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APPEAL
BEFORE THE NMI SETTLEMENT FUND
HEARING OFFICER

IN RE ADMINISTRATIVE APPEAL OF **ROSA A. CAMACHO,** Appellant.	NMISF Case No. 16-002 **LIMITED DECISION AND ORDER ON THE EFFECT OF OVERTIME ON RETIREMENT BENEFITS**

Appellant Rosa A. Camacho ("Mrs. Camacho") through her counsel, Attorney Jeanne H. Rayphand of the Northern Marianas Protection & Advocacy Systems, Inc. ("NMPASI"), filed this administrative appeal ("Appeal") of the Northern Mariana Islands Settlement Fund ("NMISF") adverse action, dated March 23, 2016 ("Adverse Action"), that sought to recover overpaid benefits due to an application of accumulated overtime/compensatory time ("OT") hours as service credit instead of as vesting service credit. *See* Overpayment of Benefits letter ("Overpayment Letter") at Administrative Hearing Record ("Record") 16-002-02 to 03. Mrs. Camacho counterclaimed, asserting that she was entitled to Cost of Living Allowance payments under Public Law 8-31.

At the hearing, held September 22, 2023 ("Hearing"), Mrs. Camacho appeared with Attorney Rayphand, and the Trustee of the NMISF, Attorney Joyce C.H. Tang ("Trustee"), appeared by NMISF in-house counsel, Attorney Nicole M. Torres-Ripple (singly a "Party," all together with Mrs. Camacho, the "Parties").

JURISDICTION AND STANDARD OF REVIEW

This Appeal is governed by the NMISF Appeal Rules and Procedures ("NMISF Rules"). *See* ECF Document 731-14 in *Johnson v. Torres*, Civ. Case. No. 09-00023, United States District Court for the Northern Mariana Islands (Hon. Frances M. Tydingco-Gatewood, Designated Judge, Rule 4, Rule 6) (filed Nov. 13, 2015). The NMISF is the successor in interest of the Commonwealth of the Northern Mariana Islands ("CNMI") Retirement Fund through a "Settlement Agreement" that was entered into and so ordered in *Johnson v. Inos*, Civil Action No. 09-00023 at ECF No. 468-1 (filed Aug. 6, 2013). References to the NMISF will accordingly encompass previous actions and references to the entity it succeeded. This Appeal was assigned to Hearing Officer Deborah E. Fisher ("Hearing Officer") for disposition.[1]

The aggrieved party has the burden of proof by a preponderance of the evidence. NMISF Rules, 6.6(e). Findings of fact will be made based on the evidence. NMISF Rules, 6.8 (h). All findings of fact and conclusions of law will be appropriately decided on the record. NMISF Rule 6.7(d).

Typically, a question of statutory interpretation is reviewed de novo. *Castro v. Telesource CNMI, Inc.*, 2022 MP 7, ¶ 6, No. 2021-SCC-0023-CIV, 2022 WL 17257593, at *1 (N. Mar. I. Nov. 29, 2022), *citing N. Mariana Islands v. Guerrero*, 2014 MP 15 ¶ 21, No. 2013-SCC-0045-CRM, 2014 WL 6485747, at *2 (N. Mar. I. Nov. 18, 2014). Here, the NMISF Rules provide for only one type of standard for the Hearing Officer: a preponderance of the evidence. *See* NMISF Rules, Rule 6. For a consideration of a legal finding, whether characterized as de novo or a preponderance, the Hearing Officer's finding will encompass what is most persuasive considering the law presented and reviewed, and therefore will at a minimum meet a preponderance standard.

[1] The Trustee's selection of the Hearing Officer was approved pursuant to an Order dated July 11, 2022, filed as ECF Document 840 in *Johnson v. Torres*, Civ. Case. No. 09-00023, United States District Court for the Northern Mariana Islands, Hon. Frances M. Tydingco-Gatewood, Designated Judge.

OTHER JURISDICTIONAL AND PROCEDURAL CONSIDERATIONS

After the Hearing Officer was assigned this Appeal, there was an interim motion made by the NMISF in *Johnson v. Torres* before the Hon. Frances M. Tydingco-Gatewood. *See Johnson v. Torres*, Civ. Case. No. 09-00023, ECF 861 "Order Granting Motion to Enforce and Confirm and for Declaratory and Injunctive Relief and Denying Cross Motion (ECF Nos. 850 and 853)" (Tydingco-Gatewood, Designated Judge, July 12, 2023) ("Order"), NMISF Supplemental Brief Appendix, 001-009. The NMISF asserted that the issue of Cost of Living Allowance ("COLA") payments involved jurisdictional and legal issues related to the interpretation of the Settlement Agreement that the District Court should resolve. *See* Order, page 3, lns. 16-19. The NMISF accordingly moved the District Court "to declare that [COLA] payments are not included in computing a retiree's benefits under the Settlement Agreement." Order p. 2, lns. 2-3, p. 3, lns. 16-19. Mrs. Camacho cross-moved for a finding that COLA was part of her benefits, and that the NMISF miscalculated her benefits by not taking OT into account. *Id.*, lns. 3-6, p. 3, lns. 20-24. The Hearing Officer stayed the hearing on this Appeal for an Order by the District Court.

The Order was issued July 12, 2023. The District Court reviewed and interpreted the language of the Settlement Agreement at ¶7.0, defining "Full Benefit Payments" or "Full Benefits." See District Court Order, p. 4, lns. 23-28, p. 5, lns 1-5. The District Court examined whether, on June 26, 2013, COLA benefits were provided under 1 CMC § 8301 *et seq.* or guaranteed by the Commonwealth of the Northern Mariana Islands' Constitution ("Constitution"). See Settlement Agreement ¶¶ 26, 27, 30 (rights and defenses preserved as of June 26, 2013). The Court granted NMISF's motion because "COLA payments are discretionary and subject to legislative appropriation," and therefore not included in the Settlement Agreement definition of "Full Benefits." P. 5, ln. 22, p. 6, lns 1-2. The District Court further found that "the Commonwealth Constitution did not guarantee Mrs. Camacho COLA payments at the time of

her employment, so any subsequent failure to pay COLA neither diminishes nor impairs her "accrued benefits" under the Constitution." Mrs. Camacho's cross motion was denied because it did not raise a requirement for the District Court to interpret the Settlement Agreement: rather, the District Court found that the OT dispute involves a benefit calculation issue that is appropriately before the Hearing Officer. District Court Order, p. 9, lns. 5-10.

Mrs. Camacho filed her notice of appeal with the 9th Circuit on August 2, 2023, to appeal that part of the District Court Order dealing with COLA but not that part of the District Court Order regarding OT that was ordered to be continued in the administrative appeals process. *Johnson v. Torres*, ECF 862, Notice of Appeal. The Parties did not request another stay in this Appeal. Considering the District Court's Order, and the stated subject matter in Mrs. Camacho's Notice of Appeal, the Hearing Officer went forward with the hearing solely on the OT issue.

