§ 11.614(1) and Kos. Civ. R. 5(b). No evidence was produced in the filings or during the hearing by the appellees that service of the Land Court's decision was ever made on Sepe Esau at any time.

The fact that Esau became aware of the Land Court's decision in February 2015 is not equivalent to being properly served to safe guard Esau's due process rights. If a party was not served notice and was then denied the right to appeal, his due process rights are violated. Heirs of Tara v. Heirs of Kurr, 14 FSM Intrm. 521, 525 (Kos. S. Ct. Tr. 2007).

Because Esau was never properly served, the statutory sixty (60) day period to appeal the decision of the Land Court is tolled until proper service is made. Serving notice of an adjudication, or decision, is required in order to give the party a chance to appeal. If a party is not properly served notice of a determination of ownership, the statutory appeals period that an appeal shall be made within sixty days of the written decision's service upon the party, does not run. *Id.*

Accordingly, this Court finds service of the Memorandum of Decision entered by the Land Court to be ineffective. This Court will allow the Land Court to properly effectuate its service of process on the appellant. Because the initial service of the decision is ineffective in this matter, the remaining issues as raised by the parties will not be considered by this Court.

V. Conclusion

The Kosrae Land Court is instructed to properly serve the Memorandum of Decision on the Appellant within thirty (30) days of the entry of this Order. The Kosrae State Court shall then allow the appellant sixty (60) days to file an appeal after the Land Court's Memorandum of Decision has been properly served. This matter is HEREBY REMANDED to the Kosrae Land Court and Kosrae State Court for further proceedings consistent with this Opinion.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

LIPTON W. TILFAS, Appellant, vs. KOSRAE STATE GOVERNMENT and WILLIAM PALIK, in his official capacity as Administrator of Personnel and Employment Services, Kosrae, Appellees.	)	APPEAL CASE NO. K7-2015 (Civil Action No. 22-15)

MEMORANDUM OF DECISION; ORDER OF REMAND

Argued: July 11, 2016
Decided: December 29, 2016

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Mayceleen JD Anson, Specially Assigned Justice, FSM Supreme Court*

*Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

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For the Appellees: Jeffrey S. Tilfas
Attorney General
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* * * *

HEADNOTES

Appellate Review – Decisions Reviewable

The FSM Supreme Court appellate division has jurisdiction to hear appeals from all final decisions of the Kosrae State Court trial division, if a notice of appeal is filed as provided in FSM Appellate Rule 3 within 42 days after the entry of the judgment or order appealed from. Tilfas v. Kosrae, 21 FSM R. 81, 86 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo; Statutes of Limitation – Accrual of Action; Statutes of Limitations – Tolling

The questions of when a statute of limitations begins to run, whether and when the statute is tolled, and whether a claim is barred by the statute of limitations are questions of law to be reviewed de novo. Tilfas v. Kosrae, 21 FSM R. 81, 86 (App. 2016).

Civil Procedure – Dismissal; Statutes of Limitations

Even though it is an affirmative defense, a court may choose to dismiss claims based on the statute of limitations, when the allegations of the plaintiff's own complaint demonstrate that certain of its claims are subject to the defense. Tilfas v. Kosrae, 21 FSM R. 81, 87 (App. 2016).

Statutes of Limitation – Accrual of Action

A cause of action accrues, and the statute of limitations begins to run, when a suit may be successfully maintained thereon – when the plaintiff could have first maintained the action to a successful conclusion. Tilfas v. Kosrae, 21 FSM R. 81, 87, 89 (App. 2016).

Public Officers and Employees – Kosrae; Statutes of Limitation – Accrual of Action

A cause of action to collect salary or wages accrues when an employee has a right to collect the money allegedly owed to him. Tilfas v. Kosrae, 21 FSM R. 81, 89 (App. 2016).

Public Officers and Employees – Kosrae; Statutes of Limitation – Accrual of Action

A school teacher could not have successfully maintained a cause of action for improper salary classification as of the date of his initial hiring when he had not submitted documentation to the government proving his educational background, thereby giving him a right to collect the higher salary allegedly owed to him. His cause of action began to accrue when, if ever, he submitted the relevant documents necessary to prove he should have been placed at the higher pay level. Tilfas v. Kosrae, 21 FSM R. 81, 89 (App. 2016).

Appellate Review – Standard – Civil Cases – Factual Findings

Determining when documents were submitted is purely a factual determination more suited for a trial court. Tilfas v. Kosrae, 21 FSM R. 81, 90 (App. 2016).

Administrative Law – Judicial Review; Public Officers and Employees – Kosrae; Statutes of Limitations – Tolling

If a public employee does not prevail on his grievance, then he could have sought judicial review of the decision within the applicable six-year statute of limitations, but when the employee received a decision in his favor, the statute of limitations was immediately suspended and the State's own inaction thereafter cannot be used to run the six-year statute of limitations. Tilfas v. Kosrae, 21 FSM R. 81, 90 (App. 2016).

