

FSM SUPREME COURT APPELLATE DIVISION

AUSEN T. LAMBERT,)	APPEAL CASE NO. P7-2021
)	
Appellant,)	
)	
vs.)	
)	
FSM NATIONAL ELECTION DIRECTOR,)	
)	
Appellee,)	
)	
FERNY S. PERMAN,)	
)	
Real Party in Interest.)	
_____)	

OPINION

Argued: May 5, 2021
Decided: May 10, 2021

BEFORE:

Hon. Beaulen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Larry Wentworth, Associate Justice, FSM Supreme Court
Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellant:	Marstella E. Jack, Esq. P.O. Box 2210 Kolonia, Pohnpei, FM 96941
For the Appellee:	Salomon M. Saimon, Esq. P.O. Box 911 Kolonia, Pohnpei, FM 96941
For the Real Party in Interest:	Erick Divinagracia, Esq. Ramp & Mida Law Firm P.O. Box 1480 Kolonia, Pohnpei FM 96941

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HEADNOTES

Appellate Review – Briefs, Record, and Oral Argument

An appellant is expected to be able to file a reply brief, and should not be deprived of the ability to file a reply brief merely because the court neglected to set a filing date for it in its scheduling order. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 289 (App. 2021).

Elections – Court Jurisdiction

If the National Election Director lacked jurisdiction to consider the merits of a candidate's petition, then the court would also lack jurisdiction to consider the merits of the candidate's appeal. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 289 (App. 2021).

Elections – Revote

When the National Election Director's election certification was March 19, 2021, a March 25, 2021 petition for a revote was timely filed because a petition for a revote must be filed within one week after the National Election Director certifies the results of the National Election in the Congressional Election District concerned. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 290 (App. 2021).

Elections – Contests

A candidate contesting an election must strictly observe the steps necessary – the filing deadlines – to give the court jurisdiction by filing his appeal within the statutory time frames. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 290 (App. 2021).

Elections – Contests

Since the time frames established by statute for election petitions to the National Election Director are short, a candidate must be vigilant in asserting his rights to petition. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 290 (App. 2021).

Elections – Contests

A candidate's March 30, 2021 submissions were filed too late to be a part of his election contest petition. They should have been submitted with the candidate's timely March 25, 2021 petition. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 290 (App. 2021).

Elections – Contests

The National Election Director has the authority to either grant or deny an election contest petition. Thus, the National Election Director's emphatic language – “dismissed with prejudice” is no more than the National Election Director's denial of the candidate's petition for the reasons stated in writing. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 291 (App. 2021).

Elections – Contests

Congress intended that the election appeal process be timely and expeditious. It would not be timely and expeditious with continual remands to the National Election Director. The statute does not contemplate remands to cure the National Election Director's lapses or shortcomings. The only contemplated remands are for the purpose of conducting a recount or a revote. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 291-92 (App. 2021).

Elections – Conduct

The statute requires that each absentee ballot be mailed separately. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 292 (App. 2021).

Elections – Revote

The National Election Director must grant a petition for a revote where he or she determines that the petitioner has shown by a preponderance of the evidence that it is more likely than not that the fraud or error complained of could have resulted in the election of a candidate who would not have won had the fraud or error not occurred. But when no election records were listed or affidavits provided or witnesses listed, that could show that it was more likely than not that there would be a sufficiently large number of Pohnpei Election District No. 1 voters who could and would be able to vote at the Guam and Honolulu special polling places in a revote, and who had not already voted by absentee mail-in ballots, the candidate could not have

been able to show by a preponderance of the evidence that he did put before the National Election Director that the outcome could change and the result would be the candidate's election. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 292 (App. 2021).

Elections – Contests; Elections – Revote

An election petition's deficiencies do not mean that the National Election Director lacks jurisdiction over a candidate's election contest petition. Those deficiencies mean that the National Election Director could and should deny the candidate's petition because the candidate did not show by a preponderance of the evidence that allowing a revote at the Guam and Honolulu special polling places could have changed the outcome. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 293 (App. 2021).

