

NO. 29464

FILED

IN THE INTERMEDIATE COURT OF APPEALS

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STATE OF HAWAII

MICHAEL "PHOENIX" DUPREE,

Appellee,

v.

ROY T. HIRAGA and SOLOMON P.
KAHO'OHALAHALA

Appellants.

Case No. BOR 08-01

APPEAL FROM FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISIONS.

BOARD OF REGISTRATION FOR
THE COUNTY OF MAUI

H. MARTINS, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

Clerk, Second Circuit Court and
ex-officio Clerk, Supreme Court

OPENING BRIEF

and

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MAY 19 2009

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BOARD OF REGISTRATION FOR
THE COUNTY OF MAUI

OPENING BRIEF

Appellant, Solomon P. Kaho'ohalahala, appeals from the findings of fact, conclusions of law, and decisions issued by the Board of Registration for the County of Maui¹ (Board) on the grounds that the Board (1) lacked jurisdiction to hear and resolve Appellee Michael "Phoenix" Dupree's appeal because Dupree never challenged Kaho'ohalahala's voter-registration status; and (2) erred in reversing the Maui County Clerk's ruling because Dupree failed to adequately prove that Kaho'ohalahala's residence was Lahaina, Maui.

I. Statement of the Case

Letters to the Maui County Clerk and the Clerk's Ruling

¹ Chairman John Henry and members Gennaro Zarro, and Mercedes Neri presided.

After Kaho'ohalahala won the primary election for the Lanai seat on the Maui County Council², the Clerk received letters questioning Kaho'ohalahala's candidacy. [Record on Appeal (RA) at 3.]. The first two letters--which were identical in form³--came from Bruce Harvey and Sheri Mora. [RA 8, 9.]. They requested the Clerk to investigate Kaho'ohalahala's ability to run for the Lanai seat:

Would you please investigate his claim to residency here? Many residence of this island would like to know what the criteria is [sic] for establishing residency. I would like to know how to proceed to file a claim that Mr. Kaho'ohalahala falsified documents filed with his signature to run for the office of Maui County Council, Lana'i Seat.

[Id.].

On September 29, 2008, the Clerk received a letter from Dupree. [RA 1-2; 18-19.]. Dupree claimed that Kaho'ohalahala was not an eligible candidate for the Maui County Council:

Our overall goal: good, direct, representative democracy on the Maui County Council for the residents of Lanai. Our Contention: Political rules that allow an individual to run in a district that he does not reside in, work in, own a home in, or actively campaign in, are not beneficial to achieving the goal of direct democracy and good representation.

With all due respect to Mr. Sol Kaho'ohalahala:

Sol is from Lanai and has family here but he doesn't live here. . . .

² The results for the primary election held on September 20, 2008 are attached as an exhibit to Appellant Solomon P. Kaho'ohalahala's motion to dismiss. This Court may take judicial notice of the record on appeal for Case Number 29476. Hawai'i Rules of Evidence (HRE) Rule 201; see also In re Estate of Kam, 110 Hawai'i 8, 12 n. 5, 129 P.3d 511, 515 n. 5 (2006) (appellate court may take judicial notice of the records and filings in a related case.) (citing Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 29 n. 7, 79 P.3d 119, 112 n. 7 (2003)).

³ Eight of the twelve letters were essentially identical.

With no disrespect to him, if off island voting patterns in the primary remain the same during the general election, he will be Lanai's representative, and we need him now more than ever to do an effective job of doing that.

For Lanai voters, in their choice for the chair that represents their district [sic], Matt Mano, Alberta deJetley, and John Ornellas placed first, second and third respectively [sic]. Those candidates are all local residents, and they are in touch with the pulse of Lanai, in this serious economic time when we need our voice heard and our will expressed.

...

In a democracy [sic] we should respect the right of each island to govern itself as much as possible. Since we don't have a mayor on this island, our **only** direct voice on this council and in local government is this chair. Don't you think it should be required that this chair be held only by a true Lanai resident in the future, if there is a worthy candidate, and this election there are [sic].

.....

