

Gibbons v. ROP, 5 ROP Intrm. 353 (Tr. Div. 1996)
YUTAKA M. GIBBONS and JOHNSON TORIBIONG,
Plaintiffs,

v.

**REPUBLIC OF PALAU, ELECTION COMMISSION OF
THE REPUBLIC OF PALAU, and HISAE OBICHANG BREL,**
Defendants.

CIVIL ACTION NO. 421-96

Supreme Court, Trial Division
Republic of Palau

Decision

Decided: September 23, 1996

Counsel for Plaintiffs : Moses Uludong and Mark Doran

Counsel for Defendants: Jeffrey A. Tomasevich, AAG
Thomas Howlett, AAG

JEFFREY L. BEATTIE, Justice:

On September 18, 1996, at 4:00 p.m., plaintiffs filed an Amended Complaint seeking, among other things, an injunction to postpone the presidential primary election scheduled for September 24, 1996. Plaintiff sought a final ruling on an emergency basis prior to the scheduled election. To accommodate plaintiffs, the matter was heard on September 20, 1996, commencing at 9:00 a.m. and the parties were permitted to submit testimony both by affidavits and live witnesses.

ALLEGED BALLOT DEFECTS

Plaintiffs allege that the ballot to be used in the primary election, a copy of which is appended hereto, suffers from defects in form and content that render it confusing and misleading. The defects alleged in the amended complaint are as follows.

1354 1. Plaintiffs allege that if a person marks the oval next to the name of his chosen candidate with an "x" or a "✓", as in past elections, the automated ballot counter will not count the ballot and the candidate will lose a vote. The ballot does not warn of these consequences.

Plaintiffs did not submit a shred of evidence to support this claim. The uncontroverted testimony was that, if the computer rejects the ballot because of the improper marking of the oval, the computer will stop the counting process. At that point, the Commission (with one representative of each of the three Presidential candidates present to observe) will examine the

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ballot to see if the voter's selection can be ascertained from his marking on the ballot. As long as the voter's selection can be ascertained from the ballot, whether it's marked with an "x" or other marking, the ballot will be counted.

2. Plaintiffs allege that the Palauan language instructions on the ballot contains misspellings and grammar errors.

The evidence shows that the Palauan language instructions do contain spelling errors, largely due to running together two or more words. For example, "er a" is spelled "era", "ke mo" is spelled "kemo", and "a lsekum" is "al sekum". But plaintiff's expert witness, Ms. Olkeriil, testified that Palauans will still know what is meant by the misspelled words.

Plaintiffs also complain that the English words "ballot" and "write-in" are not translated into Palauan in the Palauan language instructions. But another one of plaintiff's expert witnesses in Palauan language, Augusta Ramarui, testified that the English words "ballot" and "write-in" have been adopted into the Palauan language and have become words that Palauans know.

Plaintiffs claim that the word used to describe how the ovals should be filled in, "chirsengii", is too vague because it is broad enough in meaning to lead a voter to believe that marking the oval with an "x" or some other mark is appropriate, rather than filling in the oval completely. While the evidence supports plaintiff's definition of "chirsengii", the ballot instructions use pictures as well as words to show how the oval should be marked, showing a picture of a completely filled in, blackened oval. Moreover, as already explained, a voter who marks the oval with a different mark will still have his vote counted.

3. Plaintiffs allege that the names of the candidates are placed "close enough to each other to create confusion as to who[m] a person is actually voting for."

1355 No witness testified that the names were so close to each other that he was not sure of which oval to mark to select his chosen candidate. The names of the candidates are not only separately numbered, but they are printed in separate columns divided by a vertical line which runs between the names. Plaintiffs have not shown that this aspect of the ballot format will render the average voter unable to understand how to cast a vote for the candidate of his choice.

4. Plaintiffs allege that, "if a person votes under the method used for over 45 years and places a mark after or to the right of the name" of his candidate of choice, his ballot will reflect a vote for the wrong candidate and the intended candidate will lose a vote.

First, there is scant evidence that Palauans have been voting for over 45 years using the same type of ballot format. The Court notes that in the many Compact votes, for example, the ballot format changed from time to time, and there is no indication that the voters were unable to adapt. The ballot discussed in *Koshiha v. Remeliik*, 1 ROP Intrm. 65, 67 (Tr. Div. 1983), was formatted so that the box to be marked was to the left of the "yes" and "no" choices respecting the compact approval. The ballot discussed in *Gibbons v. Etpison*, 4 ROP Intrm. 1, appendix A (1993) was formatted so that the box to be marked was to the right.

Plaintiff points out that the Compact related elections did not involve ballots used for electing candidates for office, so they should not be taken into account when assessing the likelihood that voters will understand how to use the ballot at issue. The Court disagrees. The Compact related ballots assumed different forms and are probative of the voters' ability to adapt to different ballot forms. Plaintiff presented no evidence which showed the voters were unable to intelligently cast their votes when the box to be marked changed locations.

