

CHUUK STATE SUPREME COURT APPELLATE DIVISION

MARK MAILO and TAKAMICHY MORI,	)	CIVIL APPEAL NO. 01-2021
	)	
Appellants,	)	
	)	
vs.	)	
	)	
CHUUK ELECTION COMMISSION,	)	
	)	
Appellee,	)	
	)	
ALEXANDER NARRUHN and MEKIOSHY	)	
WILLIAM,	)	
	)	
Real Parties in Interest.	)	
_____	)	

OPINION AND ORDER

Decided: June 17, 2021

BEFORE:

Hon. Kerio Walliby, Associate Justice, Presiding  
Hon. Larry Wentworth, Temporary Justice\*  
Hon. JK Kaminaga, Temporary Justice\*\*

\*Associate Justice, FSM Supreme Court

\*\*Legal Counsel, Chuuk Environmental Protection Agency, Weno, Chuuk

APPEARANCES:

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HEADNOTES

Appellate Review – Dismissal; Appellate Review – Motions

Motions, even motions to dismiss an appeal, may be decided without oral argument. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 335 (Chk. S. Ct. App. 2021).

Elections – Contests

In an election contest appeal for a seat in the Chuuk Legislature, the Chuuk State Supreme Court appellate division would not have jurisdiction over the contest once the member-elect has been sworn in because each house is the sole judge of the elections and qualifications of its members, and in the case of a contested election of a member-elect of the Senate or House of Representatives, the decision of the specific House concerned shall prevail and is final. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 336 (Chk. S. Ct. App. 2021).

Elections; Elections – Contests

A voter may contest the election results by filing a complaint setting forth the particular grounds of the contest within 5 days after the declaration of the result of the election by the body canvassing the returns thereof. A Section 126 election contest challenges the declared results of an election, not the candidates' qualifications – that is, it does not challenge whether a candidate's nomination papers were in order or whether the candidate met the constitutional or legal requirements to run. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 336-37 (Chk. S. Ct. App. 2021).

Elections – Contests

Generally, an election contest is a challenge by an election's loser against the winner, calling for an analysis of the election returns, which may include reviewing voter qualifications or re-counting the ballots. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 337 (Chk. S. Ct. App. 2021).

Elections; Elections – Contests

An action to disqualify the winning ticket by challenging the candidates' qualifications is not an election contest. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 337 (Chk. S. Ct. App. 2021).

Elections

Normally, election-related matters, that are not election contests, would, long before election day, be

subject to an appeal from the Election Comm'n's decision to the trial division, and then from the trial division to the appellate division, the usual course for appeals from an administrative agency. But when the Election Commission decision involves an issue of statewide importance and extreme time sensitivity that ultimately would have to be decided by the appellate division, the Chuuk State Supreme Court appellate division may, this time only, consider the matter as a direct appeal from an administrative agency – the Election Commission. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 337 (Chk. S. Ct. App. 2021).

Elections; Elections – Contests

The Chuuk Election Code, Section 55 provides the proper mechanism to seek redress for any Election Code violations other than election contests. It allows any person who believes any Election Code provision has been violated (and that would include a candidate not having the qualifications listed in Section 34(a) of the Election Code, which mirror the Constitution's candidate qualifications) to complain to the Election Commission. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 337 (Chk. S. Ct. App. 2021).

Constitutional Law – Chuuk – Case or Dispute – Ripeness; Constitutional Law – Case or Dispute – Standing

Candidates had standing (and the issue was certainly ripe) to challenge other candidates' qualifications once those candidates had been certified in November 2020 for the March 2, 2021 general election. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 337 (Chk. S. Ct. App. 2021).

Elections; Equity – Estoppel

When the challengers knew in November 2020, that certain candidates would be put on the March 2, 2021 general election ballot and had, or should have had, all the information then to complain to the Election Commission about whether those candidates were qualified for the ballot but made no complaint, the challengers should later be estopped from challenging the other candidates' qualifications for office because they waived that right by their silence and because the law does not favor those who rest on their rights or willful blindness. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 337 (Chk. S. Ct. App. 2021).

