

FSM SUPREME COURT APPELLATE DIVISION

MARY BERMAN,)	APPEAL CASE NO. P4-2009
)	(Civil Action No. 2006-004)
Appellant,)	
)	
vs.)	
)	
PAULINO LAMBERT, on his own and in his)	
official capacity as Chief Executive of the)	
Pohnpei Department of Labor, and the)	
POHNPEI STATE GOVERNMENT,)	
)	
Appellees.)	
_____)	

OPINION

Argued: June 18, 2010
Decided: March 24, 2011

BEFORE:

Hon. Martin G. Yinug, Acting Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Statutes – Construction

Before starting an analysis of arguments concerning a statute's constitutionality, it is necessary to review any issues of statutory interpretation which may obviate the need for a constitutional ruling. Berman v. Lambert, 17 FSM Intrm. 442, 446 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Statutory interpretation is a matter of law and issues of law are reviewed de novo on appeal. Berman v. Lambert, 17 FSM Intrm. 442, 446 (App. 2011).

Public Officers and Employees – Pohnpei

Pohnpei Code Title 9, chapter 2, section 105 states that preference shall be given to qualified legal residents of Pohnpei in making appointments and promotions and providing opportunities for training in the public service, but the term "legal residents" is not defined in Title 9. Berman v. Lambert, 17 FSM Intrm. 442, 446 (App. 2011).

Choice of Law; Federalism – National/State Power

When the FSM Supreme Court decides a matter of state law its goal is to apply the law the same way the highest state court would. If there is a decision of the highest state court it is controlling. If there is no controlling state law, then the court would decide the case according to how it thinks the highest state court would. Should the state's highest court later decide the issue differently, then that case will prospectively serve as controlling precedent for the national court on that state law issue. Berman v. Lambert, 17 FSM Intrm. 442, 446 (App. 2011).

Evidence – Stipulations; Statutes – Construction

Although parties may stipulate to factual matters, they may not stipulate to interpretations of law. Berman v. Lambert, 17 FSM Intrm. 442, 446, 450-51 (App. 2011).

Statutes – Construction

It is not competent for the parties or their attorneys to determine by stipulation questions as to the existence or proper construction or application of a statute. Berman v. Lambert, 17 FSM Intrm. 442, 446 (App. 2011).

Employer-Employee; Public Officers and Employees – Pohnpei

Pohnpei Code Title 19 and its definitions, apply only to private employers and their employees, not to Pohnpei public employees. Berman v. Lambert, 17 FSM Intrm. 442, 447 (App. 2011).

Domicile and Residence; Statutes – Construction

When comparing the terms from different parts of the code, the court must presume that by using different terms, in this case "legal residents" and "residents," the drafters could have only intended that the meaning would also be different. Berman v. Lambert, 17 FSM Intrm. 442, 447 (App. 2011).

Public Officers and Employees – Pohnpei

Pohnpei Code Title 9 provides for a promotion preference, as well as a hiring preference. It offers two tiers of hiring and promotion preferences. A higher hiring and promotion preference is given to legal residents of Pohnpei, and the lower hiring and promotion preference for all FSM citizens who are not legal residents of Pohnpei. Berman v. Lambert, 17 FSM Intrm. 442, 447 (App. 2011).

Statutes – Construction

Statutes must be interpreted to remain internally sensible and consistent. Berman v. Lambert, 17 FSM Intrm. 442, 447 (App. 2011).

Statutes – Construction

A cardinal rule of statutory construction is that, where possible, courts avoid interpreting a law which may bring its constitutionality into doubt. Berman v. Lambert, 17 FSM Intrm. 442, 447 (App. 2011).

Statutes – Construction

In interpreting a statute, the statutory provision's plain meaning must be given full effect whenever possible. Berman v. Lambert, 17 FSM Intrm. 442, 448 (App. 2011).

Public Officers and Employees – Pohnpei; Statutes – Construction

If the legislature wanted the statute to provide a hiring and promotion preference to Pohnpeian or FSM citizens, then the legislature would have used "citizen" rather than "legal resident." By not defining the term "legal residents" the term's meaning must be the term's common, recognized definition. Berman v. Lambert, 17 FSM Intrm. 442, 448 (App. 2011).

