

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

THOMAS B. PANGELINAN,
Plaintiff-Appellant,

v.

THE NORTHERN MARIANA ISLANDS RETIREMENT FUND,
Defendant-Appellee.

SUPREME COURT NO. 06-0030-GA
SUPERIOR COURT NO. 04-0578C

Cite as: 2009 MP 12

Decided September 2, 2009

Robert T. Torres, Saipan, Northern Mariana Islands, for Plaintiff-Appellant
James E. Hollman, Saipan, Northern Mariana Islands, for Defendant-Appellee
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; TIMOTHY H. BELLAS, Justice Pro Tem; JESUS C.
BORJA, Justice Pro Tem

DEMAPAN, C.J.:

¶ 1 Thomas B. Pangelinan appeals the trial court’s order denying his request for retroactive payment of retirement benefits that were withheld by the Northern Mariana Islands Retirement Fund, during the time that Pangelinan re-entered the workforce to serve as a government employee. Pangelinan also argues that the trial court erred by denying his request for interest payments on the limited amount of damages it did award him. We hold that the trial court did not err in refusing to grant Pangelinan the full extent of benefits withheld by the Retirement Fund, as he assented to the work restrictions set forth at Article III, Section 20(b) of the Commonwealth Constitution by not objecting to elevated annuity payments within a reasonable time. Further, the trial court correctly denied Pangelinan interest on his damages because the Commonwealth legislature did not expressly authorize such awards. Accordingly, the trial court’s order is AFFIRMED.

I

¶ 2 Throughout his career, Pangelinan worked for the Commonwealth government in several different capacities. He began work in August 1967 as a school teacher in the Public School System (“PSS”), and eventually advanced to the positions of vice principal and principal before retiring in 1995. In 1980, while Pangelinan was still employed by PSS, he began contributing a percentage of his income to the Northern Mariana Islands Retirement Fund as required by the newly enacted Public Law 1-43. On July 21, 1995, at the age of forty-seven, Pangelinan retired after working for PSS for over twenty-eight years. As a government retiree eligible to receive a pension from the Retirement Fund, Pangelinan began drawing bi-weekly benefits in the amount of \$1,393.02. This amount was derived from a statutory formula, based on the number of years Pangelinan was employed and the average of his three highest annual salaries. However, pursuant to a constitutionally-based five-year credit, the Retirement Fund calculated the above amount as if Pangelinan had worked for thirty-three years, rather than basing his benefits on the actual twenty-eight years he worked for PSS. If the additional credit had not been applied, Pangelinan would have received \$1,171.90 on a bi-weekly basis.¹

¶ 3 Pangelinan’s additional five-year credit stems from Article III, Section 20(b) of the Commonwealth Constitution, which provides a retirement scheme for government employees

¹ In addition to the five years’ credit, the Retirement Fund also unilaterally issued Pangelinan an “early retirement bonus” in an amount equivalent to thirty percent of his annual salary at the time of retirement. The bonus was statutorily prescribed, and, similar to the five years’ credit, Pangelinan neither requested nor objected to receiving the additional money.

who have accrued enough time to retire, even if they have not reached the standard retirement age of 60. The provision states:

An employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system shall be credited an additional five years and shall be eligible to retire. An employee who elects to retire under this provision may not be reemployed by the Commonwealth Government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year

NMI Const. art. III, § 20(b).

¶ 4 Approximately four years after retiring, Pangelinan was elected to the Twelfth Commonwealth Legislature in November 1999. From January 10, 2000 until January 12, 2002, Pangelinan worked full-time as a legislator and received a salary.² During his two years and three days in the legislature, however, the Retirement Fund ceased issuing retirement benefits to Pangelinan. The Retirement Fund reasoned that Pangelinan was no longer retired, and that he had forfeited his benefits for the remainder of the fiscal year 2000 pursuant to the sixty-day limitation set forth at Article III, Section 20(b) of the Commonwealth Constitution. Additionally, he was also required to resume contributing a percentage of his salary to the Retirement Fund.

¶ 5 Following Pangelinan's term as a legislator, Governor Juan Baubauta appointed him to serve as Secretary of the Department of Land and Natural Resources ("DLNR") on February 11, 2002. Again, as a full-time government employee, Pangelinan received a salary, contributed a percentage of his salary to the Retirement Fund, and did not receive retirement benefits. The Retirement Fund also did not issue Pangelinan any benefits during the twenty-eight day period between his time in the legislature and his appointment as Secretary of the DLNR.

¶ 6 Pangelinan retired from the DLNR on February 17, 2004 after an additional two years and six days of government service. At this point, Pangelinan had accrued a total of approximately thirty-two years and six months of actual government service. Upon his second retirement, the Retirement Fund recalculated Pangelinan's benefits, taking into account the additional four years and nine days he worked as a legislator and as Secretary of the DLNR. The Retirement Fund also reapplied the constitutionally-based five year credit, bringing his total credited service to thirty-seven years and six months. Based on this extended amount of time, the Retirement Fund recommenced issuing benefits to Pangelinan in the amount of \$1,799.90 on a bi-weekly basis. Absent the five-year credit, the amount would have been \$1,454.93.

