

CHUUK STATE SUPREME COURT APPELLATE DIVISION

DAVE WILLIANDER,)	CIVIL APPEAL NO. 02-2021
)	
Appellant,)	
)	
vs.)	
)	
CHUUK ELECTION COMMISSION,)	
)	
Appellee,)	
)	
PIPIRI HAUK a/k/a Kasmino Hauk and)	
Kasmiro Hauk,)	
)	
Real Party in Interest.)	
_____)	

OPINION

Trial: April 8, 2021
Decided: April 12, 2021

BEFORE:

Hon. Kerio Walliby, Associate Justice, Presiding
Hon. Larry Wentworth, Temporary Justice*
Hon. Daniel J. Rescue, Jr., Temporary Justice**

*Associate Justice, FSM Supreme Court

**Directing Attorney, Micronesia Legal Services Corporation, Weno, Chuuk

APPEARANCES:

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HEADNOTES

Elections – Contest

A voter may contest the election results by filing a complaint setting forth the particular grounds of the contest. The election contestant must file his or her complaint within 5 days after the declaration of the result of the election by the body canvassing the returns thereof. An election contest challenges the declared results of an election, not the candidates' qualifications – that is, it does not challenge whether a candidate's nomination papers were in order or whether the candidate met the constitutional or legal requirements to run. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 223 (Chk. S. Ct. App. 2021).

Elections – Contest

An election contest is a challenge by an election's loser against the winner, calling for an analysis of the election returns, which may include reviewing voter qualifications or re-counting the ballots. A belated challenge of a candidate's qualifications is not an "election contest." Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 223 (Chk. S. Ct. App. 2021).

Elections – Conduct

If a candidate doubts another candidate's qualifications, that candidate could, and should, complain to the Election Commission at any time before the general election, preferably well before the ballots were printed. The Chuuk Election Code, Section 55 provides the proper mechanism for seeking redress for any Election Code violations. It allows any person who believes any Election Code provision has been violated (and that would include a candidate not having the qualifications listed in Section 34(a) of the Election Code) to complain. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 223-24 (Chk. S. Ct. App. 2021).

Elections – Conduct; Elections – Contest

When a candidate already knew or should have known in November 2020, all the information to challenge another candidate's eligibility, he should have complained to the Election Commission then and not after the March 2021 election because the law does not favor those who rest on their rights or willful blindness. At the least, the candidate should have challenged the other candidate before the ballots were printed, instead of using a post-election pretense of an election contest challenging all the votes for the other candidate as "illegal" votes. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 224 (Chk. S. Ct. App. 2021).

Civil Procedure – Notice

Constructive notice is a concept through which actual notice is imputed to a party regardless of whether that party has actual knowledge of the imputed facts. A party has constructive notice when from all the facts and circumstances known to him at the relevant time, he has such information as would prompt a person exercising a reasonable care to acquire knowledge of the fact in question or to infer its existence. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 224 (Chk. S. Ct. App. 2021).

Domicile and Residence; Elections – Contest

A Representative must have been a resident and registered voter of the Representative District from which elected for at least 5 years before the day of election, and the Election Code defines the term residence as that place in which a person intends to and does maintain his permanent abode and has not taken any legal or political action to contradict such residency, although the person may be actually residing

at a place other than his residence. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 224-25 (Chk. S. Ct. App. 2021).

Domicile and Residence

Domicile is often described as a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. It is also described as the residence of a person or corporation for legal purposes. – also termed legal residence; domicile by operation of law. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 225 (Chk. S. Ct. App. 2021).

Domicile and Residence; Elections

Where a person is domiciled – that is, where a person has his or her legal residence – is where that person should properly be registered to vote and be able to run for political office. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 225 (Chk. S. Ct. App. 2021).