Domicile and Residence

The word "resident" has many legal meanings that are largely determined by the statutory context in which it is used. The simplest definition of resident is a person who has residence in a location. Berman v. Lambert, 17 FSM Intrm. 442, 448 (App. 2011).

Domicile and Residence

Legal residence is defined as the place of domicile or permanent abode, as distinguished from temporary residence, it is the location defined by law as the residence of the person. Berman v. Lambert, 17 FSM Intrm. 442, 448 (App. 2011).

Domicile and Residence; Public Officers and Employees – Pohnpei

The statute's plain meaning of term "legal residents of Pohnpei" is individuals who are domiciled in Pohnpei. This interpretation allows a Pohnpeian citizen living abroad, who maintained his or her domicile in Pohnpei, to receive the same hiring preference as a Pohnpeian citizen living in Pohnpei and it would give all FSM citizens and non-citizens who have moved to Pohnpei and made Pohnpei their domicile, equal opportunity for job selection and promotion. This interpretation is also internally consistent with the statute's other parts which give a second preference for employment to FSM citizens who are not legal residents of Pohnpei when applying for a position or promotion and who would receive a preference over non-citizens who are temporarily living in Pohnpei and over other non-residents. Berman v. Lambert, 17 FSM Intrm. 442, 448 (App. 2011).

Statutes – Construction

A court should not interpret a statute in a way that would cause a question as to the statute's constitutionality. Berman v. Lambert, 17 FSM Intrm. 442, 448 (App. 2011).

Constitutional Law – Judicial Guidance Clause

The FSM Supreme Court may consider decisions and reasoning of U.S. courts and other jurisdictions in arriving at its decisions. It is not, however, bound by those decisions and must not fall into the error of adopting reasoning of those decisions without independently considering the suitability of that reasoning for the FSM. Berman v. Lambert, 17 FSM Intrm. 442, 449 n.3 (App. 2011).

Public Officers and Employees – Pohnpei

Unless the regulations directly violate a national statute or are found to be unconstitutional, Pohnpei is free to regulate its own public service system. Berman v. Lambert, 17 FSM Intrm. 442, 449 (App. 2011).

Public Officers and Employees

Currently each of the states and the FSM national government have hiring preference laws. Berman v. Lambert, 17 FSM Intrm. 442, 449 n.4 (App. 2011).

Constitutional Law – Equal Protection

Aliens are persons protected by the equal protection clause of the FSM Constitution. Berman v. Lambert, 17 FSM Intrm. 442, 449-50 (App. 2011).

Constitutional Law – Equal Protection; Constitutional Law – Fundamental Rights

Equal protection analysis within the FSM has adopted a two-tiered test. The first tier is a rational basis test. Under this test a law will be upheld if it is rationally related to a state interest. Under the second tier, laws that involve a "suspect" class of persons or touch on a "fundamental interest" are subject to strict scrutiny and are struck down unless justified by a compelling state interest. Berman v. Lambert, 17 FSM Intrm. 442, 450 (App. 2011).

Constitutional Law – Equal Protection

Non-citizen does not equate to "national origin" in the Equal Protection Clause and allow non-citizens suspect class status. Berman v. Lambert, 17 FSM Intrm. 442, 450 (App. 2011).

Constitutional Law – Declaration of Rights; Constitutional Law – Fundamental Rights

Employment is not listed as a fundamental right in the Declaration of Rights and the court should be wary of requests that it identify as fundamental any rights beyond those specified in the Declaration of Rights. Berman v. Lambert, 17 FSM Intrm. 442, 450 (App. 2011).

Constitutional Law – Fundamental Rights; Public Officers and Employees – Pohnpei

The right to work for the Pohnpei state government is not a constitutionally protected right, and, although there is a right to seek employment, there is no fundamental right for employment particularly to public employment. Berman v. Lambert, 17 FSM Intrm. 442, 450 (App. 2011).

