

CHUUK STATE SUPREME COURT TRIAL DIVISION

CHUUK STATE BOARD OF EDUCATION,)	CSSC-CA. NO. 84-2008
)	
Plaintiff,)	
)	
vs.)	
)	
SANFIO A. SONY, in his official capacity as)	
purported acting director of the Department of)	
Education, JOSES R. GALLAN, in his official)	
capacity as Attorney General, JONAS PAUL, in his)	
official capacity as acting director of the)	
Department of Administrative Services, JIMMY)	
EMILIO, in his official capacity as Director of the)	
Department of Public Safety,)	
)	
Defendants-Third Party Plaintiffs-)	
Counterdefendants,)	
)	
vs.)	
)	
PETER SISRA, JOHANNES BERDON, and ALVIOS)	
WILLIAM,)	
)	
Third-Party Defendants-)	
Counterclaimants.)	
)	

ORDER FOR PARTIAL SUMMARY JUDGMENT

Camillo Noket
Chief Justice

Decided: February 9, 2010

APPEARANCES:

For the Plaintiffs:	Ben K. Enlet P.O. Box 1650 Weno, Chuuk FM 96942
For the Defendants:	Charleston Bravo Assistant Attorney General Office of the Chuuk Attorney General P.O. Box 1050 Weno, Chuuk FM 96942
For the Third-Party Defendants:	Ben K. Enlet P.O. Box 1650 Weno, Chuuk FM 96942

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HEADNOTES

Civil Procedure – Summary Judgment – Procedure

When there may be some facts in dispute with respect to other issues in a case, their presence will not bar summary judgment if they are not material to the issue presented for summary judgment. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 60 (Chk. S. Ct. Tr. 2010).

Civil Procedure – Summary Judgment – Procedure; Constitutional Law – Chuuk – Interpretation; Statutes – Construction

Because issues of statutory construction and constitutional construction are issues of law, courts have final authority over them, and the issues are ripe for summary judgment, which will be granted to the party that is entitled to it as a matter of law. In ruling on these issues of law, the language of the statutory and constitutional provisions is controlling and the court will construe and give effect to the provisions' plain meaning. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 60 (Chk. S. Ct. Tr. 2010).

Constitutional Law – Chuuk; Public Officers and Employees – Chuuk

The Chuuk Board of Education has eight members who are appointed by the Governor with the advice and consent of the Senate. The Education Department head, who is also appointed by the Governor with the advice and consent of the Senate, serves as the Board's executive director. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 60 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

A vacancy on the Board of Education occurs when a member dies; resigns; is removed from the Board; has been incapacitated or disabled; or becomes a Department of Education employee or staff, except the member who represents the public school system, and, if there is a vacancy, the Governor appoints a replacement member who serves for the duration of the departed member's term. The vacancy provision's plain meaning is that temporary appointments are only be made when a vacancy occurs for one of the enumerated reasons; otherwise, an incumbent's term must expire and a new appointee must first be confirmed by the Senate before the new incumbent can sit on the Board. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 61 (Chk. S. Ct. Tr. 2010).

Constitutional Law – Chuuk; Public Officers and Employees – Chuuk

The Director's responsibilities to the Board of Education include duties and functions as assigned by the Board, attendance at Board meetings, and providing logistical and administrative needs to the Board and other needs as declared by the Board, and the Board is the only authority that may remove the Director, which is by a majority vote of all Board members for misconduct, incompetency, neglect of duty, or other good cause. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 61 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

Since the expiration of a board member's term is not one of the enumerated occurrences giving rise to a vacancy, it follows that during any interim after the expiration of the incumbent's term and the confirmation of a new appointment, no vacancy is created. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 61 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk; Statutes – Construction

The Board of Education Act should be read so that its provisions are internally consistent and sensible and each provision should be considered against the entire Act's background so as to arrive

at a reasonable interpretation consistent with other specific provisions and the Act's general design. Since the Board's statutorily-mandated purpose is to provide control and direction and to formulate policy for the Chuuk educational system, if the Act were construed so as to render the Board unable to perform its duties each time members' terms expired without replacements having been confirmed, the Board's ability to discharge its duties would be severely handicapped and its purpose to act towards the betterment of education in Chuuk would be undermined and since the Act contemplates an independent board with the power to perform its functions without interruption, construing the provisions for filling vacancies and appointments, and taking into account the Board's statutory purpose and the Act's overall intent, holdover incumbents continue to hold their seat until there are new incumbents. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 61 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

