

*ROP v. Gibbons*, 10 ROP 209 (Tr. Div. 2003)  
**REPUBLIC OF PALAU,**  
**Plaintiff,**

**v.**

**JOHN C. GIBBONS,**  
**Defendant.**

CIVIL ACTION NO. 02-072

Supreme Court, Trial Division  
Republic of Palau

Decided: January 31, 2003

1210

LARRY W. MILLER, Associate Justice:

This matter is before the Court on cross-motions for summary judgment on the question whether various actions taken by defendant in connection with a proposed scrap metal project violated the Code of Ethics Act, RPPL No. 5-32.<sup>1</sup> Because the rather straightforward answer to this question is yes, the Court will grant plaintiff's motion and deny defendant's.

The pertinent facts are undisputed.<sup>2</sup> Defendant, in his individual capacity is the lessee of a parcel of land in Malakal. As evidenced by a draft agreement dated April 16, 2001, and by defendant's admission, he attempted to sublease that land to Palau Metal Corporation ("PMC") as the site of a proposed scrap metal salvage operation. Under the terms of the proposed agreement, the amounts to be paid to defendant under the sublease would have substantially exceeded the amounts due under defendant's lease with Koror State Public Lands Authority.

As shown in the attachments to plaintiff's motion, in May through August, 2001, defendant took various actions towards bringing the scrap metal project to fruition. On May 10, 2001, following up on a discussion the day before, defendant wrote a letter to the Minister of Administration seeking confirmation that PMC would be temporarily exempted from the Foreign Investment Act. On June 5, 2001, defendant filed an application for an earthmoving permit with the Environmental Quality Protection Board, and on the following day he spoke in support of the application at a special meeting of the Board. On June 27, 2001, defendant filed an Application for Historic Clearance with the Division of Cultural Affairs. On July 23, 2001, defendant wrote to a German bank interested in financing the project pledging the support of the Koror State Government and describing his efforts to gain the assistance of the national government in

<sup>1</sup>Both plaintiff and defendant, apparently privy to advance copies of the next supplement to the Palau National Code, have cited to sections of Title 33 where the provisions of the Code of Ethics Act will eventually be codified. The Court is not so privileged, and cites the pertinent portions of the enacting legislation.

<sup>2</sup>Neither plaintiff nor defendant has complied with ROP R.Civ.P. 56(c)(1) or (c)(2). The Court urges counsel to do so in the future and not run the risk that motions will be denied (or granted against their clients) for that reason alone.

*ROP v. Gibbons*, 10 ROP 209 (Tr. Div. 2003)

guaranteeing the loan. Finally, on August 24, 2001, after the office of the Special Prosecutor had brought suit to enjoin the project, defendant joined in a letter from the Association of Governors urging that the suit be settled so that the project could proceed.

As defendant characterizes these actions, he “wrote letters to public officials as may anyone else, and he applied for permits as must everyone else.” Gibbons’ Opposition to ROP’s Motion for Summary Judgment (“Opposition”), December 5, 2002, at 18. As plaintiff sees it, however, “This is an egregious example of using public office for personal gain.” Memorandum in Support of Motion for Summary Judgment, October 21, **L211** 2002, at 5. For the Court’s part, it is sufficient to say that each of the actions taken contravenes an explicit prohibition of the Code of Ethics Act.

Section 6 of the Act is headed “Conflict of interest.” Section 6(a) provides in pertinent part:

No employee may take, participate in taking or use his or her government position to attempt to influence any official action where it is reasonably foreseeable that the action could have a material financial effect on that employee, or on any financial interest of that employee, that is different from the effect on the public generally.<sup>3</sup>

Breaking this provision into its constituent parts: defendant was (1) an “employee” (2) who “use[d] his . . . government position, (3) “to attempt to influence . . . official actions” (4) in circumstances “where it [was] reasonably foreseeable that the action[s] could have a material financial effect on that employee” (5) that was “different from the effect on the public generally.” The Court addresses each in turn, saving for last however, its discussion whether defendant “used his official position.”

“Employee” is defined in Section 3(c) of the Act as “[a]ny nominated, appointed, or elected officer or employee of any state government or the national government.” Defendant is the elected Governor of Koror State. He is an “employee” subject to the prohibition of Section 6(a).

“Official action” is defined in Section 3(k) as “a decision recommendation, approval, disapproval, or other action, or a failure to act, which involves the use of discretionary authority.” Each of the actions taken by defendant constituted an “attempt to influence” some other government official or body to undertake some action within his or her discretion. The letter to the Minister of Administration asked him to “reaffirm the approval of the Executive Branch” as to an agreement by the former President to allow PMC to operate for three years without a Foreign Investment permit, and explained defendant’s belief that “it is important that the terms of the agreements are honored and the government of Palau provides its complete

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<sup>3</sup>A second sentence provides an exception for an “employee who is unable to disqualify himself on any matter because he is the only person authorized by law to perform the official action.” Neither party has made reference to this provision, nor does it appear pertinent since the “official actions” at issue were those to be taken by government officials other than defendant.