Equity – Estoppel

Under the doctrine of equitable estoppel, a person may sometimes be precluded by his act or conduct, or silence when he has a duty to speak, from asserting a right which he otherwise would have had. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 338 n.2 (Chk. S. Ct. App. 2021).

Domicile and Residence; Elections

The Chuuk Election Code's definition of residency is very close to the classic definition of domicile. Domicile is often described as a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere and is also described as the residence of a person or corporation for legal purposes, also termed legal residence or domicile by operation of law. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 338 (Chk. S. Ct. App. 2021).

Domicile and Residence

Under the Chuuk Election Code's definition of residence, a candidate may be a resident of Chuuk for the required time period even though the candidate was physically absent from Chuuk much of the time. Mailo v. Chuuk Election Comm'n, 23 FSM R. 332, 338 (Chk. S. Ct. App. 2021).

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COURT'S OPINION

KERIO WALLIBY, Associate Justice, Presiding:

This comes before us on: 1) the Real Party in Interest's Motion to Dismiss; or Alternatively Motion for

Summary Judgment, with supporting affidavit, filed April 8, 2021; 2) Appellants' Response Opposing Motion to Dismiss; Cross Motion for Summary Judgment, with supporting affidavit, filed April 12, 2021; and 3) Real Party in Interest's Supplement to Motion to Dismiss; or Alternatively Motion for Summary Judgment, filed April 25, 2021. Motions, even motions to dismiss an appeal, may be decided without oral argument. Kuch v. Mori, 18 FSM R. 442, 443 (Chk. S. Ct. App. 2012). We hereby grant the motion for the reasons that follow.

#### I. BACKGROUND

In early November 2020, the Chuuk Election Commission certified six tickets of candidates for Chuuk Governor and Lieutenant Governor for the March 2, 2021 general election. Appellants Mark Mailo and Takamichy Mori and real parties in interest Alexander Narruhn and Mekioshy William were two of those six tickets. In the March 2, 2021 election, the Narruhn-William ticket garnered the most votes, but did not receive a majority of the votes cast. On March 10, 2021, the tickets of Alexander Narruhn and Mekioshy William and of Ben K. Enlet and Marcellus J. Akapito were certified as the two with the highest number of votes. The Mailo-Mori ticket had the third highest number of votes cast. A runoff election between the Narruhn-William ticket and the Enlet-Akapito ticket was then set for March 30, 2021, because when "a majority is not received, a runoff election between the candidates on the tickets receiving the two highest pluralities shall be held on the fourth Tuesday following the general election," Chk. Const. art. VI, § 7, and March 30th was the fourth Tuesday following March 2nd.

On March 9, 2021, the Mailo-Mori ticket petitioned the Chuuk Election Commission, asserting that the March 2, 2021 gubernatorial election should be set aside as void because the Election Commission had not verified the candidates' legal residency and because Narruhn and William, in particular, did not, in their view, meet the constitutional requirement that the governor and lieutenant governor each be "a resident of the State of Chuuk for at least 25 years prior to the day of election," Chk. Const. art. VI, § 5. On March 17, 2021, the Election Commission, by formal written response, rejected the Mailo-Mori ticket's petition. The Election Commission ruled that the Chuuk election law, Chk. S.L. No. 3-95-26, § 55, placed equal responsibility on any person or candidate to file complaints about any act or practice that violated Chuuk election law, so, once informed, the Commission can strike the names of any persons who are not qualified before placing candidates on the ballot rather than invalidating election results and thus disfranchising innocent voters. It noted that two other previously successful gubernatorial candidates, against whom similar residency challenges could have been made, were considered to have met the constitutional residency requirement for governor, Chk. Const. art. VI, § 5, as defined by statute, Chk. S.L. No. 3-95-26, § 64 ("the place in which a person intends to and does maintain his permanent abode"). It emphasized that Article VI, § 5 was not a provision to be used after an election when the election results were deemed unsuitable.

