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IN THE SUPREME COURT OF THE  
FEDERATED STATES OF MICRONESIA  
TRIAL DIVISION – STATE OF POHNPEI

FEDERATED STATES OF MICRONESIA,

Plaintiff,

v.

MASTER HALBERT

Defendant.

CRIMINAL CASE NO.: 2014-501

ORDER

On December 2, 2015, the FSM Department of Justice (Government), through Assistant Attorney General Craig Reffner (Reffner), filed an Entry of Appearance and a Motion for Leave of Court to Dismiss Information. Attached to this motion to dismiss was a Deferred Prosecution Agreement (DPA), signed by the defendant, his current counsel, Public Defender Lorrie Johnson-Asher (Johnson-Asher), his counsel of record in the parallel civil proceeding, Marstella Jack (Jack), as well as the Secretary of Justice, Joses Gallen (Gallen). On December 3, 2015, the court held a hearing on the propriety of issuing a DPA in this matter and both parties were heard on the issue. On the second day, after further arguments were made, the court directly addressed the defendant to ensure that the he knowingly and voluntarily understood the terms of the DPA, and granted the motion to dismiss for the reasons set forth below.<sup>1</sup>

<sup>1</sup> Even where FSM Crim. R. 11 procedures do not strictly apply, the court is nevertheless “bound by the constitutional requirements for a valid waiver... [and] the need for knowing voluntary decisionmaking can make [these] procedures a helpful guide.”<sup>1A</sup>

MOTION TO DISMISS

Pursuant to FSM Crim. R. 48(a), the prosecution may dismiss a criminal case “with leave of court.”<sup>2</sup> This court recognizes the discretion of the prosecutor “to initiate, continue or terminate a particular criminal prosecution.” FSM v. Mudong, 1 FSM Intrm. 135, 140 (Pon. 1982). Once initiated however, the dismissal is granted only upon a showing that such action is “in the public interest.” FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987). “While Rule 48 does not specify criteria for granting prosecutor’s motion, dismissal under Rule 48(a) has been held to be appropriate where the government represents that there is insufficient evidence to obtain a conviction.” In FSM v. Tomiya Suisan Co., 11 FSM Intrm. 15, 16-7 (Yap 2002). That court articulated a non-exhaustive list of other reasons a court may exercise its discretion to dismiss, including: “a plea agreement, death of the defendant, defendant’s incompetency to stand trial, government security interests that might be placed at risk by disclosures at trial, where a defendant has cooperated with a prosecutorial investigation, and where the indictment has been superseded.” *Id.* at 17 (citations omitted). Prosecutorial discretion is however limited and “prosecutors may not deliberately discriminate between persons in similar circumstances

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Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE: PLEAS § 171, at 155-56 (2006).

<sup>2</sup> Nolle Prosequi means “not to wish to prosecute.” BLACK’S LAW DICTIONARY 1074 (8<sup>th</sup> ed. 2004). FSM Crim R. 48 “is a restatement of the common law procedure of filing a nolle prosequi.” 3B Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE: PLEAS § 801, at 324 (2013). Nolle Prosequi is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further.... It is a judicial determination in favor of accused and against his conviction, but it is not an acquittal, nor is it the equivalent to a pardon.” *Id.* On December 12, 2015, the Government filed a Notice of Dismissal.

1 based upon unjustifiable standards such as race, religion, or other arbitrary  
2 classification.” Nix v. Ehmes, 1 FSM R. 114, 124 (Pon. 1982).

3 In this case, the Government moved to dismiss based on an agreement entered  
4 into with the defendant. Among other things, the terms of the DPA require that the  
5 defendant to: 1) “acknowledge responsibility for his actions, including liability to the  
6 FSM;” 2) “repay the amount of the professional premium that he received... which he  
7 was not otherwise entitled to receive... which totals \$69,837.12;” and 3) tender “a  
8 resignation from employment to the FSM, thereby terminating his employment.” Most  
9 importantly, however, this agreement requires the defendant to cooperate with the  
10 government in an ongoing investigation regarding professional premiums in the Public  
11 Service System.<sup>3</sup> Accordingly, the court finds that this is one of the reasons for the  
12 exercise of prosecutorial discretion, and the public interest is served by this agreement.  
13 Although not a plea bargain, the terms of this DPA require the defendant to acknowledge  
14 liability and make full restitution to the people of the FSM. Additionally, the statute of  
15 limitation has been expressly waived and the charges are dismissed “without prejudice.”  
16 Noncompliance with the monthly payment, or any of the other terms, obligates the  
17 Government to refile the criminal charges against the defendant at any time.  
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22 <sup>3</sup> Alternately, prosecutorial discretion to enter into a plea agreement pursuant to FSM  
23 Crim. R. 11, and suspend entry of the judgment of conviction pursuant to the terms of the  
24 DPA, enables the defendant to make restitution or comply with other requirements before  
25 dismissing the charges, but without a criminal conviction. In many cases, the public  
interest is better served by such procedures.

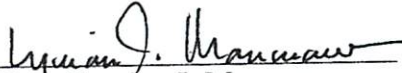
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**Conclusion**

The court emphasizes that this agreement is between the Government and the Defendant only, and does not bind this court, nor any other court of law. Although the terms of this DPA require the Government to file a motion to dismiss in other pending matters outside of this case, that is no guarantee that those courts will grant that motion. Furthermore, this court makes no determination regarding the legal sufficiency of any term contained therein.

Upon CONSIDERATION, of the file and record, of the agreement, and of the representations made by the parties, the court GRANTS the motion to dismiss without prejudice to further action.

It is so ORDERED this 10<sup>th</sup> day of December, 2015.

  
Hon. Cyprian J. Manmaw  
Temporary Justice  
FSM Supreme Court

ENTERED this 10<sup>th</sup> day of December, 2015.

  
Chief Clerk of Court