

**KYOKO APRIL,  
Appellant,**

**v.**

**PALAU PUBLIC UTILITIES CORP.,  
Appellee.**

CIVIL APPEAL NO. 08-038  
Civil Action No. 06-048

Supreme Court, Appellate Division  
Republic of Palau

Decided: November 3, 2009

[1] **Constitutional Law:** Due Process

Constitutional due process is only due when a government actor acts to the detriment of a person's life, liberty, or property rights.

[2] **Constitutional Law:** Due Process

A public corporation wholly-owned by the national government and over which the government exercises significant power of control qualifies as a government actor for due process purposes.

[3] **Constitutional Law:** Due Process

Under procedural due process a government actor must properly adhere to its own procedure in depriving a person of life, liberty, or property.

[4] **Constitutional Law:** Due Process

The hallmark of procedural due process is the requirement that the government provide

notice and an opportunity to be heard before depriving a person of life, liberty, or property.

[5] **Constitutional Law:** Due Process

The level of procedure “due” to an individual under procedural due process varies depending on the circumstances.

[6] **Constitutional Law:** Due Process

Damages for a due process violation should be calculated only to compensate a plaintiff for the affront of suffering a deprivation of process. In an action for lack of adequate process preceding a termination from government employment, back pay should only be ordered if proper process would have resulted in the employee’s reinstatement; otherwise, nominal damages are appropriate.

[7] **Employment Law:** Government

Although citizens do not generally have a right to public employment, it is impermissible for a public employer to force employees to surrender fundamental rights as a condition of their employment. At the same time, however, public employers must be afforded sufficient autonomy to oversee and reprimand their employees lest every grievance be elevated to a matter of constitutional proportions.

[8] **Constitutional Law:** Freedom of Expression

The government is free to regulate the speech of its employees when public employees speak on behalf of the government. The government may, in some instances, regulate public

employees’ personal speech on matters not of public concern, especially where the speech relates to the workplace. But, absent a powerful justification, the government may not punish public employees for expressing themselves on issues of public concern.

[9] **Constitutional Law:** Freedom of Expression

Not all expression regarding a public employer is a “matter of public concern.” It is the gravity of the substance of the expression that dictates whether a matter concerns only a few individuals or rises to the level of public concern.

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Counsel for Appellee: Oldiais NgiraiKelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Kyoko April appeals the Trial Division’s grant of judgment in favor of Palau Public Utilities Corporation (“PPUC”) in her suit stemming from her 2004 termination from PPUC’s employ. April claims that her termination violated constitutionally-guaranteed rights to due process and freedom of expression. For the reasons set forth herein, we affirm-in-part, reverse-in-part, and

remand to the Trial Division for calculation of damages.

### **BACKGROUND**

No material facts are in dispute. PPUC hired April as a clerk in 1996. In the years that followed April worked her way up to the position of Administrative Assistant to the General Manager. In 2002, the then-General Manager, Noriwo Ubedei, fired the Human Resources Officer. Ubedei delegated to April the task of managing the recruitment process to find a suitable replacement.

April advertised the open Human Resources Officer position and set up interviews. The interview process consisted of a written test, an initial interview with April, and then a second interview with the Comptroller. PPUC received five applications for the position. One applicant withdrew her application, another was off-island and unable to interview, two were determined to be unsuitable by April based on their test performance, and one was deemed unsuitable by the Comptroller.

With no suitable candidates remaining, Ubedei asked April if she would formally assume the Human Resources Officer position. April declined the invitation because the position came with a smaller salary than she received in her position as Administrative Assistant. Ubedei then created a new, more highly compensated, manager-level position, Human Resources Manager, and asked April to fill that position. April took on the new Human Resources Manager position and retained her post as Administrative Assistant to the General Manager as well. The PPUC Board of Directors (“Board”) received a

memorandum apprising them of April’s expanded role in the new position and approved funding for the position in the budget.

Approximately two years later, the Board took an interest in the Human Resources Manager position, specifically the process by which April attained the position. The Board questioned the propriety of April’s role in screening applicants for a position that she then effectively filled herself. The Board determined, in an Executive Meeting, that April’s hiring was not procedurally proper. The Board directed the then-Acting General Manager, Rukebai Inabo, to remove April from the Human Resources Manager position and to re-announce the vacancy. April was removed from the Human Resources Manager position on September 30, 2004, but retained her position as Administrative Assistant to the General Manager.

April, discontent with her demotion, sought a meeting with the Board, but such a meeting never occurred. April contacted then-President Tommy Remengesau, Jr. and then-Delegate Kerai Mariur to grieve her demotion. Following April’s complaints, Delegate Mariur criticized PPUC for the demotion of an unnamed employee during a televised House of Delegates session.

