



By the order of the court, Judge David A Wiseman

E-FILED
CNMI SUPERIOR COURT
E-filed: Feb 1 2011 4:19PM
Clerk Review: N/A
Filing ID: 35684842
Case Number: 09-0186-CV
N/A



FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JAMES C. DELEON GUERRERO, Et.)
Al.,)

Civil Action No. 09-0186-CV

Plaintiffs,)

ORDER GRANTING IN PART
PLAINTIFFS' AND DEFENDANT'S
MOTIONS FOR SUMMARY JUDGMENT

vs.)

CNMI DEPARTMENT OF PUBLIC)
SAFETY by and through its)
Commissioner, Santiago F. Tudela,)

Defendant.)

I. INTRODUCTION

THIS MATTER came before the Court on December 16, 2010, at 1:30 p.m. in Courtroom 223A for a hearing on both parties' Motions for Summary Judgment. Counsel Robert T. Torres appeared on behalf of Plaintiffs, James C. Deleon Guerrero and twenty-five similarly situated officers (hereinafter "Plaintiffs"). Counsel James T. Mitchell appeared on behalf of Defendant, CNMI Department of Public Safety (hereinafter "DPS" or "Defendant").

After reviewing the written and oral arguments of the parties, it is apparent that there are five main issues before the Court: (1) whether Plaintiffs have standing to bring this suit; (2) whether the relief Plaintiffs requested has been fully complied with rendering Plaintiffs' Petition for Judicial Review moot; (3) whether the promotion of Officer Celis was illegal; (4) whether the hiring of Officer Tagabuel and

1 Officer Ogumoro violated the Personnel Service Rules and Regulations (hereinafter “PSSRRs”); and (5)
2 whether attorney’s fees and costs should be awarded to Plaintiffs.

3 After considering both parties’ arguments, the Court believes that partial summary judgment is
4 proper in this case with respect to some of the issues that Plaintiffs and Defendant have raised. No material
5 issues of fact exist regarding compliance with the desk audit and Officer Celis’ demotion. In addition, the
6 Court believes that the issue regarding attorney fees is a question of law that can be decided by the Court.
7 Alternatively, issues of material fact still exist as to: (1) whether Officer Tagabuel and Officer Ogumoro
8 were hired in violation of the PSSRRs; and (2) whether the Governor’s Directive made Plaintiffs’ request
9 for an order ending discriminatory practices and disparate treatment moot.

10 For the reasons discussed below, Plaintiffs’ and Defendant’s Motions for Summary Judgment are
11 hereby **GRANTED IN PART.**

12 **II. SYNOPSIS**

13
14 On December 7, 2007, Plaintiff Guerrero began the process of filing a grievance with DPS in
15 accordance with the guidelines espoused in the PSSRRs codified by the Administrative Code as NMIAC
16 § 10-20.2 et. seq.

17 Pursuant to the PSSRRs, the grievance process begins with an “Informal Grievance Process” where
18 the aggrieved employee discusses the problem directly with his or her supervisor. Thereafter, the aggrieved
19 employees’ next step is to put the complaint in writing and submit it to the appointing authority as a “formal
20 grievance”. NMIAC § 10-20.2-293. Pursuant to the PSSRRs, the grievance is then examined by an
21 appointed authority and discussed with the aggrieved employee and/or their representative. *Id.* Within 14
22 days thereafter, the appointed authority is supposed to issue a written decision. NMIAC § 10-20.2-290(a).
23 Next, if the written decision does not satisfactorily resolve the grievance, the employee may submit a
24 grievance to the Civil Service Commission. NMIAC § 10-20.2-290(b). The Civil Service Commission
25 must review the grievance within a reasonable time and determine whether or not the grievance shall be

1 heard by a hearing officer. NMIAC § 10-20.2-290(c). However, the Commission may deny a hearing on
2 the appeal when such hearing is impractical by reason of unusual location or other extraordinary
3 circumstances. NMIAC § 10.20.2-276(b)(1). If the Commission determines that a hearing will not be held,
4 the parties must be notified of the reasons for denying the hearing. *Id.*

5 Plaintiff Guerrero proceeded through the grievance process as proscribed in the PSSRRs. However,
6 Plaintiff alleges that he was completely and utterly ignored at every stage in the process. Then on April 22,
7 2009, Plaintiff filed a Notice of Appeal to the Civil Service Commission and requested a formal evidentiary
8 hearing. On April 27, 2009, the Commission issued a denial of hearing for a lack of quorum to hear and
9 decide the appeal in a timely manner. The Commission also determined that Plaintiff had exhausted his
10 administrative remedies and could proceed to have his grievance heard in the Superior Court.

