

**OLIVER KASIANO,
Plaintiff,**

v.

**PALAU ELECTION COMMISSION,
WARREN FUKUICHI, IGNACIO
SANTIAGO, FLAVIN T. MISECH,
RODRICK BLANCO, and WILBUR
TELEI, JR.,
Defendants.**

CIVIL ACTION NO. 10-184

Supreme Court, Trial Division
Republic of Palau

Decided: December 23, 2010

[1] **Elections:** Regulations;
Administrative Law: Exhaustion of
Administrative Remedies

Assuming without deciding that the Election Commission is subject to the Administrative Procedures Act, failure to comply with the proper administrative procedures for challenging election results or residency qualifications will prevent a challenge to those qualifications.

[2] **Elections:** Residency and Domicile

The term “resident” under Article IX, Section 6 of the Constitution can be interpreted to mean domicile. The terms “resident” and “domicile” are used interchangeably, such that the term “resident” includes “domicile.”

[3] **Elections:** Residency and Domicile

A person's domicile is where a person has (1) an actual residence and (2) an intention to make a permanent home in the jurisdiction.

[4] **Constitutional Law:** State Constitutions

The language contained in Article VIII, Section 3 of the Angaur State Constitution is clear and unambiguous, and uses different terms for the residency requirement for a candidate and the residency requirement once a person takes office.

Counsel for Plaintiff: J. Uduch Sengebau Senior
Counsel for Palau Election Commission: Alexis Ortega
Counsel for Fukuichi, Santiago, Misech, Blanco, and Telei, Jr: Moses Uludong

KATHLEEN M. SALII, Associate Justice:

INTRODUCTION AND BACKGROUND

Oliver Kasiano, hereinafter referred to as "Plaintiff," filed suit against the Palau Election Commission (hereinafter referred to as "PEC") and Warren Fukuichi, Ignacio Santiago, Flavin T. Misech, Rodrick Blanco, and Wilbur Telei, Jr., candidates in the election for the Olbiil Era Ngeaur (hereinafter referred to as "OEN"). Plaintiff was also a candidate for the OEN in the November 2, 2010, Angaur State 15th General Election. Defendants Fukuichi and Misech were elected to seats in the OEN. Plaintiff and Defendants Santiago, Blanco, and Telei, Jr., failed to garner enough votes.

Plaintiff's First Amended Complaint

alleges that the candidate defendants did not meet the residency requirements to run for the OEN and specifically alleges that each candidate (1) has not been a resident of Angaur State for three years immediately prior to the November 2, 2010 election; and (2) does not physically reside in Angaur State. In the First Cause of Action, Plaintiff seeks to set aside Defendant PEC's October 26, 2010, decision and the results of the election, alleging that the decision was clearly erroneous under 6 PNC § 147(g)(5) and should therefore be reversed. Second, Plaintiff seeks a declaration that the candidate defendants did not meet the requirements of Article VIII, § 3 of the Angaur State Constitution.

DISCUSSION

A. Undisputed Facts

On October 7, 2010, Plaintiff wrote to the PEC Chairman, Santos Borja, challenging the candidacy of several candidates in the 15th Angaur State Legislature Election set for November 2, 2010. On October 26, 2010, PEC Chairman Borja issued a written letter informing Plaintiff that three candidates did not meet the requirements to run for office in Angaur, but that all other candidates, including candidate Defendants herein, met the qualifications to run for office. On October 29, 2010, Plaintiff filed this action challenging the eligibility of the individuals to run for a seat in the Angaur Legislature. In so doing, Plaintiff did not follow the procedures set forth under 23 PNC § 1107, as amended by RPPL 6-50, for challenging the eligibility of a candidate.

There is no dispute that the candidate Defendants did not physically reside in Angaur State throughout the three years immediately prior to the Angaur State 15th General Election in November of 2010. Defendant Fukuichi, 45 years old, grew up in and attended elementary school in Angaur, moving to Koror to attend high school, then went off-island. In 1999, Fukuichi returned to Palau, where he returned to Angaur and worked for the national government, Ministry of Education (“MOE”), first as a classroom teacher and then moving to the computer lab. In 2004, MOE reassigned him to Koror, where he has since been living while working at the central office of the MOE. He is married with children, lives in a house in Koror owned by his brother-in-law, and he and his wife built a house in Melekeok on land belonging to his wife’s family; the Melekeok house was built for and belongs to his children. The children all attend school in Koror. Fukuichi does not have a home of his own in Angaur, but lives in and is responsible for the maintenance and upkeep of the family home where his parents continue to live. The house was built in 1983, which he helped finance, and he continues to maintain the upkeep, including the 1993 work to extend the kitchen and shower areas to the house. He lives and works in Koror, traveling to Angaur for family visits, to attend customary obligations, and to maintain the family home. He also travels to Angaur to attend sessions of the OEN, and approximated the average number of days in one calendar year that he is in Angaur to be 3 months. When in Angaur, he lives in this house and nowhere else. He lives in Koror because of employment opportunities for himself and educational opportunities for his children, but considers Angaur his permanent home and

residence.

