations at § 80–30.3-205. Respondent shall consider all referrals received from the Citizen Job Placement Section and hire such referrals when they are qualified and available to work.

2. **Warning:** The obligations described above are continuing obligations. If Respondent Korean Tourism Inc. fails to comply with the terms of this Order (for example: fails to post job vacancies, fails to interview all referred applicants or to notify the Department regarding the referrals, etc.), it shall be subject to monetary sanctions in an amount to be determined after a due process hearing.

3. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 7, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of: Department of Labor Enforcement Section, Complainant, **v.** Himawari Saipan Inc., *dba* Himawari, Respondent.	)	CAC No. 13-021-12 **ADMINISTRATIVE ORDER**

This Compliance Agency Case came on for hearing on February 25, 2014, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Frank Aguon; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa. Respondent Himawari Saipan Inc. appeared through its Vice President, Tatsuhito Suzuki, and its accountant, Anita Cornista. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Violation ("Determination"), filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on December 19, 2013. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.] The Determination concerns the activities of respondent Himawari Saipan Inc. (hereinafter, "Employer").

Enforcement conducts on-site compliance inspection of businesses in the CNMI in order to ensure that employers are making good faith efforts to comply with the so-called "30% U.S. workforce requirement" specified in Department regulations. This regulation mandates that a minimum of 30% of an employer's workforce should consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents. [Employment Rules and Regulations ("Regs.") at §§ 80-30.2-120(c) and 80-30.3-440; testimony of Frank Aguon and James Ulloa.]

On October 10, 2012, Enforcement conducted an on-site compliance inspection of Employer's business and served Employer with a document request, entitled the "Business Establishment Compliances and Monitoring Report." [Determination at ¶ 1; testimony of Mr. Aguon.]

Employer failed to produce the requested documents for the next eight months. Therefore, on August 9, 2013, Enforcement served Employer with a "Final Notice of Warning," noting that Employer was not responding to the Department's document request.

On August 19, 2013, Employer provided Enforcement with all of the requested documents, including documents that listed Employer's total workforce. The documents showed that Employer had a workforce of 41 employees, consisting of 34 CW-1 workers and 7 citizens and/or permanent residents (including one FSM worker). [See document entitled "Listings of Himawari Employees," entered into evidence as Hearing Exhibit 2; testimony of Messrs. Ulloa, Aguon and Suzuki.]

On August 28, 2013, Enforcement served Employer with a "Notice of Warning," (Hearing Exhibit 3), informing Employer that it was not in compliance with CNMI labor regulations specifying that a minimum of 30% of an employer's workforce should consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents. [Regs. at §§ 80-30.2-120(c) and 80-30.3-440.] The Notice of Warning instructed the Employer to contact the Citizen Job Placement Section for assistance in (1) obtaining referrals of U.S. citizen applicants or (2) making other arrangements to meet the 30% U.S. workforce requirement. *Id.*

Over the next several months, the Citizen Job Placement Section, through Yvonne Taisacan, contacted Employer and attempted to work with Mr. Suzuki to refer U.S. citizen or permanent resident job applicants to Himawari. [Ms. Taisacan reported her efforts to her superior, James Ulloa. Later, she prepared a written summary of her efforts in a Memorandum, dated 12/11/13. The Memorandum was entered into evidence as Hearing Exhibit 4.]

On November 6, 2013, Ms. Taisacan referred four U.S. citizen job seekers to the Employer. [See a copy of referral letter, dated 10/24/13, at Hearing Exhibit 6.] Employer was instructed to interview the workers, then provide a written account to the Department regarding its hiring decisions. The letter stated: "Please take necessary actions(s) on these referral(s). You have fourteen (14) days to submit and report to the Director all actions taken. Failure to do so may result into a violation that will be addressed at the Departments' Administrative Hearing...." Id.

Employer never submitted a written report to the Citizen Job Placement Section, as required, even after being reminded of the 14-day deadline by Ms. Taisacan on December 2, 2013. At Hearing, Employer testified that three of the four job applicants had been interviewed; the fourth could not be reached by phone. The Employer hired one of those three applicants; the other two were found to have insufficient skills.

In December 2013, the Citizen Job Placement Section notified Enforcement that four job applicants had been referred, but Employer had failed to provide follow-up information, such as whether each applicant had been hired and, if not, the reason for rejecting them. Given Employer's failure to provide follow-up information, the Citizen Job Placement Section concluded that Employer had failed to make good faith efforts to recruit U.S. eligible workers. [Memorandum at Hearing Exhibit 4.]

