

without or in excess of his jurisdiction or to commit some other serious act until the petitioners' disqualification motion has been decided. We therefore decline to issue the requested writ. We are confident that Justice Walliby is aware of his responsibilities and will take no further action in CSSC SP No. 124-2019 until the petitioners' motion to disqualify him has been decided, and then only if that motion has been denied.

III. CONCLUSION

Accordingly, the petitioners' reconsideration motion is denied.

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FSM SUPREME COURT TRIAL DIVISION

WELFRED EDMUND,)	CIVIL ACTION NO. 2017-039
)	
Plaintiff,)	
)	
vs.)	
)	
REED B. OLIVER, in his official capacity as)	
Governor of Pohnpei, PATRICK CARL, in his)	
official capacity as the Director of the)	
Department of Public Safety, CHRISTINA ELNEI,)	
in her official capacity as the Director of the)	
Department of Treasury and Administration,)	
and POHNPEI STATE GOVERNMENT,)	
)	
Defendants.)	
_____)	

ORDER GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS

Larry Wentworth
Associate Justice

Decided: November 6, 2020

APPEARANCES:

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For the Defendants: Monaliza Abello-Pangelinan, Esq.
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HEADNOTES

Constitutional Law – Equal Protection

When no facts were alleged, or evidence produced, that could support an equal protection claim, there are no material disputes of fact and the defendants are entitled to a judgment as a matter of law on the equal protection claim. Edmund v. Oliver, 23 FSM R. 72, 76 (Pon. 2020).

Administrative Law; Constitutional Law – Due Process – Procedural

A plaintiff's claim that his procedural due process rights were violated because the Personnel Review Board had not heard his appeal – would not give him the process that he was due – became moot when the Board heard his appeal but decided against him. Edmund v. Oliver, 23 FSM R. 72, 76 (Pon. 2020).

Administrative Law; Public Officers and Employees – Pohnpei – Termination

Under Pohnpei state law, a management official may, for disciplinary reasons, dismiss an employee for such causes that will promote the efficiency of the public service, but a written notice setting forth the specific reasons for the dismissal and the employee's rights of appeal must first be transmitted to the employee. Edmund v. Oliver, 23 FSM R. 72, 76 (Pon. 2020).

Administrative Law; Public Officers and Employees – Pohnpei – Termination; Statutes – Construction – "May" and "Shall"

A dismissed employee has 15 days to appeal the dismissal. Pohnpei state law then provides that the Personnel Review Board "shall" hold the hearing within 15 calendar days after the Director receives the appeal. Despite the use of the word "shall," this fifteen-day requirement is merely directory, and not mandatory, because the statute does not state what consequences should ensue if the Board fails to hold a hearing within the 15-day time limit. Edmund v. Oliver, 23 FSM R. 72, 76 (Pon. 2020).

Administrative Law – Judicial Review; Public Officers and Employees – Pohnpei – Termination

In reviewing the Personnel Review Board's decision upholding an employee's dismissal, a court, in making its determination, must review the whole record or those parts of it cited by a party, and give due account to the rule of prejudicial error, and can set aside the Board's decision only if the Board's findings and conclusions are found to be: 1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; 2) contrary to constitutional right, power, privilege or immunity; 3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; 4) without observance of procedure required by law; 5) unsupported by substantial evidence in a case reviewed on the record of any agency hearing provided by statute; or 6) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the court. Edmund v. Oliver, 23 FSM R. 72, 77 (Pon. 2020).

Administrative Law – Judicial Review; Public Officers and Employees – Pohnpei – Termination; Search and Seizure – Warrants

Regardless of whether the actions of the Pohnpei state police and the Kolonia Town municipal police in executing a warrant were conducted legally or in violation of a Pohnpei Supreme Court order, another officer did not have the right to interfere with or to resist them there because any remedy for the police's supposed or alleged illegal actions was in the courts, not in self-help interference. Generally, a person has no right to resist a court-issued warrant even if that warrant turns out to be invalid, and a police force cannot operate effectively and efficiently if one of its officers advocates resistance to the force's execution of a warrant. The officer's dismissal thus not only promoted the efficiency of the state police department but it also rested on a rational basis. Edmund v. Oliver, 23 FSM R. 72, 77 (Pon. 2020).

Administrative Law – Judicial Review; Public Officers and Employees – Pohnpei – Termination

Courts generally cannot overturn an administrative decision when there was a rational basis for that decision and it was not rendered unlawfully, especially when the plaintiff does not even address the rest of the reasons for his termination – his prior history of suspensions for misconduct – so his termination defense was even further inadequate. Edmund v. Oliver, 23 FSM R. 72, 77-78 (Pon. 2020).