Defendant Misech, 40 years old, completed elementary school in Angaur and moved to Koror to attend high school. In 1993, after returning from attending school outside, he lived in Ngerbeched, Koror, with his wife and children. The Ngerbeched house belongs to his mother, who is currently residing in Hawaii. Misech and his wife are both employed by the national government, Ministry of Justice, and are stationed in Koror. Misech works for the Division of Immigration and has been with Immigration for the past ten years, and his school-aged children attend school in Koror. Like Fukuichi, Misech does not have an individual home in Angaur, but has what he refers to as a family home, originally owned by his maternal grandparents. The house belongs to all the children of Misech, and because he was adopted to his grandparents, he is considered to be the youngest of the children of Misech who has ownership interest in the family home in Angaur. In the past four years, he has traveled to Angaur a minimum of three times each month - either to attend OEN sessions or to attend to family customs. When in Angaur, this is the house he lives in. He continues to live in Koror because of work and educational opportunities for himself and his family, but considers Angaur as his permanent home and residence.

B. Conclusions of Law

The question is whether the PEC’s October 26, 2010, letter regarding the eligibility of candidates for the OEN was a clearly erroneous decision that can be overturned by the Court pursuant to 6 PNC §

147(g)(5). Plaintiff asks this Court to overturn the PEC's decision with regards to the eligibility of Fukuichi and Misech to run for seats in the OEN. The PEC first argues that Plaintiff did not exhaust his administrative remedies, because his letter to the PEC failed to include the proper affidavits regarding candidate qualifications as required by 23 PNC § 1107 as amended by RPPL 6-50; and second, that 23 PNC § 1205 excludes the Election Commission from application of the Administrative Procedures Act.

23 PNC § 1107 as amended by RPPL 6-50 provides in part:

Placing candidate's name on ballot. The Election Commission shall examine the nomination papers of all candidates and political parties and investigate all candidates to ensure that all the qualifications of the office have been met. The Election Commission shall, the day after filing of the nomination papers, provide a fifteen (15) day "challenging" period during which any person or group may submit a petition, supported by at least five (5) affidavits of persons registered in that candidate's voting district, to request further investigation and verification of a candidate's residency or citizenship qualifications. . . . A finding by the Election Commission that a candidate's qualifications are in order shall

constitute prima facie evidence that the candidate meets the qualifications for office, and the finding may be rebutted only by presentation of clear and convincing evidence to the contrary before the Supreme Court, Trial Division, within ten (10) days after publication of the Election Commission's finding.

23 PNC §1205 provides that "The rules and regulations promulgated by the Election Commission shall be exempt from the provisions of the Administrative Procedures Act of Chapter 1 of Title 6 of this Code."

[1] Plaintiff does not dispute that he did not submit a "petition supported by five affidavits" as required by Section 1107. Thus, the Court agrees with the PEC that it did not issue a finding because Plaintiff failed to comply with the statutory requirements. As such, Plaintiff's failure to comply with the procedures for challenging election results or residency qualifications of Fukuichi and Misech prevent this challenge. Furthermore, he has failed to show why the Court should disregard the mandate of 23 PNC §1205.

Even assuming that Plaintiff's complaint is not barred, are Fukuichi and Misech "residents" of Angaur as defined by the Angaur State Constitution for purposes of running for legislative office? The Court concludes that they are. The relevant provision of the Angaur State Constitution states:

Qualification of Members: A person running for membership of the Olbiil Era Ngeaur shall be at least twenty-five (25) years of age; a citizen; a resident and registered voter of the State of Angaur three (3) years immediately prior to his election; Provided that he is not serving a court sentence for felony or has not been determined by the court to be mentally incompetent. Each member of the Olbiil Era Ngeaur shall physically reside within the State of Angaur while in office.

Angaur State Constitution, art. VIII, § 3.

