



By the order of the court, Judge David A Wiseman

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

**TINIAN CASINO GAMING CONTROL
COMMISSION, LUCIA L. BLANCO-
MARATITA, and LISA-MARIA B.
AGUON,**

Plaintiffs,

**LYDIA F. BARCINAS, MATTHEW C.
MASGA, and BERNADITA C.
PALACIOS,**

Plaintiff-Intervenors

v.

**CHARLENE M. LIZAMA,
in her individual and official capacities,
JOEY P. SAN NICOLAS,
in his individual and official capacities,
and the MUNICIPALITY OF TINIAN
AND AGUIGUAN,**

Defendants.

CIVIL CASE NO. 15-0047

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS IN PART AND
GRANTING IN PART**

I. INTRODUCTION

THIS MATTER came before the Court on October 29, 2015, at 1:30 p.m. in Courtroom 223A. Defendants sued in their individual and official capacities, Charlene M. Lizama, Joey P. San Nicolas, and the Municipality of Tinian and Aguiguan (collectively, "the Mayor's Office"), were represented by Attorneys Matthew T. Gregory and Kimberlyn K. King-Hinds. Plaintiffs, Tinian Gaming Control Commission, Lucia L. Blanco-Maratita, and Lisa-Maria B. Aguon (collectively, "the Commission"), were represented by Attorney Joseph E. Horey. Plaintiff-Intervenors, Lydia F. Barcinas, Matthew C. Masga, and Bernadita C. Palacios, (collectively, "the Disputed Commissioners") were represented by Attorney Claire Kelleher-Smith.

1 The Mayor's Office filed a motion to dismiss the Disputed Commissioners' fifth and third causes of
2 action under Rule 12(b)(6) of the Rules of Civil Procedure, for failure to state a claim.

3 Based on review of the filings, oral arguments, and applicable law, the Court **DENIES** the Mayor's
4 Office's motion to dismiss in part and **GRANTS** in part.

5 **II. BACKGROUND**

6 The relevant allegations in the third-party complaint are as follows.

7 **Fifth Cause of Action: The Disputed Commissioners' § 1983 Claim.**

8 The Disputed Commissioners are three commissioners on the Tinian Casino Gaming and Control
9 Commission. They request damages stemming from alleged violations of 42 U.S.C. § 1983 by the Mayor's
10 Office that took place in late June of 2015—and assert this claim against Mayor San Nicolas and Treasurer
11 Lizama in their individual capacities.

12 According to the Disputed Commissioners, Mayor San Nicolas violated their clearly established
13 constitutional rights when he summarily declared that the Disputed Commissioners no longer held public
14 office. Mayor San Nicolas later instructed Treasurer Lizama to stop authorizing compensation for the
15 Disputed Commissioners. The Disputed Commissioners argue that Treasurer Lizama violated their clearly
16 established constitutional rights when she complied with Mayor San Nicolas's instructions. The Disputed
17 Commissioners allege that they requested a hearing on the matter on June 29, 2015. However, the Mayor's
18 Office allegedly refused the request a week later, on July 6, 2015.

19 The Disputed Commissioners also allege that on July 15, 2015, the Mayor's Office stipulated to
20 compensating the Disputed Commissioners until August 11, 2015—and that the Disputed Commissioners
21 would be given their compensation that was withheld from June 24, 2015 to July 15, 2015.

22 **Third Cause of Action: Implied Claim Under the Revised Tinian Casino Gaming Control Act.**

23 The Disputed Commissioners also raise and argue that the Revised Tinian Casino Gaming Control
24 Act of 1989 provides for a private tort cause of action against the Mayor's Office in their individual
25 capacities. They allege that the Mayor's Office acted in a way that caused their duties as members of the

1 Tinian Casino Gaming Control Commission to become more burdensome—and that they should be
2 compensated for it pursuant to the Casino Act.

3 III. DISCUSSION

4 The Mayor's Office argues that the aforementioned Disputed Commissioners' fifth and third causes
5 of action should be dismissed for two reasons. First, because said claims are asserted against the Mayor and
6 the Treasurer in their individual capacities, the qualified immunity defense shields them from personal civil
7 liability. Second, the Disputed Commissioners cannot allege facts to claim relief pursuant to a private cause
8 of action under the Casino Act because said cause of action does not exist as a matter of law.

