IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

JOSEPH JORLANG, in his capacity as Chief Electoral Officer,

Plaintiff,

v.

SIMEON, et al.,

Defendants.

CIVIL ACTION NO. 2008-068

JUDGMENT

FILED

DEC 0 6 2010

CLERK OF COURTS

REPUBLIC OF MARSHALL ISLANDS

This case involves the interpretation by the Chief Electoral Officer ("CEO") of the "date of the election" as used in the Elections and Referenda Act 1980[1] for the purpose of determining the postmark deadline for postal ballots.[2] For the 2007 general election, the CEO adopted an interpretation which differed from the practice in previous elections. He defined the "date of the election" as the date of the election in the Republic of the Marshall Islands, rather than the date of the election with reference to the place from where the postal ballots were mailed, which was the past practice. For postal voters in the United States, such as defendants in this matter, the CEO's interpretation meant that ballots postmarked on November 19, 2007 in the U.S. were rejected, as they would have been postmarked the day after the election in the Republic, because the U.S. is on the other side of the international date line from the Marshall Islands.

[1] 2 MIRC Chapter 1

[2] "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." (Emphasis added) 2 MIRC Section 162(3).

The defendants requested the rejection of their ballots be referred to the High Court.[3] The CEO filed a complaint for declaratory judgment on December 24, 2007[4] (High Court Civil Action No. 2007-225) which was dismissed by stipulation of the parties on November 4, 2008, in light of the April 7, 2008 filing of this complaint for declaratory judgment requesting the court uphold the CEO's "decision not to count postal ballots US postmarked on or after November 19, 2007."

Because the matter is likely to recur in the future, it is not moot, even though the 2007 election results would not be impacted by the votes of defendants affected by the CEO's interpretation. Although the decision of the CEO was not adopted consistent with the Marshall Islands Administrative Procedure Act 1979[5] ("APA"), the court finds that the CEO's interpretation is 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. Thus, the court upholds the decision of the Chief Electoral Officer not to count the votes of defendants.

FACTS

The facts in this case are basically uncontested. A general election was held in the Republic of the Marshall Islands on November 19, 2007, for Nitijela senators and local

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[3]2 MIRC Section 188(1) states: "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."

[4]Seven defendants were named in H.C. Civ. No. 2007-225, while six more were added in the instant action.

[5]6 MIRC Chapter 1.

government mayors and council members. Carl Alik had been appointed Chief Electoral Officer[6] in December of 2005, despite his lack of experience in elections.[7] Prior to the election, CEO Alik, upon advice of the Attorney General,[8] adopted an interpretation of the "date of the election" in reference to the requirement that postal ballots must be postmarked on or before the date of election that was different from past practice. Under the new interpretation, the "date of the election" meant the date of the election in the Marshall Islands, rather than in the place where the mailing took place. While he took steps to inform voters, he did not comply with the requirements of the APA. Defendants in this case were qualified absentee voters who submitted postal ballots for the 2007 general election. The covering reply envelopes for the ballots of four of the defendants were postmarked November 19, 2007, but were mailed from the United States. The U.S. is on the other side of the international date line from the Republic of the Marshall Islands so that the envelopes were postmarked on November 20, 2007 in the Marshall Islands. Because of his interpretation of the law, the CEO rejected the ballots of the four defendants. Counting the votes of the four affected defendants would not have changed the Nitijela, mayoral, or local government council election results.

I. <u>The action is not moot even though the ballots of the defendants affected by this decision</u>

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[6]Joseph Jorlang replaced Carl Alik as Chief Electoral Officer on March 29, 2010 and was substituted as plaintiff. Stipulation of Parties, filed May 18, 2010, paragraph 1.

[7]The *Final Report and Recommendations of the Commission of Inquiry in the 2007 General Elections* found as follows: "On the date of his appointment, Carl Alik had less than one year of public service experience and <u>no</u> electoral administration experience. Upon examination by this Commmission, the PSC Chairman Cent Langidrik conceded that Carl Alik <u>did not meet the qualification requirements</u> set out by the PSC for the position of Chief Electoral Officer." (Emphasis in the original) (p. 7.) The Commission concluded "The CEO was not Competent and Failed to Plan for the Election." (p. 25.)

