



## NMI SETTLEMENT FUND

POST OFFICE BOX 501247, SAIPAN, MP 96950

July 18, 2014

### VIA ELECTRONIC MAIL

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***RE: DEMAND FOR PAYMENT OF DELINQUENT ERC FROM  
NORTHERN MARIANAS COLLEGE***

Dear Mr. Scoggins:

I have reviewed the "Notice Re Alleged Underpayment By Northern Marianas College" filed by the NMI College in *Betty Johnson v. Inos, et. al.*, Civil Action No. 09-0023. We think the position taken by the Northern Marianas College is unreasonable and unsupported by the law or the Settlement Agreement.

The Settlement Agreement provides at §5 that "the CNMI Autonomous Agencies shall make supplemental payments to the Settlement Fund in the amount of the employer contributions for the Settlement Class members at the same contribution rates they were paying as of June 26, 2013..." Implicit in this provision is that the Government and autonomous agencies pay the correct Employer Contribution ("ERC") amounts. While we agree that NMC was paying 20% as of June 26, 2013, the twenty percent (20%) rate was not the correct ERC percentage rate. NMC's argument is that since it paid a lower *incorrect* rate, it should be allowed to continue to circumvent the law. If we were to follow NMC's logic, then a party which contributed 0% on June 26, 2013, can argue that it is not required to pay any ERC today. This was clearly not the intent of §5 of the Settlement Agreement.

For your reference, the 30% ERC was determined as follows. Public Law 6-17 ("PL 6-17"), as codified at 1 CMC § 8362 mandates that ERC must be determined by an actuary and adopted by the NMI Retirement Fund Board of Trustees. The Court held in *NMIRF v. CNMI Government*, Civil Action No. 06-0367, that PL 6-17 was still in effect because it was never amended; however, because of the CNMI's depressed economy and dismal financial condition, the Court ordered the Government and autonomous agencies to pay a lower ERC rate of 30%. *See, Order After June 29, 2011 Review Hearing* attached. Hence, 30% is the correct ERC rate as of June 26, 2013.

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During our recent meeting with the Governor and his counsel, Ms. Patel, this matter was discussed. The Government's position is that the effective rate as of June 26, 2013 was 30%. NMC is the only Government agency taking this position.

We have assessed a 25% penalty for the unpaid delinquent ERC. *See*, 1 CMC §362(e). As of pay period ending June 28, 2014, the unpaid ERC amount due is \$35,976.46, plus a 25% penalty in the amount of \$8,994.11.

The total amount due and owing today to the Settlement Fund is \$44,970.57. NMC shall have ten (10) days from the date of this letter or until July 28, 2014 to pay \$44,970.57, and to come into full compliance with the 30% ERC requirement. If full payment is not received and compliance has not occurred, the Settlement Fund will seek an order from the Court requiring compliance and payment. I hope this will not be necessary.

Please feel free to contact me if you have further questions or comments.

Sincerely,



Joyce CH Fung

cc: Ms. Lillian M. Pangelinan  
Viola Alepuyo, Esq.  
Ms. Reena Patel, Esq.



E-FILED  
CNMI SUPERIOR COURT  
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N/A

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

**NORTHERN MARIANA ISLANDS  
RETIREMENT FUND,**

Plaintiff,

vs.

**COMMONWEALTH OF THE NORTHERN  
MARIANA ISLANDS GOVERNMENT,  
HON. BENIGNO R. FITIAL, in his official  
capacity as the Governor of the Commonwealth  
of the Northern Mariana Islands,  
DEPARTMENT OF FINANCE, and ELOY  
INOS, in his official capacity as the Secretary of  
the Department of Finance.**

Defendants.

**CIVIL ACTION NO. 06-0367**

**ORDER AFTER JUNE 29, 2011  
REVIEW HEARING**

THIS MATTER came before the Court on June 29, 2011 in Courtroom 205A pursuant to the Court's Order, *Northern Mariana Islands Retirement Fund v. CNMI*, Civ. Action No. 06-0367 (NMI Super. Ct. Order after February 9, 2011 Review Hearing) ("Order"). The Court ordered the Northern Mariana Islands Retirement Fund ("Fund") and the Commonwealth Government ("Government") to meet and update the Court on negotiations regarding the Government's position with transferring to the Fund ownership of the Government owned house and vehicles in Washington, D.C. (collectively "DC Property") to partially satisfy the judgment in this matter. The Government was also ordered to provide the Fund all information within its

possession regarding the DC property. In addition, the Court also ordered the Government to provide to the Fund a list of all Government property whether real or otherwise. The Court further ordered a progress report on whether the Government should transfer the DC property to the Fund.