Elections – Contests

Although the reason – lack of jurisdiction – that the National Election Director gave for denying a candidate's petition was not in accordance with law, the court may affirm the National Election Director's denial on its result because of the lack of evidence on which the National Election Director could have granted the petition. Lambert v. FSM Nat'l Election Dir., 23 FSM R. 285, 293 (App. 2021).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This appeal arises from the March 19, 2021 certification of Ferny S. Perman as the winning candidate in Pohnpei Election District No. 1 and from the National Election Director's April 15, 2021 dismissal or denial of candidate Ausen T. Lambert's election petition that had sought a partial revote and certain other possible relief. For the following reasons, we dismiss Lambert's appeal.

I. BACKGROUND

A. *Run up to Election Certification*

Ausen T. Lambert and Ferny S. Perman were both candidates in the March 2, 2021 general election to represent Pohnpei Election District No. 1 in Congress. On December 3, 2020, the President issued a proclamation suspending the FSM's use of special polling places in Guam and in Honolulu, which meant that those voters who intended to vote at those polling places would have to vote by mail-in absentee ballots instead.

On February 25, 2021, the President amended that decree to provide that any mail-in ballot postmarked on or before March 2, 2021, and received by 5:00 p.m., March 16, 2021, should be accepted as a valid mail-in ballot. The election results were certified on March 19, 2021. Ferny S. Perman was declared the winning candidate, having received 117 more votes than candidate Ausen T. Lambert.

B. *Lambert's Election Contest Petition*

On March 25, 2021, Lambert filed a petition with the National Election Director Ioanis Sahm. Lambert asked for "a 'revote' of the election for ED #1 special polling places or absentee voters" and listed the following seven grounds for relief:

1) that the statute required that there be special polling places in Guam and Honolulu and therefore the National Election Director's decision not to designate polling places there was without authority and

should be set aside and polling places should be designated there for a revote;

2) that the President's December 3, 2020 suspension of Guam and Honolulu polling places did not give the voters, who had expected to vote there, enough time to ask for an absentee ballot by the January 21, 2021 deadline for absentee requests;

3) that the National Election Director did not strike out the names of absentee voters from the signature lists for regular polling places as required;

4) that many overseas absentee ballots were not notarized properly;

5) that Lambert's March 3, 2021 request for the signature list for Sapwuahfik was not honored and it was never produced;

6) that thirty or so absentee ballots that were in individual envelopes were not counted because they had arrived together inside one large manila envelope; and

7) that five votes for Lambert were voided because the voters had not only checked off Lambert's name on the ballot but had also written in his name in the space provided for write-in votes.

C. National Election Director's Actions

On March 29, 2021, the National Election Director issued a notice asking the parties (Lambert and Perman) to brief the application of 9 F.S.M.C. 801(4)(a)-(d) to the contents of Lambert's March 25, 2021 petition. The notice also stated that if either party wanted oral argument, they should ask for it by April 5, 2021. Neither party asked for a hearing.

On March 30, 2021, Lambert submitted affidavits from Lambert himself (about earlier requests for the Sapwuahfik signature list); from Anthony Lambert (about the five ballots with Lambert's name written in as well as checked off); and from Sammy Ray Rettin (about the individual ballots received in one manila envelope).

On April 15, 2021, the National Election Director issued his decision. The National Election Director "dismissed with prejudice" Lambert's petition because the petition had not contained a list of witnesses and election records and it was not accompanied by affidavits and documents in support, as required by 9 F.S.M.C. 801(4)(a)-(d). The National Election Director further ruled that Lambert's March 30, 2021 filing of affidavits did not cure Lambert's failure to include those things with his petition, as required. The National Election Director concluded that since Lambert had not complied with 9 F.S.M.C. 801(4), the National Election Director lacked jurisdiction to otherwise decide the petition.

D. Election Appeal

On April 19, 2021, Lambert appealed the National Election Director's decision to the FSM Supreme Court appellate division. Our April 22, 2021 scheduling order set April 23, 2021, for the parties to jointly file the agreed record; April 27, 2021 for Lambert, the appellant, to file his opening brief; and April 29, 2021, for the National Election Director, the appellee, and for Perman, the real party in interest, to file their briefs, with oral argument to be held the following week. The briefs were duly filed, and oral argument was set for May 5, 2021.

On May 5, 2021, Lambert filed a reply brief and the National Election Director then filed a motion (joined orally by Perman) to strike Lambert's reply brief because it was filed just hours before oral argument.