Administrative Law – Exhaustion of Remedies; Public Officers and Employees – Kosrae; Statutes of Limitation – Tolling

The statute of limitations cannot be said to have continued to run as against a public employee's claim when the administrative decision was issued in his favor and the administrative grievance process was still pending as to a determination of damages. Tilfas v. Kosrae, 21 FSM R. 81, 90 (App. 2016).

Statutes of Limitations – Tolling

The running of a statute of limitations can be tolled – suspended – by certain events. A defendant's wrongful conduct can, as a form of estoppel, toll or suspend the running of a statute of limitations. Tilfas v. Kosrae, 21 FSM R. 81, 90 (App. 2016).

Administrative Law – Judicial Review; Public Officers and Employees – Kosrae; Statutes of Limitations – Tolling

The statute of limitations does not to continue to run against a state employee when a favorable decision was rendered to him. To come to such a conclusion would mean any agency could immunize itself from judicial review simply by extending delay for six years or until the statute of limitations has run. Therefore, the statute of limitations was suspended when the favorable decision was rendered on December 12, 2001 until the January 22, 2015 decision to overturn the first determination, and thus a petition for writ of mandamus filed in Kosrae State Court on April 1, 2015 was, as a result of the tolled period, well within the six-year limitations period. Tilfas v. Kosrae, 21 FSM R. 81, 91 (App. 2016).

Civil Procedure – Dismissal; Statutes of Limitation

When it is clear that the allegations in the plaintiff's own complaint demonstrate that his claims are subject to the statute of limitations defense, the court may dismiss those claims as time-barred even though the statute of limitations is an affirmative defense. But when there are significant factual issues that may affect the defendant's statute of limitations defense, a motion to dismiss on statute of limitations grounds must be denied. Tilfas v. Kosrae, 21 FSM R. 81, 91 (App. 2016).

Public Officers and Employees – Kosrae; Statutes of Limitation – Accrual of Action

When a state employee's claim for wrongful probation status accrued, at the very latest, on

August 26, 1989, because that was when the event triggering the cause of action occurred and when he could have first successfully maintained a suit on his claim since he remained classified as a probationary employee despite working, as of then, one day longer than one year. Thus, when that employee first exercised his administrative remedies and filed a grievance on April 30, 1997, his action for wrongful probationary status is time-barred because his grievance and the initiation of this lawsuit clearly fall outside the six-year statute of limitations. Tilfas v. Kosrae, 21 FSM R. 81, 92 (App. 2016).

Appellate Review – Standard – Civil Cases

An appellate court may affirm the trial court's decision on a different theory or on different grounds when the record contains adequate and independent support for that basis. Tilfas v. Kosrae, 21 FSM R. 81, 92 (App. 2016).

Courts; Mandamus and Prohibition

The Kosrae State Court has the power to issue all writs and other process, and may entertain a petition for a writ of mandamus. Tilfas v. Kosrae, 21 FSM R. 81, 93 (App. 2016).

Constitutional Law – Due Process; Mandamus and Prohibition – Procedure

When the trial court clearly considered the petition for a writ of mandamus, it did not deprive the petitioner of his procedural due process by denying the writ without first having a hearing. Tilfas v. Kosrae, 21 FSM R. 81, 93 (App. 2016).

Constitutional Law – Interpretation

If a matter may properly be resolved without reaching potential constitutional issues, then the court should do so, since unnecessary constitutional adjudication is to be avoided. Tilfas v. Kosrae, 21 FSM R. 81, 93 (App. 2016).

Appellate Review – Standard – Civil Cases

An appellate court need not address an appellant's duplicative arguments. Tilfas v. Kosrae, 21 FSM R. 81, 94 (App. 2016).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

This is an appeal from an April 27, 2015 Kosrae State Court trial order denying a petition for a writ of mandamus filed by a state employee against Kosrae State Government (Kosrae) and William Palik (Palik), in his official capacity as Administrator of Personnel and Employment Services (P&ES) compelling Palik to comply with a December 12, 2001 administrative decision of Salpasr Tilfas, predecessor of Palik. The Kosrae State Court dismissed the petition on the grounds that Lipton Tilfas's claims were time-barred by the doctrine of statute of limitations as set forth by Kosrae State Code § 6.2506. We affirm the trial court holding that the statute of limitations bars Lipton Tilfas's claim for wrongful probationary status exceeding one year, but vacate the trial court holding that the statute of limitations bars his claim for wrongful salary classification and remand the matter to the trial court for further proceedings. Our reasons follow.

I. BACKGROUND

Lipton Tilfas was hired as a teacher at Utwe Elementary School, a public school, on August 22, 1988. He was hired at pay level 12/1. Upon his initial hiring, he had an A.A. degree from the College

of Micronesia (COM) and had completed COM's third year program. By completing the COM third year program, he had earned 30 undergraduate semester hours. Based on applicable laws, a classroom teacher with such credentials should be initially placed on pay level 13/1. Lipton Tilfas then worked on limited term from August 22, 1988 to August 5, 1989 and was rehired on a limited term on August 7, 1989 until September 7, 1990 when he became a permanent employee. Based on applicable laws, an employee shall not serve on probationary status for more than one year.