11 On May 9, 2009 Plaintiff Guerrero filed his Petition for Judicial Review of Agency Decision
12 relating to his grievance against DPS alleging, among other things, that DPS has failed to comply with the
13 promotion, salary/merit increase, and competitive selection process regulations proscribed by law.
14 Thereafter, Plaintiff moved to include similarly situated DPS officers in his Judicial Review proceedings.
15 On June 23, 2009, the Court granted Plaintiff's Motion for joinder of twenty-five additional officers.

16 On October 21, 2010, each party filed a respective Motion for Summary Judgment. In its Motion,
17 DPS argues *inter alia* that all material facts are undisputed and claims that Officer Celis was demoted when
18 DPS realized that the promotion was in violation of the financial austerity measures. Defendant further
19 argues that after a year long discovery process, no officer other than Officer Celis received a promotion in
20 violation of the austerity measure. DPS claims that by demoting Officer Celis, DPS was brought into
21 compliance with the PSSRRs and Civil Service Act. DPS further contends that DPS has undergone a full
22 desk audit and the fact that Governor Fitial issued a Directive that addresses all of the issues in Plaintiffs'
23 prayer for relief renders their Petition for Judicial Review moot.

24 Alternatively, Plaintiffs claim that summary judgment should be entered in their favor since all
25 material facts are unrefuted. Plaintiffs claim that all government officials charged with the implementation

1 and enforcement of the mandatory hiring and promotion practices at issue agree that procedural
2 prerequisites - if not deliberately ignored - were not followed. *See* James C. Deleon Guerrero’s Motion for
3 Summary Judgment at 1. Plaintiffs also argue that in failing to act or respond to Sgt. Guerrero’s grievances,
4 the Government has forced the Commonwealth and Sgt. Guerrero to incur fees and expenses which should
5 have been avoided.¹ *Id.* at 2.

6 On November 4, 2010, Oppositions were filed by both parties. In Plaintiffs’ Opposition, they argue
7 that DPS used “provisional appointment” and “probationary employment” loopholes to circumvent austerity
8 measures. Plaintiffs further argue that the demotion of Officer Celis did not bring DPS into compliance with
9 the PSSRRs regarding competitive selection process. Plaintiffs also claim that notices of vacancies are
10 required to be disseminated and advertised to insure compliance with the merit system, however this never
11 occurred when DPS decided to hire Ogomoro and Tagabuel.

12 On November 12, 2010, each party filed a Reply to the opposing party’s Motion for Summary
13 Judgment. In its Motion, DPS argues that Plaintiffs fail to distinguish between promotional practices and
14 hiring practices; since the austerity measure only deals with promotions. DPS claims that Plaintiffs are not
15 similarly situated to persons being hired since they are already employed which means that they cannot be
16 discriminated against in the hiring process - therefore they lack standing. DPS further argues that Plaintiffs
17 have requested a desk audit and have received it. Finally, DPS argues that Mr. Guerrero and his fellow
18 interveners are only similarly situated to Alfred Celis and by demoting Mr. Celis, conducting a desk audit,
19 and the Governor issuing a directive DPS has given Mr. Guerrero and his colleagues the only relief they can
20 request.

21
22 **III. DISCUSSION**

23 A court may grant summary judgment when there are no genuine issues as to any material fact and

24
25

¹ An overwhelming majority of DPS’ Opposition and Plaintiffs’ Reply dealt exclusively with the issue of attorney’s fees which will be addressed in subsection (G) of this Order.

