

CHUUK STATE SUPREME COURT APPELLATE DIVISION

BEN ENLET and MARCELLIUS AKAPITO,) CIVIL APPEAL NO. 04-2021
)
Appellants,)
)
vs.)
)
CHUUK ELECTION COMMISSION,)
)
Appellee,)
)
ALEXANDER NARRUHN and MEKIOSHY)
WILLIAM,)
)
Real Parties in Interest.)
_____)

ORDER MEMORIALIZING RULING

Hearing: April 13, 2021
Decided: April 13, 2021
Memorandum Issued: April 14, 2021

BEFORE:

Hon. Kerio Walliby, Associate Justice, Presiding
Hon. Larry Wentworth, Temporary Justice*
Hon. Bethwell O'Sonis, Temporary Justice**

*Associate Justice, FSM Supreme Court
**FSM Public Defender, Weno, Chuuk

APPEARANCES:

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HEADNOTES

Elections – Contests; Equity

Generally, courts of equity are without jurisdiction to enforce purely political rights, and matters concerning the conduct of elections are usually left to the political branches. The jurisdiction of courts exercising general equity powers does not include election contests, unless it is so provided expressly or impliedly by the constitution or by statute. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 231 (Chk. S. Ct. App. 2021).

Civil Procedure – Injunctions

Injunctive relief is an equitable remedy for which a court must use a balance-of-hardship test with a flexible interplay among four factors – 1) the likelihood of irreparable harm to the plaintiff without an injunction; 2) likelihood of harm to the defendant with an injunction; 3) plaintiff's likelihood of success on the merits; 4) and the public interest. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 231 (Chk. S. Ct. App. 2021).

Elections – Contests; Civil Procedure – Injunctions – Likelihood of Success

The losing candidates could not show likelihood of success on the merits based on their claim about fewer people being able to vote absentee in the runoff election than in the general election because there is no constitutional right to be able to vote absentee and it is only a privilege and because the Election Commission did its best to send out as many absentee ballots as it could in the short time between when the two tickets for the runoff election were certified on March 10, 2021, with the runoff ballots printed shortly thereafter and the time when it would be too late to send out absentee ballots with any hope that the ballots might be executed and returned by 5 pm March 30, 2021, after which any ballots received would be rejected. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 231-32 (Chk. S. Ct. App. 2021).

Elections – Contests; Civil Procedure – Injunctions – Likelihood of Success

The court will not, and cannot, judicially create new and special rules for absentee voting by mail for the covid-19 pandemic after the election is over. The court will follow the constitutionally mandated dates for runoff elections. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 232 (Chk. S. Ct. App. 2021).

Elections – Contests; Civil Procedure – Injunctions – Irreparable Harm

The losing candidates cannot show irreparable harm when they cannot show that their ticket would have had a high likelihood of winning if a larger number of overseas voters had been able to receive their runoff election ballots and returned them on time to be counted because the short time constitutionally set between the general election and any runoff election, and the even shorter time between when runoff election ballots can first be printed and sent out and when they must be received back in Chuuk to be counted makes any different outcome too speculative. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 232 (Chk. S. Ct. App. 2021).

Elections – Contests; Civil Procedure – Injunctions – Balance of Injuries

The balance of injuries does not favor either side when the losing ticket can claim some further injury because they t know if they might have actually won if a larger percentage of the absentee voters had been able to cast a vote in the runoff election but that would balance out with the winning ticket's harm of expending resources on readying matters for when they take office while awaiting for the absentee voting to be rerun. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 232 (Chk. S. Ct. App. 2021).

Elections – Contests; Civil Procedure – Injunctions – Public Interest

The public interest favors the orderly transition of executive power on the constitutionally designated date. The public interest also favors that the elections immediately preceding that transfer not be unduly disrupted, rather than several months of uncertainty that would follow an injunction delaying the swearing

in of the winning ticket, while the court first has trial on whether the absentee ballots should be rerun, and if ordered, then the Election Commission would arrange the rerun and actually conduct the rerun runoff election before actually swearing in a governor and lieutenant governor. This is true particularly when there were no apparent election irregularities. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 233 (Chk. S. Ct. App. 2021).

Elections – Contests; Civil Procedure – Injunctions – Bond

A preliminary injunction should not issue unless the applicant has given security, in such sum, if any, as the court deems proper, for the payment of such costs and damages as are incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Enlet v. Chuuk Election Comm'n, 23 FSM R. 228, 233 (Chk. S. Ct. App. 2021).

* * * *

COURT'S OPINION

KERIO WALLIBY, Associate Justice, Presiding:

On the morning of April 13, 2021, we heard, with off-island counsel appearing by video-conference, the appellants' Motion for a Temporary Restraining Order and Preliminary Injunction, filed April 12, 2021. After our review of the filings, listening to the parties' presentations and arguments, we denied the motion from the bench. This order memorializes that denial.