When no provision is made by law for an official's holdover, the official is regarded as a de facto official. A holdover official's de facto authority ends when the office is filled by appointment or election, as provided by law. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 62 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

A de facto officer is one who is in possession of an office, and discharging its duties, under color of authority. In the context of incumbent de facto officials, "under color of authority" means authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. The principle of de facto authority is based on the public's interest in having a safeguard against unnecessary interruption of public governance. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 62 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

The generally applied rule is that where a term of office is fixed by law simply for a period of time and no particular date is established for the beginning or ending of the term, each incumbent takes a term running from the date of his appointment equal in duration to the period of time fixed; and a new term does not begin at the end of the preceding term but only when the new incumbent is appointed, or holdover incumbent is reappointed. Thus, in the absence of a constitution or statute providing otherwise, an officer is entitled to hold his office until his successor is appointed or elected and has qualified. In this context, the term "holding over" when applied to an officer, implies that the office has a fixed term and the incumbent is holding the office into the succeeding term. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 62 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

The de facto doctrine is applied even in cases of executive branch officials so long as it is not otherwise expressly, or by clear implication, prohibited by law. The reasons for the application of the de facto doctrine to independent board members appears to be even stronger than other executive branch officials, since they are statutorily mandated to exercise their duties and powers independently. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 62 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

In instances where there is no FSM precedent, the court may consider cases from other jurisdictions in the common law tradition. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 62 n.2 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

What is clear from the Board of Education Act is that a term's expiration does not create a vacancy and, other than the confirmation of new members, there is otherwise no provision that would

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17 FSM Intrm. 56 (Chk. S. Ct. Tr. 2010)

allow the Board to proceed uninterrupted after the expiration of board member terms and since the Act does not set a fixed date for the beginning and ending of Board member terms but only for staggered five year terms and because the underlying public policy for the application of the de facto doctrine is especially applicable when the Board of Education's purpose is to provide uninterrupted educational services to the Chuuk public, a holdover incumbent Board member exercises de facto authority until there is a new incumbent. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 63 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

Board members were due compensation and benefits while they continued discharging their duties as holdover members. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 63 (Chk. S. Ct. Tr. 2010).

Public Officers and Employees – Chuuk

Even if the Board of Education had the authority to terminate the Director, the Board was still required to adhere to appropriate procedures and requirements for the termination to be effective. Chuuk State Bd. of Educ. v. Sony, 17 FSM Intrm. 56, 63 (Chk. S. Ct. Tr. 2010).

* * * *

COURT'S OPINION

CAMILLO NOKET, Chief Justice:

I. INTRODUCTION

The sole issue to be decided on summary judgment is whether the plaintiff, Chuuk State Board of Education, has the authority to terminate its executive director after the terms of the Board's members have expired, but before successors have been confirmed.

II. BACKGROUND

In its August 19, 2008 verified complaint, the Board of Education sought, among other things, a declaration that Board member's actions are valid during the member's term or until a replacement member is duly appointed by the Governor and confirmed by the Senate. Verified Complaint at 8, para. 2. After the court denied their motion to dismiss, on January 19, 2009, defendants filed their answer with affirmative defenses along with a third party complaint against individual Board members Peter Sira, Johannes Berdon, and Alvios William. On February 20, 2009, each of the third party defendants filed his answer with affirmative defenses along with a counter-claim against the third party defendants. On March 10, 2009, the third party defendants filed a "response" to the third party plaintiffs' complaints. On October 14, 2009, the Board filed its motion for summary judgment on this issue. On December 4, 2009, defendants filed their cross-motion for summary judgment on the same issue. On December 29, 2009, defendants filed a supplemental brief providing further legal authority on the issue, and, on January 4, 2010, the Board also filed a supplemental brief providing additional legal authority on the issue.

In its briefs, the Board argues that if the Board members terms were expired, they still had the authority to discharge their duties as Board members until their successors were duly appointed and confirmed. Conversely, in their briefs, the defendants contend that after the Board members' terms expired, their actions were illegal and void. Defendants did not raise as a basis for summary judgment any of their affirmative defenses, and the court does not find that any of defendants' affirmative

defenses provide a basis for granting them summary judgment or preventing entry of summary judgment to the plaintiff.

