

FEDERATED STATES OF MICRONESIA

Programmatic Preparation Advance (PPA)

Labor Management Procedures

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1. INTRODUCTION

Federated States of Micronesia (FSM) has requested access to funds from the World Bank (WB) that will be used to prepare future WB projects within the FSM – the Programmatic Preparation Advance (PPA). The funds will be used to prepare safeguards instruments, recruit project managers, engage short term project (Project Workers) specific professional international technical Advisors (individuals and firms) for inputs specifically related to project design and preparation and FSM CIU consultants.

FSM will apply to draw down on the fund as and when required.

Work on the PPA falls under the World Banks (WB) Environmental and social Framework (“ESF”), which requires that FSM needs to prepare safeguards instruments for the activities that could be funded under the PPA, these instruments are:

- Environmental and Social Commitment Plan (ESS1);
- Stakeholder Engagement Plan (ESS10); and
- Labor Management Procedure (ESS2), which includes a labor Grievance Mechanism (GM).

This Document is the Labor Management Procedure (LMP), which is required under “ESS2 Labor and Working Conditions”. Under ESS2 Borrowers are required to develop Labor Management Procedures (LMP), which are to facilitate planning and implementation of the project during the preparation period using PPA fund. The key objectives of the ESS2 will be maintained throughout the project cycle.

2. OVERVIEW OF LABOR USE ON THE PROJECT

Labor needs on the project are confined to professional services for the preparation of technical documentation. Key activities include:

- Activities necessary for the identification of the pipeline of Project/s;
- Conducting reviews, studies, assessments and analyses to identify Project design/s (desktop and field activities);
- Activities to identify and establish the implementation and institutional arrangements necessary for the project/s;
- Supporting the engagement and consultations with relevant stakeholders at the National, State, Municipal and traditional levels on the scope and design of Projects;
- Other activities related to the preparation and implementation-readiness of the Project/s, including but not limited to, travel and the hiring of consultants and experts with qualification, experience under Terms of Reference (TOR) acceptable to the World Bank (WB) to support preparatory activities; and
- Design work and other studies, etc. (including safeguards instruments where required) in order to prepare the project/s.

These activities will be undertaken by a mix of individual direct workers and firm consultants, either fixed term or full time.

Proposed Project Activities	International Consultants	National Consultants
Identifying the pipeline of Project/s.		
Conducting reviews, studies and analyses to identify Project design/s.		
Activities to identify and establish the implementation and institutional arrangements necessary for the project/s.		
The hiring of consultants and experts with qualification, experience under Terms of Reference (ToR) acceptable to the World Bank (WB) to support preparatory activities.		
Supporting the engagement and consultations with relevant stakeholders at National, State, Municipal and traditional levels on the scope and design of the Project/s.		
Undertaking consulting work (studies, designs, assessments etc.).		

Project workers under the PPA are described as follows:

Direct Workers: Direct workers will be engaged by the PPA as individuals to undertake specific time bound tasks either on a full or part time basis.

Characteristics of Direct Workers:

Short-term and long-term international professional technical consultants.	Internationally recruited consultants and as such a wide range of nationality will be involved. Could be remote and/or based in FSM.
Short-term and long- term national consultants.	Predominately Micronesian nationality residing within the different states of the nation.
Age Demographics	From 20 to 60+
Gender balance	Engagement based on professional skill set requirements.

Contracted Workers: It is possible a firm/s will be contracted under the PPA. Up to 10 contract workers (consultants engaged under firm contracts) are likely to be engaged in PPA-related activities though the number will be confirmed during implementation as the nature of activities and procurement arrangements is clarified. Firms are likely to be engaged to undertake professional services such as surveys and design documentation.

Primary Supply and Community Workers: Not anticipated to be engaged in PPA related activities.

Civil servants will be involved in Project activities and will be responsible for administering worker contracts under the PPA. ESS2 does not apply to civil servants with the exception of OHS requirement.

3. BRIEF OVERVIEW OF LABOR LEGISLATION: TERMS AND CONDITIONS

FSM’s national laws, incorporating its Constitution and Annotated Code 2014 (The Code), provide some important protections safeguarding employees’ labor and working conditions. These include Constitutional prohibitions on slavery and involuntary servitude, a guarantee of equal protection under the law, freedom from discrimination on various grounds, and freedom of expression and association.

Further, the prohibition since 2012 of human trafficking under Title 11 (Crime) of the Code is a significant development.

However, there are many areas where FSM's national laws are inconsistent with international standards and ESS2 including laws and practice regarding child labor, in general, and the worst forms of child labor, more specifically. Further, despite the introduction of anti-trafficking laws, human (and child) trafficking, commercial sexual exploitation and forced labor remain major issues that the Government is yet to address effectively in practice. Likewise, discrimination and harassment in employment, particularly of women and persons with a disability, appear to be persistent and ongoing issues.

While FSM has ratified some international human rights treaties bearing on labor and working conditions, including CEDAW, CRC, CRPD and the Convention on the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others, it has not ratified any ILO Conventions to date. This creates a significant international governance gap in FSM compared to many other Pacific Island nations where the World Bank Group operates which, in most cases at a minimum, have ratified the core ILO Conventions. The lack of any ILO oversight of, and accounting for, labor and working conditions in FSM exacerbate the risks and challenges for the World Bank Group and its borrowers operating projects in FSM.