We would ask that off-islanders give us the right and opportunity to govern ourselves - majority rules - here on Lanai. As Mahatma Ghandi once said, "there is no people who would not prefer their own bad government to the good government of an alien power."

Sol is a fine candidate. But why doesn't he run in the district that he currently resides in and give a current Lanai resident the opportunity to represent their home island which they love equally as well as he.

[RA 18-19.].

The Clerk received a letter from Sandi Masse on October 2, 2008. [RA 20-22.]. Masse wrote to "challeng[e] Sol Kaho'ohalahala running for the County Council on behalf of the island of Lanai, or being voted into that office in the general election on November 4, 2008, based on the question of Mr. Kaho'ohalahala's permanent/legal residency on Lanai." [RA 20.].

On September 24, 2009, the Clerk informed Kaho'ohalahala that he received twelve written challenges to his voter registration pursuant to Hawai'i Revised Statutes (HRS) § 11-25 and that Kaho'ohalahala "respond to the challenge allegation, i.e., that [he did] not reside at 444 Fraser Avenue [in Lanai City]." [RA 23].

Kaho'ohalahala responded that none of the letters "challeng[ed his] voter registration. The writers [were] clearly challenging the validity of his nomination papers[.]" [RA 28].

Kaho'ohalahala attached to his response an affidavit from his brother, Gaylien Kaho'ohalahala. [RA 37.]. Gaylien attested that he was a resident of Lanai City, Lanai and that in "July 2008, Sol telephoned [him] and discussed with the family his intention of returning to Lana'i to live." [Id.]. Gaylien swore that he "welcomed Sol's return home and he presently resides at 444 Fraser Avenue and resided there since the beginning of July, 2008." [Id.].

Kaho'ohalahala also submitted his own affidavit. [RA 38.]. Kaho'ohalahala averred that his "residence is fixed at 444 Fraser Avenue, Lana'i City and whenever [he is] absent from the island of Lana'i, [he] intend[s] to return." [Id.]. Kaho'ohalahala attested that he was "born and raised on the island of Lana'i and retained [his] residence on Lana'i except for a brief period in which [he] was in the service of the State of Hawai'i with the Kaho'olawe Island Reserve Commission." [Id.]. Kaho'ohalahala attested that he filed his affidavit of voter registration as a Lanai resident and voted in the primary election "with the belief and understanding that [he is] a legal resident of Lana'i." [Id.].

The Clerk issued his ruling on October 10, 2008. [RA 3-7.]. The letters, according to the Clerk, "assert[ed] two separate statutory grounds, namely section 12-8,

Hawaii Revised Statutes ('HRS') and section 11-25, HRS." [RA 4.]. The Clerk ruled that "[t]o the extent that the Complaint Letters constitute a challenge to Mr. Kaho'ohalahala's candidacy pursuant to the provisions of [HRS §] 12-8, . . . the challenge is untimely." [Id.]. The Clerk also ruled that Kaho'ohalahala was a Lanai resident for voter registration purposes. [RA 7.]. On October 20, 2008, Dupree sent a letter to the Board to appeal from the Clerk's ruling. [RA 52-54.].

The Motion to Dismiss for Lack of Jurisdiction.

Kaho'ohalahala submitted⁴ to the Board a motion to dismiss Dupree's appeal for lack of jurisdiction. [RA 58-63.]. Kaho'ohalahala explained that Dupree's initial letter "challenge[d] [Kaho'ohalahala's] nomination papers" and that the Clerk "improperly considered Mr. Dupree's challenge[.]" [RA 59, 62.]. The Board held a hearing on the motion on October 27, 2008.

At the hearing, Kaho'ohalahala pointed out that Dupree's appeal could not be heard by the Board because Dupree's initial challenge went to Kaho'ohalahala's ability to run for office, not his voter registration. [RA 225-26.]. Dupree conceded that his initial challenge to the Clerk was not made on voter-registration grounds:

[I]n my original challenge I didn't list the word voter registration[.] I didn't list the word nomination paper either but the thrust of the argument was that he is not a resident[.] [H]ow was he able to say he was a resident of his district and run for this position[?] [S]o I would suggest . . . that's what this case has been about this whole time.

