IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

BILL, et al., plaintiffs, v. HEMLEY BENJAMIN, in His Official Capacity as Chief Electoral Officer, defendant.	CIVIL ACTION NO. 2004-081 FINAL JUDGMENT

FILED

DEC 20 2006

ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS

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This matter comes before the High Court on Jack Bill, Limmi Bill, Bertina Bill, Marie Bill, Emity Bill, and Almita Rang's ("Plaintiffs'") June 25, 2004 complaint ("Complaint") against Chief Electoral Officer Hemley Benjamin ("CEO"). In the Complaint, Plaintiffs allege that the CEO erred in not counting their postal ballots in the November 17, 2003 Bikini/Kili/Ejit ("Bikini") mayoral election because the ballots arrived together in a single Express Mail envelope rather than in individual envelopes.

I. ISSUES

The High Court addresses the following issues:

1. Does the High Court have jurisdiction over this matter?

2. If so, by what standard is the High Court to review the CEO's actions?

3. How should the High Court construe Section 162 of the Elections and Referenda Act 1980, 2 MIRC Chp. 1 ("Elections Act")? and

4. Did the CEO err by rejecting, and not counting, Plaintiffs' ballots?

II. APPLICABLE LAW

Section 162 of the Elections Act specifies the procedure by which a postal voter votes and returns the ballot back to the Republic, while Section 166(1)(b) gives the CEO the authority to reject postal ballots that do not comply with the procedure laid out in Section 162. It is the CEO's decision to reject Plaintiffs' postal ballots pursuant to these two provisions that is at issue in this case. In relevant part, Section 162 provides as follows:

> (2) The postal voter shall:
> (a) mark the ballot in the usual way, and so that no person can see or know how it is marked (except as allowed by Section 174 of this chapter);
> (b) deposit the ballot paper in the ballot envelope and securely seal it;
> (c) complete the affidavit, and swear it before a person authorized to administer oaths in the place where the applicant is; and
> (d) enclose the ballot envelope and the affidavit in the covering reply envelope.
> (3) The covering reply envelope must be placed in the mail and be postmarked on or before the date of the election; provided, however, that in no event will a covering reply envelope that is received through the mail be accepted on or after a date fourteen days after the date of the election.

Section 166(1)(b) provides:

> (1) If when an envelope is opened in accordance with Section 165 of this Chapter:
> . . .
> (b) it is found that the voter has not complied with Section 158(2) or 162 of this Chapter, as the case may be;
> . . .
> then the ballot envelope shall not be opened and the Chief Electoral Officer or the person appointed under Section 164 of this Chapter shall mark across its face the word "Rejected", giving his reason for rejection, and shall preserve it in the same manner and for the same period that other rejected ballot papers are preserved.

III. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the Elections Act, on November 17, 2003, the CEO conducted a general election for members of the Nitijela and officers of the local governments, including the Bikini mayor. The candidates for the Bikini mayoral election included Eldon Note and Johnny

Johnson.

In December 2003, the CEO certified the official results for the November 17, 2003 Bikini mayoral election in favor of Eldon Note over Johnny Johnson and another opposing candidate. Mr. Johnson filed a recount petition on December 22, 2003, alleging a vote differential of three between himself and Mr. Note. The CEO denied Mr. Johnson's petition on December 31, 2003, and Mr. Johnson appealed to the High Court on January 5, 2004 in *Johnson v. Benjamin*, High Court CA No. 2004-002.[1] One of Mr. Johnson's grounds for the recount was that the CEO should have counted multiple ballots returned in Express Mail envelopes. At the time, the counting of these ballots was the subject of *John and Jane Does No. 1-20 v. Benjamin*, High Court CA No. 2003-213, filed on December 8, 2003.

On February 17, 2004, the High Court dismissed the complaint in CA No. 2003-213 because the original plaintiffs did not have capacity to maintain an action.[2] At the time counsel commenced the action, the identities of plaintiffs John and Jane Does No. 1-20 were unknown, which did not satisfy the legal requirement that plaintiffs must have actual legal existence as a natural or artificial person. The plaintiffs' counsel later tried to amend the action to add Mr. Dennis Momotaro, a candidate for the Nitijela from Mejit Island, as a known plaintiff, and introduce affidavits from several Oregon postal voters (plaintiffs in the current case), but the High Court held that the action was a nullity that could not be so amended and further that Mr. Momotaro had no standing to litigate on behalf of the postal voters. In the alternative, the High Court ruled that if the complaint could have been amended to add the five (actually six) Oregon

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[1]The recount petition and denial letter are attached as Exhibits A and B to the Complaint in High Court CA No. 2004-002.

