

the closure of the BOH in Pohnpei.

In line with the analysis in Helgenberger, the BOH did not breach a material provision of the contract because it notified and Susaia knew of alternative agents and locations of making payments due on the loan.

IV. CONCLUSION

The Defendant Susaia's Motion to Set Aside the Default Judgment entered on August 12, 2009 is HEREBY GRANTED IN PART. The court finds that claims from March, 2002 to November, 2002 are barred under 6 F.S.M.C. 805, which totals 9 monthly payments, amounting to \$4,993.20. Accordingly, the default judgment entered in the amount of \$25,535.19 is reduced to \$20,541.99. The clerk shall therefore enter an amended judgment in that amount.

* * * *

FSM SUPREME COURT TRIAL DIVISION

MOHNER ESIEL, APINER HADLEY, BRIGIDA PRIMO,)
CECILIA JOEL, MIYUMI CARL, MELIDA SANTOS,)
MERIANA PABLO, ARTHUR SKILLING,)
CHRISTOPHER SCALIEM, WAYNE H. HADLEY,)
IOLANI IRONS, MIRAH WAGUK, ELIHTER EDGAR,)
SEFIT YOMA, EUGENE MARQUES, OLIVER EDGAR,)
GLAYNE FRANKLIN, DICKSON DAVID, PETRING)
ALBERT, DAVID WOLPHAGEN, SAIORY D. JOAB,)
AKAPITO SEMENS, JAYDEE CARL, REAGAN)
ARTUI, KEN MANUEL, JR., RENWICK WEILBACHER,)
JENS IRONS, KORETY MORI, PHIL BISALEN,)
BRIDGET SOUMWEI, JR. FRITS, BONITUS ALBERT,)
SABRINO ROBERT, SAIMON REFIT, PALIKKUN M.)
ESTE, RENTON K. RENTON, MELTINA A. KIPPY,)
MARYOU W. ALLEN, HILTON M. PHILLIP, WILLIAM)
MONGKEYA, ASSU JACKSON, STEVE GEORGE,)
BERCIL CHARLEY, WILSON TAULUNG, MERORINA)
SIGRAH, STACY SANTOS, WETSIN PELEP, KOHLER)
CARL, MAYUMINA MATHIAS, PERRY PERMAN,)
JANET WICHEP, FRANCIS SILBANIUS, TANYA)
SILBANIUS, and JACKSON SMITH,)

CIVIL ACTION NO. 2012-017

Plaintiffs,)

vs.)

FSM DEPARTMENT OF FINANCE, DEPARTMENT OF)
ECONOMIC AFFAIRS, DEPARTMENT OF JUSTICE,)
and FSM GOVERNMENT,)

Defendants.)

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT

Martin G. Yinug
Chief Justice

Decided: July 2, 2013

APPEARANCES:

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For the Defendants: Aaron L. Warren, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

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HEADNOTES

Administrative Law – Statutory Construction

A regulation that conflicts with unambiguous statutes will not benefit from the deference the court shows to an agency interpreting its own enabling statute. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 75 (Pon. 2013).

Civil Procedure – Summary Judgment – Grounds

A summary judgment motion must be granted when, viewing the facts and inferences in a light most favorable to the party opposing the motion, the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 75-76 (Pon. 2013).

Public Officers and Employees

Under 52 F.S.M.C. 164(3), overtime is determined by a three-prong test: 1) the employee is directed to work; 2) the employee does work; and 3) the employee has first worked forty hours straight time in the same week and more than eight hours on any single day. "Directed to work," indicates that an employee cannot work overtime on his own initiative, but must be instructed to work or have received prior approval by a supervisor or government official. "Does work," indicates that overtime compensation only accrues when an employee worked outside regular working hours, in accordance with instructions or directions given by the supervising authority. And an employee cannot begin to accrue overtime hours until and unless the employee first worked a minimum of forty hours in a regularly scheduled workweek and more than eight hours on any single day worked. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 76 (Pon. 2013).