Constitutional Law – Equal Protection

A statute establishing a hiring and promotion preference for legal residents of Pohnpei and FSM citizens, which bears a rational relationship to legitimate governmental purposes of encouraging and preserving job opportunities for legal residents, of the establishment and growth of the local work force, of combating unemployment in Pohnpei, and of training its citizens to work towards self-government, does not violate the FSM Constitution's equal protection clause. Berman v. Lambert, 17 FSM Intrm. 442, 450 (App. 2011).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

I. BACKGROUND

Mary Berman, appealed the FSM Supreme Court Trial Division's decision where the trial court concluded that Berman had failed to show, by a preponderance of the evidence, that Pohnpei's statute, granting preferential treatment to legal residents of Pohnpei and FSM citizens in the hiring and promotion of Pohnpei State employees, was unconstitutional and violated her due process and civil rights.

Sometime between late 2003 and March or April of 2004, Berman, a United States (U.S.) citizen, applied for an advertised staff attorney position with the Pohnpei Environmental Protection Agency (hereafter EPA). Berman v. Lambert, Civ. No. 2006-004, at 3 (Oct. 1, 2009). Her application was not certified or forwarded to the EPA Board. The only names presented to the EPA Board as certified applicants were two FSM citizens. *Id.* at 3.

On February 6, 2006, Berman filed a complaint against Paulino Lambert, the Chief Executive of the Pohnpei Department of Labor, and Pohnpei State. *Id.* at 1. The matter went to trial on September

8, 2009. At the conclusion of Berman's case-in-chief, the defendants moved to dismiss the case, stating that Berman had failed to meet the burden of showing by a preponderance of the evidence that Pohnpei's preferential hiring process is unconstitutional. *Id.* at 1, 3. After hearing argument, the trial court issued a ruling from the bench granting the motion. The trial court found Pohnpei's hiring and promotion preference for legal residents was not unconstitutional, that the right to government employment is not a fundamental right, and that the failure of the Pohnpei Department of Labor to certify and forward Berman's application to the EPA Board did not violate her constitutional right to due process. *Id.* at 2, 9.

II. STATUTORY INTERPRETATION

Before commencing analysis of Berman's arguments concerning a statute's constitutionality, it is necessary to review any issues of statutory interpretation which may obviate the need for a constitutional ruling. Estate of Mori v. Chuuk, 11 FSM Intrm. 535, 541 (Chk. 2003) (statutes are presumed constitutional and the court should address constitutionality with reluctance if there is any other way of disposing an issue); Michelsen v. FSM, 3 FSM Intrm. 416, 422 (Pon. 1988). Statutory interpretation is a matter of law and issues of law are reviewed *de novo* on appeal. Nanpei v. Kihara, 7 FSM Intrm. 319 (App. 1995).

Title 9, chapter 2, section 105 of the Pohnpei Code states, "preference shall be given to qualified legal residents of Pohnpei in making appointments and promotions and providing opportunities for training in the public service." 9 Pon. C. § 2-105(1). The term "legal residents" is not defined in Title 9 of the Pohnpei Code. Before any analysis of Berman's issues on appeal, we must determine the correct interpretation of the term "legal residents" as used in the Pohnpei Code.

When this Court decides a matter of state law its goal is to apply the law the same way the highest state court would. If there is a decision of the highest state court it is controlling. If there is no controlling state law, then this court would decide the case according to how it thinks the highest state court would. Subsequently, should the state's highest court decide the issue differently, then prospectively that case will serve as controlling precedent for the national court on that state law issue. Phoenix of Micronesia, Inc. v. Mauricio, 9 FSM Intrm. 155, 158 (App. 1999); Island Dev. Co. v. Yap, 9 FSM Intrm. 18, 22 (Yap 1999); FSM v. Edwards, 3 FSM Intrm. 350, 360 n.22 (Pon. 1988).

At trial, the parties did not dispute the meaning of "legal residents." They stipulated for the term to be interpreted as Pohnpeian citizens. Berman v. Lambert, Civ. No. 2006-004, Stipulation at 1, 2 (May 29, 2008). The parties acted improperly. Although parties may stipulate to factual matters, they may not stipulate to interpretations of law. FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005). "[I]t is not competent for the parties or their attorneys to determine by stipulation questions as to the existence or proper construction or application of a statute." 73 AM. JUR. 2d *Stipulations* § 5, at 539-40 (1974).