1 the moving party is entitled to judgment as a matter of law. Com. R. Civ. P. 56(c); *Santos v. Santos*, 4 N.M.I.
2 206, 209 (1994). The moving party bears the initial burden of demonstrating to the court that there is an
3 absence of any genuine issue concerning any material fact and that as a matter of law, the non-moving party
4 cannot prevail. *Id.* Where the moving party satisfies this heavy burden, the non-moving party must then
5 show that there is evidence from which a jury might return a verdict in the non-moving party's favor.
6 *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990). Conclusory allegations are not sufficient to defeat
7 a motion for summary judgment. *Id.* The court must accept all of the non-moving party's evidence as true
8 and will view all inferences drawn from the underlying facts in the light most favorable to the non-moving
9 party. *Id.* Rule 56(a) and 56(c) permit the use of affidavits, depositions, and answers to interrogatories to
10 be considered as evidence on a motion for summary judgment.

11 When considering cross-motions for summary judgment, each party's motion must be examined on
12 its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is
13 under consideration. *Marianas Industrial Properties, Inc., and Golf Apparel Brands Inc. v. Robert Walter*
14 *Shaffer, Jr., and Shaffer Gold and Rubaum, LLP*, Civil Action No. 06-0434 (NMI Sup. Ct. January 6, 2011)
15 (Order as to Parties' Motions for Summary Judgment and Granting Defendants' Motion to Withdraw and
16 Amend Admissions)(citing *Hickok v. Orange County Community College*, 472 F.Supp.2d 469 (S.D.N.Y.
17 2006)). "The filing of cross-motions for summary judgment, with both parties asserting that there are no
18 uncontested issues of material fact, does not vitiate the court's responsibility to determine whether disputed
19 issues of material fact are present, since summary judgment cannot be granted if a genuine issue as to any
20 material fact exists." *Id.* (citing *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d
21 1132, 1136 (9th Cir. 2001))(citation omitted).

22 **A. Standing**

23 Standing is "a concept utilized to determine if a party is sufficiently affected so as to insure that a
24 justiciable controversy is present to the court." *Falcon v. McCue*, 2005 MP 7 ¶ 34 (citing *Commonwealth v.*
25 *Anglo*, 1999 MP 6 ¶ 8). "The essential element of standing is that a plaintiff personally has suffered either

1 actual injury or threat of injury as a result of the defendant’s conduct.” *Id.* “Moreover, the plaintiff must
2 show that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable
3 decision.” *Id.* (quotations omitted).

4 In addition, 1 CMC § 9112(b) gives a person standing to seek judicial review. *Northern Marianas*
5 *College v. Civil Serv. Comm’n*, 2006 MP 4 ¶ 4. Section 9112(b) provides that “[a] person suffering legal
6 wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial
7 review of the action within 30 days thereafter in the Commonwealth Superior Court.” *See* 1 CMC §
8 9112(b).

9 Here, Plaintiff filed a Petition for Judicial Review on May 7, 2009, which was well-within the 30-day
10 time period for filing his Petition since the final agency action occurred on April 22, 2009. In addition,
11 Plaintiff contends that he suffered an actual injury since he was passed over for a promotion as a result of
12 DPS’ failure to follow PSSRR guidelines. In addition, on June 23, 2009, the Court granted Plaintiff’s Motion
13 for joinder of twenty-five additional officers who were all negatively affected by the hiring of Celis,
14 Ogumoro, and Tagabuel. Accordingly, Plaintiffs do have standing to bring the present lawsuit.

15 **B. Mootness**

16 The duty of the Court is to “decide actual controversies by a judgment which can be carried into
17 effect, and not to give opinions on moot questions or abstract propositions, or to declare principles or rules
18 of law which cannot affect the matter at issue in the case at bar.” *Paulis v. Superior Court*, 2004 MP 10 ¶
19 17 (citing *In re Seman*, 3 N.M.I. 57, 64 (1992)(citing *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I.
20 270, 281 (1991)).

