FSM SUPREME COURT APPELLATE DIVISION

JOHN E. WEILBACHER, Appellant, vs STATE OF POHNPEI, Appellee.	)	APPEAL CASE NO. P18-2016 (Pohnpei Appeal No. 1-2015)

OPINION

Argued: December 20, 2021
Decided: February 16, 2022

BEFORE:

Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court
Hon. Chang B. William, Specially Assigned Judge, FSM Supreme Court*
Hon. Cyprian Manmaw, Specially Assigned Judge, FSM Supreme Court**

*Chief Justice, Kosrae State Court, Tofol, Kosrae
**Chief Justice, Yap State Court, Colonia, Yap

APPEARANCES:

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HEADNOTES

Appellate Review – Briefs, Record, and Oral Argument

When the appellee has not filed a brief, the appellee will not be heard at oral argument, and there will be no reply brief filed by the appellant. Weilbacher v. Pohnpei, 23 FSM R. 490, 493 n.1 (App. 2022).

Appellate Review – Decisions Reviewable

The FSM Supreme Court appellate division may review cases heard in state or local courts if they require interpretation of this Constitution, national law, or a treaty, or, if the state constitution permits, it may review other cases on appeal from the highest state court in which a decision may be had. Since the Pohnpei Constitution does not permit review of cases other than those requiring interpretation of the FSM Constitution, national law, or a treaty, the FSM Supreme Court can hear appeals from final decisions of the highest state court in Pohnpei only if the case requires interpretation of the national Constitution, national law, or a treaty. The FSM Supreme Court's, review is only of Pohnpei Supreme Court appellate division final decisions requiring interpretation of the national Constitution, national law, or a treaty. Weilbacher v. Pohnpei, 23 FSM R. 490, 493-94 (App. 2022).

Appellate Review – Decisions Reviewable

An appellant has properly raised an issue requiring interpretation of the FSM Constitution when the Pohnpei Supreme Court appellate division denied a motion to reconsider, without fully reviewing then or at any other time, the entire trial-court record, including the trial court's final order. Weilbacher v. Pohnpei, 23 FSM R. 490, 494 (App. 2022).

Appellate Review – Decisions Reviewable

It is well established that only final decisions may be appealed. Weilbacher v. Pohnpei, 23 FSM R. 490, 494 (App. 2022).

Appellate Review – Decisions Reviewable – Final Decision Defined

A final decision is generally one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Weilbacher v. Pohnpei, 23 FSM R. 490, 494 (App. 2022).

Appellate Review – Decisions Reviewable; Constitutional Law – Due Process – Procedural

The Pohnpei Supreme Court appellate division abused its discretion when it erroneously considered an earlier trial court order to be the "final order" on appeal and when it did not consider the entire record before it in rendering its decision – specifically, when it considered the appeal to be from a preliminary trial court order, thereby overlooking the appellant's trial court filing presenting his due process claim and the trial court's final orders addressing that claim, which orders were the ones for which the appellant sought appellate review. Weilbacher v. Pohnpei, 23 FSM R. 490, 494-95 (App. 2022).

Appellate Review – Decisions Reviewable; Constitutional Law – Due Process – Procedural

When the Pohnpei Supreme Court appellate division dismissed an appeal without considering the entire trial court record, including the trial court's final orders, it did not afford the appellant all the due process that he was entitled to under the FSM Constitution. Weilbacher v. Pohnpei, 23 FSM R. 490, 495 (App. 2022).

