IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

MUDGE SAMUEL, Appellant Samuel, v. ROBSON YASIWO ALMEN, in his capacity as Chief Electoral Officer; Ministry of Internal Affairs; and Government of the Republic of the Marshall Islands, Appellees.	CIVIL ACTION NO. 2017-037 **OPINION**

TO: Roy T. Chikamoto, counsel for Appellant Samuel
Attorney-General Filimon Manoni, counsel for Appellees

This case is a challenge to the 2015 mayor's election for the Majuro Atoll Local Government. Under the Elections and Referenda Act 1980, 2 MIRC Chp. 1 ("Elections Act"),[1] the Electoral Administration headed by Chief Electoral Officer Robson Y. Almen ("CEO") conducted the election on November 16, 2015, Appellant Samuel was a candidate for mayor, as was the eventual winner, Ladie Jack.

The Court takes judicial notice[2] that of the 4,705 votes cast in the mayoral race, Ladie

[1] *See* the Elections Act, Part III, Divisions 1 and 2.

[2] Facts outside that record, unless subject to judicial notice, will not be considered. Maj. Stev. & Ter. Co., Inc., v. Alik and Alik, 1 MILR (Rev.) 257, 257 (1992).

Jack received 2,285 votes and Mudge Samuel received 2,132 votes.[3] The difference in votes for Ladie Jack and Appellant Samuel was 153, *i.e.*, 3.25% of the votes cast.[4]

Under Section 180 of the Elections Act, Appellant Samuel requested that the CEO re-count the votes for the Majuro mayor election. And under Section 188(2) of the Elections Act he requested that the CEO refer to the High Court alleged violations of the rights of voters to vote.[5] The CEO rejected Appellant Samuel's requests.

For the reasons set forth below, the Court concludes: (i) Chief Electoral Officer Robson Y. Almen did not error in rejecting Appellant Samuel's request under Section 180 of the Elections Act for a re-count of the Majuro mayor's race; and (ii) Chief Electoral Officer Robson Y. Almen did not error in rejecting Appellant Samuel's request under Section 188(2) of the Elections Act to refer to the High Court alleged violations of the rights of voters to vote.

FACTUAL AND PROCEDURAL BACKGROUND

In a December 14, 2015 Petition to the CEO, Appellant Samuel, pursuant to Section 180 of the Elections Act, requested that the CEO re-count the Majuro mayor vote tally, and pursuant to Section 188(2) of the Elections Act requested that the CEO refer to the High Court alleged violations of voters rights to vote. However, the CEO did not timely advise Appellant Samuel in

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[3]*See* the Marshall Islands Journal, December 11, 2015 edition, pages 9 and 25.

[4]Articles from the Marshall Islands Journal render the Court's request to the parties for confirmation of the election results moot. For this reason, the Court denies Appellant Samuel's August 9, 2017 Motion for More Complete Results.

[5]The Court notes that although Appellant Samuel alleges violations of "the rights of voters to vote," Section 188(2) refers only to the "the right of a person to vote." As discussed below, Section 188(2) does not provide for the referral of questions regarding the right of a class of votes to vote, only the "right of a person to vote."

writing of his decision.

On December 17, 2018, without a written response from the CEO and without a re-count or referral, Appellant Samuel filed in the High Court Civil Action No. 2015-233 demanding, *inter alia*, a recount. The following day, Appellant Samuel and Janet Tokjen filed in the High Court a second case, Civil Action No. 2015-234, also demanding, *inter alia*, a recount.

On December 19, 2015, the CEO certified the results of the election. Upon certification Ladie Jack assumed the office of mayor of the Majuro Atoll Local Government Council.

Almost 10 months later, the Court, on October 27, 2016, dismissed CA No. 2015-234, under MIRCP, Rule 41(b), on the ground that the plaintiff failed to comply with the Court's orders — *i.e.*, a dismissal on the merits. More than 14 months later, the Court on February 10, 2017, remanded CA No. 2015-233 to the CEO to respond in writing to Appellant Samuel's December 14, 2015 Petition.

On February 15, 2017, the CEO, by way of a memorandum, rejected the Petition ("CEO Memorandum"). On February 27, 2017, Appellant Samuel received the CEO's Memorandum, and on Monday, March 6, 2017, Appellant Samuel filed a notice of appeal in this case. Nine days later, on March 15, 2017, Appellant Samuel filed an Amended Notice of Appeal . . . (Notice of Appeal""), appealing the CEO's rejection of his re-count request and referral request.

