IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JUAN S. DEMAPAN and CHEUNG PING YIN, Plaintiffs, v. MAYA KARA, Personally; MARVIN WILLIAMS, Personally; PHIL GOODWIN, Personally; PAUL OGUMORO, Personally; CHARLES INGRAM JR., Personally; COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS; and DOES 1-10, Defendants.	CIVIL ACTION NO. 99-0548 **DECISION AND ORDER**

I. INTRODUCTION

This matter came before the court on December 20, 1999, on Defendants' motion for summary judgment; Plaintiffs' motion for summary judgment; Defendant's motion for protective order; and Plaintiffs' motion for protective order. Assistant Attorney General L. David Sosebee, Esq., appeared on behalf of the Defendants, and Pedro M. Atalig, Esq., and Joseph A. Arriola, Esq., were present for the Plaintiffs. Arguments were presented before the Honorable Joaquin V. E. Manibusan, Jr., pro tem Judge. The court, having reviewed the briefs, exhibits, affidavits, having heard the arguments of counsel, and after having given the pending motions serious consideration, now issues the following Decision and Order.

FOR PUBLICATION

[p. 2] **II. BACKGROUND**

On January 9, 1998, the Department of Finance ("DOF") issued a lottery license to Just For Fun Incorporated ("JFF"). The license agreement limited JFF to only operating the lottery game known as Jueteng.[1] The license agreement also allowed JFF to designate "sub-agents" as representatives to sell JFF's lottery game. Only JFF, however, could be held liable and accountable to DOF.[2]

On July 21, 1999, JFF and Plaintiff Demapan ("Demapan") entered an exclusive agency agreement presumably pursuant to Paragraph 6 of JFF's lottery license agreement, in which Demapan agreed to operate lottery games as an agent of JFF.[3] On July 26, 1999, Demapan obtained a business license to operate Business Management Service Gaming Entertainment. Demapan later entered into an agreement with Plaintiff Yin ("Yin") for Yin to operate Demapan's games in Garapan.

On September 2, 1999, Defendants Ogumoro and Goodwin, two members of the Attorney General's Investigative Unit, went to the East Ocean Restaurant to serve criminal summonses in a separate matter. While at the restaurant, Ogumoro and Goodwin observed in plain view gambling activities, including the operation of baccarat and hi-lo. Ogumoro and Goodwin arrested the operators, seized the gambling paraphernalia, and then arrested the Plaintiffs.

Plaintiffs allege, however, that on September 2, 1999, two members of the Attorney General's Investigation Unit directed police officers to arrest Plaintiffs for engaging in illegal gambling without a warrant or any legal authority for the arrests. On this same date, police officers

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[1] Paragraph 1 of the lottery license authorized JFF to conduct those "one and two number public lottery games described as Jueteng."

[2] On July 15, 1998, DOF nullified JFF's license on the ground that Tattersall's of Australia had an exclusive lottery license in the Commonwealth of the Northern Mariana Islands ("CNMI"). JFF appealed DOF's decision to the Superior Court, which reversed DOF's decision and reinstated JFF's lottery license. *See In the Matter of Just For Fun, Inc.*, Civ. No. 98-858B, Lottery Case No. 98-1 (N.M.I. Super. Ct. Jun. 14, 1999).

[3] Under § II, para. A, of the agency agreement, JFF appointed Demapan as its exclusive agent for the operation of games on Saipan except for the games known as Jueteng or any game similar to Jueteng. Also, under the agreement, JFF made Demapan responsible for obtaining the necessary licenses for games operated pursuant to the agency agreement.

seized property and equipment from the Plaintiffs' place of business. Plaintiffs further allege that **[p. 3]** Acting Attorney General Maya B. Kara ratified all the activities with regard to their arrest and detainment.

On September 23, 1999, Plaintiffs instituted the above captioned matter by filing a verified complaint in the Superior Court of the CNMI. Plaintiffs have alleged that they were wrongfully arrested and falsely imprisoned; that the wrongful arrest and false imprisonment caused them to suffer emotional distress; that their due process rights were violated during their arrest; that Defendants wrongfully revoked Demapan's lottery license; and that Defendants wrongfully seized Plaintiffs' gaming equipment. Plaintiffs also set forth a taxpayer's grievance claim alleging that the current Acting Attorney General for the CNMI is holding her position illegally and in violation of the N.M.I. Constitution.

On October 14, 1999, Defendants filed their motion for summary judgment seeking summary judgment to be entered in their favor on all of the claims set forth in Plaintiffs' verified complaint. On November 30, 1999, Plaintiffs filed their motion for summary judgment seeking summary judgment to be entered in their favor on the claim that the Acting Attorney General holds her position unlawfully. Both parties filed motions for protective order.

After having given these matters careful consideration, the court grants Defendants' motion for summary judgment only as to the Plaintiffs' claims relating to the alleged illegal arrest. The court grants Plaintiffs' motion for summary judgment. Additionally, the court finds both motions for protective order to be moot. The following discussion sets forth the court's conclusions and rationale in this regard.

III. DISCUSSION

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* Com. R. Civ. P. 56(b); *see also Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, L.Ed.2d 265 (1986). When the moving party has shown an absence of evidence to support the non-moving party's case, the non-moving party

must present specific facts showing there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see* **[p. 4]** *also Castro v. Hotel Nikko, Saipan, Inc.*, 4 N.M.I. 268, 272 (1995).

The court must view the evidence and all inferences to be drawn from the underlying facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). After reviewing the facts in a light most favorable to the non-moving party, the court may only grant summary judgement when it appears as a matter of law that the moving party is entitled to judgment. *See Cabrera v. heirs of DeCastro*, 1 N.M.I. 172, 176 (1990).

The court will address each motion separately:

A. *Defendants' Motion for Summary Judgment*

Defendants have filed a motion for summary judgment asserting that there are no genuine issues of material fact with regard to all of the claims set forth in Plaintiffs' verified complaint. Having reviewed Plaintiffs' claims and having considered the parties' arguments, this court concludes that summary judgment is appropriate on all of Plaintiffs' claims relating to their arrest. Defendants' motion for summary judgment as to Plaintiffs' taxpayer grievance is denied.

