

FSM SUPREME COURT TRIAL DIVISION

GORDON SMITH,)	CIVIL ACTION NO. 2005-004
)	
Plaintiff,)	
)	
vs.)	
)	
FABIAN NIMEA, individually and d/b/a FSN)	
FINANCIAL GROUP, INC., d/b/a FFGI)	
CONSULTING GROUP,)	
)	
Defendants.)	
_____)	

ORDER AND MEMORANDUM DENYING THIRD MOTION TO RECONSIDER

Martin G. Yinug
Acting Chief Justice

Decided: November 19, 2010

APPEARANCES:

For the Plaintiff: Mary Berman, Esq.
P.O. Box 163
Kolonia, Pohnpei FM 96941

For the Defendants: Stephen V. Finnen, Esq.
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HEADNOTES

Public Officers and Employees – Pohnpei

Each division of the Pohnpei Department of Treasury and Administration, except in instances where the director maintains direct management of the division, has a division chief. Smith v. Nimea, 17 FSM Intrm. 284, 287 (Pon. 2010).

Public Officers and Employees – Pohnpei

When the Department Director held a hearing, he could conceivably have been acting as the *de facto* chief of PL&MD, or, if PL&MD did have a chief then, the Director may not have had implied authority, unless he was the division chief's designee. Smith v. Nimea, 17 FSM Intrm. 284, 287 (Pon. 2010).

Administrative Law – Administrative Procedure Act; Administrative Law – Judicial Review

The principle of exhaustion of administrative remedies requires that a plaintiff obtain a final judgment before appeal, and that failure to do so will bar the plaintiff's claims; more specifically, Pohnpei state law provides that employers, employees, or any other persons who are adversely affected

by orders or decisions issued without a hearing have the right to a hearing upon request. Smith v. Nimea, 17 FSM Intrm. 284, 287 (Pon. 2010).

Public Officers and Employees – Pohnpei

All powers statutorily granted to PL&MD are necessarily a subset of those powers granted to the Pohnpei Department of Treasury and Administration, particularly in light of the statute wherein a department director may assume a division chief's responsibilities and the statute which empowers a division chief to designate another person to act in his stead. Smith v. Nimea, 17 FSM Intrm. 284, 287-88 (Pon. 2010).

Administrative Law – Judicial Review

If the Director had jurisdiction, the plaintiff's claims are statutorily barred for his failure to appeal the Director's decision to the Pohnpei Supreme Court trial division within 15 days, but if the Director had no jurisdiction, then the plaintiff has clearly failed to exhaust his administrative remedies, meaning that the plaintiff may not yet come to court on the claims for unpaid wages, overtime and wrongful termination. Smith v. Nimea, 17 FSM Intrm. 284, 288 (Pon. 2010).

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COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

This matter comes before the Court on Plaintiff's Third Motion to Reconsider, filed on September 9, 2010, with the title "Statutory Supplement to Motion to Reconsider."

I. PROCEDURAL BACKGROUND

This matter is a dispute between Plaintiff and Defendant arising out of Plaintiff's termination late in 2004. Plaintiff first brought the matter to the attention of the Division of Personnel, Labor and Manpower Development ("PL&MD") in November 2004. PL&MD held no formal hearing in which all parties were present. Decision, Department of Treasury and Administration, Labor Matter No. 001-2006, at 3 (Apr. 17, 2006) ("the Decision"). After filing the Complaint in the FSM Supreme Court, Plaintiff requested and obtained a stay to pursue his claim administratively before the Pohnpei State Department of Treasury and Administration ("Treasury"), of which PL&MD is a part. 3 Pon. C. § 1-104(1). The Department held a hearing on April 6 and 7, 2006 ("Department Hearing"), on the wage, overtime, and wrongful termination claims. On April 17, 2006, Director Finley S. Perman ("Perman") issued the Decision denying the claims. The plaintiff never appealed the Decision, but did ask Perman for reconsideration twice, and was denied both times, the last on June 21, 2006. Mot. to Amend Answer at 4 (Mar. 12, 2007).

After the Decision, Defendant filed a Motion to Amend Answer on March 12, 2007. Through the spring of 2007, both parties filed Motions for Summary Judgment.

