

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION**

<p>REPUBLIC OF PALAU, <i>Appellant,</i></p> <p style="text-align:center">v.</p> <p>NGARCHELONG STATE GOVERNMENT, NGARCHELONG STATE ASSEMBLY, and NGARCHELONG STATE GOVERNOR BROWNY SALVADOR, <i>Appellees.</i></p>

Cite as: 2019 Palau 5
Civil Appeal No. 18-016
Appeal from Civil Action No. 16-098

Decided: February 19, 2019

Counsel for Appellant	Timothy P. Zintak
Counsel for Appellees Ngarchelong State Government and Ngarchelong State Governor Browny Salvador	Johnson Toribiong
Counsel for Appellee Ngarchelong State Assembly	Vameline Singeo ¹

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION²

PER CURIAM:

[¶ 1] Browny Salvador, Governor of Ngarchelong State, pled guilty to Misconduct in Public Office and Criminal Violation of the Code of Ethics for authorizing an increase in pay for himself, retroactive to the prior year. After

¹ At the request of the Ngarchelong State Assembly, and with approval of the Court, counsel was allowed to withdraw from representation on February 8, 2019.

² The parties did not request oral argument in this appeal.

the original charges were filed by the Office of the Special Prosecutor (the OSP), the Ngarchelong State Assembly (the Assembly) enacted a law ratifying the expenditure of the funds he misappropriated. The OSP filed suit on behalf of the Republic of Palau against the Ngarchelong State Government (the State), the Assembly, and Governor Salvador, requesting declaratory and injunctive relief to the effect that the Assembly cannot enact, and the State cannot enforce, a law that ratifies the misappropriation of funds. The Trial Division denied the OSP's motion for summary judgment and declaratory relief and granted summary judgment for the State, the Assembly, and Governor Salvador.

[¶ 2] For the reasons discussed below, we **AFFIRM** the Trial Division's judgment.

BACKGROUND

[¶ 3] The salient facts are not in dispute. On September 3, 2014, both Governor Salvador and Ngarchelong State Treasurer Skaruno April signed a Personnel Action Form retroactive to October 1, 2013 that increased Governor Salvador's bi-weekly salary from \$872.80 to \$1,000. The Republic of Palau payroll register for the last pay period of the fiscal year (ending on October 4, 2014) indicates that Governor Salvador received \$1,000 for the two-week period, as well as a retroactive payment of \$3,180.

[¶ 4] In July 2015, the Assembly called for the OSP to investigate Governor Salvador's decision to raise his pay. Resolution No. 17-08 noted that the Personnel Action Form authorizing the retroactive pay increase "was done without any change in the law granting [a] salary increase for Governor Salvador." Ngarchelong State Assemb. Res. No. 17-08, 17th Leg., 5th Spec. Sess., at 25–26 (July 21, 2015). Further, the Assembly indicated that it was "extremely concerned that Governor Salvador may be getting paid illegally in that he may be receiving more money from the State Government than what he [should be] paid." *Id.* at 10–12.

[¶ 5] The ensuing investigation by the OSP resulted in the filing of criminal charges against Governor Salvador for Theft of Government Property in the First Degree (17 PNC § 2615); Misconduct in Public Office (17 PNC § 3918); and Criminal Violation of the Code of Ethics for accepting

compensation for performance of public duties other than as provided by law (33 PNC §§ 604(d)(2) & 611(a)).

[¶ 6] On the same day Governor Salvador was arraigned on those charges, Assembly Floor Leader Dwight Ngiraibai introduced NSGPL No. 16-68, which was enacted into law and signed by the Governor three days later. The purpose of the law was to retroactively approve Governor Salvador's pay raise.

[¶ 7] The OSP filed a complaint and motion for a temporary restraining order naming the State, the Assembly, and Governor Salvador as defendants. The OSP sought a declaratory judgment that NSGPL No. 16-68 was unconstitutional under both the Palau Constitution and the Ngarchelong State Constitution, as well as invalid under national law and an unlawful attempt to interfere with a criminal prosecution. The OSP also requested:

A final judgment and order striking down NSGPL No. 16-68 as unlawful, null and void *ab initio*, and all other legal or equitable relief which may be necessary to restore the state of affairs of Defendant Ngarchelong State Government to the conditions preceding the adoption of NSGPL No. 16-68.

Compl. Requested Relief ¶ 3.

