FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. EDWARD T. BUCKINGHAM, Defendant.	CRIMINAL CASE NO. 12-0134 **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER originally came before the Court on January 21, 2014 but was continued to January 28, 2014 on Defendant's Motion to Dismiss. The Commonwealth of the Northern Mariana Islands ("Commonwealth") was represented by Assistant Attorney General George L. Hasselback. Defendant Edward T. Buckingham ("Defendant") was represented by Richard W. Pierce, Esq.

On January 7, 2014, Defendant filed a Motion to Dismiss all twelve Counts in the Second Amended Information ("SAC") filed with the Court on January 3, 2014. The Commonwealth filed its Opposition on January 16, 2014, in which it moved to voluntarily dismissed Counts Five and Twelve with prejudice. The Court granted that request from the bench at the January 21, 2014 hearing. Defendant filed his Reply on January 21, 2014. The Court heard oral arguments on January

28, 2014 and now issues this written Order granting in part and denying in part Defendant's Motion to Dismiss.

II. DISCUSSION

An information must contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged." NMI R. Crim. P. 7(c). The information must also set forth all elements of the crimes charged. *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000); *Almednarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

NMI R. Crim. P. 12(b)(2) allows "[a]ny defense, objection, or request which is capable of determination without the trial of the general issues" to be raised before the trial. The United States Supreme Court has determined that a defense is "capable of determination without trial of the general issue...if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). "General issue" has been defined as "evidence relevant to the question of guilt or innocence." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987).

The court may consider factual issues when ruling on a Rule 12(b) motion. However, the law generally favors factual determinations to be made post-trial. *United States v. Partridge-Staudinger*, 287 F.R.D. 651, 653 (E.D. Wash 2013). The court may also defer ruling on a Rule 12(b) motion until after a trial on the "general issue". NMI R. Crim. P. 12(e). Finally, if the court grants a Rule 12(b) motion based upon a defect in the information, it may order that the defendant continue to be held in custody or that his bail be continued until an amended information is filed. NMI R. Crim. P. 12(h).

A. COUNT ONE

Count One alleges that Defendant, as a public official, knowingly and willingly caused public funds, time, personnel, and/or equipment to be used for political and/or campaign activity in

violation of 1 CMC § 8534(b), made punishable by 1 CMC § 8572. Information at 2. Specifically, Defendant is alleged to have, by himself and/or through members of his staff, planned, organized, and disseminated "information and invitations regarding a gathering hosted by Defendant, the purpose of which, in whole or in part, was to provide a platform for which a then candidate for public office could address those present regarding his candidacy." *Id.* Said actions "were undertaken in whole, or in part, by public employees during their working hours, using pubically *[sic]* owned equipment…" *Id.* at 2-3.

Defendant's Motion seeks to dismiss this Count, claiming that the law does not criminalize the use of public assets to support a candidate. His argument is based upon two separate theories: (1) the Commonwealth has failed to charge a crime because the codification of 1 CMC § 8534(b) is derived from Public Law 8-11 ("PL 8-11" or "the Act"), which does not criminalize this action and (2) Count One is preempted by the Federal Election Commission Act ("FECA").

1. Criminalization of the use of public services in 1 CMC § 8534(b) versus PL 8-11

Defendant contends that 1 CMC § 8534(b) differs from the original legislation as enacted in PL 8-11. He claims that the public law from which this statute derives does not criminalize the alleged acts described in Count One of the SAC. The defense further states that the Law Revision Commission ("LRC") wrongfully changed the meaning of the legislation by expanding criminality in its codification of the same.

1 CMC § 8534(b) states:

> A public official or public employee shall not use public funds, time, personnel, or equipment for political or campaign activity unless the use is:
> (1) Authorized by law; or
> (2) Properly incidental to another activity required or authorized by law.

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1 CMC § 8534(b) is derived from PL 8-11, 1 § 8434 and amended by PL 8-28, 3.

Section 8434 of PL 8-11, 1 is contained within Chapter 3, entitled "Conflict of Interest". Section 8434(b), entitled "Restraints on Use of Public Facilities, Supplies, Services, Time, and Personnel for Campaign Activities" states:

> A public official or public employee shall not use public funds, time, personnel, facilities, or equipment for political or campaign activity unless the use is:
> (1) authorized by law; or
> (2) properly incidental to another activity required or authorized by law.

