

FSM SUPREME COURT TRIAL DIVISION

PATRICIO RAMIREZ,	)	CIVIL ACTION NO. 2013-017
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COLLEGE OF MICRONESIA, FSM	)	
NATIONAL CAMPUS,	)	
	)	
Defendant.	)	
_____	)	

ORDER

Beauleen Carl-Worswick  
Associate Justice

Decided: December 14, 2015

APPEARANCES:

For the Plaintiff: Vincent Kallop  
Tino Donre, Esq. (supervising attorney)  
Micronesia Legal Services Corporation  
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For the Defendant: Stephen V. Finnen, Esq.  
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HEADNOTES

Civil Procedure – Dismissal – Lack of Jurisdiction

Whenever it appears by the parties' suggestion or otherwise that the court lacks subject-matter jurisdiction, the court must dismiss the action. Ramirez v. College of Micronesia, 20 FSM R. 254, 260 (Pon. 2015).

Civil Procedure – Dismissal – Before Responsive Pleading

A motion to dismiss for failure to state a claim upon which relief can be granted, may not be granted unless it appears to a certainty that no relief could be granted under any state of facts which could be proved in support of the claim. Ramirez v. College of Micronesia, 20 FSM R. 254, 260 (Pon. 2015).

Civil Procedure – Dismissal – Before Responsive Pleading

The facts alleged by the party asserting the claim sought to be dismissed are to be taken as true, and the court must view those facts and the inferences drawn therefrom in the light most favorable to

the party opposing the motion to dismiss. The court evaluates the motion to dismiss only on whether the complaint has adequately stated the plaintiff's claim, and does not resolve the facts or merits of the case. Ramirez v. College of Micronesia, 20 FSM R. 254, 260-61 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies

Exhaustion of remedies is the doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that the courts will not be burdened by cases in which judicial relief is unnecessary. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies

The exhaustion of remedies means that one must follow whatever procedures are in place to seek reconsideration of an agency's allegedly erroneous decision (within the agency itself) or to seek reversal of the decision at the administrative level (often by the executive body overseeing the agency) before bringing the dispute to the judiciary's attention. Once those procedures have been completed, however, the plaintiff is entitled to judicial review, under the appropriate standard, when there is a "non-frivolous dispute." Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies

When a complaint has been filed and it appears that the plaintiff may not have exhausted his administrative remedies, the court may, in its discretion, stay the matter to allow the plaintiff to first pursue his administrative remedies and if he remains aggrieved, the court can then lift the stay and allow the litigation to proceed. Preferably, the court may dismiss the petition without prejudice allowing the plaintiff to refile so that the litigation's pleading might accurately reflect the administrative deficiency with new and accurate pleadings. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies

Exhaustion of administrative remedies is ordinarily a prerequisite for judicial jurisdiction and until those remedies are completed the court expressly cannot review the action. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies; Public Officers and Employees

The express language of Title 52 creating the National Public Service System Act, requires that the exhaustion of remedies doctrine be applied. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies

No statute requires College of Micronesia employees to exhaust their administrative remedies before seeking judicial review. Ramirez v. College of Micronesia, 20 FSM R. 254, 261 (Pon. 2015).

#### Administrative Law – Exhaustion of Remedies; Administrative Law – Judicial Review

As a corollary to the exhaustion of remedies doctrine, the courts have created the doctrine of primary jurisdiction. This doctrine should not be confused with the exhaustion of remedies, but the goals of the two are the same. Primary jurisdiction is a doctrine of common law, wholly court-made, that is designed to guide a court in determining whether and when it should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented. The primary jurisdiction doctrine arose in recognition of the need for an orderly coordination between the functions of court and agency in securing the objectives of their often overlapping competency as agencies and courts often have concurrent jurisdiction. Ramirez v. College of Micronesia, 20 FSM R.

254, 262 (Pon. 2015).

Administrative Law – Judicial Review

The primary jurisdiction doctrine arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency. Under the primary jurisdiction doctrine, courts may remand matters to administrative bodies that are familiar with the regulated activity at issue. Courts apply the primary jurisdiction doctrine in the hope that by remanding matters to an administrative body, the administrative determination will obviate the need for further court action or will make more possible a more informed and precise determination by the court. Under this doctrine, referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has the discretion either to retain jurisdiction or to dismiss the case without prejudice. Ramirez v. College of Micronesia, 20 FSM R. 254, 262 (Pon. 2015).

Administrative Law – Exhaustion of Remedies; Administrative Law – Judicial Review

The difference between the exhaustion of remedies doctrine and the primary jurisdiction doctrine is that exhaustion applies where the claim is cognizable by the administrative agency alone because Congress has expressly removed the subject matter from the court and replaced it with an exclusive administrative remedy. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the court, and the administrative remedy is considered a cumulative remedy. Technically, under primary jurisdiction, either remedy may be pursued at the plaintiff's election, but public policy nevertheless requires that the matter be first placed within the administrative body's competency. Ramirez v. College of Micronesia, 20 FSM R. 254, 262 (Pon. 2015).

