IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

AMENTA MATTHEW, GERALD M. ZACKIOS and ELDON NOTE, Petitioners, v. JOSEPH JORLANG, in his capacity as Chief Electoral Officer, Respondent.	CIVIL ACTION NO. 2011-224 MEMORANDUM OF DECISION AND ORDER

TO : Gerald M. Zackios, counsel for Petitioners
Attorney General Filimon Manoni, counsel for Respondent Joseph Jorlang in his capacity as Chief Electoral Officer

I. INTRODUCTION

This case commenced with the filing of petitioners' "Complaint for Declaratory Relief" on December 30, 2011. Petitioners requested the court to declare certain postal votes cast in the November 2011 general election were not properly notarized and were thus null and void, to order the Chief Electoral Officer to conduct a recount on that basis, and to declare the winners. While filed as a complaint for declaratory relief, petitioners subsequently urged the court to consider the matter as an appeal from the decision of the Chief Electoral Officer to deny the petition for recount from each of them. While no respondent was named in the caption or body of the complaint, the Attorney General responded and moved for dismissal on behalf of the Chief Electoral Officer on a number of grounds.

The court finds the Chief Electoral Officer is the proper party to respond to the complaint and that a legal controversy exists. Finally, the court finds that petitioners failed to follow and

exhaust the remedies provided under the Elections and Referenda Act 1980[1] (ERA), whether considered as a complaint for declaratory relief or as an appeal of the Chief Electoral Officer's decision, and the matter must be dismissed.

II. FACTUAL BACKGROUND

A general election was held in the Marshall Islands on November 21, 2011. Petitioners were candidates in the election. Amenta Matthew was a candidate for the Nitijela seat from Utrik Atoll, Gerald Zackios was a candidate for one of the two Nitijela seats from Arno, and Eldon Note was a candidate for Mayor for the Kili/Bikini/Ejit local government. The unofficial results of the election were announced on December 12, 2011. Each of the petitioners filed a petition for recount with the Chief Electoral Officer: Zackios on December 8, 2011, Matthew on December 14, 2011, and Note on December 14, 2011. The Chief Electoral Officer (CEO) Joseph Jorlang responded to each of the petitions, although petitioner Matthew stated she never received the response. The official results of the election were announced on December 28, 2011. Each of the petitioners lost their respective election contests. The petitioners filed a Complaint for Declaratory Relief on December 30, 2011.

III. DISCUSSION

Of the issues raised by the Attorney General in the motion to dismiss, some affect the complaint generally and others relate individually to each petitioner based upon their individual factual situations. Two of the issues affecting the complaint generally relate to the jurisdiction of the court based upon the failure of the complaint to identify a defendant/respondent and the failure of the complaint to identify a legal interest that had been harmed relate to the complaint generally. The issue of exhaustion of remedies is analyzed separately for each petitioner, based upon their specific circumstances.

Underlying the court's consideration of these issues is the principle declared by the RMI

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[1] 2 MIRC Chapter 1.

Supreme Court that the "court has the duty to uphold the election if possible."[2]

A. The court is not deprived of jurisdiction in the circumstances of this case by the petitioners' failure to name a defendant or respondent in the complaint.

In the present case, petitioners have not named a defendant or respondent in the caption of the case, nor in the body of the complaint. The RMI Supreme Court found the failure to name a party to be a fatal defect to the complaint in *Momotaro, et al., v. Chief Electoral Officer*[3], where the complaint requested the court order the Chief Electoral Officer (CEO) to count certain postal ballots, which had been rejected by the CEO because they had been returned in envelopes containing more than one ballot. In upholding the dismissal of the case, the Supreme Court found that a "complaint filed on behalf of unknown persons cannot establish a 'definite and concrete' controversy because there is only a possibility that a plaintiff will come forward and agree to litigate."[4] Art. VI, Sec. 3(1) of the RMI Constitution provides that the "High Court shall be a superior court of record having general jurisdiction over controversies of law and fact in the Marshall Islands." In the absence of a controversy, the court has no jurisdiction. The RMI Supreme Court quoted the US Supreme Court, "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."[5]

In the complaint as originally filed in *Momotaro*, no plaintiffs were named because their identities were unknown at the time of filing, and it was styled as *John and Jane Does Nos. 1-20 v. Hemley Benjamin, in his capacity as Chief Electoral Officer*. The court noted a plaintiff may proceed anonymously under special circumstances, such as to avoid retaliation or to preserve the

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[2] *Bien v. MI Chief Elec. Off.*, 2 MILR 94, 97. The court went on to cite case law: "'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)."