Administrative Law – Judicial Review; Constitutional Law – Due Process – Procedural; Public Officers and Employees – Pohnpei – Termination

When the Director of the Pohnpei Department of Public Safety notified the plaintiff that the department intended to terminate him for certain specified reasons and gave him an opportunity to respond (that is, to be heard), and the plaintiff did respond with written reasons why he should not be terminated, the plaintiff was given notice and had the opportunity to be heard (and in fact was heard) before he was terminated. The plaintiff is thus not automatically entitled to back pay from his termination date until the Pohnpei Personnel Review Board decision date. He would have been entitled to that back pay only if he had been wrongfully terminated. Edmund v. Oliver, 23 FSM R. 72, 78 (Pon. 2020).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on the plaintiff's Brief on Back Pay, and on the plaintiff's Motion for Reconsideration of Order Granting Partial Summary Judgment, both filed September 4, 2020. The defendants did not file a response to either filing. For the reasons given below, the Plaintiff's Motion for Summary Judgment or in the Alternative Partial Summary Judgment, filed June 24, 2020; the Defendants' Motion for Summary Judgment, filed June 25, 2020; and Plaintiff's Response to Defendants' Motion for Summary Judgment, filed July 8, 2020, are also before the court for its consideration. And as explained below, the court denies the plaintiff's motions and grants summary judgment to the defendants.

I. BACKGROUND

The plaintiff, Welfred Edmund, then a Pohnpei State Police Lieutenant, was suspended on March 14, 2017, from that office by the Director of the Pohnpei Department of Public Safety and notified that the department intended to terminate him because of his actions on November 7, 2016, that had allegedly interfered unlawfully with the execution of an arrest warrant and because of his prior history of suspensions for misconduct. Edmund, through his counsel, responded on March 16, 2017, with a letter explaining why he should not, or could not, be terminated. The Director then terminated Edmund on March 27, 2017.

On March 28, 2017, Edmund appealed his termination to the Pohnpei Personnel Review Board ("Board"). On April 18, 2017, Edmund's counsel asked the Director of Finance and Administration why his appeal had not been scheduled and heard by the Pohnpei Personnel Review Board within 15 days of his appeal and asked for an expedited hearing. On May 2, 2017, Edmund was informed that the Board did not have a quorum and that there would not be one until there were gubernatorial nominations confirmed by the Pohnpei Legislature. That did not happen for quite some time.

On June 30, 2017, Edmund filed this case, alleging that his rights to due process had been violated because he had been unlawfully terminated and his appeal had not been heard; that his rights to equal protection had been violated; and that his civil rights had thus been violated. Edmund sought reinstatement as a police lieutenant and back pay.

On August 8, 2018, the Pohnpei Personnel Review Board (now with a quorum) heard Edmund's appeal, and, on August 20, 2018, it upheld Edmund's termination. Edmund contends that August 20, 2018, should be considered his termination date.

On January 30, 2019, Edmund filed a supplemental or amended complaint, in which he alleged that his right to due process had been violated because he had been unlawfully terminated and his appeal had not been promptly heard; that his rights to equal protection had been violated; and that therefore his civil rights had been violated. He again sought reinstatement and back pay.

Edmund filed a summary judgment motion on June 24, 2020. The defendants filed their own summary judgment motion the next day – June 25, 2020. On August 25, 2020, the court issued an Order Granting Partial Summary Judgment, in which it granted the defendants summary judgment on Edmund's due process and civil rights claims insofar as those causes of action are based on his claim that his appeal has not been heard, and on his equal protection claim because no facts had been alleged that would support such a claim, and asked for further briefing on Edmund's partial back pay claim. Edmund's September 4, 2020 filings responded to this order.

II. CONSIDERATION AND RECONSIDERATION OF SUMMARY JUDGMENT CROSS-MOTIONS

Edmund now seeks reconsideration of the court's August 25, 2020 order. Edmund also asserts that the court, in that order, granted the defendants' June 25, 2020 summary judgment motion while ignoring his own June 24, 2020 summary judgment motion. That assertion has merit because the court was unaware of Edmund's June 24, 2020 summary judgment motion until it was mentioned in Edmund's motion to reconsider. For reasons unknown, the June 24, 2020 motion did not make it into the judge's file, so the court did not consider it. Therefore the court hereby vacates the August 25, 2020 partial summary judgment order and proceeds to not only reconsider the defendants' summary judgment motion but to also (having now obtained a copy) consider it together with Edmund's summary judgment motion as cross-motions for summary judgment.

A. *Parties' Motions*

1. *Edmund's Motions*

In his reconsideration motion, Edmund contends that he was wrongfully terminated because the reason for his termination, his November 7, 2016 actions that interfered with the execution of an arrest warrant, were lawful and not subject to discipline because that warrant execution was in violation of a lawful Pohnpei Supreme Court restraining order.