9 For the following reasons, the Court finds that the Mayor's Office is not entitled to the qualified
10 immunity defense at this time. However, the Court grants the Mayor's Office request to dismiss the Disputed
11 Commissioners' third cause of action, finding that the Casino Act does not confer a private cause of action.

12 **A. Qualified Immunity.**

13 In their Rule 12(b)(6) motion, the Mayor's Office asserts the affirmative defense of qualified
14 immunity against the Disputed Commissioner's claims.¹ The Court notes that qualified immunity defense
15 may be brought during the pleadings stage. *See Sablan v. Tenorio*, 4 NMI 351, 355 n.1 (1996) (affirming
16 application of a legislative immunity defense brought under 12(b)(6)); *Hunter v. Bryant*, 502 U.S. 224, 227
17 (1991) (stating preference for resolving the qualified immunity defense at the earliest stages of litigation).

18 **1. Legal Standard**

19 On a Rule 12(b)(6) motion, the moving party must show that an affirmative defense "clearly appears
20 on the face of the complaint." *See Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993). The qualified
21 immunity defense is an affirmative defense that shields a government official from personal liability for acts

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23 ¹ This Court has jurisdiction over the Commission's § 1983 claim under Article V of the Northern Mariana Islands
24 Constitution. NMI Const. art. V § 102 (2) ("[T]hose laws not described in paragraph (1) which are applicable to Guam and which
25 are of general application to the several States as they are applicable to the several states"); *see Haywood v. Drown*, 556 US 729,
731 (2009) ("In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to
42 U.S.C. § 1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state
law.").

1 made in the performance of his or her discretionary functions. *See Rayphand v. Tenorio*, 2003 MP 12 ¶ 65.

2 Here, the Mayor's Office carries the burden to show that the qualified immunity defense applies
3 through a three-part inquiry.² First, the Mayor's Office must show that the alleged wrongdoings were taken
4 in the course of a discretionary function. *See id.* Second, the pleading must not contain allegations when,
5 taken as true, show that there was an actual violation of a constitutional right. *Id.* ¶ 68. Third, the right must
6 not have been clearly established at the time of the alleged violation. *Id.*

7 **2. Discretionary Function.**

8 A government official may generally assert the qualified immunity defense unless the questioned act
9 is an exercise of a ministerial function. *Hudson v. Hudson*, 457 F.3d 741, 744 (6th Cir. 2007). A government
10 act is ministerial where the relevant law eliminates discretion by specifying the precise action that the
11 government official must take. *Id.* (citing *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984)); *contra*
12 *Holloman*, 370 F.3d at 1265 (assessing discretionary function as whether a government act falls within the
13 official's job responsibilities).

14 Here, the complaint alleges that the Mayor's Office issued and executed a directive to suspend
15 payment of the Disputed Commissioners's salaries. As to the rationale behind the act, the complaint alleges
16 that Mayor San Nicolas suspected that the Disputed Commissioners' terms have expired. However, no
17 section of the Casino Act provides a precise directive to the Mayor or Treasurer when those government
18 officials suspect that a commissioner's terms have expired. Therefore, the Court finds that the Mayor's Office
19 met their burden to show that its act of suspending the Disputed Commissioners' salaries without providing
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21 ² The Disputed Commissioners seek that the Court apply a modified version of the qualified immunity test applied by
22 the Eleventh Circuit in *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004), which places the initial burden on the
23 government official defendant to show that his or her act was in exercise of the discretionary function—and then shifts the burden
24 to the plaintiffs to prove the rest of the *Rayphand* inquiries. The Court notes that there is no majority rule in the federal circuits
25 as to the allocation of burdens to § 1983 suit litigants. Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. Ill. U.
L.J. 143–45 (2012). Accordingly, the Court is inclined to follow the Ninth Circuit, which places the entire burden on the
government official to prove his or her qualified immunity defense. *E.g., Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005); *but*
see, e.g., DiRuzza v. Cnty of Tehama, 206 F.3d 1304, 1313 (9th Cir. 2000) (“While the plaintiff bears the burden of proof
regarding whether the right is clearly established, a defendant must prove that his or her conduct was reasonable.”).