RELEVANT FACTS

Mrs. Camacho began her employment with the Trust Territory Administration on July 1, 1969. Record 16-002-096. She retired on December 15, 1991, as an Administrative Officer I. Record 16-002-098.[2] She retired as a Class II member, or a person who was a member of the Fund before the enactment of PL 6-17. Appellant's Addenda I, p. 8; Record 16-002-078; PL 6-17, Section 8314(m). On March 23, 2016, the NMISF sent an Adverse Action letter to Mrs. Camacho, demanding return of an overpayment of benefits in the amount of [redacted]. Record, 16-002-02. That calculation was updated by the NMISF to an amount of [redacted] covering the period of March 23, 2010, through July 31, 2022. See NMISF Response Brief, p. 4; Supplemental Record 16-002-SR-001.

[2] The Parties did not contest the documents or facts regarding Mrs. Camacho's employment and retirement information as presented in the filed papers, and therefore there was no oral evidentiary testimony at the hearing.

At issue are several historical benefits adjustments that occurred after Mrs. Camacho retired. Originally, Mrs. Camacho's creditable service to determine her pension benefit was calculated to be 26 years, 8 months and 7 days. See Appellant's Addenda § I, pp. 1-3, Record 16-002-092 (Letter accepting application for retirement dated Dec. 30, 1991). This credited service included five years that were added to Mrs. Camacho's vesting credit under the CNMI Constitution. Appellant's Addenda § I, p. 3, Record 16-002-096. CNMI Const. art. III, § 20(b). There was no credit given by the NMISF for sick leave accumulation under Public Law 6-17. Appellant's Addenda § I, p. 3, Record 16-002-096. Mrs. Camacho's monthly pension at the time she retired was [redacted]. Appellant's Addenda § I, p. 2, par J.

On July 23, 1993, Public Law ("PL") 8-24 was enacted. It amended 1 CMC §8333 to provide:

> Section 8333. Overtime or Compensatory Time Worked Service Credit. Vesting service credit shall be given for overtime or compensatory time performed in excess of 2,080 hours per annum. Appellant's Addenda § IV, p. 261.

In addition, PL 8-24 added:

> Section § 8334: Requirement for Overtime or Compensatory Time Worked Service Credit. The Director of Finance or the Executive Director of the autonomous agency shall certify to the Board of Trustees the total excess hours performed by such member at the end of each calendar year. The Board shall compute and add such credit to the member's total service. *Id.* at 261-262.

PL 8-24 was made retroactive by the Legislature to January 1, 1985. *Id.* at 262, Section 5.

The NMIRF amended its Administrative Rules and Regulations to administer PL 8-24 on January 27, 1994. Appellant's Addenda § IV, pp. 60-69. Then, on April 13, 1994, the NMIRF notified Mrs. Camacho that her benefits had been adjusted to add her OT to her total creditable service. Appellant's Addenda §I, p. 4. This adjustment resulted in an increase from [redacted] monthly to [redacted]. Appellant's Addenda § I, pp. 4-5.

There were two more adjustments to Mrs. Camacho's benefits, one on May 9, 1994, and one on March 15, 1995- both adding OT to the computation of her service years that, as a result, brought her pension benefit up to [redacted] monthly. Record, 16-002-075, 079, 082; Appellant's Addenda § I, pp. 6-10. *See* Supplemental Record 16-002-SR-001. Another adjustment, based on seventy-five percent of Mrs. Camacho's total benefits, was done on October 1, 2013, pursuant to the Settlement Agreement. See Supplemental Record 16-002-SR-001.

Mrs. Camacho's first notice from the NMISF that the OT calculation could have been done incorrectly in 1994 and 1995 was on or around March 23, 2016, when the Adverse Action letter was provided to her. On April 21, 2016, Mrs. Camacho moved for a stay of the Adverse Action ("Stay"). See Supplemental Record ("SR") 16-002-SR-008-009. Mrs. Camacho filed a declaration that stated, at that time, that she was "65 years, unemployed, and has serious health issues." In addition, the Hearing Record Addendum includes her joint marital tax return for 2016 which states a total income derived from pensions, annuities and social security benefits. See p. 25. The NMISF did not reduce Mrs. Camacho's pension to account for the Adverse Action once the Stay was filed. See, Response Brief filed Aug. 26, 2022, p. 4. Mrs. Camacho's declaration was uncontested and there was no other evidence presented of Mrs. Camacho's current financial or health status at the Hearing.

ISSUE FOR LIMITED DECISION AND ORDER

The issue in this Appeal concerns whether the NMISF correctly applied OT as creditable service in calculating Mrs. Camacho's benefits payments in the years 1994 and 1995, and if not, whether the NMISF's claim of overpayment is barred by the statute of limitations or equitable defenses of laches or unfairness. Normally, a statute of limitations defense would be considered first, but because the pension benefits dispute carries forward to this date and there must be a

determination of whether an adjustment must be made, even if only prospectively, the analysis of the pension benefit will proceed first. See 1 C.M.C. § 8390(a).

RELEVANT LAW AND LEGAL DOCUMENTS

The parameters of OT relevant to Mrs. Camacho are touched upon by many sources, starting with the Constitution (N.M.I. Const. Art. III, § 20) and including multiple public laws, regulations, Office of the Public Auditor reports, and an Attorney General Opinion. Because of the volume of laws and relevant legal documents that relate to this matter, they are set out generally in this section in chronological order for completeness and to provide a legislative and legal timeline of events.

The Constitution, under the 1985 enactment of the 19th Amendment, provides in pertinent part:

> (a) Membership in an employee retirement system of the Commonwealth shall constitute a contractual relationship. Accrued benefits of this system shall be neither diminished nor impaired. N.M.I. Const. Art. III, § 20(a).
>
> (b) An employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system shall be credited an additional five years and shall be eligible to retire.... N.M.I. Const. Art. III, § 20(b). https://cnmilaw.org/cons.php#gsc.tab=0.[3]

The arguments between the Parties encompass what an accrued benefit is (and when it vests), and, more specifically, what constitutes creditable service for purposes of retirement versus what constitutes creditable service for retiree benefits after retirement.

The NMISF has gone through many changes to its benefits structure through the introduction of various legislation since its predecessor, the Northern Mariana Islands Retirement Fund ("NMIRF")[4] was first established by PL 1-43 ("An Act to establish a Retirement

[3] The Constitution was amended at the Second Northern Marianas Constitutional Convention. https://cnmilaw.org/pdf/source/1985amendments.pdf.

[4] For purposes of clarity, this decision will refer to the NMISF whenever possible, but in certain circumstances the name of the predecessor entity, the NMIRF, will be used, usually if it is part of cited language or where making editorial changes would disrupt the flow of the information.

Fund for the Government of the Northern Mariana Islands"), operative October 1, 1980. Addenda I, p. 95-142. https://cnmilaw.org/pdf/public_laws/01/pl01-43.pdf. PL 1-43 defined "service," "prior service," "membership service," "total service," and "salary" as follows:

> (e) "Service" shall mean actual employment by the Government as an employee for salary or compensation, or service otherwise creditable as herein provided."
>
> (f) "Prior service" shall mean service rendered prior to the operative date.
>
> (g) "Membership service" shall mean service rendered on or after the operative date.
>
> (h) "Total service" shall mean prior service and membership service.
>
> (i) "Salary" shall mean the amount received by an employee for service, and shall include allowance for maintenance at the prescribed rate and any post differential. 1 CMC §8314(p)(PL 1-43, § 3). See Addenda IV, p. 100.

