Mario v. Palau Election Comm'n, 16 ROP 313 (Tr. Div. 2009)

EDWIN MARIO,
Plaintiff,

v.

PALAU ELECTION COMMISSION, SANTOS BORJA, in his official capacity as Chairman of the Palau Election Commission, AND CELESTINE YANGILMAU, Defendants.

CIVIL ACTION 09-005

Supreme Court, Trial Division
Republic of Palau

Decided April 14, 2009

ALEXANDRA F. FOSTER, Associate Justice:
p.314

At 4:01 p.m. on January 14, 2009, Plaintiff Edwin Mario filed a Complaint against the Palau Election Commission ("PEC"), Santos Borja, in his official capacity as the Chairman of the Palau Election Commission, and Celestine Tatuwo Yangilmau. Plaintiff ran against Defendant Yangilmau for the Delegate seat of Sonsorol State in the 2008 general election. Defendant Yangilmau won the election. Plaintiff alleged that although Yangilmau was a citizen of Palau, he did not meet the residency requirements to represent Sonsorol in the Olbiil Era Kelulau ("OEK"), as required by the Palau Constitution at Article IX, Section 6 (4) and the relevant statutes, 23 P.N.C. §§ 1102(d) and 1103. Plaintiff protested Yangilmau's victory by filing a letter of objection with the PEC on November 5, 2008, alerting the PEC to his belief that Yangilmau did not meet the residency requirements. *See* Plaintiff Exhibit 2. He provided a courtesy copy of this letter to the Attorney General's Office and followed up with a letter detailing his allegations to the Attorney General's Office on November 16, 2008. *See* Plaintiff Exhibit 3.

In addition to the Complaint, Plaintiff filed a motion for a Temporary Restraining Order and Preliminary Injunction at 4:30 p.m. on January 14, 2009. Plaintiff sought to restrain Defendant Yangilmau from taking the oath of office on the morning of January 15, 2009. In addition to the motion and underlying brief, Plaintiff filed five affidavits, all of the affiants stated, in essence, that Yangilmau did not live in Sonsorol in 1987 [1] and does not currently live in Sonsorol. In an Order issued at 5:13 p.m. on January 14, 2009, the Court denied Plaintiff's motion for a Temporary Restraining Order, concluding that Plaintiff had not shown he would suffer "irreparable injury" if Defendant Yangilmau was sworn in. Defendant Yangilmau was sworn in to the House of Delegates as the Sonsorol Delegate on January 15, 2009.

[1]Presumably, Yangilmau's whereabouts in1986-87 are relevant, because Yangilmau filed an application for national election voter registration to change his residency for voting purposes from Koror to Sonsorol in 1987, and averred that he had lived in Sonsorol for one year at that time. *See* Plaintiff's Exhibit 1.

Defendant PEC filed an answer on January 31, 2009. [2] On March 9, 2009, Defendant Yangilmau filed a motion to dismiss the complaint. Defendant Yangilmau appended several documents to his motion:

> - the House of Delegates ("HoD") Credential Committee Report, dated January 15, 2009, which "recommend[ed] that a resolution be approved certifying that the credentials of the following members-elect are in order and seating them as Members of the House of Delegates of the Eighth Olbiil Era Kelulau . . . . 2. Sonsorol: Celestine Yangilmau" (Attachment A);
> - a transcript of the HoD Installation Session on January 15, 2009, where the Delegates adopted the above-listed Credential Committee Report, and passed House Resolution No. 8-1-I, entitled "A House Resolution to confirm the results of the November 4, 2008 national election and to certify the credentials of the winning candidates to the House of Delegates and the seating of the same members of the House of Delegates of the Eighth Olbiil Era Kelulau." The transcript reflects that the Report and Resolution passed with no reservations voiced concerning the qualifications of Celestine Yangilmau[3] (Attachment B); p.315
> - A certified copy of House Resolution No. 8-1-I, which reads in relevant part: "Be it resolved, that the House of Delegates of the Eighth Olbiil Era Kelulau, Installation Session, hereby confirms the results of the November 4, 2008 national election, judges the election and qualification of its members-elect to be in order, and seats the following Delegates of the Eighth Olbiil Era Kelulau: . . . 13. Sonsorol State: Celestine Yangilmau . . . ." (Attachment C); and
> - The Oath of Office for Celestine Yangilmau as the Delegate for Sonsorol (Attachment D).