[2]February 17, 2004 Order Dismissing Complaint in CA No. 2003-213, at 1-4.

postal voters as plaintiffs, the plaintiffs would nevertheless have lost on the merits.[3] The plaintiffs in CA No. 2003-213 appealed the High Court's dismissal to the Supreme Court, but the Supreme Court denied the appeal on June 22, 2004, ruling that the High Court lacked jurisdiction over a complaint filed by unknown parties.[4] The Supreme Court vacated the High Court's alternative holding on the merits as moot.[5]

The six Bikini Plaintiffs then filed the present case, High Court CA No. 2004-081, on June 25, 2004, seeking to overturn the CEO's decision not to count their votes. This case differs from CA No. 2003-213 in that the plaintiffs are the six known Oregon postal voters whose ballots were not counted.[6] On April 16, 2006, the High Court held an evidentiary hearing in this case for which Bertina Bill flew in from Oregon to give testimony. Counsel filed closing briefs a month later. The High Court scheduled oral argument for July 12, 2006, but the parties waived argument. On August 25, 2006, the High Court ordered further briefing on the question of exhaustion of remedies, which briefs counsel filed in October and November 2006.

In making its determination in this case, the Court takes into account the following facts and inferences:

1. The six Plaintiffs were Marshallese citizens, residing outside the Republic in Oregon, United States of America, and were duly registered Marshall Islands voters for the

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[3] *Id.*, 4-13.

[4] *Momotaro and John and Jane Does Nos. 1-20 v. Benjamin*, S.Ct. Civil Case No. 04-02, slip op. at 8.

[5] *Id.*, 9.

[6] On November 8, 2004, the High Court continued the re-count case, CA No. 2004-002, pending the outcome of the present case.

Bikini mayoral election. June 13, 2005 Stipulation of Parties ("Stip."), Para. 2.

2. The Plaintiffs voted in the Bikini mayoral election via postal ballots[7] for candidate Johnny Johnson. Stip., Para. 3.

3. The CEO did not count Plaintiffs' postal ballots. Stip., Para. 4.

4. The CEO rejected Plaintiffs' postal ballots because the Express Mail envelope in which they arrived contained multiple covering reply envelopes. See Stipulation Exhibit J-1, page 4; and the Transcript of the April 6, 2006 High Court Hearing ("Tr."), 21, attached to Plaintiffs' [May 2, 2006] Closing Argument - Opening Brief as Exhibit J-3.

5. Mr. Johnson lost the Bikini mayoral election to candidate Eldon Note by less than six votes.

6. Ms. Claudia Philippo DeBrum was a secretary in the Attorney-General's office in 2003 when the CEO selected her to be one of the election officials to conduct the vote in Oregon. Tr., 8-9.

7. In November 2003, the Plaintiffs all went to a Calvary Church in Oregon to cast absentee votes in the election, at which time they met Ms. DeBrum. Tr., 2-3.

8. Ms. DeBrum gave the Plaintiffs their ballots. The Plaintiffs cast their ballots, closed their ballots, sealed them, and handed them back to Ms. DeBrum, who then put the ballots and their signed affidavits into another envelope. See Tr., 3-4.

9. Ms. DeBrum then handed the envelopes back to the Plaintiffs and told them to mail the envelopes at the Post Office, to make sure they were postmarked by November 17, and

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[7]Sections 161-167 of the Elections Act provide for "postal" ballots. Postal ballots are for those who are prevented by illness or physical disability from attending a polling place or who reside outside of the Republic on the day of the election. 2 MIRC 161(1).

to make sure they arrived in Majuro by December 1. See Tr., 5.

10. Plaintiff Bertina Bill testified that the Plaintiffs then drove directly from the voting place to the Post Office; that Plaintiff Bertina Bill and her sister, Plaintiff Marie Bill, carried the envelopes into the Post Office; and they paid $10.75 to mail them to the Marshall Islands in one Express Mail envelope to insure that the ballots would arrive in time and not get lost. Tr., 5-6.

11. Although defense counsel did not present evidence that the ballots had been tampered with, Plaintiffs' counsel did not present evidence that at the time the CEO rejected Plaintiffs' ballots the CEO had any knowledge as to how the Plaintiffs' ballots and covering reply envelopes had been handled between the time the Plaintiffs left the polling site and the time the ballots were posted by Express Mail.

12. The Express Mail envelope was postmarked on or before the date of the election and arrived at the Electoral Office before the expiration of 14 days following the date of the election. Stip., Para. 3.

13. The CEO accepted and election officers counted the contents (postal ballots) of other Express Mail envelopes so long as they each contained only a single covering reply envelope. Stipulation Exhibit J-1, 4-5.

14. The CEO conducted two informational meetings prior to the elections in which he instructed the electoral officers, including Ms. DeBrum, on how to conduct the postal voting process. The instructions given during those two meetings included: (i) that the electoral officers had to purchase stamps and put them on the covering reply envelopes; (ii) that each eligible voter was responsible for sending in his or her own ballot, and; (iii) that the ballots had to be returned individually. The CEO did not provide the electoral officers, including Ms. DeBrum,

with written instructions. Tr., 20-22.

