IN THE SUPREME COURT OF GUAM

WILLIAM M. LIMTIACO,
Petitioner-Appellee,

vs.

GUAM FIRE DEPARTMENT, **GOVERNMENT OF GUAM, and MICHAEL UNCANGCO, in his official capacity as Chief of the Guam Fire Department,**
Respondent-Appellant.

Supreme Court Case No.: CVA05-016
Superior Court Case No.: SP0261-04

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on May 9, 2006
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice[1]; ROBERT J. TORRES, Associate Justice.

CARBULLIDO, CJ.:

[1] This case involves the review of the Superior Court's grant of a writ of mandamus, compelling the Guam Fire Department to honor a "Stipulation and Order re: Settlement" issued by the Civil Service Commission ("CSC") awarding back pay to Petitioner-Appellee William M. Limtiaco ("Limtiaco") on the basis that the duties sought to be compelled were ministerial. We find that there was no legal error in issuing the writ of mandamus, and consequently we affirm.

I.

[2] William M. Limtiaco is an Emergency Medical Technician with the Guam Fire Department ("GFD"). His official job description is Firefighter I. Before he became Firefighter I, he was a Driver's License Examiner II at the Department of Revenue and Taxation earning $12.96 per hour. His move to the Fire Department was effectuated by a GG-1, "Request for Personnel Action." The GG-1 states that he would be "transferred and demoted" from Driver's License Examiner II "H-7" at a salary of $26,965 per annum to Firefighter Recruit "F-10" at approximately the same salary, $26,453 per annum. The transfer was effective on May 25, 1998, and the GG-1 shows that a certifying officer certified that funds were available. After the transfer, Limtiaco's first paycheck reflected that he was only paid $8.48 per hour or about $17,638.00 per annum in his new position, contrary to what was stated in the GG-1.

[3] Limtiaco claims that this lawsuit arose out of a grievance initiated on January 29, 2002. However, Limtiaco initiated other activity to retrieve his retroactive pay prior to 2002. The

[1] Associate Justice Frances M. Tydingco-Gatewood heard oral argument in this case. Prior to issuance of this Opinion, she was sworn in as Chief Judge of the U.S. District Court of Guam.

record shows that the Fire Chief wrote Limtiaco a memo on February 7, 2000, stating that "the department is aware of your Salary Adjustment as a result of your Transfer Promotion [sic] [the] effective the date of your GG-1. Financial constraints continues [sic] to hinder our ability to initiate any pay adjustments." RA, Tab 32, Ex.1, p. 3 (Pet. for Alternative Writ of Mandate and/or Prohibition). The memo from the Fire Chief also states, "your pay adjustment will be retroactive to effective date of your GG-1, once funding source has been identified." RA, Tab 32, Ex.1, p. 3 (Pet. for Alternative Writ of Mandate and/or Prohibition). Apparently having not received the pay, Limtiaco filed with the Attorney General a "Claim Against the Government" nine months later. This was denied by the Attorney General on January 31, 2001. The reason stated, "Our review of your claim shows that you accepted the position you were hired for and the corresponding pay." RA, Tab 32, Ex. 2, p. 1 (Pet. for Alternative Writ of Mandate and/or Prohibition). Approximately one year later, Limtiaco brought a grievance action before the CSC.

[4] The CSC entertained the claim, and on November 13, 2003, the CSC reportedly accepted a "Settlement" between GFD and Limtiaco. The record before this court does not contain a record of the CSC proceedings of November 13, 2003, so this court does not know what happened at that hearing. However, GFD counsel does not dispute that a settlement was entered at this hearing, and does not dispute the terms of that settlement.

[5] This Settlement was reduced to a writing dated June 24, 2004. The Settlement provided:

> Upon Management receiving the calculations, they shall immediately executed [sic] a GG-1 reflecting the correct pay grade and step that Employee William A. [sic] Limtiaco should be upon entry in the Guam Fire Department as stipulated in his Grievance Appeal Case No. 0304-GRE-03 thereby returning all his losses and capping all of his damages to the time of the issuance of the entry of the new GG-1.

Appellant's Excerpts of Record ("ER") Tab 2, pp. 1-2 (Stip. and Order re: Settlement, June 24,

2004). The Settlement also provided that Limtiaco's attorney Dave Highsmith would be paid $1,600.00. This resulted in yet a new GG-1, which contains the following remark: "Transfer and Demotion, as stipulated by the CSC 'Stipulation and Order.' Please see attached CSC documents." RE, Tab 32, Ex. A (Pet. for Alternative Writ of Mandate and/or Prohibition). This new GG-1 is signed by the Fire Chief, the Personnel Officer, and the Certifying Officer indicating that funds are available. However, the Settlement itself is signed by only one of the CSC Commissioners, Chairman Luis Baza. The record contains no evidence that any other CSC Commissioner other than Chairman Baza approved the Settlement, though Limtiaco asserts in his factual assertions that four CSC Commissioners approved the Settlement. This assertion remained unrebutted.

[6] By December 2004, Limtiaco had still not been paid. He filed a Petition for Writ of Mandamus in the Superior Court. In January 2005, the Attorney General's office entered an appearance. The matter went to an evidentiary hearing February 23, 2005. At this hearing, Fire Chief Uncangco did not deny that GFD owed the money pursuant to the Settlement. The Fire Chief also testified that if the obligation were ordered paid via a writ, that it would become a current year obligation.

[7] On March 10, 2005, the trial court issued the writ. The Attorney General moved for reconsideration. This motion was denied, and the Amended Writ of Mandate was entered on the docket on August 26, 2005. GFD timely filed a notice of appeal.

II.

[8] Generally, the grant of a writ of mandate is reviewed to determine whether the court's judgment is supported by substantial evidence. *Pac. Rock Corp. v. Perez*, 2005 Guam 15 ¶ 15. An appeal from trial court judgment granting mandamus relief, where there are no issues of fact

in dispute, is reviewed *de novo*. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 6. If there are issues of fact, they are reviewed for substantial evidence, and issues of law are reviewed *de novo*. We remain mindful that "[m]andamus relief is an extraordinary remedy employed in extreme situations." *Guam Publ'ns, Inc. v. Super. Ct. (Bruneman)*, 1996 Guam 6 ¶ 10. A writ of mandate may be used to compel the performance of a legal duty. 7 GCA § 31202 (2005); *People v. Super. Ct. (Laxamana)*, 2001 Guam 26 ¶ 12. Mandamus is appropriate only where there is a "clear, present and ministerial duty to act." *Holmes*, 1998 Guam 8 ¶ 11.

III.

A. Writ Jurisdiction of the Superior Court

[9] The Superior Court may grant a writ of mandamus "where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued on the verified petition of the party beneficially interested." 7 GCA § 31203 (2005). "[M]andamus will not lie to compel the exercise of discretion in a particular manner." *Underwood v. Guam Election Comm'n*, 2006 Guam 17 ¶ 14. Mandamus is appropriate only where there is a "clear, present and ministerial duty to act." *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 25 (quoting *Holmes*, 1998 Guam 8 ¶ 11).

