

CHAPTER 8

Procedure for Petitions and Appeals

SECTIONS

- § 801. **Petitions for recount, revote or challenging acceptability of votes.**
- § 802. **Filing time frames.**
- § 803. **Standard of proof.**
- § 804. **Denial of petition; Appeal to Supreme Court.**
- § 805. **Approval of petition; Notice of recount or revote.**

Editor's note: Chapter 8 of this title on Procedure for Petitions and Appeals was enacted by section 66 of PL 14-76.

§ 801. Petitions for recount, revote or challenging acceptability of votes.

- (1) A petition for a recount may be filed by any candidate who believes that there was fraud or error committed in the canvassing, casting or return of votes in a National Election.
- (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.
- (3) Any other petition challenging the acceptability of a vote or votes may be filed by any Registered Voter who believes that there was fraud or error committed in the canvassing, casting or return of votes in a National Election. A petition under this subsection shall include a petition by a candidate challenging a decision of the National Election Director made under subsection 303(10) of this title.
- (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.

Source: PL 14-76 § 67.

Cross-reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the Congress of the Federated States of Micronesia are found in title 3 of this code. The statutory provisions on the FSM Supreme Court and the Judiciary are found in title 4 of this code.

The website of the FSM National Government contains announcements, press releases, news, forms, and other information on the National Government at <http://fsmgov.org>.

The FSM Supreme Court website contains court decisions, rules, calendars, and other information of the court, the Constitution, the code of the Federated States of Micronesia, and other legal resource information at <http://www.fsmsupremecourt.org/>.

The official website of the Congress of the Federated States of Micronesia contains the public laws enacted by the Congress, sessions, committee hearings, rules, and other Congressional information at <http://www.fsmcongress.fm/>.

Case annotations: The only explicit right to suffrage found in the FSM Constitution is the right to "vote in national elections." So an alleged denial of a right to suffrage in a Chuuk state election would be the denial of a right under the Chuuk Constitution's suffrage provisions, and not a denial of FSM constitutional right to suffrage. *Ueda v. Chuuk State Election Comm'n*, 16 FSM R. 395, 397 (Chk. 2009).

A claim of denial of the right to suffrage in a state election because no revote was ordered is not a claim arising under the national constitution or law. *Ueda v. Chuuk State Election Comm'n*, 16 FSM R. 395, 397 (Chk. 2009).

When the constitutional issues the plaintiffs raise are either a part of an election contest over which the court has no jurisdiction or are hypothetical, abstract, or academic, the court lacks jurisdiction over the case. *Ueda v. Chuuk State Election Comm'n*, 16 FSM R. 395, 398 (Chk. 2009).

A petition presented to the National Election Director must 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 the petition's allegations; and d) affidavits, documents and any other evidence in support of the petition. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 420 (App. 2009).

To interpret 9 F.S.M.C. 904, the FSM Supreme Court should apply a two prong test. The first prong is whether there is a "substantial question of fraud or error" and the second prong is whether there is "substantial possibility that the outcome would be affected by a recount." *Olter v. National Election Comm'r*, 3 FSM R. 123, 136-37 (App. 1987).

§ 802. Filing time frames.

(1) A petition for a recount or revote must be filed within one week after the National Election Director certifies the results of the National Election in the Congressional Election District or State concerned.

(2) Any other petition challenging the acceptability of a vote or votes must be filed before the National Election Director certifies the results of the National Election in the Congressional Election District or State concerned, or within one week of Election Day, whichever occurs first, provided that if a petition could not have been filed within one week of Election Day as a result of a delayed action or decision of the National Election Director or a national election commissioner, then the petition shall be filed prior to certification of the election result for the relevant National Election District or State.

(3) The winning candidate shall have one week to respond to the petition.

(4) The National Election Director shall have 14 days to decide whether to approve the petition.

Source: PL 14-76 § 68.

Case annotation: The court lacks jurisdiction to hear an election appeal filed too soon because the statute does not grant the court jurisdiction over election cases until the administrative steps and time frames in 9 F.S.M.C. 902 have been adhered to. Such an appeal is therefore dismissed as premature (unripe). *Wiliander v. National Election Dir.*, 13 FSM R. 199, 204 (App. 2005).

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).

Where no action, or words, or silence of the National Election Director prior to the appellant's initial petition misled the appellant into untimely filing his petition after certification it does not give rise to an estoppel. The Director's later failure to raise the issue of untimeliness until his denial of the petition was appealed to the Supreme Court does not give rise to an estoppel. *Wiliander v. Mallarme*, 7 FSM R. 152, 157-58 (App. 1995).

Deadlines set by statute are generally jurisdictional. If the deadline has not been strictly complied with the adjudicator is without jurisdiction over the matter once the deadline has passed. This applies equally to the National Election Director as a member of an administrative agency (executive branch) hearing an appeal as it does to a court hearing an appeal from an administrative agency. Thus the Director cannot extend statutory time frames set by Congress. 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 could then have filed his appeal in the Supreme Court. *Wiliander v. Mallarme*, 7 FSM R. 152, 158 (App. 1995).