Enforcement examined the matter and issued its Determination, concluding that Employer had been "uncooperative and non-compliant" with the labor laws, rules and regulations with respect to recruiting eligible U.S. workers and permanent residents. [Determination (Hearing Exhibit 1) at ¶ 7.] This Hearing followed.

After Employer received the Department's Determination in mid-December 2013, it hired a number of U.S. citizens. [Testimony of Mr. Suzuki.] Employer's current Total Workforce Listing shows that Employer now employs 46 full-time employees: 34 foreign national (CW-1) workers and 12 U.S. citizens and/or permanent residents (6 U.S. citizens, 5 permanent residents and 1 FSM worker). [See Employer's current "Total Workforce Listing" at Exhibit 7 (by stipulation, Employer submitted the Listing post-hearing, on 2/27/2014).]

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. 3 CMC § 4525(a) and Regs. at §§ 80-30.2-120(c) and 80-30.3-440.

Among other things, Departmental Regulations require that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." *Id.* at § 80-30.3-205; see also § 80-30.3-300. "There are no waivers available with respect to the job vacancy announcement requirement." *Id.* at § 80-30.3-230.

The Department recognizes that it may take some employers time and effort to achieve the goal of employing 30% of their workforce as U.S. citizens and/or permanent residents. Nevertheless, Employers who are not in compliance with the 30% target are expected to cooperate with the Citizen Job Placement Section in order to demonstrate that they are making a good faith effort to hire U.S. citizens, U.S. permanent residents and CNMI permanent residents. [Testimony of James Ulloa.]

The Determination:

In its Determination, Enforcement made two recommendations: (1) that Employer be ordered to cooperate with the Citizen Job Placement Section, so that it could be brought into compliance with workforce objectives identified in CNMI statutes and regulations; and (2) that Employer be ordered to pay a $2,000 fine for its past non-compliance with the workforce statutes and regulations.

Citizen Job Placement Section:

Employer presented evidence (Hearing Ex. 7) to prove that it has now met the 30% threshold identified in the Department's Regulations. [Regs. at § 80-30.2-120(c).] Given that Employer is now in compliance with the regulation, there is no present need to order Employer to meet with the Citizen Job Placement Section. Nevertheless, the Hearing Officer notes that Employer has a continuing obligation to cooperate with the Department in the future by (1) posting all available job openings; and (2) hiring all qualified U.S. citizens and permanent residents for available jobs.

Sanctions: Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine of up to $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o).

In this case, Enforcement argues that Employer should be fined for its conduct that led to the filing of the Determination. Although Employer hired citizens to bring itself into compliance *after* the Determination was issued, its prior Workforce Listing (Hearing Ex. 2) shows that for many months Employer did not employ a sufficient number of U.S. citizens and/or permanent residents. During this period, Employer did not use the Department's website in order to find job applicants. [*Id.* at §§ 80- 30.3-205 and 30.3-300.] Also, in this period, Employer failed to produce documents requested by the Department, which would have shown that it employed insufficient numbers of U.S. citizens and permanent residents. Even after Employer received its Notice of Warning (Hearing Ex. 3), it was slow to react to the Department's efforts to refer workers. The Employer also failed to file an Employer Declaration, specifying its reasons for rejecting certain applicants after interviewing them. [*Id.* at § 80-30.3-450.]

Based on the evidence presented, the Hearing Officer finds that Employer should be sanctioned with a monetary sanction of one thousand dollars. However, as Employer has now brought itself into compliance with the 30% ratio, one half of the sanction shall be suspended for one year and then automatically extinguished, on the condition that Employer complies with Departmental regulations during the one-year period.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent Himawari Saipan Inc. is FINED one thousand dollars ($1,000) for its failure to comply with Departmental regulations with respect to making good faith efforts to hire U.S. citizens, U.S. permanent residents and CNMI permanent residents, as described above. 3 CMC §§ 4528(f)(2) and 4947(11). However, half of the sanction ($500) shall be SUSPENDED for one year, and then automatically extinguished, provided that Respondent complies with the terms stated below in paragraph no. 2. Respondent is ORDERED to pay the remaining $500 portion of the fine within thirty (30) days after the date of service of this Order. Payment shall be made to the CNMI Treasury; and a copy of the payment receipt shall be delivered to the Hearing Office on or before the payment deadline.