[RA 232.]. Dupree admitted that he brought this case in order to object to Kaho'ohalahala's ability to preside on the Maui County Council:

⁴ The Board of Registration for the County of Maui did not file-stamp its pleadings in this case.

The fundamental reason that we are here is because one clause . . . in the Maui County charter . . . says that one of the members of the Maui County Council must be a resident of Lanai and I would argue that in this case that the fundamental interest of the voters and the citizens of Lanai to be fairly and directly represented is what this case is about[.]

[RA 228.]. Dupree, however, maintained that he could proceed because some of the letters "brought up the issue of voter registration[.]" [RA 229.].

Kaho'ohalahala responded that the other letters had no bearing on

Dupree's appeal:

[T]here is nothing in the underlying letter by [Dupree] to the County Clerk that says anything about voter registration. So it doesn't matter if Sandy Masse or anybody else did that[;] they didn't appeal Mr. Hiraga's decision. And so, it really doesn't matter what anybody else had to say, because the only job of this Board is to determine first if it has jurisdiction to hear the kind of complaint that Mr. Dupree is making and then the question becomes . . . did Mr. Hiraga err in his ruling. And, of course, it would be in his ruling to Mr. Dupree's challenge, not to Sandy Masse, or Mickey Mouse or anybody else that may or may have not filed an appeal.

The issue of relief is very important because it again hits the heart of jurisdiction. The relief ask[ed] for in the appeal by Michael Phoenix Dupree says "please remove him from the ballot and replace him with a true Lanai resident." Again, this Board does not have the authority to do that . . . [.] [T]here is no request of this Board to do that at all. The challenge to the voter registration is part of the challenge to the candidacy. The voter registration is used as evidence to prove, try to prove, that he is not a legal candidate, but the challenge is not to vote registration itself, it's part of a bigger argument regarding the propriety of his candidacy.

[RA 238.].

On October 28, 2008, the Board denied Kaho'ohalahala's motion to dismiss. [RA 140-43.]. The Board found that the Clerk "construed Mr. Dupree's

challenge to be a challenge by a registered voter under HRS § 11-25" and concluded that it had jurisdiction to hear Dupree's appeal. [RA 141, 142.].

The Hearing Before the Board.

The evidentiary hearing on Dupree's appeal was held on October 31, 2008. As Dupree stated his case, the Board had to remind him to "keep it to [Mr. Kaho'ohalahala's] voter registration." [RA 243-49, 247.]. Dupree claimed that proving residence would be easy to show. [244.].

I would argue [Kaho'ohalahala] does not fit the test as far as Hawaii Revised Statutes in terms of, in, in terms of the test that it offers . . . for residency. Now, on Monday's hearing, Mr. Collins decided the decision where he said basically a domicile is determined by, for example, if someone packs their bags and hits the road, once they pack their bags and hit the road their domicile has changed, according to Mr. Collins and what he had already. What I would suggest to you is Sol has never packed his bags or hit the road. If you turn to the affidavit that he presented on October second, . . . the affidavit states that he lives on Lanai but the affidavit was given in Wailuku. His brother gave the affidavit at the notary public on the island of Lanai, but his affidavit was given in Wailuku. I would suggest to you in just that is further evidence that he doesn't live on the island, he doesn't intend to live there, if he had, at least he would have returned to the island to get his affidavit.

[RA 245.]. Dupree also claimed that Kaho'ohalahala could not be a Lanai resident because he did not own property on the island. [RA 246.].

On cross examination, Dupree admitted that he did not know how long Kaho'ohalahala lived in Lahaina and that he had no personal knowledge as to where Kaho'ohalahala actually slept at night. [RA 255.]. Dupree also admitted that his

conclusions and theories about to Kaho'ohalahala's residency were based on "second hand information." [RA 255-56.].

Ron Mcomber testified. [RA 267-73.]. Mcomber testified that he knew Kaho'ohalahala:

I've lived on Lanai for thirty nine years[.] I've known Sol for those thirty nine years, sometimes he lived down there and sometimes ah he doesn't. What I'm saying is now for the, the past probably ten years he has not physically lived on Lanai, that's, that's addressing the, the problem of him living on Lanai, he has not lived there.