1 an opportunity to be heard was in the exercise of its discretionary functions.

2 **3. Constitutional Violation.**

3 The Court now addresses the second part of the qualified immunity defense, whether the plaintiffs
4 alleged an actual constitutional violation. Due process is violated when there is a (1) deprivation of a life,
5 liberty, or property interest; (2) where the deprived life, liberty, or property interest was protected as a matter
6 of substantive law; and (3) lack of adequate procedures to safeguard constitutional protections. *See Premier*
7 *Ins. Co., Inc. v. Commonwealth Dep't of Labor*, 2012 MP 16 ¶ 8. Any deprived property interest must be
8 protected as a matter of substantive law when the act of deprivation took place. *See Cleveland Bd. of Educ.*
9 *v. Loudermill*, 470 U.S. 532, 541 (1985). Furthermore, that substantive law must create a reasonable
10 expectation in the plaintiff that he or she would continue to receive the benefit of a property interest. *Bd. of*
11 *Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). In construing whether a party suffered a
12 constitutional injury, the court construes the facts in the light most favorable to the plaintiff. *Saucier v. Katz*,
13 533 U.S. 194, 201 (2001).

14 The Disputed Commissioners complain that they were denied their due process rights when their
15 salaries were suspended and the Mayor's Office refused their request to entertain a hearing on the matter.³
16 Here, the complaint alleges facts to show that the Disputed Commissioners had a reasonable expectation that
17 they would have the ability to contest any suspension in salary payments, a legitimate and undeniable
18 property interest. The complaint cites the Revised Tinian Casino Gaming Control Act of 1989, a substantive
19 local law, that provides a range of compensation for the commissioners. RTCGCA § 5(4). The law also
20 states that each commissioner shall serve a term of six years. *Id.* (1). The law also protects commissioners
21 from unwarranted removal before the expiration of their terms. *Id.* (8). Therefore, viewed in the light most
22 favorable to the Disputed Commissioners, the Court finds that the Casino Act would have created an
23 objectively reasonable expectation that they would not be denied a right to contest suspension of their

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25 ³ While the Disputed Commissioners argue that no notice was provided, the complaint alleges that Mayor San Nicolas delivered a letter on June 24, 2015 notifying the plaintiffs of his intent to discontinue payment of their salaries.

1 salaries.

2 Here, the Mayor's Office does not dispute that the complaint alleges a deprivation of property without
3 a hearing.⁴ But they argue, relying on *Batterman v. Leahy*, 544 F.3d 370, 375 (1st Cir. 2008), that the alleged
4 deprivation did not rise to a constitutional violation because the Disputed Commissioners were restored of
5 their pay. Indeed, the complaint alleges that the parties later agreed to restore the withheld salaries.

6 However, *Batterman* does not hold that a court should grant qualified immunity when a government
7 official cures a constitutional violation. To the contrary, the First Circuit posits the opposite—that there
8 could be a constitutional deprivation claim, especially when the question of deprivation is unclear. *Id.* ("As
9 to that, *Batterman* may well have a state-law property right to reimbursement due to him under the
10 manual—if any is due—which would be susceptible to federal protection."). Accordingly, the Court is not
11 persuaded by the Mayor's Office's arguments that the complaint fails to allege a constitutional violation.

12 **4. "Clearly Established" Right.**

13 Having found that a constitutional violation appears on the face of the complaint, the Court addresses
14 the third step of the qualified immunity defense inquiry: (1) whether the constitutional right was clearly
15 established at the time of the government officials' action; and (2) if the right was clearly established,
16 whether such action was legally reasonable. *Rayphand*, 2003 MP 12 ¶ 68; *see also, e.g., Diamondstone v.*
17 *Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) ("Even 'where a right is clearly established,' the defendants may
18 nonetheless establish immunity by showing that reasonable persons in their position would not have
19 understood that their conduct was within the scope of the established prohibition.").