21 However, when the issue raised effects the public interest, and it is likely that similar issues arising
22 in the future would likewise become moot before this Court can make a determination, there is an exception
23 to the mootness rule. *Id.* at ¶ 18. This exception is commonly referred to as the “capable of repetition yet
24 evading review” exception. *Bank of Saipan v. Superior Court*, 2004 MP 15, ¶ 8. The exception applies when
25 there is something inherent in the situation presented such that mootness will prevent consideration of the

1 issues nearly every time those issues arise. *Id.* The Court has an interest in preventing litigants from
2 attempting to manipulate its jurisdiction to insulate their actions from review, which weighs against a finding
3 of mootness. *Paulis v. Superior Court*, 2004 MP 10 ¶ 18 (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277,
4 287 (2000)). If a defendant is free to return to the behavior at any time, a case is not moot. *United States v.*
5 *Concentrated Phosphate Export Assn.*, 393 U.S. 199 (1968).

6 Here, the widespread nature of the actions taken by DPS suggest that the issues before the Court are
7 not moot since there are allegations that DPS has continued to implore discriminatory hiring practices.
8 Additionally, even if DPS has attempted to rectify past wrongs such actions are still capable of repetition yet
9 evading review.

10 The present situation meets the first prong of the “capable or repetition yet evading review” test
11 outlined in *In re Seman* since the litigation affects the public interest - more specifically, the litigation affects
12 the public’s confidence in a government agency’s non-discriminatory hiring practices. The second prong
13 of the test is also satisfied since similar issues arising in the future might become moot before the Court could
14 make a final determination i.e. if every time an illegal hire/promotion occurred, DPS corrected its action prior
15 to trial.

16 While certain issues in Plaintiffs’ Petition might be moot since DPS has fully complied with such
17 demands, other requests are not since Plaintiffs are still claiming ongoing injury that is only remedial by this
18 Court. The Court does not believe that this case is moot since 26 people were affected by such promotions
19 and any reasonable person would look to advancement not based on merit as violating the PSSRRs and
20 would seek leave of the Court to try and remedy such action.

21 **C. Plaintiffs’ Request for a Desk Audit Has Been Fully Complied With and Thus Is Moot.**

22 Here, DPS argues in its Motion for Summary Judgment that a number of Plaintiffs’ requests in the prayer
23 for relief are now moot since they have already been complied with. First, DPS argues that Plaintiffs’ request
24 for a desk wide audit of DPS is now moot since an audit has already been administered. In support thereof,
25 DPS contends that Governor Filial awarded Management Analysis, Inc. (hereinafter “MIA”) the contract to

1 conduct a desk wide audit which has been completed. Said audit included a 154 page desk audit with an
2 analysis of the current condition of DPS, findings, cost analysis of DPS, performance evaluations, trains and
3 reorganization. *See* Appellee’s Motion for Summary Judgment at 9.

4 Alternatively, Plaintiffs argue that the desk wide audit is not complete since there is no indication that
5 the “audit” even addressed, let alone reported, on which employees were performing tasks outside of their
6 job descriptions. *See* James C. Deleon Guerrero’s Opp’n to Appellee’s Motion for Summary Judgment at
7 17. Notwithstanding Plaintiffs’ argument, the Court finds that Plaintiffs’ requests has been fully complied
8 with since a desk wide audit was performed by a reputable company. Moreover, while the parties disagree
9 as to the scope of the audit, the Court believes that such disagreement is not a material fact in question, since
10 the audit was performed as is evidenced by the 154 pages in MIA’s report.

11 **D. The Governor’s Directive Did Not Render Plaintiffs’ Request for an Order Ending Discriminatory**
12 **Practices Moot.**

13 DPS argues that Plaintiffs have failed to show discrimination and the Governor has issued a directive
14 commanding DPS remain in compliance and not to discriminate, thus rendering Plaintiffs’ request for such
15 an order moot. *See* Appellee’s Motion for Summary Judgment at 10. DPS further claims that Plaintiffs have
16 failed to show an adequate basis for his discrimination claim and have further failed to identify a protected
17 class as defined by the Constitution, statute, or case law.

18 Alternatively, Plaintiffs counter by arguing that Governor’s Directive #275 is a useless piece of paper
19 since it simply “requests” DPS to honor the personnel policies it has repeatedly abandoned. *See* James C.
20 Deleon Guerrero’s Opp’n to Appellee’s Motion for Summary Judgment at 16. Plaintiffs cite a number of
21 instances after the Directive was issued which tend to show that DPS is failing to comply with the
22 Governor’s Directive. Plaintiffs claim that DPS is continuing to reward civil service employees with payment
23 of a salary higher than that paid to those who have served longer, may be better qualified, have more
24 experience, and thus may be more deserving of a promotion and/or higher compensation. *Id.* at 17.

