FSM SUPREME COURT TRIAL DIVISION

MARK MAILO, individually and as President of the Chuuk State Legislature House of Senate, Plaintiff, vs. CHUUK HEALTH CARE PLAN, a public corporation, Defendant.	CIVIL ACTION NO. 2012-1031

ORDER GRANTING SUMMARY JUDGMENT

Martin G. Yinug
Chief Justice

Decided: October 15, 2013

APPEARANCES:

For the Plaintiff: Brian Dickson, Esq.
Legislative Counsel
P.O. Box 377
Weno, Chuuk FM 96942

For the Defendant: Johnny Meippen, Esq.
P.O. Box 705
Weno, Chuuk FM 96942

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HEADNOTES

Statutes – Construction

Generally, a statutory provision is directory and not mandatory if it requires that certain actions be completed, but does not prescribe the result which should follow if those actions are not completed. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 188 (Chk. 2013).

Insurance; Statutes – Construction

When the statute is silent about what result should follow if the Health Care Board does not submit draft legislation for the selection of its members by citizen enrolles and when that statute only directs the submission of draft legislation but does not require (nor could it) its enactment, the Board's failure to comply does not render the Board's composition illegal or its acts ultra vires. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 188 (Chk. 2013).

Insurance; Statutes – Construction

When the statute provides only that the Chuuk Health Care Plan's Board "may prescribe" or "may establish" differing premium amounts based on the number of the enrollee's dependants or on

their "risk" factors, the statute does not require it, but leaves it to the Board's discretion, the Board may choose to assess premiums in a different manner. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 189 (Chk. 2013).

Taxation

The determination of whether an assessment is a tax or a fee involves a three-part test that looks to different factors: 1) what entity imposes the charge; 2) what population is subject to the charge; and 3) what purposes are served by the use of the monies obtained by the charge. The classic tax is imposed by a legislature upon many, or all, citizens. It raises money contributed to a general fund, and spent for the benefit of the entire community. The classic regulatory fee is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 190 (Chk. 2013).

Insurance; Taxation

When the health care assessments or premiums are not imposed by the Chuuk Legislature but are imposed by a public corporation, the Chuuk Health Care Plan through its Board and when the assessments or premiums are not deposited in the Chuuk General Fund but into a special trust fund, these attributes of the premium assessments are characteristic of a classic fee and the opposite of a classic tax. Even though the funds raised will be spent, at least indirectly, for the benefit of the entire Chuuk community since the funds will be spent for the benefit of people needing or using health care services, which is nearly everyone in Chuuk at one time or another, the premium assessments lie nearer the fee end of the spectrum than the tax end. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 190 (Chk. 2013).

Taxation

Courts facing cases that lie near the mid-point of the spectrum between the classic tax and the classic fee have tended to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 190 (Chk. 2013).

Insurance; Taxation

When the health insurance premiums and assessments are not raised for general revenue purposes and cannot be used for any Chuuk state government activity and can only be used for the purposes of the Health Care Plan Act and when the premiums or assessments help defray the cost of providing medical care, the benefits they provide are not of the sort often financed by a general tax. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 190 (Chk. 2013).

Taxation

Generally, an assessment may be a fee rather than a tax when it is not used for general purposes but is used to defray the expense of performing the duties imposed on the agency and for the general purposes and expense of carrying an act into effect. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 190 (Chk. 2013).

Taxation – Constitutionality

Since the Chuuk health care premium assessments are used for the care of the ill and injured and for the general purpose and expense of carrying the Chuuk Health Care Plan Act into effect and since, weighing all the attributes of the Plan's current assessment of Chuuk health care premiums and looking at the totality of the circumstances, the Plan's payroll assessment, even though calculated as a percentage of wages and salaries, is a fee and not a tax. Mailo v. Chuuk Health Care Plan, 19 FSM R.

185, 190 (Chk. 2013).

Civil Procedure – Summary Judgment – For Nonmovant

When a party's summary judgment motion has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 191 (Chk. 2013).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

By the parties' agreement, the court, on June 18, 2013, set July 12, 2013, as the deadline for the plaintiff, Mark Mailo, to file his summary judgment motion and August 2, 2013, for the defendant, Chuuk State Health Care Plan ("Plan"), to file its cross motion for summary judgment. On July 10, 2013, Mailo filed Plaintiff's Motion for Summary Judgment, and on July 29, 2013, the Plan filed its Response to Motion for Summary Judgment.

After careful consideration, the court denies Mailo's summary judgment motion and grants summary judgment in the Plan's favor. The reasons follow.

I. BACKGROUND

The Chuuk Health Care Plan ("the Plan") was created by the Chuuk Health Care Plan Act of 1994, Chuuk State Law No. 2-94-06. The Act created a health care insurance system for the residents of the State of Chuuk. However, the system was not implemented until 2004 when the Plan began to collect health insurance premiums of 2½% of Chuuk residents' wages and salaries and a matching 2½% contribution from their employers. The employee pays half and the employer pays half. Chk. S.L. No. 2-94-06, § 5-4(1) and (2). In June 2012, the premium assessment was increased from 2½% to 3%.