[10] The first question, then, is whether the compliance with an administrative body's order for back pay is discretionary or ministerial. If the matter is discretionary, then not only is there no writ relief available, but the discussion on sovereign immunity must be approached differently, as discussed in subsection B.2. of this Opinion.

[11] California cases are persuasive because Guam's writ statute is derived from California. *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 23 n.4 (pointing out that "Title

7 GCA section 31202 mirrors California Code of Civil Procedure §1085").[2] In California the proper way to compel a government official to honor a back-pay order of an agency is by way of a petition for writ of mandamus. This concept was explained in *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 540 P.2d 609 (Cal. 1975), where the court concluded that where the public employer has already agreed to terms of payment of public employees, then there is no discretion left on the part of the public employer and mandamus proceedings are appropriate. *Id.* at 619-620. The court in that case said, "the issue here is not the validity of Ordinance No. 3936, but the sufficiency of that ordinance to fulfill the city's duty under the memorandum." *Id.* at 616. The court in *Glendale* explained that with the payment of public employee wages, the appropriate remedy could be mandamus and not a breach of contract action, stating, "often the payment of the wages of a Public employee requires certain preliminary steps by public officials; in such instances, the action in contract is inadequate and mandate is the appropriate remedy." *Id.* at 619.

[12] Other California cases have held similarly. "Mandamus is a proper remedy to compel a city council or a city civil service board to perform its mandatory duties prescribed by the charter." *LePage v. City of Oakland*, 91 Cal. Rptr. 806, 807 (Cal. App. 1970) (citation omitted). "One of the essential conditions for issuance of the writ of mandate is a showing on the part of the applicant that he has a clear legal right to the performance of the act the writ would compel." *McDaniel v. City & County of San Francisco*, 66 Cal. Rptr. 384, 386 (Cal. App. 1968).

[13] California is not alone in making this ministerial versus discretionary distinction. *See Odita v. Ohio Dep't of Human Servs.* 623 N.E.2d 140, 144 (Ohio Ct. App. 1993) ("Contrary to

[2] "California case law construing the identical statute is persuasive." *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 23 (quoting *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 6).

respondents' assertions, compliance with the order is not an executive act dependent upon the exercise of respondents' judgment, but, rather, is a ministerial act that respondents may perform 'in obedience to the mandate of legal authority, without regard to or the exercise of [their] judgment upon the propriety of the act being done.'") (citing *State ex rel. Trauger v. Nash*, 64 N.E. 558, 559 (Ohio 1902)).

[14] The ministerial duty at issue in *Odita* is to be compared with situations where the personnel action sought requires some exercise of judgment, more than merely complying with a pre-existing order. In those situations, mandamus action is inappropriate. *Cf. Milford Educ. Ass'n v. Bd. of Educ.*, 356 A.2d 109, 112-113 (Conn. 1975) (where the plaintiff was seeking basically a judicial interpretation of the terms of its contract with the defendant board of education and the payment of such sums as are due the individual teachers. Writ relief was inappropriate because that result could easily have been attained in a simple action for breach of contract or by an action for a declaratory judgment and consequential relief).

[15] We thus examine the nature of the duty that Limtiaco sought from GFD in the record. Because an order was already in place, Limtiaco asked for a mandate that GFD: (1) calculate his back pay, and (2) issue the new GG-1. These are the types of activities that the case authority has held constitute ministerial duties.[3] Discretion need not be exercised in calculating these

[3] Having concluded that there is writ jurisdiction to enforce this CSC decision, we note the Appellate Division case of *Mariano v. Guam Civil Service Commission*, No. CV-81-0052A, 1983 WL 30227 at *2, where the following statement is made: "[T]he writ of review issued by the Superior Court of Guam to the Civil Service Commission must be limited to those cases where the Civil Service Commission has exceeded its jurisdiction." However, in *Mariano*, the Government of Guam lost the grievance case before the CSC but won its case in the Superior Court of Guam as the Superior Court "annulled" the back pay award to Mariano. The record thus was not clear whether the Real Party in Interest-Appellant Mariano brought a petition for writ of prohibition or a petition for writ of mandamus. In seeking a writ of prohibition, the petitioner must establish that the board or tribunal was acting in excess of its jurisdiction. Guam law states, "[t]he writ of prohibition . . . arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." 7 GCA § 31301 (2005). If, in *Mariano*, the Government of Guam was seeking to prohibit the CSC from implementing its order for back pay, it may well have

figures or performing these acts. GFD already agreed Limtiaco was owed his back pay at the differential stated in the documents. Because ministerial and not discretionary duties were sought to be compelled, this situation fits into the line of cases that hold a writ of mandamus would be an appropriate vehicle for relief in seeking the performance of ministerial duties.[4]

[16] In response to the Government's argument that there is discretion that must be exercised in deciding which of many past due government obligations to pay first, the record does not reflect that the Government even engaged in this determination. The act of giving Limtiaco his back pay does not involve any complex policy decisions and questions of timing or priority do not exist in the record. If the Government presented evidence to the Superior Court of 100 past due debts and the Superior Court instructed the Government to pay only ten of the 100 past due debts, then the Government could argue that the Superior Court infringed upon its discretionary power. But there is no such allegation or showing by the Government.

[17] Concluding that the Superior Court could entertain a petition for writ of mandamus seeking compliance with the Settlement, we must now evaluate whether the Superior Court properly granted the writ. In order to secure the writ, Limtiaco had to show to the Superior Court that he had no adequate remedy at law and that he was a beneficially interested party. Clearly, Limtiaco is beneficially interested as the named employee, but the important question is whether he has an adequate remedy at law.

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had to establish the element required for prohibition, that the CSC had acted beyond its jurisdiction. This case originated as a petition for writ of mandamus, which does not require that petitioner show that the tribunal acted in excess of its jurisdiction. We read the *Mariano* case as confined to a case where the petitioner seeks a remedy of a writ of prohibition.

[4] This Opinion does not address the statement in *Bondoc v. Worker's Compensation Commission*, 2000 Guam 6 ¶ 6 n.2, that a petition for writ of mandamus is the proper vehicle for appealing an agency decision. Other authority holds that a petition for writ of judicial review is the proper way to appeal a personnel decision from an agency and a writ of mandamus is not appropriate. *See Perez v. Judicial Council*, 2002 Guam 12. Limtiaco's case is not an appeal of the CSC's ruling, so the issue of how to seek judicial review of an agency's decision is not before us.