15. With respect to the instructions, Ms. DeBrum's testimony on direct examination includes the following exchanges:

> BLOOMFIELD: Could you tell – do you remember the instructions that were given you?
>
> DeBRUM: First of all, we were supposed to collect all the ballots of all the islands. And we were supposed to get – take the register record for all the registered voters. And then when a person is going to cast her or his ballot, we have to check the records, the register records, and if we know them, we go ahead and mark their names. And – but, if we don't know them, then they should show ID, show their ID's (sic). And if we're done with that, we should give them their ballots with the affidavit. And hand them a small envelope and inform them to cast their ballots. And then after that, they come back to us and take the bigger envelope with the stamp on it. And put the ballots inside and mail it themselves.
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> BLOOMFIELD: So the envelops had stamps on it, did you say that?
>
> DeBRUM: Yes.
>
> BLOOMFIELD: Who paid for those stamps?
>
> DeBRUM: Us.
>
> BLOOMFIELD: So, when they came back with the ballot already inside the smaller envelope, you put those into the bigger envelope with the stamp, is what you're . . . .
>
> DeBRUM: Yes, we give them to mail them by themselves.
>
> BLOOMFIELD: When they – when they came back to you, what instructions did you give them with regards to mailing it themselves?
>
> DeBRUM: We explained to them and tell them that one should mail the ballot anytime he or she wants to mail it or he can put it in the post – in the mailbox or give it to the mailman whenever he comes to the house.
>
> . . .
>
> BLOOMFIELD: And any instructions that you give them?
>
> DeBRUM: Yes.
>
> BLOOMFIELD: And what were those?

DeBRUM: We told them that one has to cast his or her own ballot. And after casting the vote – their votes, then put it inside the envelope that we provided for them. And then hand them the bigger envelope with the stamp to put the small envelope inside.

BLOOMFIELD: And any further instructions after that?

DeBRUM: Yes, if they're done with that, then we inform them to mail – mail it – mail them by themselves.

. . .

BLOOMFIELD: Did anyone ask about mailing them together?

DeBRUM: Yes.

BLOOMFIELD: And what was your reply?

DeBRUM: I didn't really know the boy but I told – the boy asked me if they can mail them by Express Mail. I told the boy that the envelopes were already with stamps, and we already made agreement with the post – Post Office people that they should accept them so they can arrive here on time. And I also told the boy that if he wants it to be mailed by Express, then we will not be responsible for the expense. It was for his own expense. But, he should put one ballot inside one Express Mail.

BLOOMFIELD: Claudia, with regards – was this boy with the Kili-Bikini family?

DeBRUM: I don't remember.

Tr., 9-13.

16. On cross-examination, Ms. DeBrum confirmed that she told the boy that he could mail only one envelope in an Express Mail envelope and that she did not discuss the use of Express Mail with the Plaintiffs. Tr., 15.

17. On re-direct examination, Ms. DeBrum confirmed that although Plaintiff Bertina Bill did not ask her about the use of Express Mail or sending more than one ballot in one envelope, Ms. DeBrum did explain to all of the Plaintiffs "one ballot in one envelope." Tr., 16.

18. On re-cross, Plaintiffs' counsel asked, "And are you sure that you told this lady, Bertina Bill, something about not mailing more than one envelope back at the same time?" To

this Ms. DeBrum replied, "Yes, because we have to hand out the envelopes with the stamps." Tr., 17-18.

19. Then, when Plaintiffs' counsel again asked Ms. DeBrum what she explained to these people (the Plaintiffs) when they came in, she testified:

> DeBRUM: Okay. After they cast their ballot, put the ballot inside the small envelope, and then put the small envelope inside the stamped envelope, and mail it because it's the responsibility of each person to mail his or her own ballot.
>
> STRAUSS: And is that the extent of the instructions that you gave these people?
>
> DeBRUM: Yes, and they – they never asked questions. They under – they seem to understand it.

Tr., 18.

20. It can be inferred that other voters understood the instructions as well. Of the more than 2,000 people who voted through postal votes in the 2003 general elections, only twenty some, approximately 2 percent, mailed two or more covering reply envelopes together in another envelope. Tr., 22.

21. Plaintiffs' counsel did not establish that Ms. DeBrum, or anyone else, told the Plaintiffs, or anyone else, that they could mail two or more reply envelopes together in an Express Mail envelope or any other envelope.