[8]*Ibid.*, p. 21.

would not change election results.

Courts will typically not issue a decision in a case if there is no need to do so. The parties have stipulated that: "The votes of four of the named defendants whose postal ballots were found among the 131 postal ballots which were rejected for the reason that they were postmarked November 19, 2007, were from Rairok election ward on Majuro and would not affect the results of the Nitijela, Majuro Mayoral, or Majuro Local Council election results."[9] At the November 18, 2010 status conference, the court confirmed that of the named defendants, only four had postal ballots which were rejected on the basis of being postmarked in the U.S. on November 19, 2007. Because their ballots would not affect the results of the Nitijela, mayoral or local government council elections, determination of whether or not their votes should be counted would have no practical effect. This generally would be grounds for dismissal of the action on the basis of the doctrine of mootness.

The parties however, jointly submitted "that even if the Court considers this matter moot, under Heine v. WSZO; Supreme Court No. 87-07, this matter is not moot as it involves a controversy which is likely to recur, either as to the same parties before the court, or to others who are most certainly to be later before the court." Although courts will typically not take action when no action need be taken, in this case, the potential for recurrence here is high. Neither the Nitijela nor the Cabinet has taken any action to change or clarify the law. There 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.

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[9]Stipulation of Parties, filed May 18, 2010.

II. In the circumstances of this case, the Chief Electoral Officer's action is not accorded "great deference."

While the court generally will give great deference to the interpretation of the Chief Electoral Officer of the electoral statute, where the interpretation was not adopted pursuant to the APA and was inconsistent with past practice of the electoral administration, "great deference" will not be given. The court must judge the Chief Electoral Officer's action based upon the persuasiveness of his interpretation of the underlying statute.

In *Bien v. MI Chief Electoral Officer*,[10] the Supreme Court upheld the Chief Electoral Officer's decision denying a petition for recount based upon the Chief Electoral Officer's decision not to count postal ballots postmarked "after the election on November 20, 1995."[11] In that case, the court stated "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."[12] This is based upon the principle of administrative deference, i.e., that ""Courts should give great deference to the interpretation given statutes and regulations by the officials charged with their administration. *Blanding v. Dubose*, 454 U.S. 393 (1982)."[13] In *Bien*, the court upheld the CEO's strict interpretation of the absentee voting statute, stating as follows:

The court concludes that the interpretation given the statute, by the Chief Electoral

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[10]2 MILR 94 (S.Ct. Civil No. 96-01)

[11]*Ibid.*, p. 96.

[12]*Ibid.*, pp. 96-97.

[13]*Ibid.*, p. 99.

Officer, was reasonable and not an abuse of discretion. Absent an abuse of discretion, the court is not to substitute its judgment for that of the Chief Electoral Officer. The court finds the interpretation of the statute is mandatory.[14]

However, *Bien* was in a different procedural stance than the case before this court. In *Bien,* the court was considering the denial for a petition for recount, to which the court determined the APA did not apply because the Elections and Referenda Act set out a specialized procedure for the determination of petitions for recount, distinct from the APA procedures for contested cases. In the present case, defendants contend the CEO's interpretation of "date of the election" was subject to the APA's rule-making requirements[15] and that the failure to adhere to the APA requirements, specifically Section 106, requiring Cabinet approval, rendered the proposed rule ineffective. The CEO concedes that he did not "comply with the provisions of the Administrative Procedures Act in regard to his change of the established procedure and his change of the interpretation of the acceptance of postal ballots based upon their U.S. postmark dates."[16]

While it has been stipulated that in "every previous general election, postal ballots from the U.S. postmarked on the date of the election were accepted and counted by the Chief Electoral Officer,"[17] there is no definition of "date of election" in the existing Election regulations.

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[14]*Ibid.*, p. 99.

[15]The APA includes in its definition of "rule" the following: "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." 6 MIRC Sec. 102 (g) (emphasis added.)

[16]Stipulation of Parties as to Evidence, filed February 15, 2010, paragraph 11.

