

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

OCT 19 1995
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at 10 o'clock and 10 min. AM
WALTER A. Y. H. CHINN, CLERK

Edmund Kelii Silva, Jr. and Rubellite Kawena Johnson nee Kinney)	CIVIL NO. 95-00148 HG
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)	
Plaintiffs,)	ORDER GRANTING DEFENDANTS
)	OFFICE OF HAWAIIAN AFFAIRS
vs.)	AND CLAYTON HEE'S MOTION FOR
)	SUMMARY JUDGMENT
The United States of America, et al.)	
)	
)	Hearing Date: August 7, 1995
Defendants.)	Hearing Time: 9:00 a.m.

ORDER GRANTING DEFENDANTS OFFICE OF HAWAIIAN AFFAIRS
AND CLAYTON HEE'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Edmund Kelii Silva, Jr. and Rubellite Kawena Johnson nee Kinney are native Hawaiians and claim to be direct lineal descendants of the Kamehameha Hawaiian monarchy. On February 14, 1995 plaintiffs filed a nine-count complaint against, among others, the Office of Hawaiian Affairs ("OHA") and its chairman, Clayton Hee. Defendants OHA and Clayton Hee move to dismiss the claims against them.

I. Dismissal of Clayton Hee

Although Clayton Hee, the Chairman of the Office of Hawaiian Affairs, is listed in the caption of the complaint, plaintiffs make no specific allegations against him. The failure to allege that Hee participated in any wrongdoing requires that the complaint against him be DISMISSED.

II. § 1983 Breach of Trust Claim

The second of plaintiffs' nine claims is brought against the Office of Hawaiian Affairs for its failure to reclaim homestead lands in an area known as Lualualei. In 1921 the United States Congress enacted the Hawaiian Homes Commission Act ("HHCA"), which provided that certain public lands could be leased to Native Hawaiians under favorable terms. Lands subject to the Act included parcels in the Lualualei area. In 1933 the Hawaiian territorial government decided to cede certain unleased Lualualei land to the United States. Since that time, these parcels have been continuously employed by the Department of the Navy for national defense purposes. Plaintiffs claim that the state defendants' failure to attempt reclamation of these lands at any time prior to 1974 constitutes a breach of trust. As the trust was established under federal law, they further maintain that this failure constitutes a violation of 42 U.S.C. § 1983.

The trustees of the Office of Hawaiian Affairs agree with the plaintiffs' contention that the Lualualei lands were wrongfully transferred to the United States. Consequently, they believe that the lands should be returned to the Department of Hawaiian Home Lands or that compensation should be forthcoming. The Office of Hawaiian Affairs notes, however, that the matter has been previously litigated. In State of Hawaii v. United States, 676 F. Supp. 1024 (D. Haw. 1988), aff'd, 866 F.2d 313 (9th Cir. 1989), this Court ruled that Hawaii's action to recover the Lualualei lands was barred by the applicable statute of

limitations. The trust obligations of the Office of Hawaiian Affairs are not breached by their recognition that judicial precedent forecloses further litigation of these issues.

For the reasons set out above, the plaintiffs' § 1983 breach of trust claim against the Office of Hawaiian Affairs is hereby DISMISSED.

III. Adoption of the Single Beneficiary Definition of "Native Hawaiian" as a Violation under § 1983

The fourth of plaintiffs' nine claims takes issue with the decision of the Office of Hawaiian Affairs to expend § 5(f) trust funds to consider and advocate on behalf of a single beneficiary definition of "Native Hawaiian." The effect of changing this definition would have been to eliminate the existing blood quantum requirement from the definition of Native Hawaiians. The plaintiffs allege that these actions constitute a breach of trust and a violation of 42 U.S.C. § 1983.

As noted by the Office of Hawaiian Affairs, the issue of whether these actions constitute a breach of trust has already been litigated. In Kepoo v. Burgess, Civil No. 88-2987 (First Cir. Ct. Haw., May 5, 1989), the First Circuit Court of Hawaii dismissed a breach of trust complaint against Office of Hawaiian Affairs trustees that was premised upon the same facts. Finding no reversible error, the Hawaii Supreme Court affirmed. Kepoo v. Burgess, No. 14770 (Hawaii Supreme Court, June 25, 1991) (mem. op.). Thus, in a suit prosecuted by parties attempting to vindicate the same right, it has already been judicially determined that the trustees' actions in this regard did not

constitute breach of trust. As a result, the plaintiffs are estopped from relitigating the issue.

Even if the plaintiffs were permitted to relitigate these issues, however, the trustees of the Office of Hawaiian Affairs would be protected by the doctrine of qualified immunity. As government officials performing discretionary functions, OHA trustees are shielded from liability for civil damages insofar as their conduct does not violate clearly established law. Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993), cert. denied, 114 S.Ct. 1645 (1994). The Ninth Circuit further determined the OHA decision to fund the single definition referendum does not violate clearly established law. Id. at 1226. Consequently, OHA trustees are entitled to qualified immunity as to claims that they violated the Admission Act by expending trust funds to finance the single definition referendum.

Plaintiffs' claim also must fail because the underlying actions occurred in 1988. Thus, they are not within the two-year statute of limitations period applicable to § 1983 actions. See Haw. Rev. Stat. § 657-7; Pele Defense Fund v. Paty, 73 Haw. 578, 595 (1992), cert. denied, 113 S.Ct. 1277 (1993).