On November 17, 2008, this Court issued an Order: (1) granting Plaintiff's Motion for Enlargement; (2) granting Defendant's Motion to Amend Answer; (3) denying Plaintiff's Motion for Summary Judgment; (4) granting Defendant's Motion for Summary Judgment as to Plaintiff's claims for unpaid wages, overtime, wrongful termination and criminal penalties for nonpayment of wages; (5) denying Defendant's Motion for Summary Judgment as to Plaintiff's claim for unpaid commission; (6) denying Defendant's Motion for Summary Judgment as to Plaintiff's claim of libel and interference with business opportunity; (7) and denying Defendant's Motion to Dismiss Defendant Nimea in his individual

capacity.

On November 24, 2008, Plaintiff filed a Motion to Reconsider this Court's Order of November 17. The Motion argued that, contrary to the Court's Order of November 17, Plaintiff had exhausted all administrative procedures despite not appealing the Decision to the Pohnpei Supreme Court, because jurisdiction had been vested in FSM Supreme Court, such that the Pohnpei Supreme Court could no longer assume jurisdiction. Plaintiff did not mention at the time any lack of jurisdiction on the part of Perman. On December 22, this Court denied the Motion, noting that although Perman's ruling ended Plaintiff's resources as to administrative agencies, exhaustion of administrative remedies included appealing the administrative ruling to a judicial process via either Pohnpei Supreme Court or the FSM Supreme Court, and in the latter through either a new complaint, or an appeal in this matter.

On April 29, 2010, more than 16 months later, Plaintiff filed a Second Motion to Reconsider, titled as "Supplement to Motion to Reconsider". In the Second Motion to Reconsider, Plaintiff argued that Perman never had jurisdiction to begin with, citing two different versions of the Pohnpei Residents Employment Act of 1991 ("the Act"), both S.L. No. 2L-204-91 (1991) ("the 1991 Act"), and 19 Pon. C. § 2-101 *et seq.* ("the amended Act"), and that therefore Plaintiff had no statutory obligation to appeal the Decision to the Pohnpei Supreme Court.

On May 11, 2010, this Court denied the Second Motion to Reconsider. [*Smith v. Nimea*, 17 FSM Intrm. 125 (Pon. 2010).] In that order, this Court relied on the original 1991 version of the Act, and observed that the 1991 Act did in fact empower Director Perman to hold the Department Hearing, and thus to issue the Decision. Further, this Court held that in failing to appeal the Decision, Plaintiff had failed to discharge "his obligation, mandated by statute as well as by the principle of exhausting administrative remedies, to pursue the administrative process to its ultimate conclusion." *Id.* at 131.

II. ARGUMENTS

In his Third Motion to Reconsider, Plaintiff helpfully advises the Court that the 1991 Act is outdated, and attaches to the motion a copy of the amended Act. He reiterates the argument of the Second Motion to Reconsider, namely, that Perman had no jurisdiction to hold the Department Hearing, because the amended Act provides that only the PL&MD Division Chief has the authority to hold hearings on labor contract disputes.

III. ANALYSIS

A. *Characterization of the Motion*

This Court previously explained how to characterize motions to reconsider. See *Smith*, 17 FSM Intrm. at 128-29. Accordingly, the present motion is properly characterized as a Third Motion to Reconsider. Plaintiff concedes this point in his Reply to Defendant's Opposition to Motion to Reconsider at 2 (Sept. 23, 2010).

B. *Director Perman's Jurisdiction*

Plaintiff argues that Director Perman had no jurisdiction because the Director is not explicitly authorized under Title 19 of the Pohnpei Code to adjudicate in employment contract disputes. In support, Plaintiff has attached a copy of the amended Act.

The Court recognizes that the amended Act makes no reference to the Director. Therefore Perman did not have explicit authorization under Title 19. However, the Court observes that the

Division of Personnel, Labor and Manpower Development is statutorily a part of the Department of Treasury and Administration. 3 Pon. C. § 1-104(1). Further, Title 3 of the Pohnpei Code provides that "[e]ach division, except in instances where the director maintains direct management of the division, shall have a division chief." 3 Pon. C. § 1-104. Thus, if PL&MD did not have a chief between and around December 14, 2004, when a joint letter was issued by PL&MD and FSM Immigration & Labor, advising Plaintiff that his termination was "in line with the provisions of [his] employment contract," and the Department Hearing, Perman could conceivably have held the hearing acting as the *de facto* chief of PL&MD. In such a situation, Title 19 and Title 3 must be read together, and Perman would have had implied authority.

If, on the other hand, PL&MD did have a chief between and around December 14, 2004, and April 6, 2006, Perman may not have had implied authority, unless he was a designee of the division chief.¹ The fact that Plaintiff chose to address Perman instead of the division chief implies that: (1) there was no division chief at the time, and Perman was *de facto* chief; (2) Perman was the division chief's designee; or (3) Plaintiff was simply barking up the wrong tree.

