

Elia Tulop v. Palau Election Comm'n, 14 ROP 5 (2006)
**ELIA TULOP, GIOVANNI MIRA, SHANNON REKEMESIK, GEORGE KINTARO, and
HARUKO NGIRAMEKETII,
Appellants,**

v.

**PALAU ELECTION COMMISSION and MASASINGE ARURANG,
Appellees.**

CIVIL APPEAL NO. 06-031
Civil Action No. 06-162

Supreme Court, Appellate Division
Republic of Palau

Argued: November 14, 2006
Decided: November 15, 2006

16

Counsel for Appellants: Johnson Toribiong and Oldiais NgiraiKelau

Counsel for Appellee: William Ridpath and Christopher L. Hale

BEFORE: LARRY W. MILLER, Associate Justice; LOURDES F. MATERNE, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Appellants appeal the Trial Division's dismissal of their challenge to the counting of absentee ballots in the special election held to elect the Ngiwal State Governor. Having considered the arguments of the parties, we affirm the Trial Division's judgment.

BACKGROUND

Prior to the expiration of his term as governor of Ngiwal State, Elmis Mesubed resigned on May 30, 2006. Section 5 of the Ngiwal State Constitution Article VII provides that if a governor resigns from office, an election for the governorship shall be held within thirty days of the vacancy. Accordingly, Appellee Palau Election Commission ("PEC") scheduled the special election to be held on June 28, 2006. PEC promulgated rules and regulations for the special election requiring that all absentee ballots "must be received by the Election Commission by no later than 4:30 p.m. on June, 27, 2006," the day before local voters cast their ballots.

Giovanni Mira, Shannon Rekemesik, George Kintaro, and Haruko Ngirameketii are

Elia Tulop v. Palau Election Comm'n, 14 ROP 5 (2006)

registered voters of Ngiwal State presently residing in Guam. On June 26, they each filled out an absentee ballot and together sent it to PEC, who received the package with the votes on the day of the election, June 28. PEC determined the votes were untimely and left the ballots sealed and uncounted.

After all the votes were counted, PEC declared Appellee Masasinge Arurang to have won the election over Appellant Elia Tulop by one vote. Knowing that the four ballots of Mira, Rekemesik, Kintaro, and Ngirameketii were not counted, Tulop requested that the PEC open and count the four absentee ballots. The PEC denied his request and the ballot envelopes remain unopened. Tulop filed this lawsuit on July 6, seeking an order to enjoin the inauguration of the governor until the challenged ballots are counted. The Trial Division granted a temporary restraining order enjoining Arurang from being sworn in and granted the four voters' Motion to Intervene.

The Trial Division ruled that there was no applicable Ngiwal State law related to absentee voting in special elections, the regulations were valid because they were substantially similar to 23 PNC § 1605, and PEC had provided a rational basis for promulgating its regulations and not in violation of the voters' constitutional right to vote.

17

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, considering whether the trial court correctly found that there was no genuine issue of material fact and that, drawing all inferences in the light most favorable to nonmovant [sic], the moving party was entitled to judgment. *Giraked v. Estate of Rechucher*, 12 ROP 133 (2005).

DISCUSSION

Under 23 PNC § 1005, PEC has the authority to formulate election regulations “substantially similar” to the election statutes as long as there is no “applicable state law.” *Id.* In determining whether the PEC regulations are valid, we must first determine whether there is applicable state law that governs this election. If there is no applicable state law, then we must determine whether the regulations issued by PEC are substantially similar to title 23 of the Palau National Code.

The only Ngiwal state law regarding elections “provide[s] for the general election for the Governor and the Members of the Kelulul A Kiuluul of Ngiwal State.” Ngiwal Public Law 7-17. The law provides for elections to be held every fourth year for the governor and every other year for the state legislators, and it requires all absentee ballots to be received by the PEC no later than the seventh day after the election. The state law specifically states that it governs general elections and makes no mention of special elections. Moreover, the state law requires general elections to be held on the second Tuesday in August of applicable years and the subsequent inauguration to be held on the first Tuesday of September following the election. This three week delay between the general election and inauguration presents no problem because there is an office holder in place during that period. The special election in this case, however, was

Elia Tulop v. Palau Election Comm'n, 14 ROP 5 (2006)

conducted with the understanding that time was of the essence because the former governor had resigned and state law permitted the temporary replacement only to have authority for thirty days. Just as the Trial Division concluded, we find that Ngiwal Public Law 7-17 is not an applicable state law to the special election in this case under the meaning of 23 PNC § 1005.

We next look to whether the regulations issued by the PEC were substantially similar to the national code. Two potentially pertinent provisions of the national election law were considered by the Trial Division. The relevant section of Subchapter II of Chapter 15, entitled “Absentee Voters,” which requires that the completed absentee ballot “be postmarked no later than the day of the election and reach the Election Commission not later than the established closing hour of business on the seventh day after the election.” 23 PNC § 1524(a). No language in any of the sections in the subchapter limit its application to a specific type of election.

