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IN THE SUPERIOR COURT OF GUAM

GUAM FEDERATION OF TEACHERS as
agent for MATTHEW RECTOR, individually,
and on behalf of all those similarly situated,

Petitioner,

vs.

GOVERNMENT OF GUAM, a political
entity, FELIX A. CAMACHO, Governor of
Guam, LOURDES M. PEREZ, Director of
Dept. Of Administration, NERISSA
BRETANIA-SHAEFFER, Director, Guam
Public School System,
CARLOS BORDALLO, Director, Bureau of
Budget Management Research,
and DOES 1-10,

Respondents.

Case No.: **SP0009-07**

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO COMPEL PERFORMANCE
OF MANDATE; TO QUASH RETURN;
AND FOR ENTRY OF JUDGMENT

COMPLIANCE-SETTLEMENT PROCEEDINGS:
MARCH 2009 - PRESENT

1. On March 3, 2009, a hearing was held in this Court regarding issuance of a Peremptory Writ to compel Respondents to compensate and pay wages due for 1,832 DOE teachers subjected to involuntary furlough in school year 2003. Petitioners were represented by Robert P. Kutz; Attorney Steve Newman appeared as AG's representative for GovGuam and the line agency Respondents. Fred Nishihara, Esq. appeared on behalf of the Guam Public School System (GPSS).
2. At the end of the hearing, and upon review of proceedings to date, including Respondents' failure to appear at prior hearings and failure to comply with Judge Barrett-Anderson's 2006 Decision and Order granting Petitioners the same relief sought in these mandamus proceedings (SP184-04), this Court issued its Peremptory Writ of Mandate, commanding

1 Respondents to compute and pay wages due together with interest, statutory penalties, and attorney's
2 fees. At no time before issuance of the Writ had Respondents taken any action to seek review of
3 Judge Barrett-Anderson's order, either by motion for reconsideration or by appellate proceedings.
4 The time to do so has long since elapsed.

5 3. This Court's Peremptory Writ of Mandate was served on Respondents GPSS and
6 GovGuam on March 20, 2009. Though provision was made in the Peremptory Writ for the Court
7 to order additional briefings or other proceedings, the actions to be taken by Respondents were not
8 stayed, and no further proceedings have taken place.

9 4. To date, the only compliance made by Respondents to the Writ has been filing of a
10 document entitled "Return, Opposition and Defenses to Petitioner's Peremptory Writ of Mandate"
11 filed by Fred Nishihara on behalf of Guam Public School System March 30, 2009. No return or
12 other document has been filed by the Attorney General on behalf of any other respondents.

13 5. As set forth in the declaration of Robert P. Kutz submitted herewith, repeated
14 attempts at resolution of this matter have been made by counsel for Petitioners, all of which have
15 been ignored by Respondents despite verbal assertions by Mr. Nishihara that he would present the
16 matter to his clients, and thereafter present a proposal for settlement or further litigation of the
17 matter. [Declaration of Robert P. Kutz, submitted herewith.]

18 6. In an effort to further settlement or resolution of the case, Counsel for Petitioners
19 informed Mr. Nishihara by letter that although Mr. Nishihara's return of the Peremptory Writ was
20 improper, and showed no effort to comply with this Court's Writ, Petitioners would make no attempt
21 to quash the return or seek enforcement, so long as settlement negotiations could continue.
22 [Declaration of Robert P. Kutz; Nishihara letter of July 17, 2009.] One year has now passed since
23 this Court's Peremptory Writ issued, with no evidence of compliance by these Respondents, nor any
24 evidence of their intent to comply or to settle the case. These motions follow.

25 **RESPONDENT DEPARTMENT OF EDUCATION**
26 **HAS ADMITTED LIABILITY FOR PAYMENT**

27 7. By letter of September 28, 2006, Luis S.N. Reyes, then Superintendent of Education
28 for GPSS, sought the assistance of Governor Camacho for release of funds to GPSS to meet the

1 financial obligations arising from to this case. In his letter, Superintendent Reyes notes that the
2 Superior Court of Guam had affirmed and upheld the Civil Service Commission's finding that the
3 Education Policy Board and GPSS violated the rights of original teacher representative Elizabeth
4 Taimanao and 1,823 other teachers to receive full pay for 26 pay periods as authorized by Guam law
5 and furlough regulations for the period of August 1, 2003 through August 18, 2003. [Copy attached
6 as Exhibit A.]