Michael Dupree: And . . . as of July [2008] has he returned to the island to live on the island[?]

Ron Mcomber: For [(indiscernible)].

Michael Dupree: As far as your understanding.

Ron Mcomber: As far as I know, he's come back one time since that time and it was for that rally, and he has not lived on Lanai.

[RA 268.].

When the Board questioned Mcomber about Kaho'ohalahala's presence on Lanai, Mcomber admitted that he had seen Kaho'ohalahala on the island:

John Henry: I, I have a question, ah when Mr. Kahalohalo [sic] moved his residence back in July of this past year ah, did you see any signs that ah he had established, as far as any material goods there, a car, or moving van, or anything along that line

Ron Mcomber: Actually on that July thing, I did not know about it immediately because it was not advertised at in Lanai on the big news, that he did those favors, that was only the select group. But even since then, I have not seen him come back over there, and move in, move clothes in, bring a car over there. His brother picks him up at the dock and, and drives him around, he does not have a car that I know of over there.

[RA 272.].

After Dupree rested, Kaho'ohalahala and the Clerk moved the Board for a directed order on the grounds that Dupree failed to show sufficient evidence to overturn the Clerk's ruling. [RA 273.] The Board denied the motions. [Id.].

The Clerk testified on his own behalf. [RA 274-79.]. The Clerk explained that whenever someone challenges another's voter registration, his office normally conducts an investigation. [RA 275.]. The Clerk testified that in this case, his office reviewed Kaho'ohalahala's voter-registration record:

Roy Hiraga: [B]asically we pulled up Mr. Kaho'ohalahala's voter registration history . . . and . . . tracked his voter registration history from the first time he registered to vote up until the present date.

Jane Lovell: And what did that history show?

Roy Hiraga: [W]ith the exception of the period from July [2006] to July of [2008] all other . . . addresses that Mr. Kaho'ohalahala had used to register was located on the island of Lanai.

Jane Lovell: And how far back do those records go?

....

Roy Hiraga: It goes back to [1982], June of [1982].

[RA 275-76.].

The Board questioned the Clerk about Kaho'ohalahala's intent to return to Lanai:

Gene Zarro: . . . When Mr. Kaho'ohalahala changed his residency to Lahaina, everything pre[-]Lahaina really doesn't matter? That's a question. Does that matter, everything pre[-]Lahaina residency? Because you're dealing with

someone who is registered in Lahaina, so, I'm trying to make that a question, so I don't have to ask a question.

Roy Hiraga: Yeah, . . . it does have some relevance although I guess if there's conflicting information, I would seek legal guidance of, um, how to interpret that information, but, for me, when I look at the history, it just further confirm[s] to me that because . . . all along his registration was on Lanai . . . it makes sense to me that at some point he, he probably did intend to return.

Gene Zarro: Okay, but, but I had another question here then. Um, do you see a difference between intent to return and intent to move?

Roy Hiraga: Intent to return and intent to move. Yeah, there's a, I guess there's a technical difference.

Gene Zarro: I, just, do you want to tell me what you might think that could be?

Roy Hiraga: Well, the intent to return ah would insinuate that the person had previously resided there, but the intent to move could be has, has no relevance to past history, I guess.

Gene Zarro: So, do you.

Roy Hiraga: Intent to move could be to a brand new place.

Gene Zarro: Do you see this as an issue of intent to move, or intent to return.

Roy Hiraga: Well based on Mr. Kaho'ohalahala's . . . voter registration history, . . . it was, it made it, based on me, it made it clearer that the return was a was a viable answer.

Gene Zarro: But he's currently up till July [2008] was a resident of Lahaina, based on voter registration.

Roy Hiraga: That's correct.

Gene Zarro: So, again, this is an intent to move or an intent to return?

Roy Hiraga: Well based on the evidence that we're provided with, it's intent to return.

Gene Zarro: So he doesn't live in Lahaina. He lives, ah, ah okay, forget that, I, I think I've got my point.

[RA 277-78.]

