

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

VICTOR BORJA HOCO

Plaintiff-Appellant,

v.

**MELCHOR ATALIG MENDIOLA, TERESITA APATANG SANTOS, JOVITA
MARATITA TAIMANAO, JUAN MANGLONA AYUYU, and the COMMONWEALTH
OF THE NORTHERN MARIANA ISLANDS ELECTION COMMISSION**

Defendants-Appellees.

ROSS HUGH SONGAO MANGLONA

Plaintiff-Appellant,

v.

**TERESITA APATANG SANTOS, JOVITA MARATITA TAIMANAO, JUAN
MANGLONA AYUYU, and the COMMONWEALTH OF THE NORTHERN MARIANA
ISLANDS ELECTION COMMISSION**

Defendants-Appellees.

**SUPREME COURT NOS. 2009-SCC-0050-CIV and 2009-SCC-0051-CIV
SUPERIOR COURT NOS. 09-0471 R and 09-0472 R**

Cite as: 2009 MP 20

Decided December 31, 2009

Joseph Horey and Michael Dotts, Saipan, Commonwealth of the Northern Mariana Islands, for Appellants.

Robert Torres and Steven Pixley, Saipan, Commonwealth of the Northern Mariana Islands, for Appellees.

Meaghan Hassel-Shearer, Assistant Attorney General, Saipan, Northern Mariana Islands, for the Commonwealth Election Commission.

BEFORE: MIGUEL DEMAPAN, Chief Justice; TIMOTHY BELLAS, Justice Pro Tem; EDWARD MANIBUSAN, Justice Pro Tem

PER CURIAM:

¶1 It is axiomatic that our public officials, particularly those charged with the administration of elections, must conduct their ministerial duties in accordance with the law as set forth by the legislature. In this case, the Commonwealth Election Commission (“Commission”) has failed to conduct itself in accordance with the law.

¶2 Due to the time sensitive nature of election cases and given the strict time limitations the legislature has placed on the courts in resolving election disputes, we find it prudent to issue this summary order while reserving the right to issue a supplemental opinion with a more detailed analysis at a later date. For the reasons discussed below, this Court AFFIRMS the Superior Court’s finding of Commission error, REVERSES its dismissal as premature, ORDERS the writ of Mandamus to issue, and REMANDS to the trial court to supervise the recount in accordance with the procedures set forth in 1 CMC § 6605(a). The trial court may then proceed with the election contest accordingly.

I

¶3 This case comes to us on appeal from the Superior Court’s dismissal of an election contest. On November 16, 2009, Victor Hocog and Ross Manglona filed separate complaints for Election Contest in their individual capacities as voters of Rota and as losing contestants in the November 9, 2009 general election under 1 CMC § 6601(a)(4). In their amended complaints, Hocog and Manglona allege that (1) the Rota ballots were improperly counted because all of the ballots were not subject to a preliminary count on Rota as required by the election statute,¹ (2) the absentee votes cast for Mayor of Rota, Senator, and Representative were not placed on “local ballots,” as required by the election statute,² and (3) a substantial number of votes for Senator and Representative from Rota were counted as undervotes by the Commission when the intent of the

¹ 1 CMC 6524(d)(2) provides:

Votes cast ... for which only voters registered in one senatorial district may determine the outcome must be:
(2) preliminarily counted, tabulated, and published in the senatorial district in which they were cast prior to shipment to the Third Senatorial District for any final counting, tabulation, or publication deemed necessary by the Commission.

² 1 CMC 6524(d)(1) provides:

Votes cast ... for which only voters registered in one senatorial district may determine the outcome must be:
(1) placed on ballots to be known as ‘local ballots,’ separate from any contest decided by voters from more than one senatorial district.

voter could be discerned.³ The complaints alleged that these procedural errors were “sufficient to change the final result of the election” under 1 CMC § 6601(a)(4). Ultimately, the plaintiffs sought a recount. The cases were consolidated and the trial court conducted a hearing on December 4, 2009.

¶4

At the hearing, the defendants – including the Commission – stipulated that four categories of ballots for the Rota election were not preliminarily counted on Rota as required by 1 CMC § 6524(d)(2).⁴ Although the trial court found that the Commission’s failure to preliminarily count all the Rota ballots on Rota was a violation of the procedural requirements set forth in the

³ The parties stipulated to the following definitions:

- (1) Overvote – the ballot votes for more candidates than authorized. For instance, if there are three candidates running for mayor and the voter is entitled to one vote, the ballot has been marked for two candidates in the vote for mayor. These votes are not counted in the election results.
- (2) Undervote – the ballot has an insufficient number of votes or less than the maximum number of votes allowed. For instance, there are five candidates running for senate and the voter is entitled to two votes, the ballot has been marked for only one candidate in the vote for senate. These votes are counted in the election results.
- (3) Improperly marked ballots – ballots that have been marked incorrectly and rejected by the counting machine, but the voter’s intent may or may not be discernable. For instance, the voter has placed an “x” or a “check” to make a choice instead of completely shading in the circle to vote for a candidate. Whether the vote is discernable is at the discretion of the CEC.