Turning to the ballot now before the Court, it shows that the candidates' names and the ovals beside their names are separated by a vertical line which places the ovals and names of each candidate in a different column from the other candidates. Plaintiff has not established that the average voter will be unable to understand how to cast his vote due to the placement of the ovals to the left of the candidates' names.

5. Plaintiffs allege that the ballot instructions may confuse voters into thinking that they may vote for a named candidate and a write-in candidate. If two ovals are marked, the ballot will not be counted.

1356 The ballot instructs voters in English and Palauan to vote for only one candidate. In fact, that is the first instruction given. The instructions also state in both languages that if the voter votes for more than one candidate, the ballot will not be counted. Finally, the last instructions that are given, which appear in both languages just above the section of the ballot where the voter is to select his candidate, once again remind the voter to mark only one oval on the ballot. The plaintiffs have not demonstrated that the average voter would be led to disregard these instructions.

6. The ballot does not contain instructions printed in Japanese characters. Plaintiffs allege that voters who understand only Japanese characters will not know how to select their candidate and that this violates their equal protection rights.

The plaintiffs did not present any evidence showing how many registered voters, or Palauan citizens in general, are able to read Japanese characters, but not Palauan or English. Moreover, plaintiffs did not cite any legal authority to support their contention that any such "Japanese-only" voter's constitutional or other rights are violated by a ballot printed in the official languages of the Republic of Palau without also including the Japanese language. *See* Palau Constitution, Art. XIII, Sec. 1 ("Palauan and English shall be the official languages".) None of the Compact ballots of which the Court is aware contained any Japanese language instructions, nor has the plaintiff alleged that any of the ballots in the other elections held in the past 45 years contained any Japanese instructions.

7. Plaintiffs allege that the lack of a number before the oval for write-in candidates "may result in people intending to vote for Plaintiff Toribiong to mark the space to the right of the name of Plaintiff Toribiong" instead of the space to the left of the name.

The evidence showed that, because there are only three candidates running for president,

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there are only three numbered ovals. The fourth oval is not numbered because it is provided to allow a voter to vote for somebody other than the three candidates. The oval for the write-in vote is in an entirely separate column from Plaintiff Toribiong's name, and the columns are separated by a vertical line. No witness testified that he would not know how to cast a vote for Toribiong due to the lack of a number next to the write-in oval, nor does it appear that way from the Court's own examination of the ballot.

8. Plaintiffs allege that the Election Commission has "arbitrarily, unreasonably and capriciously" adopted a new and **¶357** confusing form of ballot without sufficient time to educate the public about the new form.

For reasons already stated, plaintiffs have not demonstrated that the ballot is confusing. Moreover, the only aspect of the ballot format which plaintiffs claim is new is the placement of the oval to the left of the candidates' names rather than to the right. The evidence shows that the Commission was not unreasonable, arbitrary or capricious in adopting that format.

For the first time in Palau, the Election Commission has decided to use an automated ballot counter, a computer, for counting the primary and general election ballots. The decision to use a computer was based on the fact that the computer will count ballots much more quickly and accurately than a manual count. The computer scans the left side of each column on the ballot, searching for a filled in oval. Because the oval must be on the left side of the column, the candidate's name cannot be on the left side. The name must be on the right side of the oval.

The computer also will be used to count ballots cast in the general election to be held in November. In that election, there will be numerous candidates, and it will be impossible to list them each on a single line in the ballot--they will have to be in rows side by side. That was one of the reasons why the Commission decided to list the candidates' names side by side on the ballot for the primary election--it concluded that it would be less confusing if the ballot format for the two elections were the same.

VOTER EDUCATION

The Commission is required by law to print a specimen ballot at least ten days before the election and promptly distribute copies to the candidates. 23 PNC § 1503(b). The Commission printed the specimen ballot here at issue on September 5, 1996, nineteen days before the election. Although plaintiffs allege that the ballot was not printed in time to properly educate voters on how to cast their votes, the Commission clearly complied with the timetable prescribed by law.

Importantly, plaintiffs cite no legal authority which requires any type of voter education for the primary election. They rely on a Compact case, *Gibbons v. Etpison*, 3 ROP Intrm. 398 (1993), as authority for the contention that the legislature has a duty to inform the public of the contents and effect of a ballot measure. However, *Gibbons* involved a ballot measure which would amend the Palau Constitution. Voters needed to be educated concerning the effect of the amendment and what was at stake. Here, plaintiffs do **¶358** not contend that Palauan voters do not know the effect of a vote for a candidate. More importantly, in *Gibbons*, in contrast to the

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instant case, there was a statute which established a Political Education Committee and charged it with the duty to inform Palauans about the meaning and consequences of the proposed constitutional amendment. RPPL 3-76 § 7.