Administrative Law – Judicial Review; Employer - Employees – Wrongful Discharge

The public policy reasons for requiring that a matter be first placed within the administrative body's competency include the uniformity and consistency in the regulation of business entrusted to a particular agency are secured and the judiciary's limited functions of review are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. Although wrongful termination claims rarely involve complex or technical issues that are outside of the court's competence, policy reasons also include avoiding conflict, indications of legislative intent, and other factors, and there are many policy reasons to abstain even when administrators lack identifiable expertise because the purpose is simply to promote the uniform application of the law and a proper relationship between the agencies and the judiciary. Ramirez v. College of Micronesia, 20 FSM R. 254, 262-63 (Pon. 2015).

Administrative Law – Exhaustion of Remedies; Administrative Law – Judicial Review

When the court's jurisdiction has been limited by the exhaustion of remedies doctrine, the court can only hear a petition for review of the agency action and the plaintiff can only argue that the agency action does not stand up under the proper administrative standard of review, which may be extremely limited according to the prescribed standard for review. But under the primary jurisdiction doctrine, the plaintiff can argue that the agency action cannot stand up under a petition, or request a de novo trial on the common law claim which can be decided in a way that leads to a result different from that asserted by the agency since the plaintiff is not bound by the standards of review which often require the court to apply a heightened level of deference to the agency's decisions. Ramirez v. College of Micronesia, 20 FSM R. 254, 263 (Pon. 2015).

Administrative Law – Judicial Review

Even though, under the primary jurisdiction doctrine, petitioners can bring a separate common law claim, they must usually complete the agency procedure first before the court will entertain it. To do otherwise would interfere with the administrative process and undermine the particular advantages

of the agency decision-making process that can generally resolve disputes in a less cumbersome and less expensive manner than is normally encountered at a trial in court. Ramirez v. College of Micronesia, 20 FSM R. 254, 263 (Pon. 2015).

#### Jurisdiction

For purposes of jurisdiction, since the College of Micronesia was created by national statute, and given the nature of its structure and functions, it is an instrumentality or agency of the FSM national government. Ramirez v. College of Micronesia, 20 FSM R. 254, 263 (Pon. 2015).

#### Administrative Law – Administrative Procedures Act

The Administrative Procedures Act applies to all agency actions unless explicitly limited by a Congressional statute, and significantly, it applies even if the enabling act does not mention it. Ramirez v. College of Micronesia, 20 FSM R. 254, 263 (Pon. 2015).

#### Administrative Law – Administrative Procedures Act; Administrative Law – Judicial Review; Employer - Employee

Since the College of Micronesia is an agency and instrumentality of the government, the Administrative Procedures Act should apply to all COM board decisions including employment disputes. Accordingly, a COM employee is required to bring his grievances to the agency tribunal, as the court of first instance under the primary Jurisdiction doctrine, and complete the administrative procedures before the FSM Supreme Court will adjudicate the complaint. Ramirez v. College of Micronesia, 20 FSM R. 254, 263 (Pon. 2015).

#### Administrative Law; Employer - Employee

All College of Micronesia employment contract disputes are to be treated as a grievance, subject to the mandatory grievance procedure which has two components: the informal and the formal. The aggrieved employee must first pursue the grievance informally, and if the efforts to resolve the grievance through the informal procedure have failed, the aggrieved employee may proceed to the formal grievance procedure. Ramirez v. College of Micronesia, 20 FSM R. 254, 264 (Pon. 2015).

#### Administrative Law – Rules and Regulations

Regulatory language is interpreted in the same way that statutory language is. Ramirez v. College of Micronesia, 20 FSM R. 254, 264 (Pon. 2015).

#### Administrative Law – Rules and Regulations

While it is true in construction of statutes, thus also of regulations, that the word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, the context in which the word appears must be the controlling factor. The fact that a word "may" is used is not conclusive, since it is well settled that permissive words may be interpreted as mandatory where such construction is necessary to effectuate legislative intent. Ramirez v. College of Micronesia, 20 FSM R. 254, 264 (Pon. 2015).

#### Administrative Law – Rules and Regulations; Employer - Employee

The discretion an aggrieved College of Micronesia employee has when the grievance has not been resolved informally is the choice to further pursue the grievance through the formal procedure or to abandon the grievance altogether. It is not the discretion to either pursue the formal grievance procedure or to go directly to court. Ramirez v. College of Micronesia, 20 FSM R. 254, 264 (Pon. 2015).

