

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

AGUSTÍN MONTAÑEZ ALLMAN,
OMBUDSMAN OF THE VETERANS;
MERCEDES PEGUERO-MORONTA; THE
LEGAL CONJUGAL PARTNERSHIP
comprised by them; AGUSTÍN, NICOLE
MARIE and JEAN PIERRE
MONTAÑEZ-PEGUERO

Plaintiffs,

v.

HON. ALEJANDRO GARCÍA PADILLA,
individually and as Governor of Puerto Rico;
ELIZABETH LÓPEZ-CABRERA, individually
and as Acting Ombudsman of the Veterans of
the Commonwealth of Puerto Rico; COL.
HECTOR LÓPEZ, individually and as
Designated Ombudsman of the Veterans of
the Commonwealth of Puerto Rico; THE
SENATE OF PUERTO RICO, represented by
HON. EDUARDO BATHIA-GAUTIER,
President of the Senate and by HON. MIGUEL
PEREIRA-CASTILLO, Senator and President
of the Commission for Judiciary, Security and
Veterans' Affairs; JOHN and JANE DOE.

Defendants

Civil No. 13-1683

DUE PROCESS; FIRST
AMENDMENT; CIVIL RIGHTS
ACTION UNDER §1983 OF TITLE
42, SEEKING INJUNCTIVE
RELIEF AND DAMAGES

PLAINTIFFS DEMAND TRIAL BY
JURY

**SECOND URGENT MOTION SEEKING TEMPORARY
RESTRAINING ORDER & INJUNCTION**

TO THE HONORABLE COURT:

Come now plaintiffs through their undersigned attorney and respectfully state,
allege and pray:

INTRODUCTION

Once again, Defendants' actions in the present case compel the need to request a TRO to avoid irreparable damage to Plaintiff Agustín Montañez. Not being satisfied with his illegal actions to the present, undeterred by the filing of the this case and the pending request for an injunction, Defendant García-Padilla has appointed co-defendant Col. Héctor López as Ombudsman of the Veterans of the Commonwealth of Puerto Rico and submitted said illegal appointment to the Senate of Puerto Rico, for its consideration and confirmation. This was done with high secrecy, without revealing the appointment to the general public through a press release nor otherwise, and with an obvious disregard of the proceedings being presided by this Honorable Court. To this date, codefendant García-Padilla has not informed this Honorable Court about the appointment of co-defendant Col. Héctor Lopez or its submittal to the PR Senate for confirmation, although it is evident that these actions might affect the proceedings in the case.

The present case began on September 6, 2013, when Plaintiff Montañez filed a Complaint requesting this Honorable Court for declaratory and injunctive relief, compensatory and punitive damages for reason of political discrimination and any other relief arising under the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America Section 1 of the Civil Rights Act of 1821, 17 STAT. 13, as amended, 42 U.S.C. Sec. 1983, 28 U.S.C. Sec. 2201 and 2202 (Declaratory Judgment) and Article II, Section I of the Bill of Rights of the U.S. Constitution.

The discriminatory acts inflicted upon Montañez are extensively stated in the Complaint and subsequent Amended Complaint and Second Amended Complaint. In a few words, Montañez was a lawfully appointed Veteran's Ombudsman serving a 10 year

term, who had a proprietary right and continued expectancy of employment in it. Pursuant to the Veteran's Ombudsman enacting law, the Governor may only terminate the Ombudsman for total disability or for gross negligence or reprehensible conduct, after notice and the right to a hearing.

On Monday, August 26th, 2013, Montañez learned through the press that Ms. Ingrid Vila, Co-defendant's García-Padilla Chief of Staff, made the following announcement: *"the present ombudsmen cease functions as soon as today. We will be making an announcement of the new interim appointments which are been evaluated at this moment by the Governor."* However, Montañez was not served with a notice of the "ceasing of functions", as announced by Vila. These actions allegedly responded to newly enacted acts which supposedly created a new Veteran's Ombudsman Office.

On August 28th, 2013, plaintiff Montañez received a copy of a press release dated that same date and issued by Vila. In the press release, Vila announced the designation of co-defendant López-Cabrera as Acting Veteran's Ombudsman.