PL 8-28, 3 amended Section 8434 of PL 8-11, 1 to read:

> A public official or public employee shall not use public funds, time *[sic]* personnel, or equipment for political or campaign activity unless the use is:
> (1) authorized by law: or
> (2) properly incidental to another required or authorized by law.

1 CMC § 8572 states:

> Any person found by a court to be guilty of knowingly violating any of the provisions of ***this part*** or of furnishing false, misleading or incomplete information to the Public Auditor with the intent to mislead, upon conviction thereof shall be punished by a fine of no more than $500 for any one offense. (emphasis added)

1 CMC § 8572 is derived from PL 8-11, 1 § 8472 and has been modified by the Law Review Commission ("LRC").

Section 8472 of PL 8-11, 1 is contained within Chapter 6, entitled "Penalties for Violation". Section 8472 is entitled "Judicial Penalties" and states:

> Any person found by a court to be guilty of knowingly violating any of the provisions of ***this chapter*** or of furnishing false, misleading or incomplete information to the Public Auditor with the intent to mislead, upon conviction thereof shall be punished by a fine of no more than $500 for any one offense. (emphasis added)

Defendant points out that the statute, as codified by the LRC, has been modified from its original version. According to the defense, the section of PL 8-11 under which the Defendant has

been charged (Section 8434) makes only two activities criminal: (1) a knowing violation of Chapter 6 and (2) knowingly furnishing false, misleading, or incomplete information to the Public Auditor. The original text in the public law states "this chapter", whereas the codified version states "this part". Defendant contends that this change in the wording of the statute illegally modified the legislative intent to expand the types of activities made criminal.

The Commonwealth, on the other hand, argues that the word "chapter" was a clear error in the original legislation. It further contends that the LRC has the express authority to correct these types of errors. Finally, it argues that without this correction, much of the prohibitions and requirements contained within the Act itself would be incapable of enforcement.

The objective in statutory interpretation is giving effect to the intent of the legislature. *Commonwealth Ports. Auth. v. Hakubotan Saipan Enters.*, 2 NMI 212, 221 (1991), citing *In Re Estate of Rofag*, 2 NMI 19, 29 n.10 (19991). "[L]egislative intent is…discerned from a reading of the statute as a whole and not from a reading of isolated words". *Commonwealth Ports Authority*, 2 NMI at 224, citing *Office of the Attorney General v. Cubol*, 3 CR 64, 73 (D.N.M.I. App. Div. 1897).

The first step in statutory interpretation requires the Court to review the language of the statute itself. *Commonwealth v. Taisacan*, 1999 MP 8, 6. "[U]nless the statute provides otherwise, courts should adhere to the general rule that words be given their plain meaning." *Id.* Where a statute's plain language is unclear, the Court must look to the intent of the legislature. *Bank of Haw. v. Sablan*, 1997 MP 9, 14; *Commonwealth Ports Auth. v. Hakubotan Saipan Enters., Inc.*, 2 NMI 212, 221 (1991). "A court should avoid interpretations of a statutory provision which would defy common sense [or] lead to absurd results." *Commonwealth Ports Authority v. Hakubotan Saipan Enters.*, 2 NMI at 224.

In this instance, it is clear from a reading of the Act as a whole that the use of the word "chapter" in Section 8472 of PL 8-11, 1 is an error. This error is made evident by the specific

wording contained within Section 8445 of Chapter 3, which states: "The statute of limitations for bringing an administrative of ***judicial action*** pursuant to this Chapter shall be five years." (emphasis added)

This wording is mirrored in Chapters 2 § 8423, 4 § 8453, and 5 § 8464. The term "judicial action" is not defined in the Act. However, Black's Law Dictionary defines the term as "[a]n act involving the exercise of judicial power." Black's Law Dictionary 20 (Abridged 7th ed. 2000). The use of the term "judicial action" illustrates that claims may be brought before the court for violations of the provisions contained within each chapter of the Act. There is no distinction in the definition between an act that is purely civil or criminal; rather the definition describes any act that would fall within the purview of the court system. However, while Section 8445 allows for "judicial action", Chapter 3 does not set out any types of penalties – judicial or otherwise. Instead, all the available penalties are contained within Chapter 6. Thus, without allowing Chapter 6 to control, there would be absolutely no means of enforcing or sanctioning the requirements and prohibitions contained within Chapter 3.