PL 3-99, enacted Jan. 8, 1984, further amended PL 1-43 to provide that:

> f) Accumulated sick leave shall be credited as actual work experience in determining the number of years of service of a member PL 3-99, § 7. https://cnmilaw.org/pdf/public_laws/03/pl03-99.pdf.

PL 6-17, signed by the Governor April 3, 1989, and effective in May 1989 (the "Northern Mariana Islands Retirement Fund Act of 1988"), repealed and reenacted the former law and created two classes of NMISF members. https://cnmilaw.org/pdf/public_laws/06/pl06-17.pdf. To retire, a Class II member had to be at least 60 years old or have 25 years of vesting service. Appellant's Addenda IV, p. 175 (P.L. 6-17, § 8333). The term "vesting service" and related terms were defined in Section 8314 as follows:

> (o) "Salary" means the amount received by an employee for service as shown on the employee's form W-2 wage and tax statement.
>
> (p) "Service" means actual employment by the Government as an employee for salary or compensation, or service otherwise creditable as herein provided.
>
> (q) "Membership Service" means service rendered on or after becoming a member of the Fund.

(r) "Prior Service" means service rendered prior to becoming a Fund member.

(s) "Credited Service" means prior service and membership service, plus accumulated sick leave.

(u) "Education Service" means that period of time when a member attended an accredited institution of higher learning as prescribed by rules and regulations to be promulgated by the Board; provided, that the member must have obtained a degree and that a maximum of two years of service will be earned for a completed associates degree and a maximum of four years of service will be earned for a completed bachelors degree or higher.

(v) "Military Service" means that period of time when a member served in the Armed Forces of the United States, including but not limited to the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(w) "Vesting Service" means the sum of credited service, education service and military service, which service shall be deemed creditable for the purpose of determining a member's eligibility for the additional five (5) years of credited service pursuant to "Constitutional Amendment # 19." Vesting Service shall only be used to determine whether a member is eligible for benefits and shall not be used to determine the amount of benefits to be paid to a member. Appellant's Addenda IV, p. 154 (P.L. 6-17, § 8314).

PL 6-17 was amended by PL 16-41 on Jan. 19, 1990, repealing and reenacting the definitions in Section 1 (1 C.M.C. § 8314) (https://cnmilaw.org/pdf/public_laws/06/pl06-41.pdf) that included the following provision:

(w) "Vesting Service" means the sum of credited service, education service and military service, which service shall be deemed creditable for the purpose of determining a member's eligibility for the additional five (5) years of credited service pursuant to Article III, Section 20 of the Constitution. Vesting Service shall only be used to determine whether a member is eligible for benefits and shall not be used to determine the amount of benefits to be paid to a member.[5]

[5] PL 6-41 updated the language to properly reflect the five years of credited service as being pursuant to "Article III, Section 20 of the Constitution." See Appellant's Addenda IV, p. 236. The CNMI Constitution was initially amended by the 19th Amendment, which became codified as N.M.I. Const. Art. III, Sec. 20 after voter ratification in 1986. Second Northern Marianas Constitutional Convention, 1985, (Proposed Constitutional Amendment 19). See, https://www.cnmilaw.org/pdf/source/1985amendments.pdf. Otherwise, the language of PL 6-17 regarding vesting service was not changed. There were also changes to the terms "salary" and "member" among others, but they are not relevant to this discussion.

PL 8-24 was approved July 23, 1993, and made retroactive to Jan. 1, 1985. PL 8-24 specifically provided for OT as follows:

> Section 8333. Overtime or Compensatory Time Worked Service Credit. Vesting Service credit shall be given for overtime or compensatory time performed in excess of 2,080 hours per annum.
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> Section 8334. Requirement for Overtime or Compensatory Time Worked Service Credit. The Director or finance or the Executive Director of the autonomous agency shall certify to the Board of Trustees the total excess hours performed by such member at the end of each calendar year. The Board shall compute and add such credit to the member's total service.[6]

The NMIRF amended its Administrative Rules and Regulations to administer PL 8-24 on January 27, 1994. Appellant's Addenda § IV, pp. 60-69 (Commonwealth Register, Vol. 16, No. 02, Feb. 15, 1994, p. 11694-11703).[7] ("Administrative Rules"). The purpose of the Administrative Rules' enactment was to "add new subsections to provide for the effective administration and enforcement of Public Laws 8-24, 8-30, 8-31, and for other purposes." Appellant's Addenda § IV, p. 63, Administrative Rules, Part I, Sec. 2, p. 11697. The Administrative Rules contained a provision for "4.20 Vesting Service Credit for Overtime or Compensatory Time." See Section 4.20 at 11698, Appellant's Addenda § IV, p. 64. In particular, the Administrative Rules stated:

> (1) To receive vesting service credit for overtime or compensatory time, the following conditions must be met:
>
> (a) Overtime or compensatory time hours must exceed 2,080 hours of regular hours worked within the calendar year (January to December of the same year). For example, if an employee work 2,000 regular hours and 200 hours of overtime or compensatory time for the year, the employee is entitled to 120 hours of additional vesting service credit (2,880 minus 2,200 hours equals 120 hours).
>
> (b) Overtime and compensatory time must be paid to the employee.

[6] https://cnmilaw.org/pdf/public_laws/08/pl08-24.pdf.
[7] https://cnmilaw.org/pdf/cnmiregister/1994_Volume_16/1994_Number_02.pdf.

(c) Overtime or compensatory time must be certified by the Director of Finance or the Head of the Autonomous Agency where overtime or compensatory was performed.

(2) The members who are eligible are as follows:

(a) Active employees who were paid overtime from January 1, 1985 to the date of retirement.

(b) Retired members who are receiving benefits from the NMI Retirement Fund and who had worked overtime or compensatory time while employed by the government from January 1, 1985 to the date of retirement.

(c) Retirees or surviving spouse benefits may be adjusted when the overtime or compensatory time is certified to the NMI Retirement Fund.

(d) Former employees who are vested (members having 3 or more years of contributing membership service) in the NMI Retirement Fund will receive vesting service credit upon certification by the Director of Finance or certification from the Autonomous Agency Head that the member has overtime or compensatory time. If as a result of such certification the vested member becomes eligible for benefit, it shall be processed and the annuity shall begin from the date the certification of overtime or compensatory is received by the Fund.

(3) Overtime or compensatory time and accumulated sick leave hours will be converted to vesting service credit by using the following Conversion Table: [Table omitted].

In the year 2000, a CNMI Office of the Public Auditor ("OPA") report found that the former Commonwealth Ports Authority ("CPA") Executive Director and Security Chief were improperly paid retirement annuity benefits based on impermissible OT hours that were added to the length of their service to compute benefits. "Audit of the Compensatory Time Claimed and Retirement Benefits Paid to Two Former Officials of CPA," Report No. AR-00-03 (LaMotte, L., March, 2000)("2000 Report"); Addenda IV, pp. 70-94.[8]

[8] https://www.opacnmi.com/oockuvoa/2020/09/AR-00-03-Audit-of-the-Compendatory-Time-Claimed-and-Retirement-Benefits-Paid-to-Two-Foermer-Officials-of-the-Commonwealth-Ports-Authority.pdf.

