



E-FILED
 CNMI SUPERIOR COURT
 E-filed: Mar 01 2022 03:26PM
 Clerk Review: Mar 01 2022 03:26PM
 Filing ID: 67354290
 Case Number: Multi-Case
 N/A

FOR PUBLICATION

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

MICRONESIAN ENVIRONMENTAL
 SERVICES, LLC,

CIVIL ACTION NO. 21-0004
 CIVIL ACTION NO. 20-0344

Petitioner,

v.

KINA B. PETER, in her official capacity as
 the Public Auditor of the CNMI OFFICE
 OF THE PUBLIC AUDITOR, JAMES A.
 ADA, in his official capacity as the
 Secretary of the CNMI DEPARTMENT OF
 PUBLIC WORKS, FRANCISCO C.
 AGUON, in his official capacity as Acting
 Director of Procurement & Supply, DAVID
 ATALIG, in his official capacity as the
 Secretary of the CNMI DEPARTMENT OF
 FINANCE, and TANG'S CORPORATION,

ORDER DENYING PETITIONER'S
 MOTION TO COMPEL, MOTION
 FOR SANCTIONS, AND MOTION
 TO DEEM FACTS ADMITTED

Respondents.

I. INTRODUCTION

BEFORE THIS COURT are (1) Petitioner Micronesian Environmental Services, LLC's ("Petitioner" or "MES") Motion to Compel and Motion for Sanctions Against Francisco C. Aguon and David Atalig and Their Attorneys (the "Motion to Compel" and "Motion for Sanctions"); and (2) Petitioner's Motion to Deem Facts Admitted in Petitioner's First Set of Requests for Admission to Respondent Francisco C. Aguon and Petitioner's First Set of Requests for Admission to Respondent David Atalig (the "Motion to Deem Facts Admitted"). On January 13, 2022, the Court notified the parties that it would rule on the aforementioned motions without a hearing.

Based upon a review of the arguments, filings, and relevant law, the Motion to Compel, Motion for Sanctions, and Motion to Deem Facts Admitted are **DENIED**.

By order of the Court, Presiding Judge Roberto C. Naraja

II. PROCEDURAL BACKGROUND

The parties appeared before the Court on October 13, 2021, for a status conference, following which the Court entered an order dated December 9, 2021 (the “December 9 Order”). *See* Order from October 13, 2021 Case Status Conference (filed December 9, 2021). In the December 9 Order, the Court ruled that it would hold a limited evidentiary hearing on Petitioner’s newfound allegations that there were irregularities in the procurement process and that certain data relied upon by the Procurement and Supply (“P&S”) Director in his ruling were not yet in the record. *Id.* at 2. The Court ordered Petitioner to “submit a list of the evidence it contends is not in the Record. . .” *Id.*

Petitioner did not submit a list of evidence of irregularities in the procurement process and data relied upon by the P&S Director that it contends is not in the record. Instead, on November 16, 2021, Petitioner propounded Rule 26 discovery requests on Respondents Francisco C. Aguon and David Atalig (the “Commonwealth”), which included a total of 16 requests for production, 34 interrogatories, and 19 requests for admission. *See* Ex. 1-4 to Motion to Compel and Motion for Sanctions (filed December 31, 2021); Ex. 1-2 to Motion to Deem Facts Admitted (filed December 31, 2021).

On December 17, 2021, the Commonwealth filed a Request for Clarification asking the Court to clarify whether, by its December 9 Order, it was allowing the parties to propound Rule 26 discovery requests in this action. *See* Respondents’ Request for Clarification (filed December 17, 2021) at 3. The Commonwealth did not answer Petitioner’s discovery requests. Petitioner thereafter filed its Motion to Compel, Motion for Sanctions, and Motion to Deem Facts Admitted on December 31, 2021.

Petitioner also filed an opposition to the Commonwealth’s Request for Clarification. *See* Petitioner’s Opposition to Request for Clarification (filed January 4, 2022). The Commonwealth filed oppositions to Petitioner’s Motion to Compel, Motion for Sanctions, and Motion to Deem Facts Admitted. *See* Respondents’ Opposition to Petitioner’s Motion to Compel and Motion for Sanctions (filed January 14, 2022); Respondents’ Opposition to Petitioner’s Motion to Deem Facts Admitted (filed January 14,

1 2022). On January 13, 2022, the Court notified the parties that it would rule on the motions
2 without a hearing. *See* Notice to Decide Pending Motions . . . Without a Hearing (filed
3 January 13, 2022).

4 III. LEGAL STANDARD

5 Pursuant to the Administrative Procedure Act (“APA”), in administrative appeals
6 cases such as this one, “the reviewing court shall decide all relevant questions of law,
7 interpret constitutional and statutory provisions, and determine the meaning or applicability
8 of the terms of an agency action.” 1 CMC § 9112(f). “In making the forgoing
9 determination, the court shall review the whole record or those parts of it cited by a party”
10 in order to “compel agency action unlawfully withheld” or to “hold unlawful and set aside
11 agency action, findings, and conclusions found to be . . . [a]rbitrary, capricious, an abuse of
12 discretion, or otherwise not in accordance with law.” *Id.*

13 Rule 2(g)(2) of the Commonwealth Rules of Procedure for Administrative Appeals
14 allows the trial court to consider motions submitted by the parties “on a case by case basis,”
15 excluding motions for summary judgment. NMI R. P. Admin. App. 2(g)(2). Under Rule
16 2(g), “[a]ll motions are governed by the Commonwealth Rules of Civil Procedure” except
17 where the Commonwealth Rules of Procedure for Administrative Appeals conflict with the
18 Commonwealth Rules of Civil Procedure, in which case the former shall govern. NMI R.
19 P. Admin. App. 2(g). Neither the APA nor the Commonwealth Rules of Procedure for
20 Administrative Appeals contains any provision providing for discovery in administrative
21 appeals cases before a Superior Court judge. *See generally* 1 CMC §§ 9100 *et seq.*; NMI
22 R. P. Admin. App.