Defendant points to ROP R. Civ. P. 12(b)(1) [4] and the Sole Judge Clause [5] to contend that the Court lacks subject matter jurisdiction, and should dismiss Plaintiff's complaint. On April 13, 2009, Plaintiff responded to Defendant Yangilmau's motion to dismiss the complaint. For the reasons detailed below, the Court agrees with Defendant Yangilmau and this case will be dismissed with prejudice.

The ability of the legislative branch to qualify its own is an oft-litigated issue in Palau. In

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[2]Since Mr. Borja has been sued in his official capacity, and since Mr. Borja has not separately filed anything in this matter, the Court will assume that the Attorney General's Office is also representing Mr. Borja, and that Mr. Borja's answer would mirror the PEC's answer.

[3]Specifically, the transcript reads, first, "[w]ithout any discussion or objections, the motion to adopt Credential Committee Report No. 8-1-I was put to vote and adopted by all Members-elect of the House of Delegates," and then "[w]ithout any discussion or objections, the motion to adopt House Resolution No. 8-1-I was put to vote and adopted by all Members-elect of the House of Delegate [sic]."

[4]In relevant part, the Rule reads: "the following defenses may at the option of the pleader be made by motion: (1) lack of subject matter jurisdiction . . . ." This Rule should be read in conjunction with ROP R. Civ. 12 (h)(3), which reads: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *See also Gibbons et al. v. Seventh Koror State Legislature*, 11 ROP 97, 103 (2004).

[5]"Each house of the Olbiil Era Kelulau shall be the sole judge of the election and qualifications of its members . . . ." Palau Const., Art. IX, § 10.

Fransisco et al. v. Chin , 10 ROP 44 (2003), the Appellate Court clarified the boundaries of the Sole Judge Clause. In *Fransisco*, the Court turned to the records and committee report of the First Constitutional Convention "to ascertain the meaning of constitutional language." 10 ROP at 49 (citations omitted). The Court interpreted the p.316 Committee Report to mean "that while the framers intended for the Senate to determine which candidates were elected and whether those candidates were qualified, they did not intend for the Senate to pass judgment on what the eligibility requirements set forth in the constitution were." 10 ROP at 49. In that vein, the Court concluded that it was the Court's job to "interpret the residency requirement set forth in Article IX, Section 6 of the Constitution," as it did in *Ngerul v. Chin*, 8 ROP 263 (2001), and it was the Senate's job to make factual determinations concerning a Senator-elect's residency based on the framework set out in *Ngerul*. 10 ROP at 55.

In both *Ngerul*, 8 ROP at 266, and *Tulop et al. v. Palau Elections Commission et al.* , 12 ROP 100, 102 (2005), the Court determined that it had jurisdiction to decide the viability of a candidate's qualifications, because "the legislative body had not yet reached a final decision on who to seat." In *Ngerul*, the Senate Credentials Committee assigned to investigate each candidate's qualifications for office "recommended seating each senator-elect except [Defendant], who was to remain unseated pending a further investigation of his qualifications and the outcome of the then newly-filed *Ngerul* lawsuit." *Fransisco*, 10 ROP at 46. Similarly, the *Tulop* Defendant, Delegate-elect Idechong, conceded during discussions on credentials in the HoD that he would "take my belongings and go home" if he lost the litigation concerning his seat. 12 ROP at 103. The Acting Floor Leader of the HoD added that, although he preliminarily supported the resolution to certify Delegate-elect Idechong, "if former Delegate Elia Tulop wins in court than I would like to assure him that . . . he would be seated on this floor." *Id*. These sentiments were reiterated by another HoD Delegate. *Id*.[6]

In this case, Defendant Yangilmau has proffered the Credentials Committee Report, the Resolution, and the transcript of the session where the Credentials Committee Report and the Resolution were adopted. None of them qualify Defendant Yangilmau's appointment as the Delegate for Sonsorol. [7] Mr. Yangilmau's situation is similar to that of Mr. Nakamura in the recently-decided case of *Louis v. Nakamura, Peleliu State Legislature* , Civil Appeal No. 08-035 (Filed April 10, 2009). "Unlike *Tulop* and *Ngerul* where the elected member was not yet seated or seated conditionally, in the instant case the Peleliu State Legislature seated Nakamura without condition or contingency. As a result, Nakamura is a full member of the Peleliu State Legislature and protected under the literal terms of the sole judge clause from a judicial review of his qualifications. *See Sato* , 13 ROP at 194 (challenged member had been seated; review was inappropriate)." *Louis* at p. 4.

