

**IN THE  
SUPREME COURT OF THE REPUBLIC OF PALAU  
APPELLATE DIVISION**

**THE REPUBLIC OF PALAU,**  
*Appellant,*  
**v.**  
**TARKONG BECHES,**  
*Appellee.*

Cite as: 2025 Palau 4  
Civil Appeal No. 24-015  
Appeal from Civil Action No. 23-182

Decided: March 7, 2025

Counsel for Appellant .....	Kathleen Burch, AAG
Counsel for Appellee .....	Ronald K. Ledgerwood

BEFORE: FRED M. ISAACS, Associate Justice, presiding  
KATHERINE A. MARAMAN, Associate Justice  
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

**OPINION**

PER CURIAM:

[¶ 1] This appeal involves the scope of the government’s sovereign immunity and the extent to which government employees’ rights and remedies may be limited in employment disputes. Appellant, the Republic of Palau, appeals the Trial Division’s determination that it is not entitled to sovereign immunity as to Appellee Tarkong Beches’s constitutional, contract, and tort claims.

[¶ 2] For the reasons set forth below, we **REVERSE** and **REMAND**.

## **BACKGROUND**

[¶ 3] This appeal stems from a trial court decision granting in part and denying in part the Republic of Palau’s Motions to Dismiss Mr. Beches’s Complaint.

[¶ 4] The Complaint centers on several workplace incidents involving Mr. Beches when he was an employee of the ROP Judiciary. The first incident occurred in June 2022, when Mr. Beches suffered an on-duty injury to his right hand. He returned to limited active duty in August 2022, after which he alleges that his duty station, work hours, and assignments were changed to his detriment. The second incident occurred in November 2022, when a female coworker reported Mr. Beches for harassing comments. ROP Judiciary Administrative Director (“AD”) Kenneth Uyehara discussed the complaint with Mr. Beches and no further action was taken. The third incident took place in February 2023, when a lizard that Mr. Beches brought into the Judiciary employee van escaped, prompting the van driver to pull over to the side of the road for employee safety.

[¶ 5] Mr. Beches was suspended for three days after the third incident. He appealed his suspension to AD Uyehara and requested an additional investigation of the incidents. No provision of the Judiciary Employee Handbook or Parts 11 or 12 of the Public Service System Regulations incorporated into the Judiciary Employee Handbook provides for an appeal of a disciplinary action of three days or less. Accordingly, Mr. Beches’s appeal and request were deemed covered by the Employee View Presentation process in Part X of the Judiciary Personnel Rules and Regulations. AD Uyehara requested a further investigation and formed a Disciplinary Tribunal Panel (“the Tribunal”) pursuant to the informal procedure in Regulation 10.6 of the Judiciary Personnel Rules and Regulations. Mr. Beches submitted a written statement to the Tribunal, and upon review of the matter the Tribunal recommended that he be terminated immediately. AD Uyehara agreed with the Tribunal’s recommendation and provided written notice to Mr. Beches of his

termination. Mr. Beches timely appealed his termination to a Grievance Panel,<sup>1</sup> which upheld the action as justified by written decision on September 11, 2023.

[¶ 6] Mr. Beches timely initiated the instant matter in the Trial Division, seeking an appeal of the Grievance Panel’s decision and alleging multiple causes of action. The ROP moved to dismiss, arguing in part that certain claims were barred by sovereign immunity or limited by statute. The Trial Division concluded in part that the ROP was not immune from Mr. Beches’s claims for breach of implied-in-fact employment contract, wrongful or retaliatory termination, negligent or intentional infliction of emotional distress, and violation of constitutional due process. The ROP unsuccessfully moved for reconsideration. This appeal followed.

### STANDARD OF REVIEW

[¶ 7] We review matters of law *de novo*, findings of fact for clear error, and exercises of discretion for abuse of that discretion. *Obechou Lineage v. Ngeruangel Lineage of Mochouang Clan*, 2024 Palau 2 ¶ 5.

[¶ 8] “We review a trial court’s handling of a motion for reconsideration for abuse of discretion.” *Rekemel v. Tkel*, 2019 Palau 36 ¶ 5. “Under this standard, a decision of the Trial Division will not be overturned unless it was clearly wrong.” *Sugiyama v. Airai State Pub. Lands Auth.*, 19 ROP 99, 101–02 (2012) (internal quotation marks omitted). A decision is clearly wrong where the Trial Division “misapprehends” the applicable legal doctrine. *Rechesengel v. Lund*, 2019 Palau 32.

