FSM SUPREME COURT TRIAL DIVISION

GMP HAWAII, INC., Petitioner, vs. KENSLEY IKOSIA, in his official capacity as FSM Secretary of Finance and Administration, Respondent.	)	CIVIL ACTION NO. 2013-037

ORDER

Beauleen Carl-Worswick
Associate Justice

Decided: September 18, 2014

APPEARANCES:

For the Petitioner: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonia, Pohnpei FM 96941

For the Respondent: Aaron L. Warren, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

* * * *

HEADNOTES

Administrative Law – Judicial Review

When a statute calls for judicial review but does not prescribe the standard to be employed, courts look to the Administrative Procedures Act for guidance. Those provisions, however, do not apply to the extent that those statutes explicitly limit judicial review. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 553-54 (Pon. 2014).

Administrative Law – Judicial Review

17 F.S.M.C. 111(1) explicitly limits judicial review, but that limitation must be understood as a limitation on when a judicial review is appropriate. A request for judicial review may be made only by a person adversely affected or aggrieved by a final decision. 17 F.S.M.C. 111(2) does not limit judicial review to the administrative record because the statute explicitly calls for a trial "de novo." GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 554 n.1 (Pon. 2014).

Administrative Law – Judicial Review

The Administrative Procedures Act broadly applies to all agency actions unless explicitly limited by a Congressional statute. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 554 (Pon. 2014).

Administrative Law – Judicial Review

Generally there are three standards of review for administrative decisions: 1) arbitrary and capricious, or abuse of discretion; 2) reasonableness, or substantial evidence; and 3) de novo, or agreement review. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 554 n.2 (Pon. 2014).

Administrative Law – Judicial Review; Taxation– Recovery of Taxes

Title 17, which codifies the Administrative Procedures Act, applies to challenges of administrative decisions raised under Title 54, which codifies the tax law. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 554 (Pon. 2014).

Administrative Law – Judicial Review

The FSM Supreme Court must conduct a de novo trial of the administrative tax appeal, and must decide all relevant questions of law and fact. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 555 (Pon. 2014).

Administrative Law – Judicial Review

A de novo judicial review in the administrative law context is a term of art, and generally the court reviews the record with the presumption that the facts contained therein are correct. Thus, the court gives deference to the agency's prior decision and the challenger must show to a "preponderance" of the evidence that the agency was wrong. The challenger, however, may introduce any additional evidence into the judicial record, as well as any portion, or all of the administrative record for consideration. Ultimately, the agency record remains the focal point of the review, and often a full retrial is not necessary, under the de novo standard. Alternatively, under the doctrine of primary jurisdiction, the court may remand the fact finding omission to the administrative agency before conducting its judicial review. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 555-56 (Pon. 2014).

Administrative Law – Judicial Review; Civil Procedure – Discovery

A request for a judicial review of an administrative decision regarding the tax code is appropriately filed in the Supreme Court trial division. Since there are no express statutory limitations on the admission of additional evidence or limitations of the court's subject matter, the Administrative Procedures Act applies, and the court will conduct a de novo review of the decision. Thus, all discovery requests must be honored. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 556 (Pon. 2014).

Civil Procedure – Discovery

The proper mechanism to block discovery requests is a protective order for good cause shown under FSM Civil Rule 26(c) and not by motion to strike under FSM Civil Rule 12(f). GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 556 (Pon. 2014).

Civil Procedure – Motions – For Enlargement

The court has the discretionary authority to grant enlargements. When timely filed, such requests may be granted just for cause shown. Under the cause shown standard, the moving party must simply demonstrate some justification. These motions will normally be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 556-57 (Pon. 2014).

Civil Procedure – Motions – For Enlargement

A timely-filed motion for an enlargement will be granted when additional time to complete

discovery is needed before a summary judgment decision can be made; when the motion is made in good faith, and not only will the opposing party not be prejudiced by delay but that the interest of justice makes such a delay necessary. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 557 (Pon. 2014).