22. With respect to whether a stamp was on the covering reply envelope Ms. DeBrum gave to Plaintiff Bertina Bill, Plaintiffs' counsel on direct asked Ms. Bill, "When you got the envelopes that you put in the Express Mail, was there a stamp on it? (emphasis added)," to which Ms. Bill answered, "No." Tr., 4. As "it" refers to a singular rather than a plural antecedent, the Court interprets Ms. Bill's answer as saying there was no stamp on the Express Mail envelope. If Ms. Bill intended to say, or did say, that there were no stamps on the covering

reply envelopes, then it becomes a question of who to believe, Ms. Bill or Ms. DeBrum. In this regard, the Court notes that when on direct Plaintiffs' counsel asked Ms. Bill, "And who did you vote for, for Mayor?," after a long pause she answered, "I voted for – who were they? I forgot." Ms. Bill only answered "Johnny Johnson" after Plaintiffs' counsel named the two principle candidates: Eldon Note and Johnny Johnson. Tr., 4. As Plaintiff Bertina Bill could not remember a major fact, i.e., for whom she voted, the Court does not give much credence to her testimony as to details, i.e., whether stamps were on the Plaintiffs' covering reply envelopes.

IV. JURISDICTION

In Paragraph 1 of the Complaint, Plaintiffs assert that the High Court has jurisdiction in this matter pursuant to (i) Article VI, Section 3 of the Constitution, (ii) the Elections Act, and (iii) Section 2 of the Special Court Proceedings Act, 30 MIRC Chp 2 ("Special Court Proceedings Act").

In relevant part, Article VI, Section 3, of the Constitution provides that the High Court, "unless otherwise provided by law, shall have jurisdiction to review the final determination by a government agency at the behest of any party aggrieved by such determination." (Emphasis added.) In this connection, the Elections Act prescribes how and when the High Court is to review actions of the CEO under the Act. In their Complaint, Plaintiffs do not specify which part of the Elections Act they are relying upon; however, by the process of elimination, it can only be one.

The Elections Act gives the High Court jurisdiction over electoral matters in three areas:

1. where a voter appeals his or her right to be on the electoral register under Sections 129 and 134;

2. where a candidate appeals from the CEO's decision to reject a recount petition

under Section 181; and

3. where a voter or candidate seeks to have the case referred under Section 188 because the voter's right to vote in an election has been questioned.

Since the Plaintiffs were listed in the electoral register for Bikini, Sections 129 and 134 (option one) do not apply. Since this case is not an appeal from a rejection of a recount petition, Section 181 (option two) does not apply. Only Section 188 (option three) applies as Plaintiffs claim they have a right to vote that was denied by the CEO. Under Section 188(1), "any person whose claim to a right to vote in an election has been rejected by an election official may require the Chief Electoral Officer to refer the question to the High Court, and the Chief Electoral Officer shall, unless he admits the claim, refer the question to the High Court accordingly." (Emphasis added.) The parties did not, however, present evidence that this procedure was ever followed. This is significant because Plaintiffs seek relief in the form of a declaration under Section 2 of the Special Court Proceedings Act. Generally, to secure declaratory relief in a case involving administrative action, all administrative remedies must have been exhausted beforehand. *See e.g., Villages Development Co., Inc. v. Secretary of Executive Office of Environmental Affairs*, 571 N.E.2d 361, 366 (1991); *National Park Medical Center, Inc. v. Arkansas Dept. of Human Services*, 911 S.W.2d 250, 259 (1995). The issue of whether such relief was even permitted in this case was the subject of the Court's August 25, 2006 Order Requiring Further Briefing.

Responding to that order, Plaintiffs argue that Section 188(1) is not applicable to this case because "it was not [Plaintiffs'] 'right to vote' that was questioned and rejected in the election." (Pls' Nov. 06, 2006 Reply Br. Pursuant to 08/25/06 Order Requiring Further Briefing, at 2.) Instead, Plaintiffs argue that "it is their alleged failure to comply with the procedural

process for casting a postal ballot that is at issue." *Id.*, 3. Plaintiffs' argument rests on the notion that "the right to vote is distinct from the process by which that right is exercised." *Id.* Plaintiffs conclude that the Elections Act contains no specific remedy for an alleged failure to comply with the procedural process, and therefore their declaratory judgment action is proper under the Special Court Proceedings Act. In support of this conclusion, Plaintiffs point to the language in Article IV, Section 3 of the Constitution and Section 105 of the Elections Act as defining the "right to vote" through the listing of certain qualifications, and noting that their argument is not about meeting these voter qualifications. *See id.* However, these provisions only apply to Nitijela elections.[8] They do not apply in this case as this is not a Nitijela election, but a local government mayoral election.