We hereby deny the motion to strike because an appellant is expected to be able to file a reply brief, see FSM App. R. 28(c), and we do not feel that an appellant should be deprived of the ability to file a reply brief merely because the court neglected to set a filing date for it in the scheduling order – a litigant should not be disadvantaged because we mistakenly failed to set a reply brief filing date in our order setting expedited filing dates.

II. ISSUES PRESENTED

Lambert, in his opening brief, raises seven issues for our review that vary somewhat from the seven issues in his election contest petition. They are:

1) whether the National Election Director's decision to dismiss his election contest petition with prejudice for lack of jurisdiction was arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law;

2) whether the suspension of special polling places in Guam and Honolulu was done in accordance with the law when 9 F.S.M.C. 605(2) established polling places there;

3) whether the December 3, 2020 announcement suspending the Guam and Honolulu special polling places infringed on the rights of absentee voters there to adequately request absentee ballots;

4) whether the National Election Director's alleged failure to strike out names on the Sapwuahfik signature list and his failure to release that document to Lambert unlawfully permitted double voting;

5) whether the National Election Director's refusal to release the Sapwuahfik signature list denied Lambert his right to receive records to adequately prepare his appeal;

6) whether the National Election Director acted in conformance with the law, 9 F.S.M.C. 602(4)(c), when he voided the 30 bulk mail-in votes that arrived in one large manila envelope but were in separate individual envelopes; and

7) whether the National Election Director acted in accordance with 9 F.S.M.C. 713(4) when he voided five votes for Lambert because there was a mark next to Lambert's name on the ballot and the same name was written in the space for write-in votes.

III. DISCUSSION

A. *National Election Director's Jurisdiction and Authority*

We first address the issue of jurisdiction because if the National Election Director lacked jurisdiction to consider the merits of Lambert's petition, then we would also lack jurisdiction to consider the merits of Lambert's appeal. Cf. Asugar v. Edward, 13 FSM R. 215, 219 (App. 2005) (election contestant must satisfy all the statutory deadlines for both petition to the Director and later appeal to court); Doone v. Chuuk State Election Comm'n, 16 FSM R. 513, 519 (Chk. S. Ct. App. 2009) (neither the election commission nor the court can take jurisdiction over an election contest when it is not timely filed); Doone v. Chuuk State Election Comm'n, 16 FSM R. 459, 463 (Chk. S. Ct. App. 2009) (since statutory filing deadlines are mandatory, if an election complaint was not timely filed with the election commission, then neither the election commission nor the court has jurisdiction over the election contest).

1. *Petition Timely Filed*

Lambert's March 25, 2021 petition was timely filed. That is because "[a] petition for a . . . revote must be filed within one week after the National Election Director certifies the results of the National Election in the Congressional Election District . . . concerned." 9 F.S.M.C. 802(1). Lambert thus had until March 26, 2021, to file an election contest petition after the National Election Director's March 19, 2021 certification. A candidate contesting an election must strictly observe the steps necessary – the filing deadlines – to give the court jurisdiction by filing his appeal within the statutory time frames. *Wiliander v. National Election Dir.*, 13 FSM R. 199, 203 (App. 2005); see also *Sipenuk v. FSM Nat'l Election Dir.*, 15 FSM R. 1, 4 (App. 2007); *Asugar v. Edward*, 13 FSM R. 215, 220 (App. 2005).

The National Election Director and Perman both contend that because, in their view, Lambert's March 25, 2021 petition did not contain all the items listed in the statute, and because an election contestant must strictly comply with the Election Code, the National Election Director had no jurisdiction to do anything other than to dismiss Lambert's petition. In effect, they contend that the National Election Director lacked jurisdiction over Lambert's petition because it was incomplete. The statute provides that:

(2) If a candidate believes that there was fraud or error committed in the canvassing, casting or return of votes in a National Election which cannot be corrected by recount, a candidate may petition for a revote, either in a Congressional Election District as a whole, or in the portion thereof where the fraud or error took place.

. . . .

(4) A petition under subsections (1), (2) or (3) of this section shall be filed with the National Election Director. Such petition shall contain:

(a) a statement of the nature, location and extent of the election fraud or error that forms the basis of the petition;

(b) a statement of the form of relief the petitioner seeks;

(c) a list of election records and witnesses that will establish the existence of election error or fraud, specifying how each record or official listed is relevant to allegations contained in the petition; and

(d) affidavits, documents and any other evidence in support of the petition.

