1965, to date of judgment, and accordingly you are notified of your possible entitlement to recover interest paid by you subject to making claim therefor.

You, your estate or representative must, within six months from October 15, 1973, file your claim under oath for recovery of interest paid. The claim shall be made through the offices of plaintiffs' attorneys, Micronesian Legal Services Corporation, Koror, Palau, or through the Clerk of Courts at the courthouse, Koror, Palau.

Clerk of Courts

6. Plaintiffs shall recover their costs in accordance with law, including costs of notification of members of the plaintiffs class, upon filing claim.

RICHARD L. CHRISTENSEN, Plaintiff

v.

MICRONESIAN OCCUPATIONAL CENTER, Defendant

Civil Action No. 38-73

Trial Division of the High Court

Palau District

October 17, 1973

Complaint by employee dismissed from government position. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that when a government agency undertakes to follow regulations, whether or not it is required to adhere to them, they must be strictly observed.

1. Civil Procedure—Captions

Under the rule that it is immaterial what a pleading is labeled, for the court must give effect to its substance, motion to dismiss which was actually an answer in which the prayer asked for dismissal for failure to state a cause of action would be considered as such; and the case thus being at issue by complaint and answer, court could consider plaintiff's motion for summary judgment and defendant could not successfully claim the motion was not timely in view of his "motion to dismiss".

2. Judgments—Summary Judgment—Issues

Where there was no material issue of fact to be tried, summary judgment was appropriate.

3. Judgment—Summary Judgment—Nature and Purpose

Summary judgment should be employed when a trial would serve no useful purpose, the court drawing its conclusion as to the ultimate fact from the undisputed facts.

4. Administrative Law—Review—Facts

Whether charges made against employee under contract with government were valid and, if provable, sufficient to warrant his dismissal, was for the personnel board to decide, not the court. (P.L. 4C–49, Sec. 10, (15)(c)(ii))

5. Constitutional Law—Due Process—Dismissal of Employee

Employee employed pursuant to contract with government had an interest in continued employment which was protected by due process of law, and could not be dismissed from employment, whether or not for valid reasons, by action which was arbitrary, discriminatory and a denial of fundamental property interests protected by the Trust Territory Code. (1 TTC § 4)

6. Labor Relations—Dismissal or Discipline of Employee

Government employee dismissed on 15 days' notice should have been given 90 days in which to improve his performance, in accordance with personnel manual and employee handbook.

7. Constitutional Law—Due Process—Dismissal of Employee

Dismissal of employee under contract to government, as of 15 days after receipt of letter of dismissal, was a denial of due process in that he was not given an opportunity to reply to the charges even though regulations which the government purported to follow allowed such opportunity, and he was entitled to reinstatement or, in the alternative, damages for breach of contract.

8. Administrative Law—Rules and Regulations—Persons Bound

When a government agency undertakes to follow regulations, whether or not it is required to adhere to them, they must be strictly observed.

Counsel for Plaintiff: J. LEO MCSHANE
Counsel for Defendant: EFFIE SPARLING, *Assistant Attorney General*

TURNER, *Associate Justice*

Plaintiff was a vocational construction supervisor for the defendant school of the Trust Territory Government, referred to as M.O.C. He was employed for a two-year contract, June 11, 1972, and by letter dated, June 15, 1973,

was notified by the Acting Director of Education of the Trust Territory that "I intend to remove you from your position . . . fifteen (15) days after your receipt of this letter. . . ."

Complaint was filed, June 26, 1973, wherein the Court was asked to declare "the rights, duties, and legal relations of plaintiff and defendant under the contract of employment and applicable law. Thereafter, August 6, 1973, counsel for M.O.C. filed a pleading denominated "Motion to Dismiss." A formal answer was not filed within twenty days or at all. Plaintiff then, on August 30, 1973, filed his motion for summary judgment "based on the pleadings and deposition herein."

This is a companion case, similar in its essential facts and questions of law, to *Tolhurst v. Micronesian Occupational Center*, 6 T.T.R. 296. In his motion for summary judgment, plaintiff also based his motion on this decision.

At the hearing on plaintiff's motion for judgment, defendant argued the motion "was not timely" because the defense "motion to dismiss" was before the court. Both sides were given time to file memorandums of points and authorities. Neither side filed a memorandum, but plaintiff filed an affidavit in support of summary judgment, which defendant has not controverted.

