POLYCARP BASILIUS, KUNIWO NAKAMURA, JOHN OLBEDABEL, ERMAS NGIRACHELEBAED, Plaintiffs

ELECTION COMMISSIONER, PALAU DISTRICT, Defendant

Civil Action No. 505 Trial Division of the High Court Palau District

December 28, 1970

Action challenging the regularity of a general Congressional election. The Trial Division of the High Court, Arvin H. Brown, Jr., held that the court's jurisdiction for election appeals was limited to ordering a recount and where such a recount could not disclose which ballots were lawfully cast and which were not a recount would not be ordered.

1. Elections—Legislative Responsibility

Election contests are essentially a responsibility of the legislative branch of government under the theory of separation of powers and are generally beyond the control of the judiciary except to the extent that responsibility therefor has been expressly given the judiciary by legislation.

2. Elections—Powers of Court

Under section 76(c) of the Code the Trial Division of the High Court may order a recount in a contested election; however, the court does not have jurisdiction to order anything else. (T.T.C., Sec. 76(c))

3. Elections—Recount

In order for an election recount to be warranted there must be some chance that at least some of the alleged wrongs could be corrected by it.

4. Elections—Irregularities

Where it is alleged illegal votes were cast and it is not possible for either party to prove how the alleged illegal votes affected the results, the contestants, having the burden of proof, must fail.

Assessor:

WILLIAM O. WALLY, Associate Dis-

trict Court Judge

Interpreter:

KAZUMOTO RENGULBAI

Reporter:

SAM K. SASLAW

Clerk of Courts:

SANAE N. SHMULL, acting in place of the regular 1st Assistant Clerk of

Courts

BASILIUS v. ELECTION COMMISSIONER

Counsel for Plaintiffs:

WILLIAM E. NORRIS, Assistant Public

Defender, and JOHN O. NGIRAKED

Counsel for Defendant:

JAMES E. WHITE, District Attorney

BROWN, Associate Justice

In the general Congressional election held November 3, 1970. at Koror. Palau District. Trust Territory of the Pacific Islands, plaintiffs Polycarp Basilius, Kuniwo Nakamura. John Olbedabel and Ermas Ngirachelebaed were unsuccessful candidates for the offices of the 9th Representative District, 10th Representative District, 4th Senatorial District, and 8th Representative District, respectively. Alleging that there were irregularities in the conduct of the election which caused a substantial possibility that the outcome of the election had been affected, plaintiffs on November 7, 1970, petitioned the Election Commissioner for a recount and also for a declaration that the election was void and illegal. Among the allegations made by plaintiffs in their petition of November 7, 1970, were: (1) approximately six hundred persons voted illegally in that they cast ballots without official registration; (2) numerous persons voted more than once; (3) envelopes containing absentee ballots were opened prior to official tabulation; (4) applications for absentee ballots were accepted and ballots issued after the closing date established by law; and (5) absentee ballots received by the Office of the Election Board after the closing date were counted and tabulated.

After having reviewed and considered the petition, the Election Commissioner on November 12, 1970, notified plaintiffs in writing that the petition was denied and that he had certified the results of the election to the High Commissioner.

The Election Commissioner, on November 12, 1970, also transmitted a memorandum to the High Commissioner to advise the latter of the problem which arose as a

result of the election. In this memorandum, the Election Commissioner stated, in part:—

"As the election progressed it became more and more apparent that many of the people who had in fact registered to vote were not on the registration lists in the various precincts, consequently after reviewing the situation with the candidates and chairmen of both political parties and due to the obvious extent of this problem, approximately 4 o'clock in the afternoon on election day I made the general announcement over the radio indicating that anyone who was qualified to vote should immediately go to their precinct, show age and residency within the precinct and if their name was not in the registry to write in their name on the registry and at that time he or she would be given a ballot to vote.

"This procedure was followed in the precincts during the last several hours of the election and created a total write-in vote of 857 out of a total vote of 4538. After the election was completed we made the enclosed analysis which indicates that in the 10th District, had this decision not been made, over 290 people who were in fact registered but not on the registration sheets in the various precincts would have been denied a right to vote. However this announcement did create a substantial number of write-in votes that were never registered. As far as we have been able to ascertain at this time in reference to the individuals who voted whose names were not supported in any of the lists or by affidavit, they were all 18 years of age or older and were residents within the various precincts where they voted. In the final analysis it appears that if these additional people were not allowed to vote a substantial irregularity would have occurred, or, as here where they were allowed to vote a substantial irregularity in the opposite direction occurred."