² For four years between his retirement from PSS in 1995 and his time in the legislature, Pangelinan served on the Commonwealth Board of Education. While serving on the Board, Pangelinan continued to draw full retirement benefits. He received a modest stipend for time spent at each meeting, but never received a salary for his service. Neither party makes issue of the fact that Pangelinan continued to receive retirement benefits while also receiving a stipend.

¶ 7

On December 10, 2004, Pangelinan sued the Retirement Fund seeking retroactive payment of benefits it withheld for the period of January 10, 2000 through February 17, 2004.³ Both parties stipulated to all facts, and, in turn, moved for summary judgment. The trial court denied Pangelinan's request for benefits for the full duration of his employment with the legislature and the DLNR. It found that a government employee has a choice of whether to accept the five-year credit and corresponding work restriction, and that Pangelinan tacitly assumed those conditions by accepting elevated annuity payments for approximately four years following his first retirement. However, the trial court awarded him damages for 268 of the days within the approximate four-year period. The trial court based its decision on a provision in Article III, Section 20(b) which allows a government retiree to return to paid government service for up to sixty days each fiscal year without forfeiting retirement benefits for the remainder of that year. Therefore, it found that Pangelinan was eligible for retirement benefits for sixty days each of the four years he served. In addition to those 240 days, the trial court found that he was eligible to receive benefits for the twenty-eight-day period between his term as a legislator and his service as DLNR Secretary, bringing Pangelinan's total days eligible for wrongly-withheld retirement benefits to 268.

¶ 8

The trial court also awarded Pangelinan interest on the damages at a rate of twelve percent per annum pre-judgment, and nine percent per annum post-judgment. The parties subsequently filed statements of damages, but each arrived at different amounts, as they each used different methods of interest calculation.⁴ Based on this discrepancy, and after reconsidering the interest award, the trial court entered an order sua sponte on June 13, 2006 completely revoking any award of interest, and instead entering a judgment for \$30,646.44, which was the undisputed principal amount of damages. The trial court relied upon the doctrine of sovereign immunity in reaching its decision to not award interest, finding that the Retirement Fund was a constitutionally-based public entity that was entitled to such protection.

II

Pangelinan's Rights Under Article III, Section 20(b) of the Commonwealth Constitution

¶ 9

On appeal, Pangelinan claims the trial court erred by granting summary judgment in favor of the Retirement Fund regarding the remainder of the retirement benefits it withheld. In

³ In his complaint, Pangelinan requested a declaratory judgment that he was entitled to the withheld benefits. The trial court, however, treated the complaint as a complaint for damages rather than a declaratory judgment, as it asserted a cause of action for breach of contract.

⁴ In his statement of damages, Pangelinan sought \$44,817.17 based on the principal plus interest calculated on a compound basis. The Retirement Fund, however, calculated the interest on simple basis and filed a statement asserting it was liable for only \$37,082.

support of his claim, Pangelinan argues that the constitutional limitation on returning to work set forth in Article III, Section 20(b) does not apply to him. He asserts that he did not “elect” to receive the five-year credit allowed by the provision, and thus he should not be subject to its sixty-day per year work restriction. Appellant’s Br. at 11. We therefore determine whether the constitutional restriction applies to Pangelinan, such that he became ineligible to receive retirement benefits after working more than sixty days for the government each of the four years at issue. We review grants of summary judgment de novo. *Diamond Hotel Co., Ltd. v. Matsunaga*, 4 NMI 213, 216 (1995). We likewise review matters of statutory and constitutional interpretation de novo. *Commonwealth v. Kaipat*, 2 NMI 322, 327-28 (1991); *Commonwealth v. Tinian Casino Gaming Control Comm’n*, 3 NMI 134, 143 (1992).

¶ 10 In order to trigger the benefits and restrictions of Article III, Section 20(b), a retiree must satisfy two conditions. First, the retiree must have accumulated at least twenty years of creditable government employment. The plain text of the constitutional provision states, “[a]n employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system . . . shall be eligible to retire.” NMI Const. art. III, § 20(b). Pangelinan clearly met this requirement, as he worked for PSS for over twenty-eight years prior to his first retirement in 1995. The second condition is that the retiree “elect to retire under this provision.” *Id.* Once these two conditions are satisfied, the retiree “shall be credited an additional five years and shall be eligible to retire,” but “may not be reemployed by the Commonwealth Government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year” *Id.* It is this second condition, whether Pangelinan “elected” to retire under this provision, that is at issue.

¶ 11 The word “elect” implies that a retiree has a choice to retire under Article III, Section 20(b) or another constitutional or statutory retirement scheme. Because no other retirement option exists in the Commonwealth Constitution, we look to other legal authorities to determine whether Pangelinan could have elected a different option that would have allowed him to re-enter the government workforce while continuing to draw retirement benefits.