1. False Imprisonment:

Plaintiffs first cause of action is their claim false imprisonment. Specifically, Plaintiffs assert that they were properly licensed to operate lottery games. Thus, Defendants did not have a legal or proper basis for the arrest. Defendants, however, assert that Plaintiffs were arrested for engaging in an illegal gambling operation, and therefore Plaintiffs' claim for false imprisonment fails. This court agrees.

"The essential elements of the tort of false imprisonment are (1) the detention and restraint of one against his will, and (2) the unlawfulness of such detention or restraint." *Candelaria v. Yano Enters., Inc.*, 2 CR 220 (Dist. Ct. App. Div. 1985). Plaintiffs fail to establish the unlawfulness of their detention and restraint and thus fail to establish false imprisonment.

Under Article XXI, § 1 of the N.M.I Constitution, gambling is prohibited unless provided

for by Commonwealth law.[4] Under 1 CMC § 9322(a), "[n]o persons other than those licensed by **[p. 5]** the [Commonwealth Lottery Commission] may operate or be engaged in the operation of the lottery." Further, "[a] license shall not be assignable or transferrable." *See* 1 CMC § 9313(d).

Here, it is clear that Plaintiffs did not have a lottery license at the time of their arrest. Further, it is undisputed that at the time of their arrest, Plaintiffs were operating a lottery game. Thus, this court finds that Plaintiffs were in fact engaged in an illegal gambling operation. Thus, their arrest was proper.

Plaintiffs assert, however, that there is a question of material fact as to the transferability of JFF's lottery license. JFF's license agreement clearly states that the license is not transferrable or assignable. Further, paragraph 6 of JFF's lottery license only allowed JFF to designate "sub-agents" as representatives to sell the JFF lottery game. Moreover, § 9313(d) specifically provides that lottery licenses are not assignable or transferable. Thus, because there has been no transfer or assignment of JFF's lottery license to Plaintiffs, at the time of Plaintiffs' arrest, they were engaging in the operation of a lottery game without a license.

Plaintiffs next assert that there is a question of material fact as to who actually arrested Plaintiffs. A review of documents submitted by Plaintiffs shows that Demapan admitted, on more than one occasion, that Ogumoro and Goodwin arrested the Plaintiffs in this matter.[5] Thus, there is no issue of fact in this regard.

Plaintiffs next assert that the arresting officers could not arrest Plaintiffs without a warrant. Under 6 CMC § 6103(b), "[a]nyone in the act of committing a criminal offense may be arrested by any person present, without a warrant." Here, the arresting officers entered Plaintiffs' establishment in Garapan where they found Plaintiffs illegally operating a lottery game. Thus, the arresting officers had authority to arrest Plaintiffs. Further, Plaintiffs were arrested in a place of business. It is well settled that a business, by its special nature and voluntary existence, may open itself to

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[4] The lottery on Saipan is governed by the Commonwealth Lottery Commission Act. *See* 1 CMC § 9301 et. seq. Pursuant to Executive Order 94-3, the Secretary of Finance is in charge of regulating the lottery.

[5] *See* Demapan's declaration attached to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

intrusions that would not be permissible in a purely private context. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353, 97 S.Ct. 619, 50 L.E.2d 530 (1977). The question, in the context of entry into a business, is the individual's expectation of privacy. What is knowingly **[p. 6]** exposed is not subject to Fourth Amendment protection. *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Thus, Plaintiffs were operating an illegal gambling operation in a public business establishment and in plain sight of the arresting officers. Clearly they had no expectation of privacy and the arresting officers did not need to obtain an arrest warrant prior to arresting the Plaintiffs.

Plaintiffs next assert that there is a question of fact with regard to whether the game hi-lo is a lottery game and thus an exception to the gambling prohibition. Regardless, there has been no evidence presented to this court establishing that Plaintiffs had a lottery license. The evidence shows that Demapan obtained a business license but, there is nothing before this court to show that he had a lottery license, which, as discussed previously, is a requirement to operate a lottery game.[6]

Plaintiffs also assert that they operated their gambling activities lawfully and in accordance with their designation as agents of JFF. Specifically, Plaintiffs argue that if the principal is authorized to operate a lottery game, then the agent, who acts in place of the principal, must be so authorized. The agency agreement between JFF and Demapan gives Demapan the right to operate certain lottery games other than the game of Jueteng, which JFF reserved to itself to operate. Thus, Demapan's authority to operate lottery games are for all games other than Jueteng. Demapan's operation of a baccarat and hi-lo lottery game, however, is not provided for under JFF's license with DOF, which only specifies the operation of Jueteng. While the court expresses no opinion as to the legality of the agency agreement between JFF and Demapan, the court notes that JFF is only authorized to designate "sub-agents" to **SELL** the JFF lottery game. No authority is given to sub-agents to **OPERATE** the JFF lottery game. To do so may be contrary to the non-assignable and

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[6] Moreover, JFF's license only provided for the operation of Jueteng. If hi-lo was being operated under JFF's name, then Plaintiffs were required by the agency agreement to wait for JFF to get approval from DOF to operate any other lottery games besides Jeuteng, or obtain the proper license himself. Plaintiffs' only other option was to obtain a license themselves. *See* Exclusive Agency Agreement §§ I(B)(3) and IV(B)(4).

non-transferrable provision of §9313(d).

Additionally, the agreement for the lottery license provides for the designation of sub-agents and not an **exclusive agent**. It appears that the intent of Paragraph 6 of the Lottery Operator's Agreement with DOF is to provide as many outlets as is possible to reach the target **[p. 7]** group of Filipino and Chinese non-resident workers, "who are accustomed to playing the traditional Filipino lottery game of JUETENG."[7]

Finally, Plaintiffs assert that JFF's lottery license is not limited to the operation of the lottery game of Jueteng. Specifically, Plaintiffs contend that when DOF revoked JFF's license, which JFF appealed to the Superior Court, the initial license became a general license to operate lottery games when the Superior Court ruled in favor of JFF. In *In the Matter of Just For Fun, Inc.*, Civ. No. 98-858B, Lottery Case No. 98-1 (N.M.I. Super. Ct. Jun. 14, 1999), the court found that DOF exceeded its authority in revoking the license of JFF and ordered the license reinstated. The court did not expand JFF's lottery license to give it a greater business authorization than that which the original license contained.