[17]*Ibid.*, paragraph 10. It should be noted that prior to the passage of the Elections and Referenda (Amendment) Act of 1992, the provisions governing return of postal ballots provided at Section 59C(3): "The covering reply envelope shall be either -

(a) mailed to reach the Chief Electoral Officer not later than the closing of the polls on

Neither party has asserted nor shown that the CEO's past practice was adopted pursuant to the Administrative Procedures Act. The past practice of the CEO does not have the force of law. The fact that the CEO failed to adopt the new definition of "date of the election" in compliance with the APA does not automatically establish the past practice as binding.

The U.S. Supreme Court clearly enunciated the principle of administrative deference in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984.) The U.S. Supreme Court has stated "In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."[18] However, the CEO did not adopt the new interpretation through a regulation, nor through any other A.A. recognized mechanism.[19]

In *Christensen v. Harris County*, faced with a non-regulatory interpretative statement of the Equal Employment Opportunity Commission, the U.S. Supreme Court stated:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference.[20]

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the day of the election; or
(b) delivered by and on the day of the election to a member of a Board of Elections concerned with the election or with another election occurring on the same day; or
(c) deposited in a special ballot container."

Despite the stipulation, in elections prior to 1992 the statute required postal ballots to "reach" the Chief Electoral Officer by the close of the polls on election day, without reference to post mark.

[18]*Christensen v. Harris County*, 529 U.S. 576, at pp. 586-587 (2000.)

[19]It should be noted that the Elections and Referenda Act grants the regulation making authority to Cabinet (2 MIRC Sec. 198), although the Chief Electoral Officer is granted the authority to issue "instructions." (2 MIRC Sec. 194)

[20]*Christensen, supra*, at p. 587.

The court went on to set forth the standard for evaluation of such administrative interpretations:

> Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade," *ibid.*[21]

These cases suggest that in the present case, both the new interpretation of the CEO and the past electoral practice in relation to the "date of the election," having not been adopted pursuant to the APA, lack the force of law, but are entitled to respect to the extent they are persuasive.

The fact that the new interpretation of the CEO was inconsistent with past practice is not determinative of the matter. The U.S. Supreme Court noted that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[22] The U.S. Supreme Court, citing *Chevron*, stated:

> "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," *Chevron*, supra, at 863-864, for example, in response to changed factual circumstances, or a change in administrations, see *State Farm*, supra, at 59 (REHNQUIST, J., concurring in part and dissenting in part). That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.

The court believes that a similar analysis should be applied to administrative interpretations which, as here, do not have the force of law. The past practice of counting postal ballots from the U.S. with a postmarked date which represented the day after election day in the Marshall Islands was not "carved in stone." While the CEO's new interpretation, under the circumstances

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[21] *Ibid.*, p. 587.

[22] *National Cable & Telecom. Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)

of this case, is not subject to full *Chevron*-style administrative deference, the non-APA compliant change in interpretation is not a basis for denying whatever persuasive power the new interpretation holds, where the new interpretation changes a practice which was similarly not adopted in compliance with the APA.

III. The "date of the election" is the date of the election in the Marshall Islands.

At the center of the dispute is the validity of the CEO's interpretation of "date of the election" as used in Section 162(3) of the Elections and Referenda Act 1980, which states: "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." Defendants contend the date of the election was November 19, 2007 and consequently any envelope postmarked on November 19, 2007 has been "postmarked on or before the date of the election," regardless of where the envelope was postmarked. Support for defendants' position is found in the past practice of the Electoral Administration, which accepted postal ballots on this basis. The problem arises because a significant number of Marshallese voters live in the United States of America, which is on the other side of the international date line. Consequently, an envelope post marked November 19, 2007 in the U.S. was actually November 20, 2007 in the Marshall Islands, the day after the polls closed for the election in the Marshall Islands.[23]

The Chief Electoral Officer rejected this practice and utilized a different interpretation

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[23]The *Final Report and Recommendations of the Commission of Inquiry in the 2007 General Elections* reported that for various reasons polling hours were extended and that "Because of the delays in opening the polls and processing voters, many polls did not close until Tuesday [November 20] morning." p. 17. The court does not believe the Nitijela contemplated this exceptional circumstance in establishing the "date of the election" as the postmark deadline for postal ballots.

for the 2007 general election. According to the CEO, the "date of the election" must refer to the date of the election in the Marshall Islands, where the election was being held, not with reference to the place from where the ballot was mailed.[24] Consequently, under the CEO's interpretation, ballots which were mailed from the U.S. with a postmark of November 19, 2007 (which was November 20, 2007 in the Marshall Islands, the day after the election) did not meet the statutory deadline.