Custom and Tradition – Chuuk; Domicile and Residence

If the court were to follow Chuukese custom and tradition, as it is constitutionally instructed to, of the two parents, where the mother is from is the son's most likely residence or domicile. Williander v. Chuuk Election Comm'n, 23 FSM R. 220, 225 (Chk. S. Ct. App. 2021).

* * * *

COURT'S OPINION

KERIO WALLIBY, Associate Justice, Presiding:

On April 8, 2021, this election appeal was tried before the court with off-island counsel for the real party in interest, Kasmino Hauk (also known as Pipiry Hauk, P-Three Hauk, and Kasmiro Hauk), appearing by video-conference from Pohnpei. We hereby affirm the Election Commission's decision not to discard all the votes cast for Hauk, the top vote-getter for election to the House of Representatives from Election District # 7, and therefore we also affirm its decision not to declare that the fourth highest vote-getter, Dave Williander, should have won election to the House of Representatives from Tolensom. Our reasons follow.

I. FACTS

A. *Election Run-Up*

Williander and Hauk both started campaigning for seats in the Chuuk Legislature House of Representatives in June 2020. Hauk told Williander then that they would be "like partners." After submission of their respective nomination papers in early November 2020, both Williander and Hauk were placed on the March 2, 2021 general election ballot for election in House of Representatives Election District # 7 – Tolensom.

Hauk garnered the most votes of the nine candidates running. Williander finished fourth. Election District # 7 is a multiple-member district where the top three vote-getters are declared elected to represent the district (Tolensom) in the Chuuk House of Representatives.

On March 3, 2021, Williander complained to the Election Commission that Hauk should not be declared a winning candidate since Hauk should not have been put on the ballot because Hauk was not a Tolensom resident but was an Oneisomw resident. Williander's excuse for not complaining to the Election Commission earlier was that the sample ballots for Election District # 7 were printed late and, in his view, this left too little time before the general election to complain.

B. *Hauk's Background*

Hauk's mother was from Tolensom. Hauk's father was from Oneisomw. In December 1989, Hauk was registered to vote in Oneisomw. In the 1990s, Hauk lived on Guam. Hauk did not vote while on Guam. In 1999, Hauk returned from Guam with the intent to make Tolensom his residence because Tolensom was his mother's island. In 2000, Hauk registered to vote in Foup, Tolensom. He has been on the Tolensom master list of voters ever since.

Hauk still had ties to Oneisomw. The Oneisomw mayor (and council) appointed Hauk to the Oneisomw election board in 2019, but Hauk did not serve. Hauk's name was never removed from the Oneisomw master list of registered voters. It still remains there.

II. ANALYSIS

Williander's sole challenge to Hauk's election as a representative from Tolensom is that Hauk is not a legal resident of Tolensom, but is a resident of Oneisomw, and that the Election Commission failed in its duty to investigate the nominees' qualifications before placing them on the March 2, 2021 ballot, and that if the Election Commission had done so, Hauk would not have been on the ballot. As relief, Williander asks that Hauk be considered stricken from the ballot and all the votes for Hauk be disregarded or discarded, and, with those votes discarded, that he, Williander, be considered as the third-highest vote-getter of the remaining candidates for Tolensom representative and that he be declared a winning candidate.

Hauk contends that not only is he a bona fide legal resident of Tolensom and thus eligible for election from District # 7, but also that Williander's complaint is not proper as an election contest and thus comes too late because Williander should have raised any shortcomings in his opponents' qualifications much earlier. Williander argues that this is a proper election contest under § 126 of the Chuuk Election Code, and that he could not have raised the issue earlier because he was unaware of who else was running until the sample ballots were tardily printed, and then it was too late.

A. *Election Contest*

Under Section 126, a voter may contest the election results by filing a complaint setting forth "[t]he particular grounds of the contest." Chk. S.L. No. 3-95-26, § 126(d). The election contestant must file his or her complaint "within five (5) days after the declaration of the result of the election by the body canvassing the returns thereof." *Id.* § 127. Thus, a Section 126 election contest challenges the declared results of an election, not the candidates' qualifications – that is, it does not challenge whether a candidate's nomination papers were in order or whether the candidate met the constitutional or legal requirements to run.