[3] 2 MILR 237 (2004)

[4] 2 MILR 237, 241

[5] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937), cited at 2 MILR 237, 241.

plaintiff's right to privacy. That was not the case in *Momotaro,* where the plaintiffs were not named because they were not known. As a result, not only did the court not have jurisdiction because there was no controversy, but the complaint was a "nullity" and could not be amended by a subsequent attempt to name Momotaro as a plaintiff. In the absence of a controversy,[6] the High Court had no jurisdiction and the Supreme Court upheld the dismissal of the case.

In present case, like *Momotaro*, a party is not identified. The case, as filed, was captioned *"In Re: RMI Election 2011, Postal Ballot and Papers Interpretation and Application of Section 116(1) of Part III, Division 3 and Section 162(2)(c) of Division 4 of the Election and Referenda Act 1980 As Amended, 2 MIRC 1, BY: Amenta Matthew, Gerald M. Zackios and Eldon H. Note, Petitioners."* While in *Momotaro* there was no plaintiff, in the present case, petitioners have not identified a defendant[7] in the caption of the case, or in the body of the complaint. In the absence of parties with adverse legal interests, there can be no controversy and thus no subject matter jurisdiction. On this basis, the Attorney General moved for dismissal.

However, this case may be distinguished from *Momotaro*. While there is no named defendant, petitioners have requested relief against the CEO "to conduct another re-count of All Postal Ballots and Papers," to "reject all unqualified Postal Ballots and Papers," and to "issue an official notice declaring the correct name of the proper person(s) to have succeeded" in the November 2011 elections. Additionally, the complaint and summons were served upon the CEO, as well as the Attorney General. The Attorney General has come forward, explicitly on behalf of the CEO, and defended against the petitioners.

The CEO is the proper party to defend or respond to the petitioners in this matter even though the CEO is not specifically named a party in the complaint. The situation here differs

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[6]The court also found the complaint violated MIRCP Rule 10, which requires all parties be named.

[7]Or respondent.

from *Momotaro*, where the proper parties could not be identified from the complaint because the parties were unknown. On that basis, the court found the filing of the complaint to be a "nullity" and thus the complaint was not subject to amendment.

In this case, while the complaint is defective[8] in its failure to name a defendant/ respondent, it is curable through amendment. While the court would typically require the petitioners to amend the complaint, in this case, in order to not further delay proceedings, the court will order the amendment of the complaint by naming the Chief Electoral Officer as the respondent in this case, pursuant to MIRCP 21.[9] That rule provides in part: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

There is no prejudice to the Chief Electoral Officer in so doing. The CEO was served

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[8]Petitioners contend that "the affidavits of the individual candidates along with petitioner's petitions to the CEO and the CEO's response to those petitions were all properly attached as exhibits," and this shows that the CEO was identified as a party (Supplemental Brief in Opposition to Motion to Dismiss, filed September 21, 2012, p. 8.) The Complaint for Declaratory Relief, filed on December 30, 2011, makes reference to the following exhibits which were attached to the complaint:

- Exhibit 1: a letter dated November 03, 2011 from Gerald M. Zackios to Chief Electoral Officer Joseph Jorlang "Re: November 21, 2011 National Election - Petition of Claims and Challenges in the Nititjela Election for the Arno Election District" to which two affidavits were attached - an Affidavit of Gerald M. Zackios, dated November 8, 2011 and an Affidavit of Jorta Danny, dated November 8, 2011;
- Exhibit 2: Response of Joseph Jorlang, Chief Electoral Officer dated December 27 (received December 28, 2011);

There were no affidavits, petitions or CEO responses for petitioner Amenta Matthew, nor for petitioner Eldon Note attached to the complaint. However, in the circumstances of this case, the court does not find the absence of such to be fatal to the complaint.