Therefore, based upon the foregoing discussion, the court finds that summary judgment may properly be issued in favor of the Defendant on Plaintiffs' claim for false imprisonment. The court finds Plaintiffs' arrest to have been proper and legal, and thus no claim for false imprisonment can lie.

2. Emotional Distress

Plaintiffs' second cause of action is a claim for emotional distress damages. Plaintiffs contend that due to their alleged unlawful arrest, they suffered from embarrassment and humiliation. Defendants assert that summary judgment is proper because Plaintiffs' arrest was legal, proper, and warranted. This court agrees.

Plaintiffs contend that there is a question of fact as to whether Plaintiffs were lawfully arrested, and as to whether Plaintiffs were involved in criminal activity. As previously discussed,

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[7] *See* para. 20 of the Lottery Operator's Agreement with DOF. JFF has further agreed not to actively target business from other groups.

Plaintiffs were lawfully and properly arrested. Plaintiffs, therefore, cannot maintain a claim for emotional distress damages resulting from an unlawful arrest.

Further, to prevail on a claim for emotional distress, a plaintiff must prove extreme and outrageous conduct by the defendant, through which the defendant intended to cause, or recklessly disregarded the probability of causing, emotional distress; and that the actual and proximate cause **[p. 8]** of the emotional distress was the defendant's outrageous conduct. *See Trerice v. Blue Cross of California*, 209 Cal.App.3d 878, 883 (1989). Here, Plaintiffs fail to show that Defendants did not acted "outrageously" or with any intention to cause severe emotional distress. Thus, Defendants' motion for summary judgment is granted as to Plaintiffs' claim of emotional distress.

3. Due Process

Plaintiffs next assert that their due process rights were violated through their arrest and through the subsequent seizure of their property. Plaintiffs contend that there is a question of fact with regard to the Government's seizure of their property and again, that their arrest was unlawful. As previously discussed, the court finds that Plaintiffs' arrest was lawful and proper.

The court further finds that the seizure of Plaintiffs' property was also lawful and proper in light of Plaintiffs' arrest. Plaintiffs were engaged in illegal gambling and neither had obtained a lottery license. Thus, the officers properly seized the property as it constituted contraband of an illegal gambling operation and constituted evidence of a crime.

Thus, the court finds that Plaintiffs did not suffer from a due process violation. No factual issues need to be determined to reach this conclusion, and therefore summary judgment as to this cause of action is appropriate.

4. Illegal Revocation of a License

Plaintiffs next assert that there is a material issue of fact as to whether the Attorney General can revoke a lottery license and whether Demapan's business license is valid for operating lottery games. Plaintiff argues that the Attorney General usurped the power of DOF when it closed down Plaintiffs' gaming operations, effectively revoking Demapan's lottery license.

Under 1 CMC § 9313(h), only "the [Commonwealth Lottery Commission] may suspend or

revoke, with or without prior hearing, the license of any person who violates this chapter or a regulation promulgated pursuant to this chapter. "[8] In the case at hand, it has been established that Demapan never had a lottery license. The declaration of the Secretary of Finance, attached to Defendants motion for summary judgment, states that there is no DOF record of a lottery license **[p. 9]** being issued to Demapan. Thus, there is no license to revoke, and Plaintiffs fail to establish that the Attorney General illegally revoked a lottery license.

Thus, Defendants' motion for summary judgment is granted as to this cause of action.

5. Illegal Seizure

Plaintiffs further assert that there is an issue as to who seized their property and whether the seizure was proper. As previously discussed, the court finds that Plaintiffs' property was properly seized. Further, Goodwin provided a sworn declaration, which states that he and Ogumoro, the arresting officers, seized the property in question. Plaintiffs do not contradict this statement but rather, make conclusory statements that there are questions of fact. *See Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (in motion for summary judgment, party cannot rely on unsupported conclusory statements). Because Plaintiffs fail to provide the court with any evidenced that anyone, other than the arresting officers, seized the property, there is no question of fact as to who seized the property.

Moreover, 6 CMC § 6201(a) provides that:

> [e]very person making an arrest may take from the person arrested all offensive weapons which the arrested person may have about his or her person and may also search the person arrested and the premises where the arrest is made, so far as the premises are controlled by the person arrested, for the instruments, fruits, and evidences of the criminal offense for which the arrest is made and, if found, seize them.

Thus, an arresting officer has the authority to seize property that may be evidence of a crime. Here, the arresting officers did exactly that. Therefore, Defendants' motion for summary judgment is granted as to this cause of action.

6. & 7. Taxpayers Grievance and Claim for Attorneys' Fees

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[8] As previously discussed, the Commonwealth Lottery Commission's functions have been adopted by DOF.

The Defendants seek summary judgment on the last two causes of action set forth in Plaintiffs' verified complaint, which assert that the Acting Attorney General Maya B. Kara, is improperly assuming the position of Attorney General and that Plaintiffs' attorneys are entitled to attorney's fees.

These claims also serve as the basis for Plaintiffs' pending motion for summary judgment. Because both parties are seeking summary judgment on these causes of action, it is evident that **[p. 10]** there is no issue of fact with regard to Acting Attorney General Maya Kara's appointment to this office. Thus, this court finds it proper to determine, as a matter of law, whether or not her appointment and occupation of this office are improper and illegal. After carefully considering this matter, this court concludes that Ms. Kara's occupation of this position is improper. For the reasons discussed *infra*, Defendants' motion for summary judgment as to these claims are denied.

B. Plaintiffs' Motion for Summary Judgment

Plaintiffs move this court for summary judgment and for a finding that the appointment of Defendant Maya B. Kara to act as Attorney General has been, and continues to be, unconstitutional. This court grants Plaintiffs' motion for summary judgment.