Chapter 16 is entitled “Special Elections,” and its short title is the “Olbiil Era Kelulau Special Elections Act.” Only one of its seven sections relates to absentee voting. Section 1605 requires that the completed absentee ballot “shall be mailed or delivered to the Election Commission not later than the established closing hour of business on the day before the election.” Vacancies in the OEK are the only situations that the Palauan code recognizes as being time sensitive by having guidelines on how quickly the special election should occur. When other vacancies occur, the OEK has either dictated who should fill the office or merely stated that the position shall remain vacant “until such time as a national election is held.” *See e.g.*, 3 PNC §§ 302, 303.

18

Appellants argue that because 23 PNC § 1523 provides that any qualified voter may vote by absentee ballot, the absentee ballot procedures of 23 PNC § 1524(a) are applicable to all elections. However, § 1524(a) does not have any provisions for time-sensitive special elections. PEC claims its regulations, which require absentee ballots for the Ngiwal special election to be received no later than the day before the election, is substantially similar to the provisions for time-sensitive special elections contained in 23 PNC § 1605. When there are two potentially applicable laws, a principle of statutory construction encourages a court to adopt the more specific statute as authoritative. *See Fugate v. Mayor and City Council of Buffalo*, 348 P.2d 76, 83 (1960); 73 Am. Jur. 2d *Statutes* § 170 (2001). As the Trial Division found, in this situation the section governing absentee ballots in OEK special elections is more specific than the subchapter related to absentee ballots in general. The Trial Division correctly determined that no statute superceded the PEC regulations and properly granted summary judgment.

The Appellants also claim that the PEC regulations disenfranchised them and denied them their right to vote under the Equal Protection Clause of the Constitution. The right to vote is fundamental to our free and democratic society. *See* 23 PNC § 102(a). Thus, courts review laws that result in the absolute denial of the franchise on the highest level of scrutiny. *See e.g.*, *Kramer v. Union Free School Dist No. 15*, 395 U.S. 621 (1969) (striking down statute that prevented non-property owners from voting in school district elections). This is true regardless of whether the court reviews the law under equal protection or due process analysis. *See Greidinger v. Davis*, 988 F.2d 1344, 1350-51 (4th Cir. 1994)(comparing the due process analysis in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to other cases using equal protection analysis).

Elia Tulop v. Palau Election Comm'n, 14 ROP 5 (2006)

This Court has determined that the ability to vote via absentee ballot is a privilege and not a right. *Olikong v. Salii*, 1 ROP 406 (1987). As a result, courts review laws and regulations that regulate absentee balloting on a lower standard than regulations that result in the absolute denial of voting because absentee balloting merely makes “casting a ballot easier for some.” *See Kramer*, 395 U.S. at 626 n.6. Thus, laws regulating absentee ballots must be upheld if they are reasonably related to a legitimate state end. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969).

The voters claim that there was no rational reason why the regulations mandated the absentee ballots be received the day before the election when they could have been received on the day of the election and not delay the counting of votes. In a sworn affidavit, Baudista Rengulbai, PEC's Election Services Administrator, stated that the regulation at issue was designed to meet the pressing circumstances of a special election. The Ngiwal State Constitution requires that an election be held within thirty days from the resignation of the governor. PEC required absentee ballots to be received no later than the day before the election because if the Commission had permitted the seven day waiting period for absentee ballots, the election would not have been completed until after the 30 day deadline. The PEC selected the day before the election as the deadline to make the regulations substantially similar to [L9 23 PNC § 1605](#).¹ Rengulbai stated that “the more stringent deadline is consistent with the urgency apparent” under the state constitution.

The “rational basis” test is a relatively low level of judicial review. *See Perrin v. Remengesau*, 11 ROP 266, 269 (Tr. Div. 2004). “In applying this level of review, governmental action will be upheld if there is a rational relationship between the action taken and the objective. The challenger has the burden of proving the statute or the governmental action has no rational relationship to its stated objective.” *Id.* As a result, almost any rational reason provided by the government would serve to defeat a challenger's case. The date chosen was a rational means to avoid delay in certifying the results of the special election. That the same purpose could have been served by allowing the ballots received on the day of the election to be counted does not alter our conclusion that PEC provided a rational basis for its regulations.

CONCLUSION

As there was no applicable state law and the PEC regulations were substantially similar to the national law governing special elections, the regulations governed the election and properly invalidated the Appellants' absentee ballots. PEC provided a reasonable rational basis for their regulations and they did not violate Appellants' right to vote. For these reasons, the Trial Division's judgment is affirmed.

1

Prior to the election, Appellants were notified of the deadline for submission of absentee ballots. Appellants did not raise any challenge to the deadline until after the election.