2. **Posting on Website:** Respondent Himawari Saipan Inc. is ORDERED to post all future job vacancies and job renewals on the Department of Labor website (www.marianaslabor.net), in accordance with Regulations at § 80--30.3-205. Respondent shall consider all referrals received from the Citizen Job Placement Section and hire such referrals when they are qualified and available to work.

3. **Warning:** The obligations described above are continuing obligations. If Respondent fails to comply with the terms of this Order (for example: fails to post job openings; fails to interview all referred applicants and notify the Department regarding the referrals, etc.), it shall be subject to a further monetary sanctions, including but not limited to the reinstatement of the suspended $500 portion of the fine, after a due process hearing on this issue.

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: March 7, 2014

Jerry Cody
Hearing Officer

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	CAC No. 13-023-12
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Juan A. Gacayan,	)	
dba JAG Construction,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on January 22, 2014, at 9:30 a.m. in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Jeff Camacho; the Citizen Job Availability and Job Placement Section (hereinafter, "Citizen Job Placement Section") was represented by James Ulloa. Respondent Juan A. Gacayan (dba JAG Construction) appeared together with translator Jimmy Blancia. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on a Determination and Notice of Hearing ("Determination"), filed by the Department's Enforcement Section ("Enforcement") in the Hearing Office on January 7, 2014. [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

Enforcement conducts on-site compliance inspection of businesses in the CNMI in order to ensure that employers are in compliance with the 30% requirement of 3 CMC § 4525, which mandates that a minimum of 30% of Employer's workforce should consist of U.S. citizens, U.S. permanent residents or CNMI permanent residents. [Testimony of Jeff Camacho and James Ulloa.]

On December 16, 2013, Employer filed a request for good standing from the CNMI Department of Labor. Employer provided a list of his total workforce to the Citizen Job Placement Section in support of his request. [A copy of the so-called

"Total Workforce Listing" was entered into evidence as Hearing Exhibit 2.] This document listed that Employer employed eight part-time employees, none of whom were U.S. citizens, U.S. permanent residents or CNMI permanent residents.

On December 19, 2013, James Ulloa of the Citizen Job Placement Section met with Employer. Mr. Ulloa advised the Employer that he needed to hire two U.S. citizens or permanent residents, or at least submit a "workforce plan" to hire such persons, in order to come into compliance with CNMI law [3 CMC § 4525], and in order to obtain the letter of good standing. At that point, Employer stated that he was unable to hire additional workers and that he would withdraw his attempt to obtain a letter of good standing. [Testimony of Mr. Ulloa and Mr. Gacayan.]

Subsequently, Enforcement concluded that Employer was not making any attempt to meet its obligations to comply with the 30% requirement of 3 CMC § 4525. Accordingly, Enforcement filed this Determination for such non-compliance. Enforcement requested that Employer be sanctioned $2,000 for his conduct in making no effort to comply with the 30% requirement of 3 CMC § 4525.

At Hearing, Employer testified that his business, JAG Construction, builds and repairs houses. He holds licenses in building construction and commercial cleaning services. Under questioning, Employer admitted that his Total Workforce Listing, which he had signed under penalty of perjury, was incorrect. The document listed that he employed 8 part-time workers. In fact, Mr. Gacayan testified that he employs five full-time CW workers (two masons, one carpenter, and two commercial cleaners) and three part-time CW workers (all commercial cleaners). [Testimony of Mr. Gacayan.]

When asked why his Total Workforce Listing (Hearing Ex. 2) had failed to note any full-time workers, Employer blamed his accountant for incorrectly preparing the form. *Id.*

As to his efforts to find U.S. citizens for the positions held by his "CW" workers, Employer noted that he had placed an advertisement on a local radio station for a total of three days in May 2013. Hearing Exhibit 4 (letter from Program Director of KWAW-FM to U.S. Citizen and Immigration Services ("USCIS") , dated 5/09/13).[1] Employer testified that his petition to hire five full-time CW workers was approved by USCIS in October 2013. [Testimony of Mr. Gacayan.]

[1] The letter (Hearing Exhibit 4), entitled "Job Vacancy Announcement Certification," certifies that JAG Construction placed a job vacancy for 4 carpenters, 4 masons, 6 commercial cleaners and one electrician, and that the matter was announced on the radio for 3 consecutive days from May 6, 2013 to May 8, 2013.

DISCUSSION

Under Commonwealth law, every employer is required to make good faith efforts to recruit eligible U.S. workers and permanent residents in sufficient force to meet the targeted percentage of 30% of its total workforce. 3 CMC § 4525(a) and Regs. at § 80-30.3-440.

