IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

REPUBLIC OF PALAU,
Appellant,
v.
STEVEN SALII,
Appellee.

Cite as: 2017 Palau 20
Civil Appeal No. 16-014
Appeal from Civil Action No. 12-118

Decided: May 9, 2017

Counsel for Appellant .....James E. Oliver
Counsel for Appellee .....Ronald K. Ledgerwood

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION

MICHELSEN, Justice:

I. Introduction[1]

[¶ 1] The Republic of Palau ("the Government") appeals the Trial Division's grant of summary judgment to Plaintiff Steven Salii on his procedural due process claim, as well as its subsequent award of compensatory damages based on that claim. Salii claims that his procedural due process rights were violated when the Government deemed him to have resigned from his government position after missing more than 15

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[1] In this case, the Government has requested oral argument. The Appellee opposes the request and asks that we decide this matter on the record before us. This case is appropriate for submission without oral argument. ROP R. App. P. 34(a).

consecutive work days. The Government ignored his request for a post-termination hearing regarding this determination. Salii argued that such a denial violated procedural due process, and the trial court agreed. After the court granted summary judgment to Salii on his procedural due process claim,[2] trial was held on damages, resulting in an award of $78,753.42 to compensate for lost wages.[3] The Government appeals both the finding of a due process violation and the damages award. For the reasons below, we **REVERSE** and **REMAND** for entry of judgment in favor of the Government.

II. Standard of Review

[¶ 2] The legal standard governing motions for summary judgment is set forth in Rule 56 of the Rules of Civil Procedure. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ROP R. Civ. P. 56(c).

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[2] The Trial Division also denied Salii's summary judgment motion as to breach of contract, wrongful termination, and denial of substantive due process. The issues were then dropped, and trial proceeded only on the issue of damages under Salii's procedural due process claim. The court's action on Salii's other claims has not been appealed.

[3] The court skipped a step. It should have first determined whether the result would have been the same if a proper hearing had been held. If the answer is affirmative, the plaintiff is limited to nominal damages. *April v. Palau Pub. Utils. Corp*. 17 ROP 247, 254 (2010) (adopting the reasoning in *Carey v. Piphus*, 435 U.S. 247 (1978)); *see also Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (only nominal damages recoverable "for a deprivation of property determined to be otherwise justified") (collecting cases).

> Review of a Trial Division decision on summary judgment is plenary. *Akiwo v. ROP*, 6 ROP Interm. 105, 106 (1997). It includes both a review of the determination that there is no genuine issue of material fact, and whether the substantive law was correctly applied. *Anderson v. Liberty Lobby, Inc*., 106 S. Ct. 2505, 2510 (1986).

ROP v. S.S. Enters., Inc., 9 ROP 48, 51 (2002). The substantive law implicated by Salii's claim is the Due Process Clause of the Constitution. "Where factual issues are not in dispute, issues of procedural due process are purely questions of law, reviewed *de novo*." *Lewill Clan v. Edaruchei Clan*, 13 ROP 62, 66 (2006) (citing *Renguul v. Elidechedong*, 11 ROP 11, 13 (2003)).

[¶ 3] The matter of Salii's resignation is a mixed question of law and fact. *See* 75 Am. Jur. 2d *Trial* § 604 (2007) ("In a mixed question of law and fact, (1) the historical facts are admitted or established; (2) the rule of law is undisputed; and (3) the issue is whether the facts satisfy the relevant statutory or constitutional standard . . . ."). We review mixed questions of law and fact *de novo*. *Ngiralmau v. ROP*, 16 ROP 167, 169 (2009); *In re Kemaitelong*, 7 ROP Intrm. 94, 95 (1998); *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 228 (1996).

III. Factual Background

[¶ 4] For the purpose of reviewing the trial court's decision on summary judgment, the facts can be accepted as found in Salii's affidavit and the other documents he submitted in support of his summary judgment motion, to the extent that the Government did not dispute them. Salii was a Safety Officer for the Bureau of Public Works of the National Government from 1986 to 2006. Plaintiff's Motion for Summary Judgment ("Pl.'s MSJ") Ex. M ¶ 3 ("Salii Affidavit"). On November 22, 2005, Salii was extradited from Palau to Guam to face federal charges of human trafficking in United States District Court. Salii Affidavit ¶¶ 5-6. Notwithstanding the pending charges, "for brief periods, January 22 to February 4, 2006, and from April 2-15, 2006, [Salii] returned to Palau from Guam for family and health reasons, . . . reported to

work as [a] Safety Officer," apparently using his accrued leave for his absences. Salii Affidavit ¶ 7.[4]

[¶ 5] On June 7, 2006, knowing that his June 26, 2006 trial date had been continued, Salii wrote to his Guam defense attorney to request permission from the U.S. District Court for Salii to again return to Palau pending trial. Pl.'s MSJ Ex. C. In the letter, Salii noted that his "job [was] at risk" because his annual leave was about to be exhausted, and that he wanted to return to Palau to "report to [his] work supervisor." *Id.* The request was denied by the District Court. Pl.'s MSJ Ex. K; Salii Affidavit ¶ 18. By June 11, 2006, Salii had exhausted all of his accrued annual leave. Pl.'s MSJ Ex. B.