In his June 24, 2020 summary judgment motion, Edmund contends that there is no genuine factual dispute about why he was terminated. Edmund further contends that his actions on November 7, 2016, were lawful because the actions of the Pohnpei state and Kolonia Town police that day were unlawful since the Pohnpei state and Kolonia Town police actions, although authorized by a Kolonia Town Court warrant, were in violation of a Pohnpei Supreme Court restraining order. Thus, since, in his view, his actions were lawful, Edmund contends that they could not be used as a ground to terminate him, and therefore he is entitled to a judgment as a matter of law and an order reinstating him in his former position as a police lieutenant with back pay.

2. *The Defendants' Motion*

The defendants move for summary judgment on Edmund's claims. They contend that because the Board's August 20, 2018 decision upheld Edmund's termination, Edmund's due process claim must be

dismissed since Edmund has received all the procedural process due him. They also contend that Edmund's equal protection claim must be dismissed because no evidence showed that Edmund was treated any differently than any other police officer because of his sex, race, ancestry, national origin, language, or social status nor do Edmund's pleadings allege any facts to support such a claim.

The defendants further contend that, since Edmund's due process and equal protection claims will be dismissed, his civil rights claims must also be dismissed because due process and equal protection are the civil rights that Edmund claims were violated. They further dispute Edmund's contention that the November 7, 2016 police actions were in violation of any Pohnpei Supreme Court restraining order.

B. *Analysis*

1. *Equal Protection and Due Process Claims*

The court is satisfied that there are no material disputes of fact and that the defendants are entitled to a judgment as a matter of law on Edmund's equal protection claims and on his procedural due process claim. No facts were alleged, or evidence produced, that could support an equal protection claim. The claim that Edmund's due process rights were violated because the Board would not hear his appeal – would not give him the process that he was due – is now moot. The Board heard his appeal, but decided against him.

2. *Civil Rights Claim*

Edmund's civil rights claim, as now argued, seeks to have the court declare that Edmund's termination was unlawful and to order his reinstatement in his former police position – he seeks to have the court overrule the Board decision and order his reinstatement. Edmund thus asks the court to sit in review of the Board's decision upholding his termination.

Assuming that the court has the jurisdiction to review the Board's August 20, 2018 decision (presumably taking Edmund's January 30, 2019 supplemental complaint as an appeal from the August 20, 2018 Pohnpei Personnel Review Board decision), the court can find no basis to reverse it.

a. *Administrative Review*

Under Pohnpei state law, "[a] management official may, for disciplinary reasons, dismiss . . . an employee for such causes that will promote the efficiency of the public service." 9 Pon. C. § 2-139. "[A] written notice setting forth the specific reasons for the dismissal . . . and the employee's rights of appeal" must first be transmitted to the employee. *Id.* That was done on March 14, 2017. Edmund responded to the notice on March 16, 2017. The Public Safety Director then terminated Edmund on March 27, 2017.

A dismissed employee has 15 days to appeal the dismissal. 9 Pon. C. § 2-140(2). Edmund appealed the next day. Pohnpei state law then provides that the Board "shall" hold the hearing "within 15 calendar days after the Director receives the appeal." 9 Pon. C. § 2-140(3). Despite the use of the word "shall," this fifteen-day requirement is merely directory, and not mandatory, because the statute does not state what consequences should ensue if the Board fails to hold a hearing within the 15-day time limit. See *Mailo v. Chuuk Health Care Plan*, 20 FSM R. 18, 25 (App. 2015); *FSM v. Zhang Xiaohui*, 14 FSM R. 602, 611 (Pon. 2007); *Buruta v. Walter*, 12 FSM R. 289, 293 (Chk. 2004); *Jonas v. Kosrae*, 10 FSM R. 453, 459 (Kos. S. Ct. Tr. 2001); see also *Panuelo v. Pohnpei*, 3 FSM R. 76, 81-82 (Pon. S. Ct. App. 1987). The Board eventually did conduct a hearing and render a decision once it had a quorum to do so.

b. *Judicial Review*

If the court has jurisdiction to review the Board's August 20, 2018 decision upholding Edmund's dismissal, the court, in making its determination, must "review the whole record or those parts of it cited by a party," and give "due account [to] the rule of prejudicial error." 8 Pon. C. § 3-104(3). The court can set aside the Board's August 20, 2018 decision only if the Board's

findings and conclusions [are] found to be:

- (a) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
- (b) Contrary to constitutional right, power, privilege or immunity;
- (c) In excess of statutory jurisdiction, authority or limitations, or short of statutory right;
- (d) Without observance of procedure required by law;
- (e) Unsupported by substantial evidence in a case reviewed on the record of any agency hearing provided by statute; or
- (f) Unwarranted by the facts to the extent that the facts are subject to a trial de novo by the court.

