

Becheserrak v. ROP, 5 ROP Intrm. 63 (1995)

KATSUTOSHI BECHESERRAK

Appellant,

v.

REPUBLIC OF PALAU

Appellee.

CIVIL APPEAL NO. 4-94

Civil Action No. 781-88

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: February 22, 1995

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Juliet T. Browne, AAG

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice;
PETER T. HOFFMAN, Associate Justice

HOFFMAN, Justice:

Katsutoshi Becheserrak challenged an administrative decision terminating his employment with the Republic of Palau. Both parties having moved for summary judgment, the trial court denied Becheserrak's motion and entered judgment on the Republic's motion. Becheserrak appeals from this judgment.

This is the second time this case is before us. See *Becheserrak v. Republic of Palau*, 4 ROP Intrm. 103 (1993). In our previous opinion, we were called upon to clarify procedures for challenging transfers and dismissals under the National Public Service System Act, 33 PNC §§ 101 et seq. (the "Act"). On this appeal we consider under what circumstances an employee protected by the Act may be transferred to a new position.

I. FACTUAL BACKGROUND

Becheserrak began teaching at Palau High School in 1968 where later he was assigned to handle student discipline. In 1987 the principal spoke to the Minister of Education about transferring Becheserrak to the Community Education Program and shortly thereafter Becheserrak was assigned to this new position.

A notice dated October 20, 1987 identified October 26, 1987 as the effective date of

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Becheserrak's transfer. Although the new position was at the same pay level and title, Classroom Teacher III, Becheserrak objected to the transfer because the duties were not similar to his old position. His responsibility in the new **¶64** position would have been to draft a plan to reactivate the dormant Community Education Program. Becheserrak also objected that the new position was funded by the U.S. government, and that with implementation of Palau's Compact of Free Association with the United States, his position might be terminated.

Becheserrak met with the Assistant Director of the Bureau of Education to discuss his objections to the transfer. He was warned at that time that if he failed to report to his new position, he would be dismissed for being absent without official leave. The Director of the Bureau of Education also reviewed Becheserrak's objections to the transfer and instructed him to report to his new assignment.

Becheserrak never reported to his new position, but instead demanded additional training, a change in job title, and a salary increase. He continued to report to his old position at Palau High School until February of 1988, when he was terminated under Civil Service Rule 18.5 for being absent from his new position for more than 15 consecutive working days.

The trial court initially dismissed Becheserrak's action because public employees cannot bring civil actions to contest job transfers. This court agreed that public employees cannot file civil actions to contest transfers, but remanded because Becheserrak was contesting his dismissal rather than just the transfer. This court held that Becheserrak could, on remand, show that his transfer was invalid. *Becheserrak*, 4 ROP Intrm. at 109.

On remand the trial court made three findings that are now in dispute. First, the court found that providing written notice only six days before the transfer was a de minimis violation of Rule 16.10 of the Civil Service Rules, which requires two weeks' notice to the supervisor who is losing the employee. Second, the court found that Becheserrak was properly dismissed under Rule 18.5 for being absent because he never reported to his new job. Finally, the court found that Becheserrak lacked standing to challenge his transfer under section 403 of the Act, which establishes procedures to fill new and vacant civil service positions.

II. STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo, with all evidence and inferences viewed in the light most favorable to the nonmoving party, to determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Rechelulk v. Tmilchol*, 2 ROP Intrm. 277, 281 (1991); see also ROP **¶65** Civ. Proc. Rule 56(c). The same standard applies where, as here, there are cross-motions for summary judgment. *Rechelulk*, 2 ROP Intrm. at 282.

III. DISCUSSION

A. FAILURE TO GIVE TWO WEEKS NOTICE

The first issue is whether Becheserrak's transfer is void because of the Republic's failure to comply with Civil Service Rule 16.10 requiring that a "losing supervisor" receive two weeks notice in which to object to an employee's transfer. ¹ The trial court found that any violation of the rule was de minimis only. We agree.