On March 23, 2021, the Mailo-Mori ticket appealed that decision to the Chuuk State Supreme Court appellate division, contending that the Chuuk Election Commission had not exercised its constitutional duty under article VI, § 5 of the Chuuk Constitution, and its statutory duty under Chuuk State Law No. 3-95-26, § 9 to "determin[e] the qualifications of gubernatorial Candidates Alexander Narruhn and Mekioshy William before placing them on the ballots for the March 2, 2021 election" or after receiving the Mailo-Mori ticket's petition. Notice of Appeal at [unnumbered] 2 (Mar. 23, 2021). Mailo and Mori further contended that the Election Commission did not give them administrative due process by giving notice and an opportunity to be heard "at the deliberation/determination process," before it made its decision. *Id.*

On March 26, 2021, the Mailo-Mori ticket moved to enjoin the March 30, 2021 runoff election, arguing that, if it turned out after the March 30, 2021 runoff that the Narruhn-William ticket did not meet the residency requirements, then the election would have been a sham unless the court immediately enjoined the printing or use of ballots containing the Narruhn-William ticket until the qualifications of the Narruhn-William ticket was fully determined. The appellate panel that was then sitting on this appeal denied any injunctive relief.

The runoff election went ahead as scheduled by the Chuuk Constitution. The Narruhn-William ticket prevailed. Alexander Narruhn and Mekioshy William were sworn in as the Governor and Lieutenant Governor, as scheduled, on April 13, 2021.

On April 14, 2021, we requested the parties' views on whether we still had any jurisdiction to decide any of the case's merits since the statutory deadline for deciding this case, which was brought as an election contest appeal – the date for swearing in the winning candidates for the offices involved, Chk. S.L. No. 3-95-26, § 131 – had passed. Section 131 requires that the court "decide on the contested election prior to the date upon which the declared winning candidates are to take office."

## II. PARTIES' POSITIONS

The Narruhn-William ticket moves that this case be dismissed because, in their view, the Mailo-Mori ticket should be estopped from raising the issue of their qualifications to hold the offices they ran because the Mailo-Mori ticket waited until after the Narruhn-William ticket had won a spot in the runoff election, although either Mailo or Mori could have challenged the Narruhn-William ticket's qualifications as soon as that ticket had been certified for the ballot, or even earlier when Narruhn ran for governor twice before. In the alternative, the Narruhn-William ticket moves for summary judgment because Narruhn's permanent abode is and always has been Chuuk and he has never taken any legal or political action that would put that fact in dispute, and he therefore meets the constitutional residency requirement.

The Mailo-Mori ticket contends that they had no standing to challenge Narruhn's qualifications in earlier elections and that the issue was not ripe for adjudication until the Narruhn-William ticket had been declared eligible for the runoff election. The Mailo-Mori ticket further contends that Narruhn's many years of day-to-day living on Pohnpei means that he had stopped living on Chuuk and therefore no longer qualified as a Chuuk resident and thus could not be Governor.

The Narruhn-William ticket, in response to our request, further asserts that we lack jurisdiction over this matter because appeals from the Election Commission over matters such as a candidate's qualifications should first go to the trial division because the appellate division has not been granted the authority to hear such direct appeals.

## III. ANALYSIS

### A. *Election Contests*

The first question we must address is whether Section 131 of the Election Code has divested the court of jurisdiction to decide anything in this matter because the date to swear in the new governor and lieutenant governor has passed (and the new governor and lieutenant governor have been sworn in). If this had been an election contest appeal for a seat in the Chuuk Legislature, the answer would be clear. We would not. That is because "[e]ach house is the sole judge of the elections and qualifications of its members." Chk. Const. art. V, § 7(c). And "[i]n the case of a contested election of a member-elect of the Senate or House of Representatives, the decision of the specific House concerned shall prevail and is final." Chk. S.L. No. 3-95-26, § 131. It is not as clear in the case of a contested election for the offices of governor and lieutenant governor. But we do not need to decide this now because this is not an election contest appeal.