The mechanism for CPA's improper credit of overtime was through an amendment to its personnel manual, made January 18, 1994, and an additional Resolution on May 17, 1994 by the CPA Board.[9] OPA's review of the two CPA officials ended up casting a far wider net, involving a review of NMIRF statutes to find that retirement benefits had been improperly increased through the application of compensatory time ("comptime"), creating improper unfunded liabilities to the NMIRF. 2000 Report, pp. ii, iii, 2. OPA found that "comptime and overtime hours worked should not be considered as additional years of credited service" because the Retirement Fund Act only provided for vesting service credit to determine member eligibility for the additional five years of credited service under the Constitution. Addenda IV, p. 77, 2000 Report, p. 15. OPA recommended that NMIRF recover improper payments "totaling $126,730.06, and also from all other fund members who have been overpaid by including overtime and comptime in the computation of their retirement annuity." Addenda IV, p. 80 (2000 Report, p. 22, ¶9). OPA also recommended that the NMIRF Administrator recalculate and adjust the pension benefits of all other fund members by disregarding OT hours as additional credited service. *Id.* at ¶8. The OPA report referenced the NMIRF's own legal counsel's opinion dated December 15, 1999, that disallowed OT in the computation of service credit. Addenda IV, p. 78-79 (2000 Report, p. 16-17).

The NMI Retirement Fund Administrator in his response to OPA on May 2, 2000, stated that while he "generally concurred with recommendations 7, 8, 9, and 10," including recovering overpayments and recalculating and readjusting pension benefits, he "felt that action to implement recommendations 8, 9, and 10 should await an official legal opinion from the Attorney General, after which action will be taken to implement those recommendations." *Id.* at Addenda

[9] OPA also found that CPA did not comply with the Administrative Procedure Act because it never published its Personnel Regulations in the Commonwealth Register. 2000 Report, pp. iii-iv, 10-11.

IV, p. 82, 2000 Report, p. 24, (Appendix B). In the meantime, the NMIRF Administrator asked its Fund Manager to "identify those fund members so that corrective action can be taken once the Fund receives the official legal opinion from the Attorney General's Office." *Id.*

The Attorney General issued a legal opinion to the NMIRF dated June 9, 2000, that interpreted the laws in existence at that time to mean that OT "may not be used to calculate the amount of benefit but only for determining eligibility for retirement." "Report on CNMI Agencies' Implementation of Audit Recommendations, As of December 31, 2012," Report No. TR-12-02 (Pai, M., July 10, 2013)[10], p. 66-67 ("2012 Report").[11] The Attorney General "recommended that re-calculation of benefits to affected members should be made, and the amount of overpayments should be determined." 2012 Report, p. 67. In addition, the Attorney General "stated that members should be informed and advised of their right to appeal an adverse determination. If no appeal is filed, then the collection process must be undertaken by the NMIRF." 2012 Report, p. 67.

PL 13-60, enacted December 5, 2003, clarified vesting credits for OT as well as prior service vesting credit. The term "vesting service" referred to in 1 CMC §§ 8321, 8342, 8343(b), 8346, 8350, 8352(a) and (c), 8356(b)(1) and (2) was replaced by the term "membership service." The term "'credited service' in 1 CMC §§ 8313(d), 8341, 8342, 8344, 8356(b) was replaced by the term "membership service." PL 13-60, § 4. Section 5 repealed and reenacted 1 CMC § 8313(o) to read:

> (o) "Salary" means base Salary paid to an employee for services including payment for annual leave, sick leave, administrative leave, holiday pay, but excluding lump sum payment for annual leave, or standby, hazardous, night time differential, typhoon pay differential or overtime pay, or any kind of bonus salary.

[10] https://www.opacnmi.com/oockuvoa/2020/07/TR-12-01.pdf.
[11] The actual Attorney General Opinion was not provided by the Parties, and a further search did not locate it as published in the Commonwealth Register.

When the OPA issued the 2012 Report, it followed up on its 2000 Report relating to OT. OPA Report No. TR-12-02. According to the 2012 Report, the former Administrator for the NMIRF was in communication with OPA about the OT issue over the years. *Id.*, pp. 67-68. The NMIRF recalculated the CPA officials' pensions per a response dated July 22, 2003, and then agreed on March 22, 2005, at a Board meeting, to "revisit the issue of recovering overpayments at its next regular meeting." *Id.* at p. 67. On August 14, 2006, the NMIRF Administrator stated that "the recalculation of pension benefits is ongoing...." 2012 Report, p. 67. On June 1, 2012, OPA was informed that the NMIRF's "internal auditors have completed the first phase of reviewing the files of the top 120 overtime/compensatory time recipients. As of May 8, 2012, the Fund has written to the affected retirees advising them that the Fund will adjust their pension benefits...." *Id.*, p. 67. These individuals' benefits were adjusted effective the June 15, 2012 pay period, and they had until June 8, 2012 to appeal the decision to collect the overpayment. *Id.* at 67-68.

In addition, OPA reported that NMIRF decided not to pursue overpayment in another matter where someone who had overpaid died, because of the six-year statute of limitations under 7 C.M.C. § 2505. 2012 Report, p. 70. OPA legal counsel concurred with that decision. *Id.* Because the NMIRF decided not to pursue any type of collection and the OPA legal counsel had concurred, OPA closed that recommendation. *Id.*

CONSTITUTIONAL AND STATUTORY CONSTRUCTION STANDARD

Both constitutional and statutory interpretation begin with examining the text and looking at its plain meaning. *In re Decision of Off. of the Pub. Auditor on the Admin. Appeal of GPPC, Inc.*, 2021 MP 13, ¶ 15, No. 2021-SCC-0009-CIV, 2021 WL 6194656, at *3 (N. Mar. I. Dec. 30, 2021). *See Camacho v. N. Marianas Ret. Fund*, 1 N.M.I. 131 (1990), No. 90-007, 1990 WL 291962, *2 (N. Mar. I. Sept. 21, 1990); *Peter-Palican v. N. Mariana Islands*, 2012 MP 7 ¶ 6, No. 2012-

SCC-0010-CQU, 2012 WL 2564359, at *2 (N. Mar. I. June 29, 2012). A statute should be read in conjunction, not in conflict, with the Constitution. *Pangelinan v. N. Mariana Islands Ret. Fund*, 2009 MP 12, ¶ 12, No. 06-0030-GA, 2009 WL 2854434, at *4 (N. Mar. I. Sept. 2, 2009), *citing Estate of Faisao v. Tenorio*, 4 N.M.I. 260, 265 (1995). In any review, the Constitution is paramount. *See Dep't of Pub. Lands v. N. Mariana Islands*, 2010 MP 4, ¶ 29, No. 2009-SCC-0041, 2010 WL 3945463, at *10 (N. Mar. I. Oct. 4, 2010).