#### Administrative Law – Judicial Review; Employer - Employee

An aggrieved College of Micronesia employee's failure to appeal an adverse decision to the Board

of Regents within the specified time limit, a required administrative step, is deemed as acceptance of the decision. Thus, when the aggrieved employee did not request an appeal before the Board, he failed to complete the administrative process, and thereby accepted the adverse committee decision. Ramírez v. College of Micronesia, 20 FSM R. 254, 264 (Pon. 2015).

Administrative Law – Judicial Review: Employer - Employee

All College of Micronesia disputes must be brought before its administrative body, as a court of first instance, before it will be heard by this court, and, under the primary jurisdiction doctrine, the administrative processes created by that agency must ordinarily be completed before the court will entertain either a petition for review or an independent common law complaint. Ramírez v. College of Micronesia, 20 FSM R. 254, 264-65 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds

A court, viewing the facts and inferences in a light that is most favorable to the party opposing the judgment, will render summary judgment forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A fact is material only if it might affect the outcome of the suit and the failure to prove an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Ramírez v. College of Micronesia, 20 FSM R. 254, 265 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds

When a party has not responded to a summary judgment motion, the party is deemed to have consented to the granting of the motion, and the court may, in its discretion, decline to hear oral arguments from that party. While that failure to file a timely opposition is deemed a consent to the granting of the motion, there still must be proper grounds to grant the motion. Ramírez v. College of Micronesia, 20 FSM R. 254, 265 (Pon. 2015).

Civil Procedure – Motions – Unopposed

The court is not bound to grant motions as a matter of course simply because they are unopposed. Even when unopposed, a motion must be well grounded in law and fact, and not interposed for delay. Ramírez v. College of Micronesia, 20 FSM R. 254, 265 (Pon. 2015).

Employer–Employee

Private employment is governed by the principles of contract law. Ramírez v. College of Micronesia, 20 FSM R. 254, 265 (Pon. 2015).

Administrative Law – Rules and Regulations

By statute, the College of Micronesia must adopt a personnel system which provides that the College's employees are not, for any purpose, employees of any FSM government or its political subdivisions, and which must guarantee that every College official, faculty member, and other employee is entitled to hold his or her position during good behavior, subject to suspension, demotion, layoff, or dismissal only as provided in the College's personnel regulations. Ramírez v. College of Micronesia, 20 FSM R. 254, 265-66 (Pon. 2015).

Contracts – Unilateral Contract; Employer–Employee – Employee Handbook

When an employee is presented with an employee handbook, instructed to read the handbook, told to sign off on the handbook, and when the employee does so, the employee handbook will constitute a unilateral contract between the parties. Ramírez v. College of Micronesia, 20 FSM R. 254, 266 (Pon. 2015).

Employer-Employee – Employee Handbook; Employer – Employee – Wrongful Termination

Since an employee handbook can provide contract terms between the employer and employee, when the employment contract explicitly states that the employee's position, construed employment, compensation, leaves of absences, additional employment, benefits, performance evaluations, and termination are governed by the employee manual and when that manual includes terminations provisions explicitly providing the employer with the right to initiate layoffs, the employer had the contractual right to lay off employees before the expiration of the contract term, although this right to lay off employees is limited to the procedures as set forth in the manual. Ramirez v. College of Micronesia, 20 FSM R. 254, 266 (Pon. 2015).

Employer – Employee – Wrongful Termination

A permanent employee is an employee who has successfully completed a probationary period. Ramirez v. College of Micronesia, 20 FSM R. 254, 266 n.5 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Employer – Employee – Wrongful Termination

The employer is entitled to a judgment as a matter of law when, even viewing the uncontested facts in the light most favorable to the discharged employee, there are no genuine issues of material fact and the discharged employee cannot prevail on his breach of contract claim because he was properly laid off in accord with the contract terms incorporated from the personnel manual; because the employer had the right to layoff employees; because the employer created a specific layoff procedure in its personnel manual, and because the employee was laid off according to that procedure. Ramirez v. College of Micronesia, 20 FSM R. 254, 267 (Pon. 2015).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On May 16, 2013, plaintiff, through attorney Vincent Kallop, filed a summons and complaint in this matter. On May 20, 2013, defendants, through attorney Stephen Finnen, filed an answer which raised several affirmative defenses. On July 22, 2013, plaintiff submitted a Motion for Denial of Defendants' Affirmative Defenses. On July 26, 2013, defendants filed an Opposition to Motion to Dismiss Defendant's Affirmative Defenses. On July 30, 2013, plaintiff submitted a Reply to Defendants' Opposition to Plaintiff's Motion for Denial of Affirmative Defenses. On August 23, 2013, following discovery, defendants filed a Motion for Summary Judgment. Two enlargements to respond to the motion for summary judgment were requested by the plaintiff, both of which were granted until September 30, 2014. Ultimately, however, the plaintiff failed to file a response to this motion.

