IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

JORBON, plaintiff, v. PSC, defendant.	CIVIL ACTION NO. 2011-154 **ORDER DENYING PLAINTIFF'S AUGUST 11, 2011 MOTION FOR PRELIMINARY INJUNCTION**

TO: Robert Catz, counsel for plaintiff
Divine Waiti, counsel for the defendant

SUMMARY DECISION

Under the authority of Regulation 51 of the Public Service Regulations,[1] defendant PSC

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[1]51. Public servants standing for political office

(a) A public service employee who becomes a candidate for a seat in the Nitijela or a Local Government may be granted leave of absence by the Commission. The candidate shall give written notice of candidature to the Commission through his controlling officer and Head of Department not later than 14 days before nomination day. Leave of absence may be granted as follows:

(1) leave shall commence on nomination day or an earlier date established by the Commission, and shall continue until 7 days after polling day, if the candidate is unsuccessful in the polls. If the candidate withdraws his nomination, he may resume duty on the working day following his withdrawal;

(2) during the period of leave, the candidate shall not be required or permitted to carry out official duties, and unless he has annual leave due, shall not be entitled to receive salary or other remuneration as an employee; provided, however, that the candidate's other rights as an employee shall not be affected by his candidature.

issued a July 22, 2011 memorandum requiring public service employees, who run for a Nitijela or Local Government seat in the 2011 general election, to take leave from their work from the date they file their nomination papers (not later than July 29, 2011[2]) until one week after the date of the election (which this year is November 21, 2011). In his August 11, 2011 motion for a preliminary injunction *pendente lite* and other relief (Preliminary Injunction Motion), plaintiff Jorbon, a public service employee running for a Nitijela seat from Jaluit, moved this Court to restrain defendant PSC from enforcing Regulation 51, pending a decision at trial on the validity of the regulation and the mandatory leave imposed by the PSC. For the reasons set forth below, the Court **denies** plaintiff Jorbon's Preliminary Injunction Motion.

PROCEDURAL BACKGROUND

As explained below, the nature of the relief Jorbon seeks has evolved with each pleading, motion, reply, and arugment he has filed, including

(i) his August 4, 2011 "Complaint for Declaratory Judgment (Complaint),"

(ii) "Plaintiff Jack Jorbon's [August 4, 2011] Motion for a Declaratory Judgment . . . (Declaratory Judgment Motion),"

(iii) the August 11, 2011 Preliminary Injunction Motion,

(iv) "Plaintiff's [August 25, 2011] Reply to Defendant's Response in Opposition . . . (Reply),"

(b) A public service employee declared elected as a member of the Nitijela or a Local Government shall be deemed to have resigned from his employment in the Public Service from the date of such declaration.

[2]According to Defendant's Exhibit L the deadline for filing nomination papers was July 29, 2011.

(v) Jorbon's September 1, 2011 "Amended Complaint for a Declaratory Judgment (Amended Complaint)," and

(vi) "Plaintiff's [September 9, 2011] Final Argument in Support of a Preliminary Injunction . . . (Plaintiff's Final Argument)."

The Complaint

In his Complaint, Jorbon argues that the mandatory leave imposed by the PSC under the authority of Regulation 51 in its July 22, 2011 memorandum is not required by and is inconsistent with Article IV, Section 5(1) of the Constitution[3] and Section 108(2) of the Elections and Referenda Act 1980 (Elections Act)[4].

The Declaratory Judgment Motion

In his Declaratory Judgment Motion, Jorbon seems to argue that the mandatory leave imposed by the PSC also is inconsistent with Regulation 51.

The Preliminary Injunction Motion

In his Preliminary Injunction Motion, Jorbon reverts to the argument he first made in his Complaint and seeks to enjoin the PSC from enforcing its Regulation 51, arguing Regulation 51 conflicts with both the Constitution and the Elections Act and is invalid to the extent that the

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[3]"Employees of the Public Service who become candidates for election as members of the Nitijela shall be granted leave of absence for the purposes of their candidature in accordance with any conditions prescribed by law." Const. Art. IV, Sec. 5(1).