If the meaning of a statute is unclear, the legislative intent may be examined through a statute's history, context, relevant caselaw, and statutory construction. *Commonwealth v. Camacho*, 2019 MP 2, ¶ 10, No. 2017-SCC-0018-CRM, 2019 WL 2093268, at *3 (N. Mar. I. May 10, 2019). If statutory terms are ambiguous, then courts may look beyond the text. *Castro v. Telesource CNMI, Inc.*, 2022 MP 7, ¶ 11. "A statute is ambiguous if it is susceptible to more than one reasonable interpretation." *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 556 (9th Cir. 2016) (citation omitted); *Peter-Palican v. N. Mariana Islands*, 2012 MP 7, ¶ 7.

Interpretations of a statute that would defy common sense or lead to absurd results should be avoided. *N. Mariana Islands v. Minto*, 2011 MP 14, ¶ 34, No. 2008-SCC-0034-CRM, 2011 WL 6412087, at *9 (N. Mar. I. Dec. 16, 2011); *Manglona v. Baza*, 2012 MP 4, ¶ 36, No. 2009-SCC-0033-CIV, 2012 WL 1192770, at *11 (N. Mar. I. Apr. 5, 2012). Interpreting a statutory provision in a way that would render another provision either inconsistent or meaningless should also be avoided. *Commonwealth of N. Mariana Islands v. Camacho*, 2002 MP 6, **393, No. 98-0175, 2002 WL 32983888, at *5 (N. Mar. I. Apr. 8, 2002), *aff'd in part, dismissed in part sub nom. N. Mariana Islands v. Camacho*, 66 F. App'x 707 (9th Cir. 2003). All parts of the statute should be harmonized, not only with each other, but with the general intent of the whole enactment. *DeLeon Guerrero v. Dep't of Pub. Lands, Commonwealth of N. Mariana Islands*, 2011 MP 3, ¶ 11, No. 06-0313C, 2011

WL 1316819, at *3 (N. Mar. I. Mar. 31, 2011), ¶ 11. If possible, every clause and word should be given effect. *Id.*

ANALYSIS

I. Mrs. Camacho Was Not Entitled to Overtime Being Used to Calculate her Post-Retirement Benefits.

Mrs. Camacho argues that OT was correctly applied as service credit in the calculation of her benefit payments in 1994 and 1995. She suggests that because the Constitution provides that accrued benefits shall not be diminished or impaired, any law that was ever passed regarding the NMISF should be considered to apply if it increases her benefits, and she begins her analysis with PL 1-43. NMISF argues that OT should have been calculated to determine vesting service credit only—eligibility for the five year Constitutional credit and retirement- not to calculate benefit payments. NMISF relies on the plain language of PL 6-17, the law in effect when Mrs. Camacho retired, and PL 8-24 to support its argument. An analysis of the relevant materials shows that Mrs. Camacho was not entitled to have OT used to calculate her pension benefit. Because the statutes did not confer a benefit on Mrs. Camacho, there was nothing to accrue, and therefore a Constitutional analysis to determine whether and when the OT benefit accrued or became vested is not necessary to reach here.[12]

A. PL 1-43 and 3-99 do not provide additional benefits to Mrs. Camacho.

Mrs. Camacho begins her analysis with PL 1-43, §3(e). She argues that because the term "service" was defined as "actual employment as an employee for salary or compensation, or services otherwise creditable as herein provided," that "service" would necessarily include overtime. The word "compensation" is never defined. However, the word "salary" is defined as the amount received for "service." In other words, it is clear on the face of the statute that service

[12] Likewise, while touched upon at the Hearing, it was not necessary to determine or analyze Mrs. Camacho's benefits pursuant to the Settlement Agreement.

equals salary. *Id.* at § 3(i). But without a definition for "compensation," it is swallowed by the concept of salary. In addition, the word "overtime" is nowhere to be found in PL 1-43. The CNMI Supreme Court is clear that when the meaning of a statute is plain, the courts are under a duty not to insert words and phrases that would change the meaning. *Manibusan v. Larson*, 2018 MP 7, ¶ 14, No. 2017-SCC-0024-CQU, 2018 WL 4183065, at *4 (N. Mar. I. Aug. 30, 2018)(*citation omitted).* The words "overtime" and "compensatory time" are specific terms, and it is unreasonable to attribute inclusion in a statute of words with great meaning that have not been mentioned, especially when they are addressed separately through later legislation. Accordingly, under the plain language, PL 1-43 does not give Mrs. Camacho a right to include OT in her benefits calculation.

Mrs. Camacho then moves to PL 3-99 to argue that if she had any accumulated sick leave, it would have been added and used to calculate her length of service and her pension, like the five-year provision under the N.M.I. Constitution. Looking at the "Length of Service" computation document, the ledger includes sick leave as well as five years of supplemental service under N.M.I. Const. Art. III § 20(b). Appellant's Addenda I, p. 3; Record 16-002-096. The tabulation of total service credit includes five years for Constitutional Amendment #19 (N.M.I. Const. Art. III § 20(b)) and zero years, months or days for sick leave accumulation per PL 6-17. In other words, it appears that Mrs. Camacho did receive these credits for sick leave toward the vesting of her pension and time used for calculation of benefits, but the number was zero. No evidence suggests that Mrs. Camacho had sick time that could have been added, and so it appears Mrs. Camacho is suggesting that just because sick leave was added, OT should have also been added.

PL 3-99 specifically allowed "accumulated sick leave" to be credited as "actual work experience." The word "service" was primarily defined as "actual employment" for "salary or

compensation." PL 1-43, § 3(e). Accordingly, from the plain language, the language of PL 3-99 avoided the language of salary or compensation in favor of actual employment. Because actual employment is synonymous with actual work experience—it describes the broader concept of work. To the degree that there is any ambiguity in this language, it is clarified by the fact that the Legislature eventually did add the terms at issue, overtime and compensatory time, in PL 8-24. In other words, the fact that the Legislature needed to specifically add sick leave in PL 3-99 and did not add overtime, suggests that overtime was a separate concept, just like sick leave, that could not be added to benefits in the absence of direct language to that effect. Without any additional benefit that would have accrued to Mrs. Camacho from PL 1-43 or PL 3-99, there is no need to address the argument that her benefits could have been diminished under the Constitution. N.M.I. Const. art. III § 20(a).

B. Mrs. Camacho was not entitled to OT being used to calculate her benefit under PL 6-17.

There were arguments regarding whether PL 6-17 or PL 8-24 allowed for or prohibited the inclusion of OT to calculate retirement benefits. These arguments center again on definitions of service. Mrs. Camacho argues that the overtime she provided constituted "membership service" under Section 8314 (q) that was provided before becoming a fund member (prior service under § 8314(r)). PL 6-17. She then argues that because the term "credited service" means prior service and membership service, plus accumulated sick leave," she should get overtime under her interpretation that "credited service" includes overtime. PL 6-17(s). In other words, Mrs. Camacho argues that it was correct for the NMISF to credit her with OT because OT was part of credited service.

