Skebong v. EQPB, 8 ROP Intrm. 80 (1999)

**JOHN SKEBONG, as governor of Ngeremlengui State,
Appellant,**

v.

**REPUBLIC OF PALAU ENVIRONMENTAL QUALITY
PROTECTION BOARD.
Appellee.**

CIVIL APPEAL NO. 99-09
Civil Action Nos. 98-187 and 98-220

Argued: November 5, 1999
Decided: December 1, 1999

Counsel for Appellant: Roman Bedor

Counsel for Appellee: Kathryn B. Fuller

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; DANIEL N. CADRA, Senior Land Court Judge.

MILLER, Justice:

This is an appeal from the Trial Division's decision denying the motion to dismiss of Appellant John Skebong, [1] and granting summary judgment to Appellee Environmental Quality Protection Board ("EQPB"), enforcing EQPB's orders levying fines against Appellant in his official capacity as Governor of Ngeremlengui State. Appellant challenges the authority of the ⊥81 EQPB, as an administrative agency, to perform adjudicatory functions on the grounds that the Palau Constitution has given only the judiciary the power to hear and resolve disputes. We affirm the judgment of the trial court.

BACKGROUND

The facts of the case are not in dispute. In May 1997, EQPB inspectors visited a road construction site in Ngeremlengui and discovered that earthmoving activities were occurring without a permit, and no erosion control measures were in place. In June 1997, Appellee issued a notice of violation and a cease and desist order halting all work on the road. The notice gave Appellant 10 days to provide information about the project to Appellee and to request a hearing on the allegations in the notice. Appellant did not respond.

In April 1998, EQPB inspectors returned to the site and found that additional

[1] Since Skebong has been sued in his official capacity as Governor, the appeal is, in reality, on behalf of Ngeremlengui State. *See Fanna & Merir Municipal Gov'ts v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 12 (1999).

earthmoving and construction had occurred, again without a permit or erosion control measures. Appellee issued Order 19-98 on May 6, 1998, directing Appellant to cease all activity and submit a restoration plan, and assessing a fine of $50,000 pursuant to 24 PNC § 162(a).[2] The order gave Appellant 10 days to request a hearing to contest the charges.

Appellant responded in a letter dated May 10, 1998, explaining that the road had been built to access rock samples for analysis as a possible quarry site. Appellant stated that the road was built without a permit because the permit process was too time-consuming and expensive in light of the urgency of the sampling project, and that once the samples had been taken, the road had not been developed further. The letter did not request a hearing or contest the charges.

In a letter dated May 26, 1998, Appellee again advised Appellant of his right to a hearing and extended the request period until June 2, 1998. Appellant responded on May 28 that the work alleged in Order 19-98 involved the use of a bulldozer to level some earth near the road to free a stuck vehicle, but the response did not request a hearing. Appellee brought an action in the Trial Division to enforce its May order.

On June 23, 1998, Appellee issued Order 26-98 because of earthmoving activity on another stretch of road, ordering Appellant to restore that site to its original condition, and assessing another penalty of $20,000. Appellant did not respond to that order, and Appellee filed another suit to enforce Order 26-98. The Trial Division consolidated the two cases.

Appellant moved to dismiss both complaints on the grounds that the Environmental Quality Protection Act, 24 PNC §§ 101 *et seq*., was unconstitutional to the extent it allowed Appellee to exercise judicial power in making factual determinations and issuing orders. Appellee opposed the motion and cross-moved for ⊥82 summary judgment enforcing its orders.

The trial court denied Appellant's motion to dismiss, holding that Appellee constitutionally exercised quasi-judicial authority, and granted Appellee's cross-motion for enforcement, holding that the penalties imposed on Appellant were within Appellee's statutory authority and were not so disproportionate as to warrant modification.

