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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

FRANCES M. SABIAN, et al, Plaintiff, v. BOARD OF ELECTIONS, et. al, Defendant.	Civil Action No. 93-1274 **DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Seventy-five (75) challenged voters (hereinafter Petitioners) are asking this Court for preliminary injunctive relief from the decision-making process of a government agency before the agency has issued its final decision. Defendant Board of Elections (herinafter the Board) and Defendants in Intervention oppose the motion.

I. FACTS

On November 6, 1993, the Board of Elections (hereinafter the Board) conducted a general election for the Northern Mariana Islands. A voting poll was established for Election District No. 6 on the island of Rota and the polls remained open from 7:00 a.m.

until 7:00 p.m. During the election process, the Board received 167 voter challenges from District 6. After a preliminary review of the challenges, the Board summarily dismissed 25 of the challenges as frivolous. Next, the Board arranged hearings for the remaining 142 challenged voters to begin on November 26, 1993. Pursuant to section 9109 of the CNMI Administrative Procedure Act (hereinafter the APA), the Board issued written notice of the hearing on November 17, 1993. The written notice set forth 1 CMC §6205(b)(1) (domiciliary and residency requirement) as the specific ground for the voter challenges. The letter also indicated that each challenged voter would have the opportunity to present evidence that he or she is qualified to vote as a domiciliary and resident of the CNMI, and as an actual resident of Rota, factually living and having an abode on Rota. On November 26, and again on December 3, Petitioners filed two separate motions to dismiss the challenges because of the Board's failure to provide proper notice of the grounds for challenge and because of the Board's failure to properly state a ground of challenge. After the Board denied both motions, the Petitioners brought a motion for preliminary injunction of the hearings before this Court.

It is an undisputed fact that the Board received the written challenges and proceeded to alter the grounds of the challenges to some extent before commencing the hearing process. The Board assesses its alteration of the original grounds as cosmetic. However, the Petitioners consider the changes substantial and contend that the Board has exceeded the scope of its authority and thereby violated the Petitioners' right to vote and their right to

due process of law. Further, the Petitioners claim that this Court must disrupt the Board's hearing process and judge the procedural actions of the Board today in order to preserve Petitioners' substantive rights.

II. ISSUES

(a) Can this Court assume jurisdiction over the Board of Elections hearing process before the Board has reached a final decision about the challenged votes of the Petitioners?

(b) If this Court could assume jurisdiction over this matter during the early stages of an administrative hearing, would it be proper to grant preliminary injunctive relief in light of the four factor test for issuing injunctive relief?

III. ANALYSIS

A. RIPENESS

The Petitioners have requested preliminary injunctive relief from the administrative hearing currently being conducted by the Board. Before the Court can properly assess the merits of the Petitioners' request it must have jurisdiction to hear the matter. According to *Bannercraft Clothing Co. v. Renegotiation Board*, 466 F.2d 345, 351 (1972), even a forceful showing of pending irreparable injury will not support an injunction if the trial court has no jurisdiction to issue it or if the exhaustion of administrative remedies doctrine precludes it. *Id.* Therefore, the Court must assume jurisdiction *and* find the matter ripe for review prior to a discussion on the merits.

Jurisdiction over the case at bar rests with this Court because the APA grants this Court the power to review administrative agency action. 1 CMC §9112(b). However, in addition to showing a trial court has the naked power to act, the petitioners must show that the case has reached a posture in which judicial intervention would be effective and appropriate. *Bannercraft*, at 354. This "ripeness" requirement includes a showing that available administrative remedies have been exhausted. *Id. citing Myers v. Bethlehem Shipbuilding Corp.*, 58 S.Ct. 459 (1938). Section 9112(d) of the APA codifies the exhaustion of administrative remedies doctrine and specifically states that "[a] preliminary, *procedural*, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 1 CMC §9112(d) (emphasis added). The Court finds the Board's decision to alter the grounds of the challenges to be a procedural decision. Therefore, absent a showing that the action is "directly reviewable", this Court cannot review the Board's procedural decision until the hearings have ended and the Board reaches a final decision.