7 8. Despite Superintendent Reyes expressed belief that GPSS had sufficient funding
8 appropriation in the existing budget, to meet this obligation, no action was taken by the Governor,
9 the Legislature, GPSS or anyone else. In light of this clear admission of liability, it is difficult to
10 imagine why GPSS/DOE and GovGuam have done nothing but attempt to re-litigate the entire
11 matter.

12 **RESPONDENTS' RETURN OF THE**
13 **PEREMPTORY WRIT SHOULD BE QUASHED**

14 9. By citing 7 GCA § 31206 as authority for Respondents' return of Writ, Counsel for
15 Respondents has deliberately or negligently mistaken the statutorily- authorized return of a Court's
16 Alternate Writ of Mandate, which may be answered in the same manner as a complaint in a civil
17 action, for the "compliance return" required for a Peremptory Writ of Mandate. 7GCA § 31204
18 provides that the writ may be either alternative or peremptory. The Alternative Writ must command
19 the party to whom it is directed, immediately after the receipt of the writ or at some other specified
20 time, to do the act required to be performed or to show cause before the court at a specified time and
21 place why he has not done so. The Peremptory Writ must be in a similar form, except that the words
22 requiring the party to show cause why he has not done as commanded must be omitted and a return
23 date inserted. This Court's Peremptory Writ conforms to the statute.

24 10. There is no requirement that an Alternative Writ must be first issued by the Court,
25 unless application is made to the Court without notice to the adverse party. Where the application
26 is made on due notice and the Writ allowed, the Peremptory Writ may be issued in the first instance.
27 [7GCA § 31205.]
28

1 11. Where the judgment and Writ are regular on their face and the relief granted is within
2 the jurisdiction of the Court, the respondent has no alternative but to obey. The power to order
3 compliance with a writ is not dependent on a showing of willfulness or persistent refusal. [*City of*
4 *Carmel-By-The-Sea v. Monterey County Bd. Of Sup'rs*, 137 Cal. App. 3d 964, 187 Cal. Rptr. 379
5 (1st Dit. 1982); *King v. Woods*, 144 Cal. App. 3d 571, 192 Cal. Rptr. 724 (1st Dist. 1983).] An
6 insufficient certificate of compliance is subject to being stricken or quashed on the relator's motion.
7 [*Havana State Bank v. Rodes*, 124 Fla. 288, 168 So. 249 (1936); 55 C.J.S. §382.]

8 12. Although Guam law is not quite so specific with respect to return of the writ, or
9 compliance with it, 7GCA §§ 31214 and 31215 specifically provide for instances in which a
10 respondent refuses to comply with the Court's mandate. In such a situation, the Court may itself take
11 such action as was mandated, including but not limited to making appointments to perform such acts,
12 whether those appointments are ministerial or discretionary. [7GCA § 31215.] Where persistent
13 refusal of obedience is found, the Court may order a disobedient party to be imprisoned until the writ
14 is obeyed, and make any orders necessary and proper for complete enforcement of the writ. [7GCA
15 § 31214.]

16 13. By their supposed return of this Court's Peremptory Writ citing various form of
17 denials and defenses, Respondents are making a direct collateral attack on the Writ by asking for
18 a new trial upon the facts leading to CSC and Judge Barrett-Anderson's prior decisions upon the
19 matter. Respondents completely disregard DOE's written admission of liability. [*supra*, para. 7-8.]

20 14. Once a Peremptory Writ is issued, it may not be the subject of collateral attack by the
21 respondent. All matters of law and fact that could have been pleaded in defense prior to the award
22 of the Peremptory Writ are foreclosed by that writ. [55 C.J.S. § 386, internal citations omitted.].

