

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION**

<p>Joshua Koshiba, <i>Appellant,</i> v. Palau Election Commission, et. al., <i>Appellee.</i></p>
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Cite as: 2017 Palau 37
Civil Appeal No. 17-023
Appeal from Civil Action No. 17-342

Decided: December 27, 2017

Counsel for Appellants

Joshua Koshiba..... S.B. Nakamura

Counsel for Appellee

Palau Election Commission and Aldrin Tellei.....A. Trout, Asst. AG

Franco Gibbons.....J. Toribiong

Koror State Government.....M. Doran

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Court, Kathleen M. Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] We are mindful of the adage that warns "hard cases make bad law." *E.g., N. Sec.Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Our reticence to wade into the political arena makes this a hard case, but in deciding it we endeavor not to make bad law.

BACKGROUND

[¶ 2] Koror State held its general election on November 14, 2017. Seven candidates appeared on the ballot for the office of the governor. Eyos Rudimch received the most votes, 1,339. Franco Gibbons received the

second-most votes, 1,247. No other candidate was competitive in the election. The remaining five candidates received 1,152 votes combined. The vote totals for the remaining five candidates ranged from 492 votes for the third-place candidate to 41 votes for the seventh-place candidate.

[¶ 3] Because no candidate received a majority of the votes cast, a run-off election was held on December 12, 2017. Only Rudimch and Gibbons, the two highest vote-getters at the general election, appeared on the ballot. Gibbons received 1,771 votes to Rudimch's 1,582 votes.

ISSUE AND STANDARD OF REVIEW

[¶ 4] The legal question is whether the run-off election was permissible under the Koror State Constitution. We review such legal determinations de novo. *E.g., Otobed v. Palau Election Comm'n*, 20 ROP 4, 7 (2012). The state constitution provides that "[t]he Governor shall be elected at the next general state election." Koror Const. art. VII, § 2. Elsewhere, the constitution provides that the general election shall be held every four years on the second Tuesday in November. *Id.* art. XII, §3.

[¶ 5] The basis for the December run-off election is statutory in nature. Under the relevant statute:

A candidate for Governor shall be elected if such candidate receives a majority of the votes cast in the election. In the event that no candidate for Governor receives a majority of the votes cast in the general election, then a run-off election shall be conducted as follows:

(1) The two candidates who received the highest vote totals in the general election shall be voted in a "run-off" election to be held on the second Tuesday of the December following the date of the general election.

KSPL No. K6- 123-2001, § 4(B).

The state constitution sets forth the supreme state law of Koror. Koror Const. art. II, § 1. If the run-off statute conflicts with the state constitution, the statute is invalid to the extent of the conflict. *Id.* art. II, § 2. The trial division found that the statute and constitution could plausibly be read in harmony and thus the run-off statute may stand. We disagree.

DISCUSSION

[¶ 6] Under the trial division's interpretation, "the Constitutional provision simply mandates that the gubernatorial general election be held every four years on the second Tuesday of November, but says nothing about how a winner of this election is determined (i.e. whether a candidate needs to receive a majority or just a plurality of the votes cast in order to win), leaving this detail for subsequent election legislation." Decision and Orders on Summary Judgment, Civ. Act. No. 17-342 at 6 (Tr. Div. Dec. 19, 2017). Under this interpretation, the run-off statute simply fills in the election procedure that is absent from the constitution. *Id.* at 7-9.

[¶ 7] The trial division's interpretation does not reconcile with the constitutional requirement that "[t]he Governor shall be elected at the next general state election." Koror Const. art. VII, § 2. The constitution does more than simply specify the timing of a gubernatorial general election every four years. It states that the governor "shall be elected" at that election. In other words, the general election is both a necessary and a final step; it is the determinative election of the Governor of Koror.

[¶ 8] By adding a future election *after* the general election, the run-off statute conflicts with the state constitution. While it is true that the constitution does not state how the winner of the general election is determined, it clearly states that the determination is to be made at the general election. Narrowing the field of candidates from seven to two at the general election is not same as electing the governor at the general election. Thus, the statute must yield. Section 4(B) of Koror State Law No. K6- 123-2001 is invalid in that it conflicts with the Koror State constitutional requirement that the governor shall be elected every four years at the November general election.¹

¹ The trial division analogized Koror's statutory run-off election to the national primary election for the offices of the President and Vice-President. Decision and Orders on Summary Judgment, Civ. Act. No. 17-342 at 9 (Tr. Div. Dec. 19, 2017). The national primary election, held in September, narrows the field of candidates for President and Vice-President down to two for each office. 23 PNC § 1701. The national primary election is not analogous to the Koror run-off election because the general election is the determinative election for the offices of the President and Vice-President, but not for the office of the Governor of Koror. The Koror State Constitution calls for the gubernatorial election process to conclude at the general election. As dicta, we observe that the state constitution would not bar the addition of a statutory primary election to narrow the field of gubernatorial candidates *before* the general election. The difficulty with the current Koror statutory run-off election is its timing.

