

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

FILED

2013 MAR 25

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THE REPUBLIC OF PALAU, :
 : CIVIL APPEAL NO. 12-021E
 : Civil Action No. 11-249 OF PALAU
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 Appellant, :
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 v. : OPINION
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 RAYNOLD B. OILOUCH, :
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 Appellee. :
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Argued: January 21, 2013
Decided: March 4th, 2013

Counsel for Appellant: Timothy S. McGillicuddy
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

This case concerns Appellee Raynold B. Oilouch's¹ work with the Koror State Public Lands Authority (KSPLA) and Appellant, Republic of Palau's² charge that such work constituted both Constitutional and statutory violations. For the following reasons, the Trial Division's summary judgment is AFFIRMED.

¹ The Court recognizes that Appellee is a sitting senator in the 9th OEK, but for ease of discussion, he will be referred to throughout this opinion as Oilouch, without reference to his official title.

² Appellant Republic of Palau will be referred to throughout this opinion as the Republic.

I. BACKGROUND

This case concerns Raynold B. Oilouch's legal representation of KSPLA while sitting as a senator in the OEK. The Republic of Palau alleged in the Trial Division that this representation violated Article IX, section 10 of the Constitution and 33 PNC §§ 604(b) and (e), of the Ethics Act.

The Republic sought declaratory relief for the alleged Constitutional and statutory violations as well as an injunction to prevent Oilouch from serving as a member of the OEK while under contract for legal services with KSPLA. Both Oilouch and the Republic filed motions for summary judgment. The Trial Division denied the Republic's motion and granted Oilouch's, concluding that Oilouch's contract with KSPLA violated neither the Constitution nor the Ethics Act.

The lower court examined and explained the plain meaning of "public employment" as being a relationship "established not in a contract but by statute." Further, the court found that "[a]n employee is . . . distinct from an independent contractor." The court distinguished independent contracting from the Constitutional prohibition against additional public employment, in part, by noting the absurdity of coming to a different conclusion. Specifically, the court explained that a finding that mere payment for services was sufficient to constitute "public employment" would prohibit a range of innocuous activities, including something as simple as a senator selling concessions at an inauguration.

Regarding the alleged violations of the Ethics Act, the court found the connection between Oilouch's duties with the OEK far too attenuated from his work with KSPLA to

constitute a violation of that statute. Specifically, the court found that Oilouch had no reason to believe that his position as a senator could have a direct effect on his relationship with KSPLA. As such, the court found that Oilouch did not violate the Ethics Act. The Republic appeals this decision.³

II. STANDARD OF REVIEW

We review the trial court's grant of Oilouch's motion for summary judgment de novo, giving no deference to the lower court's legal determination. *House of Traditional Leaders v. Koror State Gov't*, 17 ROP 101, 105 (2010). Accordingly, we review the motion for summary judgment through the same legal standard used by the Trial Division. *Id.*

III. ANALYSIS

The Republic challenges the lower court's determination that Oilouch's work for KSPLA should not be considered "public employment" for purposes of Article IX Section 10 of the Constitution of Palau. The Republic also challenges the lower court's determination that Oilouch's actions did not violate the Ethics Act.

According to the Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." ROP R. Civ. P. 56(c). In making such a determination, the

³ Oral argument was heard in this case on January 21, 2013. On January 18, 2013, Oilouch filed a Motion to Dismiss Appeal, arguing the issue was moot on the basis that Oilouch was no longer serving as legal counsel for KSPLA. While this change in circumstance would make the Republic's desire for injunctive relief moot, the Republic also sought declaratory relief that Oilouch was in violation of the Constitution and the Ethics Act. Accordingly, the questions before this Court concerning this declaratory relief are not moot and will still be considered in this opinion.

court will draw all inferences in light most favorable to the non-moving party. *House of Traditional Leaders*, 17 ROP at 105.

A. Violation of Constitutional Provisions

First, regarding the Constitutional claim, the Appellate Division considers whether Oilouch's representation of KSPLA constitutes "public employment." This is because the Constitution prohibits anyone from "hold[ing] any other public office or public employment while a member of the Olbiil Era Kelalau." Palau Const. art. IX, § 10.

The Constitution does not define "public employment" and the trial court determined that, despite the lack of a definition in the Constitution, the term has a plain meaning. We attempt to identify a plain meaning whenever we are tasked with defining a term or word within a statute or constitution. Where there is no ambiguity, we refrain from straying to other canons of interpretation. *See Oioled v. Palau Election Comm.*, Civ. App. No. 12-011, slip op. at 7 (Oct. 18, 2012) (noting that because the court found no ambiguity, it needed not consider other arguments concerning the meaning of a provision); *Seventh Koror Legislature v. Borja*, 12 ROP 206, 207 (Tr. Div. 2005) (explaining that a court only looks to other canons after it first determines that there is an ambiguity).

Black's Law Dictionary defines "employment" as an employer-employee relationship that reflects that of a master and servant. *Black's Law Dictionary* 566 (8th ed. 1999). It further defines "employee" as a "person who works in the service of another person under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Id.* at 564; *see also Sakuma v. Borja*,

11 ROP 286, 287 (Tr. Div. 2004) (adopting the *Black's Law Dictionary* definition). In *Sakuma v. Borja*, the court determined that an employee is one who works under contract and whose work the employer has a right to control, even down to the small details. *Id.* Further, *public* employment is characterized as employment created under the direction or with the approval of a governmental agency. 63C Am. Jur. 2d Public Officers & Employees § 8 (2009).