A. The language of the statute supports the interpretation of the Chief Electoral Officer.

The Supreme Court of the Marshall Islands has stated: "In examining constitutional provisions, the Supreme Court's task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language: if the language of the provision is unambiguous, it must be given its literal meaning and there is neither the opportunity nor the responsibility to engage in creative construction. *Rice v. Connolly,* 488 N.W.2d 241, 247 (Minn. 1992)."[25] The same guidelines apply to statutory interpretation. Common sense dictates that when a legislative body adopts language relating to the date of an election, in the absence of evidence of contrary legislative intent, the legislature means the date of the election within its jurisdiction. *Black's Law Dictionary* defines "date" as "the day when an event happened or will happen."[26] The reference event in the context of the statute is the election. The day the election happened was November 19, 2007 in the Marshall Islands and November 18, 2007 in the United States. An envelope

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[24]Affidavit of Chief Electoral Officer Carl Alik in support of his Complaint for Declaratory Judgment, Exhibit P-1, attached to Stipulation of Parties as to Documents and Exhibits, filed February 18, 2010, paragraph 6.

[25]*In the Matter of the Vacancy of the Mayoral Seat, Majuro Atoll Local Government,* S.Ct. Civil Appeal No. 08-08 (9/17/09).

[26]*Black's Law Dictionary*, 7th Edition (1999), p. 400.

postmarked November 19, 2007 in the U.S. would not be postmarked on the day the election happened. November 19, 2007 in the United States was not the date of the election. The "ordinary meaning" of the language "date of the election" is the day the election happened. The "date of the election" was November 19, 2007 in the Marshall Islands, not in the United States.

Further support for this meaning is found in the same section. Section 162(3) uses the term "date of the election" twice, once in reference to the postmark requirement and second in reference to the time by which the covering reply envelope must be received: "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.**" (Emphasis added.) The record is silent as to the practice of the Electoral Administration for receipt of the covering envelopes. However, under the defendants' interpretation, the deadline for receiving covering envelopes could have been either December 3, 2007, fourteen days after November 19, 2007, the date of the election in the Marshall Islands, or December 4, 2007, fourteen days after November 19, 2007 in the U.S. (November 20 in the Marshall Islands.) It goes against common sense to interpret the deadline for receipt of the covering envelopes as being either of two days, based upon the date of mailing in the U.S. Interpreting the second usage of "date of the election" as referring to the date in the United States can result only from a strained interpretation of the language. The Nitijela would not have established a reference day for receipt of the covering envelopes in the Marshall Islands based upon a date in the U.S. without explicitly stating that to be the case.

B. Public Policy supports the interpretation of the Chief Electoral Officer.

There are sound public policy reasons for limiting the right to vote to on or before

election day. The danger of allowing votes to be cast after the polls are closed was addressed by the Court of Appeals in Maryland in *Lamb v. Hammond*:

> The Legislature has accorded absentee voters a special privilege not shared by other voters — the privilege of having their vote count even though received by the election officials after the polls have closed. Unqualified, or qualified only by a deadline on receipt of the ballot, that privilege could become a distinctly unfair political advantage; it would allow a group of voters actually to cast their ballots after the polls had closed, and thus open the way for some very unwholesome machinations. The Legislature was very careful to avoid that possibility by requiring not only that the ballot actually be mailed before election day but also that there be an official verification of that fact by means of a postmark. Given the care that the Legislature has traditionally shown in crafting the State election laws, we cannot conceive that it intended those requirements to be other than mandatory. (Footnote omitted.)[27]