Though not required by statute to do so, the Commission did take steps to educate the public concerning the use of the ballot for the primary election. Numerous radio and television announcements have run which explain the ballot. Also, the Chairman of the Commission testified that at all of the polling places, the Commission will have representatives who will, before handing the voter his ballot:

- a. Point to the oval to the left of the name Yutaka M. Gibbons and tell the voter to mark that oval completely black if he wishes to vote for Gibbons.
- b. Point to the oval to the left of the name Kuniwo Nakamura and tell the voter to mark that oval completely black if he wishes to vote for Nakamura.
- c. Point to the oval to the left of the name Johnson Toribiong and tell the voter to mark that oval completely black if he wishes to vote for Toribiong.
- d. Point to the oval to the left of the blank line over the phrase "write-in" and tell the voter to mark that oval completely black and write a name on the line if the voter wishes to vote for a write-in candidate.
- e. Tell the voter the he can vote for only one person.
- f. Tell the voter not to fold, bend or otherwise mutilate the ballot.

CLAIM AGAINST HISAE OBICHANG BREL

Hisae Brel is related to Kuniwo Nakamura in that Brel's grandfather was the brother of Nakamura's grandmother. Brel is a member of the Election Commission. Plaintiffs claim that because of this relationship, the Court should order Brel not to participate in any of the Commission's affairs relating to the election of the President of Palau. Brel testified that she could discharge her duties impartially despite the relationship.

1359 The legislature has provided that members of the Election Commission are appointed by the President of Palau with the advice and consent of the Senate. 23 PNC § 1201(b). The plaintiffs do not contend that Brel's appointment was not confirmed by the Senate. The law provides that a Commission member may only be removed for cause or if he becomes a candidate in an election. *Id.*

Plaintiffs do not cite any legal authority which supports the contention that Brel's relationship to the President is "cause" for her removal. They do not allege that she has failed to act impartially in actions she has taken so far. The Court sees no evidence that plaintiffs face irreparable injury if the Court does not order Brel to abstain from participating.

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Accordingly, the Court will not issue any injunction against Brel. If it turns out that she is the deciding vote in any Commission action adverse to plaintiffs in the future, plaintiffs may seek appropriate relief at that time. The Court has not been presented with any evidence or legal authority which shows that Brel's relation to the President alone should disqualify her from participating.

ABSENTEE BALLOTS

Plaintiffs allege that two registered voters, Paul Temol and Grace Edeyaoch, were sent absentee ballots by the Commission even though they did not request absentee ballots. They allege on information and belief that other off island voters were also sent absentee ballots without having requested them. They claim that the Commission "may" deny these voters the right to vote in person at the polling place in Saipan because absentee ballots were sent to them.

There is no evidence to support the contention that a voter who was sent an absentee ballot will be denied permission to vote in person at the polls. The Chairman of the Commission testified that any voter may vote in person even though he has been sent an absentee ballot. When the time comes to count absentee ballots, no such ballot is counted if it was submitted by a voter who appeared in person at the polls.

Plaintiffs have not shown that any voter has been sent an absentee ballot without requesting one. Although they submitted affidavits from Temol and Edeyaoch in which they each state they were sent an absentee ballot without requesting one, defendants put in evidence two letters, one from Temol and one from Edeyaoch, which bear the purported signatures of Temol and Edeyaoch and request the Commission to send them absentee ballots. Accordingly, **L360** plaintiffs have not met their burden of proving that there is a likelihood that the Commission will send unsolicited absentee ballots in the future and no injunctive relief is warranted.

THE BALLOT COUNTER

Plaintiffs allege that the ballot counting computer is being kept in an office under the control of Masao Ueda, the chairman of the Committee to Re-Elect the President. They claim that harm is possible if the computer remains under his control.

Plaintiffs presented no evidence to support this claim. The uncontroverted evidence is that the computer is in an office to which only Commission members have access and that Ueda has never even seen the computer.

APPLICABLE LAW

Plaintiffs bear the burden of proof in this matter. *Gibbons v. Etpison*, 3 ROP Intrm. 398, 403 (Tr. Div. 1993), *aff'd*, 4 ROP Intrm. 1 (1993). Few ballots are a perfect model of clarity, and reasonable people may disagree on the best format. The test to be applied in determining

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whether a ballot is impermissibly confusing and misleading is whether the ballot is so confusing that the average voter is prevented from making an intelligent voting decision by casting a vote for the candidate of his choice. See *Gibbons v. Etpison*, 4 ROP Intrm. 1, 9 (1993).

Applying this test, and for the reasons already mentioned, the Court concludes that plaintiffs have not proven by a preponderance of evidence that the ballot is impermissibly misleading or confusing.

CONCLUSION

Only a court with an extremely unflattering opinion of the intelligence and sophistication of the average Palauan voter could uphold plaintiffs' claim that the primary ballot will confuse the voters into making an unintended selection or marking more than one oval. This conclusion is based not only on the evidence, or lack of evidence, presented by plaintiffs, but by the Court's own examination of the ballot. There is no reason to believe that the voters of Palau are not just as capable and astute as those of other democratic nations. Palauan voters have made more trips to the polls than Donald Trump has to the bank, and they know their way around the voting booth.

¶361 It is ORDERED that plaintiff's request for restraining order, postponement of the primary election, preliminary and permanent injunction and other relief requested in the amended complaint is DENIED;

FURTHER ORDERED that the second complaint be, and it hereby is, DISMISSED.