[18] The trial court did not directly address the lack of an adequate remedy on the record. The trial court merely found that Limtiaco had to go "through extraordinary effort of hiring his lawyer, . . . where it should not have to be done." Tr. pp. 12-13 (Hr'g on Pet. for Writ of Mandate, Feb. 23, 2005). The trial court also found that "Personnel obligations are continuing obligations of the Government of Guam, and they do not stop with a September 30th/October 1st turnover of the fiscal year, just as Mr. Limtiaco is not terminated as an employee of any agency just because September 30th ends and October 1 begins." Tr., p. 12 (Hr'g on Pet. for Writ of Mandate, Feb. 23, 2005).

[19] Under Guam law, whether a petitioner has an adequate remedy at law is determined by statutory analysis; 7 GCA § 31203 requires that there be no "plain, speedy or adequate remedy in the ordinary course of law," and that this must be shown upon a verified petition of a beneficially interested party. 7 GCA § 31203; *see Laxamana*, 2001 Guam 26 ¶ 23. We find that the inconvenience of having to hire a lawyer does not suffice in this jurisdiction to fulfill the requirement that there be an inadequate remedy at law: "The inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one of the hardships of litigation in our judicial system, but such hardship does not measure up to the inconveniences which would result if piecemeal appeals were permitted." *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 459 (9th Cir. 1951).[5] We agree that "inconvenience has consistently been held insufficient to justify mandamus," *id.*, and therefore, the trial court was in error in concluding that this factor militated in favor of an inadequate remedy at law.

[5] We recognize that the Ninth Circuit analyzes writ jurisdiction differently than does Guam. In *People v. Super. Ct. (Laxamana)*, 2001 Guam 26 ¶ 23 n.3, the court drew the distinction between the analysis of Guam writ jurisdiction and how it differs from an analysis under the federal All Writs Act, 28 U.S.C. § 1651. The difference between deciding writ jurisdiction under the federal standard and the Guam standard is irrelevant, however, to the principle of law contained in *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 459 (9th Cir. 1951), that inconvenience and expense has never justified the invocation of writ jurisdiction.

[20] Further, we agree with the trial court that Limtiaco had no adequate remedy at law, but for different reasons. The nature of the agreement that Limtiaco seeks to enforce is an agreement by GFD that he is owed back pay after his transfer from a Driver's License Examiner II to Firefighter I. GFD, Limtiaco and the CSC all agree that Limtiaco is entitled to the differential in compensation or in the back pay, thus there is no opportunity for Limtiaco to sue any of these other parties for damages. Limtiaco seeks to have the Government perform its ministerial duty after having secured the agreement of any potential adversary.

[21] Limtiaco has exhausted his remedies at law, i.e., a grievance under Chapter 12 of the Department of Administration Personnel Rules and Regulations, and had no other actionable remedy to bring. He cannot file another grievance with the CSC because the matter had been already litigated.

[22] The Government points out that 4 GCA § 4408 (2005) provides that the "Civil Service Commission may seek enforcement of its decisions and orders in all decisions and orders rendered pursuant to section 4403 of this Chapter by application to the Superior Court for the appropriate remedy." However, this is not a remedy available to Limtiaco. It is available to the CSC. There is no process by which Limtiaco could petition the CSC to go to court under section 4408 on his behalf.

[23] Moreover, we agree with the trial court that the Government should not be able to escape its personnel obligations simply because there is a new fiscal year. If the Government were able to avoid its personnel obligations this way, it would never have to pay as long as a new fiscal year began. Though the trial court could have made a better record on Limtiaco's lack of a remedy at law, the conclusion the court reached was the correct result. The Superior Court

properly found that Limtiaco had met the requirements for a writ of mandamus, and it was proper to grant the writ of mandate.

B. The Government Claims Act and the Civil Service Commission.

[24] The Government of Guam next advances a series of arguments meant to relieve it of liability to Limtiaco, which we will take in turn.

[25] GFD counsel first attacks Limtiaco's right to recover from his CSC grievance action, arguing that Limtiaco had already brought a government claim on the same issue which was denied. Because Limtiaco did not appeal the denial of the government claim within the limitations time, GFD counsel claims Limtiaco relinquished his right to pursue the CSC grievance. The statute of limitations on appealing a denial of a government claim under the Government Claims Act is eighteen months after denial under 5 GCA § 6106 (2005).[6]

[26] This brings us to the critical issue whether the Government Claims Act even applies to awards of back pay, or to awards that result from personnel (merit system) actions generally. This analysis involves examination of the following three issues: (1) exhaustion of administrative remedies; (2) sovereign immunity; and (3) statute of limitations.

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[6] Section 6106 states:

> **§ 6106. Limitations on Actions and Filing.**
>
> (a) All claims under this Act must be filed within 18 months from the date the claim arose, but any claims timely filed under the predecessor of this Act shall be considered to have been timely filed under this Chapter.
>
> (b) Every action filed under this Chapter shall be barred unless commenced within 18 months from the time the notice that the claim was rejected was served as provided in Article 2 of this Chapter, or within 24 months after the claim was filed in cases where the government does not reject the claim.

5 GCA § 6106 (2005).

1. Exhaustion of Remedies.

[27] Generally, even if the Government Claims Act, or some other statutory remedy, were to apply, there is a universal principle that one must exhaust one's administrative remedies before pursuing it. "Mandamus will not be granted where the petitioner has failed to pursue the administrative remedies available to him. When an administrative remedy has been provided by statute, this remedy must be exhausted before the courts will act." *Holmes*, 1998 Guam 8 ¶ 9 (citation omitted).

[28] In a case addressing agency remedies versus the Government Claims Act, *Sumitomo Construction Co., Ltd. v. Guam*, 2001 Guam 23, this court recognized that an aggrieved bidder could utilize both the procurement law and the Government Claims Act to seek relief against the Government of Guam. We stated that "we reject the Government's narrow interpretation of 5 GCA § 5427(a), and hold that controversies based upon a claim for breach of contract damages are cognizable under the Procurement Law." *Id.* ¶ 15. Prior to *Sumitomo*, in *Pacific Rock Corp. v. Department of Education* ("*Pacific Rock II*"), 2001 Guam 21 ¶ 1, we stated, "the Procurement Law serves as the final administrative remedy that is a prerequisite to filing a claim pursuant to the Claims Act." This statement suggests that the two remedies may co-exist, though ultimately, in *Pacific Rock II*, we held that a procurement appeal was the final agency action required before filing a government claim in a procurement case.

[29] Based on precedent, it is incumbent on Limtiaco to establish that he exhausted his administrative remedies before turning to the Government Claims Act. However, this issue is only relevant if the Government Claims Act is meant to apply to personnel matters of classified employees. As discussed below, we hold that the Government Claims Act was not meant to

apply to claims for relief that arise under the merit system as dictated by the Organic Act and carried out by the Guam Legislature.