[1] The threshold question is whether a summary judgment is "timely." The question may be disposed of under the rule that it is immaterial what a pleading is labeled, the court must give effect to its substance. Defendant's so-called motion to dismiss is, in fact, an answer in which the prayer asks for dismissal for failure to state "a cause of action." The case being at issue by complaint and answer for summary judgment is "timely." Even if it were only a motion to dismiss, when matters outside the pleadings are presented, it may be treated under Federal Rule 56, Rules of Civil Procedure, as a motion for sum-

mary judgment. *Guerrero Family Inc., v. Micronesian Line, Inc.*, 5 T.T.R. 87.

[2] Technically under the rule both sides ask for summary judgment. It is clear to the court that there is no material issue of fact to be tried, and accordingly summary judgment is appropriate. The only issue of dispute raised by defendant pertains to a question of law, not facts. In the so-called motion to dismiss, the facts are admitted. Defendant asserts in its pleading that there is no "valid controversy arising under, or as a result of the contract of employment, Exhibit A." Since there admittedly is no controversy, it is appropriate to determine which side is entitled to summary judgment as a matter of law. *Alten v. Alten*, 5 T.T.R. 223. *Milne v. Moses*, 5 T.T.R. 322. *N.H. Ins. Co. v. Saipan Shipping Co.*, 5 T.T.R. 408. The propriety of a summary judgment was extensively discussed in the recent decision, *Kingzio, et al. v. Bank of Hawaii*, 6 T.T.R. 334. There it was said:—

"It has been said in many decisions, the court may pierce the pleadings to determine from depositions and affidavits, whether issues of material facts actually exist."

[3] Summary judgment should be employed when a trial would serve no useful purpose. The court must draw its conclusion as to the ultimate fact from the undisputed facts. Here there are no disputed facts as to the procedure followed, and the result reached by the government with respect to plaintiff's employment contract.

[4] The only dispute pertains to whether the charges made against plaintiff are valid, and if provable, are sufficient to warrant his dismissal. This touches upon the so-called merits of the action taken and that is beyond the scope of the present inquiry. As was said in *Tolhurst*:—

"Under the law, P.L. 4C–49, Sec. 10, (15) (c) (ii), the personnel board is charged with the obligation to determine if 'the reasons

for the action' are 'substantiated in any material respect.' The court does not propose to encroach upon the statutory duties of the personnel board."

[5] The concern in the present case, as it was in *Tolhurst*, is whether or not the employee was denied his due process of law interest in the continuation of his employment contract as result of the method the school employed in dismissing him. Any grounds of dismissal, whether valid or not, are not applicable when the action taken is arbitrary, discriminatory and a denial of fundamental property interests protected in the Trust Territory Code. 1 TTC 4. The admonition in *Mesechol v. Trust Territory*, 2 T.T.R. 84, that "all officials" must act "reasonably and fairly in accordance with established principles of justice" is the test to be applied to this dismissal action, not whether the reasons given for the action could be substantiated or not.

If the court can decide that question on the record before it, then it should do so upon the motion for summary judgment. If there was a dispute as to material facts, it was the duty of defense counsel to point it out by affidavit or pleading. It was not done. The record shows there are no disputed issues of material fact. Briefly summarized the facts necessary to a decision are:—

1. March 30, 1973, plaintiff was given a "satisfactory" performance rating in accordance with Chapter XII of the Trust Territory Personnel Manual. Another performance rating with a "tampered" evaluation was given before then on March 20, 1973. This rating, as typed, was marked "outstanding" with a typewriter "x" and at some other time was marked with a hand printed "x" for satisfactory. This rating also contained a justification which only is required for "outstanding" or for "unsatisfactory" rating. Chapter XII, B, 1., Personnel Manual.

2. The letter notice of dismissal, signed by the Acting Director of Education, and dated June 15, 1973, was delivered to plaintiff with the statement that "fifteen days after your receipt of this letter . . . I intend to remove you." He was dismissed accordingly. The specific charges for dismissal were three in number occurring December 18, 1972, "Between December 13 and December 23, 1972" and "the second week in January, 1973."

3. Plaintiff did not appeal his dismissal to the Trust Territory personnel board authorized and appointed pursuant to Public Law 4C–49. Notice of right of appeal "within fifteen (15) calendar days" to the board in Saipan was contained in the dismissal letter. This provision corresponded to P.L. 4C–49, Sec. 10, (15)(c).

Upon these facts, the Court is able to decide as a matter of law whether or not petitioner was wrongfully dismissed from employment. If the action taken was illegal and in breach of his contract of employment, plaintiff is entitled to relief. He may be reinstated with full pay from date of dismissal to date of reinstatement, or he may be awarded damages for breach of contract. The question therefor is whether plaintiff was illegally dismissed.

The same question was decided in the comparable case of *Tolhurst*, and it would serve little purpose now to review in detail the issues then decided. The court does deem it appropriate to list the several questions raised by the government in *Tolhurst* and to summarize the answers found in that decision.