Notably, there are no trade unions operating in FSM currently, and no laws dealing specifically with trade unions, the right to collective bargaining, or anti-union discrimination. This is an anomalous situation compared to many other Pacific Island nations, which have active trade union movements. Like the absence of ILO oversight of labor laws in FSM, the absence of workers' organizations also diminishes Government accountability for workers' rights and presents potential risks for the World Bank Group and its borrowers operating there.

The Code of the FSM 2014 edition Title 51 Labor chapter III Hiring of Non Residential Workers (pages 131-139) sets out various requirements of workers including the need to hold work visas by foreign (other than USA) contractors and workers including fly-in fly-out consultants who are restricted by the 30 day entry visa limit, unless previously arranged. No other Labor Legislation constraints apply to workers potentially engaged on PPA activities.

Title 52 (Public Employment) provides for a grievance mechanism under the regulations whereby public service employees (or a group of employees) can raise complaints re: their working conditions, status, pay, and related matters, for hearing and adjudication. In doing so, the regulations provide that employees must be free from coercion, discrimination, and reprisals and that they may have representatives of their choice: sub chapter 144. Public sector employees are subject to national legislation, which is consistent with ESS2. However, for non-public sector employees, there is no internal grievance procedure mandated under national law.

There is no Occupational Health and Safety (OH&S) legislation in FSM. For all potential project based OH&S risks, DoFA CIU has adopted World Bank Group EHS Guidelines for all staff and contractors.

4. ASSESSMENT OF KEY POTENTIAL LABOR RISKS

Project activities will involve both administrative office-based work and/or field site visits throughout the states of the FSM.

Activities will generally be undertaken in the capitals of each of the main islands of the nation’s four states (Chuuk, Kosrae, Pohnpei and Yap States) including the nation’s capital, Palikir located in Pohnpei state. Possible activities undertaken in lagoonal islands and/or outer island atolls may be undertaken. Locations of work requirements will be project specific and detailed in the PPA TORs.

The key labor risk that may be associated with the PPA activities relates to the requirements for a general understanding and implementation of OHS requirements for travel to and around FSM. This includes fatigue, working in hot humid climates and in the tropical sun (particularly for foreign workers from temperate climates), random acts of harassment or violence, petty theft, working near or on water, traffic accidents (driving and during road inspections). In addition, cultural - traditional practices and associated risks (e.g. entering private properties without permission, working on religious days (Saturday or Sunday’s), inappropriate clothing and behavior, removing fruit-vegetation and so on) relating to workplace interactions among workers and management will be required.

Despite the gaps in formal legislation on terms and conditions, non-discrimination and child/forced labor the Project risks are considered to be low given the professional nature of the work to be undertaken. Direct and contracted workers will have clear contract terms and conditions, including a clear information on rates of pay and any deductions and timeframe for delivery. No workers under 18 will be engaged.

5. RESPONSIBLE STAFF

This section identifies the functions and/or individuals within the project responsible for (as relevant):

Functions	Responsible Entity
Engagement and Management of project workers.	DoFA Secretary in coordination with the CIU Program Manager, CIU team (including the Safeguard Team).
Engagement and Management of contractors/subcontractors.	DoFA Secretary in coordination with the CIU Program Manager, CIU team (including the Safeguard Team).
OHS briefings & Job Safety Environment Audits	CIU Program Manager and Safeguard Team
Training of Workers in LMP/OHS requirements.	CIU Program Manager and Safeguard Team
Addressing Worker Grievances.	CIU Program Manager

6. POLICIES AND PROCEDURES

All PPA activities will be compliant to FSM and State legislation and regulations and World Bank EHS Guidelines for all staff and project worker/contractors working under the PPA. These will be applicable to all direct workers, and will be included as a contract requirement for all contracted workers.

Moreover all project workers will be expected to understand and ensure compliance to these international standards.

All DOFA (CIU) contracts utilise a standard dispute resolution process. Relevant standard DoFA (CIU) contracts paragraphs (individual and/or Firm) for international and national direct and contract workers for all WB funded projects in the FSM includes:

Dispute Resolution:	Any dispute, controversy or claim arising out of or relating to this Contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.
Inspections and Auditing:	The consultant shall permit the World Bank (“the Bank”) and/or persons or auditors appointed by the Bank to inspect and/or audit the Consultants accounts and records and other documents relating to the performance of the Contract. Any failure to comply with this obligation may constitute a prohibited practice subject to contract termination and/or the imposition of sanctions by the Bank (including without limitation a determination of ineligibility) in accordance with prevailing Bank’s sanction/s procedures.
Termination:	The Client may terminate this Contract with at least ten (10) working days prior written notice to the Consultant after the occurrence of any of the events specified in paragraphs (a) through (c) of this Clause. a) If the Consultant does not remedy a failure in the performance of his/her obligations under the Contract within seven (7) working days after being notified, or within any period the Client may have subsequently approved in writing. b) If the Consultant, in the judgment of the Client or the Bank, has engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices (as defined in the prevailing Bank’s sanction procedures) in completing for or in performing the Contract. c) If the Client, in its sole discretion and for any reason whatsoever, decided to terminate this Contract.