In his Notice of Appeal and in his Opening Brief, Appellant Samuel raised unrelated complaints regarding the propriety of the election and its certification. Those complaints, however, are not within the High Court appellate or referral jurisdiction under the Elections Act. Those complaints, including Appellant Samuel's request for a special election, fall under the High Court's jurisdiction as a trial court and require an evidentiary hearing. In this appeal, the

Court has not conducted an evidentiary hearing. For his part, Appellant Samuel has pursued these unrelated complaints in other cases, including High Court Civil Action No. 2016-121,[6] where the Court has sat as a trial court and has conducted an evidentiary hearing.

In response to Appellant Samuel's attempt to improperly address unrelated claims, the Court held a conference on April 26, 2016, to frame the issues on appeal and referral, to settle the record, and to schedule briefing and argument. Counsel for the Appellees was present. Although Appellant Samuel's counsel received notice of the conference, neither Appellant Samuel nor his counsel was present or appeared by telephone or Skype.

Having consulted with counsel and having reviewed the Court's file, the Court the determined that the only questions before the Court are the two cited above: re-count and referral. Other claims and issues raised by Appellant Samuel are not properly before the Court, and are denied. Also, the Court determined that the record on appeal comprises the CEO's decision appealed from and the record before the CEO in making his decision.[7][8][9][10] As noted above, the

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[6]*See* Apellees' Response to Notice of Appeal filed April 25, 2017.

[7]An appeal is on the record. Neither enlargement of the grounds for complaint nor the presentation of additional evidence nor a hearing *de novo* is encompassed within the ordinary meaning of appeal. *Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 151 (1989).

[8]An appeal is limited to the record of evidence introduced and proceedings taken in the lower court. *So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 64 (1995).

[9]An appeal is on the record; it is not a new trial. Additional evidence, including statements of purported fact in counsel's argument, will neither be accepted nor considered. *Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995).

[10]*See also* the Court's Order Denying Motion Re Record . . . entered June 14, 2017, which by this reference is incorporated herein. In the order the Court rejected Appellant Samuel's attempt to supplement the record with (i) his February 13, 2017 Supplement, which was untimely, and (ii) the pleadings, claims, and evidence submitted in High Court CA No. 2015-233

CEO's decision appealed from is the CEO's February 15, 2017 Memorandum. Appellant Samuel attached the CEO's Memorandum to his March 15, 2017 Notice of Appeal as Exhibit A. In turn, the text of the CEO's Memorandum establishes that the record before the CEO comprised the following documents:

1. Appellant Samuel's counsel's November 26, 2015 letter to the CEO and documents delivered with it (two affidavits asserting that polling places ran out of ballots and approximately 33 affidavits of voters who said they were not marked after voting — i.e., after they voted, election officials did not mark one of their fingers marked with indelible ink);

2. The CEO's December 10, 2015 response to the November 26 letter; and

3. Appellant Samuel's counsel's December 14, 2015 Challenge to Rejected Ballots and PETITION for Re-Count of All Ballots Cast for Majuro Mayor's Election and documents delivered with it (10 affidavits regarding various matters, including the affidavit of Iso Langkio, who asserted he had registered to vote in the Majuro elections, but while voting absentee on Arno was compelled to by election officials to vote in the Wotho election).

STANDARD OF REVIEW

The standard by which the Court is to review the CEO's actions is abuse of or erroneously exercised discretion. *Clanton (1)*, at 152.

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and in High Court CA No. 2015-234, which are barred because they are beyond the scope of this appeal and are barred under the doctrine of issue preclusion, as High Court CA No. 2015-234 was dismissed on the merits for Appellant Samuels failure to comply with the Court orders to prosecute the case.

DISCUSSION

The Elections Act in Sections 180, 181, and 182 sets forth the procedure for election re-counts, and the Elections Act in Section 188 sets forth the procedure for referral to the High Court of questions regarding voting qualification.

A. Re-counts

1. Statutory Procedure.

With respect to re-counts, Section 180(1) of the Elections Act provides that a candidate for election may file a re-count petition on the following grounds:

> (a) the result was **so close** that it would be proper to have the voting figures rechecked, or
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> (b) there was an **error [i]** in relation to the count, **[ii]** the records of the election, or **[iii]** the admission or rejection of ballot papers, and that he believes that a re-count will affect the result of the election. (Emphasis added).

If the petition for re-count is made under Section (1)(b), the petition must be supported by an affidavit of the petitioner, "specifying his belief and the grounds for his belief that the manner in which the count or other alleged discrepancy was believed to have been erroneous."

"If the Chief Electoral Officer, after considering the petition and any written evidence submitted with it, is of the opinion that there is a **substantial possibility** that the result of the election would be affected by a re-count he shall grant the petition, but otherwise he shall reject it." Elections Act, Section 108(4) (emphasis added).