Moreover, it is common for penalties for all subsections of a piece of legislation to be located at the end of an act. This Act is no different; all of the penalties, with the limited exception of those contained in Chapter 2[1], are addressed in the final chapter of the Act.

Finally, the LRC was created through the enactment of Public Law 2-11, effective January 15, 1981. From that time until its incorporation into the Judiciary through the enactment of Public Law 8-22, effective July 19, 1993, the LRC was overseen by the Legislature. The subject of this part of the Motion is the codification of PL 8-11. PL 8-11 became effective on January 22, 1993, nearly six full months before the LRC was transferred to the Judiciary. Given the length of time it

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[1] Note here that Sections 8417-8422 specifically set out the criminal and civil penalties for various violations of provisions contained within Chapter 2.

takes to draft a piece of legislation and the LRC's mandate at that time[2], it is very likely that its members were instrumental in not only the codification of the law but also its creation.

Before the enactment of PL 8-22, the LRC was tasked with both recommending legislation to the Legislature and with codifying those laws enacted by the Legislature. While there were no express details about what codification entailed before the enactment of PL 8-22, the Court can assume that the duties performed by the LRC in codifying legislation was substantially similar to the duties it currently performs. Presently, the LRC's executive director, with the permission of the Commission, is authorized to make necessary changes when codifying public laws and may:

> (a) Number and renumber chapters, sections and parts of sections;
> (b) Rearrange sections so that they fit harmoniously within the code;
> (c) Change reference numbers to agree with renumbered chapters, parts or sections;
> (d) Substitute the proper section or chapter number for the terms "the preceding section" or "this act" and similar terms;
> (e) Strike out figures where they are merely a repetition of written words;
> (f) Change capitalization for the purpose of conformity; and
> (g) Correct manifest clerical and typographical errors.

PL 8-22, 3 (3806), codified as 1 CMC § 3806. Further, as stated above, before the enactment of PL 8-22, the LRC was overseen by the Legislature. Therefore, it stands to reason that its codification of laws was also under the purview of the Legislature.

Before the enactment of PL 8-22, the Commission was comprised of (1) an attorney admitted to practice before the Commonwealth Trial Court appointed by the Chairman of the Commonwealth Legislature Senate Committee on Judiciary, Government and Law; (2) an attorney admitted to practice before the Commonwealth Trial Court appointed by the Chairman of the Commonwealth Legislature House of Representatives Committee on Judiciary and Governmental Operations; (3) the Chief Judge of the Commonwealth Trial Court or an Associate Judge designated

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[2] Amongst other duties, the LRC was tasked with proposing legislation that was to be submitted to the Legislature for review. *See* PL 2-11, 3; PL 3-75, 5.

by the Chief Judge; (4) the Attorney General of the Commonwealth or an assistant attorney general designated by the Attorney General; (5) one member of the Northern Mariana Islands Bar Association elected by the membership; (6) the Public Defender of the Commonwealth or an assistant public defender designated by the Public Defender; (7) the Executive Director of the Micronesian Legal Services Corporation designated by the Executive Director; and (8) four non-lawyers appointed by the Governor. PL 2-11, 2(b).

Pursuant to the enactment of PL 8-22, the Commission is currently comprised of (1) the Chief Justice of the Commonwealth Supreme Court, or either an Associate Justice or Superior Court Judge designated by the Chief Justice; (2) the Chair of the Commonwealth Legislature Senate Committee on Judiciary, Government and Law, or a member of the committee designated by the Chair of that committee; (3) the Chair of the Commonwealth Legislature House of Representatives Committee on Judiciary and Governmental Operations, or a member of the committee designated by the Chair of that committee; (4) the Attorney General of the Commonwealth or an assistant attorney general designated by the Attorney General; and (5) one member of the Northern Mariana Islands Bar Association elected by the membership thereof. PL 8-22, 3 (§ 3802) codified as 1 CMC § 3802.