¶ 12 The Northern Mariana Islands Retirement Fund Act (the “Act”) governs most aspects of the Retirement Fund’s general operations, including administration of the Fund, retirement eligibility, and benefit calculation, among other regulations. *See* 1 CMC §§ 8301-8405. To preface our discussion on the statutory scheme, we note that, if any retirement provision at issue conflicts with Article III, Section 20 of the Commonwealth Constitution, the constitutional source prevails. *See Ada v. Sablan*, 1 NMI 415, 427 (1990) (stating that the “NMI Constitution is a paramount source of Commonwealth law”). However, where the Court is able to read a

statute in conjunction with, rather than in conflict with, the Constitution, it should do so. *Estate of Faisao v. Tenorio*, 4 NMI 260, 265 (1995).⁵

¶ 13 Several provisions of the Act are applicable to Pangelinan’s circumstances as they existed upon his first retirement in 1995. First, having worked for PSS for approximately twenty-eight years, and being a class II member of the Retirement Fund, 1 CMC § 8343(b) makes Pangelinan eligible to retire.⁶ Because this provision of the Act simply identifies when a class II member is eligible to retire, we see no reason why it cannot be read in conjunction with Article III, Section 20(b). Whether one receives the five-year credit upon retirement has no bearing on whether one has reached the twenty-five-year threshold required by 1 CMC § 8343(b). Moreover, the sixty-day limitation only becomes relevant if a retiree, after actually retiring, decides to re-enter the workforce. Thus, if an individual retires pursuant to 1 CMC § 8343(b), it is possible that he or she could simultaneously elect to retire under Article III, Section 20(b) of the Constitution as well.

¶ 14 Also applicable to Pangelinan is 1 CMC § 8344, which provides the formula by which annuity payments for class II members are calculated. Again, this formula takes into account, among other factors, the retiree’s length of service, as well as his or her average salary. As with 1 CMC § 8343(b), this provision is applicable to a class II member whether or not he or she also retires under Article III, Section 20(b) of the Constitution. Whether one retires with or without the five-year credit and corresponding sixty-day limitation, the formula for calculating benefits under 1 CMC § 8344 remains constant and does not conflict with Article III, Section 20(b).

¶ 15 The statute that is perhaps most directly related to Article III, Section 20(b) is 1 CMC § 8392, which governs reemployment and “double dipping.”⁷ Subsection (a) of this provision expressly prohibits government reemployment once an individual retires, stating “[a] person who has retired and received retirement benefits . . . shall not be employed by or under an employment or consulting contract with the government of the Northern Mariana Islands” 1 CMC § 8392(a). However, the legislature included five exceptions to the above prohibition, two of which are applicable to Pangelinan. First, 1 CMC § 8392(a)(1) allows those “[a]ppointed by the

⁵ *Estate of Fiasao* focuses on statutory, rather than constitutional interpretation. However, “[t]he general principles which apply to statutory construction are equally applicable in cases of constitutional construction.” *Camacho v. Northern Marianas Ret. Fund*, 1 NMI 362, 368 (1990) (quoting *Pangelinan v. CNMI*, 2 CR 1148, 1161 (D.N.M.I. App. Div. 1987)).

⁶ 1 CMC § 8343(b) states that “[a]ny class II member who has 25 years of vesting service may retire on a service retirement annuity upon written application to the board.”

⁷ Double dipping refers to “[a]n act of seeking or accepting essentially the same benefit twice, either from the same source or from two different sources” *Black’s Law Dictionary* 506 (7th ed. 1999).

Governor to a position requiring the advice and consent of the Senate or the House of Representatives or both” to re-enter the government workforce. 1 CMC § 8392(a)(1). In order to serve as Secretary of the DLNR, Pangelinan was appointed by the governor and subsequently confirmed by the senate, thus allowing him to avoid the reemployment restriction for that period of his career. Additionally, 1 CMC § 8392(a)(3) exempts those elected to public office from the reemployment restriction. Since Pangelinan’s position as a legislator required him to be elected by the public, he was not barred from returning to public service by this section of the Act upon returning to work in this capacity. Once again, the application of this provision to a government employee does not conflict with or prohibit an individual from also retiring pursuant to Article III, Section 20(b) of the Constitution.

¶ 16 After examining the Act in general, and specifically those provisions that are directly applicable to Pangelinan, we conclude that any government employee who wishes to receive annuity payments by virtue of his or her membership in the Retirement Fund must do so in accordance with the Northern Mariana Islands Retirement Fund Act, set forth at 1 CMC §§ 8301-8405. The Act provides a comprehensive framework that is necessary for the Retirement Fund to operate, and governs the rights and responsibilities of any government employee who wishes to retire. Article III, Section 20(b) of the Constitution, on the other hand, provides substantially less logistical guidance for Retirement Fund administration. It is applicable to only those employees who have acquired at least twenty years of creditable government service, and imposes certain burdens and benefits on those who retire pursuant to that provision. One cannot retire solely under Article III, Section 20(b); it does not provide a formula for benefit calculation, does not discuss minimum and maximum annuity payments, and does not require contributions to the Fund, among other limitations. Thus, the question remains: when an individual retires according to provisions of the Act, and the individual is also eligible to retire pursuant to Article III, Section 20(b), does Article III, Section 20(b) require the Retirement Fund to apply the five-year credit and corresponding sixty-day restriction, or may the individual opt out?