Ellen Pelesaro testified. [RA 281-87.]. Pelesaro explained that she met Kaho'ohalahala in 1991, when he was responsible for bringing cultural festivals to Lanai.

[RA 282.]. Pelesaro also testified that she and Kaho'ohalahala were later employed by the State of Hawai'i at the Kaho'olawe Island Reserve Commission. [RA 285.].

Pelesaro testified that Kaho'ohalahala always wanted to return to Lanai when he was off island:

Sol's family has been on Lanai for seven generations, and . . . as Hawaiians like to say the bones of their ohana are in the soil at Lanai. And . . . I worked for Sol at the County Council during his first um three years . . . there, and . . . we had immense conversations over long periods of time [H]e and his wife had talked as long as long as I've known them, about remaining on Lanai for the rest of their lives, their children are there, their grandchildren are there, um, it's, um, it was work related why he had to physically not be there all the time.

[RA 282-83.].

Pelesaro testified that at the time of the hearing, Kaho'ohalahala was a lecturer at Maui Community College. [RA 285.]. The Board pressed Pelesaro about these periods of employment:

John Henry: I had a question, then. Ah, when he, for the Island Reserve, Kaho'olawe Island Reserve, where was he residing at the time?

Ellen Pelesaro: He was residing with his wife.

John Henry: And do you know where the address for that location is?

Ellen Pelesaro: It's in Lahaina.

.....

John Henry: Okay, and ah do you know where he was residing while he's working for the Maui Community College?

Ellen Pelesaro: In probably same house.

John Henry: Same address?

Ellen Pelesaro: Yes. . . .

John Henry: Do you know ah how long a period of time was between unemployment from the Kahoolawe Island Reserve KIRC until MCC, was there a one month break, two month break, four months break?

Ellen Pelesaro: I don't know.

John Henry: You don't know the amount of time between the jobs.

Ellen Pelesaro: No

John Henry: Do you ever know of him moving back to Lanai or going between those two job employments?

Ellen Pelesaro: I know he was there on Lanai during that time, because I was also on Lanai during that time, ah when ah he lost some family members. So I know he was there for some time ah caring for them and ah taking care of his mother.

John Henry: But he wasn't at that time, residing between the jobs, between Kahoolawe and Maui Community College.

Ellen Pelesaro: I think he was with in his family home.

.....

John Henry: He's living on Lanai?

Ellen Pelesaro: I think he was there for awhile during the time he lost members of his family. He lost two members of his family.

[RA 285-87.].

Kaho'ohalahala won the general election on November 4, 2008 and currently serves on the Maui County Council⁵. The Board issued its Findings of Fact, Conclusions of Law, and Decision to Kaho'ohalahala on November 12, 2008⁶. [RA 175.]. The Board reversed the Clerk's ruling and concluded that "[f]or purposes of this 2008 election, Mr. Kaho'ohalahala is a resident of Lahaina, Maui, Hawai'i." [RA 153.]. Kaho'ohalahala timely appealed to this Court on November 17, 2008. [RA 159.].

II. Points of Error

1. **The Board Lacked Jurisdiction to hear and Resolve Dupree's Appeal Because Dupree Never Challenged Kaho'ohalahala's Voter-Registration Status.**

The Board erred in concluding that it had jurisdiction to hear Dupree's appeal and that Dupree had standing to appeal from the Clerk's ruling. Kaho'ohalahala raised this issue to the Clerk in his response to the initial letters and again to the Board in his motion to dismiss for lack of jurisdiction. [RA 25, 58-63, 59, and 62.]. At the hearing on the motion, Kaho'ohalahala explained that Mr. Dupree had no standing to bring an appeal before the Board because his initial complaint to the Clerk did not challenge Kaho'ohalahala's voter registration. [RA 238.]. In denying Kaho'ohalahala's motion, the Board made the following erroneous findings and conclusions:

FINDINGS OF FACT

⁵ See footnote 2.

⁶ The Board's decision was dated November 1, 2008, but it was not served until November 12, 2008.

....

3. The County Clerk's October 10, 2008 ruling construed Mr. Dupree's challenge to be a challenge by a registered voter under HRS § 11-25, challenging the right of Mr. Kaho'ohalahala to be a registered voter in the precinct that includes Lanai.