25 As such, the Court finds that Plaintiffs’ request for an order to end discriminatory practices and

1 disparate treatment within DPS is not moot. Although, DPS claims that the Governor's Directive remedied
2 any alleged discriminatory hiring practices, Plaintiffs contend that it did not. In fact, if Plaintiffs' allegations
3 are proven true, this will tend to show that the Governor's Directive was useless since similar issues are still
4 occurring regarding unfair hiring practices. Since both sides are in disagreement as to the affect of the
5 Governor's Directive, this is clearly a material fact in dispute.

6 **E. Officer Alfred Celis Was Promoted In Violation of Austerity Regulations, Governor's Directive**
7 **#275, the PSSRRs, and the Civil Service Act, However Since He Was Subsequently Demoted This Issue**
8 **Is Now Moot.**

9 DPS admits that Officer Celis had been hired pursuant to a Notice of Personnel Action dated
10 December 23, 2007 and that his hiring was contrary to the Financial Austerity Measure. *See* Appellee's
11 Motion for Summary Judgment at 3. However, DPS contends that once it became aware that Officer Celis
12 should not have been promoted, Officer Celis was subsequently demoted back to his original status. *Id.* As
13 a result of this demotion, DPS claims that said action brought DPS into compliance with the PSSRRs and
14 the Civil Service Act. *Id.* at 5.

15 Alternatively, while Plaintiffs admit that demoting Officer Celis was proper, Plaintiffs claim that this
16 action did not bring DPS into compliance with the PSSRRs regarding competitive selection process. *See*
17 James C. Deleon Guerrero's Opp'n to Appellee's Motion for Summary Judgment at 3. The Court is
18 inclined to rule on said action notwithstanding the fact that the parties agree that the promotion of Officer
19 Celis was illegal. Plaintiffs argue that Officer Celis was demoted as a result of this pending suit.
20 Alternatively, DPS contends that once it realized Officer Celis had been wrongfully promoted, that error was
21 quickly rectified.

22 While the Court is not as concerned with what motivated the decision to demote Officer Celis, the
23 Court is concerned with the importance of maintaining public confidence in government agency actions, as
24 well as, government functions. The Court will not be swayed by collateral arguments as to why Officer Celis
25 was demoted, but instead will concentrate on the illegality of his promotion.

1 On December 23, 2007, DPS made effective the Notice of Personnel Action for
2 promotion/reallocation/reclassification of Police Officer II Alfred Celis to Police Sergeant. *See* Plaintiff’s
3 Memorandum in Support of Motion for Summary Judgment and Award of Attorney’s Fees and Costs at 9.
4 Although PSSRRs and DPS regulations mandate that a higher rank be only made available to those officers
5 eligible to compete for that position, in this action, Officer Celis “leap-frogged” over the position of Police
6 Officer III and jumped to the highest salary level for a DPS Sergeant, thereby receiving a pay raise of
7 \$14,895.15 per annum. *Id.*

8 The Court finds this extremely troubling since such type of promotion is unprecedented in any type
9 of job, especially that of a police officer. Officer Celis should have served at least two years as a Police
10 Officer III before even being considered for the position of Sergeant. In addition, if Plaintiffs’ allegations
11 are true that the Governor told DPS Commissioner, Rebecca Warfield, to sign off on the personnel action,
12 this was extremely improper and tends to support allegations of discriminatory hiring practices. *Id.* at 10.
13 However, since this action has already been remedied by Officer Celis’ demotion, the Court finds that any
14 relief requested involving Officer Celis is moot.