1. Background Facts

On July 2, 1998, Governor Pedro P. Tenorio sent a letter to the Honorable Paul A. Manglona, President of the Senate of the Eleventh Northern Marianas Commonwealth Legislature, in which he nominated and appointed Maya B. Kara to serve as the Attorney General of the Commonwealth of the Northern Mariana Islands.[9] In his letter, the Governor advised the Senate President that Kara's nomination was made pursuant to Article III of the N.M.I. Constitution, and 1 CMC § 2152. The Governor further advised that the "nomination requires the advice and consent of the Senate."

On September 23, 1998, Governor Tenorio sent a letter advising both Senate President Manglona and the Honorable David Cing, Chairman of the Committee on Executive Appointments and Government Investigations, that he was withdrawing Kara's nomination for Attorney General.[10]

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[9] *See* Ex. P-3 in Plaintiffs' Motion for Summary Judgment.

[10] *See* Ex. P-4 in Plaintiffs' Motion for Summary Judgment.

That same day, the Governor sent a letter to Kara advising her of his withdrawal of her nomination for the Attorney General position, but appointing her Acting Attorney General, effective immediately.[11]

On October 22, 1998, the Governor appointed Sally Pfund to serve as Acting Attorney **[p. 11]** General. Governor Tenorio then made a series of Acting Attorney General appointments, as seen in the chart below.

KARA APPOINTMENTS

Date Appointed	Individual Appointed	Appointing Authority	Times Appointed	Days Appointed	Total Days AG/ Acting AG
07-02-98	Maya Kara	P. Tenorio	1	83	113
10-23-98	Sally Pfund	"	1	2	2
10-25-98	Maya Kara	"	2	11	124
11-05-98	Sally Pfund	"	2	7	9
11-12-98	Maya Kara	"	3	30	154
12-12-98	Sally Pfund	"	3	1	10
12-13-98	Maya Kara	"	4	16	170
12-29-98	Sally Pfund	"	4	3	13
01-01-99	Maya Kara	"	5	30	200
01-31-99	Sally Pfund	"	5	1	14
02-01-99	Maya Kara	"	6	28	228
03-01-99	Sally Pfund	"	6	1	15
03-02-99	Maya Kara	"	7	30	258
04-01-99	Sally Pfund	"	7	1	16
04-02-99	Maya Kara	"	8	27	285
04-29-99	Sally Pfund	"	8	1	17
04-30-99	Maya Kara	"	9	30	315
05-29-99	Sally Pfund	"	9	2	17
05-31-99	Maya Kara	"	10	29	344
06-29-99	Sally Pfund	"	10	1	18

[11] *See* Ex. P-5 in Plaintiffs' Motion for Summary Judgment.

06-30-99	Maya Kara	"	11	27	371
07-27–99	Kevin Lynch	"	1	1	1
07-28-99	Maya Kara	"	12	24	395
08-21-99	Sally Pfund	"	11	9	27
08-30-99	Maya Kara	"	13	25	420
09-25-99	Sally Pfund	"	12	1	28
09-26-99	Maya Kara	"	14	27	447
[p. 12]					
10-23-99	David Sosebee	"	1	1	1
10-24-99	Maya Kara	"	15	31	478
11-24-99	David Sosebee	"	2	1	2
11-25-99[12]	Maya Kara	"	16	26+	504+

On November 12, 1998, a Special I & S Investigative Committee ("Committee"), created pursuant to S.R. 11-14, filed a report with the Senate President recommending the Senate to reject the appointment of Kara as Acting Attorney General. The Committee found that Kara's re-appointment as Acting Attorney General circumvented the advice and consent power of the Senate.[13] On February 24, 1999, the Senate adopted resolution No. 11-29, reaffirming its rejection of Kara as Attorney General or as Acting Attomey General.

Despite the adoption of Senate Resolution No. 11-29, Kara continues to be appointed as Acting Attorney General. In fact, Kara was Acting Attorney General at the time this motion for summary judgment was heard by the court on December 20, 1999.

Plaintiffs assert that to date, during a period encompassing "more than seventeen (17) months, Maya Kara continues to act as Attorney General without Senate confirmation and in spite of two (2) rejections on her nomination as Attorney General for the CNMI." Plaintiffs further point out that Kara has received and continues to receive the salary of $70,000.00 per annum, the statutory salary of the Attorney General as set forth in 1 CMC §8245(a). Plaintiffs further bolster their

[12] At the time of the hearing of the motion on December 20, 1999, Kara was the "Acting Attorney General."

[13] *See* Ex. P-13 in Plaintiffs' Motion for Summary Judgment.

arguments by pointing out that Kara receives this same salary even when she is not the Acting Attorney General.[14]

Defendants assert that Plaintiffs' limited focus on Kara's Acting Attorney General appointments fails to show the whole picture: that Kara has been appointed in the same manner as all the other Acting Attorneys General since the resignation of Attorney General Richard Weil, **[p. 13]** the Commonwealth's last confirmed Attorney General. Defendants contend that Kara's appointments are a continuation of a process that has been in use since Weil resigned, and that that process conforms with 1 CMC § 2902. The chart below shows the history of Acting Attorneys General prior to the appointment of Kara.

ATTORNEYS GENERAL APPOINTMENTS PRIOR TO KARA

Date Appointed	Individual Appointed	Appointing Authority	Times Appointed	# of Days	Total Days AG/ Acting AG
06-01-95	Sebastion Aloot	Froilan Tenorio	1	25	25
06-26-95	Loren A. Sutton	Jesus C. Borja	1	29	29
07-25-95	C. Sebastion Aloot	Jesus C. Borja	2	30	55
08-24-95	Herb Soll	Froilan Tenorio	1	3	3
08-28-95	C. Sebastion Aloot	Froilan Tenorio	3	25	80
09-22-95	Loren Sutton	Froilan Tenorio	2	1	30
09-23-95	C. Sebastion Aloot	Froilan Tenorio	4	30	108
10-21-95	Herbert Soll	Froilan Tenorio	2	28	31
11-18-95	Loren A. Sutton	Jesus C. Borja	3	12	42
11-30-95	C. Sebastion Aloot	Jesus C. Borja	5	8	116
12-08-95	Loren A. Sutton	Froilan Tenorio	4	6	48
12-14-95	Loren A. Sutton	Jesus C. Borja	5	23	71
01-06-96	C. Sebastion Aloot	Froilan Tenorio	6	28	144
02-03-96	Loren A. Sutton	Froilan Tenorio	6	2	73
02-05-96	C. Sebastion Aloot	Froilan Tenorio	7	30	174
03-06-96	Loren A. Sutton	Froilan Tenorio	7	6	79

[14] Kara was paid the AG salary even though Pfund was Acting AG from 8/12 to 8/30/99. *See* Kara Appointments, *supra*.