[¶ 6] On August 3, 2006, the United States Government stipulated to dismiss the charges against Salii, "based on two jury trials in which the jury was unable to reach [a] unanimous verdict." Pl.'s MSJ Ex. D. Eleven days later, on August 14, Salii reported for work. Salii Affidavit ¶ 9. On that date, he applied for and was granted two days of sick leave. Pl.'s MSJ Ex. E. On August 15, 2006, he requested retroactive administrative leave for the period November 22, 2005 to August 11, 2006, with no deduction of his accrued annual leave for the period. *Id.*

[¶ 7] On August 31, 2006 the Acting Director of Public Works reported to the Minister of Resources and Development regarding Salii's absences, noting that he was absent from duty without leave from June 11 to August 13, 2006. Pl.'s MSJ Ex. F. That very day the Minister of Resources and Development wrote to Salii that he was deemed to have "resigned" from his job on June 11, 2006, since he was absent without official leave from his duty station from June 11 to mid-August 2006. Pl.'s MSJ Ex. G.

[¶ 8] Salii did not receive the Minister's notification informing him that he had resigned until September 6, 2006. Until the notification, he continued to work in his old position. Salii Affidavit ¶¶ 9-10. In a letter dated

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[4] Although Salii's affidavit stated that he "applied for and was granted leave from work," Salii Affidavit ¶ 7, this statement—in the context of his other statements in that affidavit, and read in conjunction with Salii's other summary judgment evidence—clearly refers to the period of time when he still had annual leave remaining.

September 14, 2006, he requested a hearing to challenge the Government's determination regarding his resignation. Salii Affidavit ¶ 11; Pl.'s MSJ Ex. H. His attorney reiterated that request in a letter dated September 22, 2006. Pl.'s MSJ Ex. I. Salii never received a formal or informal response from the Government, and no hearing was held despite Salii's repeated demands. Salii Affidavit ¶¶ 11-15.

[¶ 9] "On June 8, 2012, nearly six years to the day after his termination, Plaintiff [Salii] filed his Verified Complaint." Pl.'s MSJ at 4.

IV. Discussion

A. Due process requirements apply to permanent government employees in Palau. A hearing should be held if the employee disputes the factual basis for the Government's use of Sub-Part 18.5.

[¶ 10] Article IV, Section 6 of the Constitution provides in pertinent part that "[t]he government shall take no action to deprive any person of life, liberty, or property without due process of law." Here, Salii argues that his government employment is properly classified as "property." He is correct.

> The Olbiil Era Kelulau ("OEK") established the National Public Service System to, among other things, "attract, select and retain the best available individuals on merit, free from coercion, discrimination, reprisal or political influence." 33 PNC § 102. To achieve this goal, Palauan law requires that the National Public Service System be administered in accordance with several "merit principles." *See* 33 PNC § 202. One of these principles is "reasonable job security for the competent employee, including the right of judicial review of personnel actions." 33 PNC § 202(e).
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> Thus, one of the things that makes public service in Palau different from other types of employment is an expectation of job security.

Ngiralmau v. ROP, 16 ROP 167, 170 (2009).

[¶ 11] The U.S. Supreme Court has held that the "expectation of job security" is an interest that should be considered property within the meaning of the Due Process Clause of the United States Constitution. *See, e.g.*,

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985). In light of the National Public Service System's guarantee of "reasonable job security," we adopt the same reasoning and hold that a permanent government position in Palau constitutes property. Because a permanent government position in Palau is "property," the government can only deprive an employee of that property after affording the employee due process. Palau Const. Art. IV, § 6.

[¶ 12] While the Due Process Clause provides procedural protections for this property interest once created, the interest itself may still be limited by regulation, since the Constitution does not create the property interest or define its scope. *See Loudermill*, 470 U.S. at 538 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Attention is therefore directed to the "automatic resignation" provision of the Public Service System Rules and Regulations. The regulation is contained at Sub-Part 18.5 and provides:

> 18.5. Unauthorized Leave. Unauthorized leave (Absent Without Official Leave [AWOL]) is absence from duty without appropriate authorization. Employees who are absent from duty without prior approval, except in bona fide emergencies, shall be charged AWOL. Employees on AWOL for more than fifteen (15) consecutive working days during any one six (6) month period, shall be automatically resigned as of the last date on which the employee worked. This section shall not be applicable for termination for cause.