23 15. Respondents cannot re-litigate previous writ proceedings. The doctrine of res
24 judicata is applicable to judgments in mandamus proceedings, and this applicability is not affected
25 by the fact that the judgment may have been rendered by a trier of fact lower in rank than the one
26 before which its res judicata effect is invoked. [52 Am Jur 2d, § 467; *Annotation References*: 21
27 A.L.R. 3d 206 § 4.] In July, 2004, the Civil Service Commission ruled that the teachers-Petitioners
28 who are the real parties in interest to this matter were entitled to pay for the involuntary furlough

1 imposed on them by the Guam Education Policy Board's change of the 2003 - 2004 school year.
2 Following CSC's decision, Attorney Nishihara sought review of the facts and CSC action by Writ
3 of Review filed in the Superior Court, the result of which was Judge Barrett-Anderson's April, 2006
4 Order affirming CSC's decision in favor of Petitioners.

5 16. 7GCA § 31201 provides that a Writ of Mandamus may also be denominated a *Writ*
6 *of Review* – the two are functionally interchangeable. Sections 31202 through 31207 delineate the
7 procedures be held in a mandamus proceeding, including the fact-finding aspects of the writ process.
8 The proceedings in Judge Barrett-Anderson's Court, which were extensively briefed and argued, as
9 well as the 2004 CSC proceedings, are the legal equivalent of similar proceedings which could be
10 had in response to a petition for an Alternative Writ of Mandate. By their purported return of the
11 Court's Peremptory Writ, Respondents seek to renew their prior arguments and defenses, presumably
12 with hope of a more favorable result. Respondents must not be allowed a third bite at this well-
13 litigated apple. It is clear upon review of the record in this matter that Respondents so-called return
14 must be quashed, and compliance with this Court's Peremptory Writ compelled in such manner as
15 the Court's may direct.

16 **JUDGMENT SHOULD BE ENTERED UPON**
17 **THIS COURT'S PEREMPTORY WRIT**

18 17. As noted above, while this Court may issue appropriate orders to ensure compliance
19 with its writ, Petitioners nonetheless are entitled to a separate judgment upon the writ as prerequisite
20 to any appeal of the matter. [*A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,*
21 *v. Douglas B. MOYLAN, Attorney General of Guam.* 2004 WL 110618 (Guam Terr.)].

22 18. In the present case, it is respectfully suggested that the Court's orders should include
23 a short time for proper return of the Court's Peremptory Writ, wherein the Respondents can
24 demonstrate their compliance or intent to comply with the commandments of the writ, or may state
25 the reasons why the Respondents do not intend to comply. Since these Respondents have had more
26 than one year to determine what action they intend to take, if any, the second return period should
27 be no more than ten days. If Respondents' compliance is unsatisfactory, the Court should then order
28 entry of judgment forthwith, so the matter can be taken on appeal if either party decides to do so.

1 Should the Respondents elect to obey the writ, or to negotiate an orderly procedure for compliance
2 with it, the Court should closely monitor that procedure, issuing such supplemental orders as may
3 be necessary to ensure compliance.

4 CONCLUSION

5 19. The Court should consider these factors in framing its decision:

6 (1) Despite the passage of more than twelve months, Respondents have made no effort
7 to comply with the writ, or to respond to or make any settlement overtures whatsoever.

8 (2) The matter has been fully adjudicated in prior proceedings which have *res judicata*
9 effect upon Respondents' attempt to renew similar proceedings. Moreover, any collateral attack
10 upon the award or this Court's Peremptory Writ of Mandate requiring computation and payment of
11 the award is barred by the doctrine of government estoppel, as articulated by the Supreme Court in
12 *William M. Limtiaco v. Guam Fire Department, Government of Guam, etc.*, 2007 Guam 10, whereby
13 the Government, having admitted an existing liability, loses further discretion to delay or refuse to
14 meet the obligation, so that its duties become ministerial in nature.

15 (3) Respondent Guam Public School System, by letter to Governor Camacho September
16 28, 2006, has admitted liability for payment of these obligations. [Exhibit A hereto.]

17 WHEREFORE, the Petitioners herein request that this Court quash Respondents' supposed
18 return of the Court's Peremptory Writ and require a proper return to be made within ten days or less
19 in compliance with Guam law. Upon making of the return, this Court should speedily review the
20 same, and issue such further orders as the Court may deem necessary to compel compliance with the
21 writ, should such be necessary, and if the Court should determine that compliance will not be made,
22 that judgment issue forthwith upon the matter.

23 The foregoing is respectfully submitted.

24 Dated this 30th day of March, 2010.

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ROBERT P. KUTZ, ESQ.