

*Perrin v. Remengesau*, 11 ROP 266 (Tr. Div. 2004)  
**DAVID C. PERRIN,**  
**Plaintiff,**

v.

**TOMMY E. REMENGESAU, JR., President, and REPUBLIC OF PALAU,**  
**Defendants.**

CIVIL ACTION NO. 04-064

Supreme Court, Trial Division  
Republic of Palau

Decided: August 17, 2004

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ARTHUR NGIRAKLSONG, Chief Justice:

This matter came before the Court on defendants' motion to dismiss and plaintiff's motion for default judgment. The hearing on these motions was held on May 20, 2004.

For the reasons that follow, the Court grants defendants' motion to dismiss and denies plaintiff's motion. What remain are the disputed benefits or obligations under the contract between plaintiff ("Perrin") and the Republic of Palau ("Government").

### **MOTION FOR DEFAULT JUDGMENT**

The Court agrees with the Government that Mr. Perrin's Motion for Default Judgment is without merit. A Motion to Dismiss under Rule 12(b)(6) as to any of the claims in the complaint tolls the time period for filing an answer to the entire complaint. *See Oil Express Nat'l, Inc. v. D'Alessandro*, 173 F.R.D. 219 (N.D. Ill. 1997); *Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247 (W.D.N.Y. 1998); *Godlewski v. Affiliated Computer Servs.*, 210 F.R.D. 571 (E.D. Va. 2002); *Brocksopp Eng'g, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485 (E.D. Wis. 1991) (vacating default entered by clerk).

### **GOVERNMENT'S MOTION TO DISMISS**

Defendants' motion to dismiss is based on ROP R. Civ. P. 12(b)(6). Defendants argue that Count I against the President and Counts II and III should be dismissed on the grounds that each of these counts fails to state a claim upon which relief can be granted. In considering a Rule 12(b)(6) motion, the Court is "required to construe the petition liberally in the light most favorable to petitioners and to treat as true every allegation therein." *Yano v. Kadoi*, 3 ROP Intrm. 174, 180 (1992) (citation omitted).

Perrin was employed as "Legal Counsel to the President (Remengesau) and Special

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Assistant Attorney General” when he was terminated from his position effective July 25, 2003. (Complaint ¶ 26; Ex. 2). Perrin’s employment with the Government was under a contract. (Complaint ¶¶ 5, 6, 7, 9 and 10; Employment Contract attached to Yang Aff.).<sup>1</sup>

The contract provided that “[e]mployment may be terminated by either Government or Employee on the giving of written notice of termination at least sixty (60) calendar days prior to the effective date of cancellation of this contract.” (Complaint ¶ 19).

“A disciplinary proceeding was initiated against plaintiff in March of 2003 **1268** alleging that the plaintiff was engaged in the unauthorized practice of law by serving as legal counsel to the President. On June 12, 2003, the disciplinary panel entered its order suspending plaintiff from the practice of law for a period of four (4) months following his successful completion of all parts of the Palau bar examination.” (Complaint ¶ 24).

“On July 14, 2003, plaintiff received a memorandum declaring that his contract would be terminated effective July 25, 2003. The basis for the termination was declared to be the order of the Court suspending plaintiff from the practice of law for a period of four (4) months following his passing of all parts of the Palau bar examination. According to the memorandum, . . . the Office of the President took the position that such a sanction meant that plaintiff ‘[would] not be able to practice law in the Republic for at least six (6) months’ and required that plaintiff be dismissed.” (Complaint ¶ 26; Ex. 2).

“On or about January 17, 2001, the Court issued its opinion in Disciplinary Proceeding No. 00-05, *In the Matter of Larry Goddard*. In the *Goddard* matter, the Court banned Larry Goddard (“Goddard”), who, like plaintiff, was at the time legal counsel to President Remengesau, from the practice of law until such time as he successfully completed all parts of the Palau bar examination and became admitted to practice law in the Republic of Palau. Goddard failed to pass all parts of the bar examination in his first attempt and had to retake part of the bar examination at its next offering. As a result, upon information and belief, Goddard was prohibited from practicing law in the Republic of Palau for over six months. No adverse employment action was taken against Goddard in spite of the fact that he was unable to practice law for over six months.” (Complaint ¶ 28).

“As part of the equal protection granted to plaintiff under the Constitution of the Republic of Palau, plaintiff, as legal counsel to the President, was entitled to be treated as well as and no worse than the other legal counsel to the President, Larry Goddard.” (Complaint ¶ 45).

Perrin responded to his termination by filing this lawsuit. The complaint alleges the following three causes of action: (1) breach of contract, (2) violation of his right to equal protection, and (3) violation of his right to procedural and substantive due process.

**MOTION TO DISMISS  
PRESIDENT REMENGESAU**

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<sup>1</sup>Perrin did not attach a copy of his contract to his Complaint. At the hearing, both parties agreed that the Court can consider the contract.