03-12-96	C. Sebastion Aloot	Froilan Tenorio	8	29	203
04-10-96	Loren A. Sutton	Jesus C. Borja	8	1	80
04-11-96	C. Sebastion Aloot	Jesus C. Borja	9	25	228
[p. 14]					
05-06-96	Robert Dunlap II	Jesus C. Borja	1	3	3
05-09-96	C. Sebastion Aloot	Jesus C. Borja	10	22	250
06-07-96	C. Sebastion Aloot	Froilan Tenorio	11	10	260
06-17-96	Robert Dunlap	Paul Manglona	2	28	31
07-15-96	Gabriel E. Acosta	Jesus C. Borja	1	7	7
07-22-96	**C. Sebastion Aloot**[15]	**Froilan Tenorio**	**12**	**43**	**303**
09-03-96	**Robert Dunlap**	**Froilan Tenorio**[16]	3	29	60
10-02-96	Loren A. Sutton	Froilan Tenorio	9	2	82
10-04-96	Robert Dunlap II	Froilan Tenorio	4	29	89
11-02-96	Loren A. Sutton	Froilan Tenorio	10	1	83
11-03-96	Robert Dunlap II	Froilan Tenorio	5	29	118
12-02-96	Loren A. Sutton	Froilan Tenorio	11	1	84
12-03-96	Robert Dunlap II	Froilan Tenorio	6	30	148
01-02-97	Loren A. Sutton	Froilan Tenorio	12	1	85
01-03-97	Robert Dunlap II	Froilan Tenorio	7	28	176
01-31-97	Loren A. Sutton	Froilan Tenorio	13	3	88
02-03-97	Robert Dunlap II	Froilan Tenorio	8	28	204
03-03-97	Loren A. Sutton	Froilan Tenorio	14	1	89
03-04-97	Robert Dunlap II	Froilan Tenorio	9	8	212
03-12-97	Sally Pfund	Jesus C. Borja	1	13	13

[15] Aloot served over 30 days during this particular appointment but his name was not submitted to the Senate. He occupied the Attorney General position for a total number of 303 days.

[16] In a Memo dated September 3, 1996, the Governor advised all department heads that Sebastion Aloot was stepping down from the position of Acting Attorney General and further advised that Robert Dunlap "will be my Acting Attorney General. . . . I am sure that all of you will work with him to make this transition a smooth one." In another memorandum dated the same day, the Governor advised Dunlap that he was promoting him to Deputy Attorney General, with a commensurate increase in pay, effective September 9, 1996.

03-25-97	Robert Dunlap II	Froilan Tenorio	10	29	241
04-23-97	Sally Pfund	Froilan Tenorio	2	1	14
04-24-97	Robert Dunlap II	Froilan Tenorio	11	29	260
[p. 15]					
05-23-97	Sally Pfund	Froilan Tenorio	3	1	15
05-24-97	Robert Dunlap II	Froilan Tenorio	12	20	280
06-13-97	Sally Pfund	Froilan Tenorio	4	13	28
06-26-97	Robert Dunlap II	Froilan Tenorio	13	29	309
07-25-97	Sally Pfund	Jesus C. Borja	5	1	29
07-26-97	Robert Dunlap II	Jesus C. Borja	14	28	337
08-23-97	Sally Pfund	Jesus C. Borja	6	1	30
08-24-97	Robert Dunlap II	Jesus C. Borja	15	30	367
09-23-97	Sally Pfund	Froilan Tenorio	7	1	31
09-24-97	Robert Dunlap II	Froilan Tenorio	16	30	397
10-24-97	Sally Pfund	Froilan Tenorio	8	1	32
10-25-97	Robert Dunlap II	Froilan Tenorio	17	30	427
11-24-97	Sally Pfund	Froilan Tenorio	9	4	36
11-28-97	Robert Dunlap II	Froilan Tenorio	18	6	433
12-04-97	Loren Sutton	Froilan Tenorio	15	29	118
01-02-98	Sally Pfund	Froilan Tenorio	10	40	76
02-11-98	Sally Pfund	Pedro Tenorio[17]	11	29	105
03-12-98	Robert Dunlap	Pedro Tenorio	19	13	446
03-25-98	Sally Pfund	Jesus Sablan	11	31	118
04-25-98	Robert Dunlap	Pedro Tenorio	20	7	453
05-02-98	Sally Pfund	Pedro Tenorio	12	30	148
06-01-98	Robert Dunlap	Pedro Tenorio	21	15	468
06-16-98	Sally Pfund	Pedro Tenorio	13	16	164
07-02-98	Maya Kara	Pedro Tenorio			

Defendants assert that this process of appointments are consistent with 1 CMC § 2902, which

[17] This is the first of Governor Pedro Tenorio's on-going appointments.

states:

> Appointments to positions which require the advice and consent of the Senate, or the Senate and House . . . **shall be submitted to the appropriate presiding officer within 30 days following the date the person was temporarily appointed**. If the Senate . . . is in recess at the time of submission, the appointment shall go over to the next regular session for appropriate action unless a special session is called. (Emphasis added).

[p. 16]

It is Defendants' position that § 2902 allows the Governor to appoint Acting Attorneys General regardless of the duration of the acting appointments, so long as the individual appointments do not exceed thirty days at any one time. Thus, Kara has been legally appointed during the past seventeen months because none of her appointments have exceeded thirty days, and the power of the Governor to appoint under § 2902 is limited only by the thirty day time frame.

