

ROP v. Sakuma, 10 ROP 221 (Tr. Div. 2003)
REPUBLIC OF PALAU,
Plaintiff,

v.

TADASHI SAKUMA
and SHARP SAKUMA,
Defendants.

CIVIL ACTION NO. 02-240

Supreme Court, Trial Division
Republic of Palau

Decided: July 2, 2003

LARRY W. MILLER, Associate Justice:

This matter is before the Court on cross-motions for summary judgment. Although the Court addresses and resolves certain of plaintiff's claims below, it believes that other claims require further factual and legal development. For the reasons set forth herein, the motions are granted in part and denied in part.

The following facts are undisputed: Defendant Tadashi Sakuma is the elected Governor of Ngaraard State. Sharp Sakuma is his son.¹ On more than fifty occasions from June 16, 2000, to May 7, 2002, at the direction of Governor Sakuma, Ngaraard State rented boats at a total cost of \$23,000.00. On forty of those occasions, the State rented Sharp's boat at a total cost of \$16,350.00. Governor Sakuma approved and co-signed the checks by which payment was made for the boat rentals, including the checks to his son.

Plaintiff raises two sets of objections to these boat rentals—that it was illegal for plaintiff to participate in the renting of his son's boat and that the rentals were not undertaken for any public purpose. It is important to recognize that these objections are entirely distinct: In determining the legality *vel non* of using Sharp Sakuma's boat, the purpose for which the boat was used is immaterial. Conversely, answering the question whether the trips were undertaken for a proper purpose does not depend on who was driving the boat. The Court therefore addresses these issues separately.

I. Plaintiff challenges the rental of Sharp Sakuma's boat on two grounds: as a violation of § 654 of the procurement law, 40 PNC § 601 *et seq.*, and as a violation of § 6(d) of **1222** the Code of Ethics Act, RPPL No. 5-32. The Court agrees with the first contention, but rejects the second.²

¹Although Sharp is a named defendant, he is not represented by his father's counsel, has not otherwise appeared in this action, and no relief is sought against him by plaintiff's motion.

²Because the two laws provide for different penalties, it is necessary to address both of them.

A. 40 PNC § 654(a)(1) provides:

(a) It is a breach of ethical standards for any employee of a government agency to participate directly or indirectly in a procurement with that government agency if:

(1) the employee or any member of the employee's immediate family or a dependent of the employee has a financial interest pertaining to the procurement

It is undisputed that Sharp Sakuma was a member of Governor Sakuma's "immediate family," *see id.* § 652(g), who had a "financial interest," *see id.* § 652(e), in the "procurement," *see id.* § 606(r), of his boat by Ngaraard State.³ The question, then, is whether Governor Sakuma "participate[d] directly or indirectly in [that] procurement."

In opposing plaintiff's motion and in support of his own, defendant has submitted the affidavits of the secretary of Ngaraard's State Office and of Ngaraard's treasurer. As summarized in defendant's brief, taken together, those affidavits explain that "the boat trips were organized by Ngaraard State Government staff rather than Defendant," and that "Defendant had nothing to do with the actual selection, hiring, and reservation of boats for the trip." As stated in defendant's own affidavit:

As Governor, I make a decision on what trip should be undertaken for the State. I also approve of payments by signing checks to pay off the boat rentals. However, I do not decide whose boat to hire or to pay for. That task is left for my staff to do.

Plaintiff has not submitted any affidavits or other evidentiary materials to counter these assertions and the Court accordingly accepts them as true. Plaintiff nevertheless argues that merely by signing the checks as payment for the boat rentals, defendant participated unlawfully in the procurement.

Neither plaintiff nor defendant cited, much less analyzed, the pertinent statutory definition. 40 PNC § 652(d) defines "Direct or indirect participation" as "Involvement through decision, approval, disapproval, recommendation, and preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice or participation in any other advisory capacity." Applying the plain language of this provision, the Court is constrained to agree with plaintiff's position. Even if "[a]ll that Defendant did was to sign checks,"⁴ he was thereby "involve[d] through **1223** approval" in the procurement of his son's boat.