[¶ 8] The Trial Division granted the temporary restraining order regarding the implementation of NSGPL No. 16-68 which remained in place as a preliminary injunction until vacated in the court's final judgment. All parties filed summary judgment motions. The Trial Division stayed the case pending the resolution of Governor Salvador's criminal charges, which ultimately ended in a Deferred Acceptance of Guilty plea pursuant to 17 PNC §§ 601–604.³ The terms imposed by the Trial Division for the deferment included payment of a \$5,000 fine and a requirement to obey the law for a three year period, after which no conviction would be entered.

³ The statute regarding a deferred acceptance of a defendant's guilty plea allows the court to defer further proceedings in the matter for up to a year after a guilty plea, on conditions set by the court. If those conditions are met the defendant may apply for a dismissal of the charges and expungement of the record. *See* 17 PNC §§ 601–604.

[¶ 9] Subsequent to the resolution of Governor Salvador's criminal case, the Trial Division granted summary judgment to the State, the Assembly, and Governor Salvador in the civil suit. Specifically, the Trial Division held NSGPL No. 16-68: (1) was not unconstitutional under either the Palau or Ngarchelong State Constitutions; (2) did not interfere with a national criminal prosecution; and (3) did not violate 40 PNC § 406. This appeal concerns that judgment.

STANDARDS ON APPEAL

[¶ 10] We review *de novo* the lower court's grant of summary judgment. *Rengiil v. Ongos*, 22 ROP 48, 50 (2015) (internal citations omitted). "In considering whether summary judgment was appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party, and summary judgment is inappropriate if genuine issues of material fact exist." *Id.*

[¶ 11] "A trial court's decision to entertain a claim for declaratory relief is reviewed for abuse of discretion. Conclusions of law are reviewed *de novo*." *Otei v. Smanderang*, 2018 Palau 4 ¶ 10 (internal citations omitted). "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 10 (internal quotation marks and alterations omitted).

DISCUSSION

[¶ 12] Appellant again contends that NSGPL No. 16-68 is unconstitutional under both the Palau Constitution and the Ngarchelong State Constitution, unlawfully attempts to interfere with a criminal prosecution, and violates 40 PNC § 406. We begin by addressing Appellant's concerns regarding the Assembly's constitutional authority to enact NSGPL No. 16-68 and whether either the state or national constitutions invalidate it.

[¶ 13] Pursuant to the Palau Constitution, revenue collected by a state is kept in the state treasury and may only be removed by law. ROP Const. art. XII, § 1 ("There shall be a National Treasury and a state treasury for each of the states. Revenues derived from taxes or other sources shall be deposited in

the appropriate treasury. No funds shall be withdrawn from any treasury except by law.”). As such, it is the state’s lawmaking authority—here, the Assembly—that has the power and responsibility of appropriating state funds from the state treasury. *See* Ngarchelong Const. art. VII, § 9(b).

[¶ 14] As part of its budgetary authority, the Assembly has two powers relevant to this case. First, the Assembly can pass legislation prospectively increasing the salary of state government employees, most commonly through a state budget. There is one express constitutional limitation. The Assembly has the authority to increase the salaries of its own members, but such increases may only take effect after the Assembly’s current term. *Id.* art. VII, § 7.

[¶ 15] Second, we find the Assembly has the power to retroactively ratify expenditures or financial obligations by the Government that were not authorized when spent. *See e.g., Sixth Kelulul a Kiuluul v. Ngirameketii*, 5 ROP Intrm. 321, 322–23 (Tr. Div. 1995) (finding a state legislature ratified some of the state governor’s unauthorized expenditures by subsequently adopting a budget appropriating funding for those expenditures); *see also Koshiba v. Koror State Pub. Lands Auth.*, 8 ROP Intrm. 356, 358 (Tr. Div. 2000) (state public lands authority board may ratify lease that was defectively executed when made); *Republic of Palau v. Etpison*, 5 ROP Intrm. 313, 318–19 (Tr. Div. 1995) (the national legislature can ratify unauthorized expenditures by the President for annual leave payments). This power derives from the principle in agency law that an entity has the ability to retroactively ratify actions that it had the authority to take in the first instance. *See Ngeremlengui Chiefs v. Ngeremlengui Gov’t*, 8 ROP Intrm. 178, 180 (2000) (citing Restatement (Second) of Agency § 84 (1958)). Consequently, Appellant’s characterization of legislative ratification of funds already expanded as “*ultra vires*” must be rejected. Where, as here, the subsequent ratification of state funds was within the original expenditure authority of the Assembly, it does not run afoul of the Ngarchelong State Constitution or Palau Constitution. The Trial Division properly denied declaratory relief on this claim.