[¶ 13] The Government's current position[5] is that no process is due Salii—absence from employment for the prescribed time period ends the inquiry. However, that is not correct. Before an employee may be treated as resigned under the provision, factual determinations must be made regarding whether the employee was, in fact, absent for the requisite number of days, whether prior approval for the absence was not in fact obtained, and if prior approval was not obtained, whether there was a bona fide emergency that prevented the employee from seeking prior approval for the unauthorized absence. While these determinations may be relatively straightforward in

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[5] In a previously reported case, *Ellechel v. ROP*, 7 ROP 143 (1999), the Government provided for a post-deprivation hearing.

most cases, there is still the possibility for factual dispute. A hearing safeguards the accuracy of these determinations by permitting an employee to bring facts to the Government's attention relevant to the issue whether Sub-Part 18.5 applies.

[¶ 14] The first case discussing Sub-Part 18.5 provides an example of the need for fact- finding. *Becheserrak v. ROP*, 5 ROP Intrm. 63 (1995). There, the employee challenged the Government's right to deem him absent without leave, because he asserted he was not absent from his job. He was absent from his transferred assignment, which the Court held was an invalid transfer. Therefore he was not "absent from duty" within the meaning of Sub-Part 18.5.

[¶ 15] This regulation was also examined in *Ellechel v. ROP*, 7 ROP 143 (1999). In that case, the employee was arrested entering Saipan for drug trafficking and eventually pled guilty. Among other arguments, he stated that his arrest and subsequent legal proceedings constituted an "emergency" under the regulation. However, Ellechel's argument missed the point. The "emergency" is the particular circumstance that prevents a request for approval prior to the absence. Because Ellechel's absence began eight days before his arrest in Saipan, the arrest could not be considered an emergency that prevented him from requesting leave in advance.

[¶ 16] These cases demonstrate that even with an "automatic resignation" provision, some fact-finding by the Government must occur, and that an employee has a right to a hearing regarding those facts. In such cases, the hearing will necessarily be post-deprivation, because it is not until the Government has deemed the employee "absent" and no longer employed that the possibility for a factual dispute arises. In the present case, for example, it was not until several months after Salii's "automatic resignation" in June 2006 that he returned to work and continued to report to his position until September 6, 2006. On that date, he received the Minister's August letter informing him that he had constructively resigned in June. Once these determinations were made and Salii was deemed resigned, due process considerations come into play.

[¶ 17] In the case of *Coleman v. Dept. of Personnel Administration*, 805 P.2d 300 (Cal. 1991), the California Supreme Court addressed the issue

whether that State's "automatic resignation" statute implicated due process concerns. The majority opinion agreed that it did.

> [W]e conclude that before the state can treat a permanent or tenured employee's unexcused absence for five consecutive working days as a constructive resignation under the AWOL statute, it must give the employee written notice of the action contemplated. The notice must advise the employee of the facts supporting the state's invocation of the AWOL statute. *If the employee challenges the accuracy of the state's factual basis, the state must, as soon as practicable, give the employee an opportunity to present his or her version of the facts.*

Id. at 312 (emphasis added).

[¶ 18] We think that court's majority position is sound and adopt it here. In the case before us, the Government gave written notice of the constructive resignation, and the factual basis showing that Sub-Part 18.5 applied. The notice was drafted the same date that the Minister of Resources and Development was informed of the absences.[6]

[¶ 19] Salii did not challenge the accuracy of the facts relied upon by the Government, i.e., more than 15 days absence, no authorization for the absence, and no emergency that interfered with him seeking prior approval for his absence. Rather, he complained that the Palau Attorney General's Office cooperated in his extradition, that the office "interfere[d] with witnesses" that would have helped him in the Guam trial, and that he "was away against my will and prevented from returning to my work because of the actions taken by the Government of Palau." Pl.'s MSJ Ex. H. The contentions in this letter were not a sufficient basis for a hearing. Those contentions—even if proved—would have no effect on the determination that a constructive resignation occurred. His attorney's follow up letter, which also requested a hearing, added no facts at all. *See* Pl.'s MSJ Ex. I.

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[6] We do not excuse the two week delay between the time Salii showed up again at work, and when his supervisor conveyed the information to the Minister, but on these specific facts we do not think it affects the outcome.