After a review of the record, documents, and papers filed, in this matter, the court finds a motion to dismiss was raised by implication from the affirmative defenses and interprets the plaintiff's Motion for Denial of Defendants' Affirmative Defenses to be in substance an opposition to a motion to dismiss. The court therefore understands all of these pleadings to be essentially disputes over two motions: 1) a motion to dismiss; and 2) a motion for summary judgment.

Upon CONSIDERATION of the file and record contained herein, the court GRANTS both the motion to dismiss and the motion for summary judgment in favor of the defendant, based on the following conclusions of fact and law:

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Ramírez v. College of Micronesia  
20 FSM R. 254 (Pon. 2015)

I. FACTS

1. Patricio Ramirez (Ramirez) was an employee of the College of Micronesia (COM) and began working there pursuant to a written contract.
2. Ramirez contract was for a four year term beginning on November 1, 2009, ending on September 30, 2013, for \$15,378.00 per annum.
3. The employment contract expressly incorporates the Personnel Procedures and Policy Manual.
4. The Board of Regents for COM conducted a job audit in August 2009, restructured many employment positions, and recommended layoff in others.
5. Ramirez was notified by letter, dated April 6, 2012, of the decision to terminate his position giving him sixty (60) days' advance notice.
6. Ramirez's last day of work was on June 6, 2011. Ramirez was paid all regular wages through that date, as well as accrued leave. None of those wages are in dispute.
7. Ramirez received severance pay from June 6, 2011, to September 30, 2011, in addition to his regular wages.
8. Ramirez opposed his termination on June 30, 2011, and he requested a hearing on July 28, 2011. This hearing was held on November 2, 2011, and a decision to uphold the termination was rendered on November 14, 2011.
9. Ramirez did not appeal this decision to the Board of Regents.

II. MOTION TO DISMISS

Pursuant to FSM Civil Rule 12(h)(3), "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." This is a question of first impression regarding the limits of judicial reviewability by the court on COM employment decisions. In this case, the defendant raised two affirmative defenses based on the subject matter jurisdiction of the court including the failure to state a claim and the failure to exhaust administrative remedies. Although, this court denies the motion based on both of those defenses, the court grants the motion based on the primary jurisdiction doctrine sua sponte.

*Failure to State a Claim*

Pursuant to FSM Civil Rule 12(b)(6), the court has the authority to dismiss a complaint for "failure to state a claim upon which relief can be granted." "A motion to dismiss may not be granted unless it appears to a certainty that no relief could be granted under any state of facts which could be proved in support of the claim." Mailo v. Twum-Barimah, 2 FSM R. 265, 267 (Pon. 1986).

It is well established that the facts alleged by the party asserting the claim sought to be dismissed are to be taken as true and that these facts and the inferences to be drawn therefrom must be viewed by the Court in the light most favorable to the party opposing the motion to dismiss.

*Id.* A court evaluates a motion to dismiss only on "whether a plaintiff's claim has been adequately stated in the complaint," and does not resolve the facts or merits of the case. Latte Motors, Inc. v. Hainrick, 7 FSM R. 190, 192 (Pon. 1995).

In this case, Ramirez filed a common law action for wrongful termination. This complaint raises an ordinary contract dispute based on diversity jurisdiction under FSM Const. art. XI, § (6)(b). If the allegations in the complaint are given the benefit of all reasonable inferences; the allegation that COM wrongfully terminated the contract, without proper process as required by its own personnel regulations, is sufficiently well pled and this court has concurrent original jurisdiction over the breach of contract claim.

#### *Exhaustion of Remedies Doctrine*

The exhaustion of remedies is "[t]he doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that the courts will not be burdened by cases in which judicial relief is unnecessary." BLACK'S LAW DICTIONARY 613 (8th ed. 2004). Generally stated, the "[e]xhaustion of remedies means that one must follow whatever procedures are in place to seek reconsideration of an agency's allegedly erroneous decision (within the agency itself) or to seek reversal of the decision at the administrative level (often by the executive body overseeing the agency) before bringing the dispute to the attention of the judiciary." Asumen Venture, Inc. v. Board of Trustees, 12 FSM R. 84, 89 (Pon. 2003). Once those procedures have been completed, however, the plaintiff is entitled to judicial review, under the appropriate standard, when there is a "non-frivolous dispute." Maradol v. Department of Foreign Affairs, 13 FSM R. 51, 54-55 (Pon. 2004). "[W]hen a complaint has been filed and it appears that the plaintiff may not have exhausted his administrative remedies, the court may, in its discretion, stay the matter to allow the plaintiff to first pursue his administrative remedies and if he remains aggrieved, the court can then lift the stay and allow the litigation to proceed." Aunu v. Chuuk, 18 FSM R. 48, 50 (Chk. 2011). Preferably, the court may dismiss the petition without prejudice allowing the plaintiff to refile so that the litigation's pleading might accurately reflect the administrative deficiency with "new and accurate pleadings." Aake v. Mori, 16 FSM R. 607, 609 (Chk. 2009). Exhaustion of administrative remedies is ordinarily a prerequisite for judicial jurisdiction" and until those remedies are completed the court expressly cannot review the action. Werley v. Chuuk, 16 FSM R. 329, 332 (Chk. 2009).