The relevant provisions on the right to vote in local government elections are contained in Article 2, Section 14 of the Constitution and Section 106 of the Elections Act. Article 2, Section 14 of the Constitution states: "Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed in this Constitution and to election regulations which make it possible for all eligible voters to take part." Section 106 of the Act states in relevant part: "Subject to the constitution of the local government, all eligible voters who are registered under this Chapter with respect to the ward for which the election is to be held have the right and duty to vote in an election . . . ." Neither one of these provisions bifurcate the right to vote from the process by which that right is exercised and the vote counted. On the contrary, under the Constitution the right to vote

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[8]The headings for Article IV, Section 3 of the Constitution and Section 105 of the Elections Act read "Elections of Members of the Nitijela" and "Nitijela election," respectively.

includes the right to have the vote counted under procedures that make the voting possible.[9] This Court interprets voting in accordance with procedural requirements and having that vote counted as an integral part of the right to vote and finds that Section 181(1) applies to Plaintiffs' claims. Plaintiffs should have sought referral from the CEO before seeking judicial relief in the form of a declaratory judgment.

Exhaustion of administrative remedies, though, is an affirmative defense. *See e.g., Williams v. Runyon*, 130 F.3 568, 573 (3rd Cir. 1997); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997). Under MIRCivP 8(c), all affirmative defenses must be set forth affirmatively in pleadings. The burden was on Defendant to plead and prove failure to exhaust administrative remedies. *See Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999). Defendant claims that he did in fact raise this issue at a hearing for CA No. 2003-213 in December 2003. (Def's Oct. 25, 2006 Br for Order Aug. 25, 2006, at 8.) The Court need not entertain this argument as that was a whole separate case. Defendant should have raised it again for the case at hand. Defendant then argues that this issue was encompassed in his July 14, 2004 statement of defenses whereby he stated: "Plaintiffs' claims are barred by res judicata, laches and other defenses under the common and statutory laws of the Republic." (Def's Nov. 13, 2006 Reply for Order Aug. 25, 2006, at 3.) (Emphasis in original.) However, an un-alleged defense that should have been affirmatively raised cannot be proven under a general denial. *Dobbs v. Vornado, Inc.*, 576 F.Supp. 1072, 1081 (1983); 5 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1278, 663 (3d ed. 2004). Defendants, therefore, failed to raise the affirmative defense of

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[9]"There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted." *Reynolds v. Simms*, 377 U.S. 533, 555 n. 29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

exhaustion of administrative remedies. Failure to plead an affirmative defense results in the waiver of that defense. *See e.g., Bentley v. Cleveland County Bd. Of Cty Com'rs*, 41 F.3d 600, 604 (10th Cir. 1994); *Zaion, et al. v. Peter and Nenam*, 1 MILR (Rev) 228, 236 (RMI S.Ct. 1991) (the defense of collateral estoppel cannot be raised for the first time on appeal); *Abija v. Bwijmaron*, 2 MILR 6, 14 (RMI S.Ct. 1994) (affirmative defenses of *res judicata* and collateral estoppel must be pleaded, or they are waived); Wright & Miller, *supra*, at 644. The Court is thus satisfied that it has jurisdiction to entertain Plaintiffs' action for declaratory relief.

V. STANDARD OF REVIEW

The next issue to address is the standard by which the High Court is to review the CEO's rejection of Plaintiffs' ballots. Plaintiffs argue that the High Court may review the CEO's action de novo.[10] The CEO argues that the High Court should give deference to the CEO's decision.[11]

In another election case alleging that the CEO erred in not counting postal ballots returned under Section 162 of the Elections Act, the Supreme Court stated:

> This court is to determine whether the Chief Electoral Officer abused or erroneously exercised his discretion vested by 2 MIRC 180(4).[12] *Clanton v. MI Chief Elec. Off. (No. 1)*, 1 MILR (Rev.) 146, 152 (Aug 2, 1989).
>
> This court is not to substitute its judgment for that of the Chief Electoral Officer based on the information submitted to him unless his decision is a clear departure from statutory requirements, is fraudulent or in bad faith, arbitrary, capricious, without basis in the evidence, or his decision is one which no reasonable mind could have reached. *See* 2 Am Jur 2d, Administrative Law § 676.

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[10]Plaintiffs' [May 22, 2006] Rebuttal Argument – Reply Brief.

[11]Defendant's [August 31, 2005] Reply to Plaintiffs' Motion for Summary Judgment ("Def's Reply to Pls' SJM").

[12]In the present case, it is a question as to whether the CEO erroneously exercised his discretion under Section 166(1)(b).

> Every reasonable presumption will be indulged in favor of the validity of an election. The law presumes that election officers perform their duty honestly and faithfully. 29 C.J.S. Elections § 274.
>
> The court has the duty to uphold the election if possible.
>
> > It is a primary principle of law as applied to election cases that it is the duty of the court to validate the election if possible. That is the election must be held valid unless plainly illegal. *Rideout v. City of Los Angeles*, 197 P. 74; and cited in *Wilkes v. Mouton*, 722 P. 2d 187 (1986).
>
> If the record supports the respondent's decision, it is conclusive upon the court and the respondent's action must be sustained and will not be disturbed by the court, 2 Am Jur 2d, Administrative Law § 679.