9 F.S.M.C. 801.

2. *Affidavits and other Documents Not Timely Filed*

Perman and the National Election Director contend that Lambert's March 30, 2021 submission of affidavits and documents does not cure Lambert's failure to file those documents with his incomplete March 25, 2021 petition because they were submitted after the March 26, 2021 deadline to petition for a revote. We agree. Since the time frames established by statute for election petitions to the National Election Director are short, a "candidate must be vigilant in asserting his rights to petition." *Wiliander v. Mallarme*, 7 FSM R. 152, 157 (App. 1995). Lambert's March 30, 2021 submissions were filed too late to be a part of his election contest petition. Furthermore, we see no reason why those affidavits and documents could not have been timely submitted with Lambert's March 25, 2021 petition. The affiants were present on Pohnpei

and the information was in their possession before then.

We do not decide whether, if the affidavits had been submitted on the March 26, 2021 deadline for filing election contest petitions and the day after Lambert had filed his petition, those documents should have been considered part of Lambert's petition. That question is not before us.

Lambert contends that he could not comply with § 801(4)(c) because the National Election Director had not provided the documents, such as the Sapwuahfik signature list, that he had requested. That is incorrect. The statute only requires that the election contestant list the needed documents in his petition. Once he has done that, it is the National Election Director's duty to provide those documents to the election contestant and to the winning candidate. That is sensible because the "election records" needed are almost always in the sole possession of the election officials and nowhere else. The Sapwuahfik signature list was an election record specifically mentioned in Lambert's petition. It should therefore have been provided at that point.

The statute does not require that the petitioner's "list" of documents be in any particular form. As long as the needed "election records" are readily identifiable from the election contestant's petition, the election contestant has provided the required list of election records. There are no potential witnesses, other than Lambert himself, readily identifiable from Lambert's petition.

3. *Effect of Timely Petition*

More importantly, the National Election Director and Perman both contend that the National Election Director lacked any jurisdiction to rule on Lambert's petition because it not only did not contain the affidavits, documents, and other evidence required by § 801(4)(d), but it also did not include the list of election records and witnesses required by § 801(4)(c). We do not agree. Lambert's election contest petition was timely filed. At that point the National Election Director only has the authority to grant or deny the petition. Lambert's election contest should therefore have gone forward on the merits and with what evidence was referred to or identified in Lambert's petition or that accompanied it. The National Election Director had jurisdiction.

Lambert contends that the National Election Director's dismissal "with prejudice" of his petition exceeded the National Election Director's authority because the statute only gives the National Election Director the authority to grant or deny a candidate's election petition. The National Election Director has the authority to either grant or deny an election contest petition. See 9 F.S.M.C. 804(1). We therefore read the National Election Director's emphatic language – "dismissed with prejudice" to be no more than the National Election Director's denial of Lambert's petition for the reasons stated in writing. As such, the National Election Director did not exceed his authority by using that language, although he would have been better served by sticking to the statutory language.

4. *Possible Remands*

Perman and the National Election Director both contend that if we conclude that the National Election Director had jurisdiction, we must remand the matter to the National Election Director for him to consider and decide the merits. We decline to follow that suggestion. In *Wiliander v. Mallarme*, 7 FSM R. 152, 158 (App. 1995), we held that when the Director had not rendered his decision within the statutorily-prescribed time limit it must be considered a denial of the petition, and the petitioner can then file his appeal in the Supreme Court. In such an appeal, we would not have the benefit of the National Election Director's reasoning, but would proceed to the merits since a remand would be pointless.

Congress intended "that the election appeal process be timely and expeditious." *Wiliander*, 7 FSM R. at 161. It would not be timely and expeditious with continual remands to the National Election Director.

The statute does not contemplate remands to cure the National Election Director's lapses or shortcomings. The only contemplated remands are for the purpose of conducting a recount or a revote. 9 F.S.M.C. 804(3). To hold otherwise would only encourage lapses by the National Election Director.