The exhaustion of remedies doctrine removes subject matter jurisdiction from this court. It is a creature of statutory construction and its intent must be made explicit by Congress before that limitation has a binding legal effect. Inferences created from the final step of an agency employment procedure are not enough to remove this court's subject matter jurisdiction over a common law wrongful termination claim. Although there are countless numbers of state and national employment cases using the exhaustion of remedies to prohibit an employee from circumventing the available administrative procedures prior to filing with the court, those cases can only be used with caution as a precedent in this case, because the express language of title 52 creating the National Public Service System Act (PSSA), requires that the doctrine be applied.<sup>1</sup> No such limitation is created under title 40, which establishes the Educational System; neither are COM employees covered under the PSSA. Furthermore, the COM Personnel Procedures and Policy Manual (PPPM) itself is silent with regard to

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<sup>1</sup> Title 52 which governs the PSSA explicitly calls for the exhaustion of remedies, stating that the matter "shall in no case be subject to review in the Courts until the administrative remedies prescribed herein have been exhausted." 52 F.S.M.C. 157.



the scope of judicial review. As a result, the exhaustion of remedies doctrine does not apply and this court retains concurrent original jurisdiction over all COM employment complaints. Nevertheless, the court does give deferential weight to the PPPM, and accordingly, exercises its inherent discretion under the primary jurisdiction doctrine to abstain from hearing the claim.

*Primary Jurisdiction Doctrine*

As a corollary to the exhaustion of remedies doctrine, the courts have created the doctrine of primary jurisdiction. This doctrine should not be confused with the exhaustion of remedies, "but the goals of the two are the same." 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., *FEDERAL PRACTICE AND PROCEDURE* § 8399, at 412-13 (2006). Primary jurisdiction "is a doctrine of common law, wholly court-made, that is designed to guide a court in determining whether and when it should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented." Massa v. Peabody Coal Co., 698 F. Supp. 1446, 1450 (S.D. Ind. 1988). "The doctrine of primary jurisdiction arose in recognition of the need for an orderly coordination between the functions of court and agency in securing the objectives of their often overlapping competency." *Id.* "Agencies and courts often have concurrent jurisdiction." 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22:1, at 81 (1983). "The doctrine of primary jurisdiction arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." United States v. Haun, 124 F.3d 745, 749 (6th Cir. 1997). Under the doctrine of primary jurisdiction "courts may remand matters to administrative bodies that are familiar with the regulated activity at issue. Courts apply the doctrine of primary jurisdiction in the hope that by remanding matters to an administrative body, the administrative determination will obviate the need for further court action or will make more possible a more informed and precise determination by the court." Ruben v. FSM, 15 FSM R. 508, 518 (Pon. 2008). Ultimately, under this doctrine "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction; it has the discretion either to retain jurisdiction or . . . to dismiss the case without prejudice." Reiter v. Cooper, 507 U.S. 258, 268-69, 113 S. Ct. 1213, 1220, 122 L. Ed. 2d 604, 618 (1993).

The difference between the exhaustion of remedies doctrine and the primary jurisdiction doctrine is that exhaustion applies where the claim is cognizable by the administrative agency alone because congress has expressly removed the subject matter from the court and replaced it with an exclusive administrative remedy. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the court, and the administrative remedy is considered a cumulative remedy. Technically, under primary jurisdiction, either remedy may be pursued at the plaintiff's election, but public policy nevertheless requires that the matter be placed within the competency of the administrative body first. These public policy reasons include:

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75, 72 S. Ct. 492, 494, 96 L. Ed. 576, 582 (1952). Although wrongful termination claims rarely involve complex or technical issues that are outside of the competence of the court, policy reasons also include "avoiding conflict, indications of legislative intent, and other factors." PHC, Inc. v. Pioneer Healthcare, Inc., 75 F.3d 75, 80 (1st Cir. 1996). There are many policy reasons to abstain "even when administrators lack identifiable expertise." 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22:1, at 82 (1983). Ultimately, the purpose is simply "to promote the uniform application of the law and a proper relationship between the agencies

and the judiciary." 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8400, at 413 n.1 (2006).