The limitation of the vote to on or before election day is an important protection to the integrity of the electoral process. This protection would be diluted by allowing a class of voters to cast their votes after the polls were closed. Had it not been the intent of the Nitijela to limit the vote in this manner, it could have ignored the postmark requirement entirely, and simply relied upon the receipt of ballots by a certain date, as provided in the second part of section 162(3) of the elections statute. It did not do so. Further, the High Court has previously found that the purpose of this section of the elections statute is to insure that postal ballots are cast on or before election day.[28]

The requirement of the post mark deadline on the "date of the election" was intended to protect the integrity of the election process by not allowing postal votes to be cast after the

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[27]308 Md. 286, 309-310 (1987)

[28]See "Opinion of the Court and Judgement Affirming Decisions of the Chief Electoral Officer and Dismissing Appeals," *Bien, et al., v. Chief Electoral Officer,* High Court Civil Action No. 1995-390, 1995-391, 1996-001 (Consolidated), p. 18, where the court stated: "The purpose of the Alaska statute, like the purpose of 2 MIRC Chpt.1, sec. 162, is to insure postal ballots are cast on or prior to election day."

closing of the polls. This protection would be undermined by the practice utilized in past elections and advocated by defendants. The importance of this protection was recognized by the Supreme Court in *Bien,* when it declared

> The Nitijela, by use of the words "must," created a mandatory requirement that postal ballots be postmarked, at the latest, on the date of the election. There is nothing in the statute indicating the Nitijela intended to give any discretion to accept late postmarked ballots.[29]

Defendants have argued that under the CEO's interpretation, their votes would actually have had to be mailed on November 17, 2007 in the United States because November 18, 2007 was a Sunday and U.S. Postal Service offices are not open on Sundays. While that is a consequence, it does not change the language of the statute nor the public policy behind it. Postal voters in the U.S. are not denied the right to vote. The Nitijela has extended to them the privilege of voting even though their ballots are received after the polls have closed. However, the exercise of that privilege must be within the structure established by the Nitijela to protect the integrity of the election process.

The CEO could have adopted his interpretation of "date of the election" by regulation, which would have given the public greater notice of the post mark deadline. He could have included the definition of "date of the election" for those residing in the U.S. in the written instructions accompanying the postal ballots, which would have given prospective voters a better understanding of the post mark deadline. However, as discussed above, the matter is moot in regard to the defendants in the 2007 general election and the public notice given prior to that election is not relevant to future elections where this issue may arise again. Further, the Supreme Court has stated the "voters are presumed to know the law, that is that 'The ballots

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[29]*Bien v. MI Chief Electoral Officer,* 2 MILR 94, 99 (S.Ct. Civil No. 96-01.)

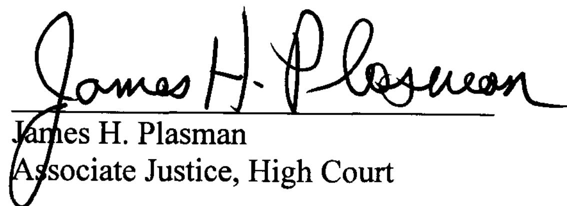
must be placed in the mail and be postmarked on or before the date of election.'"[30] The date of the election is the date of the election in the Marshall Islands. The voters must be presumed to know the law.

Defendants state that "[t]here was no compelling reason for the CEO to interpret the 'date' phrase in the manner that he did . . ."[31] In fact, the interpretation of the CEO is supported by the legislative language and by the legislative intent to protect the integrity of the election by prohibiting the casting of votes after the polls are closed and thus preventing the potential for "unwholesome machinations."

IV. <u>Conclusion.</u>

The court finds the CEO's interpretation to be reasonable and persuasive and consistent with the statute. The "date of the election" in section 162(3) of the Elections and Referenda Act 1980, as amended, means the date of the election in the Republic of the Marshall Islands. The Supreme Court has previously determined the postmark deadline is a mandatory requirement. The decision of the Chief Electoral Officer not to count postal ballots postmarked on or after November 19, 2007 in the U.S. is therefore upheld and judgment is granted for plaintiff.

Date: December 6, 2010.



James H. Plasman
Associate Justice, High Court

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[30] *Ibid.*, p. 99.

[31] Memorandum in Support of Motion, filed November 28, 2008, p. 11.