23 IV. DISCUSSION

24 In its Motion to Compel, Petitioner takes the position that it is permitted to obtain
25 discovery relevant to its claims, i.e., its newfound allegations that there were irregularities
26 in the procurement process and that certain data relied upon by the P&S Director in his
27 ruling were not yet in the record. Mot. to Compel at 8. The Commonwealth takes the
28 position that Rule 26 discovery is not appropriate in this case because “[g]enerally, judicial

1 review of agency action is limited to review of the administrative record.” Opp. to Motion
2 to Compel at 4 (citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)
3 *amended*, 867 F.2d 1244 (9th Cir. 1989)).

4 The Commonwealth is correct that, generally, “the focal point for judicial review
5 should be the administrative record already in existence, not some new record made
6 initially in the reviewing court.” Opp. to Motion to Compel at 5 (citing *Camp v. Pitts*, 411
7 U.S. 138, 142 (1973)). Although “certain circumstances *may* justify expanding review
8 beyond the record or permitting discovery,” including, for example, “when it appears the
9 agency has relied on documents or materials not included in the record,” the Court finds
10 that Rule 26 discovery is not appropriate in this case.¹ *See Hodel*, 840 F.2d at 1436
11 (emphasis added).

12 First, neither party has identified any controlling NMI Supreme Court case law
13 addressing the issue of whether Rule 26 discovery is allowed in administrative appeals
14 cases before the Superior Court, and this Court is not aware of any. Both the APA and the
15 Commonwealth Rules of Procedure for Administrative Appeals are silent as to discovery,
16 and Rule 26(a)(1)(B)(i) of the NMI Rules of Civil Procedure expressly exempts from initial
17 disclosure any “action for review on an administrative record.” NMI R. Civ. P.
18 26(a)(1)(B)(i).

19 Second, Petitioner admits that it “intended to propound discovery to prepare for the
20 evidentiary hearing.” *See* Opp. to Request for Clarification at 2. In its opposition to the
21 Commonwealth’s Request for Clarification, Petitioner confirmed that the evidence it
22 contends was not included in the administrative record consists of the following:

23
24
25
26 ¹ Petitioner also argues that the Respondents should not be allowed to benefit from
27 discovery on the one hand while precluding Petitioner from conducting its own discovery
28 on the other hand. *See* Opp. to Request for Clarification at 5-6. This is in reference to
Tang’s Corporation’s deposition of an MES corporate representative on November 30,
2021. *Id.* However, Petitioner failed to seek a protective order or any other intervention
from this Court.

- 1 (1) Evidence relating to whether ratification of the contract was ever considered by the P&S Director, and if not, why not;
- 2 (2) Evidence relating to what effect the OPA investigation had on the Protest Decision; and
- 3 (3) Evidence relating to whether potential ethical issues existed with regard to the agencies at issue being represented by Assistant Attorneys General all in one office and subject to the overall supervision of the CNMI Attorney General, and if so, its impact on the Protest Decision.

4
5
6 *See id.* at 2-3.

7 This Court has already vacated its prior orders allowing an evidentiary hearing due
8 to a clear error of law. *See Order . . . Vacating the Court’s May 3, 2021 and Dec. 9, 2021*
9 *Orders* (filed January 18, 2022). In its January 18, 2022 Order, the Court found that
10 Petitioner’s request for an evidentiary hearing was time-barred and, further, that the
11 grounds raised by Petitioner for its request for an evidentiary hearing did not comply with
12 NMI R. P. Admin. App. 6(a), which allows a reviewing court to conduct a limited
13 evidentiary hearing only on the basis of “irregularities in the procedure before the agency
14 not shown on the record.” *See NMI R. P. Admin. App. 6(a)*. The Court found as follows:

15 These are not irregularities in the procurement procedure. Petitioner’s first
16 basis for an evidentiary hearing is already addressed in the existing
17 administrative record, specifically in the Department of Finance Division of
18 Procurement Services Director’s Report. *See generally* Exhibit 1 to
19 Petition. Petitioner’s second basis for an evidentiary hearing—to hear
20 evidence on what effect the OPA investigation had, if any, on the Protest
21 Decision—does not constitute an irregularity in the procurement procedure
22 or bid process, and nevertheless would be an exercise in futility given that
23 the OPA investigation is strictly confidential by statute. It is extremely
24 unlikely that any new relevant evidence will be uncovered by a probing into
25 the subject. Finally, Petitioner’s third basis for an evidentiary hearing is
26 entirely irrelevant and does not constitute an irregularity in the underlying
27 procurement process because the agencies’ representation by the Office of
28 the Attorney General in this case occurred *after* the Protest Decision on
29 appeal. The Court cautions Petitioner that evidentiary hearings are not an
30 appropriate vehicle for discovery fishing expeditions.

31
32 *See Order . . . Vacating the Court’s May 3, 2021 and Dec. 9, 2021 Orders* at 7.

33 The Court finds that even if discovery were allowed in this administrative appeal,
34 the need for discovery was mooted when the Court vacated the evidentiary hearing for
35 noncompliance with NMI R. P. Admin. App. 6(a). Accordingly, Petitioner’s Motion to
36 Compel, Motion for Sanctions, and Motion to Deem Facts Admitted are **DENIED**.