[¶ 9] “The issue of whether there is a waiver of sovereign immunity presents a question of law that we review *de novo*.” *Republic of Palau v. Ngatpang State Pub. Lands Auth.*, 2023 Palau 7 ¶ 11 (citing *Becheserrak v.*

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<sup>1</sup> Pursuant to 33 PNC § 426(a)(1), a ROP employee may contest his dismissal, demotion or suspension by appeal to a grievance panel within fourteen calendar days after receiving written notice of the suspension, dismissal or demotion. The grievance panel consists of “one member selected by the employee, one member selected by the responsible management official, and one (1) member selected by the two (2) other panel members. If the two (2) members cannot agree on the third member, that member shall be selected by the Director.” *Id.* The appealing employee and the responsible management official each have the right to a hearing where they may present evidence and be represented by counsel. Decisions by the grievance panel are appealable to the Trial Division.

*Republic of Palau*, 8 ROP Intrm. 147, 147 (2000)). “The party raising a claim against the government bears the burden of demonstrating the waiver of sovereign immunity.” *Id.* (citing *Ochedaruchei Clan v. Oilouch*, 2021 Palau 33 ¶ 8).

## DISCUSSION

[¶ 10] As an initial matter, we find that we have jurisdiction over this matter under the collateral order doctrine. Rule 5(c) of the ROP Rules of Appellate Procedure permits an appeal as of right following “any collateral order of the trial court that: (1) conclusively determines a disputed question; (2) resolves an important issue that is completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment of the trial court under Rule 5(a).” Here, the trial court’s order on the ROP’s motions to dismiss “actually ruled on and determined the issue” of the ROP’s sovereign immunity. *See Republic of Palau v. Ngatpang State Pub. Lands Auth.*, 2023 Palau 7 ¶ 27. As a bar to suit, sovereign immunity is an important issue separate from the merits of Mr. Beches’s claims. Permitting relevant claims to proceed on the merits nullifies the defense of sovereign immunity, rendering the trial court’s order effectively unreviewable upon appeal from a final judgment.<sup>2</sup> Thus, the trial court’s order on the motions to dismiss is a collateral order, and jurisdiction is properly vested in the Appellate Division.

[¶ 11] Turning to the merits, the ROP presents three issues on appeal. The first is whether the ROP is immune from individual actions alleging constitutional violations. The second is whether the National Public Service System Act limits the rights and remedies available to government employees in wrongful termination suits. The third and final issue is whether Mr. Beches’s tort and contract claims are barred by the discretionary function exception to the ROP’s general waiver of sovereign immunity.

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<sup>2</sup> Although the ROP moved for reconsideration before noticing the instant appeal, our Rules do not require parties to pursue an interlocutory appeal in lieu of attempting to resolve the matter below. *See* ROP R. App. P. 5 (“An appeal from a decision of a trial court *may* be taken as of right in the following circumstances....”). Moreover, moving for reconsideration serves the interests of judicial economy by attempting to avoid the time- and cost-intensive process of an appeal.

## **I. Sovereign Immunity**

[¶ 12] The ROP first argues that it is immune from Mr. Beches’s constitutional due process claim pursuant to Palau’s sovereign immunity statutes and our decision in *Republic of Palau v. Ngatpang State Pub. Lands Auth.*, 2023 Palau 7.

[¶ 13] “The sovereign immunity doctrine is inherent to the government’s status as a sovereign.” *Ngatpang State Pub. Lands Auth.*, 2023 Palau ¶ 13 (citing *Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994)). The government is immune from lawsuits except to the extent that it consents to be sued, and the terms of that consent define a court’s jurisdiction to entertain the suit. *Tell*, 4 ROP Intrm. at 227 (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). We have held that a waiver of sovereign immunity cannot be implied. Rather, it “must be unequivocally expressed by statute.” *Superluck Enters., Inc. v. ROP*, 6 ROP Intrm. 267, 271 (App. Div. 1997). This “express waiver rule requires us to construe an asserted waiver of immunity strictly, and precludes us from recognizing any intent to hold the government liable where that intent is not translated into affirmative statutory . . . terms.” *Becheserrak v. ROP*, 8 ROP Intrm. 147, 148 (2000) (internal quotation and citation omitted). Under this framework, we must decide whether our immunity statutes affirmatively and expressly waive the ROP’s sovereign immunity for claims based on violations of the ROP Constitution.