20 The Mayor's Office argues that the Disputed Commissioners' right to contest their suspension of
21 salaries was not clearly established. However, prevailing due process jurisprudence provides that where a
22 state law provides that public employees are entitled to their positions during good behavior, a government
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24 ⁴ The Mayor's Office argues that questioning a commissioner's right to office or appointing a replacement are not acts
25 that violate the Constitution. However, the disputed act is the alleged suspension of salaries—more specifically, the lack of
providing an opportunity to be heard in light of said act.

1 official may not deprive them of their property interests without notice and an opportunity to be heard. *See*
2 *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 538–45 (1985). *Loudermill* also provides that the
3 governmental interest in immediate termination does not outweigh these rights. *Id.* at 544.

4 The Casino Act provides those very protections in the requirement that its commissioners be
5 protected from removal during good behavior. RTCGCA § 5(4). While the Mayor's Office argues that there
6 is a distinction from being removed from office and having his or her salary suspended, it has not shown that
7 such distinction is material in the context of a "clearly established" due process right.⁵ Both acts could
8 potentially result in a violation of a plaintiff's constitutional rights, provided such acts occurred without
9 notice and an opportunity to be heard.

10 The Mayor's Office argues that the law regarding whether commissioners were valid members of the
11 commission was not clearly established. That question remains unresolved by this Court.⁶ However, the
12 Court cannot say the same for the suspension of salary payments without affording an opportunity to be
13 heard. *Loudermill* clearly prohibits such actions. Accordingly, the Court also finds that the Mayor's Office's
14 acts were not reasonable. Therefore, the Mayor's Office did not meet its burden to show that the Disputed
15 Commissioners' salary-related due process rights were not clearly established when it rejected the plaintiffs'
16 request to be heard.

17 **5. Good Faith Exception.**

18 The Mayor's Office argues that the qualified immunity defense nonetheless should apply because it
19 relied in good faith on a legal opinion that stated that the Disputed Commissioners' terms had expired. To
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21 ⁵ An analogy may be made under the concept of furlough. For example, the federal government allows eligible employees
22 to appeal a furlough of 30 days or less to Merit Systems Protection Board under 5 U.S.C. chapter 75. 5 U.S.C. §§ 7512(5),
23 7513(d); 5 C.F.R. § 752.401(a)(5). Thus, due process is afforded in even those situations that the Mayor's Office could
conceivably label as "mere" suspensions in pay.

24 ⁶ *See generally Tinian Casino Gaming Control Commission v. Lizama*, No. 15-0047, (NMI Super. Ct. Dec. 10, 2015)
25 (Order on Declaratory Judgment and Injunctive Relief Re: Staggered Terms for Commissioners of the Tinian Casino Gaming
Control Commission) (finding that there is a remaining question of material fact as to whether the Disputed Commissioners were
valid members of the Commission).

1 supports its argument, the Mayor's Office cites to *Kelly v. Borough of Carlisle*, 544 Fed. Appx. 129, 135 (3d.
2 Cir. 2013), for the proposition that a government official may be shielded from violating a clearly established
3 right if he or she objectively relied in good faith on a relevant legal opinion.

4 The Court declines to issue a ruling on the good faith defense at this time. First, no relevant
5 allegation clearly appears on the face of the complaint. Second, the Mayor's Office has not supported its
6 assertion, for example, in the form of an affidavit under Rule 56 of the Rules of Civil Procedure.⁷
7 Accordingly, the Court defers ruling on the Mayor's Office good faith reliance defense until a later stage in
8 the litigation. Thus, the Court also finds that the Mayor's Office is not entitled to the qualified immunity
9 defense at this time.

10 **B. Private Cause of Action Under the Casino Act.**

11 Turning to the dismissal of the third cause of action, the Mayor's Office argues that the Casino Act
12 does not create an implied private cause of action. According to the Disputed Commissioners, a private tort
13 cause of action may be found within the Casino Act's text that is analogous to a subset of tortious business
14 interference as provided under Section 766A of the Restatement (Second) of Torts.⁸ However, the Court is
15 persuaded by the Mayor's Office's arguments that the Casino Act does not provide a private remedy of that
16 nature.

17 A court may find that a statute confers a private cause of action by evaluating three factors: (1)
18 whether the plaintiff is part of the class of members the law serves to benefit; (2) indication of legislative
19 intent to create or to deny a remedy; and (3) creating a remedy is consistent with the underlying purpose of
20 the legislative scheme. *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 40.

