Palau Chamber of Commerce v. Uherbelau, 12 ROP 183 (Tr. Div. 2005)

PALAU CHAMBER OF COMMERCE and POLYCARP BASILIUS,
Plaintiffs,

v.

ANDRES UHERBELAU and the REPUBLIC OF PALAU,
Defendants.

SENATORS SEIT ANDRES, HARRY FRITZ, STEVEN KANAI, JOSHUA KOSHIBA, LUCIUS MALSOL, JOHNNY REKLAI, and MLIB TMETUCHL,
Intervenors.

CIVIL ACTION NO. 42-94

Supreme Court, Trial Division
Republic of Palau

Decided: January 4, 2005

ARTHUR NGIRAKLSONG, Chief Justice:

Intervenors, who were not parties to this case, were members of the Senate, 6th Olbiil Era Kelulau (OEK). They filed motions to intervene and to modify or vacate an injunction issued by this Court nine (9) years ago. A hearing on these two (2) motions was held on October 29, 2004. After the hearing, the Court orally indicated that it will deny intervenors' motions.

At issue is RPPL No. 4-10 (4) (7) which reads:

> There shall be made available, *commencing as of January 1, 1994*, to each member of the Olbiil Era Kelulau an official expense of $2,000.00 per month each to assist in defraying the expenses related to or resulting from the discharge of the member's duties. Members shall report expenditures to the Presiding Officers of the Olbiil Era Kelulau. (emphasis added)

The factual background of this case is straightforward. Before September of 1993, members of the 4th and preceding terms of the OEK received ". . . an official expense of $1,000.00 per month each . . ." 3 PNC § 202. Then in 1993, the 4th OEK amended this law to increase this official expense to $2,000.00 a month. RPPL No. 4-10 (4) (7) became law on September 22, 1993. The Chambers of Commerce sued, amongst others, the Senate and the House of the 4th OEK, arguing that this so-called "official expense" is in fact compensation and the Constitution prohibits members of the OEK from increasing their compensation during their term. The term of the 4th OEK ended on December 31, 1996 ⊥184 and the term of the 5th OEK began on January 1, 1997.

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This Court agreed with the Chambers of Commerce that the so-called "official expense" was indeed compensation and held that RPPL No. 4-10 (4) (7) was unconstitutional on its face. *Palau Chamber of Commerce v. Uherbelau,* 5 ROP Intrm. 300, 304 (Tr. Div. 1995). The Court also enjoined the National Treasury from issuing any checks for members of the 4th OEK in excess of $1,000.00. *Id*. The judgment and the injunction were issued on April 3, 1995. Both Houses of the 4th OEK did not appeal the judgment nor did they amend RPPL No. 4-10 (4) (7) to be effective on the first day of the 5th OEK, January 1, 1997. The 4th OEK had eighteen (18) months, after the judgment, within which it could have easily amended the statute to be effective with the 5th OEK. The 4th OEK, however, did not do so. The 5th OEK had four (4) years within which it could have amended RPPL No. 4-10 (4) (7) to be effective on January 1, 2001, the first day of the 6th OEK. Like the 4th OEK, the 5th OEK did not amend the law to increase the $1,000.00 compensation for the 6th OEK. The silence of the 4th and 5th OEK, for more than five (5) years, on an amendment to the effective date of RPPL No. 4-10 (4) (7) is deafening.

Nine (9) years later, the intervenors, who were all members of the 6th OEK and some were members of the 4th and or the 5th OEK, wanted to intervene in this matter and vacate or modify RPPL No. 4-10 (4) (7) so that they would be entitled to receive the $2,000.00 compensation. Their argument follows:

> Since this Court held that in effect that the increase in their official expense allowances was an increase in their compensation, it is not reasonable to infer that it was the intent of the 4th OEK to increase their compensation effective as of January 1, 1994 during their term of office. The 4th OEK should be presumed to have known the constitutional prohibition against increasing their compensation during their term of office. Therefore, it is reasonable to infer that had the 4th OEK *intended* to increase the compensation of the members of the OEK, they would not have declared the effective date of that amendment to fall within their term of office.
>
> Under these circumstances, it is most reasonable to conclude that the severability rule should apply since it was *not* the *intent* of the 4th OEK to enact an unconstitutional law.
>
> Even though the amendment did not specifically include the severability clause, 1 PNC § 103 provides for the application of severability rule to any amendment or addition to the National Code. Thus, the amendment at issue is *automatically* subject to the *severability rule*.

