Congress has the power to appropriate public funds or to authorize withdrawals from general and special funds. The FSM also adds that Chuuk seeks to argue or seeks relief on Pohnpei's behalf but Pohnpei is not a party to this action.

The FSM has a point about the portions of the amended complaint that seem to also seek relief for the State of Pohnpei, which is not a party. Those parts of the amended complaint's prayer for relief that seek relief for Pohnpei can thus be dismissed or stricken as surplusage.

The court cannot, however, see why Congress would be an indispensable party when Chuuk is not asking for a percentage higher the constitutionally mandated 50%.

III. Conclusion

The FSM's motion is dismiss is accordingly denied, but the portion of the prayer for relief seeking relief for the State of Pohnpei is stricken. Since the FSM has already filed its answer, the following schedule is now therefore set: 1) all discovery shall be requested by July 29, 2016; 2) all discovery shall be completed by August 23, 2016; and 3) all pretrial motions shall be filed and served no later than September 13, 2016.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

SINTER ALEXANDER, Appellant, vs. HASER HAINRICK, in his official capacity as FSM Public Auditor, OFFICE OF THE FSM PUBLIC AUDITOR, and FEDERATED STATES OF MICRONESIA, Appellees.	APPEAL CASE NO. P11-2014

OPINION

Argued: May 5, 2016
Decided: May 20, 2016

BEFORE:

Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Specially Assigned Justice, FSM Supreme Court*
Hon. Benjamin F. Rodriguez, Specially Assigned Justice, FSM Supreme Court**

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

APPEARANCES:

For the Appellant: Salomon M. Saimon, Esq.
Directing Attorney
Micronesian Legal Services Corporation
P.O. Box 129
Kolonia, Pohnpei FM 96941

For the Appellees: (Hainrick & Office of Public Auditor) Erick B. Divinagracia, Esq. (brief only)
Ramp & Mida Law Firm
P.O. Box 1480
Kolonia, Pohnpei FM 96941

For the Appellee: (FSM) Joses R. Gallen, Esq. (brief)
Craig D. Reffner, Esq. (argued)
Assistant Attorneys General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

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HEADNOTES

Public Officers and Employees

Every new employee must successfully serve a probation period before becoming a regular employee, and the Public Service System Regulations require that the probationary period last at least six months and that it can be extended to up to one year. Alexander v. Hainrick, 20 FSM R. 377, 379 (App. 2016).

Appellate Review – Standard – Civil Cases – Factual Findings

The standard of review for trial court findings of fact is whether those findings are clearly erroneous. A trial court's findings are presumed correct, and the appellate court cannot substitute its judgment for that of the trial court. When a trial court finding is alleged to be clearly erroneous, the appellate court will find reversible error only: 1) if the trial court finding was not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, it is left with a definite and firm conviction that a mistake has been made. Alexander v. Hainrick, 20 FSM R. 377, 381 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo

Matters of law are reviewed de novo. Alexander v. Hainrick, 20 FSM R. 377, 381 (App. 2016).

Public Officers and Employees

A Presidential administrative order about vehicle use cannot be applied to the Public Auditor because, under the Constitution, the Public Auditor is independent of administrative control. Alexander v. Hainrick, 20 FSM R. 377, 382 (App. 2016).

Appellate Review – Standard – Civil Cases – Factual Findings

That the trial court found one witness's testimony more credible than another's, is not a ground for reversal since the trial judge was in the best position to judge the witnesses' demeanor and

credibility by observing them and the manner in which they testified. Alexander v. Hainrick, 20 FSM R. 377, 382 (App. 2016).

Public Officers and Employees – Termination

A pattern of untruthfulness that had preceded the probationary employee's lying about posting comments on a website, along with his disrespectful and insubordinate attitude to his supervisor, were more than sufficient to terminate a probationary employee, even if he had not posted any comments. Alexander v. Hainrick, 20 FSM R. 377, 383 (App. 2016).