On August 28th, Montañez received a letter signed by Vila notifying the designation by co-defendant AGP of co-defendant López-Cabrera as Acting Ombudsman of the Office of the Veterans Ombudsman of the Commonwealth of Puerto Rico. The furnished letter did not mention that he had been terminated. It plainly stated that the Office of the Veteran's Ombudsman created under the Reorganization Plan No. 1 ceased to exist and that co-defendant López-Cabrera was designated as Acting Veteran's Ombudsman of the Commonwealth of Puerto Rico on August 23rd, 2013. Under color of law, co-defendant Vila required Montañez to surrender control to co-defendant

López-Cabrera, of documents, files, equipment, materials, funds, property and any other resources of the agency.

From the outset, López-Cabrera's designation is grossly illegal and inofficious, since both the Reorganization Plan No. 1, as well as the newly enacted Law No. 79 requires that the Veteran's Ombudsman must be a veteran of the Armed Forces of the United States. Montañez was not given notice of the intent to terminate him nor was given a hearing as established under the Reorganization Plan No. 1.

Since his appointment as Veteran's Ombudsman and to this date, Montañez has performed his duties as Veteran's Ombudsman in a diligent manner and with the highest regard for the position he held. Montañez has not incurred in negligence or reprehensible conduct and was fully able and qualified to perform his duties as Veteran's Ombudsman. Montañez has never been reprimanded, sanctioned, or disciplined, nor has any action or claim been presented against him in either his personal or official capacity.

To avoid confrontation and further retaliatory acts and to protect his well-being and that of his family, Montañez has abstained to this date from going to his office and performing his lawfully appointed duties.

At all times, codefendant García Padilla has been fully aware that codefendant's Elizabeth López appointment is illegal. For that reason, and further motivated by the filing of this case, as well as another complaint presented in the State Court by a group of veterans, he unlawfully appointed codefendant Col. Héctor López as Ombudsman of the Veterans of the Commonwealth of Puerto Rico and, on or around September 3, 2013, behind the public's as well as this Court's back, submitted such appointment to the

Senate of Puerto Rico for its consideration and confirmation. (See Exhibit 1) This was done in an extremely secretive manner, without divulging the appointment to the public through a press release or otherwise, and with an evident disregard of the proceedings being presided by this Honorable Court. To this date, codefendant García-Padilla has not informed to this Honorable Court about the appointment or its submittal to the PR Senate for confirmation, although it is evident that these actions affect the proceedings in the case. In addition, Col. López has not taken possession of his appointment and codefendant Elizabeth López continues to illegally occupy the position.

García Padilla's latest unlawful and bold actions grant the issuance of an immediate TRO, to prevent Col. López to illegally occupy the position of Ombudsman of the Veterans of the Commonwealth of Puerto Rico, of which Plaintiff Montañez is legally entitled as well as to prevent the Senate of Puerto Rico to confirm Lopez's illegal appointment

In light of the above, it is hereby respectfully submitted that only through the issuance of this extraordinary relief being sought herein that this Honorable Court can assure and safeguard the constitutional rights of Plaintiff Montañez as they relate to the statements and prayers set forth in the captioned complaint.

The operative facts and applicable laws in this case are essentially the same as those in Díaz-Carrasquillo v Hon. Alejandro García Padilla, Civil No. 13-1646 (DRD) currently before this Honorable Court. On October 1st, 2013, Hon. Daniel Domínguez issued an Opinion and Order (Docket 75) in that case Granting a Preliminary Injunction to maintain Díaz-Carrasquillo in the position as Ombudsman for the People with Disabilities.

In addition, Hon. Domínguez certified the case to the Supreme Court of Puerto Rico and stayed the proceedings until said Court issues its Opinion on the matters submitted for Certification.

In his Opinion and Order, Hon. Judge Domínguez determined the following:

“Plaintiff has a likelihood of success on the merits as Plaintiff has demonstrated that in many way his job functions are quasi-judicial. For example, Plaintiff has demonstrated that he has the authority to investigate and impose monetary penalties on municipalities, the Commonwealth of Puerto Rico and private companies. Plaintiff’s agency also files administrative or civil (state and federal) complaints as well as engages in mediation. The agency also has ALJs who issues resolutions; these resolutions are directly reviewed, modified, and at times reversed, by Plaintiff. Additionally, these decisions of the Ombudsman are appealable to the Puerto Rico Court of Appeals pursuant to the provisions of the UAPA. See Article 12 of Law 78 of 2013; Section 4.1 of the UAPA.