[4]"In accordance with Article IV Section 5 of the Constitution of the Marshall Islands, every Public Service employee who becomes a candidate for election as a member of Nitijela shall be granted leave of absence. That leave of absence shall commence on the date that the candidate certifies to the Chief Electoral Officer in the certificate prescribed by Section 145(1)(c) that he is willing and qualified to stand for election. If any Public Service employee is declared elected as a member of Nitijela, he shall be deemed to have resigned from his employment in the Public Service." 2 MIRC 108(2).

regulation requires Jorbon, as a candidate for the Nitijela, to take leave from his public service employment as an assistant attorney general.

The Reply

In his Reply to the PSC's opposition, Jorbon expanded his grounds for relief, claiming Regulation 51 also treats public service employees who run for office differently from incumbent Nitijela members in violation of the public service employees' right to participate in the electoral process, to equal protection, and to substantive due process. That is, not only is mandatory leave under Regulation 51 inconsistent with the Constitution and Elections Act, but public service employees who run for office are required to take leave on or before July 29, 2011, while the Nitijela is dissolved on September 30, 2011. Const. Art. IV, Sec. 12(2).

The Amended Complaint

In his Amended Complaint, Jorbon asserts that under Section 109 of the Administrative Procedures Act, 6 MIRC Chp. 1 (APA), he has the right to bring an action for a declaratory judgment to challenge the validity of Regulation 51. Jorbon more clearly asserts that Regulation 51 violates his right to participate in the electoral process (Const. Art. II, Sec. 14(2)), his right to expression and association (Const. Art. II, Sec. 1(1)), his right to equal protection (Const. Art. II, Sec. 12), and his right to substantive due process. At this point, it appears that Jorbon argues either (i) the PSC cannot require him to take leave as a candidate for the Nitijela or (ii) if the PSC can require him to take leave, the PSC cannot require him to take leave prior to September 30, when the Nitijela dissolves.

The Plaintiff's Final Argument

In Plaintiff's Final Argument, Jorbon argues the following four points in support of his

Preliminary Injunction Motion.

First, Jorbon has established a strong likelihood of success on the merits at trial, because the PSC did not adhere to the APA's notice and comment provisions in issuing its July 22, 2011 memorandum requiring public service employees to take leave upon filing their nomination papers.

Second, absent issuance of the injunction, Jorbon will be irreparably harmed in that he will have to withdraw his candidacy and return to work for financial reasons.

Third, because the PSC's July 22, 2011 memorandum is void, the leave/nomination date would revert back to the date set by the PSC's September 11, 2007 memorandum (Defendant's Exhibit D), which date apparently is September 19, 2007 (see Defendant's Exhibit E). Further Jorbon is entitled to back pay for the days he was on leave prior to September 19.

Fourth, since the PSC's July 22, 2011 memorandum is void under the APA, granting the preliminary injunction pending trial would be in the public interest.

The PSC's Opposition

The PSC denies Jorbon's claims in the following pleadings, responses, and arguments:

(i) the "[PSC's August 17, 2011] Opposition to Plaintiff's Motion for Preliminary Injunction,"

(ii) the "[PSC's September 9, 2011] Answer to Plaintiff's Complaint for Declaratory Judgment" and attachments (Answer), and

(iii) the "[PSC's September 9, 2011] Final Argument Opposing Plaintiff's Motion for Preliminary Injunction."

FACTUAL BACKGROUND

Key to Jorbon's argument for a preliminary injunction is his statement of the facts regarding the 2003 and 2007 general elections, as well as the 2011 general election. Jorbon sets forth the factual basis for his case in paragraphs 4 through 7 of the Amended Complaint. Unfortunately, his factual allegations are either inconsistent with his and the PSC's exhibits or are incomplete.

The 2003 Election

In paragraph 4 of the Amended Complaint, Jorbon states that the PSC's September 17, 2003 memorandum, Plaintiff's Exhibit A, reminds candidates that they must take leave on the date the Nitijela was dissolved. That date would have been September 30, 2003. Const. Art. IV, Sec. 12(2) (Pursuant to the Constitution, the Nitijela dissolves on September 30.) This, however, is not what the memorandum, Plaintiff's Exhibit A, states. The September 17, 2003 memorandum states that "each candidate must vacate his duty station and be on leave of absence effective immediately [i.e., September 17, 2003]. . . ." Moreover, defendant PSC's Exhibit B, an August 29, 2003 memorandum from Jorbon to the Attorney General, states that Jorbon will go on leave effective September 15, 2003.