15 **F. An Issue of Material Fact Exists Regarding Whether Officer Tagabuel and Officer Ogumoro Were**
16 **Hired In Violation of Austerity Regulations, Governor’s Directive #275, the PSSRRs, and/or the Civil**
17 **Service Act.**

18 Plaintiffs argue that AGO Investigator Paul T. Ogumoro had been hired as a Police Sergeant when
19 no vacancy announcement had been made to DPS employees. *See* Plaintiff’s Memorandum in Support of
20 Motion for Summary Judgment at 11. Plaintiffs further contend that Ogumoro was hired as a provisional
21 appointee and was being paid a salary higher than Guerrero’s, even though he had not accumulated any time-
22 in-grade service within DPS for several years and had come from outside the Department. *Id.* at 12. In their
23 brief, Plaintiffs point out that although one of the only two candidates to apply for the position, Michael
24 Blakely, was rated higher than Ogumoro on the eligibility list, Ogumoro was hired anyway, without any
25 written justification explaining why DPS hired the less qualified applicant. *See* James C. Deleon Guerrero’s

1 Reply to Appellee’s Opp’n to his Motion for Summary Judgment at 3-4.
2

3 Plaintiffs also contend that Sergeant Vicente Tagabuel, who had recently rejoined DPS was also
4 receiving a salary greater than that being paid by Guerrero, even though Tagabuel had left DPS for nearly
5 ten years and had left DPS under less than favorable terms. *See* Plaintiff’s Memorandum in Support of
6 Motion for Summary Judgment at 12. No notice announcing the vacancy filled by Tagabuel or eligibility
7 list certifying those who could fill it was ever given. *See* James C. Deleon Guerrero’s Reply to Appellee’s
8 Opp’n to his Motion for Summary Judgment at 4. Thus, Plaintiffs claim that the Ogumoro and Tagabuel
9 lateral hires were both improper.

10 Plaintiffs offer testimony of Former Commissioner Warfield who admitted that she never announced
11 Ogumoro’s position because she wanted to get “people on board who could hit the ground running.” *Id.*
12 Moreover, regarding the Tagabuel hire, Commissioner Tudela told Mrs. Delacruz that he hired Tagabuel
13 on instructions from the Governor. *Id.* at 5.

14 Alternatively, DPS claims that the hiring of Tagabuel and Ogumoro did comply with the competitive
15 selection process. *See* Appellee’s Motion for Summary Judgment at 8. In support thereof, DPS argues that
16 the competitive selection process governed by NMIAC § 170-30.5-305 was suspended by the implementation
17 of the financial austerity measures in 1999 which did not allow for DPS to hire from within. *Id.* DPS claims
18 that promotions from within DPS to fill positions would require pay increases in violation of financial
19 austerity measures. *Id.* Accordingly, DPS argues that Plaintiffs have failed to show how the hiring of two
20 qualified individuals violated their rights since none of them had made Office of Personnel Management’s
21 Eligibility List for the positions. *Id.* at 17. Finally, DPS argues that Plaintiffs have failed to show that the
22 hiring of Ogumoro or Tagabuel was not announced or selected in accord with the regulation. *Id.* at 9.

23 After reviewing both arguments, the Court finds that an issue of material fact still exists since
24 Defendant contends that the hiring of Tagabuel and Ogumoro was in compliance with the competitive
25 selection process, whereas Plaintiffs provide contrary evidence showing that Tagabuel’s position was never

1 announced, but instead, Tagabuel was hired on instructions from the Governor. Moreover, Plaintiffs contend
2 that no announcement was ever given for the Ogumoro hire who was hired notwithstanding the fact that
3 Michael Blakely was rated higher than Ogumoro on the eligibility list. *See* James C. Deleon Guerrero’s
4 Opp’n to Appellee’s Motion for Summary Judgment at 7. As such, summary judgment is not proper with
5 respect to this issue.

6 **G. Attorney’s Fees and Costs**

7 As a general rule “[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a
8 reasonable attorney’s fee from the loser.” *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240,
9 247 (1975). Notwithstanding the general rule, Plaintiffs contend that they are entitled to attorney’s fees and
10 costs under two exceptions to the American rule: (1) the private attorney general theory; and (2) under a
11 theory of bad faith.

12 Plaintiffs argue that under the “private attorney general theory” a private attorney general may be
13 awarded attorney’s fees whenever the successful litigant: (1) incurs considerable economic expense, (2) to
14 effectuate an important legislative policy, (3) which benefits a large class of people. *See* Plaintiffs’ Motion
15 for Summary Judgment at 18. Accordingly, Plaintiffs claim that here they should be awarded attorney fees
16 since Sgt. Guerrero incurred attorney fees in forcing DPS to take corrective action which in turn effectuated
17 important legislative policies underlying the Civil Service Act.