(Intervenors' Reply Brief at 8.) (emphasis added)

In short, intervenors argue that the 4th OEK did not "intend" to enact the effective ⊥185 date of the law, January 1, 1994, because that would be unconstitutional. From this, they argue that since the date of the statute renders the statute unconstitutional, it is "automatically" severed. Once that is done, intervenors became entitled to the $2,000.00 compensation.

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The first rule of statutory construction is that you look at the statute on its face. If the statute is clear, the duty to interpret does not even begin. *Yano v. Kadoi*, 3 ROP Intrm. 174, 182 (1992) (". . . where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."). The duty to interpret a statute begins when the statute is first determined to be "ambiguous." *See* 73 Am. Jur. 2d *Statutes* § 114 (2001). "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Norman J. Singer, *Statutes and Statutory Construction*, § 45.02 at 11-12 (6th ed. 2000).

There is nothing ambiguous about the effective date of RPPL No. 4-10 (4) (7). Therefore, because statute is clear, there will be no attempt to discern the "intent" of the OEK. That intent is embodied in the clear language of the statute. *See Noah v. ROP*, 11 ROP 227, 233 (2004) (Ngiraklsong, C.J., concurring) (internal citations omitted).

To the extend the intent of the OEK may be relevant, the silence of the 4th and 5th OEK over more than five (5) years period may reasonably be read to mean that the OEK did not want or was not able for various reasons to increase the compensation for the members of the 5th or the 6th OEK. That clear intent contradicts intervenors' argument for an intent that would entitle them, without amendment to the statute, to the $2,000.00 compensation.

The intervenors are basically asking this Court to re-write RPPL No. 4-10 (4) (7) by deleting the effective date and thereby rendering the statute constitutional as it applies to presumably not just the members of the 6th OEK, but the members of the 5th OEK as well. For the members of the 5th OEK to receive the $2,000.00 compensation, the Court would have to insert an effective date of *January 1, 1997*. For the members of the 6th OEK to receive the $2,000.00 compensation, the Court would have to insert an effective date of January 1, 2001, the first day of the 6th OEK. This would constitute a classic judicial legislating, which the Court must decline to do. *Ysaol v. Eriu Family*, 9 ROP 146, 149 (2002). *See* also *Isimang v. Arbedul*, 11 ROP 66, 78 (2004) (Ngiraklsong, C.J., dissenting).[1]

The Court also agrees with the Government that the doctrine of severability does not apply in the instant case. The statute does not contain a severability clause. Hence, the presumption is that it can not be severed. *Carter v. Carter Coal Co.*, 56 S. Ct. 855, 873 (1936). And if you were to "judicially" sever the effective date of the statute, the rest of the statute is meaningless because it has no date by which the statute becomes operable. It does not follow that if the offensive date of ⊥186 the statute is severed, the first day of the 5th OEK becomes the effective date for the statute. The 4th OEK could have enacted the increase in compensation to be effective with 6th OEK, skipping the 5th . The Constitution only requires that the increase in

[1]"If a law is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the Court as upon every citizen. To allow a Court, in such a case, to say that the law must mean something different from the common import of its language, because the Court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with the lawmaking power. The remedy for a harsh law is not in interpretation but in *amendment* or repeal." Singer, *supra*, § 46.03 at 139 (citations omitted) (emphasis added).

compensation shall not apply to ". . . the members of the Olbiil Era Kelulau during the term of enactment. . . ." Palau Const. art. IX, § 8. Hence, the rest of the statute can not stand without the effective date and this Court can not and will not re-write the statute. *Dorchy v. Kansas*, 44 S. Ct. 323, 324 (1924).

The intervenors motion to intervene is based on ROP Civ. P. 24 (a)(2). They argue that they should be allowed to intervene as a matter of "right" because of their "interest" in the $2,000.00 compensation. Since the Court declines to do what is an exclusive duty of the OEK, the intervenors have no interest to protect. And without legally protected interest, they have no right to intervene under the rule.

Accordingly, intervenors' motion to intervene is denied.