Bien v. MI Chief Elec. Off., 2 MILR 94, 96-97 (RMI S.Ct. 1997).

Moreover, the election process is committed to the executive branch of government through duly designated officials all charged with specific duties by statute. The judgments of these officials are entitled to be presumptively correct. *Bush v. Gore*, 531 U.S. 98, 116 (Rehnquist, C.J., concurring). These officials are presumed to have done what the law requires of them. *Clanton v. MI Chief Elec. Off. (1)*, *supra*, 153. And voters are presumed to know the law. *Id.*, 99.

Although in this case the High Court is to determine whether the CEO abused or erroneously exercised his discretion under Section 166(1)(b) of the Elections Act, rather than under the recount provision, Section 180(4), the High Court finds that the *Bien* test is applicable. Plaintiffs have not demonstrated that it is not. Accordingly, the High Court will adhere to the Supreme Court's ruling in *Bien* and will not "substitute its judgment for that of the [CEO] based on the information submitted to him unless his decision is a clear departure from statutory requirements, is fraudulent or in bad faith, arbitrary, capricious, without basis in the evidence, or

his decision is one which no reasonable mind could have reached." *Bien, supra*, 96-97.

VI. STATUTORY CONSTRUCTION OF SECTION 162 OF THE ELECTIONS ACT

The next issue is how the High Court should construe Sections 162(2) and 162(3) of the Elections Act, which specify the procedure by which a postal voter votes and returns his or her ballot back to the Republic. As noted earlier, these sections state that:

> (2) The postal voter shall:
> (a) mark the ballot in the usual way, and so that no person can see or know how it is marked (except as allowed by Section 174 of this chapter);
> (b) deposit the ballot paper in the ballot envelope and securely seal it;
> (c) complete the affidavit, and swear it before a person authorized to administer oaths in the place where the applicant is; and
> (d) enclose the ballot envelope and the affidavit in the covering reply envelope.
> (3) The covering reply envelope must be placed in the mail and be postmarked on or before the date of the election; provided, however, that in no event will a covering reply envelope that is received through the mail be accepted on or before after a date fourteen days after the date of the election. 2 MIRC 162(2) and 162(3).

There is a split in the courts as to what standard is appropriate in the construction of election statutes, particularly with respect to the provisions controlling absentee (postal) votes. In some states, the courts have required strict construction of the absentee voting laws. *See Rogers v. Holder*, 636 So.2d 645, 647 (Miss. 1994); *Emery v. Robertson*, 586 S.W.2d 103, 107-8 (Tenn. 1979); *Tiller v. Martinez*, 947 S.W.2d 769, 775 (Tx. Ct. App. 1998). In these states, an absentee ballot can be rejected if it fails to strictly comply with any statutory requirements. *Rogers v. Holder, supra*, 649. Two general justifications have been offered in support of such strict compliance standard. The first justification stems from the notion that absentee voting is a privilege, rather than a right. *See Bell v. Gannaway*, 227 N.W.2d 797, 804 (Minn. 1975). "This notion is based on the premise that the constitutional right to vote means the right of a qualified voter to cast a ballot in person at a designated polling station on the day of election. Since, under

this view, absentee voting legislation grants voters something to which they are not constitutionally entitled, strict compliance is nothing more than a reasonable *quid pro quo* for this legislatively granted privilege." *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983). The second justification for this standard is rooted in the legislature's duty to safeguard the purity of elections. "The prevention of election fraud, it is argued, requires rigid adherence to the statutory conditions for absentee voting especially since, in contrast to in-person voters, absent voters are unable to respond to inquiries from election judges about their status as qualified voters." *Id.* This argument concludes that the legislature, in applying its duty to prevent fraud and preserve the purity of elections, intentionally used words such as "shall" to connote mandatory provisions. *See Bullington v. Grabow*, 88 Colo. 561, 566-7 (1931); *Adkins v. Huckabay*, 755 So.2d 206, 215-6 (La. 2000).