Prevention and control measures to minimize occupational hazards will be based on the use of job safety analyses (JSA). Annex 1 contains a basic JSA form, that may be used or adapted by consultants (or they may have their own version). Prior to leaving for FSM, the consultants will be expected to prepare a JSA to identify and manage the risks relating to their in-country work, with a focus on fieldwork. The CIU Safeguards Team will review prior to work commencing.

JSA is a process involving the identification of potential health and safety hazards from a particular work activity and designing risk control measures to eliminate the hazards or reduce the risk to an acceptable level. JSAs are undertaken for discrete project activities such that the risks can be readily identified and appropriate risk management measures designed.

The principles are:

- Eliminating the hazard by removing the activity from the work process. Examples include substitution with less hazardous chemicals, using different manufacturing processes, etc.;

- Controlling the hazard at its source through use of engineering controls. Examples include local exhaust ventilation, isolation rooms, machine guarding, acoustic insulating, etc.;
- Minimizing the hazard through design of safe work systems and administrative or institutional control measures. Examples include limiting exposure to sun/heat, working in pairs, calling in regularly from remote work areas, etc.; and
- Providing appropriate personal protective equipment (PPE) in conjunction with training, use, and maintenance of the PPE.

The CIU Safeguards team will monitor progress with JSA implementation.

AGE OF EMPLOYMENT

All PPA related workers will be aged 18 or older. Ages will be verified during the procurement process.

TERMS AND CONDITIONS

Terms & Conditions	Actions
Specific wages, hours and other provisions that apply to the project.	Project workers and/or Consultant firms engaged on contracts with the project, approved by the World Bank in “No Objection” process and pursuant to WB procurement guidelines as appropriate. Specific remuneration is considered private and confidential to each person/firm undertaking the work. Competitive international and national consultant rates will be included in all PPA related activities. Clear terms and conditions will be included in all contracts include terms and conditions of employment, applicable leave arrangements, wage deductions, and hours/timeframe of work, timing of payments.
Any collective agreements that apply to the project. When relevant, provide a list of agreements and describe key features and provisions.	Workers will be free to join a workers organization of their choosing; the Project will not seek to influence or control such arrangements.

7. GRIEVANCE MECHANISM

Labor Grievance Mechanism for contracted workers/consultants (national and international) will use Dispute Resolution provisions embodied in their respective contracts based on the FSM National public service regulations. Annex 2 provides a summary of relevant excerpts from the public service regulations that would apply and outlines the process to lodge a grievance and to seek a resolution.

In summary for all grievances the first step will be the lodgment of the grievance (written or verbal) to the CIU Program Manager, whom will within 2 weeks provide a response and seek resolution. If a resolution cannot be attained or agreed by the claimant then the CIU Program Manager may request the DoFA Secretary to review the complaint and seek a resolution OR it is registered and will be

managed through the FSM National public service provisions as detailed in Annex 2. All illegal activities will be directly reported to the Police and/or Department of Justice and managed accordingly.

8. CONTRACTOR MANAGEMENT

Contractors firms, providing specialist services, may be engaged on the project for specific project preparation activities. The Project will ensure that contractor workers are subject to the terms and conditions of work outlined in table above. These will be included in contractor contracts and contractors will be expected to produce evidence of compliance.

ANNEX 1: Example of Job Safety Analysis (JSA)

Add Organisation Name:

Ref Version:

Business details:			
Business Name:		Contact Person:	
Address:		Contact Position:	
Contract Phone		Contact Email:	
Emergency Services Contact Details:			
Job Safety Details:			
Work Activity:		Location:	
Who are involved in the activities:		This Job Analysis has been Authorized by: Name: Position: Signature: Date:	
Plant & Equipment used:			
Maintenance checks Required:			
Tools Used:			
Materials Used:			
Personal Protective Equipment used:			
Certificates – permits & approvals required:			
Details of Activities undertaken – write controls out in full.			

ANNEX 2: Provides a summary of relevant excerpts from the public service regulations that is included in all contracts associated with the PPA.

Annotations are marked up where there are aspects to be addressed to ensure consistency between the LMP and public service regulations.

