

Falcam v. Federated States of Micronesia (No. 2)

Supreme Court (Pon.)
King C.J.
14 September 1987

Employment law - contract of employment - illegal hiring - declaration that hiring statutorily barred - whether employee entitled to compensation for period after hiring before declaration.

10 *Contracts - illegal contract - service under illegal contract - whether employee should be paid under such contract for justified expectation.*

Constitutional law - due process of law - salary payments withheld - lack of hearing - whether expectation of monthly salary is property interest deserving protection of due process clause.

The plaintiff was illegally hired as postmaster of Pohnpei by his uncle. An earlier decision of this Court having so declared, plaintiff now seeks compensation for the eight months of service before the court hearing. Plaintiff had resigned another position, acted in good faith and on advice in taking the job, and performed to a very high standard in the job.

20 **HELD:** Plaintiff is entitled to be compensated. Mr Falcam had justified expectations of a permanent position and he was allowed to continue to perform because the government failed to take positive steps to prevent him from continuing in the job. He also had a due process right, under the F.S.M. Constitution, to a hearing before his salary was taken.

30 **OBSERVATION:** Plaintiff's uncle resigned his position as postmaster general of F.S.M. and plaintiff was rehired, without objection, as postmaster of Pohnpei after his uncle's departure from the postal service.

Cases referred to in judgment:

Etipison v. Perman 1 F.S.M. Intrm. 405 (Pon. 1984)
Falcam v. F.S.M. Postal Service 3 F.S.M. Intrm. 112 (Pon. 1987); supra at p. 25
F.S.M. v. Tipen 1 F.S.M. Intrm. 79 (Pon. 1982)
Ishizawa v. Pohnpei 2 F.S.M. Intrm. 67 (Pon. 1985)
Suldan v. F.S.M. (II) 1 F.S.M. Intrm. 339. (Pon. 1983)

Legislation referred to in judgment:

11 F.S.M.C. 1305
39 F.S.M.C. 102, 104, 106
40 55 F.S.M.C. 201, 205, 214, 221
F.S.M. Constitution, Article IV, section 3
Financial Management Act 1969
Trust Territory Code, 77 T.T.C. 503 (1980)

Other sources referred to in judgment:

Restatement (Second) of Contracts

OBSERVATION: The "Due Process" clause of the F.S.M. Constitution is, in substance, identical to the Due Process clause of the 5th and 14th Amendments to the U.S. Constitution.

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F. Ramp for the plaintiff*J. Wardof* for the defendant**KING C.J.****Judgment:**

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This case arises out of the hiring of plaintiff Albert Falcam as postmaster of Pohnpei by his uncle, who was then postmaster general of the Federated States of Micronesia. A previous ruling in this case held that the hiring violated 11 F.S.M.C. 1305, which prevents a government official from participating in any governmental decision which will redound to the economic benefit of a close relative. *Falcam v. Postal Service* (I), 3 F.S.M. Intrm. 112 (Pon. 1987); supra at p. 25. That opinion also held that the original illegal hiring decision could not be relied upon as a basis for permitting Albert Falcam to retain the postmaster position in the future. *Id.*

The remaining issue, now before the Court, is whether Albert Falcam is entitled to be compensated for work performed by him from 1 September 1986 until mid-May 1987.¹ I conclude that he is so entitled.

I. Background

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The agreed facts then known to the Court are set out in the earlier opinion. 3 F.S.M. Intrm. 112, 113-14. On 17 August an additional hearing was held during which Albert Falcam and former postal inspector, now acting postmaster general, James Miller testified. Based upon the testimony during that hearing, the following additional findings of fact are now made.

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First, Albert Falcam was acting in good faith when he resigned his employment with the Peace Corps, and accepted the Pohnpei postmaster position. On two separate occasions, before he accepted the position, he asked Mr Miller and Postmaster General Leo Falcam whether the familial relationship between Albert and Leo Falcam would create any difficulty. Mr Miller responded that no problem would arise since the decision would be based upon the merits of the applicants without regard to family relationships. Similarly, Leo Falcam assured him that the postmaster general had full power to hire whatever person he thought to be best suited for the job. Albert Falcam reasonably relied on those assurances.

Second, Albert Falcam has at all times displayed an excellent attitude and has done good work. Mr Miller testified that Mr Falcam has been an enthusiastic state postmaster. He has frequently arrived at work early and remained late. Moreover, audits conducted by F.S.M. postal inspectors at the request of Mr Miller reveal that the Pohnpei post office has operated smoothly under Albert Falcam's direction.