¶ 17 Article III, Section 20(b) of the Constitution is ambiguous as to whether applying the five-year credit is mandatory. It states in part, “[a]n employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system *shall* be credited an additional five years and shall be eligible to retire.” NMI Const. art. III, § 20(b) (emphasis added). Use of the word “shall” has the effect of creating a duty. *Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284, 292 (1992). This is particularly so when the mandate is directed toward a public official or entity. *Id.* at 293. Thus, when reading this part of Article III, Section 20(b) in isolation, the Retirement Fund has no choice but to apply the five-year credit.

¶ 18

However, when attempting to resolve an ambiguity in the law, we do not view sections of a provision in isolation. *See, e.g., Commonwealth Ports Auth. v. Hakubotan Saipan Enters., Inc.*, 2 NMI 212, 224 (1991). Rather, we view the regulation as a whole in order to ascertain the intent of the framers. *Id.* The following sentence in subsection (b) states that “[a]n employee who *elects* to retire under this provision may not be reemployed by the Commonwealth Government or any of its instrumentalities or agencies, for more than 60 days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year” NMI Const. art. III, § 20(b) (emphasis added). The general meaning of the word “elect” is “to select.” Webster’s II New Riverside University Dictionary 421 (7th ed. 1988). This Court applies the plain, commonly understood meaning of constitutional language unless there is evidence that the framers intended to convey a different meaning. *Camacho v. Northern Marianas Ret. Fund*, 1 NMI 362, 368 (1990). Under this approach, it seems clear that the framers intended government retirees to have a choice in whether to accept the five-year credit. Thus, while the first sentence creates a mandate to apply the five-year credit once an individual with at least twenty years of service retires, the second sentence makes its application optional. We must, therefore, attempt to reconcile this discrepancy. *See, e.g., Estate of Faisao*, 4 NMI at 265.

¶ 19

If credence is given to the view that the language creates a mandatory five-year credit for all retirees who reach twenty years, then the retirees’ option to “elect” the credit is essentially nullified. One provision should not be construed so as to make another provision either inconsistent or meaningless. *Id.* (citing *In re Estate of Rofag*, 2 NMI 18, 29 (1991)). Thus, we are not able to analyze Article III, Section 20(b) in a way that would ignore the framers’ intent to give qualified retirees the liberty to choose the credit. Conversely, if we honor the language creating a choice, the section directing the Retirement Fund to apply the credit remains effective. For example, once an individual does indeed *elect* to retire pursuant to Article III, Section 20(b), then the Retirement Fund *shall* credit his or her service with an additional five years. Under this reading, the retiree’s option to retire under the constitutional provision is preserved, and the Retirement Fund’s duty to apply the five-year credit is still effective. By interpreting the provision in this manner, we render a decision that is consistent with the principle that courts should regard potentially conflicting provisions as effective when they are capable of coexistence. *Id.* (quoting *Radzanower v. Touche Rosse & Co.*, 426 U.S. 148, 155 (1976)).

¶ 20

Additionally, this textual interpretation of Article III, Section 20(b) is entirely consistent with the apparent intent of the framers upon adopting the provision at the Second Constitutional Convention in 1985. *See, e.g., Songao v. Commonwealth*, 4 NMI 186, 190 (1994) (noting that a court may look to the legislative history when no single meaning clearly appears). Regarding

Article III, Section 20(b), the Committee on Governmental Institutions' Report to the Convention notes, "[t]he [five-year credit] is intended to entice those employees who have 20 years or more of qualified service to retire early from the public employment." *Subject Committee Recommendation No. 66*, Second Constitutional Convention (1985). The committee's use of the word "entice" clearly implies that the five-year provision was intended to provide government employees an incentive to retire under Article III, Section 20(b). *Id.* The existence of an incentive, in turn, indicates that retirees may choose whether to accept the credit. After all, if application of the five years was mandatory, there would be no need for the framers to entice or lure employees into taking advantage of the credit.⁸ The above report, combined with our analysis of the text of the retirement provision, leads us to the conclusion that government retirees may choose whether to accept the five-year credit and corresponding work restriction.

¶ 21 Having determined as much, we now turn to the question of whether Pangelinan tacitly retired under Article III, Section 20(b) by accepting the elevated annuity payments from his first retirement until he re-entered the workforce. The trial court held that, even though the Retirement Fund applied the five-year credit unilaterally and failed to forewarn him of potential consequences, Pangelinan cannot be allowed "to turn back the clock and avoid incurring any of the burdens imposed by Article III, Section 20, particularly after he has accepted the benefits of that provision so long without objection." *Pangelinan v. Northern Marianas Retirement Fund*, Civ. No. 04-0578C (NMI Super. Ct. July 5, 2001) (Order Granting in Part and Denying in Part Plaintiff's and Defendant's Cross-Motions for Summary Judgment at 31). We agree.