Appellant now raises two issues on appeal: whether the trial court erred in holding that Appellee's actions were not an unconstitutional exercise of judicial authority, and whether Appellee had jurisdiction to conduct proceedings against a state.[3] These present questions of

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[2] "Any person who violates any provision of this chapter shall be subject to enforcement action by the Board. Such enforcement action may include, but is not limited to, issuance of an order to cease and desist from such violation, imposition of a civil penalty of up to $10,000.00 for each day of violation, or commencement of a civil action to enjoin such violation." In this statute, the term "person" includes a "state." 24 PNC § 103(e).

[3] Appellant also suggests, in passing, that it was improper for the EQPB to have acted as both prosecutor and adjudicator in this case. We do not view this as a separate argument and note simply that, "absent special facts and circumstances"--of which none have been asserted here--"the combination of investigative and adjudicative functions does not, without more, constitute a due process violation." *Withrow v. Larkin*, 95 S. Ct. 1456, 1470 (1975).

law, which we review *de novo*. *Elbelau v. Semdiu*, 5 ROP Intrm. 19, 21 (1994).

ANALYSIS

Unconstitutional exercise of judicial power

Appellant argues that the Constitution vests the power to adjudicate disputes in the judiciary alone. According to Appellant, the Environmental Quality Protection Act improperly confers adjudicatory power on the EQPB by authorizing it to issue orders and impose fines.

Appellant's argument focuses on Article X, § 5, of the Constitution, which provides that "[t]he judicial power shall extend to all matters in law and equity." Appellant argues in his brief that this provision "establishes that the judicial branch of our government has exclusive jurisdiction on all disputes or controversies in *all* matters in law or equity." We disagree. Although we have previously said that "the use of the term 'all matters' is much broader in scope than the terms 'cases' or 'controversies' used in Article III, § 2 of the United States Constitution," *Gibbons v. Republic of Palau*, 1 ROP Intrm. 634, 637 (1989), we do not think that observation has any bearing on the question now before us. Our decision "to adopt a very liberal approach in determining whether a plaintiff has standing to bring a particular action," *id.*--that is, to take a broad view of what and by whom matters may be brought before the Court--does not compel any particular answer to the question whether certain matters must be brought there. As we now consider the latter question, we do not believe that the phrase "all matters in law and equity" was meant to sweep all of administrative law into a court in the first instance, and we are not convinced that the framers of our Constitution intended such a result.

We are fortified in this conclusion by examining the history surrounding the adoption of the Palau Constitution. As Appellant's counsel was candid to state at oral argument, there is nothing in the constitutional history to suggest that the framers meant to bar the introduction of U.S.-style administrative agencies in the Republic. That silence is significant given that the Trust Territory Code authorized administrative bodies to impose various penalties against those who violated agency rules. The 1980 ⊥83 Trust Territory Code expressly authorized administrative agencies to impose sanctions. *See* 17 TTC § 8 (1980) (referring to "adjudication[s] in which a sanction may be imposed"); *see id.* § 1(10)(c) (defining sanction as, *inter alia*, the "imposition of [a] penalty or fine"). Although the 1970 Trust Territory Code did not contain a similar general provision, various provisions throughout that version of the Code created administrative bodies and authorized them to impose penalties and fines. [4] Moreover, the

[4] *See, e.g.*, 19 TTC §§ 51, 52 (creating the Board of Marine Inspectors and providing it with the authority to forbid operation of vessels and revoke their licenses to operate); 33 TTC §§ 4, 5 (creating the District Economic Development Boards and authorizing them to ensure compliance by performing necessary investigations and enforcing their rules and regulations); 61 TTC §§ 55, 201 (establishing a Trust Territory Personnel Board and District Personnel Boards, and authorizing them to suspend, reassign, and remove employees); and 63 TTC §§ 1, 154, 304 (creating the Department of Health Services and authorizing its Director to revoke or suspend the license of persons licensed to provide health care upon cause, and "to secure effective enforcement" of the provisions controlling drug abuse).

