IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

JOSEPH JORLANG, in his official capacity as Chief Electoral Officer, Plaintiff/Appellee, vs. FLORENCE SIMEON, et al., Defendants-Appellants.	S. Ct. Civil No. 2011-001 (High Court Civil No. 2008-068) OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT* and KURREN,** Acting Associate Justices

SEABRIGHT, Acting Associate Justice:

INTRODUCTION

During the November 19, 2007 General Election, the Republic of the Marshall Islands ("RMI") Chief Election Officer ("CEO") refused to count certain absentee postal ballots because they were post-marked in the United States on or after November 19, 2007 -- a day after the RMI election given that the United States is on the other side of the International Date Line. The CEO came to this

* The Honorable J. Michael Seabright, U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Barry M. Kurren, U.S. Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

conclusion by construing the phrase "date of election" in 2 Marshall Islands Revised Code ("MIRC") § 162(3) as referring to the date of the election in the RMI, which differed from the established practice in previous elections allowing such ballots so long as they were postmarked on the date of the election in the United States.

Appellants are individuals whose ballots were rejected in the 2007 General Election, and they seek review of the December 6, 2010 High Court Judgment finding that the CEO's interpretation was reasonable, persuasive, and consistent with 2 MIRC § 162(3). Appellants argue that the CEO failed to follow the provisions of the RMI Administrative Procedures Act ("APA") regarding such rule changes, and that the CEO therefore erred in rejecting their ballots. Based on a de novo review, we find that the RMI APA does not apply to the CEO's new definition of "date of election" and therefore AFFIRM.

BACKGROUND

The facts are largely undisputed. The 2007 General Election was Monday, November 19, 2007. Appellants submitted their votes via absentee ballots mailed from the United States, postmarked November 19, 2007. The CEO rejected these ballots based on a new interpretation of the phrase "date of election" found in 2 MIRC § 162(3), which provides in relevant part that absentee ballots "must be

placed in the mail and be postmarked on or before the date of election . . . ." The CEO construed the phrase "date of election" to mean the date of election in the RMI, such that ballots were required to be postmarked on the date of the election in the RMI, not the date where the postal ballot was mailed. Thus, ballots post-marked November 19, 2007 in the United States were late because it was November 20, 2007 in the RMI when they were postmarked.

The CEO's construction differed from previous elections -- in all previous General Elections, postal ballots postmarked on the date of the General Election in the United States were accepted and counted by the CEO. Further, in adopting this change, the CEO did not consider or comply with the provisions of the RMI APA. Regardless, counting the excluded votes would not have changed the results of the General Election.

After Appellants challenged the CEO's rejection of their ballots, the CEO filed this action seeking a declaratory judgment that the High Court uphold the CEO's "decision not to count postal ballots US postmarked on or after November 19, 2007." In its December 6, 2010 Judgment, the High Court found that although the CEO's actions were not consistent with the RMI APA, the interpretation was nonetheless entitled to respect as persuasive and "consistent with the language of the statute and the legislative intention to protect the integrity of the electoral

process by not allowing postal votes to be cast after the closing of the polls in the Marshall Islands." Judgment at 2. On January 5, 2011, this appeal was filed.

ANALYSIS

Appellants do not dispute that the CEO's new interpretation of the phrase "date of election" found in 2 MIRC § 162(3) is reasonable. Rather, at issue is whether the CEO violated the RMI APA in adopting this new interpretation, and if so, whether Appellants are entitled to have their votes counted in the November 19, 2007 General Election.

Mootness

As an initial matter, although the November 19, 2007 General Election has long passed and the excluded votes at issue would not have changed the result, the questions raised are not moot. As the High Court aptly explained, the potential for recurrence of this issue is high -- "[t]here will be future elections involving overseas postal voters whose votes may be affected by the matter at issue, and it is a matter of significant public interest, as it involves both the right to vote for postal voters residing outside the country, and the integrity of the electoral process." Judgment at 4; *see also Heine v. Radio Station WSZO & GM*, 1 MILR (Rev.) 122, 124 (1988)) (providing that the court should retain jurisdiction in the face of mootness when the matter involves the likelihood of recurring controversy

and is of great public interest). Further, although the parties have submitted some evidence suggesting that the CEO provided notice interpreting the phrase "date of election" for the upcoming November 16, 2015 General Election, whether the CEO has complied with the RMI APA is a separate issue. This opinion, however, is limited to the 2007 General Election and should not in any way be construed as impacting the 2015 General Election.