If the Chief Electoral Officer rejects a petition under Section 180 of this Chapter, he shall advise the petitioner in writing accordingly, giving his reasons, and the petitioner may, within five (5) days after receipt of the advice, appeal to the High Court against the decision. 2 MIRCP

181.

2. Application of Statutory Procedure

a. Are the Results So Close That It Would Be Proper to Have a Re-Count?

In the present case, Appellant Samuel does not assert the result is so close that it would be proper to have a re-count. As noted above, the difference in votes between Appellant Samuel and candidate Ladie Jack was more than 3%. In *Clanton (1)*, at 152, the Marshall Islands Supreme Court noted that votes differences of 2 votes (1%) and 31 votes (1.5%) could, in number and percentage, be characterized as "close." However, in the absence of statutory criteria or information furnished by the appellants that arguably would give rise to a "substantial possibility" that a re-count would establish a different result, the CEO did not abuse or erroneously exercise the discretion vested in him by not finding the results were so close that a re-count is proper and that there is a "substantial possibility" the election result would be affected by a re-count. *Id.* 152. In the present case, the Petition, the November 26 letter, and attachments to them do not provide information that arguably would give rise to a "substantial possibility" that a re-count would establish a different result. For the most part, Appellant Samuel's affidavit was based upon belief, opinion, and speculation. Appellant Samuel's affidavit together with the others does not mandate a re-count.

b. Are Errors Alleged and Would They Affect the Results?

In this case, Appellant Samuel alleges errors he believes affected the results of the election. In his December 14, 2015 Petition, he lists seven categories of alleged errors: (i) election officials mishandle postal ballots and rejected postal ballots that should have been counted; (ii) election officials failed to loudly call out voters' names before issuing ballots; (iii)

election officials rejected absentee voters for the Majuro election for their failure to sign the voters' list; (iv) election officials denied legally registered Majuro voters on outer islands the right to vote absentee for the Majuro election (however, Appellant Samuel produced only one affidavit in this regard); (v) election officials failed to provide Majuro polling places (*i.e.*, Laura High School, Laura Elementary School, and Wotja Elementary School) with enough ballots for the voters, forcing voters to search for a polling place to cast their vote; (vi) counting and tabulation errors in one ward lead to a substantial change in the vote (*i.e.*, Appellant Samuel picked up 31 votes on a re-tabulation), which Appellant Samuel argues justifies a re-tabulation for the entire atoll; and (vii) election officials extended the deadline to collect ballots from confined voters. In his December 10, 2015 response to Appellant Samuel's counsel's earlier November 26, 2015 letter, the CEO addressed some of these issues.

The CEO addressed the following points raised in Appellant Samuel's November 26 letter: (i & ii) the Rita confined voters' box came in after the close of regular polling places so as to obtain the votes of all confined voters who had signed up; (iii) police officers of the National Police Department and the Majuro Atoll Local Government Police Department properly locked and secured ballot boxes; (iv) the police escorted the confined voter's box to the voters' homes, and if poll watchers were not present with them, it is because they chose not to accompany the police and the box; (v) Appellant Samuel's falsely labeled the CEO's staff driver as a campaign manager for candidate Ladie Jack; (vi and vii) voting places in Majuro did not run out of ballots; and (viii) the number of voters who did not have a finger marked with indelible ink after voting

was "relatively small."[11][12] At the end of the CEO's response, he concluded "that [there was] no substantial possibility that the result of the election would be affected by a re-count, therefore your petition for re-count is rejected."

After examining the Petition, Appellant Samuel's counsel's November 26, 2015 letter to the CEO, and the CEO's December 10, 2015 response, the Court does not see any evidence that the CEO abused or erroneously exercised his discretion in finding that there was not a "substantial possibility" the election results would be affected by a re-count and in rejecting the re-count petition.[13] That is, even if all the alleged errors were substantiated, Appellant Samuel has not shown a re-count would affect the outcome of the election, *i.e.*, that a re-count would address the problems he cites. The Rita re-tabulations shows that when the CEO was asked by poll watchers for a re-tabulation, it was done. The assertions made in the Petition, the November 26 letter, and attachments to them do not arguably give rise to a "substantial possibility" that a re-count would establish a different result.

In fact, at oral argument, Appellant Samuel's counsel in his opening statement confirmed that what Appellant Samuel seeks is a special election to cure the alleged errors, as opposed to a re-count. However, ordering a new election is beyond the scope of this appeal. As noted above, the request for a special election would have to be addressed in a case before the High Court

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[11] *Clanton (1)* at 153 ("The presumption always is that officials have done what the law requires.")