2. Sovereign Immunity for Ministerial or Discretionary Acts

[30] The Government's main argument is that Limtiaco seeks to enforce the terms of a contract, and as such, he must comply with the Government Claims Act. Consequently, the doctrine of sovereign immunity prevents Limtiaco from securing a writ for a money judgment against the Government of Guam since he failed to comply with the provisions of the Government Claims Act

[31] However, this is a petition for a writ of mandamus seeking an order for a government official to perform a ministerial act. Thus, we do not analyze sovereign immunity in the same way as we would in a case where the petitioner were seeking a discretionary act, or even a case at law for damages.

[32] Whether sovereign immunity lies against a discretionary act of a government official implicates the issue of whether sovereign immunity even applies when there are no money damages at stake. This issue has not yet been addressed by this court.[7] We have already

[7] There is general law that sovereign immunity is designed to protect the public coffers, so it is not invoked when relief in the nature of injunctive relief is sought. See *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir. 1990), which stated, "[t]he rule is entirely different, however, when the suit is for injunctive relief." The Ninth Circuit in *Ada* relied on the Supreme Court case of *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), which held that damage claims against government of Guam officials is analyzed differently than injunctive suits because damage suits "would affect the public treasury." *Id.* at 185; see *Ada*, 962 F.2d at 1371. However, there is apparent case law to the contrary from the Guam Appellate Division, in *Alexander v. Bordallo*, No. 78-0038A, 1979 WL 24948 (D. Guam App. Div. Jan. 8, 1979). That case stated, "[i]t is clear that sovereign immunity applies to specific performance actions against the Government; otherwise the government cannot operate effectively if its every act is subject to injunctive actions. *Id.* at *1, *See Larson v. Domestic and Foreign Corp.*, 337 U.S. 682, 69 S. Ct. 457, 93 L. Ed. 1629 (1948). Wright and Miller, Volume 14, section 3655." *Id.* at *1. This case does not present an opportunity to resolve this issue, but other jurisdictions have held that immunity would attach only to discretionary functions of public officials. This principle is best stated in the Texas case of *Burgess v. Jaramillo*, 914 S.W.2d 246 (Tex. App. 1996), where the court stated:

> As a general rule, official immunity to suit attaches to a government employee's official actions only when the employee's job requires the exercise of personal judgment and discretion. *Travis v.*

established that sovereign immunity does not bar suits against public officials for ministerial duties. *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 26 ("[S]overeign immunity does not prevent the issuance of a writ to perform a non-discretionary act."). The duties sought to be compelled here are strictly ministerial. Therefore, we need not decide at this time whether sovereign immunity attaches to discretionary acts of government officials.

[33] Whether sovereign immunity applies to suits for injunctive-type relief has also not been addressed by this court. The Ninth Circuit has held that it does not, albeit in an unpublished decision. The Appellate Division case of *Guam Power Authority v. Civil Service Commission*, No. CV-97-00072A, 1988 WL 242617 (D. Guam App. Div. Nov. 17, 1988), was appealed to the Ninth Circuit, and the Government raised sovereign immunity as a defense. In the appeal, the Ninth Circuit addressed the previously unlitigated issue whether sovereign immunity applies to back pay awards by the CSC. The court held that sovereign immunity does not apply to back pay awards owing by the Government of Guam. *Guam Power Auth.*, 967 F.2d 586 (9th Cir. 1992) (unpublished). The Ninth Circuit said:

> [W]e do not believe that the doctrine of sovereign immunity applies to grievance proceedings within a governmental agency. *See Delaware Dep't of Health & Social Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir.1985) (doubting, but not deciding, that the Eleventh Amendment applies to proceedings before arbitrators). Guam's inherent sovereign immunity protects it, as a sovereign, from *suit* without its consent. *Marx v. Government of Guam*, 866 F.2d

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> *City of Mesquite*, 830 S.W.2d 94, 102 (Tex.1992) (Cornyn, J., concurring). In contrast, a government employee's performance of duties that are merely ministerial in nature is not cloaked with official immunity. *Id.* Labeling an officer's acts as discretionary is probably only a shorthand notation for a more complex policy decision. *Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex.1994). Put differently, government employees are subject to suit if their acts are "ministerial" acts involving mere obedience to orders or performance of duties requiring nongovernmental choices, as opposed to "discretionary" acts requiring personal deliberation, decision, and judgment involving the government. *City of Irving v. Pak*, 885 S.W.2d 189, 192 (Tex. App.-Dallas 1994, writ dism'd w.o.j.); *Tyrrell v. Mays*, 885 S.W.2d 495, 497 (Tex. App.-El Paso 1994, writ dism'd w.o.j.).

Id. at 249.

> 294, 298 (9th Cir.1989). Thus, sovereign immunity acts as a jurisdictional limit on the courts.
>
> This appeal, however, does not concern the power of a court to assert jurisdiction over a sovereign. The backpay award was ordered in a grievance proceeding by an administrative body of the Guamanian government. The issue here, then, is the power of an agency, which was set up by the sovereign to resolve employment disputes occurring within other governmental agencies, to award monetary damages in the form of backpay. Because the back pay award was given by the CSC in a grievance proceeding, and not by a court, sovereign immunity does not apply.[fn1]
>
> > Fn1: Even if the doctrine of sovereign immunity applied in this situation, our holding would not change. The Guam government set up the CSC to resolve employment disputes occurring within other government agencies. Even more revealing, as the court noted below, in *Public Health & Social Services v. Quinones* (D. Guam App. Div. No. 86-0088A), the Guam Legislature appropriated over $100,000 to pay for the judgment rendered in that case against an employer by the CSC. Given these two factors, the government has apparently given the CSC the power to issue backpay awards.

Id. at *2.

[34] We are persuaded by this discussion and hold that sovereign immunity does not apply to an award given by the CSC in a grievance proceeding before the CSC because such award is not rendered by a court. "Sovereign immunity acts as a jurisdictional limit on the courts." *Id.* This case "does not concern the power of a court to assert jurisdiction over a sovereign." *Id.*

3. Applicability of Government Claims Act

[35] Counsel for the Government would have us characterize this case as one for damages, not for injunctive relief, since this lawsuit ultimately seeks a payout. We do not agree that the money represented in the Settlement is "damages" as that term is defined at law. Title 20 GCA § 2201 (2005), entitled "Damages," states that the measure of damages under a contract claim is "the amount which will compensate the party aggrieved for all the detriment proximately caused

thereby, or which, in the ordinary course of things, would be likely to result therefrom." Limtiaco's back pay is not meant to compensate him for detriment proximately caused by the Government. It is money meant to compensate him for his employment. Therefore, we cannot agree that Limtiaco's back pay presents a lawsuit for money damages against the Government of Guam such as to trigger an analysis of sovereign immunity as we would in a Government Claims Act case.

[36] Counsel for the Government, in fact, would have the court find that the settlement that Limtiaco seeks to enforce is a contract, and for this reason alone, the Government Claims Act should apply. We are not persuaded. The wrongs addressed in the laws which created the CSC are not the same wrongs addressed in the Government Claims Act.