PART 15 GRIEVANCES

- 15.1. Employee Coverage. The Public Service Grievance System covers all Public Service System employees.
- 15.2. Grievance Coverage. The grievance system will cover any matter of concern or dissatisfaction to an eligible employee. ~~[except the following:]~~
 - a. ~~[An adverse action appealable under Part 18.]~~
 - b. ~~[A fitness for duty examination.]~~
 - c. ~~[The content of published Government policy.]~~
 - d. ~~Non-selection for appointment, promotion, or reassignment from a group of properly ranked and certified candidates.~~
 - e. ~~[Disapproval of a merit increase, performance award, or other kind of honorary discretionary award.] *** All these exceptions need to be further detailed and clarified...~~
- 15.3. By Whom Presented. A grievance may be presented by an individual employee or by a group of employees acting jointly. For the purposes of this part, the word “employee” shall be understood to refer also to group of employees acting jointly. An employee has the right to be assisted by a representative of his choice in submitting a grievance.
- 15.4. Grievance Procedure.
 - a. Grievance may be presented either orally or in writing. An employee may present a grievance concerning a continuing practice or condition at any time. If his grievance is related to a particular act or occurrence, he must present it within [fifteen] calendar days of the date of that act or occurrence or the date when he became aware of it.
 - b. An employee shall ordinarily present a grievance first to his immediate supervisor. If the employee believes that he has a valid reason for not taking the grievance to his immediate supervisor, or if his immediate supervisor so authorizes, he may submit his grievance to a supervisory or management official of higher rank than the employee’s immediate supervisor. If the employee believes that he has a valid reason for not taking the grievance to any official in his agency, or if his grievance is not settled to his satisfaction by officials in his agency, he shall submit his grievance to the ~~[Personnel officer]~~ **Director of the Office of Administrative Services or his designee**. The action of the ~~[Personnel Officer]~~ **Director of the Office of Administrative Services** shall be final unless the ~~[Personnel Officer]~~ **Director of the Office of Administrative Services** himself authorized referral of the grievance to another official.
- 15.5. Obligation of Supervisors and Management Officials. Supervisors and other management officials have an obligation and a solemn duty to accept an employee’s grievance and to act promptly, fairly, and in good faith in the issue or issues presented in the grievance. They also have the obligation to abstain from any restraint, interference, or reprisal against employees and their representatives who are exercising the right to present grievances. It is not enough for an official to abstain from overt

threats or interference. He must also refrain from making any statement or taking any action that has the appearance of a threat, interference, or intimidation.

PART 16. TERMINATIONS OTHER THAN FOR CAUSE

16.1. Resignation. Resignations shall be in writing and shall be submitted at least fourteen (14) calendar days in advance of the effective date. The ~~[Personnel officer]~~ **Director of the Office of Administrative Services** may designate management and highly skilled technical classes for which this period may be extended to thirty (30) calendar days. The Department or Office Head shall submit a copy of the written resignation, together with the necessary terminating documents, to the ~~[Personnel Officer]~~ **Director of the Office of Administrative Services** or his authorized representative.

16.2. Termination for Medical Reasons. When the ~~[Personnel Officer]~~ **Director of the Office of Administrative Services** believes that an employee has incurred an illness, injury, or other physical defect which may cause long-lasting impairment of his ability to perform the duties of his position, or that the employee has become mentally incapacitated or has contracted an infectious or contagious disease which endangers the health of others, the ~~[Personnel officer]~~ **Director of the Office of Administrative Services** shall cause the employee to undergo medical examination as provided in ~~[Sup Part 3.12.]~~ **sub-part 3.23.** The medical examiner shall be requested to determine whether the employee suffers from such a disqualifying condition and, if so, to provide the best possible estimate of how long the disability is likely to last.

If it is expected that the disability will have ceased no later than ten working days after the expiration of the employee's accrued sick leave, the provisions of Paragraphs 10.3. d. and 10.4.b. shall apply.

If it is expected that the disqualification will last beyond the period of the employee's accrued sick leave plus ten working days, or if at the end of that period a reexamination discloses that the employee is still unable to perform the duties of his position, the following procedure shall be followed:

- a. The employee will be retained ~~[in any status]~~ in pay status until he has exhausted his accrued sick leave.
- b. Thereafter, unless a reassignment is available which the ~~[Personnel Officer]~~ **Director of the Office of Administrative Services** deems suitable, the ~~[Personnel officer]~~ **Director of the Office of Administrative Services** may terminate the employee for medical reasons.

16.3. Reduction-in-Force. [Department and agency Heads] may terminate the service of an employee because of the condition of his position, for lack of work or funds, or for other reasons outside the employee's control which reflect no discredit on the services of such employee. When there is an impending reduction in-force [and] Department or agency concerned shall inform the ~~[Personnel officer]~~ OAS Director of this fact at least [sixty (60)] days in advance of the proposed action.

c. Reduction-in-Force Notice. When the determination to abolish a position is made and all efforts to place the affected employee in another position within his competitive area have failed, the ~~[Personnel Officer]~~ OAS Director shall inform the employee, in writing, that he has been reached by reduction-in-force and that his

services shall be terminated. The [Personnel officer's] OAS Director's letter shall be dispatched at least thirty (30) days before the effective date of termination and it shall inform the employee whether his is eligible for placement on the reemployment list. The employee shall sign a copy of the letter to acknowledge receipt and return it to the [Personnel Office] OAS.

- d. Reemployment List. [Permanent] Regular employees terminated because of reduction-in-force shall be entitled to be placed on an appropriate reemployment list. Temporary employees shall not be entitled to these reemployment rights. It is the displaced employee's responsibility to request placement on the reemployment list, as outlined in [Sub-Part 4.4] of these Regulations.
- 16.4. [Exit] Interview. A Personal interview shall be provided each employee terminating his service, before the effective date of the termination action. The interview shall be conducted for the purpose of learning from the employee the reason for his termination and such other information as may be appropriate. Interviews shall be recorded in report form and be made a part of the employee's personnel folder. The interview shall be conducted by the [Personnel Officer] OAS Director or his delegation.