¶ 22 A government retiree's membership in the Commonwealth's retirement system "shall constitute a contractual relationship." NMI Const. art. III § 20(a). As such, principles of contract law govern whether Pangelinan's actions, or lack of action, caused him to ratify the terms that he now seeks to avoid. Pangelinan claims, in essence, that the five-year credit and sixty-day work restriction were terms of his agreement with the Retirement Fund that he did not assent to, and that he was not fully aware of the accompanying consequences. The Retirement Fund, on the other hand, was operating under the assumption that "it was *required* to add five years to Pangelinan's creditable service, because the plain language of Section 20(b) mandates that it

⁸ While not at issue in this case, we note that the five-year service credit no longer serves as an incentive to retirees who reach twenty-five years of government service. Once an employee reaches the full twenty-five-year service requirement, making him or her eligible to retire under the Act, there is no benefit conferred on the Commonwealth and retirement is no longer "early." The credit was only intended to apply to those retirees who have reached the twenty-year mark and want to retire early, but cannot do so without the benefit of the additional five-year credit to bring them within retirement eligibility under the Act. When viewed in this light, once a government employee has worked the full twenty-five years, Article III, Section 20(b) should no longer apply. However, as the parties have not directly addressed this point and it is not currently before the Court, we decline to adjudicate the matter at this time.

credit an additional five years to the total number of creditable years for *any employee* who acquired 20 years of creditable service.” *Pangelinan*, Civ. No. 04-0578C (Order Granting in Part and Denying in Part Plaintiff’s and Defendant’s Cross-Motions for Summary Judgment at 11). Pangelinan did not clearly understand the terms of his agreement, and the Retirement Fund was operating under a mistaken assumption of law. It is possible that Pangelinan may at one point have had a valid defense to his agreement with the Retirement Fund, such that he would have been able to avoid enforcement of its terms. However,

[t]he power of a party to avoid a contract for misrepresentation or mistake is lost if after he . . . knows or has reason to know of a non-fraudulent misrepresentation or mistake and he does not within a reasonable time manifest to the other party his intention to avoid it. The power of a party to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and if damages will be adequate compensation.

Restatement (Second) of Contracts § 381 (1981).⁹

¶ 23 Further, “in determining whether a party acted within a reasonable time once he was expected to do so, the fact that a considerable period of time had elapsed after the original transaction was significant.” *Id.* cmt. b. From the time he began receiving annuity payments in August 1995, Pangelinan accepted the elevated benefits without complaint. Although he claims to have inquired about potentially being hindered from returning to government service, he never manifested an intention to avoid the restriction to the Retirement Fund. He never expressly objected to receiving any additional funds, never attempted to return any money, and never filed any form of complaint until the immediate lawsuit. Indeed, the record is void of any documentation supporting Pangelinan’s alleged inquiries. Even if he did inquire, a mere inquiry does not demonstrate a manifestation of his intent to reject the additional benefits.

¶ 24 To avoid being bound by the Article III, Section 20(b) limitation on government employment, Pangelinan was required to manifest an intent to reject the benefits within a reasonable time after discovering their existence. On or around August 25, 1995, Pangelinan received his benefit calculation statement and a letter from the Retirement Fund concerning his annuity payments. The service computation statement acknowledged that Pangelinan received the five-year credit. This addition was notated directly beside the section titled “Services

⁹ “In all proceedings, the rules of the common law, as expressed in the restatements of law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary” 7 CMC § 3401. As there is no Commonwealth statute or case law directly governing this issue, we turn to the Restatement (Second) of Contracts.

Constitutional Amendment #19.”¹⁰ Appellant’s Excerpt of Record (“ER”) at 82. Additionally, the letter from the Fund administrator stated “you will receive a gross pension of \$1,393.02 on every fifteenth (15th) and last day of the month *as long as you remain qualified and do not return to government service.*” *Id.* at 83 (emphasis added). Since Pangelinan had actual knowledge of the conditions attached to his benefits, to avoid ratifying the agreement he would have had to manifest his intent to reject the additional money within a reasonable time from that date. As previously mentioned, “in determining whether a party acted within a reasonable time once he was expected to do so, the fact that a considerable period of time had elapsed after the original transaction was significant.” Restatement (Second) of Contracts § 381 (1981) cmt. b. Pangelinan first accepted benefits in August 1995; he did not affirmatively attempt to opt out of Article III, Section 20(b) until he requested declaratory relief in December 2004. Nine-and-a-half years is simply too long to wait before asserting a right.¹¹ Because Pangelinan retired in 1995 subject to the sixty-day restriction set forth in Article III, Section 20(b), and because he failed to object to the additional benefits within a reasonable time, he ratified the terms of the agreement and cannot avoid their consequences.