[37] The CSC, its laws, and its rules, are authorized by the Organic Act of Guam, 48 U.S.C. § 1422c, which sets forth the responsibilities of the executive branch of the Government of Guam. That section dictates that, "[t]he legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system. The Government of Guam may by law establish a Civil Service Commission to administer the merit system." 48 U.S.C. § 1422c(a) (Westlaw through P.L. 110-49, July 26, 2007). The clear direction to provide due process rights to government employees arises out of a tradition of common law, starting with the United States Supreme Court case of *Elrod v. Burns*, 427 U.S. 347 (1976). That case provides that generally, civil servants are entitled to classification status, but that those who occupy positions where policy is made – the policy of the elected official – are not extended such protection. *Id.* at 367-68. A merit system is generally set up to protect civil servants from the political winds of change in order to provide continuity, but there is a countervailing need to ensure that the elected official is able to carry out policy directives, and

for this, the elected official is able to appoint employees at will, whose employment is not meant to be protected by a merit system.

[38] Guam's merit system is most famously discussed in *Haeuser v. Department of Law*, 97 F.3d. 1152 (9th Cir. 1996), where the Ninth Circuit stated: "Congress's command to the Guam legislature to set up a merit system for government employees is explicit: the legislature shall set up a merit system and, as far as practicable, appointments shall be made in accordance with such merit system." *Id.* at 1156.

[39] The Government Claims Act, on the other hand, 5 GCA § 6105 *et seq.*, exists by virtue of the Organic Act and Guam's inherent sovereign immunity. Section 1421a of the Organic Act states:

> The government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, *with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to*, or any tort committed incident to, *the exercise by the government of Guam of any of its lawful powers.*"

48 U.S.C. § 1421a (Westlaw through P.L. 110-49, July 26, 2007) (emphasis added). *See Pacific Rock II*, 2001 Guam 21 ¶ 19. There is no question that Guam possesses inherent sovereign immunity from suit without its consent pursuant to the Organic Act. *Marx v. Guam*, 866 F.2d 294, 298 (9th Cir. 1989); *see also Crain v. Gov't of Guam*, 195 F.2d 414, 417 (9th Cir. 1952). The Government Claims Act was enacted by the Guam Legislature to reflect its consent to a waiver of immunity for expenses incurred in reliance upon a contract to which the Government of Guam is a party, and torts arising from the negligent acts of its employees acting for and at the direction of the government of Guam. 5 GCA §§ 6105(a), (b)(2005).

[40] The directive in the Organic Act to set up a merit system was not meant to be frustrated by the additional requirements of compliance with the Government Claims Act. The merit

system provides rights and privileges which are not subject to the Government Claims Act, therefore, we hold that the Government Claims Act is not applicable to administrative and judicial lawsuits involving the merit system.

[41] We reach this conclusion for two reasons. First, the employment arrangement between Limtiaco and GFD was not a contract but a stipulation between the parties before an administrative tribunal, endorsed by the CSC as a settlement of a dispute properly before it. While some settlement agreements are deemed contracts for enforcement purposes, this cause of action arose under the Organic Act merit system when Limtiaco was hired by the competitive process. This is not a contract that was procured in accordance with procurement principles. When the Government of Guam enters into employment contracts which are outside the merit system, such as those government positions that are hired under 4 GCA § 4102(a) (enumerating the positions in the Government of Guam which are by law unclassified), these may well be contracts to which the Government Claims Act may apply. This is a question we save for another day and is not the case before us.[8] The settlement of Limtiaco's case before the CSC is an acknowledgment of his rights as a classified employee protected by a merit system, as enforced by the CSC. Because Limtiaco's rights were not formed by a contract, but by constitutional principles of due process, we find that the Government Claims Act does not apply to this Settlement.

[8] Because unclassified jobs are not within the merit system as referenced in the Organic Act, these jobs may well be characterized as contracts, depending on the factual circumstances. Therefore, the holding made herein that the claims of classified employees do not fall under the Government Claims Act does not prevent us from concluding in a future case that an unclassified position is a contract to which the Government Claims Act may apply. The issue whether the Government Claims Act applies to contracts between the government and its non-classified contract employees, too, is not entertained in our ruling herein.

[42] Second, merit system disputes in general, whether adverse actions or grievances, do not arise by contract. In this case, the contract for employment of Limtiaco was reduced to a Settlement approved by the CSC, but even if it were not, it would still not be a "contract" as that term is defined by Guam law. Guam law defines "contract" in two places. First, 18 GCA § 85101 (2005) states, "[a] contract is an agreement to do or not to do a certain thing." Limtiaco's claim arises from a stipulated order of a tribunal arising from a due process right under the Organic Act, and for this reason the Settlement does not fit into the definition of a simple "agreement to do or not to do a certain thing." Guam's procurement law also defines a contract and states: "Contract means all types of territorial agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or construction." 5 GCA § 5030(d) (2005). Neither of these definitions apply to the settlement agreement arising from the employment relationship between Limtiaco and the Government of Guam.

[43] Limtiaco is a classified employee, with due process rights as set forth by the United States Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and its progeny. States uniformly hold that if employees are imbued with merit system status, the rights of the classified employee derive from due process, not from the contract of employment. Conversely, in a Connecticut case of an at-will employee, it was acknowledged that the employee had no due process rights, only those of a contract worker. *Roche v. O'Meara*, 175 F. Supp. 2d 276 (D. Conn. 2001). For instance, "per diem employees are not entitled to the same protections as permanent employees . . . . An employee has a property interest in his or her position only where he or she cannot be discharged in the absence of good cause." *Id.* at 263. Said another way by another court, "classified employees such as Plaintiffs enjoyed the right to

retain their positions absent dismissal for cause. . . . [T]his right was statutory, not contractual . . . ." *Conway v. Sorrell*, 894 F. Supp. 794, 801 (D. Vt. 1995).

[44] Because a classified employee's rights to back wages, fair adjudication, merit hiring, and other rights, arise under the Organic Act mandate for a merit system, the Government Claims Act does not apply to Limtiaco's claim in this instance. Therefore, it is immaterial that he did not make his claim pursuant to the Government Claims Act, or that he failed to timely appeal the denial of his initial Government Claim. The Government Claims Act, if applicable, would require that Limtiaco appeal that denial within eighteen months following the denial, and Limtiaco did not do so. Instead, Limtiaco filed a grievance appeal with the CSC, pursuing his merit system rights. At the time that Limtiaco's case was proceeding through the CSC, it was not clear whether a claim by a classified employee for backpay fell within the Government Claims Act. Consequently, we find it of no consequence that Limtiaco filed a government claim that was denied. The Government Claims Act was never meant to apply to personnel issues that are pre-empted by the merit system, and so his filing of the government claim is irrelevant.