Constitutional Law – Freedom of Expression; Public Officers and Employees – Termination

If the preponderance of evidence shows that a government employee would have been terminated even in the absence of the protected free speech conduct, then the employee's termination should be upheld. Alexander v. Hainrick, 20 FSM R. 377, 383 (App. 2016).

Public Officers and Employees – Termination

To grant a wrongfully discharged probationary employee a substantial back pay award would be to convert him from the probationary employee he was to a regular or permanent employee, and he cannot be treated as a regular employee since he did not successfully complete his probationary period before he was terminated. Thus, the most a court could do would be to reinstate him as a probationary employee. Alexander v. Hainrick, 20 FSM R. 377, 383 (App. 2016).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

This appeal is from the trial court's April 15, 2014 decision, made after trial, that the plaintiff, Sinter Alexander, was not wrongfully terminated from his probationary employee position as an Investigative Auditor I at the Office of the Public Auditor. We affirm. Our reasoning follows.

I. BACKGROUND

As a result of his job application and subsequent interview, Sinter Alexander was, on October 12, 2010, offered a position as an Investigative Auditor I at the Office of the Public Auditor to assist in handling fraud investigations. He accepted, and on October 20, 2010, he started work. Alexander was a probationary employee because every new employee must "successfully serve a probation period before becoming a regular employee." 52 F.S.M.C. 138(1). The Public Service System Regulations require that the probationary period last at least six months and that it can be extended to up to one year. FSM Pub. Serv. Reg. pt. 5.11.

Alexander sought to take paid annual leave, which he believed he had a right to do, although he was informed that probationary employees were not eligible to use paid annual leave. On March 7, 2011, Sophia Pretrick, the Chief Investigator (Alexander's supervisor) in the Public Auditor's Compliance Investigation Division, filed a written complaint against him about conflicts that had arisen concerning Alexander's annual leave and overtime benefits. On March 8, 2011, Alexander was asked by e-mail to resign. He apologized by e-mail, but did not resign.

About that time, Alexander ended a discussion with Pretrick (who, during the meeting, had said that since they were all Pohnpeians, they should be able to work together) by stating, "I'm the *pwilidak*!" Pretrick took that statement to be a derogatory comment on her outer island – her Mokilese

– ancestry since she understood the term *pwilidak* to mean "real Pohnpeian" or "true Pohnpeian" and that Alexander's statement implied that she was not one.

On April 20, 2011, Michael Nakasone, Alexander's co-worker, submitted a written complaint against Alexander, highlighting interoffice conflicts. On April 21, 2011, Pretrick, having completed a six-month evaluation of Alexander, discussed it with Public Auditor Hainrick. She suggested that Alexander's probationary period be extended further for six months. That was done. On May 6 or 8, 2011,[1] Alexander, Hainrick, and Pretrick met and discussed Alexander's six-month evaluation and the reasons for the extension of Alexander's probationary status.

On May 7-10, 2011, Alexander posted comments critical of the Public Auditor's Office on a Micronesian Seminar Forum ("MicSem") website under the username of Alex07. On May 10, 2011, Hainrick asked Alexander several times whether he was the Alex07 posting comments on MicSem, which Alexander denied even after Hainrick told him that they had hard evidence[2] that he was Alex07. At the meeting's end, Alexander was excused and told to go home. On May 11, 2011, a written letter from the Public Auditor's Office expressly terminated Alexander for his "personal attitude and personality."

On August 12, 2011, Alexander filed suit against Hainrick (in his personal capacity and in his official capacity as Public Auditor); Pretrick (in her personal capacity); the FSM national government; and the Micronesian Seminar Institute. Alexander alleged that he was wrongfully terminated in violation of his free speech rights and in violation of national laws and regulations (violation of his civil rights). He further alleged that Hainrick had intentionally inflicted, and Hainrick and Pretrick had negligently inflicted, emotional distress on him because Pretrick had defamed him, and that the FSM and the Micronesian Seminar Institute had engaged in a civil conspiracy against him. The civil conspiracy count and defendant Micronesian Seminar Institute were dismissed before trial.

