HERMAN Q. GUERRERO, et al., Plaintiffs

v.

EDWARD E. JOHNSTON and CONTINENTAL AIRLINES, INC., Defendants

Civil Action No. 1064

Trial Division of the High Court

Mariana Islands District

December 7, 1972

Action for injunctive relief against High Commissioner. The Trial Division of the High Court, Harold W. Burnett, Chief Justice, held that plaintiffs had standing to maintain action but were not entitled to temporary restraining order.

1. **Civil Procedure—Motion to Dismiss—Tests**

   On a motion to dismiss, the material and relevant factual allegations of the complaint are to be regarded as true.

2. **Trust Territory—Suits Against—Standing**

   The primary inquiry in deciding whether a suit not consented to by the government may be maintained against the government for the acts of one of its employees is whether the employee acted beyond the scope of his statutory powers.

3. **Trust Territory—Suits Against—Standing**

   Plaintiffs had standing to maintain unconsented to action against the government where complaint alleged the High Commissioner acted in violation of law providing that lease be executed only after obtaining advice and opinion of the District Land Advisory Board. (6 T.T.C. §§ 251, 252; 67 T.T.C. § 53(4))

4. **Trust Territory—Applicable Law—Federal Statutes**

   The Trust Territory Government is not a federal agency, and the High Commissioner, acting as its chief executive officer, is not subject to the National Environmental Policy Act and need not comply with that act's requirements regarding the obtaining of a final environmental impact statement. (42 U.S.C. § 4321 et seq.)

5. **Injunctions—Restraining Orders—Tests**

   Order restraining action of High Commissioner would not be issued where plaintiffs did not establish with reasonable certainty that they would prevail on the merits at the final hearing on a permanent injunction.

Counsel for Plaintiff:	SAMUEL WITHERS III, EDWARD C. KING and JAMES E. DUGGAN
Counsel for Defendant, EDWARD E. JOHNSTON, *High Commissioner:*	CARLOS SALII and MAMORU NAKAMURA
Counsel for Defendant, Continental Airlines, Inc.:	R. K. SHOECRAFT

BURNETT, *Chief Justice*

Plaintiffs seek injunctive relief to prohibit Continental Airlines, Inc. from continuing in possession of certain public lands of the Trust Territory, located adjacent to Micro Beach, Saipan, Mariana Islands District, and constructing a hotel thereon. Continental is in possession of the premises pursuant to a lease agreement made as of the first day of January 1972, executed on behalf of the Government of the Trust Territory of the Pacific Islands, as lessor, by the defendant, Edward E. Johnston, High Commissioner of the Trust Territory.

The principal contention of the plaintiffs is that their rights have been violated, through execution of the lease, under 67 T.T.C. § 53(4), and through failure of the High Commissioner to observe the requirements of the National Environmental Policy Act of the United States 42 U.S.C. § 4321 et seq. They further assert that their rights under 1 T.T.C. § 4, the Trusteeship Agreement for the former Japanese mandated islands and the due process clause of the Fifth Amendment of the Constitution of the United States have been violated.

Defendants have moved for dismissal of the action, and assert in support of that motion that this is an action against the High Commissioner of the Trust Territory in his official capacity, and consequently, an action against the Government of the Trust Territory. Defendants' motion

is grounded on the proposition that this is not a suit to which the Government has given its consent. 6 T.T.C. 251 et seq. Specifically they assert that the exception provided by Section 252(2) deprives the court of jurisdiction.

The motion to dismiss was heard on December 4, 1972. In accord with the court's instructions on pre-hearing conference, argument was extended beyond the grounds set forth in the motion, and included the parties' views as to the "advice and opinion" provisions of 67 T.T.C. 53, and the applicability of the National Environmental Policy Act (hereafter NEPA) 42 U.S.C. 4321 et seq.

[1] On a motion to dismiss it is well settled that the material and relevant factual allegations of the complaint are to be regarded as true. The record is further supplemented by a stipulation entered into by the parties on December 1, 1972.

The exception relied on by defendants provides in 6 T.T.C. 252:

"Section 252. Exceptions. The Trial Division of the High Court shall not have jurisdiction under the foregoing Section 251 of: (1) . . . (2) Any claim based on an act or omission of an employee of the Government, exercising due care, in the execution of a law or regulation, whether or not such law or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any agency or employee of the Government, whether or not the discretion involved be abused."

Their contention is that the High Commissioner acted in his official capacity, and that this action is, in reality, a suit against the Government of the Trust Territory.