PART 17 MINOR DISCIPLINARY ACTIONS

- 17.1. Definition. For the purposes of this Part, "minor disciplinary actions" means oral admonitions, written reprimands, and suspensions for no more than [three] working days.
- 17.2. Oral Admonition. An oral admonition may be directed to an employee by his immediate supervisor or by a supervisor of higher rank, except as the responsible management official may restrict this authority. [Oral admonition need not be reported to the Personnel office.]
- 17.3. Written Reprimand. A written reprimand may be addressed to an employee by his immediate supervisor or by a supervisor of higher rank, except as the responsible management official may restrict this authority. Written reprimands shall be subject to the following procedures:
 - a. The language of the written reprimand must make clear the nature of the offense for which the employee is being reprimanded.
 - b. A copy of the written reprimand will be sent through the responsible management official and to the [Personnel Office] OAS.
 - c. The [Personnel Office] OAS will retain the reprimand in the employee's Personnel Folder for a period [of] not to exceed [3] years from its date. If, during the [one-year period], the employee becomes subject to another minor disciplinary action (except an oral admonition) or to an adverse action, the reprimand shall be retained in the employee's Personnel Folder for a period of [one] year from that date to such subsequent action. While the reprimands are included in the Personnel Folder, it shall be taken into consideration in connection with performance evaluations, performance (within-grade) increases promotions, and action purposes.
 - d. Upon the expiration of the [one-year period] described in Paragraph c, the reprimand shall have no further force or effect for any purpose and shall be discarded from the Personnel Folder.
 - e. At any time before the expiration of the [one-year] period described in Paragraph c, the responsible management official may request the [Personnel Office] OAS Director to discard the reprimand from the employee's Personnel Folder. The

[Personnel Officer] OAS Director shall carry out this request if he thinks that the best interest of the Public Service will benefit thereby.

- 17.4. [Suspension for no more than Three Working Days.] [All suspension, regardless of their duration, will be initiated submission of a request for Personnel Action, which will state the reason why the suspension is being effected. A copy of the respective Personnel Action Form, like all other Personnel Action Forms relating to a particular employee, shall be permanently included in the employee's Personnel Folder as part of his official record.]
- 17.5. Recourse. An employee who has been made subject to a minor disciplinary action and who is not in conformity therewith may have recourse to the grievance procedure described in Part 15.

PART 18 ADVERSE ACTION

- 18.1. Definition. For the purpose of this Part, "adverse actions" means dismissals, demotions for disciplinary reasons, and suspension for more than three working days.
- 18.2. Authority to Take Adverse Action. The authority to effect adverse actions is granted to management officials by [Chapters 1 & 2 of title 52 of the Code of the Federated States of Micronesia and further amended by Section 25(1) and 25(2). P.L. No 1-47, as amended.] For this purpose, management officials shall include;
- a. The Speaker of the Congress.
 - b. The Public Auditor
 - c. The President and Vice-President of the Federated States of Micronesia.
 - d. The heads of all executive Departments, Offices, and Agencies.
 - e. The Chief Justice.
 - f. The chairman of each commission, authority, or similar body whose employees are included in the Public Service.

These persons may delegate in writing the power to effect adverse actions, to such other persons under their supervision as they deem appropriate. Copies of all such written delegations shall be sent to and retained by the [Personnel Office] OAS Director. In this part the expression "management official" will refer only to a person authorized to effect adverse actions in accordance with this Sub-Part.

- 18.3. Employee Coverage. This part applies to all [permanent] regular employees for the National Government of the Federated States of Micronesia not exempt under [section 8, P.L. No. 1-47]. [(Section 117,52 FSMC.)]
- 18.4. Merit of Adverse Action. An adverse action may not be taken against an employee covered by this part except for such cause as will promote the efficiency of the public service.
- 18.5. Notification of Adverse Action. A management official assisted by the [Personnel Officer] OAS Director shall effect an adverse action by delivering or causing to be delivered to the employee affected a notification containing at least the following information:
- a. Nature of adverse action, which is being taken.
 - b. Its effective date.
 - c. A full and detailed statement of the reasons for which the action is being taken, specifying names, dates, and places.