Bannercraft articulates an exception to the exhaustion of administrative remedies doctrine allowing a trial court to act prior to final agency action when an administrative agency's intermediate action constitutes an ultra vires act or threatens invasion of important substantive rights. The Petitioners claim that the Board has exceeded its statutory authority and has threatened Petitioners' due process rights as well as their rights to vote. For reasons set forth in the following sections of this decision, this Court finds the Board has neither acted ultra vires

nor violated Petitioners' substantive rights by altering the grounds for challenge prior to the hearing.

B. STANDARD FOR INJUNCTIVE RELIEF

Even if the Board's procedural decision was ripe for judicial review prior to completion of the hearing, the Court could only grant injunctive relief after an examination of the following four factors:

> (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the probability that plaintiff will succeed on the merits; (3) the state of the balance between the harm the petitioners will face if the injunction is denied against the harm the respondents will face if the injunction is granted; (4) the effect of the injunction on the public interest.

King v. Saddleback Junior College Dist, 425 F.2d 426, 427 (9th Cir. 1970).

Alternatively, a trial court may grant a preliminary injunction if it finds that serious issues of law are presented and that the petitioners will face much greater harm if the injunction is denied than the respondents will if it is granted. *Marianas Public Land Trust v. Government of CNMI*, 2 CR 999, 1002 (D.N.M.I. App. 1987) (*citing Los Angeles Memorial Coliseum Comm. v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)).

1. IRREPARABLE HARM

The Petitioners allege three types of irreparable harm which will result from a denial of injunctive relief. First, Petitioners claim their Constitutional right to due process of law has been violated by the Board's action. Second, the Petitioners argue that their individual rights to vote will be violated if the

Court denies preliminary injunctive relief. Third, the Petitioners assert irreparable harm in the form of lost time at work and extreme personal hardships resulting from the Board's lengthy hearing process. The Court will address each alleged hardship separately.

(a) Petitioners' Due Process Rights Were Not Violated. The Petitioners give several reasons why the Board's action violates their due process rights. First they claim that some of the original letters of challenge did not state proper grounds for challenging a voter under CNMI law because they mentioned the wrong sections of the Commonwealth Code. However, the code sections mentioned in the original challenges concern the domicile of the voter, giving a reasonable person notice that the challenge concerned domicile. Domicile is a proper ground for challenge, and the notice given in the challenge is all the Constitution requires. As our CNMI Supreme Court stated in *In re San Nicolas*,

> technical rules of pleadings such as govern civil or criminal actions are not applicable to [...] pleadings filed with an administrative agency and liberality is to be indulged as to their form and substance.

In Re San Nicolas, No. 90-008 (N.M.I. Sept. 5, 1990). The Ninth Circuit Court of Appeals reached a similar result in *NLRB v. Inter. Brotherhood of Electrical Workers*, 827 F.2d 530, 534 (1987) when it ruled that a labor complaint which failed to state the unfair labor practice charge satisfied due process so long as the parties were allowed to litigate the issues fully.

The Petitioners also complain that the Board issued new notices to the challenged voters, changing the grounds of the challenge and violating Petitioners' right to an impartial

tribunal. However, the law is clear that an agency is allowed to change the grounds for the initial complaint as long as the new grounds are related to the original ones and as long as the parties have notice of the new grounds. Two of the cases mentioned by the Petitioners express this rule. *NLRB v. Complas*, 714 F.2d 729, 733-34 (7th Cir. 1983)(NLRB had authority to amend unfair labor practices complaint to include unlawful interrogations regarding union activities because the new charge related to the original charge, but one day's notice was not reasonable notice of the change); *NLRB v. Tamper*, 522 F.2d 781, 789-90 (4th Cir. 1975)(Administrative Law Judge may call attention to an uncharged violation).