On November 20, 2012, the plaintiff, Mark Mailo, filed this lawsuit alleging that the percentage method of assessing the health insurance premium is an unconstitutional tax. He sought a preliminary injunction to halt the increase of the premium from 2½% to 3%. The preliminary injunction was denied on January 15, 2013. Mailo v. Chuuk Health Care Plan, 18 FSM Intrm. 501 (Chk. 2013).

Mailo does not contend that the Chuuk Health Care Plan Act is unconstitutional, but he does contend that the method that the Plan has chosen to assess its premiums is unconstitutional. Mailo has alleged that the health insurance premiums are a tax. Mailo also contends that since the premium assessment does not vary based on the number of an enrollee's dependents or on their risk factors, it violates the statutory guidelines, found in section 5-1, for the establishment of the Plan's premium amounts.

II. Summary Judgment Sought

Mailo asks the court to declare[1] that 1) the Plan has failed to follow Chuuk state law by not organizing and holding an election by the members to choose the Plan's Board of Trustees; 2) that the premium increase from 2½% to 3% was illegally enacted and that that increase should be rebated to the members; and 3) that the method of assessing the premium contribution payments as a percentage of gross income constitutes an unconstitutional tax on income.

III. Analysis

A. *Board Elections*

The Health Care Plan Act provides that "[w]ithin five years following the first organizational meeting of the Board, the Board shall submit to the Governor and Chuuk Legislature draft legislation to provide for the periodic selection of Board members by citizen enrollees of the Plan." Chk. S.L. No. 2-94-06, § 2-1(2). Mailo contends that the Plan's failure to comply with Section 2-1(2) means that the composition of all Boards after the first Board was organized in 2004 has been unlawful and that those Boards have acted without proper legal authority making their actions ultra vires – void because it was done without authority.

The Plan argues that the statutory provision is merely directory, that its failure to propose draft legislation does not render the Board's later actions void; that the Act does not prohibit using the appointment and confirmation method for subsequent Boards; and that the Board believes that election of the Board members would subject the Board to political pressures and corruption.

Generally, a provision is directory and not mandatory if it requires that certain actions be completed, but does not prescribe the result which should follow if those actions are not completed. Buruta v. Walter, 12 FSM Intrm. 289, 293 (Chk. 2004); *see also* FSM v. Zhang Xiaohui, 14 FSM Intrm. 602, 611 (Pon. 2007). The Act is silent about what result should follow if the Board does not submit draft legislation for the selection of its members by citizen enrolles. Section 2-1(2) is therefore directory. Furthermore, that section only directs the submission of draft legislation. It does not require (nor could it) that the Chuuk Legislature actually enact the draft or even that later Boards be chosen by citizen enrollee selection. The court further notes that even if the Board does not submit draft legislation, the Chuuk Legislature can draft and enact its own legislation.

Accordingly, the court concludes that the Board's failure to comply with Section 2-1(2) does not render the Board's composition illegal or its acts ultra vires. Mailo is not entitled to summary judgment on this claim.

B. *½% Premium Increase*

Mailo contends that since no documents evidencing the promulgation of regulations in accordance with state law have been produced in discovery, the Board must have failed to enact regulations according to state law. Mailo further contends that if there are no regulations, then the

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[1] Mailo moved to amend his complaint to include a request for a declaratory judgment in his prayer for relief. That unopposed motion was granted on August 21, 2013, and he was given until August 27, 2013 to file and serve his amended complaint. No amended complaint was filed or served. This oversight is harmless since the prayer in Mailo's original complaint did ask the court to make certain declarations and since the Plan, not Mailo, is being granted summary judgment.

Board could not increase the earlier 2½% premium to 3% and that therefore the ½% increase was unlawful and cannot be collected.

Prior case law has determined that the Plan has promulgated regulations in accordance with state law. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 540-41 (Chk. 2011). Mailo cannot be granted summary judgment on this ground.

C. *Legality of Contribution Assessment Method*

Mailo contends that since the premium contributions are assessed and paid as a percentage of a person's wages or salary, the contributions are actually a tax on income, and that being so, are therefore unconstitutional because the power to tax income is reserved exclusively to the national government and the Plan is a state agency. Mailo also contends that since the premium assessment does not vary based on the number of an enrollee's dependents or on their risk factors, it violates the statutory guidelines, found in section 5-1, for the establishment of the Plan's premium amounts that vary based on the number of an enrollee's dependents and other factors.

1. *Statutory Guidelines*

Section 5-1 provides that the Board, in its regulations "may prescribe differing amounts for enrollees who have no dependents and for enrollees with differing number of dependents." Chk. S.L. No. 2-94-06, § 5-1(2). It also provides that the Board "may establish additional classifications for enrollees for which different premiums will be determined . . . ." *Id.* § 5-1(3). Those additional classifications can be based on one or more of the following factors: "(a) Covered services for which the enrollee is eligible or is likely to use; (b) Location; (c) Risk of or exposure to injury or illness; or (d) Other factors normally considered by the health and hospitalization programs and the health maintenance organization industry in the determination of premiums." *Id.*

The statute provides only that the Plan's Board "may prescribe" or "may establish" differing premium amounts based on the number of the enrollee's dependants, *id.* § 5-1(2), or on their "risk" factors, *id.* § 5-1(3). The statute does not require it, but leaves it to the Board's discretion. The Board has chosen to assess premiums in a different manner. Mailo is not entitled to summary judgment on this ground.