Applicability of the RMI APA

Turning to the substance of Appellants' argument, the RMI APA outlines a detailed procedure to be followed "[p]rior to the adoption, amendment or repeal of any rule." *See* 6 MIRC § 104. This procedure includes a notice-and-comment period, *id.*, Cabinet approval, 6 MIRC § 106, and publication of effective rules, 6 MIRC § 107, none of which CEO did in adopting the new definition of "date of election" in 2 MIRC § 162(3). Appellants reason that the CEO's new definition is subject to the APA in light of the RMI APA's broad definition of term "rule," which encompasses "each agency statement of general applicability that implements, interprets, or regulates conduct or action, prescribes policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule . . . ." 6 MIRC § 102(g).

Appellants' argument, although simple enough, rests on the assumption that the RMI APA is the only statute that might apply to the CEO's decision in adopting this new definition. But the RMI APA is not the only statute at issue -- rather, as *Bien v. MI Chief Electoral Officer*, 2 MILR 94 (S. Ct. Civil 90-01), recognized, the RMI APA does not apply where the Election and Referenda Act sets forth a separate and distinct procedure for CEO to follow. At issue in *Bien* was whether the CEO properly denied a petition for recount, and in giving deference to the CEO's decision, *Bien* found that the RMI APA's procedure for "contested cases" did not apply where the Elections and Referenda Act set forth a specialized and different procedure for recounts. *Id.* at 98 (comparing 2 MIRC § 180 with 6 MIRC § 11).

Similar to *Bien*, the Elections and Referenda Act sets forth a specific and distinct procedure the CEO must follow for the decision at issue in this action. In particular, 2 MIRC § 142(1), titled "Proclamation of dates and referenda," provides:

> Except in the case of an election by consensus, the Chief Electoral Officer shall give as much notice as is reasonably practicable of the holding of an election and its date:
>
> (a) by press and radio, in both Marshallese and English;
>
> (b) throughout the area concerned:

(i) by written notices, in Marshallese and English, posted on public buildings and in other convenient places, and
(ii) in whatever manner is customary in the area concerned for the announcement of important news; and

(c) in such other manner as he thinks proper.

Applied here, the CEO changed the long-standing interpretation of the date of the General Election for purposes of mail ballots, which falls within 2 MIRC § 142(1) setting for the procedure the CEO must take in giving notice of "the holding of an election and its date." As a result, 2 MIRC § 142(1) requires the CEO to provide notice of this change through the press, radio, written notices, and any other manner the CEO believed proper. This procedure differs from the one outlined in the RMI APA for the "the adoption, amendment or repeal of any rule," *see* 6 MIRC § 104, which means that the CEO must follow 2 MIRC § 142(1), and not the APA.[1]

Appellants did not argue, much less address, whether the CEO complied with 2 MIRC § 142(1) in adopting a new definition of "date of election" for mail ballots for the 2007 General Election. Rather, we simply reject the limited

[1] We may affirm on any basis supported by the record, even if such basis was not raised below. *See Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1114 n.1 (9th Cir. 2014); *United States v. State of Washington*, 969 F.2d 752, 755 (9th Cir. 1992).

argument made on appeal -- that the CEO did not comply with the RMI APA -- on the basis that the RMI APA does not apply to the CEO's new definition.

CONCLUSION

For the foregoing reasons, we AFFIRM the High Court's December 6, 2010 Judgment, although based on different reasoning.

Dated: 10/9, 2015

Daniel N. Cadra
Chief Justice

Dated: October 9, 2015

J. Michael Seabright
Associate Justice

Dated: October 9, 2015

Barry M. Kurren
Associate Justice