Congress intended that the election appeal process be timely and expeditious. This is especially important in a year in which the newly elected Congress selects the President and Vice President of the nation from among its members. *Wiliander v. Mallarme*, 7 FSM R. 152, 161 (App. 1995).

When an election contestant's shifting allegations of irregularities (the allegations shifted from misreporting or tampering with the reported results to double-voting) and his later exhibits could have been an appropriate basis for a post-certification petition to the National Election Director, but instead of filing the required post-certification petition, the contestant filed a court appeal, the court cannot conduct a meaningful appellate review in such a manner and therefore cannot consider them because these issues and exhibits would, if allowed, come before the court without the benefit of the National Election Director's reasoned review and decision. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 420-21 (App. 2009).

If an election contestant's appeal is considered as only a claim challenging the acceptability of votes, the five-day time frame to appeal the National Election Commissioner's denial of that claim would start then even though a recount was pending because an FSM Supreme Court appellate division decision may have the effect of disallowing challenged votes but shall not halt or delay balloting or counting and tabulating. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 421 (App. 2009).

A candidate's only appeal from the certification of an election or the declaration of the winning candidate is to file a petition with the National Election Director within seven days of the certification, and, if the candidate is still aggrieved after the National Election Director's decision on the post-certification petition, then he or she may appeal to the FSM Supreme Court appellate division. The Election Code does not authorize an appeal of a certification of election directly to the FSM Supreme Court. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 421-22 (App. 2009).

An election appeal filed too soon will be dismissed as premature (unripe) because the statute does not grant the court jurisdiction over election cases until the administrative steps and time frames have been adhered to. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 422 (App. 2009).

§ 803. Standard of proof.

(1) The National Election Director shall grant a petition for a recount where he or she determines that the petitioner has shown by a preponderance of the evidence that there is a substantial question of fraud or error and that

there is a substantial possibility that the outcome of the election would be affected by a recount.

(2) The National Election Director shall 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.

(3) The National Election Director shall grant any other petition challenging the acceptability of a vote or votes where he or she determines that the petitioner has shown by preponderance of the evidence that fraud or error occurred in the canvassing, casting or return of votes in a National Election, and that the relief sought is a reasonable and equitable means of remedying such fraud or error.

(4) Notwithstanding subsection (1) of this section, a petition for a recount must be granted if the difference between the number of votes cast for the winning candidate and the next highest candidate is one-half of one percent or less of the total votes cast for all of the candidates for that particular seat.

Source: PL 14-76 § 69.

§ 804. Denial of petition; Appeal to Supreme Court.

(1) If the National Election Director decides to grant or deny a petition, he or she shall record the reasons for such decision in writing and provide a copy to the petitioner, and where the petitioner is a losing candidate, to the winning candidate, by the most expeditious means practicable.

(2) Except with regard to a decision to provide a recount, a petitioner, or where the petitioner is a losing candidate, the winning candidate, may, within five days after receipt of the decision of the National Election Director granting or denying the petition, appeal the decision to the Appellate Division of the Supreme Court of the Federated States of Micronesia. The Appellate Division of the Supreme Court shall review the appeal to determine if the decision by the National Election Director was:

- (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (b) in excess of statutory jurisdiction, authority, or limitations, or a denial of legal right;
- (c) without substantial compliance with the procedures required by law; or
- (d) unwarranted by the facts.

(3) If the Appellate Division of the Supreme Court decides in favor of a recount or a revote, the National Election Director shall be so notified and shall proceed as provided in section 805 of this title.

(4) A decision of the Appellate Division of the Supreme Court may have the effect of disallowing challenged votes but shall not halt or delay balloting or counting and tabulating.

Source: PL 14-76 § 70.

Cross-reference: The statutory provisions on the Judiciary and the FSM Supreme Court are found in title 4 of this code.

Case annotations: The court lacks jurisdiction to hear an election appeal filed too soon because the statute does not grant the court jurisdiction over election cases until the administrative steps and time frames in 9 F.S.M.C. 902 have been adhered to. Such an appeal is therefore dismissed as premature (unripe). *Wiliander v. National Election Dir.*, 13 FSM R. 199, 204 (App. 2005).

If the possibility of double voting is alleged the burden is on the appellant to show that it occurred. *Aten v. National Election Comm'r (II)*, 6 FSM R. 74, 78 (App. 1993).

When the National Election Commissioner's decision concerning election irregularities is appealed to the FSM Supreme Court, the appellate division must decide whether the National Election Commissioner's decision is proper, and if not, whether the irregularities complained of could have resulted in the election of a candidate who would not have won had the irregularities not occurred. *Aten v. National Election Comm'r (II)*, 6 FSM R. 74, 81 (App. 1993).

§ 805. Approval of petition; Notice of recount or revote.

(1) If the National Election Director grants a recount or a revote, or if so ordered by the Supreme Court pursuant to section 804 of this title, he or she shall cause notice of the recount or revote to be given in an appropriate manner.

(2) A recount shall be held by the counting and tabulating committee within ten days after the decision of the National Election Director or order by the Supreme Court. The counting and tabulating committee shall make certificates of such determination under oath showing the result of the election and what persons were declared elected to fill office, one of which shall be filed with the National Election Director, one with each election board concerned, and one with the person filing the petition for recount.

