Ngirutang v. ROP, 5 ROP Intrm. 280 (Tr. Div. 1994)

NGIRAITERONG NGIRUTANG
Plaintiff,

v.

REPUBLIC OF PALAU, represented by KAORU BRELL,
and President KUNIWO NAKAMURA,
Defendant.

CIVIL ACTION NO. 447-92

Supreme Court, Trial Division
Republic of Palau

Decision and order
Decided: October 25, 1994

NGIRAKLSONG, Chief Justice:

Before the Court is plaintiff's petition for reinstatement without loss of pay as an Administrative Assistant with the Bureau of Public Safety. Trial was held on this matter on May 31 and June 2, 1994. After considering all the testimony and evidence the Court finds that the reasons given for plaintiff's dismissal are substantiated by the record. Plaintiff's complaint is therefore dismissed.

Under the National Public Service System an employee may be dismissed for cause. 33 PNC § 425. If the dismissed employee ⊥281 appeals, the reviewing court must sustain the action if it finds that the reasons given for the dismissal are "substantiated or only partially substantiated." *Id.* at § 426(b). The "Notice of Adverse Action" delivered to plaintiff on November 18, 1992 stated that plaintiff was being dismissed for inexcusable neglect of duty, insubordination, dishonesty, inexcusable absence without leave, and "behavior which is of such a nature that it causes discredit to the Bureau of Public Safety."

The evidence produced at trial substantiates these claims. Documentation of plaintiff's failure to perform assigned tasks dates back to early 1989, when his supervisor expressed concern about his conduct and cautioned that "drastic action" would be taken if plaintiff did not improve his working habits. A contemporaneous record maintained by plaintiff's immediate supervisor, Morningstar Olkeriil, for all of 1992 reveals a consistent pattern of unexcused absences, a failure to satisfactorily perform routine tasks, a refusal to cooperate with management, and even dishonesty. Although plaintiff has contested some of the entries in Mr. Olkeriil's account, the Court is convinced, after hearing Mr. Olkeriil's testimony and finding him credible, that the contemporaneous record kept by Mr. Olkeriil accurately chronicles plaintiff's poor work performance.

The event which precipitated plaintiff's dismissal, or the "last straw," was plaintiff's

refusal to abide by his supervisor's order that he not take ten days off to assist the Counting and Tabulation Committee during the November, 1992 national elections. Plaintiff had previously worked for the Committee in September, 1992, taking seven days off without consulting his supervisor. By memo dated October 22, 1992 President Ngiratkel Etpison appointed plaintiff to the Tabulation Committee again, this time to serve from November 4 through 14. On November 2 plaintiff's supervisor notified the Election Commission that plaintiff would not be able to serve on the Tabulation Committee because of his existing work-load; on the next day Mr. Olkeriil notified plaintiff that he would be terminated if he worked for the Committee. Nevertheless, plaintiff ignored his supervisor's order and worked for the Committee.

Plaintiff now contends that the Bureau of Public Safety could not prevent him from working for the Committee once the President appointed him. However, David Ngirmidol, who was Chief of Public Affairs in 1992, testified that government employees appointed to election committees were required to obtain permission from their supervisors before serving. As plaintiff did not obtain this permission, he was not authorized to participate on the Tabulation Committee during working hours. By openly defying his supervisor's ⊥282 orders plaintiff was guilty of insubordination, which is punishable by termination. *See* National Public Service System Rule 11.4(c).

Plaintiff argues that his "Notice of Adverse Action" was procedurally defective because it was not "self-contained" as the NCSB rules require. *See id.* at Rule 11.6(b) ("The [termination] letter should be self-contained, so that a person unacquainted with the facts and circumstances involved can obtain from the letter a clear understanding of the reason(s) for the action."). The Notice states that plaintiff is being terminated for "the reasons specified in attachments 'A' and 'B'". Attachment 'A' is the aforementioned nine-page performance record compiled by Mr. Olkeriil; attachment 'B' is a shorter, one-page performance evaluation highlighting, in summary form, plaintiff's poor performance record. Although these documents were not actually attached to the "Notice of Adverse Action" it is undisputed that plaintiff reviewed his personnel file and copied the full texts of both attachments one week after he received the Notice and two weeks before the effective date of his termination. Thus, although the documents should have been attached to the Notice, management's failure to do so is harmless error since plaintiff, albeit through his own efforts, obtained them before the effective date of his dismissal.[1]

Plaintiff next argues that his dismissal is procedurally void because he was not afforded a pre-dismissal opportunity to be heard. NCSB Rule 11.9 states,

No action under this Part [including dismissal] may be taken until all available

[1] Plaintiff argues that Attachment 'B', plaintiff's performance evaluation, should not be considered in determining whether the reasons for his dismissal are substantiated because the performance evaluation "had not yet been made official" in that plaintiff had not participated in its preparation and had not signed it. *See* NCSB Rule 9. But the performance evaluation was attached to the "Notice of Adverse Action" merely to notify plaintiff of the grounds for his dismissal. Even if it may have been incomplete for official evaluation purposes under Rule 9, the performance evaluation could properly serve as notice of grounds for termination under Rule 11.6(b).

> facts, including wherever practicable, the employee's explanations, have been considered. Whenever an employee is dismissed, demoted ⊥283 or suspended, as provided for in Sub-part 11.5, the employee must be given the right to answer orally and/or in writing and to present documents and the testimony of witnesses on his behalf.

The record indicates that there were several meetings between plaintiff and his supervisors prior to November 18 at which plaintiff explained why he felt he should be allowed administrative leave to work for the Tabulation Committee. Plaintiff was warned orally and in writing that if he disobeyed his supervisor's orders he would be terminated. Plaintiff therefore was given fair notice and was also given an opportunity to be heard before he was dismissed. Plaintiff's claim that his dismissal occurred without notice or opportunity to be heard has no merit.

Finally, plaintiff argues that the civil service rules are unconstitutionally vague because they give management officials discretion to determine when adverse action should be taken. That management officials are given discretion to choose amongst possible adverse actions does not mean the rules are unconstitutionally vague. The determination as to whether a specific example or pattern of misconduct is sufficiently egregious to warrant dismissal as opposed to demotion or suspension must be made on a case-by-case basis; a personnel system that divested management of such discretion would be impractical, if not impossible. As long as employees are given fair notice of the types of conduct which may result in adverse action then it cannot be said that the rules are unconstitutionally vague. Because Rule 11.4 provides such notice, Plaintiff's vagueness argument is without merit.

For all of the reasons stated herein, the Court finds that the reasons given for plaintiff's dismissal are substantiated by the record. Plaintiff's complaint is therefore dismissed.