[¶ 16] Appellant next argues that the purpose of NSGPL No. 16-68 was to interfere with an ongoing criminal prosecution. However, during the

pendency of the underlying civil case, Governor Salvador entered a deferred guilty plea in the associated criminal case. Consequently, any purported attempt to interfere with Governor Salvador's criminal prosecution is irrelevant because the issue of his criminal liability is moot. Therefore, the Trial Division did not abuse its discretion in denying declaratory relief on this claim.

[¶ 17] Appellant's third argument is that NSGPL No. 16-68 is invalid under 40 PNC § 406, which establishes criminal and civil liability for individuals who misappropriate public funds. Section 406(a) states that "[n]o *person* may expend . . . or certify the expenditure . . . of any public funds for any purpose in excess of the amount appropriated by law for that purpose." (emphasis added). But NSGPL No. 16-68 is not a person, and voting to approve legislation that ratifies unauthorized expenditures does not qualify as expending or certifying the expenditure of public funds under § 406(a). *See Mesubed v. Republic of Palau*, 10 ROP 62, 67 (2003) (holding legislatures cannot be individually liable under 40 PNC § 406 by voting to appropriate funds). Therefore, NSGPL No. 16-68 cannot contravene 40 PNC § 406 because § 406 does not apply to legislative acts.

[¶ 18] Appellant attempts to overcome this problem by claiming that while NSGPL No.16-68 is not a person, "its *results* purport to nullify a national mandate applicable to an individual." Appellant's Opening Br. at 25. However, Governor Salvador was never charged with violating 40 PNC § 406, and Appellant argues that NSGPL No. 16-68 would not have any effect on Governor Salvador's potential individual liability⁴ regardless of its purported purpose. Thus, Appellant asks this Court to invalidate a state law that purportedly attempted to—but did not succeed at—extinguishing Governor Salvador's individual liability under a statute he was not charged with violating. Appellant does so in an attempt to have this Court circumvent the limits of a national statute that was not intended to apply to legislative acts. This we refuse to do. The Trial Division acted well within its discretion in denying declaratory relief on this claim.

⁴ We express no opinion on the effect of Governor Salvador's potential civil liability, or whether NSGPL No. 16-68 impacts it.

[¶ 19] Appellant presents a procedural argument as well, suggesting that the Trial Division's denial of Appellant's motion for summary judgment does not inexorably lead to granting summary judgment for Appellees. True enough, but given the Trial Division's decision not to grant any relief to Appellant, and in the absence of Appellees requesting any affirmative relief, nothing was left to resolve and judgment for Appellees was appropriate.

[¶ 20] We close by noting one last matter: The Assembly should not have been made a party in this case.

[¶ 21] The legislative power of the State of Ngarchelong is vested in the Assembly. Ngarchelong Const. art. VII, § 1. The Governor of Ngarchelong has the power and duty to execute state law. *Id.* art. VIII, § 5(a). "The legislative, executive, and judicial powers are separate. No branch shall exercise powers properly belonging to another." *Id.* art. VI, § 1.

[¶ 22] The Assembly, as in the case of any legislature in a tripartite form of government, may enact any law it believes is necessary, proper, and constitutional. It is for this Court to determine, in a proper case, whether such law is invalid and if so, the extent of the conflict. *See* ROP Const. art. II, § 2; *Beouch v. Sasao*, 20 ROP 41, 48–49 (2013) ("This Court is the ultimate interpreter of the Constitution with the duty to say what the law is." (internal quotation marks and alterations omitted)). It is the executive branch's responsibility to represent the government. It is not a joint assignment of the executive and legislature. Hence, a legislature is not to be made a co-defendant every time—or any time—a plaintiff challenges a law as unconstitutional. This Court will not grant (as Appellant requested in the Trial Division) injunctive relief prohibiting the legislature from taking a particular legislative action. To do so would be a clear violation of the doctrine of separation of powers.

CONCLUSION

[¶ 23] The Trial Division's judgment is **AFFIRMED** in all respects.

SO ORDERED, this 19th day of February, 2019.

ARTHUR NGIRAKLSONG
Chief Justice

JOHN K. RECHUCHER
Associate Justice

A handwritten signature in black ink, reading "R. Barrie Michelsen", is written on a light-colored rectangular background.

R. BARRIE MICHELSEN
Associate Justice