The 2007 Election

In paragraph 5 of the Amended Complaint, Jorbon states that on September 11, 2007, the PSC issued a memorandum, Plaintiff's Exhibit B, again reminding candidates that they must take leave on the date the Nitijela was dissolved [i.e., September 30]. However, again this is not what the memorandum, Plaintiff's Exhibit B, states. It states that "[l]eave of absence shall commence on the day a nomination is filed. . . ." Defendant's Exhibit I, a letter from Jorbon's head-of-

department to the PSC, tends to show that Jorbon commenced his leave on September 20, 2007.

The 2011 Election

In paragraph 6 of the Amended Complaint, Jorbon states that on July 22, 2011, the PSC issued a memorandum, Plaintiff's Exhibit C, "reminding candidates for public office who are employed as public servants that they must take a leave of absence from their public employment effective the date [BLANK]." Jorbon does not finish the sentence. However, the PSC's 2011 memorandum, Plaintiff's Exhibit C, reads the same as its 2007 memorandum: "[l]eave of absence shall commence on the day a nomination is filed. . . ." — presumably, on or before July 29, 2011, the deadline for filing nominations.

In paragraph 7 of the Amended Complaint, Jorbon states that on July 27, 2011, when he declared his candidacy to run for the Nitijela he was unaware that the PSC had changed its policy from that requiring public service employees to take leave of absence when the Nitijela was dissolved. However, as noted above, Jorbon's and the PSC's exhibits show that it was not the PSC's policy to require public service employees to take leave from the day the Nitijela dissolved, September 30. Instead, in 2003 and 2007, leave commenced from an earlier date (*see* Plaintiff's Exhibits A and B and Defendant's Exhibits B and I).

Regulation 51 remained unchanged; instead, the nomination date changed.

Not only do Jorbon's own exhibits demonstrates his factual allegations are false or incomplete, but also the PSC's Answer and exhibits demonstrate that Regulation 51 has been substantially the same since 1984 (*see* Defendant's Exhibit G). The change from election-to-election in the date public service employees must take leave appears to be the result of the Chief

Electoral Officer changing the nomination date,[5] not the result of defendant PSC changing Regulation 51, the PSC's memorandums to public service employees, or the PSC's policies.

Jorbon's Amended Complaint and Plaintiff's Final Argument appear to be based upon an erroneous set of facts.

LEGAL STANDARD

At this stage in the litigation, the Court is not called upon to determine who is right or wrong on the ultimate issues: "Can the PSC require that public service employee take leave to run for the Nitijela? And if so, can the PSC require that public service employees take leave prior to the date the Nitijela dissolves?" Instead, the Court is called to determine whether it should by order restrain the PSC (pending a full trial on the merits) from requiring that public service employees to take leave. Such a restraint is called a preliminary injunction.

In considering motions for preliminary injunctions, the High Court in the past has applied the standard set forth in *Madrainglai v. Emesiochel*, 6 TTR 440, 447 (Tr. Div. 1974):

> that the court must consider 'the relative importance of the rights asserted, the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from the denial of preliminary relief, probability of ultimate success or failure of the suit, and balancing of damages and conveniences generally.' (*internal citations omitted*.)

In cases where the public interest is involved, the court also must examine whether the public interest favors the plaintiff. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *Caribbean Marine Servs., Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

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[5] *See* Section 146(1) of the Elections Act, 2 MIRC 146(1).

APPLICATION OF THE LEGAL STANDARD

With respect to the first criterion — the relative importance of the rights asserted — the Court recognizes that the rights asserted by Jorbon, the right to participate in the electoral process as a candidate, the right to freedom of expression and association, the right to equal protection, and the right to substantive due process, are all important rights. However, the PSC's interest in insulating Government offices from politics and election campaigning also is very important.[6] Accordingly, this factor does not weigh for or against granting the injunction.

With respect to the second criterion — the acts sought to be enjoined — two questions arise: (1) Can the Court enjoin the PSC from imposing mandatory leave on public service employees running for the Nitijela? and (2) If the PSC can impose mandatory leave, can the Court enjoin the PSC from setting a leave date prior to the September 30 dissolution of the Nitijela.