[45] The Government further argues that the 27th Guam Legislature undertook to amend the Government Claims Act by prohibiting the payment of back wages from the Government Claims Fund. However, the 2004 amendment to 5 GCA § 6402(d) does not support the Government's position. As amended, section 6402(d) states: "Compensation for back wages shall come from the employee's agency's personnel budget and *not* from the Government Claims Fund." 5 GCA § 6402(d) (2005). The Government argues that this language was clear legislative intent that redress for back wages is an integral part of Government Claims Act. However, we note that the preamble for the amended section 6402(d) contains the following statements:

> *I Liheslaturan Guåhan* finds that the current Government Claims Act does not properly address the needs of many claimants, as money from the Government Claims Fund ("Fund") is quickly depleted for several reasons: despite Guam law that requires a department or an agency to certify that funds are available to pay for a contract, contract claims are paid out from the Fund, sometimes costing more than the entire amount appropriated to the Fund; and compensation to a government employee for back wages are drawn off from the Fund, rather than from the agency's or department's personnel budget.
>
> It is the intent of *I Liheslaturan Guåhan* to ensure that money remains in the Fund for payments of claims that have no other source of funding tort claims.
>
> In addition, the rapid depletion of the Fund has also resulted in "bumping" of claims by those who are fortunate enough to hire an attorney to obtain a *writ of mandamus*, thereby giving their claims first priority. It is, therefore, the intent of *I Liheslaturan* to require payment of claims on a "first come, first served" basis to give equity to all claimants.

Guam Pub. L. 27-142 (Dec. 30, 2004). This legislative preamble evidences a clear intent that the Government Claims Fund not be used to pay back wages. We interpret this language as support for our holding that the Government Claims Act does not apply to classified employee grievances.

[46] Again, we face problematic language in the Appellate Division case of *Mariano v. Guam Civil Service Commission*, No. CV-81-0052A, 1983 WL 30227 at *3 (Guam App. Div., June 20, 1983), where the following statement is made: "We do realize, however, that the Civil Service Commission had no jurisdiction to award monetary compensation and salary to the Appellant since such award can only be effectuated pursuant to the provisions of the Government Claims Act . . . ." In making this statement, the Appellate Division relied on no known authority, and we have found none. We believe that the statement of the Appellate Division in *Mariano* that the CSC has no jurisdiction to award money damages and the Government Claims Act Applies is in

error and it is rejected.[9] We concur with the court which stated that, "state law may elect whether or not to provide a protected status, but once it has chosen to do so, the protections which apply are governed by the due process clause." *Minella v. City of San Antonio*, 368 F. Supp. 2d 642, 650 (W.D. Tex. 2005) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)). The right to protection as a classified employee derives from an Organic Act right, and once conferred, due process rights must accompany the relationship between public employee and public employer. This is not a contract case and the Government Claims Act therefore does not apply.[10]

C. Statute of Limitations

[47] Having determined that the Government Claims Act does not apply, we need not address whether Limtiaco's claim is barred by the Government Claims Act statute of limitations, 5 GCA § 6106. However, because counsel for the Government claims that Limtiaco also exceeded the administrative claims statute of limitations set forth for grievance procedures under personnel law, we must address whether Limtiaco's claim came within the statute of limitations set forth in the merit system laws and regulations.

[48] Government counsel refers to a time limit of fifteen days. Chapter 12 of the Department of Administration Rules and Regulations ("DOA Rules") is entitled "Grievance Procedures."

[9] The Supreme Court of Guam has held that it will not deviate from precedent of the Appellate Division of the District Court of Guam if it was well established in law and well reasoned, *Sumitomo Constr. Co. v. Zhong Ye Inc.*, 1997 Guam 8 ¶ 6, or "unless reason supports such deviation." *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4. We find the law does not support this statement of the Appellate Division in *Mariano*, and there is sufficient reason supporting our deviation from it.

[10] Again, we acknowledge that certain employment situations may be referred to as "contract" employment, but in the case of a classified employee, such a "contract" carries with it much more than just the rights and duties laid out in the contract; they carry due process implications. "Certain contract situations, however, such as a 'public college professor dismissed from an office held under tenure provisions,' or 'staff members dismissed during the terms of their contracts,' have contractual rights creating 'an interest in continued employment that [is] safeguarded by due process.'" *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 345 (5th Cir. 2006) (alteration in original) (citation omitted).

DOA Rule 12.400 is entitled "General Provisions for Use of Grievance Procedures." DOA Rule 12.405, titled "Official Time for Presentation of Grievance," provides under subsection A that "[a]n employee must be given a reasonable amount of official time to present his grievance if he is otherwise in an active duty status." This "reasonable time" provision applies to all steps of the grievance procedure.

[49] Rule 12.500, entitled "Informal Grievance Procedures," is the first step of the grievance procedure. Rule 12.505B(1) provides that "an employee may present a grievance to his supervisor concerning a continuing practice or condition at any time. Grievances concerning a particular act or occurrence, must be presented within 15 calendar days of that action or occurrence." Rule 12.505B(2) provides that that supervisor must render a decision within ten calendar days of the presentation of the grievance. Most importantly, Rule 12.505C provides that an informal grievance can be presented "orally or in writing." DOA Rule 12.505C.

[50] Rule 12.600, entitled "Formal Grievance Procedures," is the next step. A prerequisite for pursuing a formal grievance procedure is that the employee must have pursued an informal grievance under section 12.500. DOA Rule 12.601. Under Rule 12.601B(4), the formal grievance procedure must be initiated by the aggrieved within five days following the denial (or inaction by the supervisor) of the informal grievance. The department head must act on the recommendation of the formal grievance committee within five days. DOA Rule 12.705H.

[51] Rule 12.800, entitled "Grievance Review Board," is the next step. It requires the aggrieved employee to have gone through informal grievance procedures and formal grievance procedures. Rule 12.801B(4) provides that the aggrieved must appeal to the Grievance Review Board within five days of the denial of his grievance, or the inactivity of the supervisor. The Review Board must act within ten days. Finally, Rule 12.900, entitled "Appeal to the Civil

Service Commission," is the last administrative step. Again there is a five-day limit. Rule 12.901B(5), provides that the aggrieved must bring the matter to the CSC within five days following the denial (or inactivity) of the Grievance Review Board.

[52] The facts in this case indicate that Limtiaco was transferred on May 25, 1998, and that "his first paycheck gave him an unpleasant surprise since it reduced his hourly wage from $12.96 to $8.48." RA, Tab 5 (Mem. P. & A. in Supp. of Pet. for Alternative Writ of Mandate, December 22, 2004). If we take the first date of incorrect pay as the date from which to calculate his 15 days, Limtiaco should have complained to his supervisors within 15 days of receiving the wrong hourly wage. Further, he would have a continuing duty to make an informal grievance each time he received a paycheck at the wrong hourly wage. The record contains no evidence whether Limtiaco filed a written grievance within 15 days, but the record does contain evidence that Limtiaco approached his supervisors at some time and "[p]revious GFD chiefs promised to correct this." RA, Tab 5 (Mem. P. & A. in Supp. of Pet. for Alternative Writ of Mandate, December 22, 2004). The record remains uncontroverted that Limtiaco notified his supervisors as soon as he learned that his pay was not the amount contained in his transfer papers, though he does not say when. Moreover, the chief of his new department promised to attend to the incorrect amount as soon as he could, finally putting that promise in writing on February 7, 2000. The record also contains evidence that Limtiaco never acquiesced to the lower pay; he filed a government claim and continued to pursue it. In addition, the record contains references that GFD continued to assure Limtiaco that his back pay would be honored.