At the start of trial on October 29, 2013, the parties stipulated to, and Alexander dismissed the infliction of emotional distress and defamation allegations, which, since Pretrick was only named as a defendant on the negligent emotional distress and defamation counts, also dismissed her as a defendant and dismissed Hainrick as a defendant in his personal capacity. Trial went forward on the wrongful termination allegations and ended on October 31, 2013.

In its April 18, 2014 decision, the trial court concluded that Alexander had not been terminated in violation of any national laws or regulations since he was a probationary employee who could be dismissed at any time for unsatisfactory performance[3] and that Alexander "failed to carry his burden with credible evidence sufficient to overcome the evidence presented by the Defendants that he was terminated as a result of personal attitude and personality, including untruthfulness." Alexander v. Hainrick, Findings of Fact and Conclusions of Law at 7, Civ. No. 2011-027 (Pon. Apr. 18, 2014) ("Findings & Conclusions").

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[1] On page 4 of the trial court's decision the date is given as May 6, 2011, while on page 7 it is given as May 8, 2011.

[2] Alexander had used the Public Auditor's Office's computer to register with and log onto MicSem and this left an electronic trail found by the Public Auditor's Office's technology specialist.

[3] "An employee whose services are unsatisfactory during his probation period may be dismissed from the public service at any time by the responsible management official. An employee so dismissed shall have no right of appeal . . . ." 52 F.S.M.C. 138(1).

The trial court also concluded that Alexander's constitutional right to due process before being deprived of property had not been violated since he was only a probationary employee and thus did not have any property interest in continued employment and that he had had sufficient notice and an opportunity to be heard for someone in a probationary employee status. *Id.* at 4-6. The trial court concluded that Alexander "was provided sufficient notice and an opportunity to be heard and that no due process violation occurred under the facts as determined." *Id.* at 6.

While the trial court concluded that Alexander's comments on the MicSem website were protected free speech whose contents could not be used to terminate him, it then found that there were sufficient, independent reasons for Alexander's termination and that those grounds were the basis for his termination. *Id.* at 8-12. The trial court concluded that Alexander's "personal attitude and personality, including dishonesty provided more than sufficient independent grounds for . . . Alexander's termination." *Id.* at 12. And it found that "these were proper and justifiable grounds for his termination, and were the basis for his termination." *Id.*

Judgment was rendered in the defendants' favor. Alexander timely appealed.

II. Issues Presented

Alexander contends that the trial court erred: 1) when it found that the statement he made to his supervisor that related to her Mwoakilloa ancestry was sufficient independent grounds to terminate him instead of finding that the true reason he was terminated was the protected speech comments he had made on the Micronesian Seminar website; and 2) because it should not have found him to have been a untrustworthy individual but instead should have deemed the Public Auditor Haser Hainrick to be untrustworthy because Hainrick violated an FSM vehicle law.

The central issue Alexander raises is whether he was terminated from his probationary position in the Public Auditor's Office because of the contents of his comments on MicSem and thus in violation of his free speech rights or whether he was, or would have been, terminated for independent and adequate reasons. Alexander asks that the trial court's findings and conclusions be reversed and that he be awarded back pay up until the time he found substitute employment and, since then, the difference between his public auditor investigator pay and his current pay.