Further, were the Court not to grant the preliminary injunction, Plaintiff would experience irreparable harm as the Governor would promptly remove Plaintiff from his post and Plaintiff would be unlikely to be reinstated.

In analyzing the third factor, balancing the hardships, the Court finds that Defendants’ hardship of having Plaintiff remain in his position is minimal as there has been no allegation that Plaintiff is in any way unfit to carry out the duties and obligations of his office. The Court also notes that Defendants have not put forth any cogent argument, or evidence, explaining how Plaintiff remaining in his position would hinder the Governor’s ability to govern. Finally, the effect of enacting the preliminary injunction on the public interest is compelling as the preliminary injunction merely preserves the status quo and ensures a smooth transition of power from one administration to the other.”

NEED FOR THE ISSUANCE OF A TRO AND INJUNCTION

1. As summarized above, and as was extensively stated in the Second Amended Complaint, it is clear and evident that defendants have acted jointly to violate Montañez’s constitutional rights by attempting to deprive him of his legally held position

and to create a tense and adverse atmosphere at the Veteran's Ombudsman Office.

2. This situation is a direct consequence of defendants' continuous and reckless disregard for the law and the constitutional rights and safeguards afforded to Montañez under law. Co-defendant's actions were geared to take over the Veteran's Ombudsman Office and seize and usurp the Veterans Ombudsman position, with reckless disregard of the consequences or the repercussions that may result from such directive being provided to the Transition Committee by the Governor.

3. As we have stated in the Complaint and repeated above, Plaintiff Montañez is serving a ten (10) year term as Veteran's Ombudsman, which expires on November, 2021. Montañez has not received a formal termination letter, as the document he received does not mention that he had been terminated, but merely that the Office of the Veteran's Ombudsman created under the Reorganization Plan had ceased to exist, and that co-defendant López-Cabrera had been designated as Acting Veteran's Ombudsman of the Commonwealth of Puerto Rico on August 23rd, 2013. López-Cabrera's designation is grossly illegal, since both the Reorganization Plan as well as the newly enacted Law No. 79 establishes that the Veteran's Ombudsman must be a veteran of the Armed Forces of the United States and/or a reservist of any of the branches of the Armed Forces of the United States and she does not comply with this requirements. More so, she has publicly admitted she does not qualify for the position and that co-defendant AGP was aware, when making the appointment that López-Cabrera does not qualify for the position.

4. In accordance with the statements proffered by the defendants, Law No. 75

and Law No. 79, signed into law by the Governor on July 24th, 2013, allowed them to dispose of Montañez's appointment as Veteran's Ombudsman. However any such interpretation is incorrect and unfounded, considering the laws do not address the termination of the employment of the Veteran's Ombudsman and merely provides the Governor the ability to name a future ombudsman. In addition, the Puerto Rico Supreme Court has determined that a fixed term position with quasi-judicial and/or quasi-legislative functions cannot be freely removed by the Governor. (See Guzmán v Calderón, 164 D.P.R. 220 (2005) Both the reorganization Plan and Law No. 79 impose quasi judicial and quasi legislative functions upon the position of the Ombudsman and Plaintiff Montañez performed such functions during his tenure, facts that were admitted and stipulated by Defendants' legal representation during the Preliminary Injunction hearing held in this case by this Honorable Court on September 17, 2013.

Further, the PR Supreme Court has established that when a position with a fixed term is abolished and a similar or equal one is created, the new position must be different in nature to the previous one in order for a Governor to be able to appoint a new person to the position. To wit, a change in nature is determined if the term of the position is changed from a fixed term to an undetermined one or vice versa, or if the position will respond to a different branch or department of the government. (See Gómez v Negrón, 65 D.P.R. 305 (1945). In the present case, the nature of the position has remained unaltered.

In light of the above, Codefendant Col. Héctor López's designation is blatantly unlawful as well, since codefendant García-Padilla has no authority under state or federal law, to appoint a new Ombudsman.