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COURT'S OPINION

DENNIS L. BELCOURT, Associate Justice

This appeal concerns the termination of the Appellant's employment from Pohnpei State government. Specifically, the Appellant is challenging the Pohnpei Supreme Court appellate division's dismissal of his appeal from an earlier decision issued by the Pohnpei Supreme Court trial division. Weilbacher v. Pohnpei, Appeal No. 001-2015 (Op. Oct. 7, 2016). The record shows that the trial court affirmed a decision by an administrative review board to uphold the termination of the Appellant's employment as the Chief of the Division of Public Lands, within the Department of Lands and Natural Resources, for the State of Pohnpei. Weilbacher v. Pohnpei, PCA No. 124-2008 (Ord. Nov. 18, 2011). On appeal, however, it appears that the appellate division did not consider this order issued by the trial court. Instead, it appears that the appellate division only considered an earlier order issued by the trial on July 6, 2011. That order, however, was not a final order issued by the trial court. For the reasons stated below, we vacate the opinion issued by the appellate division on October 7, 2016, and remand this case to the Pohnpei Supreme Court appellate division for further consideration of the entire trial court record in this case.

I. BACKGROUND

A review of the record in this case shows that on December 10, 2007, the Appellant was given notice that he was suspended. The basis for the suspension was an incident that transpired on December 5, 2007, in which the Appellant purportedly advised two (2) Pohnpei State police officers that the Pohnpei Supreme Court had issued an order calling for a survey of a parcel of public land. From the record, it appears that the use of this land was highly controversial, and that the presence of the police may have caused an incident between the individuals using the land and the land surveyors. In either event, the record shows that there was never any such court order issued. Thus, the Appellant was alleged to have made a false statement to the police.

Thereafter, on January 14, 2008, the Appellant received notice of a proposed adverse action that his employment may be terminated. A notice of termination was issued on January 30, 2008, with an effective date of February 15, 2008. On April 15, 2008, a three-member administrative appeal panel affirmed the determination to terminate the Appellant's employment.

On appeal, the Pohnpei Supreme Court issued an order on July 6, 2011, in which it remanded the matter to the three-member administrative appeal panel for further review, and, in turn, to provide the trial court with a more detailed fact-finding decision about the contradictory statements from the Appellant and various witnesses as to what was actually stated to the police officers on December 5, 2007.

On August 12, 2011, the three-member administrative appeal panel issued a further decision finding that the Appellant falsely stated that a court order had been issued, thereby once again affirming the determination to terminate the Appellant's employment. This decision appears to show that the three-member panel reconvened without taking any further testimony or arguments from the Appellant or any witnesses, and, in turn, issued a further decision as ordered by the trial court.

The Pohnpei Supreme Court trial court record shows that on September 9, 2011, the Appellant filed a pleading complaining about the manner in which the three-member administrative appeal panel conducted its further proceedings in this case, specifically that the panel reconvened without the Appellant and his counsel. Thereafter, on November 18, 2011, the trial court issued an order affirming the decision of the three-member administrative appeal panel and dismissing the Appellant's appeal. In doing so, the trial court determined that the Appellant's presence when the three-member panel reconvened was not necessary, as the Appellant was afforded an opportunity to appear before the administrative panel when his appeal was

initially heard. In addition, at that time, while the panel heard from witnesses, they did not hear directly from the Appellant as he had chosen to not testify before the panel hearing his appeal.

On December 2, 2014, nearly three (3) years later, the trial court issued an order denying the Appellant's motion for reconsideration and other post-judgment relief. The Appellant filed an appeal with the Pohnpei Supreme Court appellate division on January 5, 2015, claiming that the trial court had erred by misunderstanding the facts surrounding the termination of the Appellant's employment. In addition, the Appellant argued that he was denied his due process when the three-member administrative appeal panel reconvened following the issuance of the trial court's order of July 6, 2011. Specifically, the Appellant maintains that he was not present when the administrative appeal panel met, resulting in its decision of August 12, 2011, which reaffirmed its prior decision to uphold the determination that the Appellant's employment would be terminated.