By letter dated April 30, 1997 addressed to Salpasr Tilfas, then Bureau Chief of P&ES, Lipton Tilfas filed a grievance claiming two issues: (1) that his starting salary was incorrectly set at pay level 12/1 when it should have been set at pay level 13/1, and (2) that he was placed on limited term employment for a period of time exceeding that which the law allowed. On August 28, 2000, Salpasr Tilfas, then Administrator of P&ES, responded to Lipton Tilfas's grievance letter and tentatively scheduled a hearing for September 12, 2000 on the condition that he be supplied with a specific letter of complaint with supporting documentation for Lipton Tilfas's claims. On September 19, 2000, after the time for the tentatively scheduled hearing had already passed, Lipton Tilfas, through his legal counsel, sent Salpasr Tilfas a more specific letter of complaint as requested re-alleging that he was initially hired at the improper salary classification and improperly placed on probationary status in excess of the one-year period allowed by statute.

The record is unclear as to what transpired in the meantime, but after a purported hearing conducted on December 20, 2000, Salpasr Tilfas sent Lipton Tilfas a letter outlining his findings on December 12, 2001. As to Lipton Tilfas's first claim, Salpasr Tilfas found that, although Lipton Tilfas had possessed his education transcripts, he had not submitted them to the state for nine or more years and that, therefore, it would be proper to correct his salary only as of the time the government received them sometime in March 1997. As to the second claim, Salpasr Tilfas found that Lipton Tilfas's time as a limited term employee from August 22, 1988 to August 5, 1989 counted toward the statutory "probationary period" even though he was terminated and rehired on August 7, 1989. On August 7, 1989, he was rehired on limited term until September 7, 1990 when he became a permanent employee. Salpasr Tilfas therefore concluded that Lipton Tilfas was set as a limited term employee for longer than the one-year limitation set by statute. Salpasr Tilfas concluded his letter by stating that he was determined that both claims have merit and that P&ES would put together all the necessary documents to expedite Lipton Tilfas's claims. Lipton Tilfas indicated to Salpasr Tilfas by letter dated January 11, 2002 that he was satisfied with the decision.

Almost six years later, on December 16, 2008, Lipton Tilfas's new counsel sent Rolner Joe (Joe), then Administrator of P&ES, a letter following up regarding the status of the claims. On January 28, 2009, Snyder Simon, Assistant Attorney General, sent Lipton Tilfas's counsel a letter indicating Joe had forwarded a copy of his previous letter and that he would require additional time to form a response. Over three years later, on August 2, 2012, Lipton Tilfas, through his counsel, sent a letter to Cindy Haro (Haro), Attorney General, requesting action be taken on the claims. Lipton Tilfas also sent a letter to Tiser Reynold, Director of the Department of Administration and Finance, advising him that he was willing to settle outside of court. That same date, Lipton Tilfas also sent a letter to Haro advising her that if settlement was not reached within a week, he would seek judicial remedies.

Over two years later, on October 17, 2014, Palik, then Administrator of P&ES, advised Lipton Tilfas's legal counsel that whatever claim Lipton Tilfas may have had in September 2000 was time-barred by the statute of limitations and no longer enforceable as a matter of law. By letter dated January 22, 2015, Lipton Tilfas, through counsel, advised Palik, *inter alia*, that he would seek possible mandamus if settlement was not reached by the end of the month.

On April 1, 2015, Lipton Tilfas filed a petition for a writ of mandamus seeking to challenge

Palik's reversal of Salpasr Tilfas's decision of December 1, 2001 on the grounds that it was barred by the statute of limitations. Defendants Kosrae and Palik submitted their answer on April 8, 2015.On April 27, 2015, the Kosrae State Court *sua sponte* dismissed the petition on the grounds that the claims were time-barred by the statute of limitations pursuant to Kosrae State Code § 6.2506.

Lipton Tilfas timely appealed.

II. Issues Presented

Lipton Tilfas contends that the trial court erred:

1. by dismissing the petition for writ of mandamus based on the doctrine of statute of limitations pursuant to Kos. S.C. § 6.2506;

2. by violating his right to due process when, without notice and hearing, *it sua sponte* dismissed his petition and affirmed Palik's administrative decision which was also issued without notice or hearing on grounds that the statute of limitations time-barred his claims; and

3. because the decision was not based on substantial evidence and was clearly erroneous.

III. Jurisdiction

Pursuant to FSM Appellate Rule 4(a)(1)(A), the FSM Supreme Court Appellate Division has jurisdiction to hear appeals "from all final decisions of the trial division of the . . . Kosrae State Court . . ." if a notice of appeal is filed as provided in FSM Appellate Rule 3 within 42 days after the date of the entry of the judgment or order appealed from.

4 F.S.M.C. 201(2) further allows for the FSM Supreme Court Appellate Division to hear appeals from state courts if the appeal is permitted by that state's constitution. The Kosrae State Constitution art. VI, § 6 states that decisions of the highest division of the State Court are appealable to the FSM Supreme Court Appellate Division.