As discussed above, this interpretation would effectively insert a pivotal word that was also not present in PL 1-43: overtime. Mrs. Camacho cannot supplement the plain language definition of "membership service" to get back to credited service to include overtime, a concept

that was previously never introduced. To do so would not only add language to the statute as drafted to change its plain meaning, but it would render another provision either inconsistent or meaningless. This outcome should be avoided. *Commonwealth of N. Mariana Islands v. Camacho*, No. 98-0175, 2002 WL 32983888, at *5 (N. Mar. I. Apr. 8, 2002), *aff'd in part, dismissed in part sub nom. N. Mariana Islands v. Camacho*, 66 F. App'x 707 (9th Cir. 2003). In addition, allowing time to be credited toward a benefit of another five years of service under the Constitution and then to allow that same time that was already credited to be added again on top of the five year benefit would change what the Constitution was granting under § 20(b). This reading would contradict what the Constitution was providing. *See Pangelinan v. N. Mariana Islands Ret. Fund*, 2009 MP 12, ¶ 12; *Camacho v. N. Marianas Ret. Fund*, 1 N.M.I. 131 (1990), No. 90-007, 1990 WL 291962 *2.

There is nothing in PL 6-17 that suggests that Mrs. Camacho should have received the benefit she seeks.[13] There is, however, language that on its face demands the opposite understanding. Section 8314(w) makes it clear that "credited service...shall be deemed creditable for the purpose of determining a member's eligibility for the additional five years of credited service" under the five-year credit contained in the Constitution. *See Dep't of Pub. Lands v. N. Mariana Islands*, 2010 MP 4, ¶ 29 (the Constitution is paramount). Additionally, "[v]esting service shall only be used to determine whether a member is eligible for benefits and shall not be used to determine the amount of benefits to be paid to a member." PL 6-17, § 8314(w); See 2000 Report, p. 15. The word "shall" is mandatory. *Ishimatu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶30,

[13] The OPA 2000 Report also notes that "CNMI Personnel Regulations adopted the provisions of the Fair Labor Standards Act (FLSA) which exempt executive, administrative and professional employees from payment of overtime and from earning comptime." See 2000 Report, pp. iii, 3. As the Parties did not raise or brief issues related to what exactly was included in Mrs. Camacho's previous salary when she was working, and how that could have affected any analysis, they are not analyzed here. This footnote is only included to acknowledge that there may have been broader issues at the time this matter arose that are not being considered as part of this decision, but that further demonstrate the difficulties inherent in going back to review a statutory scheme of this nature that was previously examined comprehensively.

No. 02-0065, 2010 WL 2219348, at *11 (N. Mar. I. June 1, 2010). This language is clear: even if Mrs. Camacho's interpretation of the meaning of "credited service" was correct, it could not be applied through PL 6-17 to the determination of the amount of her benefits, but only to whether she had enough time to qualify for another five years of service under the Constitution.

C. Mrs. Camacho was not entitled to an inclusion of OT to calculate her post-retirement benefit as a result of PL 8-24, PL 13-60 and the Administrative Regulations.

PL 8-24 contains the first reference to overtime in the statutory framework that guides the NMISF. PL 8-24, even though enacted after Mrs. Camacho retired, retroactively applied to Jan. 1, 1985. PL 8-24, § 2, Appellant's Addenda IV, p. 261. It states that: "[v]esting service credit shall be given for overtime or compensatory time performed in excess of 2,080 hours per annum." PL 8-24, Section 8333. Mrs. Camacho argues that while "[v]esting service (i.e. the sum of credited service, education service and military service) is not used to calculate the amount of the retirement benefit but only to determine eligibility for the Constitutional five-year benefit... credited service is used for calculating the amount of benefits to be paid to a member." Appellant's Brief, p. 8. It does not make sense, however, that if credited service is not used to calculate the retirement benefit as part of vesting service, that it could somehow on its own be used to calculate the retirement benefit.

Rather, vesting service credit refers to credit used to determine whether a person has enough years to retire and can get the five-year benefit. "Vesting service" was defined by PL 6-17 to include credited service that is only used to determine a member's eligibility for the additional five years of credited service and to retire. PL 6-17 contains similar language restricting education and military service to "vesting service." There is a distinction between "vesting service" and "credited service," which is defined as "prior service and membership

service, plus accumulated sick leave." 1 CMC 8314(s). Clearly on the face of the statute, OT is provided for vesting purposes, not for calculation of benefits to be received after retirement.

Mrs. Camacho also argues that the previous NMI Retirement Fund Administrative Rules and Regulations (Section 4.20), enacted in part to administer PL 8-24, support her argument that OT hours should be applied as "credited service." See Appellant's Br. at 8-10. Administrative Rules, Part I, Sec. 2, p. 11697. She points to the language that discusses eligibility of members in section 2, not the language that defines vesting service credit in section 1. The Administrative Rules appear to allow a retiree or surviving spouse's benefits to be adjusted if OT is certified to the Fund post-retirement. If an adjustment is being made post-retirement, however, the calculations involving OT would have already been done. Mrs. Camacho's argument is that there would be absolutely no reason to readjust a retiree's already credited time if the purpose of the statute was only to determine her eligibility for retirement.

While Administrative Rules Section 4.20 appears to contain an ambiguity, where there is a conflict between regularly enacted statutes and the Administrative Rules, the statutes control. See *Cody v. N. Mar. I. Retirement Fund*, 2011 MP 16 ¶¶ 36-37 (when an administrative regulation conflicts with the statute it must, of course, give way) (citation and punctuation omitted); *In re Decision of Off. of the Pub. Auditor on the Admin. Appeal of GPPC, Inc.*, 2021 MP 3 ¶ 33. Because the language and meaning of the statute is clear, there is no further need for analysis: the Administrative Rules are not persuasive and do not support Mrs. Camacho's argument. *Commonwealth v. Camacho*, 2019 MP 2, ¶ 10, No. 2017-SCC-0018-CRM, 2019 WL 2093268, at *3 (N. Mar. I. May 10, 2019)("if the statute's meaning is clear, our analysis ends there.").

The changes made by PL 13-60 to rescind parts of PL 8-24 clarified the OT issue. The term "salary" was defined to clearly exclude OT. See PL 13-60, 1 CMC § 8313(o)["Salary" means base Salary paid to an employee for services including payment for annual leave, sick leave,

administrative leave, holiday pay, but excluding lump-sum payment for annual leave, or standby, hazardous, night time differential, typhoon pay differential or overtime pay, or any kind of bonus salary]. There is therefore no further argument to support crediting Mrs. Camacho with OT to calculate her retirement benefits.

II. Even if There Had Been Further Ambiguity in Any of the Statutory Provisions at Issue, the Attorney General Rendered an Opinion that is Persuasive.

The facts here suggest there was a point in time when the NMIRF believed it had the authority to issue the Administrative Rules and recompute its members' pensions in 1994 and 1995. Apparently, the NMIRF believed it had statutory authority based on these provisions that could cause a reasonable person to interpret them the way Mrs. Camacho suggests. Yet even if ambiguity did exist, the Attorney General opinion and the Public Auditor reports resolved that alleged ambiguity long ago.