The implications from applying either of the two doctrines can be "substantial." 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8400, at 418 (2006). On the one hand, when the court's jurisdiction has been limited by the exhaustion of remedies, the court can only hear a petition for review of the agency action and the plaintiff can only argue "that the agency action does not stand up under the proper administrative standard of review." *Id.* "This role may be extremely limited according to the prescribed standard for review." *Id.* at 417. Alternatively, under the primary jurisdiction doctrine, the plaintiff can argue that the agency action cannot stand up under a petition, or request a de novo trial on the common law claim which can be decided "in a way that leads to a result different from that asserted by the agency." *Id.* at 418. Thus, the plaintiff is not bound by the standards of review which often require the court to apply a heightened level of deference to the agency's decisions. *See id.* at 417-18.

Thus even though a petitioner can bring a separate common law claim, under the primary jurisdiction doctrine, they must usually complete the agency procedure first, before the court will entertain it. To do otherwise would interfere with the administrative process and undermine the particular advantages of the agency decision making process that can generally resolve disputes in "a less cumbersome and less expensive manner than is normally encountered at a trial in court." 2 AM. JUR. 2d *Administrative Law* § 5, at 34 (1994).

The College of Micronesia (COM) is established by Congress as a public corporation and governed by title 40. Congress has expressly recognized that for the purposes of taxation, "the College shall be treated as an agency or instrumentality of the National Government." 40 F.S.M.C. 729. Our Court has similarly found for purposes of jurisdiction that "COM was created by national statute, and given the nature of its structure and functions, is an agency of the FSM national government." Berman v. College of Micronesia-FSM, 15 FSM R. 76, 80 (Pon. 2007); *see Kaminanga v. FSM College of Micronesia*, 8 FSM R. 438, 441 (Chk. 1998). This finding was affirmed, after full consideration, on appeal: "The College is an instrumentality of the national government in the same way that the FSM Development Bank is. . . even though its employees are not considered government employees." Berman v. College of Micronesia-FSM, 15 FSM R. 582, 596 (Pon. 2007); *See FSM Dev. Bank v. Ifraim*, 10 FSM R. 1, 4 (Chk. 2001).

The Administrative Procedures Act (APA) under title 17, "applies to all agency actions unless explicitly limited by a Congressional statute." Moroni v. Secretary of Resources & Dev., 6 FSM Intrm. 137, 138 (App. 1993).<sup>2</sup> Significantly, the "APA applies even if the enabling act does not mention it." 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8134, at 94 (2006).

The court finds that the COM is an agency and instrumentality of the government. As a consequence, the Administrative Procedures Act (APA) under title 17 should be applied to all school board decisions including COM employment disputes. Accordingly, Ramirez was required to bring his grievances to the agency tribunal, as the court of first instance under the primary jurisdiction doctrine, and complete the administrative procedures before this court will adjudicate the complaint. Indeed, Ramirez filed a formal grievance with COM, a hearing was held on Nov. 2, 2011, and the board issued a decision on Nov. 14, 2011. Subsequently, Ramirez did not appeal the decision to the Board of

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<sup>2</sup> "This section applies, according to the provisions hereof, except to the extent that statutes enacted by the Congress of the Federated States of Micronesia explicitly limit judicial review." 17 F.S.M.C. 111(1).

Regents within the prescribed time period, even though he had the right to do so. Ultimately, the issue before the court is whether he was required to do so, before bringing a claim in the trial division of the FSM Supreme Court.

Pursuant to the PPPM section XVI, "[a]ll employment contract disputes are to be treated as grievance." The PPPM sets out a mandatory grievance procedure with two components: the informal and the formal. The aggrieved employee must first pursue the grievance informally. Subsection 6 expressly requires that an aggrieved employee go through the entire dispute procedure:

Prior to involving the Grievance procedure set forth hereunder, the aggrieved employee *shall* make every effort to informally resolve the grievance . . . . If the efforts to resolve the grievance through the informal procedure have failed, the aggrieved employee *may* proceed to the formal grievance procedure.

(emphasis added). Notably, "regulatory language is interpreted in the same way that statutory language is." Berman v. Pohnepe, 19 FSM R. 111, 117 (App. 2013). While it is true in construction of statutes (and thus also regulations) "that the word 'may' as opposed to 'shall' is indicative of discretion or a choice between two or more alternatives, the context in which the word appears must be the controlling factor." Pohnepe v. AHPW, Inc., 14 FSM R. 1, 11-12 (App. 2006). The fact that a word "may" is used is not conclusive, since it is well settled that permissive words may be interpreted as mandatory where such construction is necessary to effectuate legislative intent. AHPW, Inc. v. Pohnepe, 14 FSM R. 188, 190 (Pon. 2006). When, from the consideration of the whole statute, and its nature and object, it appears that the intent was to impose a positive duty rather than a discretionary power, the word "may" will be held to be mandatory. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM R. 621, 628 (App. 2011). Thus, in a proper case the word "may" will be construed as "must" or "shall." *Id.*