For the reasons set out above, the plaintiffs' breach of trust and § 1983 claims against the Office of Hawaiian Affairs for funding the single definition referendum are hereby
DISMISSED.

IV. Expenditures of Section 5(f) for Out-of-State Travel and Retention of Frequent Flyer Miles

The fifth of plaintiffs' nine claims charges that OHA

trustees, officers, and employees have expended § 5(f) trust funds for out-of-state travel that is not reasonably calculated to benefit Native Hawaiians. It is further alleged that these OHA officials have retained the "frequent flyer" benefits from such travel for their personal use. The complaint suggests that these actions were taken "under color of state law," thereby indicating that plaintiffs intend to state a violation of § 1983.

Initially, it should be noted that plaintiffs' allegations of frivolous and excessive travel are conclusory and completely unsubstantiated. Also significant is the plaintiffs' failure to dispute the contentions in OHA's motion to dismiss that out-of-state travel is often necessary to advocate for Hawaiian causes and to confer with other native leaders. As a result, the plaintiffs have presented an insufficient factual basis for this breach of trust claim.

Furthermore, as previously discussed, OHA trustees are government officials performing discretionary functions. To the extent that their actions do not violate clearly established law, they have the benefit of qualified immunity in civil damages suits. Plaintiffs fail to establish that out-of-state travel and retention of frequent flyer miles by OHA trustees and officials violate clearly established law. The trustees and officials thus receive the benefit of qualified immunity with respect to these travel decisions and policies.

For the reasons set out above, the plaintiffs' § 1983 breach of trust claim for out-of-state travel and retention of frequent

flyer miles is hereby DISMISSED.

V. Requiring the OHA to Match Legislative Expenditures as a Breach of Trust

The sixth of plaintiffs' nine claims alleges that OHA has been required to match certain legislative appropriations without regard to whether such actions would benefit Native Hawaiians. OHA expenditures are governed by the trust terms set out in § 5(f) of the 1959 Admission Act, therefore plaintiffs contend that the failure to evaluate the benefits to Native Hawaiians constitutes a breach of trust in violation of § 1983.

The Office of Hawaiian Affairs provided evidence establishing the factual inaccuracy of the plaintiffs' allegations. While they concede that the State legislature sometimes authorizes expenditures on the condition that OHA match the funding, supporting affidavits demonstrate that OHA retains discretion to decide whether funds should be used for matching purposes.

Plaintiffs fail to dispute OHA evidence indicating that, even when requested to match legislative expenditures, OHA always considers the benefit to Native Hawaiians. Ultimately, the plaintiffs proved unable to identify even one specific instance in which OHA breached their trust obligations by ignoring the impact of the funding decisions upon the trust beneficiaries. Plaintiffs general and conclusory allegations cannot overcome OHA's specific factual evidence to the contrary.

For the aforementioned reasons, the plaintiffs' § 1983 breach of trust claim based upon mandatory matching of

legislative expenditures is hereby DISMISSED.

**VI. Legality of Requirement That Trustees of the
Office of Hawaiian Affairs Be Hawaiian**

The ninth of plaintiffs' nine claims challenges the legality of the requirement in Article XII, § 5 that the Trustees of the Office of Hawaiian Affairs be "Hawaiians." Plaintiffs argue that this limitation restricts their choice of candidates in violation of the First and Fourteenth Amendments. The plaintiffs contention must be rejected as a matter of law.

In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld hiring preferences for Native American applicants for positions in the Bureau of Indian Affairs. The Court viewed the preference not as racial discrimination, but as an employment criterion reasonably designed to further the cause of self-government. In an analogous fashion, the limitation on OHA Board membership is permissible because it promotes the legitimate goal of fostering Hawaiian self-government. Adopting this reasoning, this Court previously rejected an equal protection challenge to provisions of the Hawaiian Homes Commission Act that limited leases of homelands to Native Hawaiians. Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990), aff'd on other grounds, 940 F.2d 1535 (9th Cir. 1991).

Accordingly, the plaintiffs' equal protection and First Amendment claims against the Office of Hawaiian Affairs are hereby DISMISSED.

VII. Failure to Comply with HRS § 92

The eighth of plaintiffs' nine claims maintains that

officers and trustees of the Office of Hawaiian Affairs have violated the provisions of Hawaii Revised Statutes § 92 by holding closed executive sessions and failing to post agendas and minutes of executive sessions in a timely manner.

As all of plaintiffs' federal claims have already been dismissed, this Court declines to exercise its supplemental jurisdiction over this state law claim. 28 U.S.C. § 1367(c)(3).

Even if jurisdiction were to be exercised, however, it appears that plaintiffs' claims would be barred by the statute of limitations. Under § 92, suits to void final agency action must be commenced within ninety days of the contested action. Haw. Rev. Stat. § 92-11.


For the above reasons, plaintiffs' claims that the officers and trustees of the Office of Hawaiian Affairs have violated the provisions of HRS § 92 are hereby DISMISSED.

VIII. Conclusion

By virtue of the above dispositions, all of plaintiffs' claims against the Office of Hawaiian Affairs and Clayton Hee have been DISMISSED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 18, 1995.


HELEN GILLMOR
United States District Judge