Under Section 126, a voter may contest the election results by filing a complaint setting forth "[t]he particular grounds of the contest." Chk. S.L. No. 3-95-26, § 126(d). The election contestant must file his or her complaint "within five (5) days after the declaration of the result of the election by the body canvassing the returns thereof." *Id.* § 127. "Thus, a Section 126 election contest challenges the declared results of an election, not the candidates' qualifications – that is, it does not challenge whether a candidate's nomination

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papers were in order or whether the candidate met the constitutional or legal requirements to run." Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 223 (Chk. S. Ct. App. 2021). "Generally, an election contest is '[a] challenge by an election's loser against the winner, calling for an analysis of the election returns, which may include reviewing voter qualifications or re-counting the ballots.'" *Id.* (quoting BLACK'S LAW DICTIONARY 596 (9th ed. 2009)).

The Mailo-Mori ticket did not call for an analysis of the election returns. They do not dispute the election returns' accuracy or allege any election irregularities. Nor do they seek review of any voter's qualifications – that is, whether anyone cast an illegal vote. The Mailo-Mori ticket does not seek a recount or a revote. The Mailo-Mori ticket just wants to disqualify the winning ticket, in the hope that they will be allowed to move up one rank in the standings and be declared the second ticket (with the Enlet-Akapito ticket) in the runoff election. Thus, the Mailo-Mori ticket's (belated) challenge of Narruhn's and William's qualifications is not an "election contest."

Normally, election-related matters, that are not election contests, would, long before election day, be subject to an appeal from the Election Commission's decision to the trial division, see Kinemary v. Siver, 16 FSM R. 201, 207 (Chk. S. Ct. App. 2008), and then from the trial division to the appellate division. This would be the usual course for appeals from an administrative agency. Macayon v. Chuuk State Bd. of Educ., 19 FSM R. 644, 649 (Chk. S. Ct. Tr. 2015); Mathew v. Silander, 8 FSM R. 560, 563-64 (Chk. S. Ct. Tr. 1998); Robert v. Mori, 6 FSM R. 178, 179 (Chk. S. Ct. Tr. 1993). But since this Election Commission decision involves an issue of statewide importance and extreme time sensitivity that ultimately would have to be decided by the appellate division, we will follow the FSM Supreme Court appellate division's procedure in Robert v. Mori, 6 FSM R. 394, 397 (App. 1994) and Olter v. National Election Comm'r, 3 FSM R. 123, 128 (App. 1987), and, this time only, consider the matter as a direct appeal from an administrative agency – the Election Commission.

B. *Estoppel*

If either Mailo or Mori had serious doubts about Narruhn's and William's qualifications, they could have, and should have, complained to the Election Commission at any time before the March 2, 2021 general election, preferably in November, 2020 when the tickets were certified.<sup>1</sup> The Chuuk Election Code, Section 55 provides the proper mechanism to seek redress for any Election Code violations. It allows any person who believes any Election Code provision has been violated (and that would include a candidate not having the qualifications listed in Section 34(a) of the Election Code, which mirror the Constitution's candidate qualifications) to complain to the Election Commission. Mailo and Mori thus had standing (and the issue was certainly ripe) to challenge the Narruhn-William ticket's qualifications once that ticket had been certified in November 2020 for the March 2, 2021 general election.