In this context, the use of the word "may" means that a COM aggrieved employee has a formal grievance process available to him, if he has not found satisfaction through the informal process. The discretion the aggrieved employee has when the grievance has not been resolved informally is the choice to further pursue the grievance through the formal procedure or to abandon the grievance altogether. It is not the discretion to either pursue the formal grievance procedure or to go directly to court. After failing to resolve his grievance informally, Ramirez proceeded to the formal grievance procedure and requested a hearing. The hearing committee's decision was not in his favor. At that time, he had the right to appeal the decision to the board of regents, but he did not. Under subsection 7(d), it states "[u]pon receipt of the committee's decision, either party may within 10 days request the Board of Regents to review the decision." Once again, Ramirez's choice or discretion was not to either pursue the formal grievance procedure or to go directly to court. His choice was to either request review by the Board of Regents or to accept the adverse committee's decision as final. The COM's regulations try to impress this point on aggrieved employees. Section 7(f)(1) expressly provides that the "[f]ailure of the aggrieved employee to appeal a decision within the specified time limit shall be deemed as acceptance of the decision." Ramirez did not request an appeal before the Board of Regents to review the committee decision. As is apparent from the context, and from Section 7(f)(1), Ramirez was required to take this administrative step. He did not. Ultimately, in failing to complete the administrative process, Ramirez accepted the adverse committee decision.

### *Conclusion*

In conclusion, the court finds that the COM is an agency and instrumentality of the FSM national government. Therefore all COM disputes must be brought before the administrative body, as a court of first instance, before it will be heard by this court. Furthermore, under the primary jurisdiction

doctrine, the administrative processes created by that agency must ordinarily be completed before this court will entertain either a petition for review or an independent common law complaint. The exercise of the primary jurisdiction doctrine is ad hoc decision made on a case by case basis for a wide variety of justiciability reasons. Thus, although the court's subject matter jurisdiction has not been expressly removed by Congress, the court nevertheless has the ultimate discretion whether to hear the claim or not. Accordingly, this Court dismisses the complaint for failure to complete the administrative procedure provided by COM.

### III. MOTION FOR SUMMARY JUDGMENT

Even if Ramirez had completed the administrative appeal process he would still not prevail. The court would have granted COM a summary judgment based on a determination of the merits.<sup>3</sup>

#### *Standard of Review*

Pursuant to FSM Civil Rule 56(c), a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FSM Civ. R. 56(c). The court "must view facts and inferences in a light that is most favorable to the party opposing the judgment." FSM Dev. Bank v. Mudong, 10 FSM R. 67, 72 (Pon. 2001). A fact is material only if it might affect the outcome of the suit and the failure to prove "an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Suldan v. Mobil Oil Micronesia, Inc., 10 FSM R. 574, 578 (Pon. 2002).

Where a party has not filed a response to a motion for summary judgment, the party is deemed "to have consented to the granting of the motion" and the court may decline, in its discretion, to hear oral arguments from that party. Actouka v. Kolonia Town, 5 FSM R. 121, 123 (Pon. 1991); see Bank of the FSM v. O'Sonis, 8 FSM R. 67, 68 (Chk. 1997) (plaintiff was not allowed to argue because it had not filed an opposition). "While it is true that failure to file a timely opposition is deemed a consent to the granting of the motion, FSM Civ. R. 6(d), there still must be proper grounds for granting of motion." Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 442 (App. 1994). Therefore, "[t]he Court is not bound to grant motions as a matter of course simply because they are unopposed. Even when unopposed, a motion must be well grounded in law and fact, and not interposed for delay." In re Parcel No. 046-A-01, 6 FSM R. 149, 152 (Pon. 1993).

#### *Breach of Contract*

It is undisputed that "private employment is governed by the principles of contract law." Ihara v. Vitt, 18 FSM R. 516, 524 (Pon. 2013). In deciding matters of "contract law, the court will apply the substantive law of Pohnpei" wherever the FSM national code does not provide guidance. *Id.* Title 40 of the FSM Code states that the "President of the College shall have full charge and control of the administration and business affairs of the college." 40 F.S.M.C. 721(1). Subject to the limitations of the Board, the President shall "see that the rules and regulations of the College are established and

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<sup>3</sup> "The court must also balance the advantages of applying the doctrine against the potential costs . . . and delay in the administrative proceedings." National Commc'ns Ass'n, Inc. v. American Tel. & Tel. Co., 46 F.3d 220, 223 (2d Cir. 1995). In this case, the court considers returning to the agency for a final decision an unnecessary cost and delay because, as stated supra, Ramirez has accepted the decision of the board as final when he abandoned the appeal process. Thus the final decision rendered by the agency would likely, if not necessarily, result in an adverse decision to Ramirez.

implemented." 40 F.S.M.C. 721(2)(a). Pursuant to 40 F.S.M.C. 722, "[a] personnel system for the College shall be adopted which provides that employees of the College are not employees of any government of the Federated States of Micronesia, or its political subdivisions, for any purpose." Additionally, that personnel system must guarantee that:

[E]very official, faculty member, and other employee of the College shall be entitled to hold his/her position during good behavior, subject to suspension, demotion, *layoff*, or dismissal only as provided in the personnel regulations of the College.