On October 7, 2016, the Pohnpei Supreme Court appellate division issued an opinion in which it rejected the Appellant's appeal and affirmed the trial court's decision. In that opinion, the appellate court stated that upon review of the trial court's July 6, 2011 order, it would defer to the trial court's review of the administrative record, including any factual findings that were made by the trial court. In addition, the appellate court stated that since the Appellant had not raised the issue of due process before the trial court, it would not consider the issue further, but that even if it did, the record showed that the Appellant's counsel was present at every stage of not only the administrative proceedings, but also the trial court proceedings. To the appellate court, it was the Appellant himself who opted to not appear at these events, including the administrative hearing where the appeals panel heard testimony from witnesses. Thus, the appellate court did not find any due process violation as alleged by the Appellant.

II. DISCUSSION

The trial court's order of July 6, 2011 was not a final order, nor was it the order that the Appellant sought relief from when he appealed his case to the appellate division. Indeed, that order from the trial court merely remanded the matter to the three-member administrative appeal panel for a more detailed statement of the factual findings at issue in the case. That remand in turn resulted in a further decision by the administrative appeal panel on August 12, 2011, which the trial court affirmed in an order issued on November 18, 2011. In addition, the trial court issued a further order on December 2, 2014, in which it rejected the Appellant's motions for any further post-judgment relief, noting that the Appellant should seek redress through the appellate process. It is the trial court's orders of November 18, 2011, and December 2, 2014, that the Appellant was apparently seeking relief from in his appeal to the Pohnpei Supreme Court appellate division.

Nonetheless, in his brief, the Appellant raises two (2) issues on appeal. First, he maintains that the appellate division abused its discretion by affirming the trial court decision in the face of evidence showing that the Appellant's due process rights had been violated. Second, the Appellant asserts that the appellate court erred when it did not reverse and remand the case back to trial court to address certain facts surrounding the Appellant's termination of employment, which the trial court, according to the Appellant, clearly misapprehended.[1]

Under section 7 of Article XI of the FSM Constitution, this Court may review "cases heard in state or local courts if they require interpretation of this Constitution, national law, or a treaty," *see* Damarlane v. Pohnpei, 9 FSM R. 114, 117 (App. 1999), or "[i]f a state constitution permits, the appellate division of the Supreme Court may review other cases on appeal from the highest state court in which a decision may be

[1] The Appellee did not file any brief in this appeal, *see* FSM App. R. 28(b), and as such, the Appellee was not heard at oral argument. FSM App. R. 31(c). In turn, there was no reply brief filed by the Appellant. FSM App. R. 28(c).

had." FSM Const. art. XI, § 7. *See* Gustaf v. Mori, 6 FSM R. 284, 285 (App. 1993) (under the FSM Constitution the FSM Supreme Court may hear cases on appeal from the highest state court in which a decision may be had if that state's constitution permits it).

The Pohnpei Constitution does not appear to permit review of cases other than those requiring interpretation of the FSM Constitution, national law or a treaty. Pon. Const. art. 10, § 5(2). Thus, this Court can hear appeals from final decisions of the highest state court in Pohnpei only if the case requires interpretation of the national Constitution, national law, or a treaty. Generally, such review only extends to final decisions of the Pohnpei Supreme Court appellate division requiring interpretation of the national Constitution, national law, or a treaty. FSM App. R. 4(a)(1)(A). *See* Edwin v. Kohler, 21 FSM R. 133, 136-37 (App. 2017) (when the appellant did not allege any facts, law, or error by the Pohnpei Supreme Court appellate division that implicate either interpretation of the FSM Constitution, national law, or treaty or a violation thereof, the appeal would not be properly before the FSM Supreme Court appellate division for review, even if the appellant were permitted to brief the matter and an FSM constitutional issue was raised for the first time); Damarlane v. Pohnpei Legislature, 8 FSM R. 23, 26-27 (App. 1997) (the FSM Supreme Court's jurisdiction is derived from the FSM Constitution which grants the appellate division the jurisdiction to review cases heard in state or local courts if they require interpretation of the FSM Constitution).