Procedural due process requires that an agency follow its own lawful regulations. See Tolhurst v. Micronesian Occupational Center, 6 TTR 296, 298-99 (Tr. Div. 1973). To establish a violation of procedural due process and thus invalidate his dismissal, Becheserrak must prove that the failure to comply with Rule 16.10 in some way caused him harm. See Martin v. Federal Aviation Administration, 795 F.2d 995, 997 (Fed. Cir. 1986); Crimaldi v. United States, 651 F.2d 151, 154 (2d Cir. 1981). Becheserrak's supervisor consented to his transfer. There is nothing in the record suggesting that the supervisor's consent would have been withheld or that the decision to transfer would have been altered in any way if Rule 16.10 had been fully complied with. Without such evidence, Becheserrak cannot demonstrate that he has been adversely affected by the foreshortened notice to his supervisor.

B. DISMISSAL FOR BEING AWOL

The second issue is whether Becheserrak was properly dismissed under Civil Service Rule 18.5 of the National Civil Service Board for being absent without leave for more than 15 **166** consecutive working days. ² He argues that because he continued reporting to his old position, he was not absent from his job and therefore could not be dismissed under Rule 18.5. The underlying premise of Becheserrak's claim is that his transfer was invalid. If his transfer was valid, then his dismissal under Rule 18.5 was perfectly proper. On the other hand, if his transfer was invalid, an issue to be discussed below, then there was no obligation on his part to

¹ Rule 16.10 of the Civil Service Rules states:

"An employee who is transferred to a different position at the same pay level, shall receive no change in compensation. A two (2)-week notice period must be given the losing supervisor or department prior to effecting a transfer, provided the losing supervisor consents to the transfer of his employee. An employee into the same class within the system may not serve a probationary period."

² Civil Service Rule 18.5 states:

"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."

report to the new position.

C. VALIDITY OF TRANSFER

1. Standing

The trial court held that Becheserrak lacked standing to challenge his transfer as being violative of section 403.³ That section sets forth procedures to be followed in filling new or vacant civil service positions, but as Becheserrak pointedly notes, is silent about transfers between positions. The trial court found that Becheserrak did not show that being transferred to another position at the same salary level caused him injury and that he did not fall within the zone of interests protected or regulated by section 403.

We disagree. The Palau Constitution states "[t]he judicial power shall extend to all matters in law and equity." Palau Const. Art. X, § 5. Our Court has held this language expresses the intent of the constitutional framers that the Palau courts exercise jurisdiction over "any and all matters which traditionally require judicial resolution." *Gibbons v. Government of the Republic of Palau*, 1 ROP Intrm. 634, 637 (1989). From this language, we have adopted "a very liberal approach in determining whether a plaintiff has standing to bring a particular action." *Id.*

¶67 As explained in *Gibbons*, "[t]he key to standing is an actual or threatened injury." 1 ROP Intrm. at 637-38. See also *Teriong v. State of Airai*, 1 ROP Intrm. 664, 679 (1989). Only slight injury need be alleged. "The basic idea that comes out in numerous cases is that an identifiable trifle [of an injury] is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Kenneth C. Davis, *Administrative Law Treatise* § 22.09-5, at 748 (Supp. 1970); see also *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 93 S.Ct. 2405, 2417 n.14 (1973). Certainly Becheserrak's discharge is more than a trifling injury sufficient to give him standing here.

The trial court correctly noted that a second inquiry may be required where, as here, a party seeks to challenge an action of a governmental agency. The trial court found that Becheserrak did not fall within the "zone of interests" protected by section 403. We disagree with this analysis.

As recently explained by the United States Supreme Court, the "zone of interest" test "is a guide for deciding whether . . . a particular plaintiff should be heard to complain of a particular agency decision." *Clarke v. Security Industry Ass'n*, 107 S.Ct. 750, 757 (1987). The "zone of interest" test need not be applied, however, where there is an express grant of judicial review to a class of persons which includes the plaintiff. See *Family & Children's Center v. School City*, 13 F.3d 1052, 1059-60 (7th Cir.), cert. denied, 115 S.Ct. 420 (1994). Here, 33 PNC § 426 explicitly provides that "[a]n employee may contest his dismissal" and we have previously ruled that Becheserrak's claim properly falls within that provision. Since it is clear that this "particular plaintiff" was permitted to make his challenge, there was accordingly no need for the trial court

³ After this claim arose 33 PNC § 403 was amended in section 2 of RPPL No. 4-23, which became effective on August 18, 1994.

to engage in a separate analysis of whether Becheserrak falls within the "zone of interest" protected by section 403.