40 F.S.M.C. 722(3) (emphasis added). In response to this grant of authority, COM created a PPPM that fills in the details of the layoff procedure. In the employment context, the courts have held that "where an employee is presented with an employee handbook, instructed to read the handbook, told to sign off on the handbook, and where the employee does so, the employee handbook will constitute a unilateral contract between the parties." *Ihara*, 18 FSM R. at 525. In short, "an employee handbook can provide contract terms between the employer and employee." *Id.* at 526. The terms of Ramirez's contract explicitly reference the inclusion of the PPPM:

It is hereby agreed and understood that the Employee's position, construed employment, compensation, leaves of absences, additional employment, benefits, performance evaluations, and termination will be governed by the manual.

The PPPM includes terminations provisions, outlined in Section XIV, and subsection 6 explicitly provides the right of COM to initiate layoffs:

When the curtailment of work, shortage of funds, or reorganization as determined by the Board of Regents makes it necessary to abolish positions, the employee affected shall be laid off.

The layoff procedure is further detailed in this section. The court notes that an amendment to this procedure was made on April 5, 2011,<sup>4</sup> but that this change is entirely inconsequential, as there were only permanent employees in the layoff pool.<sup>5</sup> Thus the applicable policy under either version requires the COM to consider "work performance" and "length of service" to make the decision.

In this case, although Ramirez was contracted from November 1, 2009, to September 30, 2013, COM had the contractual right to lay off employees before the expiration of the term, and did soon June 6, 2011, by giving Ramirez sixty (60) days' notice of his termination. Ramirez was paid his full salary until that date, including accrued annual leave. Notably, the right to lay off employees is limited to the procedures as set forth in the PPPM, and the court sees no evidence that these procedures were violated. To the contrary, the record provided by COM's Human Resources Director, Norma Edwin, demonstrates that the College followed the procedures in the layoff selection and termination. Ramirez was given the opportunity to file a grievance with the COM, which he did, and given the right to appeal

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<sup>4</sup> The pre-April 5, 2011, PPPM states, "Employees without permanent positions shall be laid off first. In the case of employees holding permanent positions, work performance as recorded on the Employee Progress Report and length of service will be used in determining the order of the layoff." The post-April 5, 2011, PPPM was changed to read, "In making the layoff decision, management will first consider the work performance. Secondary consideration will be given to the length of service."

<sup>5</sup> A permanent employee means an employee "who has successfully completed a probationary period." 52 F.S.M.C. 112(22). This court adopts that definition.

that decision, which he did not. When the uncontested facts are viewed in the light most favorable to Ramirez, he cannot prevail on breach of contract claim; he was properly laid off in accord with the incorporated terms of his contract from the COM PPPM.

In conclusion, the uncontested facts in this case indicate COM had the right to lay off employees, that COM created a specific lay off procedure in the PPPM, and that Ramirez was laid off according to that procedure. Thus, even when the facts are considered in the light most favorable to Ramirez, the court finds that there are no genuine issues of material fact, and COM is entitled to a judgment as a matter of law.

#### IV. CONCLUSION

The court holds that the COM is an agency and instrumentality of the FSM national government. As an agency, the APA applies to COM employment regulations. These regulations are not the same as those created under the PSSR, and do not expressly remove the subject matter jurisdiction of the court to hear employee grievances for wrongful termination. Accordingly, the exhaustion of remedies doctrine does not prohibit the filing of a common law complaint in this matter. Nevertheless, the primary jurisdiction doctrine gives the court the discretion not to hear a complaint until an agency's grievance procedures have been completed and a final decision is rendered. The court exercises that discretion in this case. Moreover, the court determines that it would be an unnecessary delay and expense for Ramirez to return to the agency for a final decision, because when he abandoned his right to appeal the committee decision, he accepted that decision as final. The uncontested facts of the case indicate that COM had a right to layoff employees and properly did so according to its internal policies and procedures.

Upon CONSIDERATION, of the file and record contained herein, the court GRANTS the motion to dismiss under the primary jurisdiction doctrine. Furthermore, the court GRANTS the unopposed motion for summary judgment, in favor of the defendants, finding that even if the plaintiff had a full hearing on the merits there is no material issue in dispute.

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