III. ANALYSIS

a. Summary Judgment Standard

Although this case involves multiple issues, the sole issue for summary judgment is whether incumbent Board members could legally continue to exercise their authority as Board members after their terms were expired, but before their replacements had been confirmed. For the purposes of their motions, the parties agree that the Board could not have formed a quorum after the expiration of member's terms without the expired term member's votes.¹ In any case, although there may be some facts in dispute with respect to other issues in the case, the presence of factual issues will not bar summary judgment if they are not material to the issue presented for summary judgment. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 99 (Pon. 2002).

The resolution of the issue for summary judgment depends on the construction of the constitutional and statutory provisions granting the Board its duties and powers. The duties and powers of the Board are provided for by the Chuuk Constitution (Art. X, § 3 and § 4) and by statute (The "Chuuk State Board of Education Act of 1991," Chk. S.L. No. 191-15, §§ 1-11). Because issues of statutory construction and constitutional construction are issues of law, courts have final authority over them, and the issues are ripe for summary judgment, which will be granted to the party that is entitled to it as a matter of law. K&I Enterprises v. Francis, 15 FSM Intrm. 414, 417-18 (Chk. S. Ct. Tr. 2007); Sauder v. Chuuk State Legislature, 7 FSM Intrm. 358, 360, 363 (Chk. S. Ct. Tr. 1995); Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 31 (Pon. 2001). In ruling on these issues of law, the language of the statutory and constitutional provisions is controlling and the court will construe and give effect to the plain meaning of the provisions. FSM v. Wainit, 12 FSM Intrm. 105, 111 (Chk. 2003); In re Paul, 11 FSM Intrm. 273, 278 (Chk. S. Ct. Tr. 2002).

b. The Board of Education Act

i. Board Member Appointments and Qualifications

The Board has eight members who are appointed by the Governor with the advice and consent of the Senate. Chk. Const. art. X, § 3; Chk. S.L. No. 191-15, § 3. Of the eight members, five members represent each of the five Senatorial regions, one member represents the public school system, one member represents the private schools, and one member is an expert in the field of education. Chk. Const. art. X, § 3; Chk. S.L. No. 191-15, § 3. The head of the Education Department, who is also appointed by the Governor with the advice and consent of the Senate, serves as the Board's executive director. Chk. Const. art. X, § 4; Chk. S.L. No. 191-15, § 4.

ii. Board Member Terms and Vacancies

The terms of the first Board members were staggered in three, four, and five year terms; thereafter, members are appointed for five year terms. Chk. S.L. No. 191-15, § 5. No particular dates are set for the beginning and ending of terms.

¹A quorum is formed when five of the eight Board members have been confirmed by the Senate. Chk. S.L. No. 191-15, § 7(3). Here, the defendants contend that at least three incumbent members' terms expired so that the Board no longer could form a quorum. The Board disputed that incumbent members' terms expired.

A vacancy on the Board occurs when a member dies; resigns; is removed from the Board; has been incapacitated or disabled; or becomes an employee of staff of the Department of Education, except the member who represents the public school system. Chk. S.L. No. 191-15, § 6. If there is a vacancy, the Governor appoints a replacement member who serves for the duration of the departed member's term. Chk. S.L. No. 191-15, § 6.

The plain meaning of the provision for vacancies is that temporary appointments are only be made when a vacancy occurs for one of the enumerated reasons; otherwise, an incumbent's term must expire and a new appointee must first be confirmed by the Senate before the new incumbent can sit on the Board. Chk. S.L. No. 191-15, § 5, § 6; Welle v. Walter, 8 FSM Intrm. 572, 573-74 (Chk. S. Ct. Tr. 1998) (Governor of Chuuk has no constitutional or statutory power or authority to make appointment on the Board of Education other than as provided for by the Constitution); Wainit, 12 FSM Intrm. at 111.

iii. *The Board's Power to Remove the Director*

The Director is responsible to the Board. The Director's responsibilities to the Board include duties and functions as assigned by the Board, attendance at Board meetings, and providing logistical and administrative needs to the Board and other needs as declared by the Board. Chk. S.L. No. 191-15, § 8(1)-(3). The Board is the only authority that may remove the Director. Chk. Const. art. X, § 4; Chk. S.L. No. 191-15, § 4. The Director's removal is by a majority vote of all Board members for misconduct, incompetency, neglect of duty, or other good cause. Chk. S.L. No. 191-15, § 8(6).