[9]In the May 22, 2012 motion to dismiss, the Attorney General had also moved for dismissal under MIRCP 19(a). It seems clear that the CEO is a party as described in MIRCP 19(a)(1), "in the person's absence complete releif cannot be accorded among those already parties." However, the proper relief as set out in MIRCP 19(a) would be "[i]f the person has not been so joined, the court shall order that the person be made a party." The proper response is not dismissal.

with the complaint and has participated in the defense of the case. Indeed, in the memorandum in support filed by the Attorney General along with the May 22, 2012 motion to dismiss, it was stated at page 3: "it is contended *on behalf of CEO* . . . that the complaint herein lacks merit, and is not legally sound, in substance, nor in procedure." (emphasis added.) The CEO cannot claim to have been unaware of the action, or that he did not have the opportunity to respond to it. There is no prejudice to the CEO to amend the complaint to properly reflect the parties involved in the case.

B. The court is not deprived of jurisdiction by the failure of petitioners to state in the complaint that they had lost their respective election contests.

Nowhere in the complaint do petitioners identify their legal interests that have been harmed. The complaint nowhere asserts that the petitioners lost the elections they were contesting. The complaint begins: "Comes now Amenta Matthew, Gerald M. Zackios and Eldon H. Note as candidates to the General Election 2011 in their respective constituencies, namely Utrik Atoll, Arno Atoll and Kili/Bikini/Ejit Election Ward, Republic of the Marshall Islands respectively, . . ." At paragraph 2, the complaint states "Amenta Matthew contesting as a candidate to the Senator seat for Utrik Atoll, Gerald M. Zackios as candidate to one of the two Senator seats for Arno Atoll and Eldon H. Note for the Mayor seat Kili/Bikini/Ejit . . ." There is no indication of how the plaintiffs were aggrieved by the actions of the CEO that are set out in the complaint. The mere fact of their candidacy does not establish a legal controversy at this stage post-election. If the petitioners had prevailed at the election, their legal interests would not be adverse to those of the Chief Electoral Officer. On the face of the complaint, there is no showing of a controversy which is "definite and concrete, touching the legal relations of parties having adverse legal interests."[10]

However, to support a determination of jurisdiction, a court may go beyond the

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[10] *Aetna Life Ins. Co. v. Haworth*, see footnote 5.

pleadings.[11] "The existence of an actual controversy between the parties is a jurisdictional requirement and, in search of this, the Court may look outside the pleadings and consider both affidavits and depositions. 2A Moore's Federal Practice, s 12.14."[12] On October 5, 2012, petitioners filed a motion to supplement the record with a copy of relevant portions of the CEO's Declaration of Final Results in the 2011 General Election, dated December 28, 2011. The Attorney General initially opposed the motion, but given the opportunity to review the exhibit with Joseph Jorlang, withdrew the objection. The Declaration, as filed, reveals that the petitioners lost the elections they were contesting. Based upon that, the petitioners have established a legal interest that could have been harmed by the actions of the CEO.[13]

C. Petitioners failed to follow statutorily required procedures in filing their petitions for recount with the CEO and the action must be dismissed.

The Attorney General, on behalf of the CEO, argued petitioners failed to exhaust their administrative remedies, specifically those provided under Sections 180, 181 and 188 of the ERA.[14] Section 180 deals with petitions for recount, Section 181 with rejections of such petitions, while Section 188 deals with referrals to the High Court of voter qualifications.[15]

Petitioners initially seemed to acquiesce in this procedure, requesting the motion to

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[11]This is a different issue from consideration of the record on appeal, which is limited to the record before the Chief Electoral Officer at the time he made his decision. *Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 151.

[12] *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 295 A.2d 592, 593-94 (Del. Ch. 1972) aff'd, 303 A.2d 660 (Del. 1973)

[13]In light of the supplementation of the record, the court need not consider whether it could have taken judicial notice of the election results.

[14]"Motion to Dismiss Complaint and Memorandum in Support," filed May 22, 2012, p. 8.

[15]Because the court finds the petitioners failed to meet the statutory requirements for filing a petition for recount and dismisses on that basis, it does not reach respondent's argument related to Section 188 of the ERA.

dismiss be considered as a motion for summary judgment,[16] and opposing the motion on the grounds that they had fully complied with the requirements of the ERA.[17]

However, in their September 21, 2012 Supplemental Brief in Opposition to Motion to Dismiss, petitioners took the position that respondent's motion to dismiss was improper, as the complaint should be considered an appeal of the CEO's denial of their respective petitions for recount under Section 181 of the ERA.[18] While the complaint did include Section 181 in its recital of jurisdictional basis, nowhere in the complaint does the word "appeal" appear. And, as noted above, the CEO was not named as a defendant/respondent in the caption or in the body of the complaint.