B. Bundled Ballots

We address the matter of the absentee ballots in separate envelopes but received in a bundle since these voters may be affected by the request for a revote for absentee ballots at special polling places in Guam and Honolulu. Under 9 F.S.M.C. 602(4)(c), “[a]n absentee ballot may be determined to be invalid if: . . . (v) the ballot was returned in a bundle with other ballots.” The statute is clear.

The National Election Director correctly invalidated those ballots because they all came in a single bundle or package. It is unfortunate that someone, perhaps in a misguided attempt to save on postage, thought that bundling ballots was acceptable if the ballots themselves were in separate envelopes. The statute requires that each absentee ballot be mailed separately.

C. Revote Request

Lambert contends that 9 F.S.M.C. 605(2) (“there shall be one special Polling Place in Guam and one special Polling Place in Honolulu and that these shall be the only special Polling Places located outside the Federated States of Micronesia”) requires that special polling places be established in Guam and Honolulu and that it was error that they were not established. The National Election Director and Perman contend that it was not error since the President could issue the December 3, 2020 decree suspending those polling places because of the President's power to declare emergencies during natural disasters, FSM Const. art. X, § 9(a), and his statutory authority under 9 F.S.M.C. 105(1) when the conduct of an election is affected by a natural disaster.

The errors that Lambert complains of are, in his view, the National Election Director's failure to designate special polling places in Guam and Honolulu for FSM citizens to cast their votes in the March 2, 2021 election, and that the time between the President's December 3, 2020 proclamation suspending those polling places and the January 21, 2021 cutoff date for requesting absentee ballots was insufficient. We do not have to decide whether either of these two was an error. Under 9 F.S.M.C. 803(2), the National Election Director must

grant a petition for a revote where he or she determines that the petitioner has shown by a preponderance of the evidence that it is more likely than not that the fraud or error complained of could have resulted in the election of a candidate who would not have won had the fraud or error not occurred.

Even assuming that these alleged errors complained of were actually errors, and we make no such holding, Lambert is not entitled to the relief he seeks – a revote in Guam and Honolulu special polling places. Presumably, this revote would exclude all those voters there who have already voted by mail-in absentee ballots. Based on the lack of witnesses mentioned or listed in Lambert's petition; the dearth of election records mentioned or listed; and the lack of affidavits; Lambert could not have been able to show by a preponderance of the evidence that he did put before the National Election Director that the result could have been that he, instead of Perman, would have been elected. No election records were listed or affidavits provided or witnesses listed, that could show that it was more likely than not that there would be a sufficiently large number of Pohnpei Election District No. 1 voters who could and would be able to vote at the Guam and Honolulu special polling places in a revote, and who had not already voted by absentee mail-in ballots, that the outcome could change and the result would be Lambert's election.

Put succinctly, the petition's deficiencies did not mean, as the National Election Director claimed they did, that the National Election Director lacked jurisdiction over Lambert's election contest petition. Those deficiencies did mean that the National Election Director could and should have denied Lambert's petition because Lambert did not show by a preponderance of the evidence that allowing a revote at the Guam and Honolulu special polling places could have changed the outcome. Lambert's claimed errors 4), 5), and 7) would not change this outcome, and so are not considered.

Therefore, although the reason – lack of jurisdiction – that the National Election Director gave for denying Lambert's petition was not in accordance with law, we may affirm the National Election Director's denial on its result because of the lack of evidence on which the National Election Director could have granted the petition.

IV. CONCLUSION

ACCORDINGLY, we hereby affirm the National Election Director's denial of Lambert's election contest petition for the reasons given above, and not for the erroneous reason that the National Election Director gave in his April 15, 2021 decision.

* * * *

FSM SUPREME COURT TRIAL DIVISION

MARIANNE B. SETIK, individually and as)	CIVIL ACTION NO. 2021-002
Administratrix of the Estate of Raymond Setik, and)	
IRENE SETIK, individually and as Administratrix)	
of the Estate of Manney Setik, and Personal)	
Representatives of the Heirs of Raymond Setik,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
FELICIANO PERMAN, POHNPEI COURT OF)	
LAND TENURE, and POHNPEI STATE)	
GOVERNMENT,)	
)	
Defendants.)	
_____)	

ABSTENTION; ORDER OF DISMISSAL AND REMAND

Chang B. William
Specially Assigned Justice

Decided: May 12, 2021

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