It is clear that the group of people who undertook the codification of Section 8472 of PL 8-11 had an intimate understanding of the legislative intent, and many of them had specialized legal knowledge, regardless of whether they are the group commissioned under PL 2-11 or PL 8-22.

The change made in this instance was one of terms; the LRC changed the word "chapter" to "part". The defense claims that this was an unauthorized change that expanded criminality under the original Public Law. However, when viewing the law as whole, it seems clear that the LRC's change did not expand criminality but rather corrected a manifest error contained within the body of the Act. To interpret the original legislation as proposed by the Defendant would "defy common

sense" because without the ability to apply the penalties sections contained within Chapter 6, there would be no means of enforcing Chapters 3 or 4 of the Act. *Commonwealth Ports Authority*, 2 NMI at 224. Thus, the modification made here by the LRC was authorized by law.

2. Count 1 is not preempted by FECA

Defendant claims that Count One is preempted by FECA because it arises from the election of the Commonwealth's delegate to the United States House of Representatives. Mot. at 11. However, after reviewing the legislative history of FECA, the Eighth Circuit definitively found that FECA does not preempt state laws related to the conduct of public employees in elections. *Reeder v. Kansas City Bd. of Police Comm'rs.*, 733 F.2d 543 (8th Cir. 1984). Other jurisdictions have followed the *Reeder* court's interpretation. See, for instance, *Janvey v. Democratic Senatorial Campaign Committee*, 793 F.Supp.2d 825 (N.D. Tex. 2011); *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273 (5th Fir. 1994); *Stern v. Gen. Elec. Co.*, 924 F.2d 472 (2nd Cir. 1991).

Specifically, the *Reeder* court held that Congress "intended…to leave the States free, so far as any claim of preemption was concerned, to allow or forbid political activities…by their own employees." *Reeder v. Kansas City Bd. of Police Comm'rs.*, 733 F.2d at 546. When making this determination, the *Reeder* court reviewed a conference report on the bill that became the 1974 amendment. The report states that "[i]t is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments to Title 5, United States Code, made by this legislation." *Id.*, quoting S.Conf.Rep. No 93-1237, 93d Cong., 2d Sess, reprinted in 1974 U.S.Code Cong. & Ad.News 5587, 5618, 5669.

Finally, the *Reeder* court also included a colloquy between two Senators taking place immediately before the vote on the bill, during which Senator Cannon, the Chairman of the Committee on Rules and Administration, stated: "any State law regulating the political activity of State or local officers or employees is not preempted [or]…superseded…It [would be]…up to the

State to determine the extent to which they may participate in Federal elections". *Id.*, at 545-46 (internal citations omitted), citing 120 Cong.Rec. 34386 (Oct. 8, 1974).

Given the foregoing, there can be no doubt that FECA does not preempt the Commonwealth's laws regulating the actions of public employees relating to election activities.

Accordingly, Defendant's Motion to Dismiss Count One is denied.

B. COUNT TWO

Count Two alleges that Defendant used the name of a government department or agency to campaign for or express support for a candidate running for public office in violation of 1 CMC § 6705(a). 1 CMC § 6705(a) states that "[n]o person may use the name of the government department or agency to campaign for or express support for a candidate running for public office." Under 1 CMC § 6003(e), the term "candidate" is defined as "a person who is either seeking a nomination or is proposed for a nomination by sponsors…" PL 12-18, Section 6003(e).

Defendant makes two arguments in support of his Motion to Dismiss Count Two. First, he claims that the statutory definition of "candidate" prevents criminalization of his actions. Second, he claims that the Commonwealth's law infringes on his First Amendment rights.

1. Definition of "Candidate"

According to the Defendant, the definition of "candidate" as set forth in 1 CMC § 6003(e) limits criminalization to those seeking a nomination. Once an individual has been nominated, he is no longer legally defined as a candidate for the purposes of this code section.

Defendant argues that this Count should be dismissed because at the time in question Joseph N. Camacho was no longer seeking a nomination and was, therefore, not a candidate according to the definition as set forth in 1 CMC § 6003(e). Defendant's interpretation, however, is without merit.