Interest Payments Not Authorized

¶ 25

Pangelinan also appeals the trial court’s denial of interest payments on the \$30,646.44 in damages for 268 days worth of wrongly-withheld benefits. The trial court found that, although the Retirement Fund may sue and be sued, it did not specifically waive its immunity from interest damages. It reasoned that, “[b]ecause an award of interest was historically considered to be an award separate and apart from an award of monetary damages, a general consent to suit and liability would not encompass the sovereign’s liability for interest.” *Pangelinan*, Civ. No. 04-0578C (Order as to Prejudgment and Postjudgment Interest at 5). Pangelinan claims, on the other hand, that the Retirement Fund functions as a private entity, and as a result, the privilege of sovereign immunity should not extend to potential interest damages. Whether a government

¹⁰ Article III, Section 20 of the Commonwealth Constitution is referred to at times throughout the parties’ briefs and trial court order as “Amendment 19.”

¹¹ The Retirement Fund provides numerous citations to cases holding that a party’s delay was sufficiently long enough to ratify, as a matter of law, terms that the party sought to avoid. Although these cases discuss ratification in the context of avoidance based on duress, we nevertheless find their time limits persuasive: *DiRose v. PK Management Corp.*, 691 F.2d 633, 634 (2d Cir. 1982) (eighteen months); *Boyle v. Burkich*, 665 N.Y.S.2d 104, 105 (nearly two years); *Reader v. Reader*, 653 N.Y.S.2d 768, 768 (fifteen-and-one-half months); *Nicholas A. Cutaia, Inc. v. Buyer’s Bazaar, Inc.*, 637 N.Y.S.2d 857, 858 (six months); *Benjamin Goldstein Prods., Ltd. v. Fish*, 603 N.Y.S.2d 849, 851 (over one year); *Kranitz v. Strober Org., Inc.*, 580 N.Y.S.2d 350, 350 (twelve months); *Bank Leumi Trust Co. v. D’Evori Int’l, Inc.*, 558 N.Y.S.2d 909, 914 (over six months); *George Colon & Co. v. East 189th Street Bldg. & Constr. Co.*, 126 N.Y.S. 226, 227 (nearly fifteen months).

entity enjoys sovereign immunity on interest damages is a question of law reviewed de novo. *United States v. \$277,000 United States Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995).

¶ 26 The Retirement Fund, as a government entity, would generally be entitled to immunity from lawsuits. However, “[t]he fund, through its trustees, has the following powers and duties: To sue or be sued in its corporate name.” 1 CMC § 8315(d). Under this authority from the legislature, Pangelinan successfully sued the Retirement Fund for wrongly-withheld benefits in the principal amount of \$30,646.44. When the legislature opened the door for lawsuits against the Retirement Fund, it waived its immunity from damages, but in doing so did not also expressly waive the Fund’s immunity from interest on those damages. In suits between two *private* parties, “[c]ourts may allow interest as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled even where interest is not stipulated for by contract, or authorized by statute.” *Manglona v. Commonwealth*, 2005 MP 15 at ¶ 43 (citing *United States v. North Carolina*, 136 U.S. 211, 216 (1980)). However, “[w]here a sovereign government is a party and interest is not stipulated for by contract or authorized by statute, interest is not to be awarded against a sovereign government.” *Id* (citations omitted). “The presence of a ‘sue-and-be-sued’ clause . . . is not dispositive of the question of whether an agency is subject to awards of prejudgment interest.” *Kingston Constructors, Inc. v. Washington Metro. Transit Auth.*, 860 F.Supp 886, 889 (D.D.C. 1994). Accordingly, since the legislature has not extended the scope of damages to include awards of interest against the Retirement Fund, and because the Retirement Fund has not contractually waived this protection, the trial court did not err in denying Pangelinan interest on his damages.

¶ 27 Pangelinan argues that the trial court ignored established exceptions to the no-interest rule. He states that the government may be held liable for interest damages: “(1) in a takings case where interest is constitutionally required, (2) where interest awards are specifically provided for in statute or contract or otherwise expressly consented to, and (3) where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.” *Studio Frames, Ltd. v. Standard Fire Ins. Co.*, 397 F.Supp.2d 685, 686 (M.D.N.C. 2005). Specifically, Pangelinan argues that the third exception applies to the Retirement Fund, because it is “authorized to employ and consult with outside experts, loan money, and perform a host of other commercial activities in the course of managing its pension fund, including, but not limited to, filing lawsuits on its own behalf.” Appellant’s Br. at 28.

¶ 28 Contrary to Pangelinan’s assertion, the trial court did in fact address this exception. It found that, “even though [the Retirement Fund] may operate in some ways that resemble those of private retirement plans,” it nevertheless remains “an agency of the sovereign and subject to

immunity” *Pangelinan*, Civ. No. 04-0578C (Order as to Prejudgment and Postjudgment Interest at 5). In support of its conclusion, the trial court commented on *Studio Frames*’ liberal extension of sovereign immunity principles, citing the fact that “even a *private* insurance company was entitled to claim immunity from interest because its policy was issued pursuant to a government program.” *Id.* (citing *Studio Frames*, 397 F.Supp.2d at 686).