Plaintiff is not asking this Court to define p.317 the residency qualifications. His

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[6]*Ngerul* and *Tulop* rely on *Roudebush v. Hartke*, 92 S.Ct. 804 (1972). *Roudebush* was factually similar to *Ngerul* and *Tulop* (and dissimilar to this case) in that the U.S. Senate had not reached a final decision in *Roudebush*, it had left the door open for the judiciary. *Ngerul*, 8 ROP at 265 ("The [U.S.] Senate had provisionally seated one of the candidates, but postponed a final determination until the pending lawsuit could be resolved.").

[7]Plaintiff has proffered no documents which indicate otherwise.

Complaint cites no due process violation, and seeks no legal interpretation of a statute or the Constitution. He is solely asking the Court to make factual determinations as to whether Defendant Yangilmau has met the residency qualifications.[8] That is a job for the Legislature, and not the Court.[9]

In reaching this conclusion, this Court finds itself in disagreement with the trial court in *Elbelau et al. v. Office of the Election Commissioner et al.* , 3 ROP 426, 426-432 (Tr. Div. 1993). In *Elbelau*, the Court denied Defendants' motion to dismiss a challenge to the qualifications of a seated Delegate, and proceeded to address the merits of the allegations after trial. 3 ROP at 426. In reaching its conclusion, the *Elbelau* Court did not have the guidance of *Ngerul, Fransisco , Tulop* or *Louis,* however.

The *Elbelau* Court justified its decision to consider all matters of candidate election and qualification on its reading of the Committee Report notes, and the apparent incongruity that would stem from a different conclusion: If PEC p.318 determines that a prospective candidate is not qualified, that candidate can appeal to the Supreme Court, [10] so why should someone who questions the bona fides of an elected candidate not have that same option? *Elbelau*, 3 ROP at 430.[11] **[1]** There are at least two reasons which mandate different treatment for a candidate as

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[8]Plaintiff cites *Fransisco* and *Melaitau v. Lakobong* , 9 ROP 165 (2002). However, the Courts in those cases were asked to reach conclusions on constitutional issues, and not make factual determinations. In *Melaitau*, the factual conclusions were not in debate ("there is absolutely no dispute that the three challenged members do not satisfy the constitutionally-mandated eligibility requirements" and "there is no claim that the [legislature] has made any determination otherwise"), so the Court needed only decide the constitutional issue. 9 ROP 166, 169. In *Fransisco*, the Court clarified the proper interpretation of the residency requirement set forth in Art. IX, Sect. 6 of the Palau Constitution, and returned the matter to the Senate for "the factual determination" as to whether Chin met the residency requirement. 10 ROP at 55.

[9]The D.C. Circuit makes a compelling policy argument to justify this legislative self-policing:

> While it is not our role to examine the wisdom of a disposition that appears so clearly in the text and history of the Constitution, we may observe that it makes eminent practical sense. The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies. Adding a layer of judicial review, which would undoubtedly be resorted to on a regular basis, would frustrate this end . . . . [I]nstitutional incentives make it safer to lodge the function [in the legislative branch] than anywhere else . . . . The major evil of interference by other branches of government is entirely avoided, while a substantial degree of responsibility is still provided by regular elections, the interim demands of public opinion, and the desire of each House to preserve its standing relation to the other institutions of government.

Morgan v. United States, 801 F.2d 445, 450 (D.C. Cir. 1986).

[10]*See, e.g., Nicholas v. Palau Election Commission* , Civil Action No. 08-259 (Tr. Div., Oct. 10, 2008) (affirming PEC exclusion of plaintiff's candidacy based on residency requirement).

[11] The section of the First Constitutional Convention Committee Report, which the *Fransisco* Court relied upon to conclude that the Senate should "determine which candidates were elected and whether those candidates were qualified," while the court should "pass judgment on . . . the eligibility

compared to an elected legislator: first, the plain language of the Constitution places the onus on the legislative body, and not the courts to make factual determinations concerning the qualifications of their members; second, it is not true that a complainant has no recourse after a candidate is elected, if his complaint is factual in nature it should be filed with the legislature, and if the issue requires constitutional or other legal interpretation, or raises due process concerns, then it should come to the judiciary.

For the reasons set out in this decision and further discussed in the *Louis* Opinion, Defendant's motion is **GRANTED**, and this matter is dismissed with prejudice.

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requirements set forth in the constitution," 10 ROP at 49, the *Elbelau* Court used to conclude, incorrectly, that the drafters meant to give courts the power to intercede in all issues, including factual determinations, of candidate election and qualification, 3 ROP at 428-29.