Becheserrak v. ROP, 4 ROP Intrm. 103 (1993)

KATSUTOSHI BECHESERRAK,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CIVIL APPEAL NO. 33-91
Civil Action No. 781-88

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: December 30, 1993

Counsel for Appellant: Johnson Toribiong, Toribiong & Coughlin

Counsel for Appellee: Juliet T. Browne, Assistant Attorney General

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; and JANET H. WEEKS, Part-Time Associate Justice.

PER CURIAM:

This appeal raises issues concerning the timing and scope of Katsutoshi Becheserrak's efforts to challenge his dismissal as a high school teacher. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

In September, 1968 Katsutoshi Becheserrak began work at Palau High School in a position designated as "Classroom Teacher III." On October 12, 1987 the Minister of Social Services approved a Personnel Action Form transferring Becheserrak to "Classroom Teacher III" in the Community Education Program, effective October 19. On October 20 the Director of Education informed the principal of Palau High School of the transfer.

⊥104 Becheserrak, whose primary responsibility in the new position would have been to draft a plan to reactivate the dormant Program, objected to the transfer on the grounds that he did not have the necessary education and experience. He also expressed concern that his job security was more tenuous in the Community Education position because it was funded by the United States government rather than the national government. On November 4 he informed the Director of Education that he would not agree to the transfer unless he received two years of training, a change in title, and a salary increase. Rather than assuming his new position,

Becheserrak continued to report to work at Palau High School, without pay, until he received his termination notice on February 3, 1988.

On February 9 Becheserrak requested a hearing before an impartial hearing officer pursuant to National Civil Service Board ("NCSB") regulations then in place. In a February 23 decision, the hearing officer found that the Bureau of Education violated NCSB regulations by failing to give Becheserrak's supervisor a two week notice prior to the transfer. The hearing officer also found that the transfer form was deficient because the department head and the official requesting the transfer had not signed it and because the box for noting the authority for the transfer was left blank. The hearing officer concluded that because the transfer was invalid Becheserrak was not required to report to work at the Community Education Program. The hearing officer recommended that the transfer form and the termination form be removed from ⊥105 Becheserrak's personnel file and that Becheserrak be compensated for the time he worked without pay at Palau High School.

On March 23 the Director of Education informed Becheserrak's that it would not comply with the hearing officer's recommendation.

On April 18 Becheserrak instituted the present lawsuit, asking that he be reinstated in his previous position. The ROP moved to dismiss, arguing that Becheserrak was required to bring suit within 30 days of the termination. The trial court denied the motion, finding that the 30 day appeal period did not commence until after the Bureau of Education rejected the hearing officer's recommendation.

The trial court granted ROP's second motion to dismiss, concluding that a National Civil Service employee's right to contest his transfer is limited to internal grievance procedures and does not include judicial review. Becheserrak appeals this ruling and the trial court's denial of his motion for judgment on the pleadings; ROP cross-appeals the trial court's denial of its first motion to dismiss.

DISCUSSION

Pursuant to 33 PNC § 426(a) a dismissed civil service employee is entitled to bring a civil action for reinstatement. Although section 426(a) provides that the action must be brought within
thirty calendar days after written notice of the dismissal has been sent, we have previously found no time bar in a case in which the dismissed employee, like Becheserrak here, had commenced ⊥106 his action only after administrative proceedings had been completed. *Yalap v. Republic of Palau*, Civ. App. No. 18-91, Slip Op. at 4 (Feb. 20, 1992). Although the *Yalap* Court did not state the reasons for its conclusion, we agree with its result. We find that in this case ROP is estopped from raising the statute of limitations contained in section 426(a) as a defense because National Civil Service Board ("NCSB") regulations in place at the time of the dismissal implied that an employee need not file a civil action until administrative proceedings are complete. Becheserrak's reasonable reliance on these regulations therefore tolled the 30 day filing period until after the Director of Education rejected the hearing officer's recommendations. Because

Becheserrak filed his civil action within 30 days of the Director of Education's rejection of the hearing officer's recommendations, his suit is not time-barred.

At the time of Becheserrak's dismissal, NCSB regulations entitled a dismissed employee to request a hearing within 7 days of his dismissal. [1] *See* NCSB Public Service Reg. Part 11.9(a). If an employee requested a hearing, the NCSB chairman was required to appoint an impartial hearing officer who, in turn, was required to hold a hearing and notify the employee and employer in writing of his findings of fact and recommendations. *Id.* The hearing ⊥107 officer's report was merely advisory, as an employer who disagreed with its recommendations could disregard them. *Id.* This is what happened in the present case.

The regulation establishing the administrative hearing process further stated,

> The employee's right to present his position in a hearing under this Sub-Part is separate and distinct from his right to appeal to the Court of Common Pleas [2] within thirty (30) calendar days after written notice of adverse action has been sent to him. Nothing in this Sub-part precludes the employee from by passing the hearing option and directly bringing an action for reinstatement and loss of pay in the Court of Common Pleas where the employee is . . .dismissed.

Id. at 11.9(b). The NCSB has said that Part 11.9 was intended to "provide a process for the employee and the management to exhaust all administrative remedies for resolving the employee's problems." *See* NCSB Directive No. 26-87.