¶ 29

A sue-and-be-sued government agency that also engages in commercial activities does not per se “cast off the cloak of sovereignty” in regard to interest damages. *See, e.g., R&R Farm Enters. v. Fed. Crop Ins. Co.*, 788 F.2d 1148, 1153 (5th Cir. 1986). Rather, the agency must “embark upon an essentially commercial venture which aspires to profitability” in order to subject itself to liability for interest damages without previously waiving such insulation. *Id.* As *Pangelinan* points out, the Retirement Fund does indeed invest much of its capital and consult with third-party experts in order to accumulate a larger reserve of funds. However, its main objective is not to make a profit for those who contribute to the fund, and thus have an ownership interest in it. Its purpose in engaging in commercial activities is to ensure that there is enough money to cover annuity payments that are presently due. The amount of members’ benefits is not necessarily contingent on profits the Retirement Fund may make; members’ benefits are fixed amounts that are based solely on the formulas contained in the Northern Mariana Islands Retirement Fund Act. Of course, if the Retirement Fund happened to lose money to the point of becoming insolvent, members would receive nothing, but if profits surge, the beneficiaries reap no more than they otherwise would have. Thus, the Retirement Fund has not embarked upon “an essentially commercial venture which aspires to profitability.” *Id.*

¶ 30

In addition, federal case law demonstrates the extent to which a government entity must insert itself into the private sector in order to forfeit its immunity from interest damages. For example, the United States Supreme Court has held that the United States Postal Service (“USPS”) is an agency that has waived its immunity from interest damages through its commercial activities. *Loeffler v. Frank*, 486 U.S. 549, 556 (1988). Like the Retirement Fund, the USPS is a sue-and-be-sued agency with no separate express legislative waiver from interest damages. However, the United States Supreme Court found that the United States Congress had intentionally launched the agency into the commercial world so that it might compete with similar private businesses, and to become a market participant on equal footing with other mail services. *Id.* The Supreme Court noted that Congress intended for the USPS to “be run more like a business than its predecessor, the Post Office Department,” and as a result, Congress “cast off the Service’s ‘cloak of sovereignty’” *Id.* (citing *Franchise Tax Board of California v. USPS*, 467 U.S. 512, 520 (1984)).

¶ 31 In contrast, Pangelinan has not provided sufficient evidence to establish that the Commonwealth legislature intended to launch the Retirement Fund into the business arena in the same way. While it may hire consultants, invest funds, and make third-party loans, it does so for the benefit of its contributors, and so that future retirees are able to receive scheduled annuity payments. Moreover, government employees such as Pangelinan are required by statute to contribute a portion of their salaries to the Retirement Fund, whereas the USPS provides an optional service to its patrons. The non-compulsory nature of the USPS’s business dealings is an inherent characteristic of a private commercial enterprise, and it cannot, unlike the Retirement Fund, compel a large section of the population to supplement its profits and losses on a regular basis. The Commonwealth legislature has declared that “[t]he purpose of [the Retirement Fund] is to provide retirement security and other benefits to government employees” 1 CMC § 8301. It is clear from this stated purpose, as well as the Fund’s general divergence from the private commercial enterprise model, that the legislature did not intend to cast off the agency’s cloak of sovereignty, thereby sanctioning interest awards on any damages assessed by the judiciary.

Takings Analysis Not Applicable

¶ 32 Pangelinan argues that principles from takings jurisprudence should be incorporated into this case to allow for interest damages. In support of this assertion, he notes that when the government wrongfully seizes property, and the government is later forced to return that property, courts generally allow the deprived owner to recover interest damages. *\$277,000 United States Currency*, 69 F.3d at 1497. In takings cases such as these, interest awards are “based on an interpretation of constitutional text (‘just compensation’) to which the requirement of an express waiver of sovereign immunity by Congress is not applicable.” Appellant’s Br. at 32 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986)). In essence, courts have found that the term “just compensation” in the Fifth Amendment inherently encompasses both the principal amount seized plus interest for the time that the owner was deprived of his or her property. *Id.* Similarly, Pangelinan argues, a separate waiver of sovereign immunity for interest damages is not required here, as his ability to receive benefits for at least sixty days each fiscal year is found in the text of the Commonwealth Constitution itself.

¶ 33 Although the Constitutional requirement of “just compensation” has been held to encompass the return of the wrongly-seized res plus interest, the fact that the double-dipping regulation at issue is located in the Commonwealth Constitution does not automatically abolish sovereign immunity protection from interest awards. Pangelinan argues that Article III, Section 20(b), stating that a retiree may not work “for more than 60 days in any fiscal year without losing

his or her retirement benefits,” like the “just compensation” requirement, is a constitutional guarantee requiring the Retirement Fund to pay interest along with wrongly-withheld benefits. This assumption is misguided for two reasons. First, the text of the takings clause places a mandate on the government – that it must pay just compensation if it takes private property. On the other hand, the relevant section of the Commonwealth Constitution acts as a limitation to a retiree’s ability to work while continuing to receive retirement benefits. The actual right to receive a retirement annuity derives from the statutory scheme set forth in the Act. Moreover, the Retirement Fund’s legal relationship with retirees, including the amount of each respective annuity payment, is governed by provisions of the Act and principles of contract law, whereas a property owner’s right to compensation, including how much compensation he or she receives, is purely constitutionally-based.