Despite this procedural imprecision, whether the action is regarded as an appeal from a decision of the Chief Electoral Officer, or as a complaint for declaratory relief for which administrative remedies must be exhausted,[19] the same analysis applies.[20] As the analysis

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[16]"Petitioners' Reply and Motion in Opposition to Respondent's Motion to Dismiss Complaint," filed on July 09, 2012, p. 12. In response to this request and the exhibits introduced with the motion to dismiss (including the petitions for recount of petitioners Matthew and Note), as well as the exhibits introduced in petitioners' July 9 Reply, the court opened the record to supplementation on the issues raised in the motion to dismiss through a number of stipulations and, finally, through the court's order of September 25, 2012 setting a deadline for any motions to supplement the record. Petitioners took advantage of this opportunity as described above in section III.B.

[17]*Ibid.*, at p. 11.

[18]"Supplemental Brief in Opposition to Motion to Dismiss," filed September 21, 2012, p. 3.

[19]It should be noted that the CEO has characterized the exhaustion defense as jurisdictional, while it has been characterized in other cases (see *Bill, et al., v. Hemley Benjamin, in his capacity as Chief Electoral Officer*, H.Ct. CA No. 2004-081, "Final Judgment," filed December 20, 2006, p. 13) as an affirmative defense which must be pled or waived. Here, the exhaustion defense has been pled and asserted in a timely manner so the distinction, with regard to the possible waiver of the defense, is not significant.

[20]While the question of whether this matter is a complaint for declaratory relief or an appeal from the decision of the CEO may not be significant for the purposes of analyzing

depends upon the specific facts relating to each petitioner, they will be discussed separately.

(1) **Petitioner Gerald Zackios failed to file his petition for recount within the required two week period after the announcement of the unofficial results of the election.**

Petitioner Gerald Zackios requested a recount, among other concerns, in a letter dated November 03, 2011 from Gerald M. Zackios to Chief Electoral Officer Joseph Jorlang "Re: November 21, 2011 National Election - Petition of Claims and Challenges in the Nititjela Election for the Arno Election District."[21] Attached to this petition were two affidavits, one of petitioner and one of Jorta Danny. Both affidavits were signed before a notary public and were dated November 8, 2011. The general election was held on November 21, 2011. The unofficial results were announced on December 12, 2011.[22] On this basis, the Attorney General sought dismissal, based upon Section 180(3) of the ERA which provides: "The petition shall be filed within two weeks after the date of the announcement of the unofficial result of the election in accordance with Section 178(4)(b) of this Chapter." The Attorney General asserted that the

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compliance with statutory requirements in the ERA, it may well be significant for appellate purposes.

[21]See Exhibit 1, (marked as "P Exh 1"), attached to the Complaint for Declaratory Relief, filed December 30, 2011. It was also attached to Joseph Jorlang's Affidavit in Support, filed with respondent's Motion to Dismiss, filed on May 22, 2012, as Exhibit 5. It was similarly attached to Petitioners' Reply and Motion in Opposition to Respondent's Motion to Dismiss Complaint, filed on July 09, 2012 as Petitioners Exhibit 7. The affidavits of Gerald M. Zackios and Danny Jorty were appended to P Exh 1attached to the complaint, and were attached to Exhibit 5 of Jorlang's Affidavit in Support. The affidavits were not appended to Petitioners' Exhibit 7 attached to Petitioners' Reply. The parties agreed that the failure to attach the affidavits to Petitioners' Exhibit 7 did not constitute a contention by either party that the affidavits were not filed with the petition for recount (Record of Status Conference and Order, filed September 3, 2012, ¶ 1.)

[22]See Joseph Jorlang's Affidavit in Support, filed with respondent's Motion to Dismiss, filed on May 22, 2012 at ¶ 2: "That the unofficial results of the 2011 Elections were announced on December 12, 2011." This was not disputed in any factual submission by petitioner.

petition on its face was invalid as November 3, 2011 did not fall within the required time period for filing a petition for recount.