[2] The primary inquiry must be whether the employee of the government was acting within the scope of his statutory powers; if he was, and the only challenge is as to the manner in which he executed those powers or exercised the discretion confided in him by law, then his acts would be

those of the government and the cited exception would bar this court from taking jurisdiction.

The rule governing the maintenance of an action against a federal officer is found in *Larson v. Domestic and Foreign Corp.* 337 U.S. 682, 69 S.Ct. 1457.

In a later case the Supreme Court said, quoting and following *Larson*,

> "Cutting through the tangle of previous decisions, the Court expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.' 337 U.S., at 702, 69 S.Ct. at 1467. Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States."

Malone v. Bowdoin, 369 U.S. 643, 82 S.Ct. 980.

Theory of the rule is set out in *Larson*:

> ". . . where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief."

[3] Here the plaintiffs specifically contend that the High Commissioner acted in violation of law, in that he executed a lease to defendant Continental without obtaining the advice and opinion of the District Land Advisory Board, and without first complying with the requirements of NEPA. At the outset it would thus appear, if factual allegations in the complaint support plaintiffs' contention, that the exception is inapplicable and the court must take jurisdiction.

While the issue has not been formally raised, I find the plaintiffs have standing to maintain the action, under the standards set out in *Sierra Club v. Morton* 405 U.S. 727, 92 S.Ct. 1361 (1972), affirming *Sierra Club v. Hickel*, 433 F.2d 24 (9 C.C.A. 1970).

Defendant Continental's initial application to lease public land for hotel purposes was disapproved by the District Land Advisory Board, and the District Administrator was so notified on October 20, 1970. The application itself is not in the record, but the land is referred to as being located "at Micro Beach." The lease was executed on January 1, 1972; whether the land leased thereby is the same as that covered by the rejected application does not appear on the record.

I am consequently unable to say at this point, from this record, whether the "advice and opinion" requirements of 67 T.T.C. 53(4) have been complied with or not. I do not mean to suggest that I conceive any limitation on the authority of the High Commissioner to reject such advice and opinion; he must, however, obtain it before entering into a use agreement for public lands.

Further factual inquiry is needed, and the motion to dismiss must therefore be denied.

[4] With respect to plaintiffs' further contention, I conclude that the Trust Territory Government is not a "federal agency" and that the High Commissioner, acting as its chief executive officer, is not subject to the National Environmental Policy Act. It follows that he was not acting in violation of law by failing to obtain a final environmental impact statement.

In so deciding, I rely primarily on the prior determination of the Secretary of the Interior that "territorial governments, under the jurisdiction of the Secretary of the Interior, are not agencies or instrumentalities of the executive branch of the Federal Government . . . (and) that

the territorial governments are not organizational entities of the Department of the Interior." Departmental Manual of the Department of the Interior, 150.1.4.

On oral argument counsel for plaintiffs suggested that the views of the Secretary are "not surprising, and that they need not be considered." To take that position would be to ignore the provisions of 48 U.S.C. 1681(a), and the executive orders of the President, which have placed "all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory" in the Secretary. Note also Comptroller General's Opinion B-162910, January 17, 1968, which recognizes the separate character of the Trust Territory Government, with contracting authority in its own right, rather than as an agency of the United States Government.

It is true that NEPA is not geographically limited to the United States and that agencies of the federal government are required to observe its requirements when engaged in activity within the Trust Territory. In this instance however, federal funds are not committed, nor did the High Commissioner act as a federal agent.

There remain additional contentions of violations of rights under the Trusteeship Agreement, and due process provisions of 1 T.T.C. 4 as well as the Fifth Amendment of the United States Constitution. I note only that their decision must rest principally on a determination of the question of whether or not the lease was executed in accord with applicable law. Additionally, I admit to a reluctance to "elevate to a Constitutional level" matters of environmental concern. See *Ely v. Velde* 451 F.2d 1130, at 1139 (4 C.C.A. 1971).

[5] Plaintiffs have also asked that a restraining order issue to prohibit further activity pending hearing on a preliminary injunction, and final hearing on the merits of the case.

"In order to obtain such relief, particularly against the discretionary action of an official of cabinet rank, the plaintiff must establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing."

Sierra Club v. Hickel, supra.

No less "reasonable certainty" should be required for temporary restraint. Particularly in view of my views of the inapplicability of NEPA, I am unable to find such certainty or probability of success of plaintiffs' cause.

It is therefore ordered:—

1. Defendants' motion to Dismiss is denied.

2. Plaintiffs' motion for a temporary restraining order is denied.