Statutes – Construction

Wording in the FSM Code or in statutes enacted by Congress must be construed according to the English language's common and approved usage. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Statutes – Construction

When the people's intent as voiced through its duly elected Congress is expressed in a statute, a court must give effect to the statutory provision's plain meaning whenever possible. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Immigration; Public Officers and Employees

Sea vessels and aircraft arriving in the FSM must compensate the FSM Treasury for the actual costs of overtime that immigration officials accrue clearing sea vessels and aircraft into the FSM. These costs must be 1) associated with the arrival of sea vessels and aircraft into the FSM; 2) actual; 3) originate in the official duties of immigration officers carrying out Title 50's requirements; and 4) accrue outside immigration officers' normal working hours. "Actual hours worked" will always correlate with hours that have already been worked or performed and the FSM Treasurer will not be compensated for subjective or imputed work. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Statutes – Construction

It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Immigration; Public Officers and Employees

Reading 52 F.S.M.C. 164(3) and 50 F.S.M.C. 115, jointly in order to ensure that the FSM Treasurer is compensated for all actual overtime expenses, the cost of overtime compensation allotted to employees under § 164(3) must equal the compensation the treasury receives under the second part of § 115, and as the treasury is compensated only for actual hours worked, it is clear that the treasury may remunerate employees only for actual hours worked. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Public Officers and Employees

A calculation of actual hours worked may not include imputed hours because the meaning of the pertinent statutes regarding overtime is plain and unambiguous that overtime compensation will be allotted for actual hours worked only. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Administrative Law – Statutory Construction; Public Officers and Employees

Because overtime is based on actual hours worked, the automatic two-hour credit provision under the regulations is inconsistent with the statute and is, therefore, null and void. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Administrative Law – Statutory Construction

Statutory construction must prevail over any contrary regulation since regulations that conflict with a statute are impermissible extensions of the statute. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77 (Pon. 2013).

Administrative Law – Judicial Review; Administrative Law – Statutory Construction

Courts must afford considerable weight to an agency's construction of a statute that it administers when Congress has not directly addressed the precise question at issue, but when the legislative intent is clear and unambiguous, that is the end of the matter. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77-78 (Pon. 2013).

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment, filed March 18, 2013; Defendants' Opposition to Motion for Summary Judgment and Cross Motion for Summary Judgment, filed March 28, 2013; and Plaintiffs' Opposition to Defendants' Cross Motion for Summary Judgment, filed April 19, 2013. Defendants' Cross Motion for Summary Judgment is granted. The reasons follow.

I. BACKGROUND

Plaintiffs are border security inspectors and officers employed by the national government. They seek to reinstate a generous calculation of overtime compensation codified in Public Service System Regulation 8.6(d)(3) which mandates that "[a]n employee who is required to work overtime for less than two (2) hours in one day is credited with a minimum of two (2) hours overtime worked for that day." Five separate (and conflicting) legal opinions have been issued by the government regarding whether this regulation should be given effect, the first of these dating back to 1993, and the most recent issued by the Department of Justice in 2011.¹ The most recent legal opinion determined that the regulation is unenforceable, thereby precipitating this litigation.

The most recent legal opinion, issued in 2011, contends that the scheme for calculating overtime compensation established in Pub. Serv. Sys. Reg. pt. 8.6(d)(3) is inconsistent with the Public Service System Act ("PSSA") which defines overtime as "all time when [an employee] is directed to work and does work in excess of eight hours in one day" 52 F.S.M.C. 164(3). That statute should be read in tandem with the FSM Immigration Act which directs that the operator of a sea vessel or aircraft must compensate the FSM government for overtime costs associated with inspecting and clearing the sea vessel or aircraft. 50 F.S.M.C. 115. That statute specifically defines overtime as "actual hours worked in excess of 40 actual hours per week worked." *Id.*

The question now before the Court is one of statutory construction that is ripe for summary judgment: Is Pub. Serv. Sys. Reg. pt. 8.6(d)(3) consistent with the statutory framework and plain language of the Public Service System Act and the FSM Immigration Act? As will be demonstrated below, the regulation conflicts with statutes that are unambiguous, and therefore it does not benefit from the deference the Court shows to an agency interpreting its own enabling statute. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694, 703 (1984).