Defendants further argue that the Senate rejection of Kara was a "nullity." The Governor had withdrawn her nomination from the Senate and thus, there was no nomination to reject. Defendants assert that if the Commonwealth Legislature is not satisfied with the way the appointments are made, the Legislature can amend and limit the number of days an individual can serve in an acting capacity. Further, Defendants assert that legislative enactment, not court intervention, is the appropriate way to address this issue.

2. Discussion

Under Article III, § 11 of the N.M.I. Constitution:

> The governor shall appoint an Attorney General with the advice and consent of the Senate. The Attorney General shall be a resident and a domiciliary of the Commonwealth of the Northern Mariana Islands for at least three years immediately preceding the date on which the Attorney General is confirmed. The Attorney General shall be responsible for providing legal advice to the governor and executive departments, representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law.

1 CMC § 2904 provides in pertinent part:

> If the appointment is not confirmed by the Senate . . . within 90 days from the date the person was temporarily appointed, the appointment shall automatically terminate, the position shall become vacant and the person nominated shall not be renominated. The Attorney General is generally considered the chief law officer of the country, state, commonwealth, territory or other jurisdiction in which the person serves.

The Attorney General is generally tasked with the responsibility of advising the executive

branch and other departments of the executive branch, and is entrusted with the duty of prosecuting all suits and proceedings and violations of law. In many jurisdictions and states, the office of the Attorney General is an elected position. In other jurisdictions, the office is appointive. The appointment is usually made by the governor of the jurisdiction and the approval of such a selection **[p. 17]** is undertaken by the upper legislative body of that jurisdiction.

In the Commonwealth of the Northern Mariana Islands, as well as in the United States of America, the Island of Guam, American Samoa,[18] and various other jurisdictions, the office is an appointive position. In the United States, the current Attorney General is Janet Reno. President Clinton appointed Reno in 1993 and the Senate confirmed the appointment. In Guam, the Attorney General is John Tarantino. Governor Carl T. C. Gutierrez appointed Tarantino in 1999 and the Guam Legislature confirmed the appointment.[19] In Hawaii, Governor Benjamin J. Cayetano appointed Margery S. Bronster in 1994. Bronster served several years as Attorney General and her successor is Attomey General Earl I. Anzai.

In the Commonwealth, the last confirmed Attorney General was Richard Weil. He resigned in 1995, during the administration of Governor Froilan C. Tenorio. Since 1995, the Commonwealth has not had the benefit of an appointee confirmed by the Senate. Ironically, four years have passed; a new century has dawned; a new millennium has beckoned, yet the Commonwealth continues to be lacking a confirmed Attorney General. One full gubernatorial term[20] has passed and yet no Attorney General has received the "advice and consent of the Senate."

In response to the court's question whether the Commonwealth has an Attorney General, the Defendants' responded that the Commonwealth does not have an Attorney General but does have an Acting Attorney General. The court now asks: "Is there an Acting Attorney General position within the Commonwealth Government?" What is an "Acting Attorney General?" Is there a legal

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18 The house in American Samoa recently voted to have the Attorney General position elected.

19 Tarantino is Governor Gutierrez's third appointment to the office. Attorney General Calvin Holloway was appointed and confirmed in 1994. After his resignation, there were a series of acting appointments before the Governor made an appointment. That appointee did not receive legislative confirmation, and consequently Tarantino was appointed.

20 A gubernatorial term is four years.

difference in the appointment of an Attorney General versus that of an Acting Attorney General? Does the Governor have authority to appoint an Acting Attorney General?

After reviewing the laws of the Commonwealth, this court finds that there is no statutorily **[p. 18]** created position of "Acting Attorney General." Under Article III, § 11, of the N.M.I. Constitution, the Governor is required to appoint an Attorney General. There is no reference to an Acting Attorney General appointment, nor does this provision give the Governor authority to make such an acting appointment. Moreover, 1 CMC § 8245 provides for the annual base salary of the Attorney General at $70,000. There is no reference in § 8245 as to the salary of an Acting Attorney General.

Defendants, however, continue to assert that § 2902 does, in fact, authorize the Governor to appoint an Acting Attorney General. Defendants base their argument on the fact that Article III, § 11 does not impose a time requirement for appointments. Defendants assert that § 2902, only requires the Governor to submit an appointment of an Attorney General to the Senate within thirty days. The Governors and Acting Governors from Froilan C. Tenorio to the present Governor have made their appointments in compliance with the statute. Defendants further assert that "designated Acting Attorneys General have not served more than 30 consecutive days between the time of their temporary appointments and replacements." Thus, based upon this rationale, Defendants argue that there is no reason to submit the names of those acting appointments to the Senate as "[a]ll have been and continue to be lawful temporary appointments."

After reviewing Defendants' arguments, this court finds that Defendants' position that the Governor is authorized under § 2902 to make interim thirty day appointments is misplaced. The Governor does not have the authority to appoint any person as interim Attorney General for periods of thirty days or less. Rather, the Governor's sole authority to appoint an Attorney General derives from Article III, § 11. Thus, whenever the Governor appoints a so-called "Acting Attorney General," he is appointing the person pursuant to his authority under Article III, § 11 of the N.M.I. Constitution and no other authority.

The statutes of the Commonwealth allow the Governor to make appointments to the office

of the Attorney General only when there is a vacancy in the position. In 1995, when the Attorney General position became vacant, Governor Pedro P. Tenorio, as well as his predecessor Governor Froilan C. Tenorio, felt forced to make numerous so-called "acting" appointments to the office of Attorney General. Clearly, if there were no vacancy, there would have been no need to make such **[p. 19]** appointments. All of the "acting" appointments were essentially appointments under Article III, § 11 and pursuant to § 2901(b). Thus, when the Governor makes his appointments under Article III, the persons appointed take and hold their office and assume all powers of that office until such time as the Senate acts to reject the appointment.