On November 16, 1970, plaintiffs filed with the Palau District Court a purported appeal and complaint for other relief wherein the Court's order is sought for a judgment of recount and disallowance of votes, or such other relief as is not inconsistent with law.

On November 24, 1970, plaintiffs filed with this Court a motion to transfer the matter from the District Court to the Trial Division of the High Court and on November 24, 1970, a consent order so transferring the matter was signed.

On November 30, 1970, defendant filed with this Court a motion for judgment on the pleadings, or for summary judgment, or to dismiss with prejudice.

Hearing on defendant's motions came on regularly before this Court, and, after argument, and after certain documentary evidence was offered and received for the purposes of the motions only, and certain stipulations likewise were made, the matter was taken under submission on December 10th.

OPINION

After having carefully considered all of the foregoing, it is abundantly clear that there were serious and numerous irregularities in the election. This Court is deeply concerned over those irregularities but nevertheless must grant defendant's motion to dismiss. In so doing, this Court does not condone any of the irregularities which were so clearly present and trusts that corrective action will be taken by the proper authorities to prevent any recurrence of such regrettable acts and omissions which took place during the balloting and which led to understandable concern, not only on the part of plaintiffs, but also on the part of the public and this Court.

The Court's first consideration is to determine whether or not it has jurisdiction to order any re-election or to issue any order to the Election Commissioner other than an order for a recount. That very question was presented to this Court in the case of Liberal Party of Palau v. Election Commissioner for Palau, 3 T.T.R. 293, wherein this Court, through then Chief Justice Edward P. Furber, correctly pointed out that the complaint in that case, as in the case at bench, failed to indicate any legislative basis for such an appeal or to indicate facts which would in any way bring it within the scope of the limited jurisdiction granted district courts for election appeals under the

provisions of Chapter 3A of the Code of the Trust Territory of the Pacific Islands.

[1] Election contests are essentially a responsibility of the legislative branch of government under the theory of separation of powers and are generally beyond the control of the judiciary except to the extent that responsibility therefor has been expressly given the judiciary by legislation. 26 Am. Jur. 2d, Elections, §§ 316 and 317.

The election with which this Court is concerned was for Members of the Congress of Micronesia. Executive Order of the Secretary of the Interior, No. 2882, of September 28, 1964, as amended, created the Congress of Micronesia and granted legislative authority thereto. Section 70(i) of that order expressly provides, in part, as follows:—

"The Congress shall be the sole judge of the elections and qualifications of its members"

It is true that limited jurisdiction has been granted District Courts for election appeals under Section 76(c) and (d) of the Code of the Trust Territory of the Pacific Islands. Section 76(c) provides as follows:—

"If the Election Commissioner decides not to approve the petition and grant the recount, he shall record the reasons for such decisions. The aggrieved candidate may, within five (5) days after receipt of the decision of the Election Commissioner, appeal his case to the district court. The district court shall review the appeal promptly and render a decision. If the decision is in favor of a recount, the Board of Elections shall be so notified and shall proceed as provided in sub-section (b) of this section."

Section 76(d) is not pertinent to any of the issues of this case.

[2] Since the parties had stipulated to a consent order transferring the case to the High Court rather than to the District Court, this Court, under Section 76(c), may order a recount. However, this Court does not have jurisdiction to order anything else.

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[3, 4] Under paragraph five of plaintiffs' purported appeal and complaint there are listed certain "alleged errors" substantially as set forth in plaintiffs' petition referred to above. It is upon these alleged errors that plaintiffs have demanded a recount. However, in order for a recount to be warranted, there must be some chance that at least some of the alleged wrongs could be corrected by it. In this case, it is stipulated, and the documentary evidence reveals that all of the ballots cast at each polling place were deposited in a single box, and no challenged ballots were segregated from the others. A recount, therefore, could only determine the number of votes cast for each candidate, and this has already been done. A recount could not possibly disclose which ballots were unlawfully cast and which were not. Where it is alleged illegal votes were cast and it is not possible for either party to prove how the alleged illegal votes affected the results, the contestants, having the burden of proof, must fail. 26 Am. Jur. 2d, Elections 321, 338 and 342.

ORDER

Since this Court has no jurisdiction to make any order concerning the conduct of the election other than to order a recount, and since it is apparent that the ordering of a recount could neither change the result of the election nor reveal any illegal ballots, it is accordingly ordered that this action be, and it is hereby dismissed with prejudice.