As discussed in greater detail in Part A of this Order, "legislative intent is to be discerned from a reading of the statute as a whole and not from a reading of isolated words". *Commonwealth Ports Authority*, 2 NMI at 224, citing *Office of the Attorney General v. Cubol*, 3 CR 64, 73 (D.N.M.I. App. Div. 1897). While a Court must generally adhere to definitions of terms contained within a statute, it also has a duty to interpret legislation in a way that will not lead to absurd results. *In re Adoption & Change of Name of Y.M.F.V.*, 2001 MP 7 ¶ 9 and *Commonwealth Ports Auth. v. Hakubotan Saipan Enters., Inc.*, 2 NMI 212, 224 (1991) respectively.

When reading the Commonwealth Election Law as a whole, it is clear that the term "candidate" is meant to describe more than just an individual seeking a nomination but rather covers individuals from the start of the nomination process through the election. To find otherwise would "defy common sense", as much of the Election Law would be made meaningless by using Defendant's interpretation of the term "candidate". *Commonwealth Ports Auth. v. Hakubotan Saipan Enters., Inc.*, 2 NMI at 224. The Court does not agree that the Legislature's intent was to ban certain activities, such as bribery, only until an individual was nominated and then no longer require that he refrain from such activity.

2. First Amendment rights

Defendant states that 1 CMC § 6705(a) violates rights guaranteed under the First Amendment. 1 CMC § 6705(a) reads, in relevant part states: "[n]o person may use the name of the government department or agency to campaign for or express support for a candidate running for public office."

According to Defendant, this statute is overbroad. It is aimed directly at the content of speech and is, therefore, presumptively invalid. It can be sustained only if the government can show a compelling interest with no least drastic means of protecting that interest. Because this statute is unconstitutional, Count Two must be dismissed. Mot. at 17-18.

"A statute should not be construed to be unconstitutional where it is open to a constitutional interpretation." *Estate of Faisao v. Tenorio*, 4 N.M.I. 260 (1995). Moreover, a "court will not impute to the legislature an intent to pass unconstitutional legislation." *Id.* "In testing the constitutionality of a statute, the language must receive a constriction that will conform it to a constitutional limitation, if it is susceptible of such an interpretation. This principle comports with the strong, widely recognized judicial policy of preserving statutes in the face of constitutional challenges whenever possible." *In re Seman*, 3 N.M.I. 57 (1992). "Statutes are presumed to be constitutionally valid, unless a clear violation is shown." *Tenorio v. Superior Ct.*, 1 N.M.I. 1 (1989).

The presumption that a statute is valid is particularly strong when a court is asked to determine facial challenges, which are disfavored for several reasons. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). First, these types of challenges often rest on speculation. *Id.* This precise problem is evidenced in the scenarios envisioned in Defendant's motion. *See* Mot. at 17. Consequently, facial challenges may require a court to prematurely interpret a statute based on factually incomplete records. *Id.*, citing *Sabri v. United States*, 541 U.S. 600, 609 (2004). These types of challenges

> run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Id. at 450-51 (internal citations omitted).

Therefore, the United States Supreme Court has generally found that an individual "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications. *Id.* at 449, citing

United States v. Salerno, 481 U.S. 739, 745 (1987) (overturned on other grounds). In determining if a law is facially invalid, a court must be "careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." *Id.* at 449-50 (internal citations omitted).

Here, the alleged facially invalid statute has never been applied in any way that would require court interpretation. Given the above, the Court is hesitant to find as Defendant requests. The Commonwealth asks the Court to interpret this statute as it would apply in this case only, that is, as applied to a public official using his public office to advocate for a candidate. Applying the law in this fashion alleviates any concern based on the broadness of the statute, as government employees are often banned from certain political activities. *See*, for instance, *U.S. Civil Service Comm. v. Nat'l. Ass'n. of Letter Carriers*, 413 U.S. 548, 556 (1973).