III. Standards of Review

The standard of review for trial court findings of fact is whether those findings are clearly erroneous. Ihara v. Vitt, 19 FSM R. 595, 600 (App. 2014). A trial court's findings are presumed correct, and we cannot substitute our judgment for that of the trial court. *Id.* When a trial court finding is alleged to be clearly erroneous, we will find reversible error only: 1) if the trial court finding was not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, we are left with a definite and firm conviction that a mistake has been made. *Id.*

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

IV. Analysis and Suggestions

A. *Hainrick's Reliability as a Witness*

Alexander contends that the trial court should have found that Hainrick was an unreliable witness and thus discounted his testimony while giving Alexander's testimony full credit because Hainrick was a cabinet-level government official with law-enforcement responsibilities and had use of a government vehicle, which he drove home at nights, and this use was, in Alexander's view, illegal. He also argues that Pretrick's credibility should have been doubted because, he asserts, Pretrick also made a derogatory ethnic remark. We address these contentions first since they are only relevant if Alexander can use them to help convince us that the trial court's factual findings were clearly erroneous. Otherwise, Hainrick's vehicle use and Pretrick's comment are irrelevant collateral matters.

Alexander argues that a Presidential administrative directive made it illegal for cabinet-level officials to drive their government vehicles home at night unless they had the President's written permission. Hainrick testified that he did not have the President's written permission and that he did drive his government vehicle home at night. He also testified that the Public Auditor's office is independent of the rest of the government. Alexander never put the Presidential directive in evidence.

Nor did Alexander ever show that the Public Auditor is subject to any such Presidential directive. The Constitution clearly indicates that a Presidential administrative order such as the one that Alexander contends exists, cannot be applied to the Public Auditor. It provides that "[t]he Public Auditor shall be independent of administrative control except that he shall report at least once a year to Congress. . . ." FSM Const. art. XII, § 3(c). The Executive branch's restricting the Public Auditor's vehicle use would be a form of administrative control.

The trial judge had the opportunity to observe witness Hainrick's manner and demeanor while he was testifying as well as Alexander's, and he could easily have found Hainrick the more credible witness even if Hainrick's government vehicle use had been improper. That the trial court found one witness's (Hainrick's) testimony more credible than another's (Alexander's), is not a ground for reversal since the trial judge was in the best position to judge the witnesses' demeanor and credibility by observing them and the manner in which they testified. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 352 (App. 2012). Furthermore, Alexander admitted during his trial testimony that he had earlier lied when he denied being Alex07.

Alexander also attacks Pretrick's credibility by insisting that during an investigation in Chuuk, she stated that Chuukese were pathological liars. Pretrick's testimony was that she stated that the person in Chuuk they had just finished interviewing was a pathological liar. Again, this is a collateral matter of doubtful relevance, and the trial judge found her testimony more credible than Alexander's. Furthermore, Pretrick's testimony was corroborated by Michael Nakasone's written report.

Therefore, we must reject this assignment of error.

B. *Were There Adequate Independent Grounds to Terminate Alexander?*

Alexander contends that the trial court ruled that the reason he was terminated was the statement he made to his supervisor, Pretrick, that related to her Mwoakilloa ancestry. He contends that this was not a sufficient independent ground to terminate him, especially since his probationary period was extended after this, so the matter should be considered closed. He asserts that the trial court should have found that the true reason he was terminated was the protected speech comments he had made on the Micronesian Seminar website since his termination came shortly after he was

questioned about whether he was the Alex07 who was posting items about the Public Auditor's Office on MicSem. He contends that but for his MicSem postings, Hainrick never would have asked him if he was Alex07 and he would not have been terminated for denying it.

Alexander is incorrect or inaccurate when he argues that the trial court found Alexander's statement to Pretrick that he was the *pwilidak* to be the sole, independent reason he was terminated. It was one of a number. The trial court relied not only on the *pwilidak* incident but also on "[f]urther conflicts at work regarding [Alexander's] ability to utilize leave led to negative comments in his employment file and demonstrated the difficulty that his supervisor was having with him." Findings & Conclusions at 11. Furthermore, his employer "was having doubts about his honesty and one of his co-workers [had] submitted an internal memorandum expressing the same concern." *Id.* The trial court also found that Alexander "showed disrespect to his supervisor and did not comply with instructions." *Id.* And, the trial court noted that "according to his employment evaluation, [Alexander] was given two unsatisfactory ratings out of four. Of the other two, one was satisfactory, and the other was not made due to lack of information." *Id.* at 7.

