FSM SUPREME COURT APPELLATE 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, Appellants, vs. FSM DEPARTMENT OF FINANCE, DEPARTMENT OF ECONOMIC AFFAIRS, DEPARTMENT OF JUSTICE, and FSM GOVERNMENT, Appellees.	APPEAL CASE NO. P4-2013 Civil Action No. 2012-017

OPINION

Argued: October 8, 2014
Decided: October 27, 2014

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Aliksa B. Aliksa, Specially Assigned Justice, FSM Supreme Court**

*Chief Justice, State Court of Yap, Colonia, Yap
**Chief Justice, Kosrae State Court, Tofol, Kosrae

APPEARANCES:

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HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo; Civil Procedure – Summary Judgment – Grounds

A grant or denial of summary judgment is reviewed using the same standard that the trial court initially used under Rule 56(c) in its determination of the summary judgment motion. Thus, the appellate court determines de novo whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 593 (App. 2014).

Appellate Review – Standard – Civil Cases – De Novo

Matters of law are reviewed de novo. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 593 (App. 2014).

Administrative Law – Statutory Construction

A regulation cannot impermissibly extend or limit the reach of the statute that authorizes it. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 593 (App. 2014).

Appellate Review – Standard – Civil Cases

Generally, the rule is that an issue not raised below will not be considered for the first time on appeal. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 594 (App. 2014).

Separation of Powers – Legislative Powers; Statutes – Construction

By its nature, a statute is a declaration of public policy. Congress determines and declares public policy by enacting statues. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 594 (App. 2014).

Statutes – Construction

A statute declares public policy. If that statute is constitutional it can never be declared to be against public policy. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 594 (App. 2014).

Separation of Powers; Statutes – Construction

When the legislature, by enacting a statute, declares the public policy, the judicial branch must defer to that pronouncement. Thus, when the legislature has declared, by law, the public policy, the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, not the judiciary whose function is to declare the law but not to make it. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 594 (App. 2014).

Public Officers and Employees; Statutes – Construction

When Congress enacted unambiguous statutes it chose what the public policy is – that the FSM national government be paid in full for its expenses in clearing the ships and planes after hours and that those ships and planes pay for actual overtime work. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 594 (App. 2014).

Statutes – Construction

If the appellants believe that their arguments reflect a public policy better than the one Congress adopted by statute, they can apply to Congress for a modification or change in the statutes. Esiel v. FSM Dep't of Fin., 19 FSM R. 590, 594 (App. 2014).

* * * *

COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This appeal is from the trial division's July 2, 2013 summary judgment ruling that the Public Service System Act and the FSM Immigration Act, read together, require that the actual hours worked form the basis for calculation of public service overtime benefits and that the regulation, which required the payment for a minimum of two hours of overtime anytime overtime was worked, clearly contravened its enabling statute and was unenforceable. Esiel v. FSM Dep't of Fin., 19 FSM R. 72, 77-78 (Pon. 2013). We affirm. Our reasoning follows.

I. BACKGROUND

Public Service System Regulation part 8.6(d)(3) 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." On August 25, 2011, Acting Secretary of the Department of Justice Lorrie Johnson-Asher, in her Legal Opinion on Overtime Issues, concluded that this scheme for calculating overtime compensation was inconsistent with the Public Service System Act – that government employees were henceforth to be paid only for actual overtime hours worked.

The national government's border security inspectors and officers filed suit against the FSM Department of Finance, Department of Economic Affairs, Department of Justice, and FSM Government to reinstate Part 8.6(d)(3)'s calculation of overtime compensation. The matter came before the trial court on cross motions for summary judgment.

The trial court concluded that, as the regulation conflicted with unambiguous statutes, it did not benefit from the deference the court shows to an agency interpreting its own enabling statute. The trial court then turned to the statute itself and determined that "[n]owhere 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." Esiel, 19 FSM R. at 76.

The statute, 50 F.S.M.C. 115, provides that "[f]or 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." Since § 115's plain meaning was that aircraft and sea vessels arriving in the FSM must compensate the FSM Treasury for the actual costs of overtime that immigration officials accrue clearing aircraft and sea vessels into the FSM, the trial court concluded that read "[t]ogether, the

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," and not for any imputed or subjective hours. Esiel, 19 FSM R. at 77. The trial court reasoned that "actual" meant "[e]xisting in fact; real" and that therefore "[a]ll actual hours worked will in every instance correlate with hours that have already been worked or performed." *Id.* It thus concluded that "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," and that the regulation, Pub. Serv. Sys. Reg. pt. 8.6(d)(3), "is in clear contravention of its enabling statute." Esiel, 19 FSM R. at 78.

The trial court therefore granted summary judgment for the defendants. The plaintiffs timely appealed.

II. Issue Presented and Standards of Review

The appellants contend that the trial court's conclusion that Public Service System Regulation part 8.6(d)(3) was contrary to 52 F.S.M.C. 164(3) and 50 F.S.M.C. 115; was an error of law; and was thus an abuse of the trial court's discretion.

When we review a grant or denial of summary judgment, we use the same standard that the trial court initially used under Rule 56(c) in its determination of the summary judgment motion, and we determine de novo whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Allen v. Allen, 17 FSM R. 35, 39 (App. 2010); Berman v. College of Micronesia-FSM, 15 FSM R. 582, 590 (App. 2008). Matters of law we review de novo. *E.g.*, Iriarte v. Individual Assurance Co., 18 FSM R. 340, 351 (App. 2012).