The trial court found that the Pohnpei Department of Labor did not certify and forward Berman's job application to the EPA Board. Berman v. Lambert, Civ. No. 2006-004, at 3 (Oct. 1, 2009). It found that both applications from FSM citizens were certified and forwarded. *Id.* Niomi Phillip was responsible for reviewing applications and forwarding qualified applications to the EPA Board. Ms. Phillip could not remember receiving Berman's application, but stated that she would have only certified applications from the two FSM citizens. *Id.*

The trial court defined "legal resident" as a citizen of the FSM residing in Pohnpei. *Id.* at 4. Its analysis relied on the definition of "resident" as provided in Title 19 of the Pohnpei Code. 19 Pon. C. § 2-104(6). The statute states that a, "resident is any individual who is a citizen of the FSM and is

permanently residing in Pohnpei." *Id.* Title 19 of the Pohnpei Code is commonly referred to as the Pohnpei Employment Act of 1991. It states that all FSM citizens who are currently residing in Pohnpei, "be accorded priority over non-residents to fill all positions of employment offered within this jurisdiction." 19 Pon. C. § 2-104, 2-106. On its face this appears to be congruent with Title 9, but even under that statute, Berman is not considered a non-resident.¹ Moreover, Title 19 exempts Pohnpei State from being defined as an employer.² 19 Pon. C. § 2-104(3), (5). Title 19 and its definitions, apply only to private employers and their employees, not to public employees.

Title 19 is not analogous to Title 9, and the principles and definitions from one cannot be used interchangeably with the other. When comparing the terms from different parts of the code, the Court must presume that by using different terms, in this case "legal residents" and "residents," the drafters could have only intended that the meaning would also be different. FSM v. Wainit, 12 FSM Intrm. 105 110 (Chk. 2003).

In supplemental briefs provided at the Court's request, Berman and the State asserted their analysis of the term "legal residents." Berman argued that "legal residents" should be interpreted as Pohnpeian citizens. Appellant's Suppl. Br. at 3. Berman's arguments initially refer to the stipulation of law made by the parties before the original trial. Berman v. Lambert, Civ. No. 2006-004, Stipulation at 1, 2 (May 29, 2008). She further argues that if legal residents were to mean all FSM citizens, then Title 9 would be in conflict with itself.

Title 9 provides for a promotion preference, as well as a hiring preference. 9 Pon. C. §§ 2-105(1), (2). It offers two tiers of hiring and promotion preferences. A higher hiring and promotion preference is given to legal residents of Pohnpei, and the lower hiring and promotion preference for all FSM citizens who are not legal residents of Pohnpei. *Id.* Berman asserts that the key to interpreting the term "legal residents" rests in the fact that the statute is not only a hiring preference law, but a hiring and promotion preference law. Appellant's Suppl. Br. at 4. Berman contends that an FSM citizen working for the Pohnpei government would logically be residing in Pohnpei and therefore a "legal resident" cannot be interpreted as any FSM citizen living in Pohnpei. Statutes must be interpreted to remain internally sensible and consistent, and Berman's contention offers one internally consistent interpretation. McCaffrey v. FSM Supreme Court, 6 FSM Intrm. 279 (App. 1993).

However, a cardinal rule of statutory construction is that, where possible, courts avoid interpreting a law which may bring into doubt its constitutionality. In re Otokichy, 1 FSM Intrm. 183, 190 (App. 1982) (when interpreting a statute, courts should avoid selecting an interpretation which may bring into doubt the constitutionality of the statute). Interpreting the statute to give promotional preferences to Pohnpeian citizens over other FSM citizens both of whom have shown the intent to permanently reside in Pohnpei may bring into question the statute's constitutionality.

¹ "Nonresident" means any individual who is not a citizen of the Federated States of Micronesia, but does not include holders of Pohnpei foreign investment permits. 19 Pon. C. § 2-104(4). Berman had a foreign investment permit at the time of her application. Appellant's Br. App. at 26.

² "Employer" means any person hiring or otherwise engaging an individual to perform personal services or labor for compensation or other consideration, and such person's authorized representatives. For purposes of this definition, the term "person" shall mean any individual, firm, partnership, corporation, company, association, cooperative or any other association of individuals, but does not include foreign governments, public corporations or the governments of the Federated States of Micronesia, Pohnpei State, the local jurisdictions of Pohnpei or their agencies. 19 Pon. C. § 2-104(3).