C. Administrative Relief

This Court has explained several times in this matter that the principle of exhaustion of administrative remedies requires that a plaintiff obtain a final judgment before appeal, and that failure to do so will bar the plaintiff's claims. See Smith v. Nimea, 16 FSM Intrm. 186, 190 (Pon. 2008); Order Denying Reconsideration at 2 (Dec. 22, 2008).

More specifically, Pohnpei State Law provides specific rules on administrative relief. Under 19 Pon. C. § 2-117(5), "Employers, employees or any other persons who are adversely affected by orders or decisions issued without a hearing shall have the right to a hearing upon request." If, as Plaintiff claims, Perman had no jurisdiction, then it was incumbent upon Plaintiff to seek redress with the division chief of PL&MD or his designee.

The history of this matter suggests that not only this Court and Perman, but Plaintiff as well, have at one point or another relied on "erroneous or outdated" Pohnpei statutes. In fact, Plaintiff's Reply to Opposition to Request for Temporary Stay of Proceedings (Oct. 4, 2005) includes as an attachment the 1991 Act.

Nevertheless, both the 1991 Act and the amended Act prescribe substantially the same final administrative process. Both the 1991 Act and the amended Act provide that those "who are adversely affected by orders or decisions issued without a hearing shall have the right to a hearing upon request," which hearing is to be provided by PL&MD, complete with "a reasonable notice of the date of the hearing, an opportunity to present evidence, the right to be represented by an attorney at his own expense, and an opportunity to cross-examine witnesses."

Because PL&MD exists within the Department of Treasury and Administration, it stands to reason that all powers statutorily granted to PL&MD are necessarily a subset of those powers granted to the Department of Treasury and Administration, particularly in light of 3 Pon. C. § 1-104, wherein a department director may assume the responsibilities of a division chief, and 19 Pon. C. § 2-104(1),

¹ The opening page of Plaintiff's Third Motion to Reconsider quotes 19 Pon. C. § 2-104(1): "Unless the context clearly indicates otherwise, the following meanings shall apply to this chapter: (1) "Chief" and "Assistant" mean the Chief of the Division of Personnel, Labor and Manpower Development, *or his designee*." (emphasis added).

which empowers a division chief to designate another person to act in his stead. This addresses the only difference between the 1991 Act and the amended Act, i.e., while the 1991 Act refers to the Director, the amended Act refers to the Chief. Specifically, the 1991 Act provides that the decision of the Director is final, and that "[a]ppeals of an order or decision of the Director must be made to the Trial Division of the Pohnpei Supreme Court, within 15 days of the date of the decision or order." Pon. S.L. No. 2L-204-91, §§ 16(7), 18(2). The amended Act provides that the decision of the Chief shall be final, and that "[a]ppeals of an order or decision of the Chief must be made to the Trial Division of the Pohnpei Supreme Court, within 15 days of the date of the decision or order." 19 Pon. C. §§ 2-117(7), 2-119(2). Both provide that "[s]ervice of the notice of appeal shall be made upon the Attorney General" and that "[f]ailure to serve and file a timely appeal shall bar the action." Pon. S.L. No. 2L-204-91, § 18(2); 19 Pon. C. § 2-119(2).

Thus, assuming Perman had jurisdiction, Plaintiff's claims are statutorily barred for his failure to appeal the Decision. On the other hand, if Perman had no jurisdiction, Plaintiff has clearly failed to exhaust his administrative remedies by complying with Pohnpei statute to begin with, meaning that Plaintiff may not yet come to court on the claims for unpaid wages, overtime and wrongful termination.

IV. CONCLUSION

Based upon the above reasoning, Plaintiff either has not exhausted his administrative remedies by requesting a hearing from the actual, *de facto*, or designated Chief of PL&MD, or is statutorily barred from asserting his claims for unpaid wages, overtime and wrongful termination due to his failure to appeal Perman's Decision in the manner prescribed by state law. In either situation, the claims are not properly before this Court. Accordingly, Plaintiff's Third Motion to Reconsider is hereby DENIED.

As an aside, this Court advises Plaintiff thus: the Pohnpei statute of limitations in matters of this nature appears to be 6 years, 58 Pon. C. § 3-101 *et seq.*, which term is fast approaching. Should Plaintiff wish to bring this matter before the Trial Division of the Pohnpei Supreme Court, as he should have to begin with, he would be well advised to make all haste.

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