1970 Code stated that "[a]ny fine imposed in accordance with law by anyone other than a court shall be paid into the Treasury . . . ." *See* 6 TTC § 452. That section clearly contemplates that entities other than courts could lawfully impose fines. Perhaps most notably, the Trust Territory Environmental Quality Protection Act, 63 TTC §§ 501 *et seq*., gave the Trust Territory environmental protection board precisely the same power to impose fines as was exercised by the EQPB here. *Compare* 63 TTC § 507(1) (now codified at 24 PNC § 242(a)) *with* 24 PNC § 162(a).[5] Administrative agencies and their powers were thus familiar to the framers of the Constitution, and the language of the Constitution could have been crafted to limit their authority, but it does not do so.[6]

The actions of the First Olbiil Era Kelulau following the adoption of the Constitution are also noteworthy. The Administrative Procedure Act, enacted in March 1983 as RPPL 1-53, includes an entire subchapter concerning "Adjudicative Proceedings," 6 PNC §§ 141-148, and clearly contemplates the existence of administrative agencies with the power to hear and decide contested cases, *id.* §§ 141-144, and to enforce those decisions subject to judicial review. *Id.* § 147; *see id.* § 147(c) ("The filing of the petition [for review] does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms."). The Environmental Quality Protection Act, including the provision utilized by the EQPB in this case, became law as RPPL 1-58 just ⊥84 two months later. It was initially proposed in April 1981 by a Senator who had been a delegate to the Constitutional Convention, *see* Senate Bill No. 65, was reported favorably to the Senate by a committee whose Chairman, Vice Chairman and one of whose members had likewise been delegates, *see* Committee on Health, Education and Welfare, Standing Committee Report No. 64 (July 22, 1981), and was reported favorably to the House of Delegates by a Committee that included two former delegates. *See* Committee on Health, Education and Welfare, Standing Committee Report No. 312 (March 24, 1983). These enactments, "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, . . . [are] contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 8 S. Ct. 1370, 1378 (1888).[7]

If the framers had intended to curtail the creation of administrative agencies exercising adjudicative and enforcement powers, it is at best incongruous that the First OEK--which

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[5] Although the First OEK passed its own Environmental Quality Protection Act that incorporated much of the language of the Trust Territory Act, it did not repeal the earlier law "[i]n order to ensure continued compliance with the requirements . . . for grant funding." 24 PNC §172. Thus, both acts were codified in the Palau National Code. *Compare* 24 PNC §§ 101 *et seq. with* 24 PNC §§ 201 *et seq.*

[6] *See, e.g., ROP v. Techur*, 6 ROP Intrm. 340, 341-42 (Tr. Div. 1997) (upholding warrantless border searches where "drafters of the Palau constitution were familiar with the practice in the Trust Territory" and "[n]one of the language in the Palau constitution [could] be construed to restrict border searches to something stricter than what had previously been allowed").

[7] *Accord, Printz v. United States*, 117 S.Ct. 2365, 2370 (1997); *Bowsher v. Synar*, 106 S.Ct. 3181, 3186 (1986); *see, e.g., Elbelau v. Election Commission*, 3 ROP Intrm. 426, 435 (Tr. Div. 1993).

included many of the same people--proceeded to provide the procedural framework for and then to establish such agencies. We think, to the contrary, that no such intent can be discerned from the Constitution or its history.

We note finally that the statutory scheme at issue here would clearly be constitutional under pertinent United States precedents. Although the United States Constitution, in language similar to the Palau Constitution, [8] provides that "[t]he judicial Power of the United States, shall be vested in one [S]upreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const., art. III, § 1, the United States Supreme Court has long recognized that not all matters capable of judicial determination need come before a court in the first instance. In perhaps its earliest discussion of the subject, the Court explained as follows:

> "[W]e do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature is not a subject for judicial determination. At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not ⊥85 bring within the cognizance of the courts of the United States, as it may deem proper."