[12] *Bien v. MI Chief Elec. Off.*, 2 MILR 94, 97 (1997) (The law presumes that election officers perform their duty honestly and faithfully.)

[13] *Clanton (1)*, at 153 ("The presumption always is that officials have done what the law requires.")

siting as a trial court, *e.g.*, as in CA No. 2016-121. In this appeal, the issues before the Court are only two: a re-count; and the right of a person to vote.

In Appellant Samuel's counsel's reply argument, he returned to Appellant Samuel's request for a re-count. However, he did not show that a re-count would address the issues Appellant Samuel raised or that there was a "substantial possibility" the election results would be affected by a re-count. Appellant Samuel did not show that the CEO abused or erroneously exercised his discretion.

B. Violations of the Right of a Person to Vote

With respect to violations of the right of a person to vote, Section 188(2) of the Elections Act provides as follows:

> (2) At any stage of an election, a candidate or the authorized representative of a candidate may require the Chief Electoral Officer to refer to the High Court any question that has arisen concerning **the right of a person to vote in the election**, and the Chief Electoral Officer shall refer the question to the High Court accordingly. Provided, however, that any challenge relating to an entry in the electoral register **must be made prior to the close of business on the fourth day preceding the date of an election**. Regulations may be made specifying the types of documentation that must be submitted before the Chief Electoral Officer is required to refer questions to the High Court. (Emphasis added).

Appellant Samuel's Petition for referral under Section 188(2) fails for two reasons: (i) he has identified only one person, Iso Langkio, who claims that although he was registered to vote in the Majuro election, while on Arno he was not permitted to vote absentee in the Majuro election; and (ii) any challenge to an entry in the electoral register is too late.

In an affidavit dated December 10, 2015, Mr. Langkio's claimed that although he was registered to vote in the Majuro election, while voting absentee on Arno, he was not permitted to vote in the Majuro election. Instead, he was permitted to vote in the Wotho election. His

affidavit was submitted to the CEO with Appellant Samuel's December 14 Petition. That is, by the time the matter was brought to the attention of the CEO, the November 16 election was long over, and Mr. Langkio had already voted in the Wotho election. It was too late for the CEO or the Court to address the matter for the 2015 election. *See generally, Clanton, et al. v. MI Chief Elec. Off (2)*, 1 MILR (Rev.) 156, 159 (1989).

Other than Mr. Langkio's claim, Appellant Samuel did not seek referral of a challenge to the right of an identified person to vote, only classes of voters. With respect to the scope of Section 188(2), the Marshall Islands Supreme Court has held "[t]he Chief Electoral Officer is not required to refer to the High Court a challenge to the rights to vote of a class of voters, as distinguished from the right to vote of a single identified individual." *Id.* To the extent Appellant Samuel sought referral of challenges to classes of voters as opposed to an identified voter, his request is of no avail.

In his Petition Appellant Samuel claimed errors regarding certain classes of voters, including absentee voters voting by postal ballots, absentee voters on the outer islands, regular voters who had to go to special polling places to get ballots, and confined voters. However, other than with respect to Mr. Langkio, Appellant Samuel did not seek referral of a challenge to an identified individual's right to vote.

Also, to the extent that in his post-election Petition, Appellant Samuel sought to challenge an entry in the electoral register, he was too late. Under Section 188(2) "any challenge relating to an entry in the electoral register must be made prior to the close of business on the fourth day preceding the date of an election." The date of the election was November 16, 2015. Appellant Samuel's November 26 letter was 14 days late, and his December 14 Petition was 32

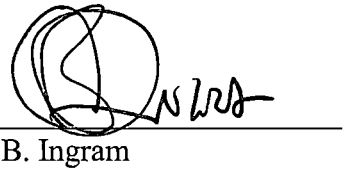
days late.

Accordingly, the Court concludes that Appellant Samuel has failed to show that the CEO erred in refusing to refer to the Court violations of the right of a person to vote. Appellant Samuel did not show that the CEO abused or erroneously exercised his discretion.

CONCLUSION

For the above reasons, the Court concludes as follows: (i) Chief Electoral Officer Robson Y. Almen did not error in rejecting Appellant Samuel's request under Section 180 of the Elections Act for a re-count; and (ii) Chief Electoral Officer Robson Y. Almen did not error in rejecting Appellant Samuel's request under Section 188(2) of the Elections Act to refer to the High Court alleged violations of the rights of voters to vote. Accordingly, the Court affirms Chief Electoral Officer Robson Y. Almen's February 15, 2017 rejection of Appellant Samuel's Petition and denies Appellant Samuel Mudge Samuel's appeal and referral.

So Ordered and Entered: August 31, 2018.



Carl B. Ingram
Chief Justice