⁴ The parties stipulated that the ballots cast in the Rota election fell into five categories:

- (1) The voter was on Rota and the ballot was accepted by the Rota counting machine. These votes were counted on Rota in a preliminary count.
- (2) The voter was on Rota and the ballot was rejected by the Rota counting machine. These votes were counted on Saipan.
- (3) “Emergency” absentee ballots that were dropped off by voters at the Rota Post Office on or before Election Day. These votes were counted on Saipan.
- (4) Absentee ballots that were mailed to the CEC by registered Rota voters in Guam, the United States, or elsewhere around the world, in envelopes preprinted with a Saipan address. These votes were counted on Saipan.
- (5) Ballots of unknown origin. These votes were counted on Saipan.

Of the above five categories, it is undisputed that the ballots rejected by the Rota counting machine, “emergency” absentee ballots, absentee ballots, and other ballots of unknown origin were not preliminarily counted on Rota.

newly enacted Public Laws 16-38 and 16-43, the court held that neither plaintiff had demonstrated the requisite “actual prejudice” under 1 CMC § 6602(a) to be entitled to relief, and dismissed both complaints for “lack of evidence” under 1 CMC § 6605(b). The trial court held that the Election Contest Statute did not provide for the relief the plaintiffs sought, stating that “[t]he Court is mindful of Plaintiffs’ argument that only a recount will show if there was an error made in the counting conducted on Saipan. However, . . . [t]he Court will not undermine Legislative intent by allowing Plaintiffs in this action to use recount as a discovery process to determine if the improper conduct in the proceedings of the election changed the outcome of the election.” Appellants’ Excerpt of Record (“ER”) at 127. In other words, the trial court found no statutory remedy available for the failure of the Commission to comply with the law.

II

¶5

Pursuant to Article IV, section 3 of the Commonwealth Constitution, this Court is vested with “all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth.” *See also*, 1 CMC § 3102(b) (stating that the Supreme Court has original jurisdiction to issue all writs, including the writ of mandamus, “necessary and appropriate to the full exercise of its appellate and supervisory jurisdiction”). We agree with the trial court that the Commission violated Public Laws 16-38 and 16-43 when it failed to conduct a preliminary count on Rota of all the votes cast in the Rota election. We also agree that the Election Contest Statute does not provide plaintiffs with an adequate remedy at law for these violations. We disagree, however, with the trial court that these were mere technical violations. We find that the violations that occurred in this case not only run counter to the legislative purpose behind the enactment of Public Laws 16-38 and 16-43, but that they also effectively undermine the core principles of our democratic process. The stated purpose of Public Law 16-38 was to “promote fair, honest, and transparent elections in the Commonwealth,” and to “amend[] current election law to the benefit of the voters wishing to participate in the political process.” The Commission’s failure to conduct a preliminary count on Rota deprived the candidates their right to observe the Commission’s review of ballots rejected by the voting machine – thereby subverting transparency – and effectively removed Rota voters from the arguably most important part of the election. We recognize that the Commission is constrained by its budget, but that could be said for all governmental entities, and we find the Commission’s cavalier attitude towards Rota voters to be repugnant to the democratic process.

¶6

For the reasons discussed below, under the circumstances of this case, we find it appropriate to exercise our supervisory jurisdiction and issue a writ of mandamus requiring the

Commission to count and tabulate the votes cast in the Rota election in accordance with the law under the supervision of the Superior Court.

A. *Mandamus is the appropriate remedy in this case.*

¶7

Mandamus is a discretionary writ that has been used by courts to compel a government official or government agency – such as election officials or the board of elections or its equivalents – to perform a legally required, ministerial public duty. *See In re Wilbourn*, 590 So.2d 1381, 1386 (Miss. 1991). Unlike the Commonwealth Election Contest Statute, the writ of mandamus does not establish legal rights; it only enforces the performance of preexisting public duties. *See State ex rel. Willke v. Taft*, 836 N.E.2d 536 (Ohio 2005). We begin with the premise that the Commonwealth Election Commission is empowered to execute, not to make, election laws and its decisions are subject to the same review as the decisions of any other administrative agency. *See Hammond v. Love*, 49 A.2d 75 (Md. 1946). This Court has held that “[i]t is generally accepted that an action in mandamus is proper to compel administrative agencies to exercise the powers entrusted to them, to perform ministerial acts and to enforce their rules and regulations.” *Govendo v. Micronesian Garment Manufacturing*, 2 NMI 270, 286-87 (1991) (quoting *Tew v. City of Topeka Police and Fire Civil Service Commission*, 697 P.2d 1279, 1283 (Kan. 1985)). Other courts have held that “[m]andamus is the correct remedy for compelling an [election] officer to conduct an election according to law.” *Hoffman v. State Bar of California*, 113 Cal. App. 4th 630, 639 (2003) (citing *Wenke v. Hitchcock*, 493 P.2d 1154 (Cal. 1972)). In order to be entitled to a writ of mandamus, the plaintiff must establish (1) that the defendant had a clear legal duty to act as requested, coupled with failure to do so, and (2) that mandamus is the only available adequate remedy. *See e.g., Fattlar v. Boyle*, 698 N.E.2d 987 (Ohio 1998).

