

Termeteet v. Election Comm'n, 9 ROP 249 (Tr. Div. 2001)
**KRISPIN TERMETEET, MIRIAM TIMARONG, MAXIE TAIMA, and GABINO
LLECHOCHL,
Plaintiffs,**

v.

**ELECTION COMMISSION, REPUBLIC OF PALAU, PRESIDENT KUNIWO
NAKAMURA, ELMIS B. MESUBED, RUSSEL MASAYOS, CISCO MELAITAU,
BENDIX N. LAKOBONG, AUGUSTO RENGUUL, BEN TEMOL, JOSEPH I. TIOBECH,
and
LAZARUS SALUI INACIO,
Defendants.**

CIVIL ACTION NO. 00-153

Supreme Court, Trial Division
Republic of Palau

Decided: May 22, 2001

[1] **Elections:** Burden of Proof

The party challenging election results has the burden of proof.

[2] **Elections:** Elements of Proof

To successfully challenge election results, the challenger need not show actual fraud, but only the fact that the election is not being conducted according to law.

[3] **Elections:** Voiding

Where election officials comply with every provision of the law, circumstances not attributable to election officials, though they may be an impediment, are not grounds for voiding an election.

R. BARRIE MICHELSEN, Associate Justice:

Defendants seek an order granting partial summary judgment, arguing that as a matter of law the regrettable delay in delivery of absentee ballots to off-island voters during the election, (which all agree was not due to any culpable behavior of government officials), does not require the voiding of the Ngiwal State election held in August, 2000.

Plaintiffs Krispin Termeteet, Miriam Timarong, and Gabino Llechochl were unsuccessful candidates for elective office for governor and the legislature respectively in the August, 2000 Ngiwal State election, Plaintiff Maxie Taima is a citizen of the Republic of Palau and currently lives in Guam. She is a registered voter in Ngiwal State, and concededly made a proper request

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for an absentee ballot for the Ngiwal election but did not receive it in time to vote and have the ballot counted.

The moving Defendants are the Election Commission and the members of the Commission named as parties in their official capacity, and hereinafter will be referred to as “the Commission.”¹

FACTS

The pertinent facts are not in dispute. On August 8, 2000, Ngiwal State conducted an election for the office of Governor and the seven elective seats in the State Assembly. As already noted, Plaintiffs Termeteet, Timarong and Llecholch were all **L250** unsuccessful candidates in the election. After the preliminary results were announced but before the results were certified by the Commission, Plaintiff Termeteet’s election committee complained that many absentee voters outside of Palau did not receive their ballots in time to cast their votes in the election. An investigation of the absentee ballots revealed that nineteen days before the election, 132 absentee ballots were mailed by the Commission at the Koror Post Office to voters in Guam, Saipan, Hawaii, and the U.S. mainland. On July 20, 2000, those ballots had been delivered to Continental Micronesia for shipping by air at the Palau International Airport. Airline records indicate that the mail was shipped on Flight 954 July 21. However, the mail was not located in Guam until approximately 23 days later, on August 14 and 15. The discovery came too late for the absentee ballots to be cast in the election. The delay in delivery of the ballots was not caused by the Election Commission or Palau postal officials, but rather because of the time lost while the mail was in the custody of the airline. The investigation revealed no evidence of mail tampering or intentional obstruction, and the Commission certified the election results.

LEGAL ANALYSIS

[1, 2] Palau courts have had occasion to review election results and consider whether an election should be enjoined or its results not certified. Unquestionably “the authority to suspend any election . . . is an extraordinary authority . . .” *Kanai v. Ngaraard State*, 1 ROP Intrm. 278, 279 (Tr. Div. 1985). In such cases, as “[i]n all election contests, the party challenging the election results has the burden of proof.” *Gibbons v. Etpison*, 3 ROP Intrm. 398, 403 (Tr. Div. 1993) (citing United States cases).² This burden is a high one, but not impossible. “Actual fraud need not be shown – only the fact that the election is not being conducted according to law.” *Olikong v. Salii*, 1 ROP Intrm. 406, 412 (1987).