This matter is an appeal of a Kosrae State Court final order where the notice of appeal was timely filed,[1] thereby vesting the FSM Supreme Court Appellate Division with jurisdiction.

IV. Standard of Review

The questions of when a statute of limitations begins to run, whether and when the statute is tolled,[2] and whether a claim is barred by the statute of limitations are questions of law to be reviewed *de novo*. Kosrae v. Skilling, 11 FSM R. 311, 315 (App. 2003) (citing Damarlane v. United States, 8 FSM R. 45 (App. 1997); Nahnken of Nett v. United States, 7 FSM R. 581 (App. 1996)); *see* Tafunsak v. Kosrae, 7 FSM R. 344, 347 (App. 1995).

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[1] The Kosrae State Court issued its final judgment on April 27, 2015 and Lipton Tilfas filed his Notice of Appeal on April 30, 2015.

[2] "A law that interrupts the running of a statute of limitations in certain situations . . . ." Black's Law Dictionary 1525 (8th ed. 2004).

V. Analysis

Lipton Tilfas seeks as relief an appellate court order reversing the April 27, 2015 Kosrae State Court ruling that his petition for writ of mandamus was time-barred by the statute of limitations under Kos. S.C. § 6.2506 and an order remanding the matter back to Kosrae State Court to hear the petition.

A. *Statute of Limitations*

The basis for the Kosrae State Court's dismissal of the petition for a writ of mandamus stated that the

> court does not ultimately need to address the question of whether the statute of limitations should have barred this action prior to Salpasr Tilfas' 2001 ruling as Petitioner's failure to take any meaningful actions to pursue this matter from 2001 to 2012 clearly bars this claim under the Statute of Limitations.

Tilfas v. Kosrae, Civil Action No. 22-15 (Kos. S. Ct. Tr. 2015). A court may choose to dismiss claims based on the statute of limitations, although it is an affirmative defense, when the allegations of the plaintiff's own complaint demonstrate that certain of its claims are subject to the defense. Mobil Oil Micronesia, Inc. v. Pohnpei Port Auth., 13 FSM R. 310, 314 (Chk. 2005).

Lipton Tilfas contends that the statute of limitations was tolled from the time he filed his original grievance by letter dated April 30, 1997.He further contends that the December 12, 2001 decision letter from Salpasr Tilfas had no due date for the final resolution of the actions described therein and that, therefore, the statute of limitations never began to run. Appellees Kosrae and Palik's arguments address the time period between 1988 when Lipton Tilfas was first hired and 1997 when he filed his grievance letter. They contend that anything that occurred after the grievance letter was sent in 1997 is irrelevant because the statute of limitations had already run its course by the time Lipton Tilfas sent his grievance letter in 1997.

There can be no dispute that, if a limitations statute were to bar Lipton Tilfas's claims, it would be the general six year limitations period set forth in Kos. S.C. § 6.2506, which states: "Section 6.2506. Limitations of six years. Commencement of an action not stated in Sections 6.2503, 6.2504, or 6.2505 occurs within *six years after the accrual of the cause of action*." (emphasis added).

Therefore, the only questions for our determination are when Lipton Tilfas's causes of action accrued and whether the statute of limitations applies to time-bar either claim. A cause of action accrues, and the statute of limitations begins to run, when a suit may be successfully maintained thereon. Waguk v. Kosrae Island Credit Union, 6 FSM R. 14, 17 (App. 1993). "This is established at the time when the plaintiff could have first maintained the action to a successful conclusion." Kosrae v. Skilling, 11 FSM R. at 315. It is important to note that the trial court did not make any factual findings about when the causes of action accrued and the statute of limitations began to run in this matter, but because our standard of review is *de novo*, we are permitted to consider the question as if it is before us for the first time.

In determining the correct resolution to this question, we must examine the applicable Kosrae State laws and regulations and their application in this case. Kosrae State Code § 5.402(3), which was controlling law at the time of filing his grievance in 1997, stated that "[a] permanent employee has the right to: . . . (3) present his views in a grievance hearing concerning his working conditions, status, pay, and related matters and to having a response to, or resolution of, the grievance. . . ." Section 5.429 stated, in relevant part: "Section 5.429. Grievance. (1) By regulation the Director provides a

procedure for the presentation and hearing of a grievance. . . . (3) Upon hearing a grievance the official states his findings concerning the grievance and orders whatever action he finds appropriate to a resolution of the grievance." Pursuant to Kosrae State Code § 5.429(1), the Executive Service Regulations (ESR) were promulgated. The pertinent parts of the ESR state, in relevant part:

> 11.2 Grievance Procedure.
>
> a. Grievance may be presented either orally or in writing. An employee may present a grievance concerning a continuing practice or condition at any time. If a grievance is related to a particular act or occurrence, it must be presented within fifteen calendar days of the date of the act or occurrence or the date when the employee should have become aware of it had he been exercising reasonable diligence.
>
> b. . . . The Director . . . will make written findings in the manner required by Kosrae Code Section 5.423 and order appropriate action, if any. . . .
>
> c. An employee may seek appeal of the findings regarding his grievance pursuant to Part XV.
>
> . . .
>
> 15.1. Filing Notice and Appeal.
>
> . . . An employee may seek to appeal findings on his grievances by filing notice of request to appeal with the Director within fifteen (15) days of the employee's receipt of the findings.