In the case at bar, the Board decided to substitute original challenges filed under 1 CMC §§6201-6203, which refer to a domicile requirement, with a uniform challenge filed under 1 CMC §6205(b)(1) referring to a residency requirement. Thus, the initial challenges related to domicile, and the amended challenges relate to residency. "Residence means living in a particular locality, but domicile means living in that locality with an intent to make it a fixed and permanent home." BLACK'S LAW DICTIONARY, 1176 (5th ed. 1979). The fact that BLACK'S LAW DICTIONARY found it necessary to articulate a distinction between domicile and residency demonstrates how closely related these grounds for challenge are. The letters indicating the related grounds for challenge were mailed on November 17, nine days prior to commencement of hearings on November 26th. The Court considers this notice timely given the close relationship between the original and amended challenges and the fact that the Board faces

significant time constraints in its attempt to certify an election prior to inauguration day. This is what the "due process" clause of the Constitution and the Commonwealth's Administrative Procedure Act require.

The Petitioners argue that 1 CMC §6104(g) stands for the proposition that the Board cannot change the grounds of a complaint once received from a challenger. Section 6104(g) grants the Board the following power:

> To promulgate rules and regulations pertaining to procedures to be followed respecting the receipt, investigation and action on the complaints of election irregularities. 1 CMC §6104(g).

The Petitioners place great emphasis on the framers' use of the word "receipt" claiming its presence in the statute bars the Board from initiating a complaint. Memorandum and Points and Authorities in Support of a Preliminary Injunction, at 24. While the Court agrees with Petitioner's interpretation of §6104(g), the Court does not construe the Board's activity in the case at bar as the initiation of a complaint. Nor does this Court find that the Board acted without having received a complaint. The Court finds that the Board's November 17 letter changing the grounds originally challenged constituted an interpretive reaction to the receipt of seventy-five challenged votes. Thus, the Board did not initiate the complaint. Rather, it classified the original challenges filed by concerned citizens who understandably lack the Board's knowledge of election challenges.

The Court finds that 1 CMC §6104 grants the Board the power to promulgate a procedure allowing itself to make reasonable interpretations of otherwise confusing voter challenges it *receives*. To hold otherwise would force the Board to depend

solely on each challenger's ability to fill out the "grounds for challenge" portion of a voter challenge form. Although some challengers may be well-versed in the various basis for challenge listed through Article 1, Division 6 of the Commonwealth Code, the Court is convinced that many challengers either lack the language skills or education levels necessary to articulate a technically proper voter challenge. Petitioners interpretation of §6104 would cause these potentially valid voter challenges to be thrown out. Such a result frustrates the purpose of a voter challenge system to ensure the integrity of elections.

Lastly, the Petitioners point to a Board of Election adjudicative decision made in 1989. In the course of addressing the merits of certain voter challenges, the Board decided that "the challenger is bound to the grounds of his decision." Petitioners claim that the Board, by deciding to change the grounds of challenge in the case at bar, ignored their own rule and thereby violated Petitioners' Constitutional right to due process. However, according to the papers filed by the Board, this part of its 1989 decision was not intended to do anything more than deal with the specific case before it at that time. The Court has no way of knowing whether that challenge involved facts similar to those here.

Even if the Board 1989 decision created a rule, Petitioners' due process claim ignores a fundamental difference between an agency's regulations and its adjudicative decisions. By law agencies are allowed to depart from earlier adjudicative decisions. As one authority on administrative law stated, "the administrator is expected to treat experience not as a jailer but

as a teacher." DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 17.07 (1958); *see also Washington Water Power v. Idaho Public Utilities Comm.*, 617 P.2d 1242, 1254 (Idaho 1980) ("an agency must at all times be free to take such steps as may be proper in the circumstances irrespective of its past [adjudicative] decisions"). Thus, the Board is allowed to depart from the holdings of past Board decisions if it feels the circumstances warrant the departure.