On October 13, 2004, April received a memo from Inabo seeking her resignation, citing April’s violation of a PPUC personnel rule “prohibit[ing] employees from making public statements or displays unfavorable on the Company or its employees.” April refused to resign, and, later that same day, she received a memo from the newly-minted General Manager, Dallas Peavey, terminating

her employment for the reason stated in the resignation request. April filed suit in the Trial Division on March 3, 2006, and following trial, the court below issued a June 12, 2008, opinion denying April's claim and granting judgment in PPUC's favor. April then filed a timely notice of appeal.

### STANDARD OF REVIEW

Due process issues are reviewed *de novo* when, as here, factual issues are not in dispute. *Lewiil Clan v. Edaruchei Clan*, 13 ROP 62, 66 (2006). The same standard applies to review of other legal conclusions as well. *Id.* at 63.

### DISCUSSION

#### I. Due Process

April complains that her termination lacked proper procedure whereby PPUC violated her right to due process as guaranteed by the Palau Constitution. The Constitution reads in pertinent part: "The government shall take no action to deprive any person of life, liberty, or property without due process of law . . . ." ROP Const. art. IV, § 6.

[1, 2] Due process is only due when a government actor acts to the detriment of a person's life, liberty, or property rights. The first inquiry therefore is whether PPUC qualifies as a government actor. PPUC is a "Public Corporation of the Republic of Palau created by the Republic of Palau." (Compl. ¶ 2; Answer ¶ 1); *see* 37 PNC § 403(a). "Public corporation," with regard to PPUC, means "an entity wholly-owned by the national government, doing business as a corporation

formed under the laws of the Republic." 37 PNC § 402(d). All members of the Board are "appointed by the President of the Republic of Palau with the advice and consent of the Senate." 37 PNC § 404(b). Because it is a public corporation wholly-owned by the national government and the government exercises significant power of control over its operations (through the appointment of Board members), PPUC qualifies as a government actor for due process purposes.

The second inquiry is whether any of April's three due process rights—life, liberty, or property—were violated. PPUC defends itself with the claim that April, as a non-contractual employee, had no property (or any other) right to continue in its employ. We need not look past the pleadings to resolve the issue.<sup>1</sup> PPUC admitted, in response to paragraph 10 of April's Complaint, that "[April] had a right to continued employment so long as she did her job properly." (Answer ¶ 1.) Although PPUC now claims that April had no right to continued employment, we need not inquire into the basis for this right, as it was admitted by the most formal means possible.<sup>2</sup> *Cf. Palau Marine Indus. Corp. v. Pac. Call Invs., Ltd.*, 9 ROP 67, 71 (2002) (even withdrawn pleadings can still constitute an admission of a party).

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<sup>1</sup> The parties' pleadings in the Trial Division are open for consideration on appeal. ROP R. App. P. 10(a).

<sup>2</sup> The Court does not today consider what property rights an at-will public employee maintains in their continued employment absent an employer admission of such a right.

Because PPUC, a government actor, deprived April of her right to continued employment, she should have been afforded due process before that deprivation occurred. Although the specific nature of the alleged due process violation is unclear from April's appellate briefing, April pressed a procedural due process argument before the Trial Division. (See April's Closing Argument at 10 ("Why was I not given a verbal or written warning?" "Why wasn't I given another chance to correct what you think I did wrong?") (quoting Trial Testimony of April)). Therefore we will review the following due process contentions under the mantle of procedural due process: (1) whether April's termination violated PPUC's internal rules of procedure; and (2) whether April was terminated with sufficient notice and an opportunity to be heard.

#### **A. Conformity with Enumerated Procedure**

[3] Under procedural due process a government actor must properly adhere to its own procedure in depriving a person of life, liberty, or property. Such procedures ensure that the government acts with an even hand. April claims that by statute the General Manager of PPUC had sole authority to terminate her employment and that her termination was improper because it came by way of instruction by the Board to the General Manager.

Legislation grants the General Manager the power to "[t]o select, hire and terminate the employees of [PPUC], except as otherwise provided in this chapter . . . and to plan, organize, and control the services of

such employees in the exercise of the powers of [PPUC] under the general direction of the Board and the policies established by the Board." 37 PNC § 407(b)(5). Those powers, however, are tempered by the requirement that the General Manager act "in accordance with the oversight of and policies established by the Board." 37 PNC § 407(b). Therefore the Board maintains oversight of employee terminations through the General Manager and April's termination did not violate these procedures. April's appeal fails on this front.

#### **B. Notice and an Opportunity to be Heard**

[4, 5] The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property. See *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999). Of course, one procedure does not fit all. A criminal defendant facing an extended prison sentence is due more process than a contractual government employee facing termination of their contract. See *Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). Here, April was afforded neither notice of her termination nor an opportunity to be heard. She received a memo requesting her resignation. She refused and was terminated immediately. April did not receive even a minimal level of process before deprivation of her continued employment, therefore her due process was violated.