As set forward above, the CNMI Office of the Public Auditor was substantially involved over a span of at least twelve years with this issue. OPA has a special duty to prevent fraud, waste, and abuse of public funds, and in that capacity is empowered to review legislation and regulations to make recommendations, as well as provide assistance with implementation of a suggested policy. 1 C.M.C. § 2304; *In re Decision of Off. of the Pub. Auditor on the Admin. Appeal of GPPC, Inc.*, 2021 MP 13, ¶¶ 11-13. OPA issued its 2000 Report, finding that NMIRF members had been incorrectly credited with OT for their benefit payments. OPA specifically found that "**comptime and overtime hours worked should not be considered as additional years of credited service**" because the Retirement Fund Act only provided for vesting service credit to determine member eligibility for the additional five years of credited service under the Constitution. Addenda IV, p. 77, 2000 Report, p. 15 (emphasis added). The NMIRF's own legal counsel opinion, dated December 15, 1999, disallowed OT in the computation of service credit. OPA recommended NMIRF recover improper payments "totaling $126,730.06, **and also from**

all other fund members who have been overpaid by including overtime and comptime in the computation of their retirement annuity." Addenda IV, p. 80 (2000 Report, p. 22, ¶9)(emphasis added). The NMIRF Administrator wanted to wait until he had an official legal opinion from the Attorney General, but stated he would act "to implement those recommendations." Addenda IV, p. 82, 2000 Report, p. 24 (Appendix B). In the meantime, the Fund Manager was directed to "identify those fund members **so that corrective action can be taken once the Fund receives the official legal opinion from the Attorney General's Office**." *Id.* (emphasis added).

The Attorney General is responsible for providing legal advice to executive departments (including public corporations and autonomous agencies) in the CNMI. N.M.I. Const. art. III, § 11; *Torres v. Manibusan*, 2018 MP 4, ¶¶ 14, 21-23, No. 2017-SCC-0030-CQU, 2018 WL 3202001 (N. Mar. I. June 26, 2018) (attorney general has "expansive control in directing the Commonwealth's legal business"). While an Attorney General's opinion may not be binding, it operates as persuasive authority. *Palacios v. Yumul*, 12 MP 12 ¶18, No. 2012-SCC-0001-CQU, 2012 WL 4105120, at *620 (N. Mar. I. Sept. 18, 2012). The Attorney General issued an opinion interpreting these very statutes on this very issue. The Attorney General "recommended that re-calculation of benefits to affected members should be made, and the amount of overpayments should be determined." 2012 Report, p. 67.

The opinion of the Attorney General, along with OPA's 2000 Report and 2012 Report, is persuasive. The arguments presented in this Appeal appear to reflect an old dispute between CNMI factions battling to include or exclude OT in retirement benefits calculations that ended well over twenty years ago. There is no case law supporting Mrs. Camacho's interpretation, but rather an interpretation she sets forth that appears to have already been rejected by the Attorney General and the OPA. Mrs. Camacho has presented no new evidence that would suggest

revisiting this issue. Accordingly, while the Hearing Officer reads the Public Laws to be reasonably clear, and the interpretation set forth to be consonant with the Constitution and other materials presented, to the extent there could be further ambiguity in any of these Public Laws over the years, the OPA reports detailing the Attorney General's opinion are persuasive to interpret these statutes and materials as not permitting OT to be applied to retirees' benefits calculations. Because Mrs. Camacho was not entitled to have OT added to her credited service for purpose of retirement benefits, there is no need to address the argument that her benefits could have been diminished under the Constitution. N.M.I. Const. art. III § 20(a).

III. A Recoupment is Unwarranted Under a Statute of Limitations Analysis, and It Is Unfair at this Time to Require Mrs. Camacho to Reimburse the NMISF for Past Payments, But Her Benefits Must Be Adjusted Going Forward.

The catchall statute of limitations that applies is "six years after the cause of action accrues." 7 CMC § 2505. *Bd. of Trustees of N. Mariana Islands Ret. Fund v. Ada*, 2012 MP 10, FN7, No. 2010-SCC-0033-CIV, 2012 WL 3779318 (N. Mar. I. Aug. 30, 2012). The question of when a claim accrues under an applicable statute of limitations is an issue of law. *Id.* at ¶ 9.

The question here is whether the NMISF can start the statute of limitations running back from the date of the Adverse Action letter dated March 23, 2016, or whether the statute started running earlier. Mrs. Camacho argues that the cause of action accrued, and the statute of limitations started running, in the years 1994 to 1995 when her pension was adjusted to include the OT credit in her benefit calculation that NMISF is seeking to readjust and recoup. Mrs. Camacho has presented uncontested reports by the CNMI Public Auditor that show that NMISF knew that its OT increases did not comport with the law as of December 15, 1999, when its own legal counsel informed it, and that the Attorney General subsequently issued an opinion that the NMISF needed to reverse the OT inclusion of service credit in the calculation of benefit payments on June 9, 2000. As of June 9, 2000, the Attorney General "stated that members should be

informed and advised of their right to appeal an adverse determination. If no appeal is filed, then the collection process must be undertaken by the NMIRF." 2012 Report, p. 66-67. The NMIRF appears to have been recalculating and recovering overpayments throughout the 2000s to some degree. 2012 Report, p. 67. As late as May 8, 2012, NMIRF wrote to its top 120 overtime/compensatory time recipients to notify them that their pension benefits would be adjusted. 2012 Report, p. 67.

NMISF argues that the limitations period runs from six years before the date it sent the Adverse Action to Mrs. Camacho. This, NMISF argues, was the finding in the *Ada* case, where the court ran the statute of limitations on the member's claim for benefits not from the time the benefits arose, but from the time he received a notice of benefits from the NMIRF years later. *Bd. of Trustees of N. Mariana Islands Ret. Fund v. Ada*, 2012 MP 10 ¶ 29. The difference there, however, was that the claim was the member's claim for benefits- not the NMIRF's claim for recoupment. In other words, the claim was that the NMIRF failed to pay Mr. Ada his double-dipping benefits when he was rehired in the year 2000. *Id.* at ¶ 31. There was no rule or regulation that governed his situation, and he was not informed that he had six years to file a claim from the year 2000 when he was re-hired. *Id.*

The Supreme Court examined when Mr. Ada's cause of action accrued. It determined that double-dipping benefits accrued not when he became eligible for them in 2000 but when he was put on notice he was being denied in 2008 through a statement of benefits that did not include the double-dipping benefit. *Id.* The Court held that "a suit to enforce rights under a pension plan accrues, and the statute of limitations begins to run, when there has been a clear and continuing repudiation of rights... which is made known to the beneficiary." *Id.* at ¶ 30. Accordingly, the Court found that the member's claim was not barred by the statute of limitations.

Mr. Ada's claim was demanding something be paid to him by someone else that was a benefit he was entitled to but had been denied. In this case, however, the NMISF is demanding that Mrs. Camacho give back a benefit that it incorrectly computed- so it seeks to take something away from a retiree. The party to be charged with the running of the statute in Ada was Mr. Ada. He was the party who waited to seek a benefit he was not paid. But here, the party to be charged is the NMISF because it is the claimant and seeks to recoup benefits from Mrs. Camacho that it waited to recover. The NMISF therefore cannot run its time from the date it sent a notice of the Adverse Action to Mrs. Camacho. Its time must be run from the time its claim accrued. *See,* 7 CMC § 2505.