Defendant rightfully points out that mere advocacy cannot be criminalized. *See*, for instance, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *Citizens United v. FEC*, 558 U.S. 310, 349 (2010). ("The First Amendment simply does not permit the government to fine or jail citizens for political speech.") "First Amendment standards must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. FEC*, 558 U.S. 310, 327 (2010). Criminalizing speech goes directly against that basic premise of our constitutional rights. However, 1 CMC § 6705 does not criminalize *mere advocacy*. Rather, the act which is criminalized is using "the name of the government department or agency" in expressing support for a candidate. The statute does not in any way encroach upon an individual's ability to support a candidate in his private capacity as a citizen. Instead it prevents individuals from using the influence inherently connected with a government department or agency in their campaigning efforts.

Accordingly, Defendant's Motion to Dismiss Count Two is denied.

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C. COUNT THREE

Count Three alleges that Defendant, as a public official, performed illegal acts under the color of his office, in violation of 6 CMC § 3202. This Count mirrors the allegations as stated in Counts One and Two: that Defendant "used his position as Attorney General…to plan, organize and secure the attendance of several persons at a political function, the purpose of which, in whole or in part, was to provide a platform for which a then candidate for public office could address those present, using public funds, time, personnel and/or equipment…" Information at 4.

In order to prove this charge, OPA must show that Defendant was (1) a public official, who (2) committed an illegal act under color of office. 6 CMC § 3202. Defendant correctly argues that this charge is dependent upon the success of either Count One or Count Two and can survive only if Counts One and/or Two survive this Motion to Dismiss.

The Court has already determined that both Counts One and Two will proceed to trial. Accordingly, Defendant's Motion to Dismiss Count Three is denied.

D. COUNT FOUR

Count Four alleges that Defendant, as a non-elected official of the Commonwealth, knowingly refused to provide documents and/or information requested by the Public Auditor pursuant to an investigation conducted pursuant to 1 CMC § 8561, in violation of 1 CMC § 8571(b), made punishable by 1 CMC § 8571(b) and 1 CMC § 8572. Since this charge is being prosecuted pursuant to 1 CMC § 7847, it is further made punishable by 1 CMC § 7851. Information at 4.

Defendant's argument is twofold. First, he claims that there are not two different punishments contained in separate sections for the same act. Second, Defendant states that the Public Auditor lacks authority to investigate violations of the rules contained in any chapter of the Act other than Chapter 5.

1. Punishments contained within 1 CMC § 8571(b) and 1 CMC § 8572

The Defendant argues that "there are not two punishments in separate sections for the same act." Mot. at 20. Further, he contends that Section 8571(b) is not a criminal statute but rather provides for only administrative, employment sanctions.

1 CMC § 8571(b) states:

> Any nonelected official, employee, or government contractor who fails to provide documents or information requested by the Public Auditor under 1 CMC § 8561 shall be subject to employment sanctions, removal from office, or cancellation of contract rights.

1 CMC § 8572 states:

> Any person found by a court to be guilty of knowingly violating any of the provisions of this part or of furnishing false, misleading or incomplete information to the Public Auditor with the intent to mislead, upon conviction thereof shall be punished by a fine of no more than $500 for any one offense.

Both 1 CMC § 8571(b) and 8572 are contained within Chapter 6 of the Election Law. Chapter 6 of the Act is entitled "Penalties for Violation". There is no section stating that only a single penalty can or will apply for a single act. However, it is clear from the reading of these statutes that only the latter describes criminal penalties. The Defendant is correct in his understanding of the former as being merely an administrative penalty and therefore inapplicable to this criminal action.

2. Authority of the Public Auditor

Defendant's second argument is that the Legislature limited the Public Auditor's authority strictly to the provisions contained within Chapter 5 of the Act. However, here again, it appears that the legislature inadvertently used the word "chapter" when what it actually meant was "part" or

"Act". To find otherwise would lead an absurd result.[3] *See analysis for Count One on the rules governing statutory interpretation.*

As pointed out by the Commonwealth, finding the Public Auditor's authority limited to the provisions of Chapter 5 would effectively prevent the Public Auditor from operating. Chapter 5 lacks any regulation of conduct related to the prohibition or requirement of any particular act. Rather, the prohibitions and requirements for public officials and employees are contained solely within Chapters 2 through 4. Thus, to hold, as Defendant suggests, that the Public Auditor's authority to act is based solely upon the provisions of Chapter 5, would prohibit the Public Auditor from conducting any action. Such an interpretation would prevent the legislature's intent from being achieved.