21 Here, the Casino Act serves to benefit the Disputed Commissioners by protecting their tenure while

22 ⁷ The Mayor's Office instead directs the Court to an earlier filed memorandum of points and authorities.

23 ⁸ Pursuant to Section 766A of the Restatement (Second) of Torts, "One who intentionally and improperly interferes with
24 the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from
25 performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for
the pecuniary loss resulting to him."

1 in good behavior. RTCGCA, § 5(4) ("Removal of a commissioner before the expiration of his term shall
2 occur only by the Mayor and on grounds of gross neglect or dereliction of duty, conviction of a misdemeanor
3 or felony, or mental or physical incapacity, except that upon conviction of any felony or upon the finding
4 of a violation under this Act, the Commissioner shall lose his position automatically."). Thus, this factor
5 favors the Disputed Commissioners.

6 As to legislative intent to create a private cause of action, the Disputed Commissioners argue that
7 certain protections exist within the Casino Act to insulate the Commission members from political
8 interference. For example, citing Section 5(7) of the Casino Act, the Disputed Commissioners argue that
9 Commission members are able to elect their chairperson. As another example, the Disputed Commissions
10 point to the following language from Part XII, Section 12 of the Casino Act:

11 It is in the public interest that the institution of licensed casino establishments be strictly
12 regulated and controlled pursuant to the above findings and pursuant to the provisions of this
13 Act, which provisions are designed to engender and maintain public confidence and trust in
14 the regulation of the licensed enterprises, to provide a meaningful and permanent
15 contribution to the economic viability of the resort and tourist industry of Tinian and the
16 Commonwealth.

17 However, the Court does not find that these provisions are indicative of a legislative intent to create
18 a private remedy for the Disputed Commissioners. As a preliminary matter, there is no traditional legislative
19 history that the Court can draw on to determine legislative intent. *E.g.*, *National R.R. Passenger Corp. v.*
20 *National Ass'n of R.R. Passengers*, 414 U.S. 453, 461–62 (1974) (drawing on congressional records to
21 determine legislative intent). The Court takes judicial notice that the Casino Act first became law through
22 local initiative. Accordingly, the Court may only construe the Casino Act's underlying legislative scheme
23 from the language of the law as a whole. *See id.* at 461.

24 Here, the Mayor's Office has shown that the text of the Casino Act does not imply that the Disputed
25 Commissioners should be compensated in damages for their injuries—the pecuniary loss resulting from the
employer's alleged interference with the execution of their duties. In addition, the Disputed Commissioners
have not cited to case law that allows a Court to interpret policy provisions that promote competent

1 regulation for the people's welfare in such a way. Accordingly, the second and third factor weighs against
2 the Disputed Commissioners. Therefore, the Court finds that the Casino Act does not confer a private cause
3 of action for alleged wrongful interferences with a commissioner's duties and responsibilities. The Court
4 grants the Mayor's Office 12(b)(6) motion on this issue. In addition, the Disputed Commissioner's third
5 cause of action is dismissed.

6 **CONCLUSION**

7 Based on the foregoing, the motion to dismiss filed by the Mayor's Office is **DENIED** in part and
8 **GRANTED** in part.

9 The Court **FINDS** that the Mayor's Office is not entitled to the qualified immunity defense at this
10 stage in the litigation. Thus, at this time, the Mayor's Office is not entitled to assert the qualified immunity
11 defense as the basis for dismissal of the claims against Mayor San Nicolas and Treasurer Lizama in their
12 individual capacities. In this respect, the Mayor's Office's motion to dismiss is **DENIED**.

13 Furthermore, the Court **FINDS** that the Casino Act does not provide for a private cause of action
14 analogous to Section 766A of the Restatement (Second) of Torts. Thus, the Mayor's Office's dismissal of
15 the third cause of action is **GRANTED**. The Disputed Commissioner's third cause of action is **DISMISSED**
16 with prejudice.

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18 **SO ORDERED** this 29th day of December, 2015.

19
20 /s/
21 David A. Wiseman, Associate Judge