- d. A statement of the employee's right of appeal of the adverse action, including the statement that such an appeal must be filed with the [Personnel Officer] OAS Director within [fifteen] calendar days after the date of transmittal of the notification pursuant to Paragraph 18.6.(b) below.
- 18.6. Delivery of Notification of Adverse Action.
- a. The notification of adverse action shall be delivered to the employee affected by one of the following means:
- (1) Whenever possible, to the employee personally. His written acknowledgement of its receipt should be obtained; in the absence of such written acknowledgement, a certificate by the person who made the delivery may be substituted.
 - (2) When personal delivery is not possible, to the residence of the employee. Delivery at that location may be made to any person not less than eighteen years of age and of sound mind residing or employed there. Delivery in these circumstances shall be proved by means either of writing acknowledgement of receipt by the person accepting delivery, or of a certificate signed by the person who made the delivery.
 - (3) When neither personal delivery nor delivery to the residence is possible by registered mail with return receipt requested, to the employee's last known address.
- b. The date of transmittal of the notification to the employee shall be;
- (1) When personal delivery is made, the date of such delivery.
 - (2) When delivery is made to the employee's residence, the date of such delivery.
 - (3) When the notification is sent by mail, the date of mailing.
- c. The effective date of the adverse action shall not be earlier than the close of business on the date of delivery.
- 18.7. Procedure for Filing Appeals. An employee may appeal from an adverse action at any time during the period of [fifteen calendar days], counted from the date when the notification of the adverse action was transmitted to him. All appeals shall be in writing and shall be filed with the [Personnel Officer] OAS Director, by the employee personally or by his authorized representative. The appeal shall include or be accompanied by the following materials:
- a. A statement of the employee's reasons for contesting the adverse action.
 - b. Any offer of proof or documentary evidence which the appellant then wishes to submit.
 - c. The names of witnesses and the description of documentary and other evidence that the appellant wishes to have at the hearing, with such explanation of their relevancy as may be appropriate.
 - d. Any request the appellant may wish to make for a delay in the date of his hearing, beyond the period of [fifteen] days from the date when the appeal is filed.
 - e. The designation of the employee's authorized representative, if any.
- 18.8. [Ad Hoc Hearing Committee.]
- a. Appeals from adverse actions will be heard by an ad hoc hearing committee consisting of three members, selected from a panel of not less than seven officers or employees of the National Government, nominated by the [President] with the advice and consent of the Congress. Each committee shall comprise one member chosen by the appellant, one chosen by the [Personnel Officer] OAS Director, and a third chosen jointly by the other two members. If the first two members are unable

- to agree on the choice of a third member within [two] working days after they have been notified of their selection, the [Personnel Officer] OAS Director shall then select the third member by [lot] from among the remaining members of the panel.
- b. No member of an ad hoc committee shall be an officer or employee of component of government to which the appellant is or was assigned, or a close relative of either the appellant or the responsible management official. For the purposes of this Sub-Part, the work “component” shall mean either:
- (1) The legislative Branch;
 - (2) The Judicial Branch;
 - (3) Any Executive Department or Office; or
 - (4) Any board, commission, authority, or similar body.
- c. At the time of filing his appeal with the [Personnel Officer] OAS Director, the appellant or his authorizing representative shall select from the panel a member of the ad hoc hearing committee. The [Personnel Officer] OAS Director shall immediately determined whether or not the member named is prevented from serving in conformance with Paragraph b of this Sub-Part; If so, he shall inform the appellant’s representative, who shall forthwith make another selection. The [Personnel Officer] OAS Director shall then choose the second member of [other] the committee and shall promptly notify the two persons of their selection, urging them to meet at the first opportunity to jointly select the third member.
- 18.9. [Personnel Officer’s] OAS Director’s Responsibilities before Hearing. In the period after the ad hoc hearing committee has been constituted, the Personnel Officer will have, among another responsibilities, the following:
- a. To inform the management official who authorized the adverse action that an appeal has been filed, and to obtain from him the names of witness and the description of tangible evidence for which [he wishes] subpoenas to be issued, if any;
 - b. To turn over to the ad hoc committee the original appeal, supporting documentation, and lists of subpoenas requested by the appellant and the management official concerned.
 - c. To ascertain from the committee the date and time of the hearing, and inform all interested parties. The hearing shall be held within [fifteen] days after the appeal is filed, unless the appellant requests a delay; if he does so, the date of the hearing shall be at the discretion of the ad hoc committee.
 - d. To serve as a channel of communication between the committee and the interested parties and to explain all legal, technical, and procedural requirements.
 - e. To arrange for a hearing room and other logistical needs.
- 18.10. Subpoenas.
- a. The ad hoc hearing committee may on its own motion or that of the [Personnel Officer] OAS Director, management, or the appellant subpoena witnesses and tangible evidence, when such witnesses and evidence are relevant and material to the hearing. The committee shall be the judge of relevancy and materiality.
 - b. The appellant shall be entitled to review all material relied on by the management official to support the reasons specified in the notification of adverse action, including material relevant to the appellant’s past record if that record forms part of the basis for the action. This requirement means that management cannot use any material to support its reasons which, because of security or other considerations, cannot be disclosed to the appellant or his authorized representative. The appellant must be informed of his right to review the material relied upon.