[¶ 9] As to the current election, the invalidity of the run-off statute does not simply mean that the results of the general election should be elevated to the status of final election results. Our primary concern is for the voters of Koror. On November 14, 2017, the citizens of Koror cast their ballots with the expectation that a run-off election would occur if no candidate received a majority of the votes. Each voter filled out his or her ballot according to this premise. Knowing that there were seven candidates on the ballot and that two of the candidates were much more popular than the rest of the field, some voters likely felt free to cast their votes for one of the less popular candidates because they could rest assured that there was a high likelihood that they could still participate in a determinative future run-off election between the top two candidates. Some voters would likely have voted differently if they had known that the general election was in fact the final and determinative election.

[¶ 10] Had voters known in November that there could be no run-off election, there is reason to believe that the results of the general election would have been different. Supporters of less-favored candidates may have instead cast their votes for one or the other of the top two candidates. The bottom three candidates each received fewer than 200 out of the 3,770 votes cast. Even the third- and fourth-place candidates only respectively received approximately 13% and 9.5% of the votes cast. Supporters of those five candidates likely perceived that their preferred candidate did not have a realistic chance at winning the election. Those supporters may well have opted to cast their ballots for one of the two more realistically electable candidates if voters had been informed that the general election was the final and determinative election.

[¶ 11] The general election was held under the misconception that there would be a run-off election if no candidate garnered a majority of the votes. Because Rudimch only received 92 more votes than Gibbons at the general election, it would not take many voters switching from one of the other five candidates to Gibbons in order to change the outcome. Thus, the most democratic remedy would be to nullify not just the result of the run-off election, but also of the gubernatorial portion of the general election. The voters at the general election were operating under the erroneous belief that the process could proceed according to the run-off statute. Thus, the votes

they cast for governor on November 14 may not reflect their true preferences had they known that the run-off statute was invalid.

[¶ 12] Practically speaking, however, we cannot go back in time. Moving forward, it would simply be too administratively burdensome to conduct another general election with all seven candidates on the ballot and with the voters' knowledge that a governor would be produced from that general election. Moreover, the Koror State Constitution specifies that the general election be held every four years in November, Koror Const. art. XII, § 3, so it would not even be permissible to hold a "make-up" election at some future date. Fortunately, we already have a suitable replacement. The results of the December 12 run-off election serve as a window into the preferences of the people of Koror. The run-off election functions as a close proxy for the conditions under which the general election should have operated. At the run-off election, the people of Koror understood that the election would produce either Rudimch or Gibbons as their next governor. That is essentially the same posture that the people of Koror would have assumed had they known on November 14th that the run-off statute was invalid; although five other candidates appeared on the ballot, Rudimch and Gibbons were the two realistically electable candidates, and one would become the next governor. Thus, the results of the run-off election, in which Rudimch and Gibbons competed head-to-head, best reflect the preferences of the voters of Koror for the office of the governor.

[¶ 13] We are guided by law, but also moved by the spirit of democracy. *See Teriong v. Airai*, 1 ROP Intrm. 664, 676 (1989). There are no allegations of coercion or fraud here. The only allegation of gamesmanship involves the timing of the plaintiff's complaint. The citizens of Koror deserve their preferred—and democratically elected—governor. Mindful of our judicial role, we shall not upset what the voters have done at the ballot box. *See Gibbons v. Etpison*, 4 ROP Intrm. 1, 2 (1993). Accordingly, we order that Gibbons, as victor of the run-off election, shall be deemed, for purposes of section 2 of article VII of the Koror State Constitution, as having been elected Governor of Koror at the general election on November 14, 2017.

CONCLUSION

[¶ 14] We **AFFIRM** the trial division's dismissal of the plaintiff's complaint and **REVERSE** the decision of the trial division as to the validity of KSPL No. K6-123-2001, § 4(B).²

SO ORDERED, this 27th day of December, 2017.

² Although the Appellant has requested oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.