Kosrae State Exec. Serv. Reg. 11-87. The requirement for written findings required by Kosrae State Code § 5.423 states:

> Section 5.423. Written Finding. When this chapter allows discretion to the Director or a management official or requires a finding, he expresses his finding in writing which is available to an interested person who requests to review it. A finding states in detail its grounds and may not rely on a general ground such as the public interest.

On August 22, 1988, Lipton Tilfas was hired to his new position and classified at pay level 12/1. Lipton Tilfas contends that his salary classification was incorrect as he already held an A.A. degree with more than 30 undergraduate semester hours. He further contends that he was kept at probationary status for over two years, in excess of the statutorily permitted 180 days for a probationary appointment. These claims were submitted pursuant to Kosrae State Code §§ 5.402(3) and 5.429 and ESR Part 11.2 by letter dated April 30, 1997, almost nine years after his improper classification and seven years after his probationary appointment should have expired. His action was consistent with the grievance procedure set forth in ESR 11.2(a).

Salpasr Tilfas complied with Kosrae State Code § 5.423 and ESR Part 11.2 and replied to Lipton Tilfas's grievance by letter dated December 12, 2001, in which he set forth in writing his findings in detail and ordered appropriate action. It is important to note that Salpasr Tilfas's letter expressly stated that he found it necessary to properly place Lipton Tilfas at pay level 13/1 only at the time when the government received his transcripts sometime in March 1997 proving he was entitled to be classified at that pay level. Lipton Tilfas expressly accepted Salpasr Tilfas's findings and ordered action by letter dated January 11, 2002.

1. *Lipton Tilfas's claim that his salary was incorrectly classified upon his hiring.*

As stated *supra*, a cause of action accrues, and the statute of limitations begins to run, when a suit may be successfully maintained thereon. Nahnken of Nett v. Pohnpei, 7 FSM R. 485, 489 n.1 (App. 1996); Waguk, 6 FSM R. at 17. "This is established at the time when the plaintiff could have first maintained the action to a successful conclusion." Kosrae v. Skilling, 11 FSM R. at 315; Kos. S. C. §6.2502. Based on these principles, we must determine when Lipton Tilfas's claim that his salary was incorrectly classified upon his hiring accrued.

Kosrae and Palik claim that the statute of limitations began to run the day he was hired, August 22, 1988 and that therefore his grievance letter on April 30, 1997 was submitted after the limitations period had already expired. In support of their argument, they cite section 11.2(a) of the ESR, which states, *inter alia*, that

> [a]n employee may present a grievance concerning a continuing practice or condition at any time. If a grievance is related to a particular act or occurrence, it must be presented within fifteen calendar days of the date of the act or occurrence or the date when the employee should have become aware of it had he been exercising reasonable diligence.

They contend that when the state placed Lipton Tilfas at pay level 12/1 on August 22, 1988, that was a particular act or occurrence after which Lipton Tilfas had 15 days to submit a grievance.

We disagree with this argument. A cause of action to collect salary or wages accrues when an employee has a right to collect the money allegedly owed to him. Segal v. National Fisheries Corp., 11 FSM R. 340, 342 (Kos. 2003) (citing Johnson v. Allied Stores Corp., 679 P.2d 640, 644 (Idaho 1984)).

Notwithstanding, Lipton Tilfas could not have successfully maintained a cause of action for improper salary classification as of the date of his initial hiring because he had not submitted documentation to the government proving his educational background, thereby giving him a right to collect the money allegedly owed to him. At that time, based on the documentation they received, the government had placed Lipton Tilfas at the appropriate pay level because it had no knowledge of his education and Lipton Tilfas had provided none. The cause of action began to accrue when, if ever, he submitted the relevant documents necessary to prove he should have been placed at pay level 13/1 and thereafter when each paycheck with the misclassified salary amount was issued. When Lipton Tilfas submitted the appropriate documentation to the government is an integral fact essential for determining when the action accrued because any paycheck issued to Lipton Tilfas at pay level 12/1 after the government had received the necessary documentation to prove he should be classified at pay level 13/1 would cause the statute of limitations to run.

Salpasr Tilfas's letter of determination to Lipton Tilfas, stated, *inter alia*:

> In analyzing the first claim, I found that during Mr. Lipton Tilfas' employment he was initially placed as Classroom Teacher I at PL 12/1, while his transcripts revealed that he had received credits over his initial classification, thus, in further reviewing his transcripts, he did not receive until sometimes [sic] in March 1997 or later. . . . Although, he had possessed these certificates he did not submit his transcripts after 9 years.