(3) A revote shall occur as soon as practicable but in no event more than 30 days after a decision by the National Election Director or order by the Supreme Court. The national election commissioner shall report the results of the revote to the National Election Director and the candidates.

(4) The person receiving the greatest number of votes shall be deemed to have been elected, but if two or more candidates shall receive an equal number of votes for the office, the tie vote shall be resolved in accordance with section 712 of this title.

Source: PL 14-76 § 71.

Case annotations: Where election irregularities cannot be corrected by a recount, the election, in whole or in part, can be set aside and done over only if it is more likely than not that the irregularities complained of could have, not necessarily would have, resulted in the election of a candidate who would not have won had the irregularities not occurred. *Aten v. National Election Comm'r (II)*, 6 FSM R. 74, 82 (App. 1993).

While the court has statutory authority to hear appeals regarding the conduct of elections, its power to grant relief is limited to ordering a recount or a revote. Only Congress can decide who is to be seated and once it has seated a member unconditionally the matter is nonjusticiable. *Aten v. National Election Comm'r (III)*, 6 FSM R. 143, 145 & n.1 (App. 1993).

The time frame for an aggrieved candidate to seek a revote is the same as that to seek a recount. It must be filed within one week of certification of the election results. The winning candidate has one week to respond to the petition. The National Election Director then has 10 days to decide whether to approve the petition. If he decides not to approve the petition, he must record the reasons for the decision. *Wiliander v. National Election Dir.*, 13 FSM R. 199, 203 (App. 2005).

When election irregularities cannot be corrected by recount, a candidate may petition for an election to be set aside and done over, either in

a district as a whole or in the part where the irregularities took place. The procedures for the filing a revote petition, action thereon, and appeal of its denial are the same as those for a recount petition. *Wiliander v. National Election Dir.*, 13 FSM R. 199, 203 n.3 (App. 2005).

Assuming that, as a result of the revote, that the candidate seeking to enjoin the revote is not declared the winning candidate (an assumption that the court cannot make), he still has all the avenues provided by the statutory provisions governing election contests, and once the administrative remedies before the National Election Director have run their course, a candidate still aggrieved may, at that time, seek relief from the FSM Supreme Court appellate division. Since this is an adequate alternative remedy, the candidate cannot show irreparable harm. *Asugar v. Edward*, 13 FSM R. 209, 212-13 (Chk. 2005).

The court, in an election contest, would be extremely hesitant to grant the relief of nullification of all of the votes cast in a ballot box and a declaration that the election contestant was then the winner because that would disenfranchise the many qualified voters who properly cast their ballots in that ballot box in good faith. If there had been proven illegal votes in sufficient number that the ballot box result was cast in doubt, the court would have been inclined to consider ordering the election done over as a less drastic and more equitable and democratic remedy. The statute explicitly gives the court the power to order a recount during trial, but does not specifically grant the power to order a revote or to nullify a ballot box. The powers to effect remedies for irregularities that likely could have affected an election's outcome appear to be implied or inherent in the Election Commission's powers and thus in the court's powers in review of the Commission's election contest decisions. *Samuel v. Chuuk State Election Comm'n*, 14 FSM R. 591, 596-97 (Chk. S. Ct. App. 2007).

Provisions for challenging the acceptability of votes apply to individual or particular votes and not to an entire polling place. The only proper remedies when the reliability of an entire polling place result is in question, are either a recount or a revote, depending on the particular circumstances. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 421 (App. 2009).

The court will decline to order the exclusion of all votes at a polling place, thus disenfranchising many qualified and innocent voters and possibly altering the will of the electorate and the election results. Only a recount or a revote would be proper in such cases. *Nelson v. FSM Nat'l Election Dir.*, 16 FSM R. 414, 421 (App. 2009).

The right to contest an election is not a common law right. Elections belong to the political branch of the government, and are beyond the control of the judicial power. *David v. Uman Election Comm'r*, 8 FSM R. 300d, 300g (Chk. S. Ct. App. 1998).

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).

It is a general rule that courts of equity have no inherent power to try contested elections, notwithstanding fraud on the part of the election officers. *David v. Uman Election Comm'r*, 8 FSM R. 300d, 300g (Chk. S. Ct. App. 1998).

Constitutions and statutes of most jurisdictions provide, as a part of the machinery of elections, a procedure by which election results may be contested. Such contests are regulated wholly by the constitutional or statutory provisions. A strict observance to the steps necessary to give jurisdiction is required, and the jurisdictional facts must appear on the face of the proceedings. If these steps are not followed, courts are powerless to entertain such proceedings. *David v. Uman Election Comm'r*, 8 FSM R. 300d, 300g (Chk. S. Ct. App. 1998).

Election contests are purely statutory, and the courts have no inherent power to determine election contests, the determination of such contests being a judicial function only when and to the extent that the determination is authorized by statute. *David v. Uman Election Comm'r*, 8 FSM R. 300d, 300h (Chk. S. Ct. App. 1998).