Accordingly, Defendant's Motion to Dismiss Count Four is granted as it relates to 1 CMC § 8571(b). The remaining sections of this Count will proceed to trial. The Commonwealth shall amend the SAC to strike 1 CMC § 8571(b).

E. COUNTS SIX AND SEVEN

Count Six charges Defendant with obstructing justice by interfering with the service of process. Count Seven alleges misconduct in office. Both charges are based on the same alleged act: that Defendant, being aware that a penal summons was issued against him, engaged "in a course of conduct intended to deceive, resist and/or otherwise prevent" the effectuation of service upon him. Information at 7.

Defendant argues that the penal summons was invalid because it was not signed by a judge. Therefore, it is impossible for him to have obstructed service of process. Defendant also alleges that obstruction laws traditionally require some type of physical threat or physical resistance. In

[3] The difference between the mistake in Chapter 5 and Chapter 6 is that the LRC did not make the necessary change in its codification of Chapter 5 that it made in Chapter 6. Therefore, the Court is charged with interpreting the legislation and not whether the codification was an accurate reflection of legislative intent.

response, the Commonwealth contends that the summons was signed by the Clerk of Court, a process which had been Court policy for over 25 years. It also contends that no physical threat or physical resistance is required under Commonwealth law.

1. VALIDITY OF THE PENAL SUMMONS

A penal summons must (1) ***be signed by a judge***, (2) describe the offense charged in the information, (3) contain the defendant's name, and (4) "summon the defendant to appear before the court at a stated time and place." NMI R. Crim. P. 4(c)(1)-(2) and 9(b)(1)-(2). The penal summons in this case did not meet the first criterion; rather it was signed by the Clerk of Court.

The Commonwealth argues that the penal summons is valid because at the time this summons was issued, the Court had a policy that allowed the Clerk of Court to sign these documents. This policy existed for over 25 years. Opp'n at 18. Further, while it was unable to locate any official record of this policy, the Commonwealth also cites to 6 CMC § 3303 in support of its contention that the penal summons is valid. 6 CMC § 3303 states:

> Every person who, knowingly and willfully obstructs, resists, or opposes any chief of police, policeman or other person duly authorized, in serving or executing, or attempting to serve or execute ***any process issued by any court or official authorized to issue process***, or whoever assaults, beats or wounds any chief of police, policeman, or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such process shall be guilty of obstructing justice and, upon conviction thereof, shall be imprisoned for a period of not more than one year, or fined not more than $1,000, or both. (emphasis added)

However, while 6 CMC § 3303 does allow criminal penalties where an individual has obstructed service of process issued by an "official authorized to issue process", the Rules of Criminal Procedure control here. 6 CMC § 3303 makes the allowance for authorized officials because the Rules of Civil Procedure allow the court clerks to issue summonses in *civil* cases. NMI R. Civ. P. 4(a). The obstruction of service of a civil summons is no less a criminal act than the obstruction of service of a criminal summons.

Thus, the penal summons issued in this case is invalid, as previously determined by this Court. Order Denying Defendant's Motion to Dismiss, Sept. 4, 2013 at 2. Since the summons is invalid, these Counts must be dismissed.

2. Requirement of Physical Threat or Physical Resistance

Having found that the penal summons is invalid, the Court need not address the issue of whether a physical threat or physical resistance is required under Commonwealth law.

Accordingly, Defendant's Motion to Dismiss Counts Six and Seven is granted.

The Commonwealth's oral motion for leave to amend is denied.

F. COUNTS EIGHT AND NINE

Count Eight charges theft of services, and Count Nine charges misconduct in public office. Both counts surround Defendant's use of the Office of the Attorney General's ("OAG") personnel and resources to assist in his defense in the instant case.

1 CMC § 1607(b), Theft of Services states:

> A person commits theft if, having control over the disposition of services of others to which the person is not entitled, that person knowingly diverts those services to his or her own benefit or to the benefit of another not entitled to it.