II. ANALYSIS

A motion for summary judgment must be granted where, viewing the facts and inferences in a light most favorable to the party opposing the motion, the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine

¹ These are the Memorandum of February 18, 1993, by the Chief of the Division of International Law at the FSM Attorney General's Office, Joses R. Gallen; the Memorandum of April 19, 1993, by Deputy Chief of FSM Immigration David M. Wohlphagen; the Memorandum of April 26, 1995, by Deputy Chief of the Division of Immigration David M. Wohlphagen; the Memorandum of May 29, 1996, by Assistant FSM Attorney General Nina Eejima; and the Legal Opinion on Overtime Issues of August 25, 2011, by Acting Secretary of the Department of Justice Lorrie Johnson-Asher.

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Berman v. Pohnpei Legislature, 16 FSM Intrm. 492, 494 (Pon. 2009); William v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 584, 586 (Pon. 2002); Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 282 (Pon. 2001).

The Court must begin by looking to the applicable statutes to determine the correct interpretation of law. The PSSA, codified under 52 F.S.M.C., is statutory law governing, inter alia, employment and compensation of national government employees. The applicable provision of Title 52 of the PSSA that controls the calculation of overtime differential is § 164(3). This section states in pertinent part that a national government employee:

shall be paid overtime compensation at the rate of one and one-half of his adjusted base salary for all time when he is directed to work and does work in excess of eight hours in one day; or when he is directed to work and does work on the sixth or seventh day of the work week; provided that he has first worked forty hours at straight time in the same work week. . . .

"Overtime" in that section is determined by a three-prong test.

- 1) The employee is directed to work;
- 2) The employee does work; and,
- 3) The employee has first worked forty hours straight time in the same week and more than eight hours on any single day.

The first part of § 164(3) requires that an employee be "directed to work," indicating that an employee cannot work overtime on his own initiative, but rather must be instructed to work or have received prior approval by a supervisor or government official.

The second requirement of § 164(3) is that an employee "does work," indicating that overtime compensation shall only accrue where an employee worked outside regular working hours, in accordance with instructions or directions given by the supervising authority.

The third requirement set out in § 164(3) is that an employee cannot begin to accrue overtime hours until and unless the employee first worked a minimum of forty hours in a regularly scheduled workweek and more than eight hours on any single day worked.

Nowhere in § 164(3) is there a suggestion that an employee may be compensated for more overtime hours than he or she is directed to work and does work. Furthermore, when 52 F.S.M.C. 164(3), the Public Service System Act, is read together with 50 F.S.M.C. 115, the FSM Immigration Act, it becomes clear that the only correct construction is that compensation shall be limited to actual time worked.

The FSM Immigration Act directs that:

Any aircraft or sea vessel landing at any airport or calling at any port in the Federated States of Micronesia shall be responsible for paying to the treasurer of the Federated States of Micronesia an amount equal to the actual costs to the National Government accrued by the officials responsible for carrying out the purposes of this Title . . . whenever such officials are required to carry out their official duties relating to the aircraft or sea vessel at a time outside of the officials['] ordinary working hours. . . . *For purposes of this Section, overtime means actual hours worked in excess of 40 actual*

hours per week worked by an official or employee of the National Government.

[50 F.S.M.C. 115] (emphasis added).

Wording in the FSM Code or in statutes enacted by Congress "shall be construed according to common and approved usage of the English language." FSM v. Sam, 14 FSM Intrm. 328, 334 (Chk. 2006); 1 F.S.M.C. 208. Because the people's intent as voiced through its duly elected Congress is expressed in statute, a court must give effect to the plain meaning of a statutory provision whenever possible. FSM v. Wainit, 13 FSM Intrm. 532, 539 (Chk. 2005) (citing Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 379 (App. 2003)); see also FSM Social Sec. Admin. v. Kingtex (FSM), Inc., 8 FSM Intrm. 129, 131 (App. 1997).