Pohnpei State argued that "legal residents" should be interpreted to mean all FSM citizens residing in Pohnpei, relying on similar arguments as relied upon by the trial court. Appellee's Suppl. Br. at 3. The State further argued that it was the most logical definition when viewed with 9 Pon. C. § 2-105(2). *Id.* This argument works against itself. It is logical to conclude that individuals working for Pohnpei State will be living in the State. Therefore it makes little sense to have a statute that provides a second tier of promotion preferences for FSM citizens not living in Pohnpei.

III. STATUTORY ANALYSIS

In interpreting a statute, the plain meaning of a statutory provision must be given full effect whenever possible. Nena v. Kosrae, 14 FSM Intrm. 73, 82 (App. 2006); FSM Social Sec. Admin v. Kingtex (FSM) Inc., 8 FSM Intrm. 129, 131 (App. 1997) (what a legislature says in the statute's text is considered the best evidence of the legislative intent or will). Following this rule, if the legislature wanted the statute to provide a hiring and promotion preference to Pohnpeian or FSM citizens, then the legislature would have used "citizen" rather than "legal resident." By not defining the term "legal residents" the term's meaning must be the common, recognized definition of the term. Wainit, 12 FSM Intrm. at 111.

The word "resident" has many legal meanings that are largely determined by the statutory context in which it is used. The simplest definition of resident is a person who has residence in a location. BLACK'S LAW DICTIONARY 1309 (6th ed. 1990). Legal residence is defined as "the place of domicile or permanent abode, as distinguished from temporary residence . . . it is the location defined by law as the residence of the person." BLACK'S LAW DICTIONARY 897 (6th ed. 1990). Applying these plain meanings to the statute would interpret the term "legal residents of Pohnpei" to mean individuals who are domiciled in Pohnpei.

Applying this interpretation to the statute would allow a Pohnpeian citizen living abroad, for example, for educational purposes, who maintained his or her domicile in Pohnpei, to receive the same hiring preference as a Pohnpeian citizen living in Pohnpei. Further, it would give all FSM citizens and non-citizens who have moved to Pohnpei and made Pohnpei their domicile, equal opportunity for job selection and promotion. Individuals who move to Pohnpei temporarily, and who retain professional licenses, property, the ability to vote, continue to pay taxes at a previous residence, or otherwise show signs of maintaining a legal residence outside of Pohnpei, would not have the same hiring and promotion preference.

This interpretation is also internally consistent with other parts of the statute. Pohnpei v. KSVI No.3, 10 FSM Intrm. 53, 64 (Pon. 2001). The interpretation that "legal resident" is to be a person who is domiciled in Pohnpei is also supported by reading the next section of the statute. That section states, "second preference for employment shall be given to citizens of the Federated States of Micronesia who are not legal residents of Pohnpei at the time of application to a position or promotion within said position." 9 Pon. C. § 2-105(2). This interpretation would provide that FSM citizens, who are living in Pohnpei and working for Pohnpei State, but do not intend to make it their domicile, would not receive the same level of preference in promotion as individuals who are domiciled in Pohnpei. However they would receive a preference over non-citizens who are temporarily living in Pohnpei and over other non-residents.

IV. CONSTITUTIONAL ANALYSIS

A court should not interpret a statute in a way that would cause a question as to the constitutionality of the statute. Barrett v. Chuuk, 16 FSM Intrm. 229, 234 (App. 2009); Jano v. FSM, 12 FSM Intrm. 569, 573 (App. 2004). Appellant asserts that a hiring preference against resident aliens

is unconstitutional. Appellant's Br. at 8-9. Applying the above interpretation of "legal residents," the statute does not give all resident aliens the same hiring status as other individuals. We now engage in a constitutional analysis as to whether Pohnpei can provide a hiring preference for legal residents. It must be determined whether Pohnpei has the authority to enact such a statute and if so does the statute violate the constitutional due process rights of resident aliens.