[¶ 14] Title 14, section 501 of the Palau National Code provides in part that sovereign immunity is waived for “any other civil action or claim . . . against the government of the Trust Territory or Republic founded upon any law of this jurisdiction or any regulation issued under such law.” 14 PNC § 501(a)(2). In *Ngatpang*, however, we determined that the Trust Territory purposefully excluded the ROP Constitution from the scope of this waiver and held that the ROP did not waive sovereign immunity for constitutional claims. 2023 Palau 7 ¶ 21. We did not carve out any exceptions; nor could we. The express waiver rule precludes us from recognizing any intent to hold the government liable where that intent “is not translated into affirmative statutory . . . terms.” *Superluck*, 6 ROP Intrm. at 271–72. The ROP’s sovereign immunity may only be waived by statute, and legislative power is vested in the OEK. ROP Const. art. IX sec. 1. Inasmuch as the OEK has yet to enact legislation permitting

actions for money damages for constitutional violations, we find that the ROP is immune from Mr. Beches's constitutional claim.

[¶ 15] Accordingly, the trial court erred in failing to apply *Ngatpang*, and thus abused its discretion in denying the ROP's motion to reconsider.

## **II. Statutory Preemption**

[¶ 16] The ROP next contends Mr. Beches's claims for breach of implied-in-fact employment contract, wrongful or retaliatory termination, and negligent or intentional infliction of emotional distress are preempted by the National Public Service System Act, 33 PNC § 101 *et seq.*

[¶ 17] We turn first to Mr. Beches's claims for breach of implied-in-fact employment contract and wrongful or retaliatory termination. The ROP has generally waived sovereign immunity for "any other civil action or claim . . . against the government of the Trust Territory or Republic founded upon any law of this jurisdiction or any regulation issued under such law or upon any express or implied contract with the government of the Trust Territory or Republic." 14 PNC § 501(a)(2).

[¶ 18] However, the National Public Service System Act provides a grievance process for regular government employees who wish to contest their dismissal, demotion or suspension. Under the Act, an employee may appeal such employment actions to a grievance panel and pursue action in the Trial Division for reinstatement and loss of pay. Upon submission to the Trial Division,

[i]f the court finds that the reasons for the action are not substantiated in any material respect, or that the procedures required by law or regulation were not followed, the court shall order that the employee be reinstated in his position, without loss of pay and benefits. If the court finds that the reasons are substantiated or only partially substantiated, and that the proper procedures were followed, the court shall sustain the action of the management official, provided that the court may modify the action of the management

official if it finds the circumstances of the case so require, and may thereupon order such disposition of the case as it may deem just and proper.

33 PNC § 426(b)(2). “An employee who fails to appeal [the grievance panel’s decision] within the time prescribed . . . may not bring an action in any court to contest his suspension, dismissal or demotion.” 33 PNC § 426(a)(1).

[¶ 19] We find 33 PNC § 426 controlling as to ROP employee grievance actions. *Elia Tulop v. Palau Election Comm’n*, 14 ROP 5, 8 (2006) (“When there are two potentially applicable laws, a principle of statutory construction encourages a court to adopt the more specific statute as authoritative.”). The Act specifically limits the rights and remedies available to a ROP employee filing a grievance action, and sets out an explicit timeline for such actions. Therefore, we hold that the Act preempts alternative causes of action arising from a ROP employee’s dismissal, demotion or suspension. Accordingly, we find that Mr. Beches’s claims for breach of contract and wrongful termination are statutorily preempted.<sup>3</sup>

[¶ 20] The trial court, applying our decision in *Koror State Gov’t v. Marbou*, 18 ROP 174 (2011), concluded that these claims were allowed under the ROP immunity statutes. However, *Koror State* involved an employment suit against a Palauan state, not the ROP. The OEK has provided the applicable procedure, rights and remedies available to ROP employees in grievance actions within 33 PNC § 426. We thus find that the trial court, in failing to consider the preemptive nature of 33 PNC § 426, misapprehended the applicable legal doctrine and abused its discretion in declining to reconsider.

[¶ 21] By contrast, we find that Mr. Beches’s claim for negligent or intentional infliction of emotional distress (NIED/IIED) is not preempted because it does not arise from his dismissal. As stated in the Complaint, this claim relates to Mr. Beches’s work assignments, duty station, and shift times while he was on limited active duty. The ROP points to no provision of 33 PNC § 426 or other legislative history suggesting that the OEK intended the statute

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<sup>3</sup> Although not the subject of this appeal, we note that Mr. Beches’s Complaint includes a claim pursuant to 33 PNC § 426(b), which remains pending below.

to cover circumstances unrelated to dismissal, demotion, or suspension. Nor does our review indicate an intent to broadly construe the statute. Accordingly, we interpret 33 PNC § 426 narrowly and find that it does not preempt Mr. Beches's NIED/IIED claim. We thus consider whether this claim is barred by the discretionary function exception to the ROP's immunity waiver.