[53] From the record, it is apparent that Limtiaco's supervisors continually assured Limtiaco that his pay would be adjusted and the Government presented no evidence below to controvert this. In other words, Limtiaco pursued informal grievance procedures – he approached his

supervisors – and the informal grievance or grievances were resolved in Limtiaco's favor. There is no reason for Limtiaco to pursue formal (written) grievance procedures if informal grievance procedures were effective.

[54] The law instructs that the statute of limitations normally starts "*either* when the course of conduct is brought to an end . . . *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." *Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 190 (Cal. 2001) (emphasis in original); *see also United States v. Reitmeyer*, 356 F.3d 1313, 1321-22 (10th Cir. 2004).

[55] Again, we turn to the *Mariano* case, 1983 WL 30227, which held that the aggrieved employee's delay in bringing action was forgiven because the continued promises by his employer to pay him induced lack of action on the aggrieved employee's part. Relying on the case of *Ex Parte Logan*, 205 S.W.2d 994, 996 (Tex. Crim. App. 1947), the Appellate Division held the estoppel constituted a "continuing offense, which was not committed by any overt act, but by neglect and failure to act. The . . . offense continued so long as the neglect continued without excuse. . . . [T]he grievance is the failure of the Government to pay the Appellant the wages due and the continuation of that failure." *Mariano*, 1983 WL 30227 at *2. In finding that the Government of Guam should be estopped from denying Mariano's claim because they induced inaction on Mariano's part, the court stated, "[t]o hold otherwise would be contrary to public policy and would require an employee to file a formal grievance with his employer fifteen (15) days from the date his check was due instead of informally attempting to resolve the problem with his superiors." *Id*. at *3.

[56] An examination of the facts in this case indicate that though Limtiaco shows no written formal grievance within any 15-day deadline, and did not appeal the denial of his government

claim within 24 months, he received assurances throughout his employment that the Government would give him his back pay. We rely on the law that a "continuing offense" can toll the statute of limitations, *see Richards*, 29 P.3d at 190, and hold that under the specific facts of this case, Limtiaco's failure to prove that he met the deadlines set forth in the DOA Rules is irrelevant because the deadlines were tolled. Moreover, as analyzed below, we find that the Government is estopped from raising this defense.

D. Estoppel

[57] The equities favor Limtiaco being allowed to go forward with his claim. In fact, in its brief on appeal, GFD counsel states that GFD concedes that it had a duty to pay Limtiaco "until the Department acquired a legitimate excuse not to pay." Appellant's Opening Brief, p. 8 (Dec. 28, 2005).[11] If we allowed this, the Government could concede an obligation but delay paying it until the Government "acquired a legitimate excuse not to pay," at which point, if the statute of limitations had expired, the obligation would be excused. This argument cannot stand.

[58] We adopted the same test for estoppel that the Appellate Division did in *Mariano*:

> Guam's equitable estoppel doctrine was adopted from the California Civil Procedure law (CCP § 1962). Case law applying the doctrine has set forth four elements that must be proven in an equitable estoppel analysis:
>
> (1) the party to be estopped must be apprised of the facts;
>
> (2) he must intend that his conduct will be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon;

[11] The argument made by GFD counsel is that the Department's neglect and failure to pay Limtiaco began on May 25, 1998, the date he became employed, and continued until the GFD had an excuse not to pay. GFD acquired a legitimate excuse not to pay Limtiaco on January 31, 2001, when the Government denied Limtiaco's claim.

(3) the party asserting the estoppel must be ignorant of the true state of the facts; and

(4) he must rely upon the conduct to his injury.

Mobil Oil Guam, Inc. v. Young Ha Lee, 2004 Guam 9 ¶ 24 (citations omitted). We hereby rely on these elements of estoppel in the present case, and analyze whether this doctrine should be used against GFD.

[59] First, was the GFD apprised of the facts? We conclude from the record that GFD was aware that Limtiaco was not being paid according to his GG-1 as early as February 7, 2000, when the Fire Chief wrote a memo acknowledging the disparity, and promising that Limtiaco would be paid retroactive to his date of hire into the new position. GFD never contradicted their knowledge of the pay problem, and as late as November 13, 2003, GFD agreed that it owed Limtiaco back pay starting from his date of hire. This is confirmed in the settlement of June 24, 2004. The Fire Chief testified at a February 2005 hearing that Limtiaco was owed the money. Therefore, the first prong of estoppel is met.

[60] The second inquiry is whether Limtiaco could have relied on the representations of GFD that he would be receiving his pay differential. The record supports that Limtiaco could have reasonably relied on GFD's statements made over a five-year period.

[61] Third, Limtiaco must show that he was ignorant of the true facts. In fact, we believe that Limtiaco was powerless over any of the financial information of the Government of Guam that was preventing his agency from paying him. It was the Department of Law, not his employing agency, which made the decision not to pay Limtiaco (beginning with the denial of his government claim) and has continued in that posture, ending in this appeal.

[62] Finally, Limtiaco has relied to his detriment on GFD's statements. He could have filed this grievance in 2000 after the Fire Chief acknowledged his debt but did not pay it, and he could have filed his grievance in 2003 when they promised him again. He could have pursued this writ of mandate any time in the prior five years. We find that the elements of estoppel are met.

[63] Thus, while we expressly reject the holding made in *Mariano* that back pay awards are subject to the Government Claims Act, we adopt with approval the Appellate Division's use of estoppel against the Government. In *Mariano*, a police officer filed a grievance when he was inexplicably not paid for months. 1983 WL 30227 at *1. He received the repeated assurances of his supervisor that his back pay would be honored, but payment was never made. *Id.* The officer eventually filed a grievance with the CSC against his employer, the Department of Public Safety. *Id.* The CSC awarded $1,449.60 in back pay. *Id.* The Department of Public Safety did not pay this, and sought a writ of review from the Superior Court. *Id.* The writ was eventually granted and the award annulled. The Appellate Division eventually reversed this case, holding that the Department of Public Safety should not be allowed to disregard prior promises. *Id.* at *2-3. The decision rests on the basis of estoppel; the Government of Guam was estopped from not paying Mariano after telling him many times that they would pay him. *Id.* at *2. The Appellate Division said, "[w]e are aware that extreme caution must be exercised in applying the doctrine of equitable estoppel against a sovereign," further noting, "this is not to say that equitable defenses can always be used as a defense against sovereigns; a court must employ a balancing test to determine whether the injustice to the private party will far outweigh the public interest to be protected." *Id.*

[64] We therefore invoke the doctrine of estoppel which was used with success in the *Mariano* case. GFD representatives made no less than four promises to Limtiaco that he would be paid

for the hours worked at the wage set forth in his hiring papers. The Government should be estopped from luring Limtiaco into inaction, and then telling Limtiaco that his debt is too late or a prior year's obligation. The *Mariano* case (as modified by this Opinion) supports such estoppel.