The Court begins with Count I, breach of contract. It is clear that Perrin's allegations of benefits due to him under the contract are more than sufficient to withstand a motion to dismiss. The allegations are taken as true and they stand as such at this juncture. But defendants' motion with respect to Count I is only to dismiss the President as he is not a party to the contract. Only a party to a contract can be liable for breaching it. 17A Am. Jur. 2d *Contracts* § 412 (2004). In other words, the President cannot breach a contract to which he is not a party. The Republic of Palau, not the President, is Perrin's "employer" under the contract. (Complaint ¶ 5). Accordingly, Count I is dismissed as to defendant President of the Republic of Palau.

### **DUE PROCESS AND EQUAL PROTECTION**

Perrin alleges that when the Government terminated his position, it violated his rights under the due process and equal protection clauses of the Palau Constitution. The due process clause, found at Article IV, Section 6 of the Palau **L269** Constitution, provides that, "[t]he government shall take no action to deprive any person of life, liberty, or property without due process of law." The doctrine of due process has two components: procedural and substantive. *Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206, 209 (Tr. Div. 1985). Under procedural due process, a person cannot be deprived of property without notice and an opportunity to be heard. *Id.*<sup>2</sup>

Under substantive due process, governmental action "shall not be unreasonable, arbitrary, or capricious, and . . . the means selected shall have a real and substantial relation to the object sought to be attained." *Governor of Kayangel*, 1 ROP Intrm. at 210-11 (quoting *Nebbia v. New York*, 54 S. Ct. 505, 511 (1934)).

The equal protection clause is found at Article IV, Section 5 of the Palau Constitution. It reads in part that "[e]very person shall be equal under the law and shall be entitled to equal protection. The government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation."

There are at least two levels of judicial review when governmental action, such as a statute or conduct pursuant to law, is challenged under both the due process and equal protection clauses. The minimal level of judicial review is known as the "rational basis" test. *See U.S. R.R. Retirement Bd. v. Fritz*, 101 S. Ct. 453, 459-60 (1980).<sup>3</sup> In applying this level of review, governmental action will be upheld if there is a rational relationship between the action taken and the objective. The challenger has the burden of proving that the statute or the governmental action has no rational relationship to its stated objective. *Id.*

The second and the most stringent level of judicial review is used when constitutional rights have been violated or when governmental action creates "suspect" classifications, such as

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<sup>2</sup>Perrin has abandoned his procedural due process claim. (Perrin Opp'n at 8).

<sup>3</sup>Palau courts may look to U.S. case law for guidance, especially those cases interpreting identical or similar constitutional provisions. *Yano*, 3 ROP Intrm. at 181 n.1.

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those based on race or national origin. This level of review is known as “strict scrutiny.” Under this test, a law or governmental conduct will only be upheld if it is necessary to achieve a “compelling” governmental purpose. *Adarand Constructors v. Pena*, 115 S. Ct. 2097, 2113 (1995). Here the government has the burden of proving that it has a “compelling interest.” *Id.*

It follows that whether this Court uses the “rational basis” test or the “strict scrutiny” test depends on the private interest Perrin is seeking to protect under the due process and equal protection clauses. What kind of interest is Perrin claiming? Is that interest constitutionally protected?

The Court believes that Perrin’s interest is in continued employment under his contract with the Government. This interest is created by the contract and not by the Constitution. *See Bd. of Regents of State Colls. v. Roth*, 92 S. Ct. 2701, 2709 (1972)). In order for this interest in his continued employment to rise to the level of a constitutional right, Perrin must “have a legitimate claim of *entitlement* to it.” *Id.* 1270 (emphasis added); *see also Randall v. Buena Vista County Hosp.*, 75 F. Supp.2d 946, 954-55 (N.D. Iowa 1999). Perrin cannot show that he is entitled to continue to work even after the Government has exercised its right to terminate him.

Perrin has no meritorious constitutional claims. Even assuming that his claims of due process and equal protection violations have merit, both claims must fail. Perrin was terminated because he was no longer licensed to practice law in Palau for at least six months. This is more than just reasonable justification for his termination. In fact, had the Government continued to employ Perrin in his position as legal counsel, the Government would have been aiding him in the unauthorized practice of law. Perrin’s inability to practice law may even have been a “compelling” justification to end the contract.

Perrin further claims that his equal protection rights were violated because Goddard, who also flunked the Palau bar and was not eligible to practice law for a certain period of time until he took and passed the bar, was not terminated as legal counsel to then Vice-President Remengesau. The Court believes that had Goddard been terminated, he, too, would not have had a constitutional or contractual right to continue to work as legal counsel.

Whether it is a class of one, Perrin, *see Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074-75 (2000), or a class of two, Perrin and Goddard, neither status confers a constitutional right to continued employment on Perrin nor creates a “suspect” classification that deserves constitutional protection. The fact that Goddard was not terminated does not “entitle” Perrin to continued employment as legal counsel to the President.

In conclusion, Perrin’s claims of due process and equal protection violations are without merit. His rights are controlled by his contract with the Government. Assuming that his constitutional claims have merit, Perrin cannot show that his termination was not reasonable. The Government’s reason to terminate him under the contract was required, for he was no longer able to do what he was hired to do for at least six months. This is a compelling reason to justify the termination under the “strict scrutiny” test if constitutional rights or “suspect” classifications were present in this case, which they are not.

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Accordingly, Counts II and III are hereby dismissed.