Alexander does not directly challenge these other trial court findings. He only asserts that his comment about him being *pwilidak* – thus the implied comment about Pretrick's Mokilese ancestry – was insufficient grounds to terminate him and that therefore his MicSem comments must have been the real reason he was let go. But, as shown above, that was not the only ground the trial court found as the basis for Alexander's termination. The last straw may have been Alexander's lying about whether he was Alex07, but it fit a pattern of untruthfulness that had preceded it and which, along with Alexander's disrespectful and insubordinate attitude to his supervisor, were more than sufficient to terminate a probationary employee, even if Alexander had not made any comments on MicSem.

If the preponderance of evidence shows that a government employee would have been terminated even in the absence of the protected free speech conduct, then the employee's termination should be upheld. Damarlane v. Pohnpei Legislature, 8 FSM R. 23, 28 (App. 1997). In Tither v. Marar, 18 FSM R. 303, 306 (Chk. 2012), the court held that a plaintiff's termination or discharge was not unlawful when, even if the plaintiff had been able to prove that his constitutionally-protected conduct had been a substantial or motivating factor in his termination and the burden of proof had then shifted to the defendants, the plaintiff still would not prevail since the defendants demonstrated that they would have taken the same action in the absence of the protected conduct because of the plaintiff's probationary status and his unsatisfactory conduct would have prevented him from being converted to a permanent employee and he would have been terminated anyway. In light of Alexander's probationary status and his generally unsatisfactory performance, the Public Auditor's Office would have, based on the trial court's factual findings, inevitably terminated Alexander before he became a regular employee.

Having reviewed the entire trial transcript, we see no reason to hold the trial court's factual findings to be clearly erroneous. The trial court, which was able to observe the witnesses' manner and demeanor and thus assess their credibility, made findings of fact that were supported by substantial evidence in the record. Therefore, there were independent, adequate grounds to terminate probationary employee Alexander.

One last point, even if we had concluded that the trial court findings were clearly erroneous, we could not grant Alexander the remedy he seeks. To grant him a substantial back pay award would be to convert him from the probationary employee he was to a regular or permanent employee. He could not be treated as a regular employee since he had not successfully completed his probationary period before he was terminated. 52 F.S.M.C. 138(1). Thus, the most we would have been able to do would have been to reinstate him as a probationary employee.

VII. Conclusion

The trial court findings are supported by substantial evidence in the record. The trial court did not misconstrue the applicable law. And, construing the entire body of evidence in the light most favorable to the appellees, the trial court's findings were not clearly erroneous. Accordingly, we affirm the trial court.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

CHRISTOPHER CORPORATION, PATRICIA (PEGGY) SETIK, MARIANNE B. SETIK, THE ESTATE OF MANNEY SETIK, ATANASIO SETIK, VICKY SETIK IRONS, IRENE SETIK WALTER, MARLEEN SETIK, JUNIOR SETIK, ELEANOR SETIK SOS, JOANITA SETIK PANGELINAN, MERIAM SETIK SIGRAH, CHRISTOPHER JAMES SETIK, GEORGE SETIK, individually and d/b/a CHRISTOPHER STORE, Appellants, vs. FSM DEVELOPMENT BANK, Appellee.	APPEAL CASE NO. C1-2015 APPEAL CASE NO. C1-2014 APPEAL CASE NO. C2-2015 (Civil Action No. 2007-1008)

ORDER GRANTING ENLARGEMENTS OF TIME AND CONSOLIDATING APPEALS

Decided: May 20, 2016

BEFORE:

Hon. Cyprian Manmaw, Specially Assigned Justice, Presiding*
Hon. Midasy O. Aisek, Specially Assigned Justice**
Hon. Benjamin F. Rodriguez, Specially Assigned Justice***

*Chief Justice, State Court of Yap, Colonia, Yap
**Associate Justice, Chuuk State Supreme Court, Weno, Chuuk
***Chief Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

For the Appellants: Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941