E. Rule of Four

[65] Government counsel argues a correct statement of law, that under 4 GCA § 4402,[12] and Appellate Division precedent, any action of the CSC requires the vote of four commissioners to be enforceable. *Pub. Health & Soc. Servs. v. Quinones*, No. CV-86-0088A, 1987 WL 109892 at *2 (D. Guam App. Div. Aug. 27, 1987); *Guam Power Auth. v. Civil Serv. Comm'n*, Docket No. CV-90-0043A, 1991 WL 336909 (Guam App. Div. June 12, 1991). We have no quarrel with this proposition of law. However, Limtiaco's counsel notes correctly that the violation of the "Rule of Four" was not raised below. As such, this court conducts a different review.

[66] As a general rule, this court will not address arguments raised for the first time on appeal. *See Dumaliang v. Silan*, 2000 Guam 24 ¶ 12; *Lizama v. Dep't of Pub. Works*, 2005 Guam 12 ¶ 41. Nonetheless, this court may recognize exceptions to this rule, such as "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is

[12] The Rule of Four finds its basis in 4 GCA § 4402 (2005):

> § 4402. **Quorum.**
>
> The quorum of the Commission shall be four (4) members. The affirmative vote of four (4) members shall be required for any action of the Commission. The Commission may adopt rules to govern its procedures and the standards to be maintained by non-attorney representatives; provided, that rules adopted by the Commission shall recognize that representative is not an attorney and cannot be bound by the same standards and ethics as an attorney; and, further, provided, that in cases where an employee represents oneself, the Commission shall render all possible assistance to the employee to insure a fair and impartial hearing.

purely one of law." *Taniguchi-Ruth + Assoc. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 80 (quoting *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1).

[67] The issue of whether the "Rule of Four" was complied within this case is a factual issue and not an issue purely of law. Limtiaco assures that there were four commissioners in agreement with the Settlement, but there is an insufficient factual basis before this court to determine whether this actually occurred. The Government also does not argue review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process. Therefore, we decline to exercise our discretion to review this issue raised for the first time on appeal.

F. Attorney General's signature

[68] The Department of Law argues that the document that Limtiaco seeks to enforce is not valid unless it has the signature of the Attorney General and the Governor of Guam pursuant to 5 GCA § 22601, entitled, "Execution of Contracts," which provides that "all contracts shall, after approval by the Attorney General, be submitted to the Governor for his signature. All contracts of whatever nature shall be executed upon the approval of the Governor." 5 GCA § 22601 (2005). However, as we established herein in subpart B.2., Limtiaco's Settlement is not a contract in this specific instance. It is a binding promise arising from his status as a protected class of employees under the Organic Act. Because we have held that the Settlement in issue is not a contract, 5 GCA § 22601 does not apply.

G. Applicability of Guam Public Law 27-106 and Guam Public Law 27-107

[69] Counsel for GFD finally contends that Limtiaco's back pay debt is a prior year's obligation, and as such, the Guam Legislature has passed legislation preventing the executive branch from using current year appropriations to pay prior year obligations. Counsel for GFD

cites the Budget Acts, Public Laws 27-106 and 27-107, where this restriction is contained. Both budget laws contain the following preamble: "Except as otherwise provided in this Act, the appropriations made by this Act shall be available to pay for the obligations incurred on or after October 1, 2004, but *no later than* September 30, 2005." Guam Pub. L. 27-106 (Sept. 30, 2004) and 27-107 (Oct. 1, 2004) (italics in original).

[70] Limtiaco claims that his Settlement is not a prior year's obligation. The following verbal exchange shows that the Fire Chief agrees that if the judge granted the writ, it would be transformed into a current year obligation:

> Q: [by the court] So if I give you a writ of mandate right now, it'll become a current year obligation, is that correct?
>
> A: [by Fire Chief Uncangco] Yes. Yes Ma'am. Yes Ma'am.

Tr., p. 10 (Hr'g on Pet. for Writ of Mandate, Feb. 23, 2005). Even counsel for GFD at the Writ hearing conceded that if the writ were issued, Limtiaco's pay would be a current year obligation.

[71] Despite the Government's agreement, we do not agree that this obligation can be made into a current year obligation by consensus. The agreement of the Fire Chief at the hearing is immaterial to accounting principles that hold this to be an obligation of prior years. However, when the executive branch owes a past due obligation, and the judicial branch has properly ordered it paid, and the executive branch is constrained from doing so from its current year budget, there is nothing to prevent the owing agency to seek the funds for this obligation from the Guam Legislature in the agency's budget.

H. Res judicata

[72] The Government finally argues that Limtiaco's claim is barred by res judicata in that the decision on Limtiaco's government claim is binding. The Government argues that since

Limtiaco did not appeal the denial of his government claim, that the adjudication of the government claim is "final" for purposes of a final judgment. The Government cites *In re: Application of Leon Guerrero*, 2001 Guam 22 ¶ 24 to argue that because there is a final judgment (denial of the government claim) on this identical issue, the matter was barred by res judicata, and the trial court should not have entertained the case.

[73] We have determined that the Government Claims Act does not apply to claims for back wages under these circumstances. Therefore, the denial of Limtiaco's government claim was not a final judgment on the merits. Therefore, the argument that the case was barred by res judicata is rejected.

V.

[74] In conclusion, we hold that: (1) A petition for a writ of mandamus was the appropriate way to seek enforcement of the agreement made before the CSC that GFD would calculate Limtiaco's back pay and generate the paperwork to effectuate payment of such back pay, because these are ministerial duties by nature; (2) Limtiaco exhausted his administrative remedies because he sought informal resolution of the matter, followed by a government claim (which we conclude to have been unnecessary), followed by a grievance procedure. He exhausted the administrative remedies available to him; (3) Sovereign immunity does not apply to this action because GFD's duties sought to be enforced are ministerial in nature; (4) The Government Claims Act does not apply to claims arising under the merit system, and we vacate this holding in *Mariano v. Guam Civil Service Commission*, No. CV-81-0052A, 1983 WL 30227 (D. Guam App. Div. June 20, 1983); (5) Limtiaco did not fail to abide by the statute of limitations because GFD's offense in failing to pay him was continuing; and (6) GFD is estopped from claiming that Limtiaco did not act with haste when GFD's representatives

themselves induced inactivity by their promises. We find that the Government's other arguments do not change this result, and consequently, we **AFFIRM**.