The Attorney General also argued that the veracity of the petition was questionable and unreliable as the date on its face preceded the election about which it complained.[23] Petitioner Zackios responded that the November 3 and November 8 dates in the petition were typographical errors, and should have been "December," rather than "November." Moreover, he asserted that the petition had been served on the CEO on December 8, 2011. The CEO ultimately stipulated that he had received Zackios' petition for recount on December 8, 2011.[24]

This does not remedy the petition's infirmity. The statute requires the petition to be filed "within two weeks *after* the announcement of the unofficial results." (emphasis added.) The filing of the petition with the CEO on December 8, 2011 still preceded the announcement of the unofficial results. It was not filed "within two weeks after" the announcement of unofficial results on December 12, 2011. Use of the word "shall" in the statute establishes a mandatory condition. Failure to meet the condition for timely filing invalidates the petition for recount.[25] There was nothing before the CEO for him to reject. There was no rejection from which to appeal. The petitioner failed to properly pursue his complaint of alleged irregularities through the statutory process for a petition for recount. He did not exhaust his remedies. Whether a complaint or an appeal, in regard to petitioner Gerald Zackios the action must be dismissed.

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[23]"Motion to Dismiss Complaint and Memorandum in Support," filed May 22, 2012, p. 10.

[24]see Record of Status Conference and Order, filed September 3, 2012, ¶ 2.

[25]see *State ex rel. Shroble v. Prusener*, 185 Wis.2d 102 (1994.) The court there stated "if a candidate does not petition for a recount to challenge a mistake in the canvassing process within the three-day time limit provided for in sec. 9.01, that candidate is precluded from challenging the canvassing mistake." 185 Wis.2d at 110. Consequently, "[b]ecause Shroble did not request a recount within the time limit under the statute, his remedy has expired." 185 Wis.2d at 107.

(2) Petitioner Amenta Matthew failed to support her petition for recount to the CEO with the required "affidavit of the petitioner."

It is undisputed that petitioner Amenta Matthew filed with the CEO on December 14, 2011 a letter to Joseph Jorlang, dated December 14, 2011 "RE: November 21, 2011 National Election - Petition of Claims and Challenges in the Nitijela Election for the Utrik Election District."[26] In the letter she stated it should be considered a petition for a recount. Also filed was a cover letter from Matthew to which were attached two affidavits, one by Brene C. Lalimo and one by Dian Micheal. Section 180(2) of the ERA states: "In the case of a re-count applied for on the grounds set out in Subsection (1)(b) of this Section, the petition *shall be supported by an affidavit of the petitioner*, specifying his belief and the grounds for his belief that the manner in which the count or other alleged discrepancy was believed to have been erroneous." (emphasis added.) Petitioners acknowledged their petitions were based on Section 181(1)(b)[27] of the ERA.[28] The statute requires that the petition be supported "by an affidavit of the petitioner." While the evidence before the court shows the petition of Matthew was accompanied by two

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[26]Matthews' petition for recount was not attached to the complaint. It did not appear in a court filing until it was attached to Joseph Jorlang's Affidavit in Support filed with respondent's Motion to Dismiss, filed on May 22, 2012, as Exhibit 3. It was similarly attached to Petitioners' Reply and Motion in Opposition to Respondent's Motion to Dismiss Complaint, filed on July 09, 2012 as Petitioners Exhibit 6. The cover letter and the attached affidavits of Brene C. Lalimo and Dian Micheal were appended to Exhibit 3 of Jorlang's Affidavit in Support. The cover letter and affidavits were not appended to Petitioners' Exhibit 6 attached to Petitioners' Reply. The parties agreed that the failure to attach the affidavits to Petitioners' Exhibit 6 did not constitute a contention by either party that the affidavits were not filed with the petition for recount. (Record of Status Conference and Order, filed September 3, 2012, ¶ 1.)

[27]2 MIRC 181(1)(b) provides for a petition for recount on the grounds that "there was an error in relation to the count, the records of the election, or the admission or rejection of ballot papers, and that he believes that a re-count will affect the result of the election."

[28]Petitioners' "Supplemental Brief in Opposition to Motion to Dismiss," filed September 21, 2012, p. 9: ". . . Petitioners again availed themselves of administrative remedies by filing their petitions under **Section 180(1)(b)** with the CEO . . ." (emphasis added.)

affidavits, there is no evidence it was accompanied by the statutorily required "affidavit of the petitioner."

Use of the word "shall" in the statute establishes a mandatory condition. Failure to meet the condition invalidates the petition for recount.[29] There was nothing before the CEO to reject. There was no rejection from which to appeal. The petitioner failed to properly pursue her complaint of alleged irregularities through the statutory process. She did not exhaust her remedies. Whether a complaint or an appeal, in regard to petitioner Amenta Matthew, the action must be dismissed.