Mailo and Mori knew in November 2020, that Narruhn and William would be placed on the March 2, 2021 general election ballot. They had, or should have had, all the information then to complain to the Election Commission about whether Narruhn and William qualified to be put on the ballot. They made no complaint. The law does not favor those who rest on their rights or willful blindness. See Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 145 (App. 2013).; *cf.* Setik v. Mendiola, 21 FSM R. 537, 558 (App. 2018) (party cannot sit idly by and then seek to present additional defenses in the event of an adverse outcome); Senate v. Elimo, 18 FSM R. 199, 202 (Chk. S. Ct. Tr. 2012) (same); AHPW, Inc. v. Pohnpei, 18 FSM R. 1,

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<sup>1</sup> The Narruhn-William ticket points to other jurisdiction(s) where, once the candidates have been certified for the ballot, the election law gives only a short time within which a person can challenge a candidate's qualifications for office. There is no such provision in the Chuuk election law. The Legislature might want to consider adding one lest these after-the-election-is-over challenges become frequent.

10 (Pon. 2011) (same); *Arthur v. Pohnpei*, 16 FSM R. 581, 599 (Pon. 2009) (same). The Election Commission was correct when it stated that the residency provision [and qualification provisions in general] was not a provision to be used after an election was over and a candidate deemed the results unsuitable. At this point, the Mailo-Mori ticket should be estopped<sup>2</sup> from challenging the Narruhn-William ticket's qualifications for office. They waived that right by their silence.

### C. Residency Requirement

The Chuuk Constitution requires that the governor [and lieutenant governor] be "a resident of the State of Chuuk for at least 25 years prior to the day of election." Chk. Const. art. VI, § 5. The Mailo-Mori ticket contends that Narruhn and William were not. They point not only to Narruhn's long-time presence and everyday living on Pohnpei where he has been the Director of FSM Social Security but also to Narruhn's "usual place of abode" in Mechitiw, Weno as abandoned and uninhabitable with no sign that it is being prepared for someone to return and take up residence.

That Election Code's residency provision reads:

For the purposes of this Act, the residence of a person is that place in which he intends to and does maintain his permanent abode and has not taken any legal or political action to contradict such residency, although he may be actually residing at a place other than his residence. Any change of residency shall not take effect unless such change has been approved by resolutions of the municipal councils of both the original and intended residences at least one year prior to the next election in the intended residence.

Chk. S.L. No. 3-95-26, § 64. Mailo and Mori do not provide any evidence that either Narruhn or William took any contradictory legal or political action. They only point to Narruhn and William being physically absent from Chuuk during much of the previous 25 years.

The Chuuk Election Code's definition of residency is very close to the classic definition of domicile. Domicile is often described as "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." BLACK'S LAW DICTIONARY 558 (9th ed. 2009). It is also described as "[t]he residence of a person or corporation for legal purposes. – Also termed . . . *legal residence; domicile by operation of law.*" *Id.* at 559 (emphasis in original). The FSM Supreme Court has held that "[l]egal residence is defined as 'the place of domicile or permanent abode, as distinguished from temporary residence . . . it is the location defined by law as the residence of the person.'" *Berman v. Lambert*, 17 FSM R. 442, 448 (App. 2011) (quoting BLACK'S LAW DICTIONARY 897 (6th ed. 1990)).

Thus, under Section 64's definition of residence, Narruhn was a resident of Chuuk for the required time period. Narruhn thus satisfies the constitutional residency requirement. (This is also true of William.)

## IV. CONCLUSION

Accordingly, either the Mailo-Mori ticket should be estopped from challenging the Narruhn-William ticket's qualifications at this late stage, or the Narruhn-William ticket should be granted summary judgment on the merits. Either way, this appeal is dismissed. The real parties in interest may have their costs. Chk. S.L. No. 2-95-26, § 136; *Cholymay v. Chuuk State Election Comm'n*, 10 FSM R. 220, 223 (Chk. S. Ct. App.

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<sup>2</sup> Under the doctrine of equitable estoppel, a person may sometimes be precluded by his act or conduct, or silence when he has a duty to speak, from asserting a right which he otherwise would have had. *Iriarte v. Individual Assurance Co.*, 18 FSM R. 340, 363 (App. 2012).