6 CMC § 3202, Misconduct in Public Office states:

> Every person who, being a public official, does any illegal act under the color of office, or wilfully neglects to perform the duties of his or her office as provided by law, is guilty of misconduct in public office, and upon conviction thereof may be imprisoned for a period of not more than one year, or fined not more than $1,000, or both.

Defendant claims that this Court already ruled that an assistant attorney general ("AAG") could appear at his arraignment. He further argues that since the Commonwealth has "a profound interest in this proceeding," it was appropriate for the OAG to represent Defendant at the arraignment. Mot. at 33. The Commonwealth contends that while Judge Wiseman allowed AAG

Birnbrich's limited appearance at the arraignment, he did not rule upon the propriety of Defendant's use of public services in his defense. Opp'n. at 23.

The essential element of both Counts is whether Defendant was *entitled* to receive the services he obtained from the OAG. The Court did not rule on that issue. Rather, Judge Wiseman allowed a limited appearance by an AAG for purposes of the arraignment. Despite allowing this limited appearance by AAG Birnbrich, Judge Wiseman expressed his concern and stated that he did not believe the OAG had the authority to represent an individual in a criminal matter. Transcript of Oral Argument at 2-3, 8 (Aug. 6, 2012). Thus, the issue of whether Defendant was entitled to the services rendered by the OAG has not yet been decided by the Court.

Accordingly, Defendant's Motion to Dismiss Counts Eight and Nine is denied.

G. COUNTS TEN AND ELEVEN

Count Ten charges conspiracy to commit theft of services. Specifically, Defendant is alleged to have conspired with personnel from DPS, CPA, and other government agencies to have a police escort take him to the airport so he could leave the Commonwealth before being served with the penal summons.

6 CMC § 303(a), Conspiracy states:

> A person commits the offense of conspiracy if, with intent to promote or facilitate the commission of an offense:
> (1) The person agrees with one or more other persons that they, or one or more of them, will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and
> (2) That person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

1 CMC § 1607(b), Theft of Services states:

> A person commits theft if, having control over the disposition of services of others to which the person is not entitled, that person knowingly diverts those services to his or her own benefit or to the benefit of another not entitled to it.

Count Eleven charges misconduct in public office. Specifically, Defendant is alleged to have used his influence to conspire to assure that services were diverted to his benefit.

6 CMC § 3202, Misconduct in Public Office states:

> Every person who, being a public official, does any illegal act under the color of office, or wilfully [*sic*] neglects to perform the duties of his or her office as provided by law, is guilty of misconduct in public office, and upon conviction thereof may be imprisoned for a period of not more than one year, or fined not more than $1,000, or both.

Defendant argues that these Counts should be dismissed because that there is no law within the Commonwealth that renders a police escort unlawful. Mot. at 37. He further asserts that the the motivation behind the escort as alleged by the Commonwealth is irrelevant because motivation is not an element of conspiracy or theft of services. *Id.*

However, the relevant issue before the Court on these Counts is whether Defendant was entitled to the services he received. The motivation behind the alleged conspiracy is particularly relevant to this issue. The charges allege that Defendant used a police escort to avoid being served with a penal summons. One of the required duties for a law enforcement officer is to "promptly make diligent effort to execute or serve [judicial summonses] either personally or through another police officer." 6 CMC § 6101. While it is true no law specifically prohibits police escorts, it is equally true that an individual is not entitled to receive a service that would impede a law enforcement officer from fulfilling his duties or to actively disregard those duties.

Accordingly, Defendant's Motion to Dismiss Counts Ten and Eleven is denied.

III. CONCLUSION

Defendant's Motion to Dismiss Counts Six and Seven is **GRANTED**.

Defendant's Motion to Dismiss Count Four is **GRANTED** only as it relates to 1 CMC § 8571(b). The remaining sections of this Count will proceed to trial. The Commonwealth shall amend the SAC to strike 1 CMC § 8571(b).

Defendant's Motion to Dismiss Counts One, Two, Three, Eight, Nine, Ten, and Eleven is **DENIED**.

The Commonwealth's oral motion for leave to amend Counts Six and Seven is **DENIED**.

SO ORDERED this 31st day of January 2014.

KENNETH L. GOVENDO
ASSOCIATE JUDGE