Generally, an election contest is "[a] challenge by an election's loser against the winner, calling for an analysis of the election returns, which may include reviewing voter qualifications or re-counting the ballots." BLACK'S LAW DICTIONARY 596 (9th ed. 2009). Williander does not call for an analysis of the election returns. He does not dispute the election returns' accuracy. Williander does not seek review of any voter's qualifications – that is, whether anyone cast an illegal vote. Nor does Williander seek a recount. Williander just wants to disqualify the winning candidate, in the hope that he will be allowed to move up one slot and be declared the third-highest vote-getter and thus the winner of a Tolensom representative seat (instead of, if Hauk were disqualified, a vacancy being declared and a special election called). Williander's (belated) challenge of Hauk's qualifications is not an "election contest."

If Williander doubted Hauk's qualifications, he could have, and should have, complained to the Election Commission at any time before the March 2, 2021 general election, preferably well before the ballots were printed. The Chuuk Election Code, Section 55 provides the proper mechanism for seeking

redress for any violations of the Election Code. It allows any person who believes any Election Code provision has been violated (and that would include a candidate not having the qualifications listed in Section 34(a) of the Election Code, which mirror the Constitution's candidate qualifications).

Even if Williander (as he testified) mistakenly believed in June 2020, and the following months, that Hauk intended to run for representative from Oneisomw instead of Tolensom, he knew, or should have known, in early November 2020, that Hauk was a candidate in Tolensom. That is because that is when the Election Commission knew whose names would appear on the March 2, 2021 general election ballot. Williander could have easily learned from the Election Commission who would be his opponents in the March 2, 2021 election. He knew when the nomination deadline was because he knew when he had to get his nomination papers in. He knew when the Election Commission would determine whose names would be put on the March 2, 2021 general election ballot. Williander already knew in November 2020, of Hauk's ties to Oneisomw. Williander had, or should have had, all the information then to the Election Commission about Hauk's candidacy in Tolensom. The law does not favor those who rest on their rights or willful blindness. See Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 145 (App. 2013).; *cf.* Setik v. Mendiola, 21 FSM R. 537, 558 (App. 2018) (party cannot sit idly by and then seek to present additional defenses in the event of an adverse outcome); Senate v. Elimo, 18 FSM R. 199, 202 (Chk. S. Ct. Tr. 2012) (same); AHPW, Inc. v. Pohnpei, 18 FSM R. 1, 10 (Pon. 2011) (same); Arthur v. Pohnpei, 16 FSM R. 581, 599 (Pon. 2009) (same).

Even if Williander did not actually know who he was running against for election to a Tolensom representative seat, he had constructive notice in November 2020 that Hauk was a candidate for the three Tolensom seats in the House of Representatives. Constructive notice is a concept through which actual notice is imputed to a party regardless of whether that party has actual knowledge of the imputed facts. Dereas v. Eas, 14 FSM R. 446, 457 (Chk. S. Ct. Tr. 2006); Nahnken of Nett v. Pohnpei, 7 FSM R. 171, 177 n.11 (Pon. 1995). A party has constructive notice when from all the facts and circumstances known to him at the relevant time, he has such information as would prompt a person exercising a reasonable care to acquire knowledge of the fact in question or to infer its existence. Dereas, 14 FSM R. at 457; FSM Dev. Bank v. Arthur, 13 FSM R. 1, 10 (Pon. 2004); Nahnken of Nett, 7 FSM R. at 177 n.11. Williander had all the facts and circumstances known to him that should have prompted a reasonable candidate, exercising a reasonable care, to acquire in November 2020, knowledge of who the other candidates were for the office for which he was campaigning.