2. Section 403

Although the trial court did not reach the merits of Becheserrak's challenge to the validity of his transfer under section 403, we, having found that standing exists, may do so. "[A]n appellate court has the power to order summary judgment for appellant, both where he made no motion and also where he made a cross-motion in the trial court" 6 James W. Moore & Jeremy C. Wicker, Moore's Federal Practice § 56.27[2] at 56-860 to 56-861 (2d ed. 1988); see also id. § 56.27[3]. Exercising the power to grant summary judgment on appeal is particularly appropriate **L68** when the issue presented, as in this appeal, is purely one of statutory interpretation.

The issue squarely presented below is whether an employee under the National Public Service System may be transferred between positions without complying with the requirements of section 403.⁴ The starting point of our analysis is section 402 which states, in pertinent part, "[a]ll new positions which are created and all established positions which are covered by this division shall be filled only after an examination has been conducted and candidates interviewed

⁴ Before the section was amended by RPPL No. 4-23, 33 PNC § 403 stated:

"All vacancies and new positions in the public service shall be filled in the following manner:

(a) Whenever there is a position to be filled, the appropriate management official shall request the chairman of the Board to submit a list of persons eligible. The chairman shall thereupon certify a list of the five persons who scored highest in the most recent test for that position. The management official shall conduct interviews and take the appointment only from the list of eligible persons certified to him, unless there is no person acceptable to him on the list certified by the chairman, in which case he shall reject the list and request the chairman to submit a new list. In such event the chairman shall submit a new list of eligible persons selected in like manner.

(b) An appropriate management official may fill a vacant position in his department by promoting any regular employee in the department without examination if the employee meets the minimum class qualifications of the position to which he is to be promoted, and if the position is in the same series as the position held by the employee or is clearly an upward progression in the same career-ladder of positions.

(c) In the event that no eligible persons are available, the appropriate management official may, after notifying the Board, make a provisional appointment, for a period no longer than 90 days, of any person who meets the qualification standards for the class involved. The Board shall then conduct an examination within 90 day period."

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for the position, unless otherwise provided in section 169 403" 33 PNC § 402. Becheserrak did not take an examination nor was he interviewed for his new position. Therefore, it is to section 403 we must look to see if his transfer was valid. That section states that "[a]ll vacancies and new positions in the public service" shall be filled from a list of five persons who scored highest in the most recent test for the position or by promoting any regular employee in the department. 33 PNC § 403. There was no contention before the trial court by either party that Becheserrak was on the list of those five persons who scored highest in the most recent test for the position nor that he was being promoted, only that he was being transferred.⁵

Section 403 does not provide for filling positions by transfer. ⁶ While one could easily argue for the benefits of creating a system of public employment that provides for transfers between positions, the Olbiil Era Kelulau chose not to do so. Nor does this appear to be merely an oversight, but instead a decided policy decision. ⁷ A system that would permit the transfer of unwanted employees would also provide supervisors with incentives for shifting unwanted employees to other offices or departments instead of going through the more difficult task of demoting or terminating an unsatisfactory employee. See 33 PNC § 425. Such a system would also permit supervisors to punish disfavored employees by transferring them to positions with the same title and pay, but more onerous duties or less secure funding. Prohibiting lateral transfers within the National Public Service System arguably contributes to several purposes of the Act, namely eliminating "unnecessary and inefficient employees" and building a career service "free from . . . reprisal." 33 PNC § 102(a).

⁵ A Presidential Order in effect at the time prohibited both new hires and promotions. We do not mean to suggest that any time an employee's duties are altered a transfer has occurred. But in this instance, even though Becheserrak retained the same title and pay, the parties treated his new duties and job location as a transfer and labelled it as such.

⁶ The dissent would have us rewrite the Act to provide for transfers where no such authorization now exists. There are many advantages, as the dissent notes, to a civil service system that provides for transfers between positions as there are advantages to a system that prohibits such transfers. It is not for this court to decide whether it is more desirable to permit or prohibit transfers; that decision is for the OEK to make.

⁷ The statute, as amended by RPPL No. 4-23, likewise does not provide for transfers within the Civil Service System.