³Taking one step back, there is also no dispute that the Governor is an "employee" covered by § 654(a). *See id.* § 606(k).

⁴Beyond signing the checks, plaintiff's exhibits show that defendant expressly "APPROVED" some of the purchase order invoices for payments to his son, *see* Exs. 5, 18, 26, and other boat operators, *see* Exs. 33, 37, 41.

The Court paused before reaching this conclusion to consider whether it was truly the intent of the procurement law to forbid the approval of expenditures to a vendor even where, as sworn to here, there was no involvement in the decision of which vendor to do business with. The short answer is that the OEK used both the words “decision” and “approval” and so prohibited both types of involvement. A slightly longer answer is that creating an exception for “only” signing checks would mean equally that defendant—or any Procurement Officer⁵—could approve of payments and write checks not just to third parties, but also to himself as vendor, so long as he could deny having had any involvement in making the decision to do business with himself. The Court is confident that the OEK did not intend that result, but purposely adopted a broad definition of “Direct or indirect participation” so as to require a complete withdrawal from any involvement in a procurement where there was any potential conflict of interest.⁶ It accordingly grants plaintiff’s motion⁷ and denies defendant’s motion as to this aspect of plaintiff’s claim.

B. Plaintiff also argues that defendant’s actions concerning the rentals of his son’s boat violated Section 6(d) of the Code of Ethics Act:

No employee may use or attempt to use the employee’s official position to secure or grant privileges, exemptions, advantages, contracts, or treatment, for himself or others, including but not limited to the following:

- (1) Seeking other employment or contracts for services for the employee by the use or attempted use of the employee’s office or position; and
- (2) Soliciting, receiving or accepting compensation or other consideration for the performance of the employee’s official duties or responsibilities except as provided by law;
- (3) Soliciting, receiving or accepting any gift or other item of monetary value from **L224** any person seeking official action from, doing business with, or conducting activities regulated by the employee’s agency, or from any person whose interests may be substantially affected by the performance or

⁵The record is silent as to whether defendant served as Procurement Officer for Ngaraard State. Although plaintiff cites 40 PNC § 408, that provision states that “[t]he Procurement officer for each state government shall be that person designated by each state governor.” It is clear in any event that, whether as Procurement Officer or as Governor, defendant was regularly involved in the purchase of goods and services by Ngaraard State.

⁶*Cf.* 40 PNC § 654(c): “Upon discovery of an actual or potential conflict of interest, an employee shall promptly file with the Procurement Officer concerned a written statement of disqualification and shall withdraw from further participation in the transaction involved.”

⁷As plaintiff argues, it will therefore be entitled to a judgment requiring Governor Sakuma (and potentially his son as well) to repay the amounts disbursed. 40 PNC § 662(a) (“The value of anything transferred or received in breach of the ethical standards of this article or regulations promulgated hereunder by an employee or non-employee may be recovered from either the employee or non-employee by the government.”).

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nonperformance of the employee's duties; provided that this subdivision shall not apply to wedding gifts, customary gifts and gifts exchanged between individuals on birthdays, holidays and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.

On this point, the Court is not persuaded. In the first place, plaintiff's quotation of this provision omits any mention of the illustrative examples that follow. Although those examples are not exhaustive, they demonstrate that the provision is aimed at circumstances—not present here—where a government official attempts to trade on his authority to act in exchange for some benefit to himself: “I’ll grant your application if you pay me X dollars” or “I’ll grant your application if you hire me as your consultant.”⁸