A number of other states, however, have concluded that in the absence of fraud, the absentee voting laws should be liberally construed so as to further the right to vote. *See Brown v. Grzeskowiak*, 230 Ind. 110, 128 (1951); *Wells v. Ellis*, 551 So.2d 382, 383-4 (Ala. 1989). These states reason that liberal construction is warranted so as to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disenfranchisement, and to uphold the will of the electorate. *Brown v. Grzeskowiak, supra*, 130. Given the realities of the modern world, whereby mobility is often necessary, it is argued that strict compliance is too unyielding a standard. *Erickson v. Blair, supra*, 755. The consequences of the strict compliance standard are viewed as too harsh because they lead to disenfranchisement of voters who commit good-faith errors, and it thus thwarts the free expression of popular will. *Id.*, 756. On the other hand, substantial compliance with the statutory language is viewed as adequate to the task of both preventing fraud in elections and preserving the absent voter's right of suffrage against

unnecessary and technical restrictions. *Id.* Under this standard, substantial compliance only requires "actual compliance with respect to provisions essential to the reasonable objectives of the absentee voting law." *Adkins v. Huckabay*, *supra*, 218. Whether an error then substantially complies with an essential provision "depends on the intimacy of the relation between the provision and the general purpose it serves to accomplish, the nature and extent of the departure, and whether violence will be done to the legislative scheme." *Id.*

Here, the Court has yet to make a determination as to which standard of construction applies when there is an ambiguity in the election statute, as in this case. In *Bien*, the Court looked to the language of Section 162(3) and found that when the Nitijela used the word "must," it created a mandatory requirement that postal ballots be postmarked, at the latest, on the date of election. *Bien*, *supra*, 99. In such a case, there is no discretion to stray from that mandatory language. *Id.* The Court, therefore, agreed with the CEO's strict construction of Section 162(3). *Id.* The present case, however, differs from *Bien* in that the Elections Act does not specifically address the use of Express Mail envelopes. There is no mandatory language that controls in this case. Nothing in the statute even suggests that the Nitijela contemplated the use of Express Mail envelopes. It is the CEO's policy, though, that ballots received in Express Mail envelopes be accepted if they are sent individually, but not if they are sent in groups. This policy does not result from a strict construction of the statute. The CEO himself testified that the statute does not say anything about such a policy, but that he inferred this from the language in Section 162(3) that requires a postmark. (*See* Stipulation of Parties, Ex. J-1 at 5.) This case, therefore, does not appear to call for the strict construction required in *Bien*. A liberal construction of the Elections Act is more appropriate in this case because the policy questioned is itself a product of liberal construction on the part of CEO (i.e., to count ballots sent individually in Express Mail

envelopes without postmarks on the covering reply envelopes) and there is no evidence of fraud. Using this standard, the Court is to determine if there was "actual compliance with respect to provisions essential to the reasonable objectives of the absentee voting law." *Adkins v. Huckabay, supra*, 218. In making this determination, the Court is to consider "the intimacy of the relation between the provision and the general purpose it serves to accomplish, the nature and extent of the departure, and whether violence will be done to the legislative scheme." *Id.*

VII. APPLICATION

Did the CEO err by rejecting and not counting Plaintiffs' ballots? Under the *Adkins* test, the answer is "No."

A. Plaintiffs did not substantially comply with the Elections Act by sending in their postal ballots as a group in a single Express Mail envelope because they did not actually comply with provisions essential to the reasonable objectives of the statute.

In enacting Sections 162(2) and 162(3) of the Elections Act, the Nitijela was not only concerned about when ballots would be postmarked, as Plaintiffs seem to argue[13], but it was also concerned about the secrecy and security of the ballots. Indeed, the language in Section 162(2) requires that no person be able to see or know how the ballots are marked, and that the ballots are securely sealed. Additionally, the Supreme Court, in reviewing the legislative intent behind Section 162(3), has held that "[t]he Nitijela clearly wanted an election that was free from any impropriety or appearance of such." *Bien, supra*, 96. It is, therefore, apparent that among the objectives of Sections 162(2) and 162(3) is the preservation of the secrecy and security of the ballots.

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[13]Plaintiffs' November 3, 2005 Memorandum in Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment, at 3 ("Pls' Memo in Reply to Def's Opp. to Pls' SJM").

1. Individual mailing of ballots is related to the purpose of ensuring the secrecy and security of the ballots.

Relying on Sections 162(2) and 162(3), the CEO set up a policy whereby each covering reply envelope had to be postmarked and mailed in individually. This policy was applied uniformly. All those ballots that failed to meet these requirements were not counted. Tr., 21. The CEO testified that he did this because there was uncertainty as to what the person collecting the several envelopes would do with them once he had collected them. (Stipulation of Parties, Ex. J-1, at 10.) As there is a potential of fraud with such uncertainties, CEO's rationale for this policy appears to be directly related to the purpose of ensuring secrecy and security of the ballots.