2. *Constitutionality*

This case turns on whether the payroll assessments[2] are fees or taxes. If it is a tax, it would be an income tax and as an income tax it would unquestionably be unconstitutional since only the national government has the constitutional authority to levy taxes on income.[3] If the assessments are fees, they would be constitutionally permissible since these assessments fund an activity the state has

[2] Since the case's outcome depends on whether the employer and employee contributions are taxes or fees, it would complicate matters unnecessarily to refer to them as one or the other in the analysis. The court will therefore refer to these as contributions or assessments throughout the analysis.

[3] "The following powers are expressly delegated to Congress . . . to impose taxes on income." FSM Const. art. IX, § 2(e).

the constitutional authority to engage in – to establish a system of public welfare[4] by establishing a health insurance system.

The determination of whether an assessment is a tax or a fee involves "a three-part test that looks to different factors: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge." Valrero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000). "The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money contributed to a general fund, and spent for the benefit of the entire community." San Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685 (1st Cir. 1992). "The classic 'regulatory fee' is imposed by an agency upon those subject to its regulation. . . . [I]t may serve [regulatory] purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses." *Id.* (citations omitted).

The health care assessments or premiums are not imposed by the Chuuk Legislature. They are imposed by a public corporation, the Chuuk Health Care Plan through its Board. Chk. S.L. No. 2-94-06, § 5-1(1). The assessments or premiums are not deposited in the Chuuk General Fund. The Health Care Plan Act establishes a special trust fund into which all assessments and premiums and other receipts[5] are deposited. *Id.* § 6-1. These attributes of the premium assessments are characteristic of a classic fee and the opposite of a classic tax. However, the funds raised will be spent, at least indirectly, for the benefit of the entire Chuuk community since the funds will be spent for the benefit of people needing or using health care services, which is nearly everyone in Chuuk at one time or another. Even so, the premium assessments lie nearer the fee end of the spectrum than the tax end.

This may be a close case. "Courts facing cases that lie near the mid-point of this spectrum [between the classic tax and the classic fee] have tended . . . to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation." San Juan Cellular Tel. Co., 967 F.2d at 685. The premiums and assessments are not raised for general revenue purposes and cannot be used for any Chuuk state government activity. Those funds can only be used for the purposes of the Health Care Plan Act. Chk. S.L. No. 2-94-06, § 6-2. The premiums or assessments help defray the cost of providing medical care. Thus, the benefits they provide are not of the sort often financed by a general tax.

Generally, an assessment may be a fee rather than a tax when it is not used for general purposes but is used to defray the expense of performing the duties imposed on the agency and for the general purposes and expense of carrying an act into effect. San Juan Cellular Tel. Co., 967 F.2d at 685-86 (collecting cases). The Chuuk health care premium assessments are used for the care of the ill and injured and for the general purpose and expense of carrying the Chuuk Health Care Plan Act into effect.

Weighing all the attributes of the Plan's current assessment of Chuuk health care premiums and looking at the totality of the circumstances, the court concludes that the Plan's payroll assessment, even though calculated as a percentage of wages and salaries, is a fee and not a tax. Mailo is denied summary judgment on this ground as well.

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[4] "The following powers may be exercised concurrently by Congress and the states . . . to establish systems of social security and public welfare." FSM Const. art. IX, § 3(c).

[5] Other funds may be deposited as well – state and national government subsidies and other sources, Chk. S.L. No. 2-94-06, § 6-1(3), and investment income, *id.* § 6-2.

IV. Conclusion

Accordingly, Mailo's summary judgment motion is denied in its entirety as a matter of law. When a party's summary judgment motion has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 569 (Pon. 2011); Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 n.5 (Pon. 2010); Truk Continental Hotel, Inc. v. Chuuk, 6 FSM Intrm. 310, 311 (Chk. 1994).

Mailo has had an adequate opportunity to show that there is a genuine issue. He agrees that there are no factual matters in dispute and that the only disputes are matters of law. Mailo has also had an adequate opportunity to show that the Plan is not entitled to judgment as a matter of law. Since, based on the above analysis, the Plan is entitled to judgment as a matter of law, summary judgment shall be entered in its favor.

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FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF EDMOND TULENKUN, Petitioners, vs. CHIEF JUSTICE ALIKSA B. ALIKSA, Kosrae State Court, Respondent, HEIRS OF TULENSRU SEYMOUR and HEIRS OF EDMOND NED, Real Parties in Interest	APPEAL CASE NO. K1-2013 KSC Civil Action No. 46-12

ORDER DENYING PETITION FOR A WRIT OF PROHIBITION

Decided: October 17, 2013

BEFORE:

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