The answer to the first questions appears to be yes. Under the proper circumstances, the courts have the power to enjoin government action. However, just because the Court has the power does not mean it should exercise it.

The answer to the second question is not as clear. Although under Regulation 51, the PSC requires that Jorbon take leave not later that the nomination date deadline, it is the Chief Electoral Officer,[7] not the PSC, that sets the nomination deadline date. In this regard, it appears that the PSC has not changed its practices since 1984. That is, the PSC has not changed the status quo to Jorbon's detriment. It appears that the Chief Electoral Officer is the one

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[6]*See* 44 A.L.R. Fed. 306, § 2[a] (Originally published in 1979).

[7]*See* Section 145 of the Elections Act.

responsible for this year's nomination date being earlier than that set for 2007 and 2003. As the purpose of granting a preliminary injunction is to maintain the last undisputed status quo, there is nothing the Court can do to make the PSC change the 2011 nomination date back to the 2007 or the 2003 date. The PSC does not have the power to do so. Hence this factor weighs against granting the requested injunction against the PSC.

With respect to the third criterion — the irreparable nature of injury allegedly flowing from the denial of preliminary relief — Jorbon has failed to establish that he will be irreparably harmed if the Court does not issue the requested injunction. That is, Jorbon has failed to establish that he has or will suffer any harm that the Court cannot later remedy in a judgment on the merits. This factor weighs against an injunction. Jorbon claims that when his paid-leave runs out, he will have to end his campaign to support his family. However, Jorbon has not established when his paid-leave ends, that when it ends he cannot continue his campaign, and that money damages would not provide adequate relief, if he prevails. Moreover, Jorbon knew what he was getting into when he filed his nomination papers on July 27. Jorbon has gone through the nomination process at least twice before in 2003 and 2007.

The fourth criterion — the probability of ultimate success or failure of the suit — also does not support issuance of an interlocutory injunction. Jorbon has failed to establish "a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing." Guerrero v. Johnson, 6 TTR 124, 130 (Tr. Div. 1972) (citing *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970). This is true for two reasons.

First, Jorbon has not established by a "strong likelihood" or "reasonable certainty" that he will prevail on the interpretation of the word "shall" in Section 5(1) of the Constitution. Section

5(1) reads as follows: "Employees of the Public Service who become candidates for election as members of the Nitijela shall be granted leave of absence for the purposes of their candidature in accordance with any conditions prescribed by law (emphasis added)." The PSC reads "shall" in Section 5(1) as stating public service employees who become candidates for office "must" take leave. Whereas, Jorbon argues the Court should read "shall" as "must" only if the subject public service employee requests leave. However, it is well-established that a government may place restrictions upon the political activities of its employees, including a prohibition against running for office.[8]

Second, Jorbon has not, and cannot, prove the PSC is responsible for changing the nomination date or setting it prior to September 30. As explained above, it is the Chief Electoral Officer who sets the nomination date.

With respect to the fifth criterion – the balancing of damages and conveniences – the Court finds that the balance favors not granting an interlocutory injunction. The Government is in the middle of trying to organize the November 2011 general election. Changing the leave policy or nomination date would be inviting chaos. The November 2007 general election is generally considered to have been a mess. It is all the more important that the November 2011 general election proceed smoothly. On the other hand, the plaintiff's case is not compelling. He does not seem to be able to get his facts straight.

The sixth criterion — the benefit or harm to the public interest — does not require the

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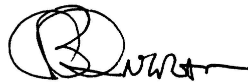
[8]*See* 44 A.L.R. Fed. 306, § 3[a] (Originally published in 1979) ("Thus, in *United States Civil Service Com. v National Asso. of Letter Carriers* (1973) 413 US 548, 37 L.Ed. 2d 796, 93 S. Ct. 2880, the Supreme Court stated that neither the First Amendment nor any other provision of the Constitution invalidates a law barring partisan political conduct by federal employees, including becoming a partisan candidate for, or campaigning for, an elective public office.")

Court grant an interlocutory injunction. It is not in the interest of the public to disrupt the 2011 general election on plaintiff Jorbon's clearly erroneous statement of the facts.

CONCLUSION

For these reasons, and all of them, the Court **denies** Jorbon's Preliminary Injunction Motion.

Date: September 19, 2011.



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