The court sees a pattern in the appointment process since 1995 to the present. During the Governor Froilan C. Tenorio's administration, the Govenor appointed C. Sebastion Aloot Acting Attorney General twelve separate times for a total number of 303 days. At the time Aloot resigned his position, the Governor advised all department heads that Aloot was stepping down from the position of Acting Attorney General and that Robert Dunlap would be the next Acting Attorney General. A review of the appointments, *supra*, shows that Governor Froilan C. Tenorio appointed Dunlap Acting Attorney General eighteen separate times for a total of 433 days. It is evident that Governor Froilan C. Tenorio appointed both Aloot and Dunlap as Attorney General and they both acted as the Attorney General during that administration. Neither appointee, however, ever went through the "advice and consent" process.[21]

In *Dennis v. Luis*, 741 F. 2d 628 (3rd Cir. 1984), members of the Virgin Islands Legislature brought suit challenging Governor Luis' appointment of his nominee Golden as "acting Commissioner of Commerce." While defendants conceded that there was no statutory authority for an "acting" appointment, they "rel[ied] on custom to support its validity." The Third Circuit held that:

> The defect in the appellants' argument is that by their theory there could be a complete nullification of the legislative power of advice and consent- a power which was explicitly granted in the Organic Act of 1954. There would be no limit to the time period in which an "acting" executive officer could serve. Thus, anyone

[21] The court also notes that while both men served significant periods as Acting Attorney General, the Senate never took action to reject or object to their appointments.

> appointed as an acting executive officer could serve the entire period of the Governor's term without ever having obtained the prerequisite approval of the Legislature.

Dennis v. Luis, 741 F. 2d. at 634.

Here, Kara has been appointed Acting Attorney General sixteen separate times for a total **[p. 20]** number of 504 days.[22] At no time during this period has Kara received Senate confirmation. Rather, the Senate has rejected her nomination. The court notes that Kara's appointment on October 24, 1999, exceeded thirty days. Her name, however, was not submitted to the Senate for confirmation as required by § 2902 and Article III. Further, § 2904 provides that if the appointment is not confirmed within ninety days from the date of that persons temporary appointment, the appointment automatically terminates and the position becomes vacant. Thus, the provisions and requirements of §§ 2902, 2904, and Article III have been disregarded and the process sidestepped. More than ninety days have passed since Kara's October 24 appointment as Acting Attorney General, yet she continues to serve in this position. As the court previously pointed out, there is no authority provided for the Governor to make "temporary"[23] appointments such as these. Thus, for the foregoing reasons, this Court finds that it must grant Plaintiffs' motion for summary judgment.

The position of the Attorney General is an important position in any state, commonwealth, territory or jurisdiction. Further, the people of that territory or jurisdiction have an interest in seeing that any person appointed to the position of Attorney General is qualified to hold the position. This is the very reason why confirmation procedures were created. Thus, it is important that the processes and procedures that are in place for the nomination and confirmation of an Attorney General are followed, and that a nominee or appointee go through the confirmation process.

If these procedures are sidestepped or disregarded, then the advice and consent provisions of Article III and § 2904 are effectively rendered meaningless. This court cannot reach a conclusion other than to find a deliberate and sidestepping procedure meant to avoid the confirmation process.

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[22] This number continues to grow as Kara continues to serve as Acting Attorney General.

[23] While the curt uses the term "temporary," it is clear that the Governor has been making these temporary appointments permanent by continually reappointing the Acting Attorney General.

The appointments of Sally Pfund on December 12, 1998, for one day; her subsequent re-appointments on January 31, 1999; March 1, 1999; April 1, 1999; June 29, 1999; September 25, 1999, all for one day, with the immediate re-appointment of Kara thereafter; and the **[p. 21]** similar appointments of Kevin Lynch on July 27, 1999; David Sosebee on October 23, 1999, and November 24, 1999, also for one day as Acting Attomey General, with again the immediate re-appointment of Kara, reinforces the court's finding of a process which usurps the Senate's advice and consent power.

This court is aware that §2902 does not state what happens to a nomination if the name is not submitted within the thirty day period. This court cannot conclude, however, that in the absence of such a provision, an acting appointment can effectively be rendered permanent by an unlimited number of acting reappointments. The court finds that an acting appointment must be for a reasonable time period, and during this period, the appointee must either be confirmed or rejected by the Senate. If such appointee is rejected, that person should vacate the office and the Governor should proceed to make another appointment.

If the Legislature intended to allow a person to serve in an acting position in excess of thirty days, then specific legislation would have been drafted to reflect such an intention. There is no such legislation. Therefore, it is logical to conclude that if a name is not submitted to the Senate within the thirty day period, such nomination must fail because the Governor has reconsidered the appointment and has decided to withdraw the appointment. Thus, the Governor must proceed to make another appointment and not re-nominate the said individual.

In the present case, the number of days served by Kara as Acting Attorney General is not reasonable. Kara has effectively held this position for approximately one and one-half years without being confirmed by the Senate; certainly this practice does not comply with the advice and consent provisions of Article III or § 2904, which specifically states that if an appointment is not confirmed by the Senate within the ninety day period, such appointment shall terminate automatically, and that

position shall become vacant.[24]

Moreover, not only has Kara failed to receive confirmation from the Senate, her nomination **[p. 22]** was actually rejected by the Senate on February 24, 1999. It is further important to note that Kara actually occupied the Attorney General position when the Senate acted on February 24, 1999, to reject her appointment. The fact that she has not been confirmed by the Senate violates the practices and procedures in place for confirmation. The fact that her nomination has been out right rejected by the Senate clearly shows that she is improperly holding this position.

The court rejects the argument that the withdrawal of Kara's name from the nomination process forecloses the Senate from rejecting her nomination. Defendants contend that because the Governor withdrew Kara's nomination before the end of the thirty day statutory period, her nomination can not have been rejected by the Senate.[25] This scheme of repeatedly withdrawing the nomination of Kara directly circumvents the statutory and constitutional provisions for confirmation.

Kara was nominated for the position of Attorney General. Subsequently, her name was withdrawn from this nomination. The Senate however, having initially received the nomination, rejected her nomination on February 24, 1999.