### **III. Discretionary Function Exception**

[¶ 22] Mr. Beches alleges that while on limited active duty, he was reassigned only to the Ngerulmud courthouse, where he stayed until his dismissal. While in Ngerulmud, he was allegedly unable to go to the hospital for physical therapy, hindering his ability to obtain a full medical clearance for return to active duty and reintegration into the Marshal rotation between the Koror and Ngerulmud courthouses. He contends his supervisors knew or should have known the he suffers from Post-Traumatic Stress Disorder, and that his reassignment to Ngerulmud and changes to his work schedule were designed to cause him emotional distress. The ROP asserts that Mr. Beches's NIED/IIED claim is barred by the discretionary function exception to its general waiver of sovereign immunity because decisions regarding a Marshal's assignments are discretionary judgments grounded in economic and public policy concerns.

[¶ 23] The ROP's sovereign immunity is generally waived for

civil actions against the government . . . on claims for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the government . . . if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

14 PNC § 501(a)(3). However, the OEK has excepted from the waiver

any claim based on an act or omission of an employee of the government, exercising due care, in the execution of a law or regulation,



whether or not such law or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any agency or employee of the government, whether or not the discretion involved be abused.

14 PNC § 502(b). The trial court found that Mr. Beches’s NIED/IIED claim could fall under either section “depending on the facts presented,” and that it might later be subject to dismissal. However, it went on to conclude without further analysis that the claim “[was] not blocked by sovereign immunity.”

[¶ 24] The two-pronged test used in *United States v. Gaubert*, 499 U.S. 315 (1991) is authoritative in determining the applicability of the discretionary function exception. *See Taro v. ROP*, 12 ROP 175, 176–77 (Tr. Div. 2004) (adopting the *Gaubert* test). Under *Gaubert*, the exception applies if (1) the act or omission on which the claim is based “involves an element of judgment or choice”; and (2) “that judgment is of the kind that the discretionary function exception was designed to shield.” *Gaubert*, 499 U.S. at 322–23. Regarding the first prong, the exception cannot apply if the employee in question was “bound to act in a particular way.” *Id.* at 329; *see also Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (“In general, governmental conduct cannot be discretionary if it violates a legal mandate.”). As to the second prong, “[b]ecause the purpose of the exception is to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort,” the exception “protects only governmental actions and decisions based on considerations of public policy.” *Id.* at 323. This inquiry is objective, concerning only whether an employee’s actions “are susceptible to policy analysis.” *Id.* at 325; *see also Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (“[D]ecisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield.”).

[¶ 25] Applying *Gaubert*, the conduct underlying Mr. Beches’s claim for NIED/IIED is protected under 14 PNC § 502(b) and excepted from the ROP’s general immunity waiver. As to the first prong of the test, there is no doubt that

the decision to change a Marshal's duty station, schedule, or assignments involves an element of judgment or choice. Mr. Beches identifies no ROP statute, regulation, or other policy that mandates employees follow a particular procedure in making such changes or otherwise proscribes such action.

[¶ 26] Regarding the second prong, it appears that Marshal assignments are grounded in public policy and economic considerations. The primary function of the Marshal's Division is to "provide court security, including providing safety and security for the Judiciary, participants in court proceedings and the general public visiting the court's facilities." 4 PNC § 502. The decision to assign a Marshal to a particular duty station and schedule when he is medically cleared only for limited active duty reflects the economic and public policy concerns of ensuring the Division adequately fulfills its statutory obligation.

[¶ 27] Mr. Beches maintains without support that the trial court "could only possibly determine if discretionary or ministerial authority was being applied by hearing factual evidence." *See Suzuki v. Gilbert*, 20 ROP 19, 23 (2012) ("Unsupported legal arguments need not be considered by the Court on appeal."). We find this argument unavailing. Whether the discretionary function exception bars a plaintiff's claim is a matter of jurisdiction. *See Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996) ("Where the discretionary function exception . . . applies, no federal subject matter jurisdiction exists."). Mr. Beches fails to set forth facts alleging "negligence unrelated to any plausible policy objectives." *Taro v. ROP*, 12 ROP 175, 177–79 (Tr. Div. 2004). The changes to Mr. Beches's work assignments relate to plausible policy objectives connected to the Marshal Division's statutory obligations; thus, his claim is excepted from the ROP's immunity waiver.

[¶ 28] Because the trial court should have conducted the discretionary function analysis before determining that sovereign immunity did not apply, we find that the trial court's decision as to Mr. Beches's NIED/IIED claim was erroneous. Thus, the trial court abused its discretion in denying reconsideration of the same.

### **CONCLUSION**

[¶ 29] For the foregoing reasons, we **REVERSE** the Trial Division's decision as to Mr. Beches's Second, Third, Fifth and Sixth Causes of Action and **REMAND** this case for further proceedings consistent with this opinion.