The trial court cited three U.S. Supreme Court cases which support a state's right to govern employment within its borders. Hiem v. McCall, 239 U.S. 175, 36 S. Ct. 78, 60 L. Ed. 175 (1915); Crane v. New York, 239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915); and Atkin v. Kansas, 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148 (1903).³ In Hiem and Crane, the U.S. Supreme Court upheld state statutes completely barring non-residents from working for the New York State Civil Service. *Id.* In Atkin, the U.S. Supreme Court upheld a Kansas state law requiring an eight hour work day. Atkin, 191 U.S. at 224, 24 S. Ct. at 128, 48 L. Ed. at 158. In all of these cases, the Court held that states are authorized to govern and enforce the employment practices within its borders. This included the state's right to exclude non-permanent residents from public employment.

In her brief, Berman argues these U.S. Supreme Court cases are out-dated and no longer controlling. App. Br. at 4-5. In 2003, the U.S. Supreme Court continued to support state statutes regarding hiring preferences. In Malabed v. North Slope Borough, 335 F.3d 864 (9th Cir. 2003), a borough in Alaska created an ordinance which provided a hiring preference for Native Americans. *Id.* at 866. The ordinance relied on a federal statute. Alaska state law does not allow any form of hiring preference. *Id.* The Court reaffirmed its opinion in Hiem, Crane, and Atkin, and held that the state statute, not the federal statute, governs. *Id.* at 871. Unless the regulations directly violate a federal statute,⁴ or are found to be unconstitutional, Pohnpei is free to regulate its own public service system.⁵

Berman argues that the Pohnpei hiring and promotion preference law violates her civil rights as an alien non-resident of Pohnpei. We have held that aliens are persons protected by the equal

³ The FSM Supreme Court may consider decisions and reasoning of U.S. courts and other jurisdictions in arriving at its decisions. It is not, however, bound by those decisions and must not fall into the error of adopting reasoning of those decisions without independently considering the suitability of that reasoning for the FSM. Panuelo v. Amayo, 10 FSM Intrm. 558, 563 (App. 2002).

⁴ Currently each of the states and the FSM National Government have hiring preference laws. 51 F.S.M.C. §§113, 114; Truk S. L. No. 3-43, §5; Kos. S.C. §8.104; 8 Y.S.C. §122. In establishing a hiring preference statute, the National Government set precedent for the states to enact their own hiring preference laws.

⁵ Berman argued that any statute which treats aliens unequally is an infringement on the powers of the President and Congress to regulate immigration and foreign affairs. Berman relies on Hampton v. Mow Sun Wong to make this argument. Appellate's Br. at 8, 9; Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976). However, Berman misconstrues Hampton. Hampton does not address statutes requiring citizenship for employment, rather it questions whether a government agency can enact policy regulations and rules forbidding non-citizen government opportunities. *Id.* at 105, 96 S. Ct. at 1906, 48 L. Ed. 2d at 510. Berman v. FSM Supreme Court is analogous to Hampton. *Id.*; Berman v. FSM Supreme Court, 5 FSM Intrm. 364 (Pon. 1992). In both cases government agencies, not Congress, created the policy of excluding non-citizens. Hampton, at 105, 96 S. Ct. at 1906, 48 L. Ed. 2d at 510; Berman, 5 FSM Intrm. at 365. Both cases found that the government agencies did not have the authority to create discriminatory regulations based on citizenship. These cases do not invalidate hiring preferences. Hampton specifically states that, "the Congress and the President have the constitutional power to impose the citizenship requirement that the Commission has adopted." Hampton at 114, 96 S. Ct. at 1910, 48 L. Ed. 2d at 515.

protection clause of the FSM Constitution. Berman v. FSM Supreme Court (I), 5 FSM Intrm. 364, 366 (Pon. 1992). The FSM Constitution, article 4, section 4 states, "Equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status." Equal protection analysis within the FSM has adopted a two-tiered test. The first tier, most often employed is a rational basis test. Under this test a law will be upheld if it is rationally related to a state interest. Laws that involve a "suspect" class of persons or touch on a "fundamental interest" are subject to strict scrutiny and struck down unless justified by a compelling state interest.

