CABOT
MANTANONA LLP
929 South Marine Corps Dr., Ste. 200
Tamuning, Guam 96913
Telephone: (671) 646-2001
Facsimile: (671) 646-0777

OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEALS

IN THE APPEAL OF	)	**APPEAL NO. OPA-PA-16-002**
	)	
1-A GuamWEBZ,	)	**PURCHASING AGENCY'S**
	)	**REPLY IN SUPPORT OF**
	)	**OBJECTION TO AND MOTION TO STRIKE**
	)	**PAGES 1-3 OF APPELLANT GUAMWEBZ'S**
Appellant.	)	**BRIEF REGARDING REMEDIES**
	)	

Purchasing Agency Guam Community College ("GCC") submits this Reply in support of its Objection to and Motion to Strike Pages 1-3 of Appellant 1-A GuamWEBZ's ("GuamWEBZ") Brief Regarding Remedies ("Motion to Strike") filed July 12, 2016.

ARGUMENT

In its Opposition to the Motion to Strike filed July 14, 2016 ("Opposition to Strike"), GuamWEBZ agrees that its proposed findings of fact and conclusions of law were submitted in violation of the Hearing Officer's order. (*See* Opp'n to Strike at 2 ("There is no dispute that the Hearing Officer did not *explicitly* request proposed findings of fact or conclusions of law.") (emphasis in original).) Nonetheless, after acknowledging the assertions in GCC's Motion to Strike are correct, GuamWEBZ goes on to argue that: (1) GCC is just being petty, (2) GCC is elevating form over substance and GuamWEBZ may submit proposed findings of fact and conclusions of law even without permission to do so, and (3) GCC also wrongfully submitted proposed findings of fact and conclusions of law.

As explained below, GuamWEBZ's arguments fail. Accordingly, GCC's request to strike GuamWEBZ's proposed findings of fact and conclusions of law should be granted.

1. Compliance with OPA's Orders and Preserving Matters Are Not "Petty Issues"

First and foremost, GCC does not share GuamWEBZ's view that complying with OPA's order is a "petty issue[]." (Opp'n to Strike at 3). Nor is it "petty" to call this matter to OPA's attention. Indeed, if it had not filed the instant Motion to Strike, then GCC would likely be barred from later raising the improprieties in GuamWEBZ's so-called Remedies Brief. *See, e.g., Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) ("'[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*'" (quoting *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952))) (emphasis and omission in original); *id.* ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."); *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 462 (6th Cir. 2004) ("Courts decline to consider issues not raised before an agency because to do otherwise would 'deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.'" (quoting *Unemployment Comp. Comm'n v. Aragon,* 329 U.S. 143, 155 (1946)) (alteration in original).

Accordingly, unlike GuamWEBZ, GCC does not view the issues raised by its Motion to Strike as "petty."

2. This Is Not "Form Over Substance" Because Guam Law Provides that Findings of Fact and Conclusions of Law Are Only Submitted If Ordered and GuamWEBZ's Cited Cases Do Not Provide Otherwise

Contrary to GuamWEBZ's contention, the Motion to Strike is not based on a matter of "form over substance." (Opp'n to Strike at 1.) Although the Rules of Civil Procedure do not apply in this forum, they are illustrative for the matter at hand. Under Guam's Local Civil Rules, proposed findings of fact and conclusions of law are submitted by the parties only when ordered by the Court. *See* Guam Super. Ct. Local R. CVR 52.1 ("In non-jury cases, *if ordered by the Court*, the parties shall not less than fourteen (14) calendar days prior to the date on which the trial is scheduled to commence, serve and lodge proposed findings of fact and conclusions of law.") (emphasis added). Furthermore, there is a world of difference between a brief — which is what the Hearing Officer permitted — and proposed findings of fact and conclusions of law. *Accord Certusview Tech., LLC v. S&N Locating Serv., LLC, et al.*, No. 2:13CV346, 2016 WL 3647592, at *1 (E.D. Va. June 29, 2016) ("Additionally, CertusView argues that S&N's assertion, that Local Civil Rule 7(F)(3) applies to 'all briefing,' is contradictory because S&N filed Proposed Findings of Fact and Conclusions of Law in excess of the thirty-page limit. CertusView's argument misses the mark. '[P]roposed findings of fact and conclusions of law are not briefs or motions" and therefore the page limitations in Local Civil Rule 7(F)(3), governing briefs and motions, does not apply to such submissions.'" (quoting *Hegwood v. Ross Stores, Inc.*, No. 3:04cv2674, 2007 WL 2187245, at *1 n.2 (N.D. Tex. July 28, 2007))) (record citations omitted).