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¶70 It is significant that the Act in other sections does not mention transfers, but only appointments, demotions, terminations, and promotions. See 33 PNC §§ 102(b), 202, 306(a), 404, 423, 425, and 426. The one use of the term transfer occurs in section 418, but this section is directed to geographic transfers, presumably while maintaining the same position within the system, and not transfers between positions. 33 PNC § 418.

The Republic points to Rule 16.10 of the Board's Rules as authorizing transfers. This rule, while not directly providing for transfers, does implicitly authorize them.⁸ But the Board through rules and regulations cannot accomplish what is prohibited by statute:

Administrative regulations must be consistent with the constitutional or statutory authority by which they are authorized. Administrative rules may not enlarge, alter or restrict the provisions of the statute being administered. Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted, so administrative regulations that are inconsistent or out of harmony with the statute or that conflict with the statute, for instance by extending or restricting the statute contrary to its meaning, or that modify or amend the statute or enlarge or impair its scope are invalid or void, and courts not only may, but it is their obligation to strike down such regulations.

2 Am. Jur. 2d Administrative Law § 228, at 244-45 (1994). See also Kenneth C. Davis, Administrative Law Text § 6.04, at 145 (3d ed. 1972) ("An agency obviously is without power to create either a standard or a rule which is contrary to the express or implied intent of a statute . . .").

A rule that permits lateral transfers directly contradicts section 404 which states "[e]very member of the public service shall be entitled to hold his position during good behavior, subject to suspension, demotion, or dismissal only as provided in this division and in the regulations promulgated by the Board." 33 PNC § 404. Until he was suspended, demoted, dismissed or, pursuant to section 403, promoted, Becheserrak was entitled to retain his original position. Therefore, his transfer was in violation of section 403 and was void.

¶71 IV. CONCLUSION

In summary, Becheserrak had standing to challenge his dismissal as being based on a transfer in violation of section 403. Becheserrak's transfer was in violation of section 403 and his dismissal based on his failure to report to his new position must necessarily be void. Summary judgment should be entered accordingly. For the foregoing reasons, this action is remanded to the Trial Division for further proceedings consistent with this opinion.

Justice BEATTIE, concurring in part and dissenting in part.

⁸ The text of Rule 16.10 is recited in footnote 1. Transfers are also referred to in Rules 5.1 and 8.4.

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I join in parts II and III A. of the majority's opinion. Because I do not agree that Becheserrak's transfer was invalid, I dissent in parts III B., III C. and in the judgment.

The National Public Service System Act, 33 PNC § 101 et seq., (the "Act") provides that all positions are to be classified on the basis of their similarities in duties and responsibilities, that each class is to be given a title, and that the class titles "shall be the official titles of all positions involved and shall be used for all personnel . . . purposes". 33 PNC § 406. Prior to his transfer, Becheserrak held a Classroom Teacher III position at the Palau High School. It is not suggested by either party that he was hired into the Classroom III position without having taken an examination. He was transferred to a Classroom Teacher III position with the Community Education Program. Both positions were in the Bureau of Education and had the same salary. His transfer was therefore from one Classroom Teacher III position to another in the same department and with the same salary.

To assure that positions are filled based on merit principles, § 402 of the Act provides that vacant positions "shall be filled only after an examination has been conducted and candidates interviewed for the position unless otherwise provided in section 403". Section 403 provides an exception to the examination requirement and expressly provides that, under certain circumstances, an employee already in the public service can be promoted to a position without having to take an examination. Reading sections 402 and 403 together, I see no intent to prohibit an employee who has already proven to be qualified for a Classroom Teacher III position from transferring into another Classroom Teacher III position. Reading the statute in light of the overall purposes of the Act, it is fair to conclude that the legislature presumed that the employee in that case would already have passed 172 the Classroom Teacher III test and for that reason did not deem it necessary to specify such a transfer as an exception to the examination requirement. However, because an employee in a lower position would not have taken the examination for the higher position, a specific exception was made for promotions, allowing management to promote a qualified employee by transferring him into a higher paying position.

I do not view § 404, which provides that an employee in the public service "shall be entitled to hold his position during good behavior", as barring transfers. It means only that an employee in public service is more than an employee at will, so that he cannot be subject to arbitrary action affecting his position, and has "reasonable job security . . . including the right to judicial review" of certain personnel actions. 33 PNC § 202(e).