To contrast, independent contracting is defined in a way that is mutually exclusive to the definition of employment. The Restatement (Second) of Torts defines “independent contractor” as “any person who does work for another under conditions which are not sufficient to make him a servant of the other.” *Restatement (Second) Torts* § 409 cmt. a (1965). The United States Supreme Court has addressed the distinction between an employee and an independent contractor, noting a number of factors that help courts to distinguish the two. *Nationwide Mut. Ins. Co. v. Darden*, 303 U.S. 318, 323 (1992). Some of these factors include the hiring party’s right to control the work, the duration of the relationship, “whether the hiring party has the right to assign additional projects to the hired party,” and “the hiring party’s role in hiring and paying assistants.” *Id.* (internal quotation marks omitted) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

The Republic urges this Court to look to the Ethics Act, which also discusses public employment, for guidance in defining the term as it is used in the Constitution. This Court has explained on prior occasions its hesitation to defer to legislative interpretations of words in the Constitution. *See Nicholas v. Palau Election Comm’n*, 16

ROP 235, 239 (2009). Interpretation of the Constitution is the role of the judiciary and subsequent legislation defining the same words is not authoritative for the judiciary in performing this function.

In line with the Trial Division's discussion of what constitutes an "employee," and reviewing the definition for "independent contractor" and the factors described by the United States Supreme Court, we hold that Oilouch's work for KSPLA is much more akin to that of an independent contractor. Oilouch was hired for one very specific purpose. It is undisputed that Oilouch's work for KSPLA was temporary and that he was asked to represent KSPLA in his capacity as an attorney. His work with KSPLA looks nothing like regular employment. Oilouch is not listed as an employee on any KSPLA records. Furthermore, his work with KSPLA did not prohibit Oilouch from representing other clients in his law practice, hiring assistants to help him in his work, nor did it grant KSPLA the authority to control the details of Oilouch's work for KSPLA or any other client Oilouch may have decided to represent. These circumstances sufficiently establish that Oilouch was an independent contractor for KSPLA and was not an employee for purposes of the "public employment" prohibition as set out in Article IX Section 10 of the Constitution.

This Court recognizes the possibility that the Constitutional prohibition may be avoided by labeling additional governmental employments as independent contracting. However, the question before the court today is a question of whether Oilouch's one-time representation of KSPLA should be considered other public employment. Today, our holding is limited, as we hold only that Oilouch's work for KSPLA is not in violation of

the Constitution. Accordingly, the Trial Division's grant of summary judgment on this ground is affirmed.

B. Violation of Statutory Provisions

The Republic challenges Oilouch's representation of KSPLA pursuant to the Ethics Act, 33 PNC §§ 605 (b) and (e). The relevant sections forbid any government employee, including elected officials, from acquiring "a financial interest in any business or other undertaking which he has reason to believe may be directly affected by official actions to be undertaken by him." *Id.* at § 605(b). A financial interest in this context means "employment" or "any rendering of services for compensation." *Id.* at §§ 601 (h) and (i).

It is undisputed that Oilouch acquired a financial interest in his involvement with KSPLA, and that KSPLA is a "business or other undertaking." Thus we must only determine Oilouch had reason to believe that KSPLA would be directly affected by his official actions as a senator. The lower court determined that the Republic failed to prove this aspect and explained that Oilouch's actions as a senator are far too attenuated from his involvement as temporary counsel for KSPLA.

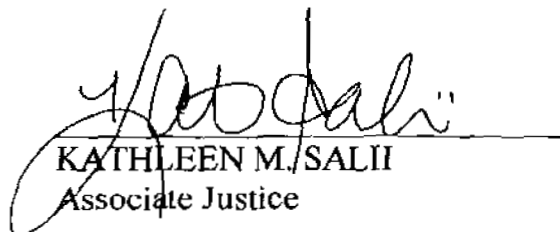
The record below contains no evidence, and not even a charge, that the OEK is contemplating any action that might affect KSPLA or its funding. This is relevant to the Republic's contention that Oilouch has violated § 604(b) of the Ethics Act, which prohibits officials from "engage[ing] in any outside employment or other outside activity that is incompatible with the full and proper discharge" of the official's duties. This provision also notes that "[t]he Ethics Commission shall, for each government agency,

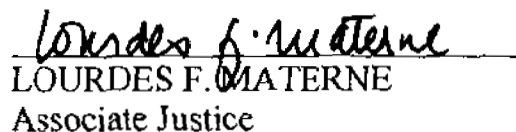
designate those outside activities that are deemed to be incompatible with the duties of the employees of that agency.” *Id.* There is no designation on record for the OEK, nor real direction for what activities should be deemed incompatible in Oilouch’s case. Thus, without more from the Republic, there is no factual basis for concluding that the lower court erred in finding that Oilouch has not violated this provision of the Ethics Act.

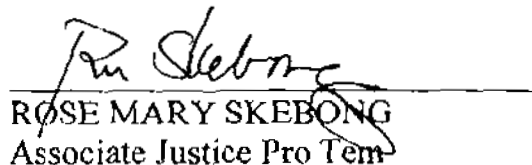
IV. CONCLUSION

For the foregoing reasons, the Trial Division’s grant of summary judgment in favor of Oilouch is **AFFIRMED**.

SO ORDERED, this 4th day of March, 2013.


KATHLEEN M. SALII
Associate Justice


LOURDES F. MATERNE
Associate Justice


ROSE MARY SKEBONG
Associate Justice Pro Tem