Looking specifically at the cases cited in the Opposition to Strike, GuamWEBZ has not presented anything that could possibly support its arguments. Its cherry-picked quotations

are from cases that are wholly inapposite to the matter at hand. (*See* Opp'n to Strike at 1-2.) GuamWEBZ's quotation from *Veasey v. Abbott* (*see id.* at 1) appears in a discussion about the Fifth Circuit declining to address an alleged *constitutional rights* violation because the conduct in issue had a "discriminatory effect under Section 2 of the Voting Rights Act." *Veasey v. Abbott*, 796 F.3d 487, 513-14 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016); *id.* ("Since we affirm the district court's determination that SB 14 has a discriminatory effect under Section 2 of the Voting Rights Act, Plaintiffs will be entitled to the same relief they could access if they prevailed on these First and Fourteenth Amendment claims. Put another way, the *rights and remedies are intertwined* and, therefore, we need not decide the constitutional issue.") (citations omitted) (emphasis added to illustrate GuamWEBZ's cherry-picked language).

GuamWEBZ's quotation from *Swonger v. Swonger* (*see* Opp'n to Strike at 1) is part of the Tennessee Court of Appeals' discussion regarding Tennessee Civil Procedure Rule 65's requirement that a trial court render findings of fact and conclusions of law in a decision on a motion for a temporary injunction. *See Swonger v. Swonger*, No. E2015-01130-COA-R3-CV, 2016 WL 1730732, at *7 (Tenn. Ct. App. Apr. 28, 2016) ("We note, however, that Tennessee Rule of Civil Procedure 65.04 requires that a court *'set forth findings of fact and conclusions of law* which constitute the grounds of its action as required by Rule 52.01' *when modifying a temporary injunction*. Such findings and conclusions were not set out in the trial court's order in this case. As we have previously explained, when a trial court's order fails to meet the requirements of Rule 52.01, 'the appropriate remedy is to 'vacate the trial court's judgment and remand the cause to the trial court for written findings of fact and conclusions

of law.'") (citations omitted) (emphasis added to illustrate GuamWEBZ's cherry-picked language).

And, GuamWEBZ's quotation from a decision of the Southern District of Texas' Bankruptcy Court (*see* Opp'n to Strike at 1-2) is contained in a footnote explaining how the decision's "factual background" is a summary of the findings of fact and conclusions of law that the court rendered after a "four-week bench trial." *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150, 154-55 & n.2 (S.D. Tex. 2009) ("The following is a brief summary of the facts giving rise to this suit. For a fuller treatment, *see ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278 (S.D. Tex. 2008). Except where specifically noted, the *factual recitation* contained herein *is not meant to supplant or amend the actual findings of fact and conclusions of law contained in this Court's prior opinion on liability. This summary is included in an effort to give context to the Court's present ruling on damages.*") (emphasis added to illustrate GuamWEBZ's cherry-picked language).

Accordingly, Guam law supports GCC's Motion to Strike. Not one case cited in GuamWEBZ's Opposition to Strike supports the proposition that when a party is given permission only to file a brief regarding remedies, then that party is also permitted to submit proposed findings of fact and conclusions of law.

3. As Instructed by the Hearing Officer, GCC Properly Used Facts and Law Only Insofar as to Argue in Favor of Certain Appropriate Remedies

GuamWEBZ's attempt to establish that GCC's Remedies Brief contained proposed findings of fact and conclusions of law is unavailing. (*See* Opp'n to Strike at 2.) As shown above, a brief is unequivocally distinct from a "proposed findings of fact and conclusions of

law." Moreover, by using facts and law to argue in favor of certain appropriate remedies, GCC's Remedies Brief complied with the Hearing Officer's instruction. *See, e.g., Appeal of JMI-Edison*, No. OPA-PA-11-001, Decision at 9-10 (Guam Office of Pub. Accountability Apr. 21, 2011) (explaining that a party's remedies brief, which used facts and law to argue for certain remedies, complied with the Hearing Officer's order regarding remedies briefs).

In short, there is a vast difference between GCC's and GuamWEBZ's filings. GCC supported its remedies requests with facts and law set forth as argument. GuamWEBZ, however, set forth entirely distinct sections of proposed findings of fact and conclusions of law; this is simply not allowed.

CONCLUSION

For the foregoing reasons and those articulated in its Motion to Strike, GCC objects to and respectfully requests that the Hearing Officer strike from the record pages 1 through 3 of Appellant GuamWEBZ's Brief Regarding Remedies.

Respectfully submitted this 18th day of July 2016.

CABOT MANTANONA LLP
Attorneys for Purchasing Agency
Guam Community College

By: _____
REBECCA J. WRIGHTSON

RJW:kma
O:\Kasteen\GCC-PROCUREMENT\Reply to Mtn. to Strike Remedies (Final).docx