*ROP v. Gibbons*, 10 ROP 209 (Tr. Div. 2003)

support for PMC's efforts." The application to and appearance before the EQPB, and the application to the Division of Cultural Affairs, were submitted to gain the issuance of an earthmoving permit and to receive historic clearance for the scrap metal project. The letter to the German bank, although not itself an attempt to influence any official action, explained that defendant was "working through the proper political channels to have the ROP execute a Payment Guaranty." Finally, the letter to the Special Prosecutor, signed by defendant as a member of the Association of Governors, stressed the benefits of the scrap metal project and urged the Special Prosecutor to "quickly resolve through negotiated settlement" the lawsuit challenging the project, rather than seeking an injunction that would halt its construction.

**1212** Next, although the statute does not define "material financial effect," all of these actions, to the extent that they attempted to bring about the construction of the scrap metal facility on defendant's leased land, made it "reasonably foreseeable" that they would—and certainly could—benefit defendant financially through the proposed sublease of that land. And whatever the benefits of the scrap metal operation to the public generally, obviously the benefits from the proposed sublease would be unique to defendant.

The Court turns finally to the question whether defendant "used his government position" in making these efforts. The Court leaves this question for last not because it believes there is much doubt about it, but because it demonstrates the flaw in defendant's protestations that the actions he undertook were those that "may be undertaken by any member of the public." *See* Opposition at 19. There is absolutely no question that defendant, like "any member of the public," had the right to try and profit from his property and, to the extent necessary and/or advisable, to seek the approval or assistance of government officials to achieve that goal. What makes these actions unlawful—and plainly so—was that every one of them was undertaken not as John C. Gibbons, private citizen, but as Governor John C. Gibbons, representative of Koror State Government. The letters to the Minister of Administration and to the German bank were written on the letterhead of Koror State Government and signed by John C. Gibbons, Governor. The letter to the Special Prosecutor was written on the letter head of the Association of Governors and signed by John C. Gibbons, Governor of the State of Koror. The application to the EQPB and to the Division of Cultural Affairs were signed by John C. Gibbons on behalf of Koror State Government. And when he attended the special meeting of the EQPB Board, he appeared as "Governor John C. Gibbons of Koror State Government" and "explained that the project is endorsed by . . . Koror State." Minutes of Special Meeting, June 6, 2001.

The assertion that "[e]ven if Gibbons had not stated his position [on the EQPB application], everyone would know who he is," *see* Opposition at 5, is disingenuous, as is the claim that defendant submitted the application "[i]n the manner of a member of the public seeking to comply with environmental laws." *Id.* The mere fact that, as a matter of habit or respect, one refers to oneself (and is referred to by others) by one's official title is not sufficient to show that he has "used his government position" inappropriately. Here, however, the application was sought by and granted to, Koror State (which is troubling in itself<sup>4</sup>) and

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<sup>4</sup>Defendant argues at some length that it was appropriate for Koror State to choose to become involved in a business project that it believed to be in the public interest. But that argument raises the obvious question whether Koror State's "choice" was made by anyone other than defendant. If not, then the very

*ROP v. Gibbons*, 10 ROP 209 (Tr. Div. 2003)

defendant submitted the application as Governor of Koror State. Thus, the notion that defendant acted “as a member of the public” and only mentioned his title incidentally is utterly untrue.<sup>5</sup>

**¶213** The question in this case is not whether the proposed scrap metal project was in the public interest, nor even whether defendant genuinely believed it was. It is entirely possible that a government official’s sincere view of the public interest may coincide with his private interest. But the Code of Ethics Act was enacted to “ensure that governmental officials perform their duties . . . free from bias caused by their own financial interests,” RPPL 5-32, § 2, and “embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.” *United States v. Miss. Valley Generating Co.*, 81 S. Ct. 294, 309 (1961). Conflict-of-interest statutes, like the provisions of the Ethics Act at issue here, “are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer’s undivided and uncompromised allegiance.” *People v. Honig*, 55 Cal. Rptr. 2d 555, 567 (Cal. Ct. App. 1996) (citations omitted). By repeatedly using his public position to advance a project in which he had a private financial interest, defendant violated the Act. The parties are directed, within the next ten days, to submit their views on the appropriate penalty to be imposed under § 13 of the Act.

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decision by Governor John C. Gibbons to lend the support of Koror State to a project in which John C. Gibbons, private citizen, stood to profit, was itself a serious violation of the Ethics Act.

<sup>5</sup>Indeed, the application is remarkable for its omission of any mention that defendant had any interest in the project other than as Governor of Koror State, much less that he was the lessee of the land where the project was to be located. The application states at one point that “Koror State owns the property” and is checked “YES” in response to the question, “Does the applicant have clear right to ownership or use of the land where the proposed project will take place, under existing laws?” These responses are literally true, but non-responsive at best and misleading at worst on the question whether Koror State had the authority—without separate approval of defendant as its lessee—to engage in any activities on the land.