To assist in the enforcement of this policy, the CEO required that all election officials who were dispatched abroad buy stamps, and put the stamps on the outside of the covering reply envelopes before handing them out to voters. Tr., 21. Cash was given to these election officials in order to enable them to buy stamps. *Id.*, 20. Claudia Philippo DeBrum testified that she did in fact receive those instructions, and complied with them. Tr., 10. She further testified that she explained to voters that each person was responsible for his or her own ballot. *Id.*, 17. Bertina Bill's testimony is, on the other hand, at best ambiguous. It is not clear that she testified that there were no stamps on the covering reply envelopes. She appears to state there was no stamp on the Express Mail envelope. Tr., 6. If Ms. Bill did, or meant to, say there were no stamps on the covering reply envelopes, the Court is not persuaded. Ms. Bill testified that she forgot who she voted for in that election and only answered Johnny Johnson after being reminded of the names of the candidates. *Id.*, 4. If Ms. Bill could not recall such a major fact, her testimony with regards to the more minor details from almost two years past lacks credibility.

Furthermore, since neither party attempted to bring into evidence the actual envelopes containing the ballots in this case, which are preserved pursuant to the Court's order of June 24, 2004, the Court proceeds on the presumption that the election officials did their duty and put stamps on the outside of the envelopes. *Langijota v. Alex*, 1 MILR (Rev) 216, 221 (RMI S.Ct. 1990) (In the absence of evidence to the contrary, there is a very strong presumption that public officers have properly discharged the duties of their office.) This then renders support for the CEO's policy, as one who sees the stamps on the envelopes can only presume that they were meant to be sent in individually.

2. Failure to mail in ballots individually is a significant departure from the objective of preserving the secrecy and security of the ballots.

As the CEO rightfully points out, there is uncertainty as to what someone collecting several ballots would do with them once he or she had collected them. The process applied in the polling stations abroad left only one opportunity for such uncertainty: the actual mailing of the covering reply envelopes. Each voter assumes individual responsibility for this task. When someone else assumes this responsibility, the voter cannot account for the state that his or her ballot is in. This opens up the door for the possibility of human manipulation of the ballots. Such a possibility is what CEO's policy of requiring individual mailings is aimed at. Failure to mail in ballots individually opens up the door for the possibility of human manipulation and, therefore, significantly departs from the objective of preserving the secrecy and security of the ballots.

3. Violence may be done to the legislative scheme if ballots mailed in as a group are counted.

Nowhere in the Elections Act does it appear that the Nitijela ever contemplated group mailings of ballots. On the contrary, it appears that the Nitijela intended that each person's ballot be secure from other's view and control. It is quite telling in this respect that the Nitijela did not allow for ballot boxes to be sent abroad with the electoral officers. For as CEO argues:

> If it were legislatively permissible to accept five postal ballots sent together in one express mail envelope, then presumably it would be just as correct to accept one hundred postal ballots sent together in one express mail container. This then makes such a parcel no different from any official ballot box sent to Majuro from any off-island voting station for tabulation. At what number of ballots should the court draw the line? At which point does the integrity and purity of the elections become suspect when postal ballots are sent in multiple numbers but contained in one postal envelope.

Def's Reply to Pls' SJM, 6.

In response to this argument, Plaintiffs argue that "if someone wanted to alter the ballot inside of a covering reply envelope, it would actually be easier to do it in a ballot inside of a covering reply envelope that is not inside of an express mail envelope. Also, there is no difference in having 6 covering reply envelopes in an express mail envelope and having 6 or 60 or 600 covering reply envelopes inside of a U.S. postal mail bag which is delivered by the post office." Pls' Memo in Reply to Def's Opp. to Pls' SJM, 5. (Emphasis in original.) The Court is not convinced by the Plaintiffs' argument because there are differences of interest and opportunity between these two scenarios. A postal officer who does his duty, particularly one who works for the United States Postal Service, is probably less interested in the outcome of these elections than is someone who actually voted and then collected other voters' ballots. Additionally, one who collects ballots actually knows what they are, whereas a postal officer who works with thousands of letters daily may not notice that certain envelopes contain ballots.

In light of these differences, CEO's argument is a compelling one. Allowing six ballots in a single envelope to be counted opens up the door for hundreds of ballots in a single container to be counted as well. This is a slippery slope for which the High Court is unwilling to go down without legislative initiative.

B. The CEO did not abuse his discretion in rejecting Plaintiffs' ballots because his interpretation of Sections 162(2) and 162(3) of the Elections Act is reasonable.

The CEO's interpretation is reasonable given the fact that people collecting ballots abroad on their own would not be selected and trained by the Electoral Office. These persons would not necessarily know what the Elections Act requires. They might not know what to do to avoid even the appearance of impropriety. Additionally, as stated above, these persons may have an interest in the elections themselves. Though there is no allegation of fraud in this case, the CEO's interpretation is a uniform one meant to deter any fraud. It is a reasonable means of preserving the secrecy and security of the ballots. It is, therefore, not an abuse of the CEO's discretion.

VIII. CONCLUSION

For the reasons stated above, the High Court dismisses the Complaint with the parties to bear their own expenses.

Dated: December 20, 2006

Carl B. Ingram
Chief Justice