Ignoring these examples, plaintiff asserts flatly that defendant violated the Act “[b]y using his position as Governor for his son’s financial benefit.” On that reading of the provision, however, the Governor broke the law not only by paying his son, but by paying the other boat operators and, indeed, by using his position as Governor to enter into any contract—and thereby conferring a “financial benefit” on the other party to the contract. Obviously, it is plaintiff’s intention to single out defendant’s dealings with his son, as opposed to his dealings with others, as wrongful. But to do so, it must either make a factual showing that the decisions to use his son’s boat were tainted by favoritism—which it has not done and which is rebutted on the record before the Court by defendant’s affidavits—or to show that there is a legal barrier that prohibits any such dealings whatsoever, irrespective of any wrongful motivation. But there is nothing in this provision of the Ethics Act, unlike the procurement law, that addresses this issue. Put another way, in considering this provision of the Ethics Act, one cannot differentiate between the Governor’s dealings with his son from his dealings with other vendors without-unjustifiably-assuming legal distinctions and principles that are simply not there. Accordingly, on this aspect of plaintiff’s claim, plaintiff’s motion for summary judgment is denied and defendant’s is granted.

II. Plaintiff also challenges *all* of the boat rentals on the ground that they were not undertaken for public purposes, relying both on what might be called the common-law constitutional doctrine⁹ that “appropriations of 1225 public funds must be for a public purpose,” *see* 63C Am. Jur. 2d *Public Funds* § 58 (1997), and on Section 5 of the Code of Ethics Act: “Use of government property. No employee may use national or state time, equipment, facilities, assets or property for political activities or other private activities that serve no governmental or public purpose.” It is the Court’s view that these claims require further factual and legal development before they are addressed by the Court, and it therefore denies both plaintiff’s and defendant’s motions in this regard. In brief, although plaintiff is justified in complaining about the incomplete information provided by defendant, it is not clear that the absence of any

⁸The Court recognizes that the provision prohibits an official from using governmental authority to secure benefits “for himself *or others*” (emphasis added). Nevertheless, the paradigmatic case that that clause is meant to cover is something in the nature of “I’ll grant your application if you give *my son* a job.”

⁹The Court uses this phrase because, as the principal case relied on by plaintiff explains, “Although there is no specific constitutional clause so stating, the rule is firmly established that there can be no expenditure of public funds for a private purpose.” *State ex rel. Hammermill Paper Co. v. La Plante*, 205 N.W.2d 784, 794 (Wisc. 1973) (citation omitted).

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explanation for *some* of the rentals is enough to establish that *all* 53 trips were wholly lacking in any public purpose. Information has been provided about some of the trips, and at least a few of them—if the invoices are to be believed—seem to the Court to be a perfectly reasonable use of public funds. *E.g.*, Ex. 8 (“Ngaraard Elem. School students trip to visit Coral Reef Center”). If plaintiff contends that taking students to PICRC (or mechas to the women’s conference and market, *see* Ex. 41) does not constitute a public purpose either as a matter of common law or within the meaning of the Ethics Act, it should explain why. If that is not the contention, and if, as the Court believes, it is necessary to address the rentals one by one (or at least group them into categories), it is plaintiff and not the Court that should undertake that task in the first instance.¹⁰

On the other hand, defendant’s motion is supported by affidavits that are themselves too unspecific to support the granting of summary judgment. The assertions that “Each and every boat rental covered by Exhibits 1 thru 44 was made at the request of the Ngaraard State Government to achieve a public purpose of the state,” and “There is not a single boat rental reflected in Exhibits 1 thru 44 that was not for the public purpose of Ngaraard State Government,” are both legal conclusions that are not sufficient to support a grant of summary judgment without knowing the facts upon which those conclusions are purportedly based.

As to these claims, therefore, both motions are denied without prejudice to their re-assertion with additional factual and/or legal explication.

So Ordered.

¹⁰The Court recognizes that in its reply brief plaintiff has categorized and addressed some of the boat rentals (regarding trips to the Rock Islands and transportation of the Governor between Koror and Ngaraard); but it has not addressed all of them and, because plaintiff waited until its reply brief to do so, the Court has not had the benefit of any counter-arguments that defendant might offer.