I. BACKGROUND

In early November 2020, the Chuuk Election Commission certified six tickets of candidates for Chuuk Governor and Lieutenant Governor for the March 2, 2021 general election. In the March 2, 2021 general election, the Alexander Narruhn and Mekioshy William ticket garnered the most votes, but did not receive a majority of the votes cast. On March 10, 2021, the tickets of Alexander Narruhn and Mekioshy William and of Ben K. Enlet and Marcellius J. Akapito were certified as the two tickets with the highest number of votes. A runoff election between the Narruhn-William ticket and the Enlet-Akapito ticket was then set for March 30, 2021, because when "a majority is not received, a runoff election between the candidates on the tickets receiving the two highest pluralities shall be held on the fourth Tuesday following the general election." Chk. Const. art. VI, § 7.

The runoff election was held as constitutionally scheduled. Because of post office staffing problems and the short time between the general election and runoff election dates, the Election Commission was only able to send out 1,004 absentee ballots for the runoff election. About 13,000 had been sent for the general election. Of the 1,004 that were sent out, only 313 were returned and counted in the runoff election. The March 30th runoff election results were certified on April 2, 2021. The Narruhn-William ticket received a majority of the votes cast, with a margin of around 380 votes.

On April 5, 2021, the Enlet-Akapito ticket filed its verified complaint with the Chuuk Election Commission, asking that the results be stayed and that the voting by absentee mail-in ballot part of the election be rerun because a large number of the persons who had requested absentee ballots for the March 2, 2021 general election had not been able to receive absentee ballots for the March 30, 2021 runoff election. On April 7, 2021, the Election Commission informed the Enlet-Akapito ticket that its petition would be denied. The Commission issued its written decision on April 11, 2021.

II. MOTION TO ENJOIN ELECTION RESULT

On April 12, 2021, the Enlet-Akapito ticket appealed that decision to the Chuuk State Supreme Court appellate division and also filed a motion asking us to temporarily restrain or preliminarily enjoin the certification of election of and the swearing in of Alexander Narruhn and Mekioshy William the next day as Governor and Lieutenant Governor respectively. Since they were expected to be sworn in at noon, we held a 9:30 a.m., April 13, 2021 hearing on the Enlet-Akapito ticket's motion.

The Enlet-Akapito ticket asserts that absentee ballot part of the March 30, 2021 runoff election should be rerun since the result might have been different if all of the persons who had been sent absentee ballots for the general election had also been sent absentee ballots for the runoff election.

The Enlet-Akapito ticket contends that they would be irreparably harmed if their requested relief is not ordered because if all 13,000, instead of 1,004, ballot requestors had been sent absentee ballots, they, instead of the Narruhn-William ticket, might have been elected. They further contend that the public interest does not favor the disfranchisement of thousands of potential absentee voters through no fault of their own. The Enlet-Akapito ticket also asserts that they are likely to succeed on the merits, and that balancing the harms between them and the Narruhn-William ticket, they bear the greater harm because, at most, the harm to Narruhn and William would be that they would be delayed taking office.

The Enlet-Akapito ticket therefore asks that the court exercise its equity powers to restrain the swearing in of Narruhn and William and to further order that the absentee voting be rerun.

III. COURT'S RULING

Generally, courts of equity are without jurisdiction to enforce purely political rights, and matters concerning the conduct of elections are usually left to the political branches. Election Comm'r v. Petewon, 6 FSM R. 491, 500 (Chk. S. Ct. App. 1994). The jurisdiction of courts exercising general equity powers does not include election contests, unless it is so provided expressly or impliedly by the constitution or by statute. David v. Uman Election Comm'r, 8 FSM R. 300d, 300g (Chk. S. Ct. App. 1998). The Enlet-Akapito ticket asserts that it is implied by the Election Code allowing for delays under extraordinary circumstances.

Injunctive relief is an equitable remedy for which a court must use a balance-of-hardship test with a flexible interplay among four factors – 1) the likelihood of irreparable harm to the plaintiff without an injunction; 2) likelihood of harm to the defendant with an injunction; 3) plaintiff's likelihood of success on the merits; 4) and the public interest. Onopwi v. Aizawa, 6 FSM R. 537, 539 (Chk. S. Ct. App. 1994). We considered these factors and could find none that favored the appellants, so we denied the motion from the bench.

A. *Likelihood of Success on the Merits*

Enlet and Akapito could not show likelihood of success on the merits because there is no constitutional right to be able to vote absentee and it is only a privilege. Chipen v. Losap Election Comm'r, 9 FSM R. 46, 48 (Chk. S. Ct. Tr. 1999) (due process and equal protection rights are not violated by regulation or restriction of voting by absentee), *aff'd*, 9 FSM R. 80, 81 (Chk. S. Ct. App. 1999) (single justice order denying appellate injunction).

No election irregularities are apparent. The Election Commission did its best to send out as many absentee ballots as it could in the short time between when the two tickets for the runoff election were certified (March 10, 2021) and the runoff ballots printed shortly thereafter and the time when it would be too late to send out absentee ballots with any hope that the ballots might be executed and returned by 5 pm

March 30, 2021, after which any ballots received would be rejected. Chk. S.L. No. 3-95-26, § 92; Setile v. Chuuk State Election Comm'n, 18 FSM R. 641, 643 (Chk. S. Ct. App. 2013) (mail-in ballots must be received at the main office of the Chuuk State Election Commission the closing of the polling places on election day not just at the post office).