¶ 34 Second, the case law cited by Pangelinan is not applicable to the instant case. As previously noted, interest damages are not available to claimants in the absence of an express provision to the contrary in the relevant statute or contract. *Manglona*, 2005 MP 15 ¶ 43; *see also United States v. Tillamooks*, 341 U.S. 48, 49 (1951). The only textually-based exception arises when the taking entitles the claimant to just compensation under the federal Fifth Amendment takings clause. *Id.* “Only in such cases does the award of compensation include interest.” *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304 (1923). Since the exception Pangelinan cites has only been extended to claims arising under the takings clause, and the takings clause is not applicable to the case at hand, we decline to apply it here.

¶ 35 Pangelinan also cites three cases in which the government seized property upon allegations that the owner had used the property to further illegal activities.¹² In each of these cases, the respective courts recognized and reiterated the rule set forth in *Shaw* – that “interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity from an award of interest.” 478 U.S. at 311. However, each court also held that the rule did not apply in those specific cases, because “not every payment of money by the government related to something it has seized can be characterized as a forbidden award of pre-judgment interest.” *\$277,000 United States Currency*, 69 F.3d at 1493. The courts stated that the government, in seizing property related to alleged criminal matters, essentially stood in the shoes of the former property holder for the time the government was in possession. *Id.* They held that,

¹² *\$277,000 United States Currency*, 69 F.3d at 1492 (dealing with the wrongful seizure of alleged drug-trafficking money); *United States v. \$515,060 United States Currency*, 152 F.3d 491, 495 (6th Cir. 1998) (arising out of a currency seizure which occurred as part of a federal investigation into illegal gambling); and *United States v. 1980 Lear Jet*, 38 F.3d 398, 400 (9th Cir. 1994) (arising out of the seizure of a jet that was allegedly used to further criminal activities).

in cases of this nature, “there was also no issue of sovereign immunity ‘because the government is not being required to pay interest, only to disgorge some of its share of the proceeds of seized property.’” *Id.* (quoting *United States v. 1980 Lear Jet*, 38 F.3d 398, 402 (9th Cir. 1994)). “The government simply obtained an ownership interest in a portion of the proceeds of the sale of property,” and it was not allowed to retain benefits earned on that temporary property interest. *1980 Lear Jet*, 38 F.3d at 402. The interest became part of the principal in these seizure cases, essentially taking this issue of interest damages off the table. Because of this, sovereign immunity protections did not apply.

¶ 36 The case at hand is distinguishable in several respects. First, the nature of the claims against the government are vastly different. This is a contract dispute; there is no alleged criminal act similar to those in the cases cited by Pangelinan. Additionally, the Retirement Fund did not actively seize property, but rather Pangelinan made gradual formulaic contributions to a collective pool of money. In the criminal cases, the courts found that the government acquired an ownership interest in the seized property, whereas the Retirement Fund simply acts as a manager of money that government employees contribute. Furthermore, any benefit the Retirement Fund may have gained by retaining Pangelinan’s money was actually an indirect benefit for Pangelinan himself, as profits from investments are added to the reserve of money used by the Retirement Fund to issue annuity payments to retirees. The same cannot be said for property seized pursuant to criminal and tort statutes. In sum, while Pangelinan’s claim against the Retirement Fund bears some resemblance to wrongly-seized property under the takings clause and criminal statutes, the no-interest exceptions in those cases do not apply here. Unlike the takings cases, there is no constitutional guarantee that encompasses both the principal amount plus interest, such that a waiver of sovereign immunity is unnecessary. Further, unlike the criminal seizure cases Pangelinan cites, this case involves a request for actual interest awards under contract law, rather than earned benefits that have become part of the principal. As such, protections of sovereignty immunity apply. Since neither the legislature nor the Retirement Fund made a separate stipulation for interest damages, they are not allowed in this case.

III

¶ 37 For the foregoing reasons, we hold that the trial court did not err by denying Pangelinan the remainder of the benefits the Retirement Fund withheld. Pangelinan retired pursuant to Article III, Section 20(b) of the Commonwealth Constitution by not objecting to the five-year credit within a reasonable time. In addition, Pangelinan is not entitled to interest on the limited damages he did receive, as the Retirement Fund is a government entity entitled to immunity from interest damages. Since the Commonwealth legislature did not expressly authorize such awards,

and since the Retirement Fund's operations do not bring it within the private commercial enterprise exception, Pangelinan's damages are limited to the principal amount of \$30,646.44. Accordingly, we AFFIRM the trial court's order.

SO ORDERED this 2nd day of September 2009.

MIGUEL S. DEMAPAN
Chief Justice

TIMOTHY H. BELLAS
Justice Pro Tem

JESUS C. BORJA
Justice Pro Tem