[¶ 20] Without being given *some* reason to review whether Sub-Part 18.5 was misapplied, the Government was not obligated to hold a hearing. At no time, either in his letter to the Minister, his lawyer's subsequent letter, or indeed during the proceedings below, has Salii ever suggested facts that might disprove the elements of a constructive resignation. A public employee is entitled to present his case as to why Sub-Part 18.5 does not apply to his case if he "challenges the accuracy of the state's factual basis." *Coleman*, 805 P.2d at 312. Salii failed to make such a challenge. That being the case, he was not entitled to a hearing. If an employee is not going to contest the salient facts regarding a constructive resignation or disclose any additional facts for consideration, but instead simply demands a hearing in the abstract, due process does not require one. We therefore **REVERSE** the trial court's grant of summary judgment in favor of Salii.

B. The record on summary judgment established that the Government was entitled to judgment as a matter of law.

[¶ 21] Because the uncontested facts presented by Salii demonstrate the absence of a necessary component of Salii's case, summary judgment should have been granted to the Government. *Allstate Ins, Co. v. Fritz*, 452 F.3d 316, 323 (4th Cir. 2006) (Trial courts have an inherent power to grant summary judgment *sua sponte* so long as the party against whom summary judgment is entered has notice "sufficient to provide [it] with an *adequate opportunity* to demonstrate a genuine issue of material fact."); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 140 (2d Cir. 2000) ("[A] *sua sponte* grant of summary judgment against [the moving] party may be appropriate if those materials show that no material dispute of fact exists and that the other party is entitled to judgment as a matter of law.").[7] On *de novo* review of the summary judgment record, we conclude that summary judgment in favor of the Government is warranted.

[¶ 22] A determination of a resignation due to absence under Sub-Part 18.5 will be upheld when the evidence demonstrates that: (1) the employee

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[7] When construing R. Civ. Pro. 56, as with all of our Rules of Civil Procedure, this Court considers United States authorities when interpreting our Rules. *Melekeok Gov't Bank v. Adelbai*, 13 ROP 183 (2006); *Airai State Pub. Lands Auth. v. Aimeliik State Gov't*, 11 ROP 39, 41 n.1 (2003).

had no advance approval for the absence, (2) the absence continued for more than fifteen consecutive working days, and (3) the failure to obtain approval for the absence was not due to a bona fide emergency. *Ellechel v. ROP*, 7 ROP Intrm. 143, 146 (1999). The summary judgment record clearly established that all three elements were met, thus requiring judgment for the Government.

[¶ 23] With respect to the first element, despite Salii's certain knowledge in June 2006 that his accrued annual leave was about to run out, he failed to give prior notice of his need for administrative leave because of his upcoming court appearances—or because of any other reason—in June, July, and August.[8] It was not until two months after his annual leave ran out (and more than a week after the indictment was dismissed) that he simply showed up at his place of work, applied for two days of sick leave, and requested retroactive administrative leave back to the previous November. The evidence thus established that he did not obtain prior approval to be absent following the exhaustion of his annual leave. With respect to the second element, Salii did not challenge the mathematics that his absence between June 11 and August 14, 2006 continued for more than 15 consecutive working days. It was clearly erroneous for the trial court to conclude that there was "a genuine issue of material fact as to whether Plaintiff was absent without leave for more than fifteen consecutive working days" in June, July, and August of 2006.

[¶ 24] The only remaining issue is the third element: whether there was an emergency in early June 2006 that prevented Salii from seeking prior approval for administrative leave before his annual leave was exhausted. The request could have been sent by email or postal mail the same day that he wrote his attorney (June 7, 2006), when he knew that the June 26 trial date had been postponed and that he might be in Guam well into July or August. But there is no evidence that such a request was made, and Salii does not suggest that there was an "emergency" that continued throughout June and July—and remained in place during the eleven days after the indictment was dismissed—that prevented him from requesting leave. There being no facts to

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[8] The Government, of course, was not obligated to grant an open-ended leave request in any event.

implicate the "bona fide emergency" exception to the requirement of prior approval for absences, Salii's failure to obtain prior approval for his absence in June to August of 2006 justifies the Government's invocation of Sub-Part 18.5 to deem Salii's absence as an automatic resignation.

[¶ 25] Because the undisputed facts on summary judgment demonstrated the Government's entitlement to judgment as a matter of law, we find it appropriate to remand for entry of judgment rather than for further fact-finding. *See KSPLA v. Toribiong*, 2017 Palau 12 ¶ 43 ("In other circumstances we might remand the case for [further factual determinations]. Here, however, the record supports only one finding.").

V. Conclusion

[¶ 26] For the reasons above, we **REVERSE** the trial court's grant of summary judgment in favor of Salii and **REMAND** for entry of judgment in favor of the Government.

SO ORDERED, this 9th day of May, 2017.