For the reasons stated above, the Board's procedural decision to change the original grounds for challenges it received from the challengers did not violate Petitioners' Constitutional right to due process.

(b) Petitioners' Voting Rights Are Not Threatened. Second, petitioners claim that the right to vote will be taken from them in the hearings. However, the point of the Board's hearings is to ensure that the right to vote is exercised by people eligible to do so. As this Court stated in *King v. Board of Elections*, No. 91-1191 (Super. Ct. Dec. 11, 1991), "a voter challenge system of some type is necessary to ensure the integrity of elections." Only if the Board's procedures are so flawed as to deny the challenged voters their due process right will the hearings amount to a deprivation of the right to vote. As shown above, the Board's procedures do not violate due process. Therefore, Petitioners' right to vote will not be lost in the hearing process.

(c) Inconveniences Related to Hearing Do Not Violate Due Process. Finally, the Petitioners argue that they will suffer irreparable harm in the form of lost time at work and other personal difficulties as the Board completes the hearing process.

Unfortunately, that kind of inconvenience is not something a court can consider in deciding whether to grant a preliminary injunction. As the United States Supreme Court stated in *F.T.C. v. Standard Oil Co.*, 101 S. Ct. 488, 495 (1980), having to participate in these kinds of hearings is "part of the social burden of living under government." Therefore, though some of the petitioners will be seriously inconvenienced by participating in the Board hearings, the Court cannot lend any weight to this type of harm in deciding whether to grant the injunction.

Therefore, with respect to the ripeness issue, the Board's actions neither threaten Petitioners' substantive rights nor constitute ultra vires activity.

2. LIKELIHOOD OF SUCCESS ON MERITS.

As discussed above, the Court is unpersuaded by Petitioners' arguments alleging irreparable harm. This general failure to show irreparable harm at this stage makes success on the merits at trial very unlikely.

3. BALANCE OF HARDSHIPS.

Because this Court does not believe the Petitioners are likely to suffer the loss of any Constitutional right if the Board's hearings are allowed to proceed, there will be no hardship to them in denying the injunction. As stated above, their inconvenience in participating in the Board's hearings is not the type of hardship the Court can consider.

4. PUBLIC INTEREST.

Lastly, this Court must consider the public interest, which in this case favors denying the injunction. First, there is a public interest in allowing the Board of Elections to fulfill its legislatively-mandated role, once the Court is satisfied that the hearing process does not violate petitioners' due process rights. As shown above, the Court is so satisfied.

Second, there is a strong public policy to be served by allowing administrative agencies to reach final decisions on the merits before a court steps in to review their work. Orderly government requires that the courts not intrude into the day-to-day functions of the executive branch until the time is ripe to do so.

The petitioners argue that the public interest requires this Court to act now, so that the election results may be certified in time for an orderly transition of government to take place, and so that complex jurisdictional issues may be avoided later. The Court does not agree that granting this injunction would necessarily speed the final resolution of these voter challenges or resolve jurisdictional questions. However, even if an injunction would speed the certification process, the Court cannot interfere with the challenge procedures set up by the legislature just because they may be slow or involve complexities. As the Commonwealth Supreme Court stated in *Tenorio v. Superior Court*, 1 N.M.I. 1, 18 (1980), the Superior Court cannot "substitute its judgment for that of the agencies delegated by the legislature [...] and by the Constitution [...] to legislate the matter." Neither can the Court disrupt the established procedures because

of the possibility that the petitioners' voting rights may be violated by possible future governmental action. If some future action by the Board violates either the petitioners' or the candidates' constitutional or statutory rights, this Court will remain available to provide appropriate remedies.

IV. CONCLUSION

In conclusion, the Court has found that the petition for preliminary injunction is not ripe for decision. Furthermore, the petition does not meet the stringent tests set forth by law for the granting of this kind of extraordinary, equitable relief and is therefore DENIED.

So ORDERED this 3 day of January, 1994.

ALEXANDRO C. CASTRO, Presiding Judge