1 The parties have advised the Court that after the former postmaster general resigned his position to become a member of the Congress of the Federated States of Micronesia, Albert Falcam was reapointed to the postmaster position. There is no contention that either 11 F.S.M.C. 1305, or this Court's earlier opinion, bars that May 1987 hiring decision.

Third, the F.S.M. department of finance has at all times refused to issue salary cheques for Mr Falcam. By mid-September 1986, Albert Falcam had become aware of this. At that time he knew there was a controversy and that various national government officials believed his hiring to have been in violation of 11 F.S.M.C. 1305. By 8 October 1986 he knew of the written opinion of Carl V. Ullman, F.S.M. attorney general at that time, holding the hiring to have been in violation of that law.

Fourth, neither the postmaster general nor any other person affiliated with the national government has taken direct action to prevent Albert Falcam from continuing work and carrying out responsibilities as Pohnpei postmaster. No person has ever told him that he must stop working in the capacity of postmaster.

Fifth, no prior notice was given to Albert Falcam and no hearing of any kind was provided, either before or after the refusal of the department of finance to make salary payments to him, to determine the propriety or legality of that refusal.

II. Legal Analysis

The factors enumerated in section 178(3) of the *Restatement (Second) of Contracts* and identified in the earlier opinion as militating against Albert Falcam's continuing claim to the position of Pohnpei postmaster, 3 F.S.M. Intrm. at 122, are of equal force against his claim for compensation.

However, the countervailing section 178(2) factors weigh much more heavily on Mr Falcam's compensation claim than for his other claim, rejected in the earlier opinion, that he was entitled to retain the position pursuant to appointment by his uncle.

These factors, set out in the *Restatement (Second) of Contracts* section 178(2), are as follows:

- (2) In weighing the interest in the enforcement of a term, account is taken of
 - (a) the parties' justified expectations,
 - (b) any forfeiture that would result if enforcement were denied, and
 - (c) any special public interest in the enforcement of the particular term.

Restatement (Second) of Contracts section 178(2). The factors call for separate analysis.

A. Justified expectations

Plainly, at the time Mr Falcam gave up his job with the Peace Corps and began work with the postal service, he was justified in believing that he would hold the postmaster position until terminated by a supervisor within the postal service and that he would be compensated for his work in that capacity. He had received specific assurances that his relationship with Mr Falcam would have no effect. Moreover, although the postmaster position is exempt from the public service system, 39 F.S.M.C. 106, and therefore outside the responsibilities of the F.S.M. office of personnel, the personnel office had also reviewed his application and certified that he was qualified to hold the Pohnpei postmaster position.

Subsequently, questions were raised by executive branch officials. Nevertheless, Mr Falcam's superiors at the postal service continued to insist upon his right to remain as postmaster. This fact has particular significance because the postal service is an "independent agency", not part of the executive branch. 39 F.S.M.C. 102. Yet, it is also worth noting that even the executive branch officials did not tell Mr Falcam

that he should stop working as postmaster.

Thus the only actions calculated to shake Mr Falcam's belief that he had been hired legitimately to serve as postmaster, and his expectation that he would be compensated for his work in that capacity, were the refusal of the department of finance to pay his salary and the attorney general's issuance of an opinion holding his hiring to be illegal.

140 1. *Finance Withholding* - The government contends that the secretary of finance had statutory authority to withhold salary payments under the Financial Management Act of 1979.²

Mr Falcam aptly points out there are substantial issues as to the extent of the secretary's authority under 55 F.S.M.C. 201(5) to refuse to pay obligations created by allottees under 55 F.S.M.C. 214, especially where, as here, the obligation at issue relates to operations of an agency such as the postal service, which is not part of the executive branch. 39 F.S.M.C. 102. *See also* 39 F.S.M.C. sections 104(1) and (3).

150 The already difficult issues of statutory interpretation are multiplied in this case by the manner in which the refusal to pay occurred. There has been no showing that the secretary himself exercised his own discretion in deciding to withhold. No specific order signed by the secretary has been presented. Nor has the Court been advised of any statement of reasons, issued concurrently with the refusal to pay, explaining why withholding was "necessary" within the meaning of the Act.³

Further, there is nothing in the record to suggest that the secretary of finance perceived the need to reconcile his power to withhold under 55 F.S.M.C. 205(1) with his obligation under 55 F.S.M.C. 221(3) to disburse obligated funds within thirty days of their becoming payable.⁴ The secretary continued to withhold beyond the thirty day period and failed to take any affirmative action to obtain judicial affirmation of his theory that the salary payments would have been illegal.