Among other things, Department Regulations require that "[a]n employer who intends to employ a foreign national worker...on a full-time basis...must post a job vacancy announcement on the Department's website, www.marianaslabor.net." *Id.* at § 80-30.3-205; see also § 80-30.3-300. "There are no waivers available with respect to the job vacancy announcement requirement." *Id.* at § 80-30.3-230.

The Department recognizes that it may take some employers time and effort to achieve the goal of employing 30% of their workforce as U.S. citizens and/or permanent residents. Nevertheless, Employers who are not in compliance with the 30% target are expected to cooperate with the Citizen Job Placement Section in order to demonstrate that they are making a good faith effort to hire U.S. citizens, U.S. permanent residents and CNMI permanent residents. [Testimony of James Ulloa.]

An employer who fails to cooperate with the Citizen Job Placement Section, after it is requested to do so, creates the impression that it is ignoring or evading its legal responsibilities under CNMI law. 3 CMC § 4525(a) and Regs. at § 80-30.3-440.

In this case, the Hearing Officer finds that Employer failed to operate in good faith with respect to its obligation to hire and employ U.S. citizens and permanent residents sufficient to meet the 30% requirement. *Id.* As stated above, Employer met with the Placement Section in an effort to obtain a letter of good standing. However, when he was told that the Department expected him to take steps to hire U.S. citizens by receiving and interviewing job applicants referred by the Department, he immediately sought to withdraw his request for a good standing letter and made no attempt at further communication with the Department. [Testimony of Messrs. Ulloa and Gacayan.]

After the meeting with the Citizen Job Placement Section in mid-December 2013, Employer failed to contact the Placement Section for further referrals of job applicants. Moreover, Employer never posted his available construction and commercial cleaning jobs on the Department's website in 2013, as required by CNMI Department of Labor Regulations. *Id.*; Regs. at § 80-30.3-205.

The above findings raise two issues: sanctions and corrective action.

Sanctions: Enforcement asked in its Determination that Employer be assessed the maximum fine of $2,000 for its conduct. [Testimony of Jeff Camacho.]

Enforcement's examination of Employer's workforce was part of a Departmental investigation conducted under Chapter 2 of the Commonwealth Employment Act of 2007, as amended by Public Law 17-1. 3 CMC § 4527. In cases of violations under that chapter, the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with general principle, stated in the Regulations, that "[t]he hearing officer is authorized to...[u]se the inherent powers of a hearing officer...to further the interests of justice and fairness in proceedings." Regs. at § 80- 50.4-820(h) and (o). [Emphasis added.]

Applying the above standards to the facts of this case leads this Hearing Officer to conclude that a monetary sanction of $1,000, together with corrective action, is the appropriate sanction to be assessed against this Employer.

Corrective Action: This Employer shall be ordered: (1) to post all of its future job vacancies on the Department's website (www.marianaslabor.net); and (2) to meet with the Citizen Job Placement Section to discuss long-range workforce plans to meet the 30% target.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Sanctions:** Respondent Juan J. Gacayan is FINED one thousand dollars ($1,000) for his conduct in 2013, as described above. 3 CMC §§ 4528(f)(2) and 4947(11). Respondent is ORDERED to pay this fine in two monthly installments of $500 each, due on or before March 21, 2014 and April 21, 2014, respectively. Payments shall be made to the CNMI Treasury; and a payment receipt shall be delivered to the Hearing Office on or before each payment deadline.

2. **Cooperation with Citizen Job Placement Section:** Respondent Juan J. Gacayan is ORDERED to contact James Ulloa of the Citizen Job Availability and Job Placement Section, within thirty (30) days of the date of this Order. The purpose of the contact shall be to cooperate with the Department to devise a

workforce plan to move towards meeting the so-called 30% requirement of 3 CMC § 4525(a). 3 CMC § 4947(11). To this end, respondent shall consider all referrals received from the Citizen Job Placement Section and hire such referrals when they are qualified and available to work.

3. **Posting on Website:** Respondent is ORDERED to post all job vacancies and renewals in the future on the Department website (www.marianaslabor.net), in accordance with Regulations at § 80 – 30.3-205.

4. **Further Sanctions:** If Respondent fails to comply with the terms of this Order, he shall be subject to further monetary sanctions in an amount to be determined at a later hearing.

5. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: January 27, 2014

Jerry Cody
Hearing Officer