

Shmull v. Rosenthal, 8 ROP Intrm. 261 (2001)
TEMMY SHMULL,
Appellant,

v.

MICHAEL J. ROSENTHAL,
Appellee.

CIVIL APPEAL NOS. 00-03 & 00-15
Civil Action No. 99-297

Argued: November 17, 2000
Decided: January 12, 2001

Counsel for Appellant: Mark Doran

Counsel for Appellee: Pro se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;
KATHLEEN M. SALII, Associate Justice.

SALII, Justice:

Appellant Temmy Shmull appeals from a dismissal of his claim that there is no express statutory authority for the Special Prosecutor to hire another attorney to assist the Special Prosecutor in carrying out the purposes of the Special Prosecutors Act. We affirm the Trial Division's decision to dismiss this case and affirm the award of sanction against him, as we find that there is express statutory authority.

BACKGROUND

On October 20, Shmull filed this civil complaint seeking damages and injunctive and declaratory relief against Michael Rosenthal, the Special Prosecutor, for hiring an Assistant Special Prosecutor, which Shmull alleged to be a violation of 40 PNC § 406. In particular, Gary Soberay had been hired as assistant Special Prosecutor to "make appearances in such courts, on behalf of the Special Prosecutor as are necessary to carry out the powers, functions, and duties of the Office of Special Prosecutor as set forth in 2 PNC § 503." Shmull contended that Rosenthal needed special statutory authority to hire Soberay.

On October 27, Rosenthal filed his Motion to Dismiss and requested costs and sanctions. Shmull filed his Opposition to Dismiss and Cross-Motion for Summary Judgment, arguing that the Special Prosecutors Act does not authorize the hiring of an attorney to act as "Assistant Special Prosecutor" in Palau and that the Act is unconstitutional in any event.

The Trial Division, presided over by Justice Michelsen, dismissed the complaint finding that 2 PNC § 503(a)(5), which authorizes the Special Prosecutor to hire "staff," includes hiring

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attorneys. Judge Michelsen found the complaint to be “baseless,” “retaliatory,” “groundless, frivolous, and brought in bad faith.” As a result, Shmull was sanctioned under Rule 11 in the amount of \$300.00 for a “serious abuse of the judicial process.”

ANALYSIS

Appellant argues that by allowing someone else to investigate, file, and pursue legal actions in the name of the Republic by making court appearances, Appellee has delegated discretionary authority of his office without any express language in the Special Prosecutors Act that allows him to do so.

We are in agreement with the Trial Division that there is specific statutory authority that allows the Special Prosecutor to hire an assistant. Section (a)(5) of 2 PNC § 503 allows the Special Prosecutor “to hire such staff as may be necessary to carry out its functions under this chapter.”

¶262 Appellant at oral argument tried to distinguish staff which he considers to be engaged in “mere employment” from those who exercise the powers, functions, and discretion of the office itself. Appellant’s entire argument rests on the definition of the word “staff,” but he is unable to cite any Palauan or United States authority for his interpretation that the word “staff” does not include attorneys.

Appellee cites a plethora of United States case law where staff is interpreted to mean attorneys. For example, in *Giglio v. United States*,¹ the assistant United States Attorney was considered on the “staff” of the United States Attorney. In *Whitehead v. Nevada Commission on Judicial Discipline*,² the Court mentioned: “[i]t must be remembered that the Attorney General and her extensive *staff* must, in the performance of their constitutional duties, appear before the judges and justices of this state on a daily basis.”³ Appellee correctly cites twenty-two other U.S. federal and state cases where the courts have used the term “staff” to include assistant and deputy prosecutors, and assistant and deputy attorneys general.⁴

Justice Michelsen cited the Webster’s Dictionary definition⁵ of the word staff and

¹ 92 S.Ct. 763, 765 n.1 (1972).

² 878 P.2d 913, 918 (Nev. 1994).

³ *Id.* (emphasis added).

⁴ See *Kaul v. Stephen*, 83 F.3d 1208 (10th Cir. 1996); *State v. Kattenhoff*, 801 P.2d 548, 552 (Haw. 1990); *State ex rel. Stephen v. Reynolds*, 673 P.2d 1188 (Kan. 1984); *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197 (Me. 1989); *Goldberg v. State*, 556 A.2d 267 (Md. App. 1987); *Colon v. Vacco*, 662 N.Y.S. 2d 963 (N.Y. App. Div. 1997); *Haggarty v. Himelein*, 654 N.Y.S.2d 705 (N.Y. App. Div. 1997); *State ex rel. McLeod v. Snipes*, 223 S.E.2d 853, 855 (S.C. 1976); *T.E. Crawford v. Tennessee Cons. Retirement Sys.*, 732 S.W.2d 293, 297 (Tenn. App. 1987); *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Ct. App. 1994); *State v. Stenger*, 760 P.2d 357 (Wash. 1988).

⁵ “1. A group of people, esp. employees, who carry out the work of an establishment or perform a specific function. 2. A group of assistants to a manager, superintendent, or executive.” *Webster’s College Dictionary* 1300 (1996).

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concluded that the definition cannot be construed to refer only to clerical support, and to exclude attorneys.

Looking at the case law and the common usage of the word,⁶ we have no reason to disagree with the trial division. We therefore affirm the Trial Division's decision to dismiss the complaint based on the fact that the Special Prosecutor did have statutory authority under 2 PNC § 503(a)(5) to hire Gary Soberay.

Appellant also argues, in response to the Motion to Dismiss, that the Special Prosecutors Act is an unconstitutional taking of power from the president of the Republic of Palau, and violates the separation of powers under the Constitution. Because this claim was not part of Shmull's complaint, the Trial Division did not rule on this issue, so neither will we. However, the constitutionality of the Special Prosecutors Act was recently upheld in *Olikong v. ROP*.⁷

Finally, Shmull argues that the trial judge abused his discretion in imposing Rule 1263 11 sanctions on him. We disagree. In the face of statutory language authorizing the Special Prosecutor, without limitation, "to hire such staff as may be necessary to carry out its functions," appellant filed a complaint asserting that the Special Prosecutor was "without any lawful authority" to hire an assistant. Even with the aid of his current counsel,⁸ appellant has failed to point to any authority even suggesting the word "staff" should be read to exclude attorneys and, as noted above, there is an abundance of authority to the contrary. We, therefore, hold that the trial court's imposition of sanctions was not an abuse of discretion.⁹

⁶ Under 1 PNC § 202, words in the Palau National Code "shall be interpreted according to the common and approved usage of the English language."

⁷ Civ. App. No. 00-14 (Dec 19, 2000) (upholding *Kotaro v. ROP*, 7 ROP Intrm. 57 (1998)).

⁸ Mark Doran was not counsel for Appellant when this action was originally filed.

⁹ *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 113 (1995).

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CONCLUSION

Accordingly, the Court affirms the Trial Division's decision in its entirety.