Mrs. Camacho argues that the statute should start running in 1994 and 1995 at the time the OT benefits were improperly credited. As a general matter, there is a reasonable argument that the accrual of a claim for restitution or unjust enrichment to recover money paid by mistake should accrue on the date payment was made, except where a statute provides otherwise or the money was obtained by fraud. Restatement (Third) of Restitution and Unjust Enrichment § 70 (2011). *See,* 7 CMC § 3401. Here, nothing in the record suggests that the NMIRF knew or should have known in 1994 or 1995 that its credit of OT was unlawful under the statutes. In other words, it is reasonable to glean from the materials presented that the NMIRF thought it was acting pursuant to a statute by enacting Section 4.20 of the Administrative Rules and proceeding to mistakenly disburse benefits starting in the 1990s, until it received its own counsel's legal opinion. Then, on June 9, 2000, when the Attorney General formally provided its opinion to the NMIRF and told it to recoup benefits that had been improperly calculated with OT, it should have become clear that adjustments were required to be made. Accordingly, the accrual of the statute of limitations for the recovery of OT begins June 9, 2000. The Adverse Action was

therefore started too late to collect payments that were made to Mrs. Camacho on the basis of the incorrect application of OT in 1994 and 1995.

But this determination is not enough to end this analysis. There are three remaining issues. First, as of the date of the Adverse Action, the NMISF should have been able to reduce Mrs. Camacho's pension payments as calculated without inclusion of OT. *See Bd. of Trustees of N. Mariana Islands Ret. Fund v. Ada*, 2012 MP 10, ¶28. However, because the Stay was granted on or about April 21, 2016, Mrs. Camacho is now in a position where even though she knew of the dispute, she essentially withheld the disputed amount for another seven years. See Supplemental Record ("SR") 16-002-SR-008-009. Laches cannot be applied during the Stay because Mrs. Camacho was aware of the dispute and the NMISF needed to adjust her benefits prospectively. Second, because the type of overpayment concerns a pension, NMISF argues that the statute of limitation accruals run from each pension payment it made to Mrs. Camacho, thus further complicating the statute of limitations analysis.[14] Third, the NMISF lacks the discretion to waive collection of overpayments: the language is mandatory. 1 C.M.C. 8390(a). Under the statutory framework, the Administrator, now Trustee, recovers overpayments administratively through an adjustment to future payments. 1 CMC 8390(a).[15] In other words, the NMISF cannot continue to overpay going forward. This is evident in CNMI caselaw: even where the CNMI Supreme

[14] The continuing claims doctrine can save later arising claims after the limitations period if they can be "broken down into a series of independent and distinct events each having its own associated damages." *Winnemucca Indian Colony v. United States*, 167 Fed. Cl. 396, 418 (2023). *See Baka v. United States*, 74 Fed. Cl. 692, 696 (2006)(continuing claims doctrine saves later arising claims even if the statute of limitations has lapsed for earlier events); *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456-7 (Fed. Cir. 1997); *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990)(after husband died, no new claim accrued each time the government failed to pay a widow a survivor annuity- if the statute had not been invoked from the time the events occurred that fixed the liability of the Government and entitled the claimant to start an action, the statute of limitations would never start to run). This issue is further complicated by determining when the NMIRF would have been able to bring a "claim" as it appears it may have been involved in some kind of an administrative process for some amount of time. *See* 2012 Report. There is not enough information that has been provided to make such a determination here, and because a finding of unfairness is warranted, the discrete details of whether there could have been a continuing claim are not determined here.

[15] "Whenever the administrator finds that more or less than the correct amount of benefits have been paid with respect to any individual, proper adjustment or recovery shall be made by appropriate adjustments to future payments to the member or any survivors, or from the estate of any recipient of benefits." 1 CMC § 8390(a).

Court has allowed a retiree to keep a bonus that would have been unfair to recoup, it did not allow retirees to receive that same bonus prospectively. *Bd. of Trustees of N. Mariana Islands Ret. Fund v. Ada*, 2012 MP 10, ¶28.

Mrs. Camacho asks that the equitable doctrine of fairness be considered. Fairness was invoked in the *Ada* case, where the parties acted in good faith when providing a bonus under a statute that was later found to be unconstitutional. *Id.* The Court found it was not fair to strip NMIRF members of previously received bonuses as this would put them "in the untenable position of paying back funds which they received in good faith and upon which they may have reasonably relied." *Bd. of Trustees of N. Mariana Islands Ret. Fund v. Ada*, 2012 MP 10, ¶28. Recouping the bonuses from members who relied in good faith on the validity of an enacted statute was found to be unreasonable and unfair. *Id.* The Supreme Court held that members who had previously received the bonus could retain it, but that going forward the bonus would not be given. *Id.*

Similarly, the concept of unfairness was alluded to in the *Cody* case, where the Court expressed its concern as a matter of policy about the NMIRF's effort to bar a plaintiff's claim due to a failure to exhaust administrative remedies. In that situation, the NMIRF was effectively attempting to use the exhaustion requirement to keep Mr. Cody out of court- after the matter had been before a hearing officer 7 months earlier and no decision had been rendered. The Court found that it was not reasonable to bar Mr. Cody's claim because it would allow the NMIRF to use an "indefinite timeframe to bury unfavorable claims in the administrative process and to stay the proceedings for an indefinite time." *Cody v. N. Mar. I. Retirement Fund*, ¶ 17. In other words, there was a concern that if the NMIRF could delay an administrative decision indefinitely, the result would be unfair to Mr. Cody.

Here, where overpayments stemmed from incorrect calculations done in 1994 and 1995, and Mrs. Camacho has waited over seven years for this matter to be resolved administratively (and with an appeal at the 9th Circuit on the COLA issue, it appears the matter may not be resolved even by this decision), there is an amount of unfairness that cannot be disregarded.[16]

CONCLUSION

For the reasons stated above, the Hearing Officer finds that OT should not have been included in the calculation of Mrs. Camacho's post-retirement benefits. However, Mrs. Camacho shall not be recouped or required to reimburse the NMISF for any monies due to any readjustment of her benefits based on the expiration of the statute of limitations and the unfairness of requiring payment after the length of time that has passed. The NMISF, however, shall properly adjust Mrs. Camacho's benefit payments to reflect the correct calculation going forward from the date of this decision.

Mrs. Camacho has the right to request a stay of the Hearing Officer's decision pending appeal to the Arbitrator should she decide to appeal this decision. NMISF Rules, Rule 5.[17]

The Parties shall contact Hearing Coordinator Ms. Susan T. Lobo within seven (7) days to arrive at a mutually agreed date and time to meet with the Hearing Officer for a status conference.

DATED: October 20, 2023

Deborah E. Fisher

Deborah E. Fisher
Hearing Officer

[16] *See also,* 1 CMC § 8390(b) (requiring overpayment be recovered from beneficiary within two years).
[17] For reconsideration and appeals more specifically, see NMISF Rules 6.7(c) and 7.