After having carefully considered the applicable authority on this issue, the court is of the opinion that the Governor does not have the authority to appoint an Acting Attorney General.[26] Rather, this court finds that the Governor may appoint a nominee to the position of the Attorney General, and that nominee shall either be confirmed or rejected by the Senate within the allotted time

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[24] The withdrawal by Governor Tenorio of Kara's nomination on September 23, 1998, appears to be ineffective. To be effective, a withdrawal must be accompanied by the nomination of a different person to the position of Attorney General. While withdrawing Kara's name, the Governor never withdrew his appointment. Kara's temporary appointment continued to October 23, 1998, for a total of 113 days. Applying § 2904, Kara's appointment automatically terminated after ninety days and she could not subsequently be re-nominated to that position.

[25] Again, the court notes that under § 2902 appointments that are subject to the advice and consent of the Senate are to be submitted to that body within thirty days of the appointment. This section does not provide a time in which the Senate is required to act on an appointment. Thus, the Senate presumably could act within days of an Article III, §11 appointment even though there is no submission of the name of the appointee to that body. It must act, however, within ninety days to confirm.

[26] *See also Sonoda v. Cabrera*, Civil Action No. 96-0012, Certified Question Number 96-001 (D. N. Mar. I. 1997), *appeal dismissed for lack of jurisdiction, Sonoda v. Cabrera*, 189 F.3d 1047 (9th Cir. 1999).

period. The court finds that with regard to an "acting" appointment, the only person with the authority to delegate an acting position is the incumbent in that particular office. In other words, the court finds that only the Attorney General, who has been properly nominated and confirmed by the Senate, may appoint an Acting Attorney General to serve in his or her stead, in the event the Attorney General is temporarily unable to perform his or her duties as required by that position.

[p. 23] Here, it is evident from a review of Kara's various and continuous "acting" appointments that she is holding this position in violation of the N.M.I. Constitution, and in violation of the specific statutory provisions that apply to the nomination and confirmation procedure. Moreover, the fact that the required procedures have been disregarded and sidestepped, is overshadowed only by the fact that Kara's nomination to the position of the Attorney General was rejected by the Senate. For the foregoing reasons, the court finds that Kara's appointment as Acting Attorney General is in violation of the N.M.I. Constitution, and thus Plaintiffs' motion for summary judgment is granted. The court finds that the series of so-called "acting" appointments made by the Governor constitute executive usurpation of the advice and consent powers of the Senate as provided in Article III, § 11 of the N.M.I Constitution.

The court therefore respectfully orders Kara to step down and relinquish her position, and that the Governor endeavor to appoint an Attorney General with the advice and consent of the Senate.

Having found that Plaintiffs prevail in their cause of action as it relates solely to their taxpayer's grievance claim, this court hereby awards Plaintiffs their costs and attorneys fees in a reasonable amount relative to the public benefit of the suit. Plaintiffs are to file with the court a memorandum or statement as to their costs and reasonable fees as well as an itemization. Plaintiffs are to file this memorandum or statement no later than twenty days from the filing of this decision. Should defendants object to the fees and costs, they are to file their objections within ten days after receipt Plaintiffs' memorandum. If necessary, the court will set a hearing to determine the reasonableness of the fees and the costs.

C. Plaintiff's and Defendant's Motion For Protective Order

Having granted summary judgment as to all the relevant claims herein, the court finds that the protective order motions have been rendered moot.

IV. CONCLUSION

The court, having given careful consideration to all issues involved herein, concludes that the Plaintiffs were properly and lawfully placed under arrest for the offense of illegal gambling. The evidence presented herein indicates that neither Plaintiff had a lottery license, and thus neither **[p. 24]** Plaintiff was authorized to operate lottery games, assuming that hi-lo is in fact a lottery game. If hi-lo is not a lottery game, then the operation of such is prohibited by statute as it constitutes illegal gambling. Thus, in either instance, the Plaintiffs were not authorized to operate the gaming establishment at issue here, and their arrest was proper. The court also finds that the Plaintiffs were not authorized by JFF under the agency agreement to operate the lottery game known as Jueteng and that JFF's license is limited to the operation of that game and to no other.

Based upon this finding, the Court finds that summary judgment on the claims set forth in Plaintiffs' verified complaint is appropriate. There are no issues of fact to determine with regard to Plaintiffs' claims. Therefore, the Defendants' motion for summary judgment shall be granted with regard to causes of action one through five of Plaintiffs' verified complaint.

The court grants Plaintiffs' motion for summary judgment with regard to Plaintiffs' claim that Acting Attorney General Kara is holding this position in violation of the N.M.I. Constitution. It is evident in reviewing Kara's occupation of this office, and in reviewing her repeated nomination to this "acting" position, that the advice and consent procedures in place for the confirmation of an Attorney General have been wholly disregarded and sidestepped. Moreover, it is further evident that while the Governor has attempted to avoid the confirmation requirements by continually withdrawing Kara's nomination just prior to the time period expiring, that the Senate has, in fact, rejected Kara's nomination on separate occasions. Thus, the court finds from the record before it, that it is undisputed that Kara is holding the position of Acting Attorney General in violation of the N.M.I. Constitution. The court thus finds that the "acting" appointments process, which the

Governor has availed himself of, results in an executive usurpation of the Senate's advice and consent power provided for under Article III, § 11 of the N.M.I. Constitution. Thus, the court finds that it is necessary for Kara to step down.

Defendants' motion for summary judgment on this issue is denied. Having prevailed in its taxpayer's grievance action, the court awards the Plaintiffs their reasonable attorneys fees and costs as it relates solely to that issue.

These are the findings of this court. Let judgment be entered accordingly. The parties are directed to provide the court a judgment consistent with this court's rendered decision. A judgment **[p. 25]** approved as to form by the other party will automatically be approved by the court.

SO ORDERED this 20 Day of January, 2000.

/s/ Joaguin V. E. Manibusan
Joaquin V. E. Manibusan, Jr., Judge Pro Tem