160 We need not here parse the language of 55 F.S.M.C. 205(1). Whatever authority may properly be exercised by the secretary under that provision, it is clear that the actions of the secretary in this case contravened constitutional due process requirements.

The executive branch officials involved here seem to have overlooked the fact that the conflict about the hiring affected interests in addition to those of the department of finance and the postal service. Individual property rights of Albert Falcam were

2 The government relies upon 55 F.S.M.C. 205(1), which says: "(1) The Secretary of Finance of the Federated States of Micronesia shall be the general accountant of the General Fund of the Federated States of Micronesia. He shall record and audit, or cause to be recorded and audited, every receipt and disbursement of money paid to, by, or through the National Treasury of the Federated States of Micronesia. He shall have full and complete supervision of all funds of the Federated States of Micronesia, including the power to withhold his approval when necessary to prevent misappropriation of public funds as well as the disbursement of public moneys in excess of specific appropriations." (Emphasis added).

3 Withholding presumably is permitted and "necessary" only long enough for the secretary to obtain a judicial determination as to the validity of the proposed payment.

4 Nothing in the applicable legislative history nor the Financial Management Act itself reveals any intent by Congress that the last sentence of 55 F.S.M.C. 205(1) should override other provisions within the Act, or provisions of other statutes such as the National Postal Service System Act, which provides that the postmaster general, not the secretary of finance, will supervise the operations of the postal service. 38 F.S.M.C. 108. The provision codified as 55 F.S.M.C. 205(1) was not in the original proposed bill. Drawn from the Trust Territory Code, 77 T.T.C. 503 (1980), the language was inserted, without explanation or comment, by the Committee on Ways and Means. S.C.R.E.P. No. 1-88, J. of 1st Cong. 1st Spec. Sess. 111 (1979). There was no discussion on the floor of the Congress concerning the import of the provision.

also at issue.

170 Albert Falcam had been hired by the postal service pursuant to normal personnel procedures.⁵ He began work at the beginning of September and by mid-September had a sound basis for expecting to be paid. This expectation was a property interest qualifying for protection under the due process clause of the Constitution.⁶

In addition, he had received assurances from supervisory persons within the postal service of a right to continued government employment, subject only to removal by the postmaster. This expectation of continued employment also qualifies for due process protections. *Suldan v. F.S.M.* (II) 1 F.S.M. Intrm. 339, 352 (Pon. 1983).

180 Yet, the secretary's immutable refusal to make salary payments, coupled with the secretary's failure to seek a judicial determination, reveal that the secretary intended to use his withholding power not only to deny Albert Falcam's claim for compensation already earned, but also to force Mr Falcam to abandon the postmaster position, terminating his employment.

The due process clause prevents governmental authorities from depriving an individual of such property interests, without first according an opportunity to be heard as to whether the proposed deprivation is permissible. *Etpison v. Perman*, 1 F.S.M. Intrm. 405, 423 (Pon. 1984). Only in extraordinary circumstances, where immediate action is essential to protect crucially important public interests, may private property be seized without a prior hearing. *Ishizawa v. Pohmpei*, 2 F.S.M. Intrm. 67, 76 n.9 (Pon. 1985). The secretary rarely, if ever, would have authority under 55 F.S.M.C. 205(1) to withhold salary payments without a prior hearing. In any event, any withholding of private property without a hearing can be justified only so long as it takes the secretary to file a lawsuit to obtain a judicial determination as to legality of the payment being withheld.

190 Here, Albert Falcam received no prior notice from governmental authorities that consideration was being given to withholding his salary payment. No hearing was provided for him either before or after the seizure. The secretary made no move to obtain judicial approval of his seizure of the funds. Albert Falcam himself was finally forced to initiate this litigation to obtain a hearing and judicial determination as to the validity of his claim for compensation.

200 The actions of the secretary of finance were therefore in violation of the due process rights of Albert Falcam. This Court will not regard such unlawful governmental actions as a factor in favour of the government's position.

2. Attorney General's Opinion - The 8 October 1986 opinion of the attorney general does not alter the legal effect of anything said here. While in retrospect the analysis set forth in the opinion is sound, it was not a judicial decision, and could not serve as an adjudication of the rights of the parties.

5 In oral argument the government tentatively suggested that finance's refusal to make salary payments was justified because of a lack of proper documentation to support the payments. That is without foundation. The government concedes that finance originally received the notice of Mr Falcam's personnel action. Subsequent retrieval of that notice by the office of personnel was without legal effect. It is doubtful that the office of personnel can affect compensation rights of any employee simply by retrieving from finance a previously delivered notice of personnel action. In any event, the office of personnel is surely without power to affect the compensation rights of an independent agency's employee who is specifically exempted from the provisions of the National Public Service System Act.