We find that an employee could reasonably have read Part 11.9 to mean that if he opted for a hearing, he need not file his civil action until after he exhausted all his administrative remedies. This reading, which comports with generally recognized rules of administrative law, also appears to be how the NCSB viewed the matter. A 1987 NCSB Directive, designed to supplement and clarify the grievance procedure established in Part 11.9, provided that if an employee was dissatisfied with a hearing officer's ⊥108 recommendation, he could bring a civil action to further contest the adverse employment action. *See id.* The directive did not say that an employee must file a civil action contemporaneous with his request for a hearing. To the contrary, the directive implied that an employee should not file his civil action until after he has exhausted his administrative remedies. At the very least, Part 11.9 and the directive created confusion as to the proper path an employee should follow to preserve his rights.

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[1] The regulations we examine in this and the following paragraphs were declared void in *Yalap* which was handed down after Becheserrak's hearing. Following *Yalap*, a dismissed employee no longer has the option of requesting a hearing; if he desires review of his dismissal (or suspension, or demotion), his only choice is to file an action in the trial division of the Supreme Court. Thus, the dilemma presented in the present case no longer exists.

[2] An aggrieved employee must now file his claim in the trial division of the Supreme Court. *Yalap*, Slip Op. at 7 (holding that the portion of 33 PNC § 426(a) which directed employees to file their claims in the Court of Common Pleas violated Article X § 5 of the Palau Constitution).

As ROP, through the NCSB, was responsible for creating this confusion, and therefore for inducing the delay in filing the civil action, it cannot now claim that Becheserrak's civil action is time-barred. Courts have long held that a party is equitably estopped from asserting a statute of limitations as a defense when its actions led the party against whom the defense is asserted to justifiably believe that the time limit would be tolled. *See e.g. Glus v. Brooklyn Eastern District Terminal*, 79 S.Ct. 760, 762-63 (1959). For the reasons explained above, we believe this is an appropriate case to apply the equitable estoppel doctrine. We therefore affirm the trial court's denial of ROP's first motion to dismiss.[3]

⊥109 The cornerstone of the trial court's granting of ROP's second motion to dismiss is that an aggrieved employee cannot bring a civil action to contest a transfer.[4] With this we agree. However, Becheserrak filed suit to contest his dismissal, not his transfer. This would be a different case if Becheserrak had never been dismissed. Had he filed a civil action in October 1987, after first learning of his transfer, then we would have no hesitation in upholding a dismissal based on 33 PNC § 426(a). However, Becheserrak did not file suit at that time. He continued to report to his original position until he was terminated in February, 1988, almost 4 months after he received notice of the transfer. It was not until he was actually terminated that he brought this civil action for reinstatement. Thus, his civil action falls within the ambit of those allowed by 33 PNC § 426(a). We therefore reverse the trial court's granting of ROP's second motion to dismiss.

On remand, Becheserrak can attack his dismissal by demonstrating that his transfer was invalid. We leave for the trial court to determine whether the procedural irregularities claimed by Becheserrak were sufficient to invalidate the transfer at issue here.

In making this determination, the trial court is not bound by the findings of the impartial hearing officer. The Administrative Procedure Act, 6 PNC §§ 101 et seq., does not apply to dismissal actions brought pursuant to Title 33. *See Yalap*, Slip ⊥110 Op. at 4. Therefore, the limitation on judicial review found in 6 PNC § 147(g) does not apply to this case. Further, as noted earlier, in *Yalap* we found that the hearing procedure established in NCSB Public Service Reg. Part 11.9 was void because it violated the intent behind Title 33. *Id.* at 7. Thus, the hearing officer's recommendations, made pursuant to Part 11.9, cannot bind the trial court, which is entitled to address all issues de novo.

We recognize that after today's ruling an aggrieved employee may fairly conclude that he may obtain judicial review of an otherwise non-reviewable employment action by refusing to

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[3] Certain courts in the United States will not apply equitable estoppel where a statute creates a right and prescribes a limitation for bringing a suit, reasoning that the limitation on the remedy is to be treated as a limitation on the right. *See* 51 Am. Jur. 2d Limations of Actions § 435 (1970). This rule, however, is not universal. *See Glus*, 79 S.Ct. at 763 and n.11 (applying equitable estoppel to bar a defendant from asserting a statute of limitations defense against an employee suing under Federal Employer's Liability Act). In the circumstances of this case, and in the absence of a demonstrated legislative intent to create a jurisdictional ban, we see no reason for making an exception to the doctrine of equitable estoppel in this case.

[4] We review a trial court's conclusions of law de novo.

obey his supervisor's directive, and then filing a civil suit once he is dismissed for not complying with the contested order. We wish to warn employees contemplating such action of the important consequence of such a gambit. If the employee fails to convince the court of the impropriety of the action leading up to the dismissal, then the dismissal will stand. We think it wiser, and it is our hope, that employees seek to resolve workplace disputes not subject to judicial review through the recognized grievance procedures found in Part 13 of the NCSB regulations.

The trial court's denial of ROP's first motion to dismiss is AFFIRMED. The trial court's granting of ROP's second motion to dismiss is REVERSED. This case is REMANDED for proceedings not inconsistent with this opinion.