- 18.11. Representative.
- a. An appellant has the right to present an appeal without representative, or to be accompanied, represented, and advised by a representative of his choice at any stage of the proceeding. The representative may be either an officer or employee of the National Government (provided that no conflict of interest would be produced) or a person from outside the government. A representative who is a government officer or employee shall be allowed reasonable periods of Administrative Leave from his regular duties to attend his functions as such representative. To change his authorized representative, the appellant must give written notice to the ad hoc hearing committee through the [Personnel Officer] OAS Director.
 - b. The representative of management in connection with the hearing shall be the Attorney General or his designee.
- 18.12. Freedom from Reprisal or Interference. An appellant and his representative must be free to use the appeal system without restraint, interference, coercion, discrimination, or reprisal. An employee, whether acting in an official capacity for the government or on any other basis, must not interfere with or attempt to interfere with another employee's exercise of his rights under this Part. It is not enough for an official to abstain from overt threats or interference. He must also refrain from making any statement or taking any action that has the appearance of a threat, interference, or intimidation.
- 18.13. Conduct of Hearings. All hearings shall be public [unless the appellant requests a closed hearing]. At the hearing, technical rules of evidence shall not apply and evidence shall be taken steno graphically or by recording machine. The appellant and the management official who authorized the adverse action shall each have the right to be heard, to present evidence, and to be confronted by all adverse witnesses. The appellant may be represented by counsel of his own choosing. The [Personnel Officer] OAS Director or his qualified designee shall attend the hearing and all meetings of any ad hoc hearing committee and provide technical advice on request.
- 18.14. Report of Ad Hoc Committee. Within [seven] calendar days after the close of the hearing, the ad hoc committee shall prepare a full written statement of its findings of fact and its recommendation concerning the adverse action that was appealed. It may recommend that the action be affirmed, modified, or reversed. [The committee shall immediately deliver this statement, with such supporting documentation as it deems appropriate, to the highest management official responsible for the agency in which the appellant is or was employed, with a signed copy to the [Personnel Officer] OAS Director.] That management official, after considering the findings and recommendations, will personally give the final decision on the appeal. This management official shall be;
- a. For the Legislative Branch, the Speaker of the Congress.
 - b. For the Executive Branch, the President.
 - c. For the Judicial Branch, the Chief Justice.
 - d. For each commission, board, authority, or similar body, the Chairman thereof.
- 18.15. Appeal File. For every appeal which is submitted in connection with an adverse action, the [Personnel officer] OAS Director shall establish an appeal file, which shall be separated and distinct from the regular employee files. The contents of the appeal file shall include, but not necessarily be limited to, the following:
- a. Copy of the notification of adverse action.

- b. The appeal submitted by the employee, with all supporting documents.
- c. All Written statements, authorizations, requests, and other documents presented in connection with the appeal and the hearing.
- d. The lists of subpoenas requested by the appellant at the hearing.
- e. Copies of all documentary evidence introduced at the hearing.
- f. Transcript of the hearing, including original tapes or other recordings, if any.
- g. Signed copy of the report of the ad hoc committee.

Each appeal file shall be kept by the [Personnel Office] OAS for not less than [six] years from the date of final decision of the respective appeal, and thereafter for such additional period as the Attorney General may find appropriate.

TITLE 17 FSM Constitution

§ 108. Hearings.

(1) Any person aggrieved by agency action is entitled to a hearing before the highest administrative official of the department or office of which the agency is a part. Hearings shall be initiated by the submission of a petition to such administrative official.

(2) Hearings shall be conducted and orders shall be made in accordance with section 109 of this chapter; provided, however, that in the event and to the extent that any other law establishes another procedure for administrative review of the particular matter the provisions of such other law shall be controlling.

Source: PL 1-150 § 8.

Case annotations: Analysis of a claim of bias of an administrative decision-maker begins with a presumption that decision-makers are unbiased. The burden is on the challenger to show a conflict of interest or some other specific reason for disqualification. Specific facts, not mere conclusions, are required in order to rebut the presumption. *Heirs of Mongkeya v. Heirs of Mackwelung*, 3 FSM R. 92, 99 (Kos. S. Ct. Tr. 1987).

There is a presumption that a judicial or quasi-judicial official is unbiased. The burden is placed on the party asserting the unconstitutional bias. The presumption of neutrality can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. Where disqualification occurs, it is usually because the adjudicator has a pecuniary interest in the outcome or has been the target of personal abuse or criticism from the party before him. *Suldan v. FSM (II)*, 1 FSM R. 339, 362-63 (Pon. 1983).

§ 109. Conduct of hearings.

(1) All parties and all persons who have an interest in the controversy who are known to the agency or hearing officer, and any person requesting individual notice shall be entitled to personal notice of all hearings. Persons entitled to notice of a hearing shall be timely informed of:

- (a) the time, place, and nature of the hearing;
- (b) the legal authority and jurisdiction under which the hearing is to be held;

- (c) the particular sections of the statutes and regulations involved; and
- (d) the issues presented.

(2) If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

(3) Unless precluded by law, disposition without a hearing may be made of any contested matter by stipulation, agreed settlement, consent, order, or default.

(4) The hearing shall be held within 30 calendar days after the submission of the petition, unless the petitioner requests a delay. At the hearing, the petitioner, the management official responsible for the agency action which is the subject matter of the controversy, and such other persons as the hearing officer shall permit, shall each have the right to be heard, to present evidence, to confront all adverse witnesses, and to be represented by counsel of his own choosing.

(5) At the hearing, technical rules of evidence shall not apply. At the discretion of the hearing officer, evidence may be taken stenographically or by recording machine. The hearing officer is authorized to issue subpoenas for witnesses and tangible evidence at the request of any party or on his own motion. Hearings shall be public except when the petitioner requests a closed hearing.

(6) Within 15 days after the conclusion of a hearing, the hearing officer shall prepare a full written statement of his findings of fact and his decision. The hearing officer shall forthwith transmit his findings of fact and decision to all parties. The decisions of the hearing officer shall constitute final agency disposition of the action.