6 "A person may not be deprived of life, liberty, or property without due process of law." F.S.M. Constitution Article IV, section 3.

The opinion did not attempt to order the postmaster general to terminate Albert Falcam. Since the postal service is not part of the executive branch, it is doubtful that such an order could have been enforced. Moreover, the opinion did not say that Albert Falcam was or must be terminated as postmaster and did not discuss his compensation rights. The opinion was merely legal analysis offered to the postmaster general and legal advice to be acted upon by the secretary of finance. Unfortunately, the actions taken by the secretary of finance, presumably based upon guidance from the office of the attorney general, were not in conformity with constitutional requirements.

Applying the section 178(2)(a) justified expectations test to these facts, I find that: (1) Mr Falcam had a substantial and justified expectation of compensation when he began work; and (2) his expectation justifiably continued even after the secretary withheld his salary payments and after the attorney general issued his opinion on 8 October 1986.

Looking at the other side of the scale, neither the postal service nor the national government could justifiably have expected that Mr Falcam was to carry out the duties of postmaster of Pohnpei for some eight months without being compensated. By failing to take steps to prevent Mr Falcam from continuing to perform those duties, the government effectively acquiesced in his expectations.

B. Forfeiture if Enforcement Denied

Of course, Mr Falcam forfeited his Peace Corps job at the very outset in expectation that he would serve as Pohnpei postmaster. Thereafter, he devoted some eight months of full time work to the position. All of that would be forfeited if compensation is now denied him.

There is apparently no dispute whatever that the postal service received excellent performance of the duties for which Mr Falcam now seeks compensation. In short, the postal service and the people of the Federated States of Micronesia would forfeit nothing if Mr Falcam is compensated as originally agreed.

C. Public Interest

The Congress has determined that there is a public interest in preventing government officials from hiring their close relations to public positions. There plainly is, then, a substantial public interest in preventing Albert Falcam from realizing compensation as a result of the enforcement of 11 F.S.M.C. 1305.

On the other hand, there is an even stronger public interest in preventing government officials from repeating the pattern of conduct reflected in this case. Mr Falcam was deprived of compensation without a hearing. Moreover, by refusing to pay his salary, the secretary of finance was trying to terminate Mr Falcam's employment. These actions were calculated to deprive Albert Falcam of his claims to compensation and employment without due process.

Executive branch officials undoubtedly had laudable motives in acting as they did. The secretary of finance believed, understandably and correctly, that the hiring of Albert Falcam was illegal. After withholding was initiated, that belief was supported by a written opinion of the attorney general. This quite naturally led to the conclusion that Albert Falcam should not be paid. Thus, the secretary of finance, guided by the attorney general, was simply attempting to enforce the law and to prevent misuse of public funds.

They could have accomplished this goal by promptly filing a lawsuit seeking a judicial determination, arrived at in accordance with due process. Subsequent events have shown that this would have resulted in a ruling that the hiring was illegal. Albert Falcam would have been prevented from continuing to work and from increasing his claim for compensation.

260 However, the secretary and the attorney general did not file a lawsuit. Instead, they apparently viewed the withholding decision, arrived at without a hearing of any kind, as final rather than as an interim decision designed to provide an opportunity to obtain a judicial determination. In attempting to enforce one law, they violated constitutional rights of a citizen. Such violations must not be allowed in the name of law enforcement.

270 The people of the Federated States of Micronesia have drafted, adopted and ratified a constitution calling for substantial protection of their individual and human rights. We may not acquiesce in the erosion of these fundamental rights through tolerance of zealous and well-intentioned, but improper, actions of law enforcement officers. The integrity of the governmental powers entrusted to this Court, to law enforcement officers, and to other governmental officials, by the people of the Federated States of Micronesia demands that we must, above all, adhere to the Constitution and laws which are the sole source of our authority.

F.S.M. v. Tipen 1 F.S.M. Intrm. 79, 95 (Pon. 1982).

III. Conclusion

280 All of the tests set forth in section 178(2) of the *Restatement (Second) of Contracts*, which this Court adopts as suitable for application in Micronesia, weigh in favour of Mr Falcam's compensation claim. It is therefore held that he is entitled to be paid at the rate payable for the position of postmaster of Pohnpei, for all his uncompensated work from the time of hiring until the date of this Court's previous ruling.

Reported by: D.V.W.