Civil Procedure

Under FSM Civil Rule 16, the court has the authority to hold pretrial conferences. GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 551, 557 (Pon. 2014).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On May 27, 2104, petitioner, through attorney Marstella Jack, submitted a Motion for Summary Judgment in this matter. On June 3, 2014, respondent, through Assistant Attorney General Aaron Warren, responded with an Opposition to GMP's Motion for Summary Judgment and Motion to Enlarge Period to Supplement Response to GMP's Motion for Summary Judgment. On June 23, 2014, petitioner filed a Reply in Support of Motion for Summary Judgment and an Opposition to Motion to Enlarge Period to Supplement Response to Motion. On July 1, 2014, this court granted the enlargement request. On July 2, 2014, the respondent filed a Defendant/Counter-Plaintiff Secretary of Finance's Motion to Compel Discovery/Renewed Request for Enlargement. In this request, the respondent moves the court to 1) set a trial schedule; 2) postpone a summary judgment decision until the parties have completed discovery; 3) to compel release of discovery documents and the presence of personnel at depositions. On July 9, 2014, the petitioner filed Petitioner's Motion to Set Status Conference. On July 10, 2014, respondent filed Defendant/Counter-Plaintiff Secretary of Finance's First Set of Interrogatories and First Set of Request's to Produce. On July 14, 2014, petitioner submitted a Further Reply in Support of Motion for Summary Judgment. In this request the petitioner moves the court to 1) deny requests for enlargements; 2) decide on summary judgment without further discovery. On August 8, 2014, petitioner submitted a Motion to Strike Discovery. On August 18, 2014, defendant submitted the Secretary of Finance's Opposition to GMP's Motion to Strike. On August 29, 2014, the petitioner submitted GMP's Reply in Support of Motion to Strike Discovery. The court will address these multiple motions and requests as three primary disputes over: Discovery, Enlargements, and a Pretrial Schedule.

I. Discovery

The Tax law codified under Title 54 expressly provides the right to a judicial review of a tax decision:

> (1) If a decision of the Secretary is adverse to the taxpayer, in whole or in part, the taxpayer shall have the right within one year from the date of such decision to institute an action for review, irrespective of the amount, in a Court of competent jurisdiction in the Federated States of Micronesia. Such action shall be commenced by filing a petition setting forth assignments of all errors alleged to have been committed by the Secretary in his determination of the assessment, the facts relied upon to sustain such assignments of errors, and a prayer for appropriate relief. The Secretary or his successor in office shall be the defendant in such proceedings.

54 F.S.M.C. 156. "When a statute calls for judicial review but does not prescribe the standard to be employed, courts look to the Administrative Procedures Act (APA)" for guidance. Semes v. FSM, 4

> (2) A person adversely affected or aggrieved by agency action is entitled to judicial review thereof in the Supreme Court of the Federated States of Micronesia. The court shall conduct a *de novo trial* of the matter and may receive in evidence any or all of the record from the administrative hearing that is stipulated to by the parties.
>
> (3) To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and fact, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall:
>
> (a) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (b) hold unlawful and set aside agency actions and decisions found to be: (i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (ii) contrary to constitutional right, power, priviiege, or immunity; (iii) in excess of statutory jurisdiction, authority, or limitations, or a denial of legal rights; (iv) without substantial compliance with the procedures required by law, or (v) unwarranted by the facts.

17 F.S.M.C. 111 (emphasis added). In short, the FSM Supreme Court "shall conduct a de novo trial of the matter, and that the court shall decide all relevant questions of law and fact." Ting Hong Oceanic Enterprises, 10 FSM Intrm. at 27.[5] A de novo judicial review in the administrative law context is a term of art, and generally the court reviews the record with the presumption that the facts contained therein are correct. *See* 33 CHARLES A. WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8332, at 159 (2006). Thus, the court gives deference to the agency's prior decision and the challenger must show to a "preponderance" of the evidence that the agency was wrong. *Id.* at 158.[6] The challenger, however, may introduce any additional evidence into the judicial record, as well as any portion, or all of the administrative record for consideration.[7] *Id.* at 158; 17 F.S.M.C. 111. Ultimately, the agency record remains the focal point of the review, and often a full retrial is not

---

[5] Similarly, in Michelsen, the appellate court held that it "shall conduct a de novo trial of the matter" pursuant to 17 F.S.M.C. 111 of the APA. 5 FSM Intrm. at 253. That court based its decision on the absence of statutory limitations on judicial review in title 32, which codifies the Foreign Investment Act. *See* 5 FSM Intrm. at 254.

[6] There are times when the burden of proof and the agency decision are in accord and therefore "it does not matter." George v. Nena, 12 FSM Intrm. 310, 316 (App. 2004).

[7] "The APA enacted by the Congress of the Federated States of Micronesia is generally quite similar to the United States Administrative Procedure Act. Yet the APA here is pointedly different from the United States' version concerning the responsibility of court to review factual findings. Instead of the United States approach that the courts are to accept an agency's factual findings if supported by substantial evidence the FSM APA specifically provides that the Court . . . conduct a de novo trial of the matter . . . and decide all relevant questions of law and fact, in contrast to the United States Administrative Procedure Act which limits the responsibility to questions of law." Olter, 3 FSM Intrm. at 131 (quotations omitted). Such departures "represent a conscious effort by the [FSM Congress] to select a road other than that paved by the United States for judicial review of factual findings of administrative agencies." *Id.* (quotations omitted) (citing Tammow v. FSM, 2 FSM Intrm. 53, 57 (App. 1985)). This "imposes more affirmative obligations and requires the court to make its own factual determinations." *Id.*

necessary, under the de novo standard. *Id.* § 8332, at 161.[8] Alternatively, under the doctrine of primary jurisdiction, the court may remand the fact finding omission to the administrative agency before conducting its judicial review. *Id.* § 8372, at 289. *See* Ruben, 15 FSM Intrm. at 518.