Berman argues that a strict scrutiny standard should be applied in this situation. Berman argues that it is the intent of the equal protection clause's broad language to include non-citizenship as a suspect class. Appellant's Reply Br. at 3. There is no FSM case suggesting that the term national origin equates to non-citizen. In Foley v. Connelie, the U.S. Supreme Court ruled that non-citizen residents were not a suspect class and analyzed a New York law excluding non-citizens from becoming policemen using the rational basis test. Foley v. Connelie, 435 U.S. 291, 294, 98 S. Ct. 1067, 1070, 55 L. Ed. 2d 287, 291 (1977). The Foley Court stated:

It would be inappropriate to require every statutory exclusion of aliens to clear the high hurdle of "strict scrutiny," because to do so would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship." The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others.

Id. at 295, 98 S. Ct. at 1070, 55 L. Ed. 2d at 292. Following the same analysis as in Foley, we will not broaden the meaning of FSM Constitution, Article 4, § 4 and equate non-citizen to national origin and allow non-citizens suspect class status.

Berman also asserts that the right to work for the government is a fundamental right. In Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 591 (App. 2008), we noted that employment is not listed as a fundamental right in the Declaration of Rights and held that the Court "should be wary of requests that it identify as fundamental any rights beyond those specified in the declaration of rights."

In 1987, the Pohnpei Supreme Court trial court held that the right to work for the state government is not a constitutionally protected right. Paulus v. Pohnpei, 3 FSM Intrm. 208, 217 (Pon. S. Ct. Tr. 1987). Although there is a right to seek employment, the court held that there is no fundamental right for employment particularly to public employment. *Id.*

If the law does not include a suspect class or involve the infringement upon a fundamental right, then the question becomes, whether the classification is based on a legitimate governmental purpose. Berman, 15 FSM Intrm. at 192. Encouraging and preserving job opportunities for legal residents is a legitimate governmental purpose and offers one justification for Pohnpei's hiring and promotion preferences. Additionally other policy reasons stated in the Pohnpei Code further justify the preference: establishment and growth of the local work force; help in combating unemployment in Pohnpei; and training its citizens to work towards self-government. 9 Pon. C. § 2-105; 19 Pon. C. § 2-102. A statute establishing a hiring and promotion preference for legal residents of Pohnpei and FSM citizens, bears a rational relationship to a legitimate governmental purpose and does not violate the equal protection clause of the FSM Constitution.

V. REMAND

In 2008, the parties stipulated that Berman, a U.S. citizen, is not a permanent lawful resident of Pohnpei. This is a legal conclusion that the parties are not allowed to stipulate to. FSM Social Sec.

Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005). The parties were, and are able to stipulate to the fact that Berman resided on Pohnpei in 2003. They could not stipulate that by her residence she was not a legal resident under the statute. Moreover, there are no facts on the record to support this part of the stipulation. Appellant's Br. at 14-33. Further, there are no facts on the record that Berman, at the time of her application in 2003, provided the Pohnpei Department of Labor information showing that she was domiciled in Pohnpei, had made Pohnpei her permanent home, and had abandoned any previous domicile. Appellant's Br. at 24.

At trial, neither party was able to produce a copy of her application. The record only shows that the trial court accepted the parties' stipulation that an application had been submitted. Appellant's Br. at 16. Niomi Phillip, the person who reviewed and certified Pohnpei government job applications, was unable to recall receiving Berman's application and therefore was unable to recall what information was included in the application. *Id.* Without this evidence it cannot be determined whether Berman was in fact a legal resident of Pohnpei in 2003, and if the Pohnpei Department of Labor knew of Berman's resident status when she applied for the job.

VI. CONCLUSION

For the reasons outlined above, this case is HEREBY REMANDED to the trial court. The trial court is to hold an evidentiary hearing and determine whether Berman was a legal resident of Pohnpei in 2003. The trial court is to use the definition of legal resident. If the trial court finds that Berman was a legal resident, the trial court must determine if the Pohnpei Department of Labor knew of Berman's resident status at the time of her job application in 2003. Knowing these two facts, the trial court will then be able to determine whether the Pohnpei Department of Labor acted correctly in not certifying and forwarding Berman's application to the EPA Board. If the trial court finds that the Pohnpei Department of Labor acted incorrectly, then it must determine what damages, nominal or otherwise, should be awarded to Berman.

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