5. Plaintiff Montañez has sued the individual defendants in their official capacities for their actions taken under color of law, as authors, implementers and as enforcers of Laws No. 75 & No. 79, which they have illegally utilized to attempt to justify the physical removal of Montañez from office. All codefendants have knowledge or belief that Montañez is politically affiliated to the New Progressive Party (NPP) and have acted in full concert, collaboration and coordination, based on their own political motivations, to remove plaintiff from his office, with disregard of his legal right to hold such position until November, 2021.

6. As per the basis required to maintain a procedural due process claim, the plaintiff must allege *"that he or she was deprived of constitutionally protected property because of defendants' actions, and that the deprivation occurred without due process of law."* Rumford Pharm., Inc. v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992). To assert such a claim *"arising out of the termination of his employment, a public employee must first demonstrate that he has a reasonable expectation, arising out of a statute, policy, rule, or contract, that he will continue to be employed."* Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 101 (1st Cir. 2002) (citing Perkins v. Bd. of Dirs. of Sch. Admin. Dist. No. 13, 686 F.2d 49, 51 (1st Cir. 1982)).

7. To maintain a procedural due process claim, the plaintiff must also demonstrate that he was deprived of a property interest without the minimum amount of process that was due under the Constitution [including] *'some kind of hearing'* and *'some pretermination opportunity to respond'*. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); see also Mard v. Town of Amherst, 350 F.3d 184, 193 (1st Cir. 2003).

Pre-termination and post-termination proceedings are not evaluated for constitutional adequacy in isolation from each other; a reviewing court studies the totality of the process received in light of the factual record to determine if the procedural due process provided to the plaintiff was sufficient. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 547 (1985).

8. In the instant case, Defendants did not provide Plaintiff Montañez any advance notice of his intention to appoint a substitute Veteran's Ombudsman, nor explained the reasons for the pretended termination of his position as Veteran's Ombudsman. They failed to afford Montañez with an opportunity to be heard. Defendants did so with the obvious intent of depriving the Plaintiff of his Due Process rights because, otherwise, they would not have been able to terminate Plaintiff. As a result, Defendants deprived Plaintiff of the rights afforded by the Due Process Clauses of the Fifth and/or Fourteenth Amendments to the Constitution of the United States.

9. As detailed in the Second Amended Complaint filed by Montañez on this same date, he has a proprietary right over his position of Veteran's Ombudsman, as well as an expectancy of continuous employment, until the expiration of his 10 year term appointment. Moreover, pursuant to the quasi-judicial and quasi-legislative nature of the Office of the Veteran's Ombudsman and the Veteran's Ombudsman position, and that there was no change in the nature of the position, Montañez cannot be freely removed by the Governor. Therefore, Montañez is the rightful Veteran's Ombudsman and as such, the unconstitutional actions of the defendants have deprived him of occupying his position and exercising his functions.

11. The actions set forth herein, in conjunction with the statements set forth in the Complaint deprive the plaintiff of his rights, in violation of the constitutional guarantees of substantive and procedural due process under the Constitution of the United States.

12. If this Honorable Court does not act decisively and expeditiously to prevent these violations, Plaintiff will suffer irreparable harm, in that he will not be able to exercise the powers the law requires him to exercise, having no office to hold for the benefit of the Puerto Rico Veterans, and being unable to carry out its mission. In addition, these actions are irreparably and permanently damaging Montañez's good name and professional reputation. The illegal appointment of Col. López as Veteran's Ombudsman furthers the irreparable harm caused to Montañez, since it has already been submitted by co-defendant García Padilla for confirmation to the PR Senate and in the event that he is confirmed, will weigh negatively in the decision of this Honorable Court to issue an injunction to remove López and reinstate Montañez. Moreover, in light of the secretive way Col. López's appointment has been handled, there is an imminent risk that the Senate's Commission may act expeditiously, disregarding the necessity of holding public hearings on Lopez's appointment, and act to submit such appointment for consideration and approval by the Puerto Rico Senate, in the following hours.

13. The only effective way to assure the adequate protection of Plaintiff's and veteran's rights and their public interest, as well as the operations of the Veteran's Ombudsman Office, is through the issuance of immediate injunctive relief directed at each of the defendants, all of whom, through their actions, have sought to completely disregard plaintiff's constitutional rights.