(3) Petitioner Eldon Note failed to support his petition for recount to the CEO with the required "affidavit of the petitioner."

The petition for recount of petitioner Eldon Note is similarly defective. It is undisputed that petitioner Note filed his petition for recount with the CEO on December 14, 2011 in a written document entitled "Re: Petition for Recount Postal Ballot."[30] Accompanying the petition

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[29]see *Giacobello v. Board of Elections of Borough of Mount Union*, 322 A.2d 429, 430 (Commonwealth Court of Pennsylvania1974.) In upholding the dismissal of the petition for recount for failing to satisfy the statutory requirement that the petition be verified by three qualified electors, when it had been verified by only one, the court quoted from the decision of the lower court:

> The effect of the type of irregularity which exists in this case was considered in the case of North Union Township Election Case, 250 Pa. 98, (95 A. 421,) in which case one of the persons signing and swearing to the Petition for the contest was not a qualified elector of the election district. The Court there held that the Petition was not verified as required by the Act of Assembly, and the Court acquired no jurisdiction of the proceeding, stating that an affidavit of the required number of qualified electors is essentially necessary to give jurisdiction.

[30]Note's petition for recount was not attached to the complaint, nor to the Memorandum of Point filed at the same time. It did not appear in a court filing until it was attached to Joseph Jorlang's Affidavit in Support filed with respondent's Motion to Dismiss, filed on May 22, 2012, as Exhibit 1. It was similarly attached to Petitioners' Reply and Motion in Opposition to Respondent's Motion to Dismiss Complaint, filed on July 09, 2012 as Petitioner Exhibit 8. The affidavits of Kanji Joseph and Ronald Ajen were appended to Exhibit 1of Jorlang's Affidavit in Support. The cover letter and affidavits were not appended to Petitioner Exhibit 8 of Petitioners'

were two affidavits, one from Kanji Joseph, one from Ronald Ajen. Section 180(2) states: "In the case of a re-count applied for on the grounds set out in Subsection (1)(b) of this Section, the petition shall be supported by an affidavit of the petitioner, specifying his belief and the grounds for his belief that the manner in which the count or other alleged discrepancy was believed to have been erroneous." As noted above, Petitioners specifically acknowledged their petitions were based on 181(1)(b). The statute requires that the petition be supported "by an affidavit of the petitioner." The undisputed evidence before the court shows the petition was accompanied by two affidavits, but it lacked the statutorily required "affidavit of the petitioner."

Use of the word "shall" in the statute establishes a mandatory condition. Failure to meet the condition invalidates the petition for recount. There was nothing before the CEO to reject. There was no rejection from which to appeal. The petitioner failed to properly pursue his complaint of alleged irregularities through the statutory process. He did not exhaust his remedies. Whether a complaint or an appeal, in regard to petitioner Eldon Note, the action must be dismissed.

IV. CONCLUSION

Although the Chief Electoral Officer was not named as a defendant or respondent in this case, it is clear that he is and was meant to be the responding party to the complaint. This was not a case where the party was unknown, rendering the complaint a nullity. The complaint may be amended and the court will so order. Similarly the failure to allege a legal injury was cured by a subsequent filing which was sufficient for the court to find it had jurisdiction on that basis.

Whether the action is considered a complaint for declaratory relief or an appeal from a decision of the Chief Electoral Officer, the result is the same. The petitioners failed to comply with the statutory requirements for filing their respective petitions for recount with the CEO.

Reply. The parties agreed that the failure to attach the affidavits to Petitioner Exhibit 8 did not constitute a contention by either party that the affidavits were not filed with the petition for recount. (Record of Status Conference and Order, filed September 3, 2012, ¶ 1.)

Because the matter is resolved on this basis, the court does not reach the other grounds raised in the respondent's motion to dismiss, nor does it reach petitioners' underlying complaint. As a complaint or as an appeal, the action must be dismissed.

ORDER

Based upon the forgoing, it is hereby ORDERED as follows:

1. The Chief Electoral Officer is JOINED as the respondent in this case and the caption is amended accordingly; and
2. The action is DISMISSED as to all three petitioners.

Date: November 14, 2012.

James H. Plasman
Associate Justice, High Court