The plain meaning of § 115 is that sea vessels and aircraft arriving in the FSM shall compensate the FSM Treasury for the actual costs of overtime that immigration officials accrue clearing sea vessels and aircraft into the FSM. These costs must be (1) associated with the arrival of sea vessels and aircraft into the FSM; (2) actual; (3) originate in the official duties of immigration officers carrying out the requirements of Title 50; and (4) accrue outside immigration officers' normal working hours, i.e., during overtime as defined in the latter half of § 115.

The plain language of the statute says "actual hours worked." "Actual" is defined as "[e]xisting in fact; real." BLACK'S LAW DICTIONARY 38 (8th ed. 2004). All actual hours worked will in every instance correlate with hours that have already been worked or performed. The FSM Treasurer shall not be compensated for subjective or imputed work, but rather for overtime hours that have an objective basis in reality.

"It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." BLACK'S LAW DICTIONARY 807 (8th ed. 2004). The two statutes, 52 F.S.M.C. 164(3) and 50 F.S.M.C. 115, must be read jointly in order to ensure that the FSM Treasurer is compensated for all actual overtime expenses, as required under the first part of § 115. The cost of overtime compensation allotted to employees under § 164(3) must equal the compensation the treasury receives under the second part of § 115. As the treasury is compensated for "actual hours worked" only, it is clear that the treasury may remunerate employees only for actual hours worked. Together, 52 F.S.M.C. 164(3) and 50 F.S.M.C. 115 limit how border security officers may be compensated for overtime work, allowing compensation for actual hours worked only.

The issue in contention in this matter is whether a calculation of actual hours worked may include imputed hours, as per Pub. Serv. Sys. Reg. pt. 8.6(d)(3). The answer is an emphatic no. The meaning of the pertinent statutes regarding overtime is plain and unambiguous. When read together these statutes clearly show that overtime compensation shall be allotted for actual hours worked only. Legislative intent is clear that the actual costs of overtime charged to incoming vessels must equal the actual cost to the government of overtime compensation due to employees for clearing what this Court presumes are actual sea vessels and actual aircraft upon official entry into the FSM.

Having established that overtime is based on actual hours worked, the automatic two-hour credit provision under Pub. Serv. Sys. Reg. pt. 8.6(d)(3) is inconsistent with the PSSA and is, therefore, null and void. Statutory construction must prevail over any contrary regulation. Regulations that conflict with a statute are impermissible extensions of the statute. Jonas v. Kosrae, 10 FSM Intrm. 453, 462 (Kos. 2001). Certainly, courts must afford considerable weight to an agency's construction of a statute that it administers, where Congress has not directly addressed the precise question at issue. Chevron, 467 U.S. at 843, 104 S. Ct. at 2781-82, 81 L. Ed. 2d at 703. However, in this instance legislative

intent is clear and unambiguous. "If the intent of Congress is clear, that is the end of the matter." *Id.*

III. CONCLUSION

It is this Court's considered opinion that the Public Service System Act and the FSM Immigration Act, read together, require that actual hours worked form the basis for calculation of overtime benefits. For many years, immigration officials received the benefit of overtime compensation to which they were not legally entitled. The August 25, 2011 Legal Opinion on Overtime Issues authored by the Department of Justice served as a long overdue correction to a regulation, Pub. Serv. Sys. Reg. pt. 8.6(d)(3), that is in clear contravention of its enabling statute. As the Department of Justice has correctly interpreted the statute governing the calculation of overtime compensation, this Court must grant summary judgment to Defendants.

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FSM SUPREME COURT APPELLATE DIVISION

KINO RUBEN, next of kin to Rubert Kino Ruben,)	APPEAL CASE NO. C1-2012
)	Civil Action No. 2011-1005
)	
Appellant,)	
)	
vs.)	
)	
CHUUK STATE, JIMMY JOSEPH, GIBSON KUN,)	
STEPHAN SOS, JASON KONINOS, and KERSON)	
RIZAL in his official capacity as Director of Public)	
Safety, Department of Public Safety,)	
)	
Appellees.)	
)	

ORDER

Decided: July 4, 2013

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Bealeen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Temporary Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

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