(7) The hearing officer may:

- (a) administer oaths and affirmations;
- (b) rule on the admissibility of evidence;
- (c) take dispositions or have dispositions taken when the ends of justice would be served;
- (d) regulate the course of the hearing;
- (e) hold conferences for the settlement or simplification of the issues by consent of the parties;
- (f) dispose of procedural requests or similar matters;
- (g) make or recommend orders or decisions in accordance with this chapter;
- (h) take such other action as would serve the ends of justice.

(8) Except to the extent required for the disposition of ex-parte matters as authorized by law, the hearing officer may not consult a person or party or representative of a person or party on a fact in issue unless notice and opportunity are given to allow all parties to participate.

(9) The hearing officer may:

(a) communicate with other members of the agency, except as limited by subsection (8) of this section; and

(b) have the aid and advice of one or more personal assistants, and of the Attorney General and his staff if such assistance would not be in violation of subsection (8) of this section. Such assistants shall be constrained in the same manner as the hearing officer as provided in subsections (8) and (9) of this section.

(10) Any oral or documentary evidence may be received, but the hearing officer as a matter of policy shall provide for the exclusion of irrelevant, immaterial, unreliable, or unduly repetitious evidence. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Except as otherwise provided by law, privileges relating to evidence in the courts of the Trust Territory and Federated States shall apply in the conduct of hearings. A sanction may not be imposed or order or decision issued except on consideration of the whole record supported by and in accordance with substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

Source: PL 1-150 § 9.

Cross-reference: The statutory provisions on the Judiciary are found in title 4 of this code. The statutory provisions on Judicial Procedures are found in title 6 of this code.

Case annotations: The highest management officials cannot be said to be biased as a class and they cannot be disqualified, by virtue of their positions from final decision-making as to a national government employee's termination under section 156 of the National Public Service System Act, without individual consideration. *Suldan v. FSM (II)*, 1 FSM Intr. 339, 363 (Pon. 1983).

The FSM Rules of Civil Procedure do not apply to proceedings before administrative agencies. *Andrew v. FSM Social Sec. Admin.*, 12 FSM R. 101, 104 (Kos. 2003).

An agency action must be set aside when the action was without substantial compliance with the procedures required by law. *Ruben v. FSM*, 15 FSM R. 508, 516 (Pon. 2008).

When a letter does not set forth the agency's required findings of fact, it does not qualify as a full written statement of the hearing officer's findings of fact and his decision, and in the absence of a full written statement of findings of fact and an explanation of how the hearing officer arrived at his decision, the court has no reasonable basis upon which to review the agency action. Because the agency failed to substantially comply with the procedural requirement, the court will set aside its administrative action. *Ruben v. FSM*, 15 FSM R. 508, 517 (Pon. 2008).

Although a hearing officer has the discretion to decide which recording method to use stenographic or recording machine the hearing officer does not have the discretion to altogether fail to make a record of

the hearing and its failure to substantially comply with this procedural requirement is yet another reason an agency action must be set aside. *Ruben v. FSM*, 15 FSM R. 508, 517 (Pon. 2008).

When an agency failed to substantially comply with the procedures required by law through the hearing officer's failure to prepare a full written statement of his findings of fact and his decision and the agency's failure to make a record of the hearing proceedings, either stenographically or by recording machine, the court will set aside the agency order. *Ruben v. FSM*, 15 FSM R. 508, 517 (Pon. 2008).

When there are discrepancies in the evidence, which result in a dispute of material facts, the court will decline an invitation to conduct a *de novo* review and conclude the matter by summary judgment. *Ruben v. FSM*, 15 FSM R. 508, 517 (Pon. 2008).

Under the common law rule known as the doctrine of primary jurisdiction, courts may remand matters to administrative bodies that are familiar with the regulated activity at issue. Courts apply the doctrine of primary jurisdiction in the hope that by remanding matters to an administrative body, the administrative determination will obviate the need for further court action or will make possible a more informed and precise determination by the court. *Ruben v. FSM*, 15 FSM R. 508, 518 (Pon. 2008).

The doctrine of exhaustion of remedies requires that a potential plaintiff follow whatever procedures are in place to seek reconsideration of an agency's allegedly erroneous decision before bringing the dispute to the attention of the judiciary. It is incumbent on parties to exhaust administrative procedures concerning their disputes as designated by applicable state law before coming to court, unless and until the state law is judged invalid. *Smith v. Nimea*, 16 FSM R. 186, 190 (Pon. 2008).

Closely related to the requirement of exhausting all administrative remedies before seeking judicial redress is the doctrine of *res judicata*, which bars the relitigation by parties or their privies of all matters that were or could have been raised in a prior action that was concluded by a final judgment on the merits that has been affirmed on appeal or for which time for appeal has expired. Once a plaintiff availed himself of the administrative remedies available for claims under Pohnpei state law, he was obligated to exhaust those remedies as provided by Pohnpei state law before filing suit in the FSM Supreme Court. When the plaintiff failed to exhaust these remedies by failing to appeal the Pohnpei administrative decision, his claims for unpaid wages, overtime, wrongful termination and criminal penalties are barred as a matter of law. *Smith v. Nimea*, 16 FSM R. 186, 190 (Pon. 2008).