This matter is a request for a judicial review of an administrative decision regarding the tax code, under 54 F.S.M.C. 156, and is appropriately filed with in the Trial Division of the Supreme Court. Furthermore, in this case, the appellate court has sent the parties to the FSM Trial Division with the explicit instruction to develop a factual record. *See* GMP Hawaii, Inc. v. Ikosia, 19 FSM R. 285, 289 (App. 2014). Notably, there are no express statutory limitations on the admission of additional evidence or limitations of the subject matter of the court. As a result, the APA applies, and the court will conduct a de novo review of the decision. All discovery requests, including interrogatories, production of documents, and depositions, must be honored pursuant to the rules of FSM rules of civil procedure, and the petitioner's Motion to Strike Discovery is denied. Furthermore, the court notes that the proper mechanism to block discovery requests are made by a protective order for good cause shown under FSM Civil Rule 26(c) and not by motion to strike under FSM Civil Rule 12(f).[9]

II. ENLARGEMENT

Pursuant to FSM Civil Rule 6(b), this court has the discretionary authority to grant enlargements. When timely filed, "[s]uch requests may be granted just for cause shown." Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 218 (Chk. 2001). Under the cause shown standard, the court held that the moving party must simply demonstrate "some justification."[10] People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 461, 466 (Yap 2012). That court also held these

---

[8] De novo review of an agency decision said to be wasteful and inefficient, and therefore not the "preferred" standard. 33 CHARLES A. WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8332, at 160 (2006). In fact, it is nearly "black letter law" in the United States that the court should not go outside of the administrative record. *Id.* § 8306, at 73. Redundancy, however, ensures accuracy, and there are many times when the legislature intended just such a review. *Id.* § 8332, at 161. This is often the case when the legislature does not have full confidence in the abbreviated adjudicative procedure of administrative agency. *Id.*

[9] FSM Civil Rule 26(c) states in full,

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery, (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

[10] For contrast, in Bank of Hawaii v. Helgenberger, the court held that a complete omission and total failure to specify any reason was not "cause shown." 9 FSM Intrm. 260, 262 (Pon. 1999).

motions "will normally be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." *Id.* (citation omitted).[11] This court has previously found that additional time needed to "complete all discovery" was considered legitimate justification under the cause shown standard. Medabalmi, 10 FSM Intrm. at 218. Similarly, this court has found that "procuring off-island experts and arranging for a stenographer to take depositions . . . would have been a valid reason for a motion for further enlargement under Rule 6(b)(1)." Paul v. Hedson, 6 FSM Intrm. 146, 148 (Pon. 1993). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion." Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 578 (Pon. 2002) (emphasis added) (citation omitted). Before making a summary judgment decision, it is customary to review all of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." FSM Civ. R. 56(c).

This motion for an enlargement was timely filed. In support of this motion for Assistant Attorney General Warren states that additional time to complete discovery is needed before a summary judgment decision can be made. The motion is made in good faith, and the court finds that under these contested circumstances, not only will the opposing party not be prejudiced by delay but that the interest of justice makes such a delay necessary. Therefore, the court grants the enlargement until the close of discovery.

III. Scheduling Conference

Pursuant to FSM Civil Rule 16, the court has the authority to hold pretrial conferences. Accordingly, a scheduling conference is set for Wednesday, October 22, 2014, at 9:30AM at the Supreme Court in Palikir. If the parties submit a joint trial schedule before this date, the conference will be removed from the calendar. The trial schedule should include both the expected dates for the completion of discovery, as well as the appropriate dates for a hearing on summary judgment, and any other pretrial motions as necessary.

IV. Conclusion

ACCORDINGLY, the parties are ordered to comply with all discovery requests, in expectation of a trial de novo, and the Motion to Strike Discovery is DENIED. Second, the motion for the enlargement of time is GRANTED until the necessary discovery can be completed. Third, the parties are required to appear in person for a scheduling conference on Wednesday, October 22, 2014, at 9:30AM, at the Supreme Court in Palikir, unless they agree to, and file, a joint trial schedule on or before Tuesday, October 21,2014.

* * * *

[11] In People of Eauripik ex rel. Sarongelfeg, the court noted that the "cause shown standard" is lower than the "good cause standard" used in the U.S. jurisdictions under original Federal Rule of Civil Procedure 4(j) on which FSM Civil Rule 6(b) is based. 18 FSM Intrm. at 466 n.4. The word "good" was intentionally omitted when the FSM adopted its version of the Civil Rules of Procedure. *See id.*