[2, 3] As the parties acknowledge, the word “resident” and what constitutes residency in Palau for purposes of the eligibility to run for office has been the topic of case law in Palau, with the most recent case being *Nicholas v. Palau Election Commission*, 16 ROP 235 (2009). In *Nicholas*, the Appellate Division held that the term “resident” under Article IX, Section 6 of the Constitution can be interpreted to mean domicile, and that one did not need to be physically present in a state to maintain a domicile there. In so doing, the Court recognized that the terms “resident” and “domicile” are oftentimes used interchangeably, and ultimately accepted the term “resident” to include “domicile.” A person’s domicile, as defined by the *Nicholas* Court, is where a person has (1) an actual residence and (2) an intention to make a permanent home in the jurisdiction. Norbert

Blau, Plaintiff’s witness, testified that he was one of the drafters of the Angaur Constitution. Blau was asked about the difference in terms used in Article VIII, Section 3 regarding the qualifications of a candidate for the OEN; namely, the first section provides that a person must be a “resident and registered voter” of Angaur to run for office, and the last sentence of the same provision states that each member of the OEN must “physically reside” within Angaur while in office. Blau testified that while the drafters may have used different terms, the intent was that a person running for office must have a house and physically live in Angaur three years prior to the election. He stated there really was no difference between these two phrases, and a candidate was required to physically reside in Angaur three years prior to the election. He further testified that such intent is reflected in the journal reports for the Angaur Constitutional Convention and were available at the State Office.

The Court finds it interesting that Blau, by his own testimony, served as the Angaur Delegate in the OEN from 1987-2005, holding the office of President of the OEN. During this time, he was living in Koror, returning to Angaur usually on payday weekends to attend sessions. He did not own a house in Koror, but lived in Koror because his wife was living in Koror. Prior to becoming a member of the OEN in 1987, Blau testified that he was a member of the Olbiil Era Kelulau in the House of Delegates representing Angaur, and was residing in Koror. By his own testimony, Blau was elected to the OEN under the same constitutional provision which he now testifies requires someone to have a home that he built

himself in Angaur and must live there for three years before running for office. In accepting Blau's testimony at face value, he himself did not meet the constitutional requirements when he successfully ran for office and was elected between 1987 and 2005.

[4] In any event, while it may be Blau's recollection and testimony that the intent of the drafters was to have one requirement for candidates, and that such requirement was for physical residence within Angaur three years prior to running for office, when constitutional language is clear and unambiguous, courts apply its plain meaning. *Tellames v. Congressional Reapportionment Comm'n*, 8 ROP Intrm. 142, 143 (2000). The language contained in Article VIII, Section 3 is clear and unambiguous, and uses different terms for the residency requirement for a candidate and the residency requirement once a person takes office. The terms are not synonymous, and this Court is compelled to apply the plain meaning of Article VIII, Section 3 to the facts herein.

Turning now to whether Fukuichi and Misech are residents as defined by *Nicholas*, the Court found that Nicholas was no longer a resident of Palau with the requisite intent to return based on the following: Nicholas resided in Saipan for over 20 years; did not have a home in Palau; traveled infrequently to Palau and lived in hotels when he did; brought his mother from Palau to Saipan to live with his family; conducted 95% of his business in Saipan; and built his one and only home in Saipan. By contrast, Defendants Fukuichi and Misech have homes in Angaur, and had these homes prior to 2007. While the homes were

not built from the ground, purchased outright, or solely owned by them, the undisputed fact is that they own homes in Angaur, acquired either through outright conveyances or through inheritance. Both Fukuichi and Misech travel several times a month to Angaur for both personal family business as well as to attend to legislative sessions. When in Angaur, they stay at their homes. Neither Fukuichi nor Misech owns a home in Koror, and would live and work in Angaur on a full-time basis if they could do so; employment and educational opportunities, however, do not make this possible. Finally, unlike Nicholas, Fukuichi and Misech continue to reside within Palau, only living in Koror for economic reasons.

The Court is cognizant of the fact that Plaintiff, who at one time lived and worked in Koror, has relocated to Angaur and lives there on a full-time basis, while Fukuichi and Misech have made a choice to continue to live and work in Koror, have residences in Koror, are raising their children in Koror, and have long-term employment in Koror. While Plaintiff contends that such factors establish a lack of intent on their part to make Angaur their permanent home someday, the Court finds otherwise and is not convinced that Fukuichi and Misech have clearly shown that they have no intent to make Angaur their permanent residence and domicile.

CONCLUSION

For the reasons discussed above, the Court finds that Defendants are entitled to judgment in their favor. Warren Fukuichi and Flavin T. Misech meet the requirements of Article VIII, § 3 of the Angaur State

Constitution to run for legislative seats in the 15th Angaur State General Election. The results of the November 2, 2010 15th Angaur State General Election shall proceed to certification and Defendants be sworn in.