Plaintiff Fund was represented by Viola Alepuyo, and Defendants (“Government”) were represented by Assistant Attorney Generals Meaghan Hassel-Shearer and Gil Birnbrich. Interested retirees were also in attendance in the gallery.

The Plaintiff and Defendants (collectively “Parties”) stipulated to Plaintiff’s Exhibit 1 entitled the NMIRF Schedule of Unremitted NMI Employer Contributions, GHLI Investment, and Tax Remittance (30%/20%) as of June 28, 2011 (“Exhibit 1”) offered to demonstrate to the Court the Government’s trend of non-payment with regards to the employer contribution.

<u>Exhibit #</u>	<u>Name</u>	<u>Description</u>
1	NMRIF Schedule	List of unremitted NMI ERC, GHLI Investment, and Tax Remittances as of June 28, 2011.

The Fund drew the Court’s attention to the “Date Paid” section of Exhibit 1 and pointed out the last payment made was on the day of the last court hearing, February 9, 2011, and not other payments have been received from the Government since then. Viola Alepuyo explained to the Court the purpose of Plaintiff’s Exhibit 1 was to show the CNMI Government’s payment trend and the Fund was not requesting the Court to include the amounts in the judgment.

Concerning Plaintiff’s Exhibit 1, the Government stated that the amounts of NMIRF had listed as employer contributions were estimates by the Plaintiff. The Government stated that these numbers were not accurate reflections of the actual amount of employer contributions that were unpaid. Accordingly, the Court stated that it would not add to the judgment and that the two parties should meet to reconcile the numbers so that the amount of employer contributions was accurately depicted by the NMIRF in the future.

The Government called the Secretary of Finance (“Finance”), Ms. Larrisa Larson (“Secretary”), who testified about the Government’s monthly revenue of approximately \$9 million, which fluctuates but is anticipated to drop significantly. She also testified Finance has an internal policy of prioritizing “life or death” Government obligations such as the Commonwealth Utilities Corporation payments of approximately \$250,000 per week totalling \$1 million per month; the Commonwealth Health Center payments of approximately \$1 to \$2 million per month; and employee payroll of approximately \$3 million per payroll, totaling \$6 million per month. The Secretary testified that after she pays these “life or death” Government obligations, there are no monies to be paid to anything else including all vendor payments and the Fund. The Secretary upon questioning by Plaintiff stated the retirement fund payments were not considered a “life or death” obligation.

The Secretary also testified for Fiscal Year 2012 appropriations are projected to be approximately \$102 million and that the Government’s proposed budget for Fiscal Year 2012 appropriates approximately \$10 million for payment to the Fund. The Secretary further stated that it was the plan of the Governor’s Office that the \$10 million appropriation to the Fund would not change even if the projected budget was decreased.

The Secretary then testified that employer contributions for federally funded CNMI Government employees were unpaid between October 23, 2010 and June 29, 2011. However, the Secretary stated that it was her understanding from biweekly conversations with the Treasurer that federally funded employer contributions were being paid every two weeks. Therefore, when it was brought to her attention that these payments had not been paid, she instructed her staff to prepare and deliver a check to the Fund for the entire amount immediately.

During a previous hearing, the subject of holding current defined benefit employee

contributions in reserve had come up in the context of the Fund failing.<sup>1</sup> Fund Administrator, Richard Villagomez, testified that the Fund's preliminary estimate of employee contributions held by the Fund and not yet repaid as pensions was approximately \$72 million. The Court said the media had reported it may be up to \$90 million. Ms. Alepuyo advised the Court that the amount is now closer to \$100 million. After a short discussion in which the Court suggested that the Fund's trustees implement a policy in case of Fund failure to protect those funds for current defined benefit employees and new retirees who have not yet received the amount they had put into the Fund, Ms. Alepuyo suggested that the Court make it part of this Order. In light of some of the serious problems that the Fund has had in the past and the Court's suspicion that if the Court does not protect the current defined benefit members and new retirees, the Fund may not be able to do so, the Court will make such an Order. In making such an Order, the Court must point out that the Fund has an obligation to its members in respecting that employee contributions are the individual property of the members (funds that are taken out of each defined benefit employee's paycheck every pay period) and the Fund has a fiduciary obligation to make sure each individual member gets his/her money back in case the Fund tragically fails.<sup>2</sup>