c. *Holdover Authority*

Neither the Constitution nor the Board of Education Act specifically address what, if any, authority a holdover incumbent has. The expiration of a board member's term is not, however, one of the enumerated occurrences giving rise to a vacancy. Chk. S.L. No. 191-15, § 6. It follows that during any interim after the expiration of the incumbent's term and the confirmation of a new appointment, no vacancy is created. *Id.*

The court also considers that the Act should be read so that its provisions are internally consistent and sensible. McCaffrey v. FSM Supreme Court, 6 FSM Intrm. 279, 281 (App. 1993). Each provision should be considered against the background of the entire act, so as to arrive at a reasonable interpretation consistent with other specific provisions and the general design of the act. Bank of the FSM v. FSM, 6 FSM Intrm. 5, 8 (Pon. 1993). The statutorily mandated purpose of the Board is to provide control and direction and to formulate policy for the Chuuk educational system. Chk. S.L. No. 191-15, § 2. If the court were to construe the Act in such a way as to render the Board unable to perform its duties each time members' terms expired without replacements having been confirmed, the Board's ability to discharge its duties would be severely handicapped and its purpose to act towards the betterment of education in Chuuk would be undermined. Nowhere is it explicated or implied in the Act that the Board's purpose would be advanced through periods of inactivity resulting from delays in the confirmation process. Rather, the Act contemplates an independent board with the power to perform its functions without interruption. Chk. S.L. No. 191-15, § 1 *et seq.* Construing the provisions for filling vacancies and appointments, and taking into account the statutory purpose of the Board and overall intent of the Act, the court concludes that holdover incumbents continue to hold their seat until there are new incumbents.

d. *De Facto Authority*

Since the Board of Education Act and Constitution do not explicitly provide for the authority of

holdover Board members, the court also relies on the application of the de facto doctrine in reaching its conclusion. Where no provision is made by law for an official's holdover, the official is regarded as a de facto official. Hartman v. FSM, 6 FSM Intrm. 293, 298-99 (App. 1993) (constitutionally ineligible judge had de facto authority); *see generally* 67 C.J.S. *Officers* § 271 (1978). The de facto authority of a hold over official ends when the office is filled by appointment or election, as provided by law. 67 C.J.S. *Officers* § 271 (1978).

FSM courts and the Chuuk State Supreme Court have held that a de facto officer is one who is in possession of an office, and discharging its duties, under color of authority. *See e.g.*, Tulensru v. Kosrae, 15 FSM Intrm. 122 (App. 2007); Ruben v. Hartman, 15 FSM Intrm. 100, 114 (Chk. S. Ct. App. 2007); Alafonso v. Suda, 10 FSM Intrm. 553, 556 (Chk. S. Ct. Tr. 2002); Hartman v. FSM, 6 FSM Intrm. 293, 298-99 (App. 1993). In the context of incumbent de facto officials, "under color of authority" means authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. Tulensru, 15 FSM Intrm. at 129. The principle of de facto authority is based on the public's interest in having a safeguard against unnecessary interruption of public governance. *Id.* In the FSM, the de facto principle has been applied to uphold the authority of judges acting in a de facto capacity. *See Tulensru*, 15 FSM Intrm. at 129 (judge's order valid even though term had officially ended); *see also Ruben*, 15 FSM Intrm. at 114 (special justice's acts were valid as a judge de facto); and *see Alafonso*, 10 FSM Intrm. at 556 (same).

The Tulensru court noted that a case involving an executive officer might be distinguishable from a case involving a judicial officer. 15 FSM Intrm. at 122; *see generally* 67 C.J.S. *Officers* § 71 (1978) (Exceptions to the application of the principle of an official holding over and exercising de facto authority exist in some instances in the case of higher judicial officers, in cases of members of the legislature, or of specified members of boards and assemblies, as where the constitution has in effect, or by clear implication, prescribed the terms of such officers). The court did not find any FSM cases directly addressing the de facto authority of board members under a similar statutory scheme. Even in cases involving executive branch officials, however, the generally applied rule is that where a term of office is fixed by law simply for a period of time and no particular date is established for the beginning or ending of the term, each incumbent takes a term running from the date of his appointment equal in duration to the period of time fixed; and a new term does not begin at the end of the preceding term but only when the new incumbent is appointed, or holdover incumbent is reappointed. 67 C.J.S. *Officers* § 69 (1978). Thus, in the absence of a constitution or statute providing otherwise, an officer is entitled to hold his office until his successor is appointed or elected and has qualified. 67 C.J.S. *Officers* § 71 (1978); *see also*, 63A AM. JUR. 2d *Public Officers* § 166-69 (1984). In this context, the term "holding over" when applied to an officer, implies that the office has a fixed term and the incumbent is holding the office into the succeeding term. 67 C.J.S. *Officers* § 71 (1978).