18 In addition, Plaintiffs also argue that they are entitled to attorney’s fees under the “bad faith”
19 exception to the general rule. Plaintiffs claim that the promotion/reallocation of Alfred Celis contravened
20 all rules and regulations, was without legal basis, and all subsequent actions taken by DPS show bad faith
21 on the part of the government. *Id.* at 20.

22 Alternatively, DPS argues that the Court should not deviate from the long established American rule.
23 *See* Appellee’s Opp’n to Appellants’ Motion for Summary Judgment at 8. In support thereof, DPS claims
24 that Sgt. Guerrero was not forced to retain an attorney since such action was voluntary nor did Sgt. Guerrero
25 ever state that he was acting as a private attorney general when bringing this suit. *Id.* at 7. Regarding the

1 bad faith claim, DPS argues that the facts of the case do not constitute bad faith or wantonness entitling
2 Plaintiffs to attorney fees. *Id.* at 10.

3 The Court believes that any lawsuit where a government agency is alleged to have violated
4 discriminatory hiring practices if remedied would benefit the public at large. However, such benefit would
5 be incidental to the public if such action was not brought on behalf of taxpayers, but instead was brought as
6 a personal grievance where plaintiff's primary goal in bringing the lawsuit was for an individual benefit,
7 which is the case here.²

8 That being said, the Court disagrees with DPS' contention that Plaintiffs voluntarily brought this suit
9 since Plaintiff Guerrero was forced to file suit when his grievances went unanswered by all the officials in
10 the grievance procedure including the Civil Service Commission. In addition, the Court does not believe that
11 Officer Celis' promotion was merely a transgression of the austerity measures, but instead was in direct
12 violation of the PSSRRs and the Civil Service Act. Although the Court finds that Officer Celis' promotion
13 was illegal, the Court does not believe that Plaintiffs' suit rises to the level of awarding attorney's fees under
14 either of the exceptions enumerated in Plaintiffs' briefs.

15 In order to depart from such a long standing and widely used precedent such as i.e. the American rule
16 regarding attorney's fees, a special justification is required. Factors the Court should consider would be: (1)
17 whether the precedent is so unworkable as to be intolerable; (2) whether parties justifiably relied on the
18 precedent so that reversing it would create an undue hardship; (3) whether the principles of law have
19 developed to such an extent as to leave the old rule 'no more than a remnant of abandoned doctrine;' and (4)
20 whether the facts have changed in the interval from the old rule to reconsideration so as to have "robbed the
21 old rule" of justification." *New Mexico Right to Choose/NARL v. Johnson*, 986 P.2d 450, 454-455 (N.M.
22 1999).

23
24 ²Attorney fees are allowed for prevailing in a taxpayer action pursuant to N.M.I. Const. Art. X,
25 #9.

1 Here, none of the factors are present which would warrant a deviation from the general rule. Even
2 if Plaintiffs were to have gone through the Civil Service Commission, they would still be required to hire an
3 attorney at their own expense if they wanted legal representation. As such, the Court cannot in good
4 conscience establish precedent in the Commonwealth whereby an aggrieved party suing on his own behalf
5 be awarded attorney fees under a private attorney general theory notwithstanding the fact that the public is
6 an incidental beneficiary of that suit.

7
8 **IV. CONCLUSION**

9 For the foregoing reasons, Defendant's Motion for Summary Judgment is **Granted In Part** since
10 the desk audit and Officer Celis' demotion have already been complied with. In addition, Plaintiff's
11 Motion for Summary Judgment is **Granted In Part** since there are no material facts in dispute that
12 Alfred Celis was unlawfully promoted in violation of the PSSRRs and the Civil Service Act. However,
13 issues of material fact still exist as to: (1) whether Officer Tagabuel and Officer Ogumoro were hired in
14 violation of the PSSRRs; and (2) whether the Governor's Directive made Plaintiffs' request for an order
15 ending discriminatory practices and disparate treatment moot.

16
17 **SO ORDERED this 1st day of February, 2011.**

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20 _____ / s / _____

21 David A. Wiseman, Associate Judge
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