Appellant's App. D. This is the single place in the entire record that mentions when Lipton Tilfas submitted his transcripts which, if true, would make any action for recovery of the salary timely if filed

within six years of March 1997. When asked during oral argument when the transcripts and necessary paperwork were received by the government, although it was not certain, Kosrae averred that it might have received them sometime in March or April of 1997. Determining when the documents were submitted is purely a factual determination more suited for the trial court.

Kosrae and Palik contend, and it seemingly being a partial basis on which the trial court issued its dismissal, that the suit was not filed until April 1, 2015, thus making it untimely. However, Lipton Tilfas filed his grievance by letter dated April 30, 1997, which would be within the purported limitations period if the documentation was submitted sometime in March or April of 1997. Once Salpasr Tilfas issued the December 12, 2001 decision letter, the statute of limitations was immediately suspended because the State's own inaction thereafter cannot be used to run against the six-year statute of limitations. *See* Kosrae v. Skilling, 11 FSM R. at 316-17. If Lipton Tilfas had not prevailed on his grievance, then he could have sought judicial review of the decision in the courts within the applicable six-year statute of limitations. It was unnecessary to file an appeal at that time because he received a decision in his favor.

At this stage, we cannot say that any statute of limitations continued to run as against Lipton Tilfas's claim because the administrative decision was issued in his favor and the administrative grievance process was still pending as to a determination of damages. See Kosrae v. Skilling, 11 FSM R. at 317. "The running of a statute of limitations can be tolled – suspended – by certain events. A defendant's wrongful conduct can, as a form of estoppel, toll or suspend the running of a statute of limitations . . . ." Iwo v. Chuuk, 18 FSM R. 252, 254 (Chk. 2012) (citing Pohnpei v. AHPW, Inc., 14 FSM R. 1, 18 n.3 (App. 2006)).

Although we do not expressly find that Kosrae committed a wrongful act, the execution of the letter signed by Salpasr Tilfas and the acknowledgment of the letter by Lipton Tilfas approximately one month later served as an indication of the State's unequivocal intent to move forward with the satisfaction of the claims, which resulted in the tolling of the statute of limitations. *See id.* at 255. It is important to note that neither the applicable statutes nor regulations in place at the time contained any specific time period for the State to act. It is also important to note that, pursuant to ESR 11.2(a), an employee may present a grievance concerning a continuing practice or condition at any time. Once Lipton Tilfas began the administrative process, and certainly after a decision in his favor, he was entitled to some resolution pursuant to Kosrae State Code §§ 5.402 and 5.423.

This matter is remarkably similar to Kosrae v. Skilling, 11 FSM R. 311 (App. 2003). In that case, an employee of the State of Kosrae was reallocated to a new position and did not receive proper placement and salary. *Id.* at 316. The employee then followed the grievance procedures that applied to him, which are substantially identical to the applicable procedures in this matter. The State failed to take any action on the employee's grievance and he retired in 1997. The appellate court in that case held that "Skilling's administrative action was still pending when he retired in 1997 because the State had never ruled on his grievance . . . [and] the applicable statute of limitations began to run at the time Skilling left State employment in 1997." *Id.* at 317. In support of its holding that court stated:

> The fact that Skilling, while an employee of the State, did not bring his suit earlier was not inexcusable delay or lack of diligence on his part, in light of the State's inaction throughout his administrative grievance process.
>
> . . .
>
> The State is essentially asking us to allow the time of inaction by the State to run against the six year statute of limitations and find that the limitation period has expired.

> If we did so, we would be condoning a situation where the Director or other appropriate management official simply delayed acting on a grievance until the applicable statute of limitations ran out. Under this particular factual setting, employees would receive no administrative resolution of their grievance and they would also be precluded from making their claims in court. We cannot come to such a conclusion.

Id. The only distinguishable fact therein from this matter is that, in the Skilling case, the State never took any action. In this matter, the State took action and issued a decision in Lipton Tilfas's favor, but thereafter took no action to enforce that decision.

Similarly, the facts presented in this matter mirror that of Iwo v. Chuuk, 18 FSM R. 252, 254 (Chk. 2012). In Iwo, the plaintiff Iwo alleged that Chuuk took an easement over his property without just compensation. He alleged that, following the taking, the Chuuk Land Management Office promised him that there would be a written agreement for compensation to him for the state's use of his land. Iwo further alleged that the same office later told him that no agreement or compensation would be forthcoming. The court held that "Chuuk's alleged promise to compensate Iwo and its alleged subsequent repudiation of that promise may have tolled the running of the statute of limitations [and that] Iwo's cause of action might not, depending on the circumstances, be time-barred."

We agree with the reasoning in Kosrae v. Skilling and Iwo v. Chuuk and cannot say that the statute of limitations continued to run against Lipton Tilfas as of the time a favorable decision was rendered to him. To come to such a conclusion would mean any agency could immunize itself from judicial review simply by extending delay for six years or until the statute of limitations has run. Therefore, we believe the statute of limitations was suspended between the time Salpasr Tilfas filed his determination letter on December 12, 2001 and William Palik's decision to overturn Salpasr Tilfas's determination on January 22, 2015. The petition for writ of mandamus was then filed in Kosrae State Court on April 1, 2015 which, as a result of the tolled period, was well within the six-year limitations period.