Thus, the de facto doctrine is applied even in cases of executive branch officials so long as it is not otherwise expressly, or by clear implication, prohibited by law. The reasons for the application of the de facto doctrine to independent board members appears to be even stronger than other executive branch officials, since they are statutorily mandated to exercise their duties and powers independently. For example, in McCall v. Cull, 75 P.2d 696, 699 (Ariz. 1938), the court determined examined a statute that provided for a livestock board in trying to determine the holdover authority of incumbent board members.² The court stated the general rule that where appointments are made subject to the confirmation of some officer or body, such appointment must be approved before the person is legally entitled to take office. In such instances, if the holdover incumbent's term has expired but a successor

²In instances where there is no FSM precedent, the court may consider cases from other jurisdictions in the common law tradition. Walter v. FSM, 15 FSM Intrm. 130, 131 (App. 2007).

has not been confirmed, "the [holdover] incumbent may hold over until the successor is properly appointed and confirmed." McCall, 75 P.2d at 699 (quoting Ruling Case Law, 433, § 84). The court concluded that if an office is lawfully occupied by a qualified incumbent whose title has not been defeated by the appointment of a qualified successor, the holdover incumbent's title is not defeated and the office is not vacant. McCall, 75 P.2d at 699. Until a new appointee was nominated and confirmed, the holdover incumbent retained the office and could lawfully discharge its duties. *Id.* at 700. In its reasoning, the court found persuasive that the expiration of a term was not one of the enumerated bases in the statute creating a vacancy. *Id.* at 699.

In this case, the court finds no reason to reject application of the de facto doctrine. The weight of authority in this and other jurisdictions is to apply the de facto doctrine to official acts, with some exceptions not applicable here, since the public has an interest in uninterrupted governance. Although the court's conclusion may have been different had there been an explicit statutory provision or clear implication from the Board of Education Act prohibiting holdovers, what is clear from the Act is that the expiration of a term does not create a vacancy and, other than the confirmation of new members, there is otherwise no provision that would allow the Board to proceed uninterrupted after the expiration of board member terms. See McCall, 75 P.2d at 699. The court also gives some weight to the fact that the Act does not set a fixed date for the beginning and ending of Board member terms but only for staggered five year terms. See C.J.S. *Officers* § 69 (1978). Finally, the court considers the underlying public policy for the application of the de facto doctrine to be especially applicable here where the Board of Education's purpose is to provide uninterrupted educational services to the Chuuk public. The court therefore concludes that holdover incumbent Board member exercises de facto authority until there is a new incumbent.

IV. CONCLUSION

Plaintiff's motion for summary judgment is granted. Defendants' is denied.

Because the court grants plaintiff summary judgment on that issue for declaratory relief, the court also finds summary judgment appropriate for plaintiff on its first cause of action, counts III and IV, wherein it asserts that the Attorney General unlawfully prevented the Board from exercising its duties (first cause of action, count III) and from receiving compensation for doing so (first cause of action, count IV). The court also finds summary judgment for plaintiff appropriate on its second cause of action, wherein it asserted that plaintiff Board members were due compensation and benefits while they continued discharging their duties as holdover members. The issue of the amount of compensation and benefits due each Board member remains for trial. The issues presented in plaintiff's first cause of action, counts I and II, also remain, since, in those allegations, plaintiff asserts that the Director was validly terminated and his actions after the termination, including receipt of entitlements, were void. The court, however, has not determined if the Board validly terminated the Director, only that the Board had the authority to do so. The court does note that the Director does not appear to have objected to his termination through any administrative or legal proceeding. But, the court is unwilling to conclude at this time that the purported termination was proper. Even if the Board had the authority to terminate, it was still required to adhere to appropriate procedures and requirements for the termination to be effective. If the termination was effective, then the related issue of whether the subsequent actions of the Director were void arises. The court therefore requires the parties to file pre-trial briefs addressing the facts and law on these two related issues by **February 22, 2010**.

Also remaining for trial are the issues raised in the third party complaint against the individual Board members, including their purported conspiracy to hire outside counsel in violation of the Financial Management Act, as well as those issues raised in the third party defendant Board members' counterclaim, including the allegation that the third-party complaint was baselessly filed.