III. Analysis

A. *Appellants' Position*

The appellants state that they agree with the trial court's determination that "[a]ll actual hours worked will in every instance correlate with hours that have already been worked or performed" but contend that the regulation "specifically provides that actual overtime is an automatic two hours." Appellants' Br. at 7 & n.4. The appellants then argue that the trial court should have taken public policy into consideration when analyzing whether the regulation was contrary to the enabling statute but did not. They contend that it is sound public policy to impute two hours overtime because otherwise the FSM government employees would be reluctant to commute from their homes to work a few minutes' overtime at the airport or seaport. The appellants conclude that "[t]he trial court was quick in its interpretation of the overtime law, but failed to take into account public policy consideration. Therefore the appellate court should overturn the decision granting summary judgment and remand this matter for further consideration." Appellants' Br. at 14. During oral argument, the appellants further asserted that the word "actual" in the statute does not mean "the literal translation" of the word "actual," so that, in their view, the two hours imputed by the regulation is the "actual" overtime.

The appellants thus ask us to vacate the trial court judgment and remand the case to the trial court for it to determine whether, as a matter of public policy, the regulation should be held not to conflict with the statute.

B. *Statutes and Public Policy*

A regulation cannot impermissibly extend or limit the reach of the statute that authorizes it. Continental Micronesia, Inc. v. Chuuk, 17 FSM R. 526, 533 (Chk. 2011); Klavasru v. Kosrae, 7 FSM

R. 86, 91 (Kos. 1995). The appellants, apparently conceding that the overtime regulation conflicts with the statutes' actual words, now claim that the trial court should interpret or re-interpret the statutes with a view to certain public policy considerations, expecting that if that is done, they might get a more favorable result.

We are uncertain where in the record below that the appellants argued that public policy concerns should be applied to the interpretation of the statutes and regulation. Generally, the rule is that an issue not raised below will not be considered for the first time on appeal. Pohnpei v. AHPW, Inc., 13 FSM R. 159, 161 (App. 2005).

However, that need not concern us here since, by its nature, a statute is a declaration of public policy. Congress determines and declares public policy by enacting statues.

We have previously noted in a Kosrae case that it is the Kosrae Legislature's role to consider and determine the public policy that supports a Kosrae statute, and to enact legislation that reflects that public policy. Allen v. Kosrae, 15 FSM R. 18, 22 (App. 2007) (citing Siba v. Sigrah, 4 FSM R. 329, 336 (Kos. S. Ct. Tr. 1990)).[1] In Laurel Bank & Trust Co. v. Mark Ford, Inc., 438 A.2d 705 (Conn. 1980), the appellant argued that a statute should not be enforced because it was void as against public policy. The court did not agree. It held that: "A statute declares public policy. If that statute is constitutional it 'can never . . . be declared to be against public policy.'" *Id.* at 707 (quoting General Motors Corp. v. Mulquin, 55 A.2d 732, (Conn. 1947)). The court in Maher & Associates, Inc. v. Quality Cabinets, 640 N.E.2d 1000, 1005 (Ill. App. Ct. 1994), explained that "[w]hen the legislature, by enacting a statute, declares the public policy . . . the judicial branch must defer to that pronouncement." Thus, "'[w]hen the legislature has declared, by law, the public policy . . . the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, not the judiciary whose function is to declare the law but not to make it.'" Roanoke Agency, Inc. v. Edgar, 461 N.E.2d 1365, 1371 (Ill. 1984) (quoting Collins v. Metropolitan Life Ins. Co., 83 N.E. 542, 544 (Ill. 1907)). We agree with the analysis in these cases.

C. *Application to this Appeal*

The appellants do not contend that the statutes are unconstitutional. Nor do they contend that the trial court misunderstood the statutes' plain meaning. Rodriguez v. Bank of the FSM, 11 FSM R. 367, 378 (App. 2003) (statutory provision's plain meaning must be given effect whenever possible; courts should not broaden statutes beyond the meaning of the law as written). They do contend that the matter should be remanded to the trial division for it to consider whether the regulation requiring an automatic minimum of two hours overtime pay is a better public policy than the statutes' actual meaning and should therefore be upheld.

When Congress enacted unambiguous statutes it chose what the public policy is – that the FSM national government be paid in full for its expenses in clearing the ships and planes after hours and that those ships and planes pay for actual overtime work. The trial court correctly deferred to Congress's choice as expressed in the statutes' plain meaning. Public Service System Regulation part 8.6(d)(3) broadens the statutes beyond the meaning of the law as written. It is therefore invalid. If the appellants believe that their arguments reflect a public policy better than the one Congress adopted by statute, they can apply to Congress for a modification or change in the statutes.

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[1] The Kosrae State Court explained that the legislature's power "is to decide what the law shall be, to determine public policy and to frame the laws to reflect that public policy." Siba v. Sigrah, 4 FSM R. 329, 336 (Kos. S. Ct. Tr. 1990)

IV. Conclusion

Accordingly, we affirm the trial court judgment. Costs are to be borne by the parties. FSM App. R. 39(b).

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FSM SUPREME COURT APPELLATE DIVISION

MAYLEEN IHARA, Appellant, vs. JOSEPH VITT, in his official and individual capacity as the General Manager of Pohnpei Transfer & Storage, Inc., POHNPEI TRANSFER & STORAGE, INC., and POHNPEI TRAVEL SERVICES, Appellees.	)	APPEAL CASE NO. P2-2013 (Civil Action No. 2008-031)

OPINION

Argued: October 7, 2014
Decided: October 27, 2014

BEFORE:

Hon. Ready E. Johnny, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, State Court of Yap, Colonia, Yap

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