In reviewing cases from a state's highest court, we have found that an appellant has properly raised an issue requiring the interpretation of the FSM Constitution when the Pohnpei Supreme Court appellate division did not, in an order denying a motion to reconsider (or at any other time), fully address the appellant's contention that a member of the appellate panel who issued the order of dismissal was disqualified from sitting on the appeal. Jano v. Santos, 21 FSM R. 241, 244-45 (App. 2017). In this case, aside from the due process claims raised by the Appellant, we see that the appellate division dismissed this appeal without fully reviewing the entire trial-court record, including what appears to be the final order issued by the trial court. Thus, this case is properly before us.

In this appeal, it appears that the Pohnpei Supreme Court appellate division abused its discretion in two (2) regards. First, it appears that the appellate division erroneously considered the trial court's order of July 6, 2011 to be the "final order" on appeal. It is well established that only final decisions may be appealed. Salomon v. Mendiola, 20 FSM R. 357, 360 (App. 2016). A final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Id*. at 360. Here, the July 6, 2011 order in question merely remanded the matter to the three-member administrative appeal panel for further proceedings. This does not appear to be a final order. Indeed, it was not until after the three-member panel issued a further decision that the trial court entered what appears to be a final order on November 18, 2011, affirming that administrative review. Even then, however, there was no separate judgment entered. Instead, it was not until December 2, 2014, that the trial court entered a further order denying the Appellant's post-judgment motions for further relief. Further, it was after this December 2, 2014 order – in which the trial court urged the Appellant to seek appellate review – that the Appellant filed his notice of appeal, on January 5, 2015.

Second, it appears that the Appellate Division did not consider the entire record before it when rendering its decision. Specifically, the appellate division considered the appeal at issue here to be from the trial court's order of July 6, 2011. This in turn apparently resulted in the appellate court overlooking the trial court orders of November 18, 2011, and December 2, 2014. It also apparently resulted in the appellate division overlooking the Appellant's September 8, 2011 filing in which he complained about the fact that the three-member administrative appeal panel did not include either him or his lawyer when it reconvened following the trial court's July 6, 2011 order. George v. Nena, 12 FSM R. 310, 319 (App. 2004) (an issue raised for the first time on appeal is waived. An exception to this rule is in the case of plain error – error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings); Paul v. Celestine, 4 FSM R. 205, 210 (App. 1990) (the general rule is that on appeal a party is bound by the theory advanced in the trial court, and cannot urge a ground for relief which was not presented there, particularly where the party had ample opportunity to raise the issues in the trial court

instead of presenting them for the first time on appeal). Indeed, this resulted in the appellate division incorrectly stating that the Appellant had not previously presented his due process claim to the trial court when, in fact, he had done so in a pleading filed with the trial court on September 8, 2011. Moreover, in its order of November 18, 2011, the trial court addressed that claim by the Appellant, and, in turn, dismissed his appeal. It is this action by the trial court that the Appellant was seeking review of, and not the July 6, 2011 order which the appellate division addressed.

In addressing procedural irregularities like that at issue here, this Court has previously explained that the Pohnpei Supreme Court appellate division committed reversible error when it first granted an appellant's requests for a 124 day enlargement of time to file her brief, but then a month after the brief had actually been filed, the court arbitrarily dismissed her case when it denied her timely request for an additional 4 day enlargement of time, by concluding that she: "chose to remain silent in the end." Silbanuz v. Leon, 21 FSM R. 336, 341 (App. 2017). To the extent that such irregularities interfere with a party's rights under the FSM Constitution, they constitute more than mere harmless error. George v. Albert, 17 FSM R. 25, 32 (App. 2010) (harmless error is not a ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order). Here, by dismissing this appeal without apparently considering the entire trial court record, including the November 18, 2011 and December 2, 2014 orders from the trial court, it appears that the appellate division may have not afforded the Appellant all the due process that he was entitled to under the FSM Constitution.

III. CONCLUSION

We vacate the opinion issued by the Pohnpei Supreme Court appellate division on October 7, 2016, and remand this case to it for consideration of the entire trial court record, including the trial court's orders of November 18, 2011 and December 2, 2014.

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