If it were clear that the allegations in the plaintiff's own complaint demonstrate that his claims are subject to the defense of statute of limitations, the court may dismiss those claims as time-barred even though the statute of limitations is an affirmative defense. But when there are significant factual issues that may affect the defendant's statute of limitations defense, a motion to dismiss on statute of limitations grounds must be denied. Aunu v. Chuuk, 18 FSM R. 48, 50-51 (Chk. 2011) (citing Mobil Oil Micronesia, Inc. v. Pohnpei Port Auth., 13 FSM R. 223, 228 (Pon. 2005)); Lonno v. Trust Territory (III), 1 FSM R. 279, 281-82 (Kos. 1983); *see* Iwo v. Chuuk, 18 FSM R. at 255. When Lipton Tilfas submitted his transcripts to the government, thereby giving him the right to be placed at pay level 13/1 and triggering the running of the limitations period, is a significant factual issue that directly affects the statute of limitations defense. This is not a matter that can be determined from the face of the petition or answer thereto and is a factual matter subject to proof. Depending on the circumstances, Lipton Tilfas may be able to prove his claim is not time-barred or it may be shown that his claim is time-barred. The factual evidence needed for a court to make such a determination is not present at this stage. Therefore, the trial court's *sua sponte* dismissal of the petition for writ of mandamus was reversible error.

The trial court's dismissal of the petition for writ of mandamus based on the application of the statute of limitations between the period of 2001 and 2012 is vacated on the grounds that it made erroneous conclusions of law based on insufficient facts and the matter remanded in order that the court can make the necessary findings of fact, especially the date Lipton Tilfas's claim began to accrue, and apply the law consistent with this analysis.

2. *Lipton Tilfas's claim that he worked for two years before he was granted permanent employee status in violation of Kosrae State Code § 5.409 and ESR § 4.6.*

Again, we must determine when Lipton Tilfas's claim for improper job classification began to accrue. Kosrae State Code § 5.409(1), in effect at the relevant times, provided, *inter alia*, that "[u]pon successfully completing probation a person becomes a permanent employee." Section 5.101(25) defines "probation" as "a period of probationary employment status of not fewer than six months or exceeding one year from the beginning of employment in a position." ESR § 4.6 states, in relevant part:

> 4.6. Probation Period. An appointee, to a permanent position from an eligible list including a permanent employee who is promoted or transferred, shall serve a probationary period of *not more than one year* before his probationary appointment may be converted to a permanent appointment.

(emphasis added).

Lipton Tilfas was hired on a limited term on August 22, 1988 and remained employed on the limited term until August 5, 1989, a total of 11 months and 13 days. On August 7, 1989, he was rehired on a limited term and remained employed on the limited term until September 7, 1990, a total of one year, one month, and one day. This resulted in Lipton Tilfas being employed for two years and 13 days on probationary status, well over the legally allowed duration under Kosrae State Code § 5.101(25) and ESR § 4.6.

Accepting these facts as true, we find that Lipton Tilfas's claim for wrongful probation status accrued, at the very latest, on August 26, 1989, the date at which he remained classified as a probationary employee despite working, as of that date, one day longer than one year. Lipton Tilfas first exercised his administrative remedies and filed a grievance on April 30, 1997. When Lipton Tilfas was forced to remain on probationary status beyond the one year allowed by law, his cause of action accrued and the six-year statute of limitations for claims against the state started running because it was the date on which the event triggering the cause of action occurred and it was also the time when he could have first successfully maintained a suit on his claim that he should not have been kept on probationary status.

Under any set of conceivable facts, Lipton Tilfas's claim for wrongful probationary status accrued, at the very latest, on August 26, 1989. He filed his grievance on April 30, 1997, over seven years later. Because the date of his grievance and the initiation of this lawsuit clearly fall outside the six-year statute of limitations, his action for wrongful probationary status is time-barred.

An appellate court may affirm the trial court's decision on a different theory or on different grounds when the record contains adequate and independent support for that basis. Chuuk v. Actouka Executive Ins. Underwriters, 18 FSM R. 111, 121 (App. 2011). Accordingly, the trial court's dismissal as to Lipton Tilfas's claim for wrongful probationary status is affirmed on other grounds as stated herein.

B. *Violation of Right to Due Process*

Lipton Tilfas contends that his right to due process was violated; first when William Palik reversed his predecessor's administrative decision without notice or an opportunity to be heard and second when the trial court denied the petition for the writ of mandamus without a hearing.