8 Pon. C. § 3-104(2).

c. *Review of Edmund's Claim*

Edmund's contention is that, since, in his view, the November 7, 2016 execution of a Kolonia Town warrant was unlawful because it was in violation of a lawful Pohnpei Supreme Court restraining order, his actions resisting or interfering with that warrant's execution were thus lawful and therefore could not be a lawful basis to dismiss him from his state police lieutenant position. Edmund thus contends that his dismissal violated his constitutional right to continued police employment, implicating 8 Pon. C. § 3-104(2)(b), and was short of (lacked) any statutory right to dismiss him, implicating 8 Pon. C. § 3-104(2)(c).

The court cannot agree. Regardless of whether the November 7, 2016 actions of the Pohnpei state police and the Kolonia Town municipal police were conducted legally or in violation of a Pohnpei Supreme Court order, Edmund did not have the right to interfere with or to resist them there. Any remedy for the police's supposed or alleged illegal actions on November 7, 2016, was in the courts, not in self-help interference. See *FSM v. Wainit*, 13 FSM R. 433, 446 (Chk. 2005) (remedy for a victim of an illegal search is not the self-help of resistance); *FSM v. Wainit*, 11 FSM R. 424, 436 (Chk. 2003) (defective search warrant is not a defense to a prosecution for resisting the defective warrant). Generally, a person has no right to resist a court-issued warrant even if that warrant turns out to be invalid. See *Wainit*, 13 FSM R. at 448. A police force cannot operate effectively and efficiently if one of its officers advocates resistance to the force's execution of a warrant. Edmund's dismissal thus not only promoted the efficiency of the state police department but it also rested on a rational basis.

Courts generally cannot overturn an administrative decision, such as the Board's August 20, 2018 decision, when there was a rational basis for that decision and it was not rendered unlawfully. *Carlos Etscheit Soap Co. v. McVey*, 22 FSM R. 137, 143 (Pon. 2019). Furthermore, Edmund does not even address the rest of the reasons for his termination – his prior history of suspensions for misconduct – so his termination defense was even further inadequate.

Accordingly, the essential material facts not being in dispute, the court, for the foregoing reasons, must deny Edmund's summary judgment motion and his related motions, and must, as a matter of law, grant the defendants' summary judgment motion because the Board's decision was proper.

III. BACK PAY FROM FIRING DATE TO DATE OF REVIEW BOARD DECISION

Edmund further contends that, regardless of whether his termination was wrongful, he is entitled, under Poll v. Victor, 18 FSM R. 235, 244 (Pon. 2012), to back pay for the unnecessarily long time from when the Pohnpei state police fired him to the date the Pohnpei Personnel Review Board's decision upheld his firing. The court cannot agree.

In Poll v. Victor, Poll, an FSM government employee, was abruptly terminated on October 28, 2009, for cause set out in an October 27, 2009 memorandum, which also informed him that he could appeal. 18 FSM R. at 242. He appealed, and the first chance Poll had to respond to the memorandum and its reasons for his termination was when an Ad Hoc Committee heard his appeal. *Id.* at 245. The committee decided, on December 21, 2009, to uphold Poll's termination. *Id.* The Poll court held that since the October 28, 2009 termination "could not have taken effect prior to Poll's being given an opportunity to be heard, which he received at the Ad Hoc Comm. hearing [thus, a]t the earliest Poll's termination would be effective on the date of the Ad Hoc Comm.'s decision on December 21, 2009." *Id.* The Poll court accordingly awarded Poll "his pay from October 28, 2009 through December 21, 2009, minus the income and social security tax withholdings." *Id.* at 246.

Edmund relies upon this holding for his claim for back pay from March 27, 2017 to August 20, 2018. But a careful reading of Poll does not give Edmund the support he hopes it would. Poll was awarded his back pay from his firing up until the date the Ad Hoc Committee issued its decision because he had not been given the opportunity to respond to the reasons given for his firing until his Ad Hoc Committee hearing.

In this case, the Director of the Pohnpei Department of Public Safety notified Edmund that the department intended to terminate him for certain specified reasons and gave Edmund an opportunity to respond (that is, to be heard). Edmund did respond on March 16, 2017, with written reasons why he should not be terminated. Edmund was then terminated on March 27, 2017. Edmund was thus given notice and had the opportunity to heard (and in fact was heard) before he was terminated. Poll v. Victor therefore does not apply to this case.

Edmund is thus not automatically entitled to back pay from his March 27, 2017 termination date until the August 20, 2018 Pohnpei Personnel Review Board decision date. Edmund would have been entitled to that back pay only if he had been wrongfully terminated. He was not. Thus, as a matter of law, the defendants are granted summary judgment on Edmund's claim for back pay between March 27, 2017 and August 20, 2018.

IV. CONCLUSION

Accordingly, Welfred Edmund's motions are denied, and the defendants are granted summary judgment on the merits. This case is closed.

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