The Court then addressed the Government's Memorandum on Issue of Whether the Court Can Seize Government Property and Whether the Court Can Order a Line Item

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<sup>1</sup> This matter started as a default judgment against the Defendants. There were no liability issues and the amount of the judgment should have been stipulated to. Instead, it was necessary to hold many hearings to determine the damages; damages that need to be continually updated. Lately, the Court has had a good look at the government finances and the outlook is dismal in the Defendants coming anywhere close to paying off this judgment or even making annual payments that will equal the interest on the judgment. Additionally, the Court is aware of how much the Fund draws down annually to pay the present retirees and expenses. Unfortunately, the Court is now forced to consider the unthinkable and heretofore unspeakable—when is the Fund going to fail? It is now time for all concerned to start planning for it.

<sup>2</sup> If the Fund fails, current defined benefit members are not going to get any retirement at all. Adding insult to that injury would be not giving them back their own money and using the excuse that it was used to pay administrative costs, consultants, actuaries, attorneys, money managers, and present retirees who have received more than they put into the Fund. This is what the Court is rightfully worried about.

Appropriation and the Fund's Response. The Court reiterated that the June 29, 2009 Judgment for Damages and Order Thereon was a final order, therefore, the 30 days time for the Government to appeal the Court's final order has expired. As such, the Court can, upon the Fund's request, issue a Writ transferring the DC property as well as any other Government property to the Fund in partial satisfaction of the amount owed.

The Court then set the next Review Hearing on November 9, 2011 at 9 a.m. in Courtroom 205A and instructed the parties to draft and submit their proposed order 30 days after this hearing or no later than July 29, 2011.

The Court having heard the testimony of all the witnesses, accepted the parties' stipulations. Accordingly, it is therefore:

**ORDERED**, the Secretary for the Department of Finance shall pay to the Fund all monies received from the federal government for employer contributions of federally funded employees within 3 days of receipt; it is further

**ORDERED**, the parties' shall file all discovery motions by September 8, 2011; it is further

**ORDERED**, Assistant Attorney General Gil Birnbrich and Viola Alepuyo shall meet and confer on Plaintiff's Exhibit 1 in order to update the Court and agree on the amounts owed for employee and employer contributions; it is further

**ORDERED**, that the Northern Mariana Islands Retirement Fund Board of Trustees shall keep in reserve all sums held in members contribution (includes presently employed defined benefit members and retired members who have not received as much as they have contributed) pursuant to 1 CMC § 8381(a), which sum is approximately \$100 million at present. Said sums shall not be used to pay benefits to other members (other than each contributing member with

respect to his or her own employee contributions), and such sums shall not be expended for administrative expenses, consultant fees, money manager fees, and attorney's fees except as set for herein or otherwise permitted by subsequent Order of this Court. Each month the Board of Trustees shall update the current amount held in reserve so that they know how much should be set aside if the Fund fails. Said sums may be invested along with other funds handled by the Fund; it is further

**ORDERED**, that the June 29, 2009 Judgment for Damages and Order Thereon was a final order pursuant to the Commonwealth Rules of Civil Procedure; it is further

**ORDERED**, that the Court has the ability to execute writs of execution on government property to aid in the payment of the Plaintiff's judgment; it is further

**ORDERED**, that the Fund shall periodically update such reserve and such updated amounts shall be protected as described herein until released by Order of this Court; it is further

**ORDERED**, that all previous orders made by the Court remain in effect, including that the Government, NMC, PSS, and MVA shall continue to remit employer contributions in the amount of thirty percent (30%), as well as timely remit the hotel occupancy and container taxes as they become due to the Retirement Fund; it is further

**ORDERED**, that a review hearing in this matter is set for November 9, 2011 at 9:00 a.m. in Courtroom 205A.

**IT SO ORDERED** this \_\_\_\_\_ day of August, 2011.

**KENNETH L. GOVENDO**  
Associate Judge



This document constitutes a ruling of the court and should be treated as such.

**Current Date:** Aug 22, 2011

**Case Number:** 06-0367-CV

**Case Name:** N M I R F vs CNMI

/s/ **Judge Kenneth L Govendo**