Williander thus knew, or should have known, in November 2020, of all the grounds he now uses to try to erase Hauk's election as the top vote-getter for the Tolensom representat'l've seats. If Williander actually wished to challenge Hauk's qualification to run, Williander should have challenged it before the ballots were printed, instead of using a post-election pretense of an election contest challenging all the votes for Hauk as "illegal" votes. Williander's claim, however, is not that any of those votes were illegally cast, or cast by illegal voters, or illegally counted. There is no evidence that any of the votes cast for Hauk were illegal votes. Williander just asserts that Hauk's candidacy was illegal. Williander, knowing what he knew, has made that assertion too late, and in the wrong manner.

Accordingly, we affirm the Election Commission's denial of Williander's complaint on this ground. But even if we consider the merits of Williander's claim, the result would not change.

B. *Residency*

Williander claims that Hauk does not meet the five-year residency requirement for election as a representative. The Chuuk Constitution sets out the qualifications for a member of the Chuuk House of Representatives. It provides:

No person is eligible to serve as a Representative unless at least 25 years of age . . .

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on the day of election; was a born Chuukese, has been a resident and registered voter of the Representative District . . . from which elected for at least 5 years prior to the day of election, and is a citizen of the Federated States of Micronesia.

Chk. Const. art. V, § 7(a). The relevant Election Code provision is identical, except that it also defines the term "was a born Chuukese." Chk. S.L. No. 3-95-26, § 34(a). Hauk is undisputedly a "born Chuukese." The Election Code also defines the term residence. It provides:

For the purposes of this Act, the residence of a person is that place in which he intends to and does maintain his permanent abode and has not taken any legal or political action to contradict such residency, although he may be actually residing at a place other than his residence. Any change of residency shall not take effect unless such change has been approved by resolutions of the municipal councils of both the original and intended residences at least one year prior to the next election in the intended residence.

Chk. S.L. No. 3-95-26, § 64. The Chuuk Election Code's definition of residency is very close to the classic definition of domicile.

Domicile is often described as "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." BLACK'S LAW DICTIONARY 558 (9th ed. 2009). It is also described as "[t]he residence of a person or corporation for legal purposes. – Also termed . . . *legal residence; domicile by operation of law.*" *Id.* at 559 (emphasis in original). The FSM Supreme Court has held that "[l]egal residence is defined as 'the place of domicile or permanent abode, as distinguished from temporary residence . . . it is the location defined by law as the residence of the person.'" Berman v. Lambert, 17 FSM R. 442, 448 (App. 2011) (quoting BLACK'S LAW DICTIONARY 897 (6th ed. 1990)).

When Hauk returned from Guam, it was with the intent to make Tolensom, his mother's home island, his domicile or legal residence. He registered to vote on Tolensom in 2000. We have insufficient evidence to find that Hauk was domiciled anywhere other than Tolensom since 2000. We would think that where a person is domiciled – that is, where a person has his or her legal residence – is where that person should properly be registered to vote and be able to run for political office.

Hauk has thus been domiciled in Foup, Tolensom for over twenty years and registered to vote there. We are not persuaded that Hauk's possible failure to obtain all the paperwork from the necessary municipal councils (we have no evidence either way) twenty years ago, is an impediment to Hauk being a legal resident and domiciliary of Foup, Tolensom. Nor do we think Hauk's unsought and unperformed appointment to the Oneisomw election board changes matters. Other than having once been registered to vote in Oneisomw (in 1989) and Hauk's father having been from Oneisomw, there is no indication that Hauk would need Oneisomw's approval to establish his legal residence and domicile in Tolensom where his mother was from. If we are to follow Chuukese custom and tradition, as we are constitutionally instructed, Chk. Const. art VII, § 14 (Chuuk court decisions should be consistent with "local traditions and customs"), of the two parents, where the mother is from is the son's most likely residence or domicile.

III. CONCLUSION

Accordingly, we dismiss Dave Williander's appeal and affirm the Election Commission's certification of the winners for the three House of Representative seats representing Election District # 7 – Tolensom.