When we engage in the difficult process of legislative interpretation, we can obtain valuable insight and guidance from examining the interpretation given to a statute by the agency responsible for administering it. 73 Am. Jur. 2d Statutes, § 168 at 371. The National Service Board (the "Board") is responsible for administering the Act and for promulgating regulations to carry out the provisions of the Act. 33 PNC § 306. The Board's regulations make it clear that it interprets the Act as allowing transfers such as the one Becheserrak received. Regulation 5.1 provides that the appropriate management official must fill a vacant position from a list of eligible candidates "unless he elects to fill a position by transfer, promotion or demotion". (emphasis supplied) Regulation 16.10 provides that an "employee transferred into the same class within the [public service] may not serve a probationary period". (emphasis supplied)

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Regulation 8.4 requires that employees be transferred into other positions where possible instead of resorting to a reduction-in-force.

In construing a statute, the legislative intent is the most important and controlling factor to be considered. 73 Am. Jur. 2d Statutes, § 145 at 351. In August of 1994, after the Board's regulations had been in place for almost ten years, the legislature amended the Act. See RPPL No. 4-23. That presented an ideal opportunity for the legislature to put a stop to the transfers allowed by the regulations if indeed the legislature had intended to prohibit them in the Act. Significantly, it did not enact any amendments which prohibit the transfers which are provided for in the regulations. This is a strong indication that the legislature did not intend to prohibit the transfers.

The majority's construction of the Act suffers from focusing too narrowly on § 403. Different sections of the Act **L73** illuminate each other, and therefore the Act should be construed as a whole, giving effect to each section and harmonizing the sections with each other and with the purpose of the Act. Demotions are expressly authorized by the Act. 33 PNC § 425. This clearly authorizes the transfer of an employee into a position with a lower salary and/or lower rank. Under the majority's construction of § 403, however, only transfers which are promotions are authorized. Reductions-in-force are expressly authorized by the Act if necessary due to lack of work or funds, and the Act specifies that regulations shall be promulgated using merit as the primary basis for establishing the order of layoffs. 33 PNC § 423. Following this mandate, the Board's regulations contemplate that the most qualified employees be transferred to other positions instead of being terminated, if possible. This is not permitted by the majority's holding.

The majority's interpretation of the Act prevents management from filling a position by transferring an employee who has proven skills and merit and holds another position in the same class, yet it allows the filling of the position by the promotional transfer of an employee who has never held a position in the class and whose work skills for positions in that class are unproven. The court's holding today deprives management officials of the flexibility and discretion they must have in order to achieve the legislative goal of an efficient and competent work force, and is at odds with the legislative goal of attracting and retaining "career service" employees. See 33 PNC § 102. To achieve these goals, not only must management have some discretion to transfer employees in order to make the best use of its personnel, but employees must be able to take advantage of new opportunities that arise in the public service by transferring into them when approved by the appropriate management officials⁹.

Both of these points are illustrated by this case. At the time of Becheserrak's transfer, a Presidential Order was in effect which prohibited new hires and promotions. Thus, a transfer was the only way in which this important position could be filled. Moreover, this was not the first time Becheserrak had been transferred in his public service career. In 1985 he was

⁹ Although in this case Becheserrak objected to his transfer, the court's holding today that the Act does not authorize transfers would clearly bar the transfer even if he had consented to it. Under the majority's construction of section 403, the employee's consent to a transfer is irrelevant.

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transferred from teaching classes to work in the registrar's office 174 transferred from teaching classes to work in the registrar's office [sic] of Palau High School to handle student counseling and discipline¹⁰. He was apparently in favor of that transfer, having remained in that position until the transfer at issue.

Becheserrak's transfer was valid, and his failure to report to work at his new position was good cause for termination of his employment. Although my reasoning differs from the trial court's, I would affirm.

¹⁰ I do not read the court's decision as requiring that Becheserrak be reinstated into the position he held just prior to the transfer here at issue. Indeed, if Becheserrak is reinstated into the position he held just prior to the transfer here at issue, he will be reinstated into a position he held pursuant to a transfer which, under the court's holding today, was a void and invalid transfer. One can only speculate on how many other public service employees, previously transferred pursuant to the Board's regulations, will now find themselves holding jobs of questionable validity due to their void transfers.