14. There is no adequate remedy at law to redress the grievances caused by these patently unconstitutional actions.

PROCEDURAL REQUIREMENTS FOR A TRO AND INJUNCTION

15. A Verified Second Amended Complaint has been filed on this same date. Plaintiff has complied with all the requirements of Rule 65(b)(1) and (2), regarding the issuance of a Temporary Restraining Order.

16. Upon the filing of the Second Amended Complaint and prior to the filing of the present motion, the undersigned notified the complaint filed as well as the motion seeking a TRO to defendants in the following manner:

To Defendant's attorney of record, Wandymar Burgos-Vargas, to her email, wburgos@justicia.gobierno.pr; Hon. Alejandro García-Padilla to his email, alejandro@alejandrogarciapadilla.com and Fortaleza's Counsel Angel Colón-Pérez, Esq. Email, acolon@fortaleza.pr.gov; Elizabeth Lopez through the Office of the Veteran's Ombudsman Fax number 787-758-5788, and her official email elizabeth.lopez01@va.gov; to Col. Héctor López, through his known Facebook email account, hكتورlc@facebook.com; to Senator Eduardo Bhatia-Gautier, through his official email; ebhatia@senado.pr.gov and to Senator Miguel A. Pereira-Castillo, through his official email; mpereira@senado.pr.gov.

17. The Plaintiff has described the injury and why it is irreparable.

18. The Plaintiff has clearly described the unconstitutional conduct and has further provided a request for relief which clearly indicate to the defendants the actions which they are prohibited from doing.

19. The Plaintiff has demonstrated that it is extremely likely that he will prevail on the merits, that there is relatively little harm to the Defendants, while great harm may be effectuated should the relief requested herein not be granted, and that the public interest will be served by the granting of the TRO.

20. The general purpose of injunctive relief is to prevent future acts or omissions of the non-movant that constitute violations of the law or harmful conduct. United States v. Oregon Med. Soc., 343 U.S. 326, 333 (1952). The United States Court of Appeals for the First Circuit has set forth a four-part test for trial courts to use when considering whether to grant preliminary injunction requests. Lanier Prof. Serv's, Inc., v. Ricci, 192 F.3d 1 (1st Cir. 1999); Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991). A preliminary injunction is appropriate if: (1) the plaintiff has exhibited a likelihood of success on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) such injury outweighs any harm which granting injunctive relief would inflict on the defendant; and (4) the public interest will not be adversely affected by granting the injunction. Narragansett Indian Tribe, 934 F.2d at 5; see, e.g., Aoude v. Mobil Oil Corp., 862 F.2d 890, 892 (1st Cir. 1988); Hypertherm, Inc. v. Precision Products, Inc., 832 F.2d 697, 699 & n.2 (1st Cir. 1987).

21. Whether to issue a preliminary injunction depends on balancing equities where the requisite showing for each of the four factors turns, in part, on the strength of the others. Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 611-13 (1st Cir. 1988). Although a hearing is often held prior to entry of a preliminary injunction a hearing is not an indispensable requirement. Aoude v. Mobil Oil Corp., 862

F.2d at 893. See also, COPECA, Inc. v. Western Aviation Services Corp., No. 08-2090 (D.P.R. 08/25/2009).

22. In conclusion, it is clear from the facts and arguments set forth in the captioned complaint, as well as the verified statements in the present motion in support of the TRO and Injunction being sought herein, that Plaintiff has clearly demonstrated that there is a likelihood of success on the merits, that there is no contesting the fact that Plaintiff will suffer an irreparable injury in the event that the TRO and injunction are not granted by this Court.

23. The injury to Plaintiff vastly outweighs any possible harm which granting the injunctive relief would inflict on the defendants, if any; and by no means the public interest, in this specific case, the services provided to veterans, will not be adversely affected by granting the TRO and Injunction.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that this court issue a Temporary Restraining Order ordering defendant García-Padilla to vacate or retire Col. López appointment as Designated Veteran's Ombudsman, and/or order the Senate of Puerto Rico to stay Col. López's confirmation proceedings, until the Court issues its determination with respect to the constitutionality of defendant's actions and the acts set forth herein, with any other or further relief this Honorable Court may deem just and proper under the circumstances.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, the 6th day of October, 2013.

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