[6] The first of the applicable facts is that Chapter XII of the Personnel Manual was followed in the March performance rating—whether it was "outstanding" March 20, or "satisfactory" March 30, is immaterial to the ultimate result. If the school intended to discharge plaintiff, it should have, in accordance with the Manual and the "Employees Handbook," given plaintiff ninety days within

which to improve his performances. Chapter XII, c., 3. The performance was evaluated approximately three months after the grounds for discharge, recited in the June 15, 1973, letter had occurred. The recited reasons occurred six months before the dismissal letter was written.

When asked in a deposition if the 90-day notice or an unsatisfactory rating had been given plaintiff, the school director replied:—

"No, this is a criminal case."

Whether the conclusion was warranted or not (there is nothing in the record that criminal proceedings were brought against plaintiff) it at least was contrary to personnel regulations and is another example criticized in *Tolhurst* of the government writing new rules as it goes along.

If the acts of misconduct "are so notorious and disgraceful that they may jeopardize the effectiveness of the government," they require removal "on the first offense," the manual says at Chapter XII D. Even this situation does not permit removal without a pre-dismissal hearing. The employee may be suspended but may not be discharged without a 30-day opportunity to reply to the charges "and the proposed penalty."

[7] It was held in *Tolhurst*, and it is again applicable to the present case that the administrative action deprived plaintiff of due process in that he was not given an opportunity to reply to the charges before being dismissed. The government followed neither P.L. 4C–49(15)(b)(ii) allowing notice of "at least ten (10) working days" which may or may not be "fifteen (15) days from date of receipt" as specified in the notice, nor did it give "the employee 30 days from the date of receipt to reply." Chapter XII, E, 3.

[8] As was pointed out in *Tolhurst* when an agency undertakes to follow regulations, whether required to adhere to them or not, they must be strictly observed, *Vitardli v. Seaton*, 79 S.Ct. 1968.

The procedure followed by M.O.C. and the Department of Education clearly denied plaintiff due process of law provided in 1 TTC § 4. It also must be noted again United States Supreme Court definition and application of due process has compelling persuasiveness on the Trust Territory Court. *Ichiro v. Bismark*, 1 T.T.R. 57.

Finally, the question raised, argued and decided adversely to the government in *Tolhurst*, concerning the obligation upon an employee to "exhaust his administrative remedies" was implied but not pressed in the present case.

If there are any new thoughts or law applicable to "exhaustion of administrative remedies" as decided in *Tolhurst* defense counsel has not presented them. Once again the decision must be that the administrative remedy of appeal to the personnel board is permissive and not mandatory under the statute.

It must be concluded plaintiff is entitled to relief by way of reinstatement or in the alternative damages for wrongful breach of contract. In suggesting relief in damages the Court is not unmindful of 6 TTC § 252(2) excluding recovery on an act or omission of an employee "exercising due care." The present case is within the purview of 6 TTC § 251(1)(b) and (c) being an action for the breach of an express contract by the "wrongful act" of "an employee acting within the scope of his office or employment."

The foregoing conclusions leave open which of the alternative forms of relief to be granted. Further hearing is necessary. It is unnecessary to cite the often decided rule that summary judgment may be granted on the question of liability without reaching the question of damages

or other relief. The rule must be applied in the present case.

Ordered, adjudged and decreed:—

1. That plaintiff shall have and hereby is granted judgment against defendant for wrongful breach of plaintiff's employment contract.

2. That further hearing shall be held to determine the nature of the relief to be awarded plaintiff, whether it shall be an order of reinstatement or an order awarding damages for breach of contract and if damages are to be awarded the amount of such relief.

3. That the Court will look with favor upon any stipulation as to relief agreed by the parties and their counsel without further hearing.

4. Plaintiff is awarded costs in accordance with law upon filing claim.

MANUEL T. CRUZ, VERONICA S. CASTRO, ADOLFO TAISAKAN, CONSUELO T. NAKATSUKASA, on behalf of themselves and all others similarly situated, Plaintiffs

v.

EDWARD E. JOHNSTON, individually and in his capacity as High Commissioner of the Trust Territory of the Pacific Islands, Defendant

Civil Action No. 46-73

Trial Division of the High Court

Mariana Islands District

October 19, 1973

Class action for declaratory judgment and injunctive relief. The Trial Division of the High Court, Burnett, Chief Justice, held that where homesteaders had complied with requirements necessary to the conveyance of the land to them, High Commissioner could not refuse conveyance on the grounds of inadequate surveys and unreliable description of the lands.