There have been two reported cases where the court has intervened and voided election results. In *Skebong v. Election Commissioner*, 1 ROP Intrm. 366 (1986), a judgment voiding the

¹Then-President Nakamura was also named as a party, Plaintiffs being unaware that RPPL No. 2-38 repealed the provision of the election law that named the President the Election Commissioner. The former President is therefore dismissed as a party. Issues regarding other Defendants are deferred at this time.

²Although the court only cited United States cases for this point of law, it is hard to imagine any other rule. The public has a right to require timely elections, and timely results, and a plaintiff requesting the court to grant such relief should shoulder the burden of proof.

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Ngeremlengui State election results was affirmed on appeal. The Trial Division found that 373 votes were cast by persons who were not eligible voters in that state, and since “these illegal votes were sufficient in number to alter the results of the election,” the court held the results were properly voided. *Id.* at 375. A more recent example is *Secharaimul v. Palau Election Commission*, 7 ROP Intrm. 246 (Tr. Div. 1998), where the court approved a stipulation of the parties to invalidate the results of the March 1998 Airai State gubernatorial election. The stipulation was entered into after “the Court concluded that plaintiff was likely to succeed in proving that the number of voters who should not have been permitted to vote in the Airai election, and should now be disqualified, equaled or exceeded the margin of victory in the gubernatorial election.” *Id.* at 247.

In other cases, the court has canceled or postponed votes because of other irregularities. In *Olikong v. Salii*, 1 ROP Intrm. 406 (1987), a referendum regarding the Compact of Free Association was canceled **1251** because the provisions of law regarding absentee ballots had not been followed. The court held that “balloting service stations are an illegal substitute for polling places and the absentee ballots delivered to the election official at said stations are void.” *Id.* at 415. An injunction was also issued in *Koshiha v. Remeliik*, 1 ROP Intrm. 65 (Tr. Div. 1983). There, a referendum on the Compact was enjoined because “the language of the ballot will not allow a free and impartial vote.” *Id.* at 72.

In the election cases where the court has felt constrained to intervene, an illegality was involved. In *Skebong* and *Secharaimul*, ineligible voters were allowed to cast votes. In *Olikong*, the collection method for absentee ballots was unauthorized. In *Koshiha*, the votes were not going to reflect the view of the electorate because of the “tainted language” of the referendum question.

Here, Plaintiffs do not argue there were any improper acts of the officials conducting the election. Rather they argue that forces outside the control of election officials – timely delivery of the mail – affected the number of votes cast. However, many factors outside the control of election officials may impact on a voter who is living away from Palau. For example, mail delays between Hawaii and Guam have been a recurring problem over the years. Twice in the last 15 years, the Pohnpei runway has been closed for weeks, causing major disruptions of air and mail service. Typhoons passing through Guam can significantly disrupt power and air service there. And, of course, there are the usual vagaries of airline delivery, which was the problem here. Any of these occurrences may interfere with timely receipt of off-island ballots.

[3] Elections in Palau are often decided by a handful of votes. Each election can be said to turn on the absentee ballot count. If circumstances affecting the absentee ballot count require new elections in close races whenever off-island impediments to voting are present, repeating elections may become commonplace, even though election officials complied with every provision of law. The Palau National Code does not require that level of electoral perfection.

CONCLUSION

The Voting Rights Act of 1981 has as its purpose

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to prevent any activity by the national, state or other political subdivision or government from denying or acting in such a way as to have the effect of denying any qualified citizen, on account of race, creed, clan, color, status, financial circumstance, political affiliation or sex from exercising the right to vote.

23 PNC § 102(d). To effectuate this purpose, “[t]he Supreme Court may issue any order, suspend any election, void any election, reorganize any procedures for elections or take any actions excluding reapportionment as may be necessary to insure conformity with the requirements of this chapter.” 23 PNC § 106(c).

Here, no activity by any government official acted in such a way that interfered with anyone’s right to vote. Partial summary judgment on Plaintiff’s claim for relief based upon the nonarrival of the absentee ballots will be granted to the Commission.