In the past, overseas Chuuk citizens were fortunate in that the Election Commission has facilitated, even encouraged, their participation in Chuuk elections by providing convenient polling places overseas where Chuukese may cast their votes instead of mailing in absentee ballots. That, of course, was particularly useful when a runoff election was needed because, even in the best of times, it would be quite difficult, after the runoff candidates are certified, to print and mail the runoff ballots in time that the absentee ballots would be able to get back to Chuuk in time for them to arrive at the Election Commission office before the polls close on election day. The use of overseas polling places alleviated that problem. But the Election Commission was unable to use them in this election because of the covid-19 pandemic and the consequent elimination of most travel and the greatly reduced air shipment frequency.

We will not, and cannot, judicially create new and special rules for absentee voting by mail for the covid-19 pandemic after the election is over. We will follow the constitutionally mandated dates for runoff elections.

B. Irreparable Harm to Appellants

We conclude that the irreparable harm factor does not favor Enlet and Akapito. That is because Enlet and Akapito cannot show that their ticket would have had a high likelihood of winning if a larger number of overseas voters had been able to receive their runoff election ballots and returned them on time to be counted. The short time constitutionally set between the general election and any runoff election makes the even shorter time between when runoff election ballots can first be printed and sent out and when they must be received back in Chuuk to be counted makes any different outcome too speculative. An absentee voter is always subject to the chance that the absentee ballot will not arrive in time to execute and return, or, even if properly executed and returned, that the ballot might not arrive in Chuuk Election Commission office by 5 p.m. on election day.

A court may not grant a movant's request for temporary or preliminary injunctive relief when there has been no showing of irreparable harm. Macayon v. Chuuk State Bd. of Educ., 19 FSM R. 644, 648 (Chk. S. Ct. Tr. 2015).

C. Balance of Harms

Because the Enlet-Akapito ticket has made a weak showing of its likelihood of success, the balance of harm factor does not favor Enlet and Akapito either. The apparent harms to both the Narruhn-William ticket and the Enlet-Akapito ticket are all the effort and resources they have expended and would have to continue to expend are harms both would bear equally. The Enlet-Akapito ticket might claim some further injury because Enlet and Akapito do not know if they might have actually won if a larger percentage of the absentee voters had been able to cast a vote in the runoff election. But that would balance out with the Narruhn-William ticket's harm of expending resources on readying matters for when they take office while awaiting for the absentee voting to be rerun. The balance of injuries thus does not favor, or strongly favor, either side.

D. Public Interest

Enlet and Akapito contend that the public interest favors an injunction because the public interest favors learning whether the result would be different if more absentee ballots had been sent out.

The public interest favors the orderly transition of executive power on the constitutionally designated date. The public interest also favors that the elections immediately preceding that transfer not be unduly disrupted, rather than several months of uncertainty that would follow an injunction delaying the swearing in of Narruhn and William as Governor and Lieutenant Governor, respectively, while the court first has trial on whether the absentee ballots should be rerun, and if ordered, then the Election Commission would arrange the rerun and actually conduct the rerun runoff election before actually swearing in a governor and lieutenant governor. This is true particularly when there were no apparent election irregularities. The failure to send out more absentee runoff election ballots to everyone who had requested a general election absentee ballot (except, of course, for those whose ballots were returned as undeliverable) can only be attributed to the Post Office, not the Election Commission.

Furthermore, it is doubtful whether we should or could order a delay that long. The Election Code allows only a 60-day delay in case of typhoon or other such unexpected emergencies. Chk. S.L. No. 3-95-26, § 32. The short time between the general election and the runoff was not an unexpected emergency. We should not be able to order a greater delay than that but would probably need to in order to permit greater absentee voting participation based on the hypothetical that if more persons had voted absentee, the outcome might change.

Thus, this factor does not clearly favor injunctive relief.

E. *Bond*

Lastly, there was no offer of a bond to cover the Election Commission's expenses (or the Narruhn-William's ticket's expenses) if the injunction were granted and then later determined to have been wrongfully granted – that is, that the Enlet-Akapito ticket did not prevail on its claim that the absentee part of the runoff election be rerun. A preliminary injunction should not issue unless the applicant has given security, in such sum, if any, as the court deems proper, for the payment of such costs and damages as are incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. FSM Petroleum Corp. v. Etomara, 21 FSM R. 123, 128 (Chk. 2017).

IV. CONCLUSION

Accordingly, we denied from the bench Enlet's and Akapito's Motion for a Temporary Restraining Order and a Preliminary Injunction. Parties are invited to file, within the next ten days of entry of this memorandum, briefs on whether we have any further jurisdiction in this matter once the Governor and the Lieutenant Governor have been sworn in.

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