1. *The Trial Court's Denial of the Petition for a Writ of Mandamus Without a Hearing.*

Lipton Tilfas contends that the Kosrae State Court denied him due process when it dismissed the case *sua sponte* without notice or a hearing in violation of Kosrae State Court General Court Order (GCO) 1998-6 and the Kosrae and FSM Constitutions. He contends that GCO 1998-6 mandates that a motion for dismissal is a motion that requires a hearing. Lipton Tilfas's contention misconstrues the action the trial court took to dispose of the matter. Although it is true that the trial court's April 27, 2015 order was called an "Order of Dismissal of Action," we believe the trial court denied the petition for a writ of mandamus and did not dismiss the action. Despite the same procedural outcome, the two actions are governed by different procedural rules. While it may be true that a litigant has a right to a hearing on a motion to dismiss, the same may not be true for denial of a writ. Thus, we must look to the procedural requirements for disposing of a writ.

Kosrae State Code § 6.101(1)(a) gives the Kosrae State Court the power to issue all writs and other process. The power of the trial division of the Kosrae State Court to entertain a petition for a writ is beyond dispute. Shrew v. Sigrah, 13 FSM R. 30, 34 (Kos. 2004). The Kosrae State Court Rules do not set forth the procedure to follow in writ proceedings, but it has proceeded before analogously with Rule 21(b) of the FSM Rules of Appellate Procedure. *Id.*

It is clear that at the federal level, both in the FSM and the United States, that a petition for a writ may be disposed of at any time. FSM Appellate Rule 21(b) states, *inter alia*, "[i]f the remaining fulltime justice(s) are of the opinion that the writ clearly should not be granted, they shall deny the petition. Otherwise, they shall order that an answer be filed."[3] Thus, a writ may generally be denied without an answer, let alone a hearing. *See, e.g.*, McIlrath v. Amaraich, 11 FSM R. 502 (App. 2003); Goya v. Ramp, 14 FSM R. 303, 304 (App. 2006); Shrew, 13 FSM R. at 34. Additionally, courts have said that "[t]he opportunity for hearing is complied with by considering written submissions from the affected parties." Adams v. Island Homes Constr., Inc., 11 FSM R. 218, 228 (Pon. 2002) (citing 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 37.23[5] (3d ed. 1999)). Here, the trial court clearly considered the petition. Accordingly, the trial court did not deprive Lipton Tilfas of his procedural due process by denying the writ without first having a hearing. Amayo v. MJ Co., 14 FSM R. 355, 363 (Pon. 2006) ("A petition for a peremptory writ, such as prohibition or mandamus, is an expedited procedure that does not usually require the certification of a trial court record, or extended briefing, or even a transcript, or oral argument.").

2. *Administrator Palik's Reversal of his Predecessor's Administrative Decision Without Notice or Hearing.*

Lipton Tilfas contends that his right to due process was violated when Palik unilaterally reversed his predecessor's administrative determination and order without notice or an opportunity to be heard.

We abstain from addressing this issue because there remains a possibility that, on remand and with the guidance of this opinion, the trial court may grant the petition for a writ of mandamus, thereby obviating the need for us to interpret the Constitution. *See* Suldan v. FSM, 1 FSM R. 201, 205 (Pon. 1982). If a matter may properly be resolved without reaching potential constitutional issues, then the court should do so since unnecessary constitutional adjudication is to be avoided. Kosrae v. Langu, 9 FSM R. 243, 251 (App. 1999); Jonah v. FSM, 5 FSM R. 308, 313 (App. 1992) (stating that an

[3] Similarly, the United States Federal Rules of Appellate Procedure provide that "[t]he court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time." Fed. R. App. P. 21(b)(1).

appellate court will not decide a constitutional issue if not raised below).

C. *Whether the Trial Court's Order was Not Based on Substantial Evidence and Clearly Erroneous.*

Lipton Tilfas requests that we find the trial court's findings as clearly erroneous and unsupported by substantial evidence. He again argues that the record on appeal clearly demonstrates that the statute of limitations should not apply to bar his actions, that it should apply to bar Palik's October 17, 2014 reversal of the original administrative decision issued December 12, 2001, and that Palik and the trial court violated his right to due process by taking their respective actions without notice or opportunity to be heard.

It appears Lipton Tilfas simply quotes the substantial evidence and clearly erroneous standards and continues to argue the same issues as previously set forth. The same holds true for his oral arguments. Because his arguments are duplicative, we need not address them again in light of our conclusions above. Simina v. Kimueo, 16 FSM R. 616, 622-23 (App. 2009).

VI. Conclusion

ACCORDINGLY, we AFFIRM the trial court's decision to dismiss Lipton Tilfas's claim for wrongful probationary status on the grounds that, under any set of conceivable facts, it was time-barred by the statute of limitations. We, however, VACATE the trial court's decision as to Lipton Tilfas's claim for wrongful salary classification and REMAND the matter to the trial court for further proceedings consistent with this Memorandum of Decision; Order of Remand.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF SISUO ALOKOA, Appellants, vs. HEIRS OF NEIME PRESTON, KOSRAE LAND COURT, and KOSRAE STATE GOVERNMENT, Appellees.	)	APPEAL CASE NO. K5-2015 (Civil Action No. 92-14)

OPINION

Argued: July 11, 2016
Decided: December 29, 2016

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Mayceleen J.D. Anson, Specially Assigned Justice, FSM Supreme Court**