B. *The Commission failed to fulfill its clear statutory obligations*

¶8

It is uncontested that the Commission failed to count all the Rota ballots in the preliminary count on Rota. It is also uncontested that the Commission failed to provide “local ballots” for Rota absentee voters. For the purposes of this order we focus only on the failure to conduct a full preliminary count on Rota. The first question is whether the Commission was legally required to count all the Rota ballots during the preliminary count on Rota. We note at the outset that two of the three Appellees conceded at oral argument that the Commission committed procedural errors during its administration of the Rota election.

¶9

Whether a public officer has acted contrary to a clearly established legal duty is dependent upon whether the action taken was discretionary or ministerial. *See Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Auth.*, 876 S.W.2d 940 (Tex. App. 1994). A writ of mandamus will issue to compel a public official to perform ministerial acts. *Id.* “For an act to be

considered as ministerial – for mandamus purposes – the law involved must clearly spell out the duty to be performed with sufficient certainty that nothing is left to the exercise of discretion.” *Id.* at 944.

¶10 The Commonwealth Election Law, as amended by Public Laws 16-38 and 16-43 provides:

1 CMC § 6524. Tabulation of Votes

(d) Votes cast for Senator, Representative, Municipal Council and Mayor, as well as for any local initiative or any other matter for which only voters registered in one senatorial district may determine the outcome *must be*:

...

(2) preliminarily counted, tabulated, and published in the senatorial district in which they were cast *prior to shipment to the Third Senatorial District* for any final counting, tabulation, or publication deemed necessary by the Commission.

¶11 The language of 1 CMC § 6524(d)(2) is mandatory on its face. Votes cast for certain local positions “must be” “preliminarily counted, tabulated, and published in the senatorial district in which they were cast prior to shipment to the Third Senatorial District for any final counting.” *Id.* Furthermore, nothing in 1 CMC § 6524 allows the Commission to waive this obligation. The Commission contends that the language of 1 CMC § 6524(d)(2) does not encompass the “emergency” absentee ballots actually cast on Rota or the general absentee ballots cast from around the world for the Rota election but which were mailed to Saipan. We disagree. The statute presumes that all votes will eventually end up in the district for which they are cast. The plain language of 1 CMC § 6524(d)(2) requires the Commission to “tabulate[], and publish[]” the results “*prior to shipment to the Third Senatorial District.*” This also comports with 1 CMC § 6211(c), which specifically provides that “the Commission *shall* establish a mailbox in each senatorial district at which a voter eligible to cast an absentee ballot may cast and deliver their ballot into the custody of the Commission to be counted as provided by this Chapter.” (emphasis added).

¶12 Since 1 CMC § 6524(d)(2) is mandatory, and cannot be waived, the Commission’s failure to preliminarily count, tabulate, and publish the ballots cast for the Rota election in Rota prior to their shipment to Saipan was a violation of a clearly established legal duty and warrants mandamus.

C. *Mandamus is the only available adequate remedy*

¶13 The Election Contest Statute (1 CMC §§ 6601-6610) was meant to provide for an expeditious and efficient means for Commonwealth voters to contest election results based on various grounds, including error of the Commission in the conduct of an election. *See* 1 CMC § 6601(a)(4). This Court reads the Election Contest Statute as only providing three remedies: (1) automatic recount “[i]f less than five votes separate the person declared elected and the next highest vote getter,” 1 CMC § 6601(b); (2) voiding an election for irregularity or improper conduct in the proceedings of the election, 1 CMC § 6602(a); and (3) setting aside an election on account of illegal votes cast. 1 CMC § 6602(b). The statute provides no remedy for voters seeking recount based on errors committed by the Commission where the plaintiff cannot make a prima facie showing that the errors would have effected the outcome of the election under 1 CMC § 6601(a)(4). The practical effect of this statutory scheme is that plaintiffs concerned with blatant procedural violations by the Commission in the conduct of the election simply will not be able to challenge those violations of the law. The Commission literally holds the keys to the ballot box. This power disparity between our public officials and Commonwealth voters, combined with the strict time limits imposed by the legislature for plaintiffs to file election contests, effectively bars plaintiffs from conducting any meaningful discovery or ultimately challenging agency conduct. Suffice it to say that we find plaintiffs in this case without an adequate remedy for the purposes of mandamus.

¶14 We further note that we do not fear the flood gates opening in future elections. To the contrary, if the Commission follows its statutorily defined duties this Court would not have to issue mandamus at all.

III

Conclusion

¶15 For the reasons stated above, this Court AFFIRMS the Superior Court’s finding of Commission error, REVERSES its dismissal as premature, ORDERS the writ of Mandamus to issue, and REMANDS to the trial court to supervise a recount of all Rota ballots cast in the Rota election pursuant to the procedures set forth in 1 CMC § 6605(a).

SO ORDERED this 31st day of December 2009.

/s/

MIGUEL DEMAPAN,
Chief Justice

/s/

TIMOTHY BELLAS,
Justice Pro Tem

/s/ _____
EDWARD MANIBUSAN
Justice Pro Tem