Den v. The Hoboken Land and Improvement Co., 15 L. Ed. 372, 377-78 (1856). More recently, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), the Court stated that it had repeatedly upheld the "constitutionality of legislative courts and administrative agencies created by [the legislature] to adjudicate cases involving 'public rights.'" *Id.* at 2869 (plurality opinion). Although the line between "public rights" and "private rights" (and whether such a clear line even exists) has been the subject of some controversy in recent years, [9] this case falls squarely into the former category of "matters arising between the Government and persons subject to its authority," *id.*, and concerning new, "congressionally created public rights*," see Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 97 S.Ct. 1261, 1269 (1977), as to which the role of administrative agencies has long been upheld. [10] It does not

[8] Article X, § 1, of the Palau Constitution provides:

> The judicial power of Palau shall be vested in a unified judiciary, consisting of a Supreme Court, a National Court, and such inferior courts of limited jurisdiction as may be established by law.

[9] *Compare Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3258-59 (1986) *with id.* at 3262-63 (Brennan, J., dissenting); *and Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3335-37 (1985) *with id.* at 3341-43 (Brennan, J., concurring in the judgment).

[10] *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 60 S.Ct. 907, 915 (1940) (upholding administrative regulation of the sale and distribution of bituminous coal: "Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least half a century of administrative law.").

involve "the liability of one person to another," *Northern Pipeline*, 102 S.Ct. at 2870, as to which the proper role of administrative agencies, if any, requires closer scrutiny. *See Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3258 ("where private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights have been adjudicated has been searching").

We have no occasion today to set a precise boundary between those matters which may be made the subject of administrative proceedings and which may not, nor to decide whether the majority or minority views expressed in the U.S. Supreme Court, *see* n.9 *supra*, or some other approach entirely should govern more difficult cases. *See, e.g., McHugh v. Santa Monica Rent Control Board*, 777 P.2d 91, 106 (Cal. 1989)(establishing a two-part test, including a requirement of judicial review, to determine when administrative agencies can perform adjudicatory functions). For now it is sufficient to state that, in light of both the history and practice discussed above and of U.S. caselaw, we see no constitutional bar to the actions taken by the EQPB in this matter.

<u>Proceedings against a state</u>

Appellant also argues that the Constitution confers exclusive jurisdiction over matters in which a state is a party to the Trial Division of the Supreme Court, and that Appellee lacked jurisdiction to conduct proceedings against a state in its own forum. Again, we disagree. The relevant portion of the Palau Constitution provides that "[t]he trial division of the Supreme Court shall have original and exclusive jurisdiction over all matters . . . in which the national government or a state government is a party. In all other cases, the National Court shall have original and concurrent jurisdiction with the trial division of the Supreme Court." Palau Const. ⊥86 Art. X, § 5. Consistent with our discussion above, we read this provision not to address the dividing line between courts and administrative agencies by dictating when a matter must be brought to court in the first instance, but solely to allocate jurisdiction within the Judiciary over cases that have been brought there.

Yalap v. Republic of Palau, 3 ROP Intrm. 61 (1992), relied upon by Appellant, is not to the contrary. There, citing Article X, § 5, the Court invalidated a statute granting jurisdiction to the Court of Common Pleas over public employment cases in which the national government was a party. 3 ROP Intrm. at 64-66. Notably, although the Court also held that the National Civil Service Board had no role in reviewing personnel grievances, it reached that conclusion solely on the basis of legislative intent. *Id.* at 64 ("The legislature intended Title 33 grievances to be heard by a court, and not an administrative agency."). Of course, if the Court had believed that the Constitution simply prohibited an administrative agency from considering such matters because of the involvement of the national government--as it held with respect to the Court of Common Pleas--there would have been no need to delve into legislative intent. *Yalap* is thus in accord with our understanding that Article X, § 5, that provision governs the division of jurisdiction within the judiciary, and does not concern the jurisdiction of administrative agencies.

CONCLUSION

For all of the reasons set forth above, the judgment of the trial court is AFFIRMED.