[6] Damages for a due process violation should be calculated only to compensate a

plaintiff for the affront of suffering a deprivation of process. Only if proper process would have resulted in April's reinstatement should she be allowed to recover anything resembling back pay or compensation for her termination. If notice and an opportunity to be heard would have left her in the same position employment-wise, nominal damages are likely appropriate. *See Zinermon v. Burch*, 110 S. Ct. 975, 983 n.11 (1990) (“[I]n cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages.”).

## II. Freedom of Expression

[7] Although citizens do not generally have a right to public employment, it is impermissible for a public employer to force employees to surrender fundamental rights as a condition of their employment. Otherwise public employers would be free to require their employees to vote for a certain candidate or join a certain religion. At the same time, however, public employers must be afforded sufficient autonomy to oversee and reprimand their employees lest every grievance be elevated to a matter of constitutional proportions.

The Trial Division followed the teachings of United States case law, whereby public employers are prohibited from abridging their employees' right to express themselves as citizens on matters of public concern. Civ. Act. No. 06-048, Decision at 8-9 (Tr. Div. June 12, 2008.) The court below also followed the American view that when public employees speak as employees or speak

on matters not of public concern, public employers “enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Id.* at 9 (quoting *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983); *see also Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (“The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.” (citations omitted))).

At the outset we must be mindful that our guarantee of free expression, located in Article IV, Section 2 of the Palau Constitution, is not a mirror image of the American guarantee to freedom of speech, located in the First Amendment to the United States Constitution. Much can depend, in constitutional construction, on the variation of language. Furthermore, the freedom of expression jurisprudence of the United States has ventured far afield from the actual language contained in their constitution. We must be wary not to follow a foreign jurisdiction's reasoning into unsteady territory that strays from our Constitution as informed by our traditional values. At the same time, we must not shun borrowed wisdom, for it comes at a lesser price than knowledge paid for by the painful injustice of error and adjustment.

[8] It would be unworkable to find that public employers are wholly powerless to regulate the expression of their employees. When public employees speak as employees, their expression is in effect not their own.

They communicate, not as private citizens, but as representatives of their government employer. *See Garcetti*, 126 S. Ct. at 1960. The government must be free to regulate its own expression. And, because the government’s expression can only be carried forth by human couriers, the government must be free to oversee its employees without judicial interference when public employees speak as government agents.

But when a public employee speaks as a private citizen the government no longer has the same level of self-interest in the employee’s expression. Despite that diminished interest, all citizen-speech by public employees cannot lie outside the bounds of employer oversight. Public employees, by virtue of the identity of their employer, do not enjoy unfettered leeway to publicly air their personal workplace grievances without repercussion. *See Connick*, 103 S. Ct. at 1690. To impose such a bar on public employers—a constitutional bar no less—would impede the fruitful operation of the Republic.<sup>3</sup>

Stifling expression on matters of public concern, however, is a much graver matter. Speech on matters of public concern is at the heart of our guarantee to freedom of expression. Free discourse regarding such matters is a bedrock of any democratic

society. Absent a powerful justification, punishing public employees for expressing themselves on issues of public concern—whether those issues relate to the public employer or not—would run afoul of our constitutional guarantee to freedom of expression. *See Garcetti*, 126 S. Ct. at 1958.

[9] The battle line going forward will be to define which areas qualify as those “of public concern” and which do not. Although, in the literal sense, because public employers are funded with public money, all facets of a public employer’s operation concern the public. But this is not what we mean today by a “matter of public concern.” Reviewing courts should inspect the gravity of the substance of the expression to delineate between matters that may concern only a few individuals and those that truly rise to the level of public concern. *See Connick*, 103 S. Ct. at 1690-91.

With these guideposts staked out, we turn to the facts at hand. April was punished for going over her supervisors’ heads and sharing a personal gripe—discontentment regarding her demotion—with President Remengesau and Delegate Mariur. Her demotion was not a matter of public concern. Therefore (within the bounds of due process and other statutory and constitutional constraints) PPUC was free to exercise its powers as employer to react to April’s expression as it felt was appropriate. It saw termination appropriate and we will not—in the name of freedom of

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<sup>3</sup> Although the Court lacks the ability to forecast all future factual scenarios it would seem extraordinary that a public employer’s interest in orderly administration would trump an employee’s right to speak as a private citizen on matters not of public concern unrelated to the workplace.

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expression—substitute our judgment for that of PPUC.<sup>4</sup>

### CONCLUSION

For the reasons stated herein, we AFFIRM the Trial Division's denial of April's free expression claim. We REVERSE the Trial Division's wrongful termination decision and find that a due process violation occurred. We therefore REMAND to the Trial Division to calculate damages in the first instance.

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<sup>4</sup> April has mounted an as-applied freedom of expression challenge both before the Trial Division and on appeal. Therefore, while we will not assess the facial validity of the PPUC personnel rule restricting employee expression, we do caution PPUC that it would be prudent to revise the rule to conform with the law as laid out in this opinion.