4. Mr. Dupree's appeal of the Clerk's ruling was filed on October 16, 2008 and challenged the application of the rules for determining residency that were applied by the County Clerk.

....

CONCLUSIONS OF LAW

....

2. The Board of Registration for the County of Maui has jurisdiction over the parties herein, and has primary jurisdiction of the subject matter of this appeal, which is a challenge by a registered voter under HRS § 11-25, challenging the right of Mr. Kaho'ohalahala to be a registered voter in the precinct that includes Lanai.

3. Mr. Dupree has standing to bring this appeal of the County Clerk Roy Hiraga's determination regarding the voter registration status of Solomon P. Kaho'ohalahala.

[RA 141, 142.]. In its decision issued on November 17, 2008, the Board made more erroneous findings and conclusions:

FINDINGS OF FACT

....

3. By letter received September 29, 2008, Mr. Phoenix Dupree, also known as Phoenix, a registered voter of the State of Hawai'i, filed a challenge of Mr. Kaho'ohalahala's right to be or to remain registered as a voter of the Lanai District/Precinct 13/07.

....

CONCLUSIONS OF LAW

....

2. The Board has jurisdiction over the parties herein and the subject matter of this appeal.

3. Appellant Michael P. Dupree has standing to bring this appeal of County Clerk Roy T. Hiraga's decision regarding Mr. Dupree's challenge to Solomon P. Kaho'ohalahala's residency for election purposes. Haw. Rev. Stat. § 11-25 ("Any registered voter may challenge the right of a person to be or to remain registered as a voter in any precinct for any cause not previously decided by the board of registration or the supreme court in respect to the same person[.]")

4. Pursuant to the Maui County Charter Section 3-1, the Council shall be composed of nine members elected at large, and as it pertains to this case, one of whom shall be a resident of the island of Lana'i.

5. Pursuant to Maui County Charter Section 3-3, to be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days ext preceding the filing of nomination papers and at the time of the filing of nomination papers, a resident in the area from which the person seeks to be elected.

[RA 146, 150].

2. The Board Erred in Reversing the Clerk's Ruling Because Dupree Failed to Adequately Prove that Kaho'ohalahala Residence was Lahaina, Maui.

The Board erred in reversing the Clerk's ruling. [RA 145-55.]. Throughout the Board hearings Kaho'ohalahala maintained that Dupree failed to meet his burden of proof in overturning the Clerk's ruling. [RA 225-241, 242-292.]. After Dupree presented his case, Kaho'ohalahala moved for a directed judgment on the grounds that Dupree failed to meet the burden of proof. [RA 273.] The Board denied the motion and

ultimately reversed the Clerk's ruling. [Id.] The Board made a number of erroneous findings of fact and conclusions of law:

FINDINGS OF FACT

....

5. Based primarily on Mr. Kaho'ohalahala's stated intention of establishing his residence in Lana'i City, with the intention of making it his permanent dwelling place, the County Clerk concluded that "with the exception of the period from July 2006 to July 2008, Mr. Kaho'ohalahala's residence address of record has always been on Lana'i." Accordingly, the County Clerk determined that Mr. Dupree's challenge was not sustained.

....

7. Up until July 10, 2006, Mr. Kaho'ohalahala resided at 533 Akolu Place, Lana'i City, Lana'i, Hawai'i 96763.

8. On or about July 10, 2006, Mr. Kaho'ohalahala changed his residence from Lana'i to 124-A Fleming Road, Lahaina, Maui, Hawai'i 96761.

....

13. Mr. Dupree has lived on Lanai since 1991 and is currently employed as the general manager of the Blue Ginger Café. He presented Mr. Ron McComber, a resident of Lana'i, as a witness who testified that he has not seen Mr. Kaho'ohalahala on Lana'i.

14. Since July 2008 (when Mr. Kaho'ohalahala claims that he moved back to Lanai), Mr. Dupree has not seen Mr. Kaho'ohalohalo [sic] at the post office, either bank, the Lanai store, the gas station, or any restaurant on Lanai.

....

16. In support of his claim of residency on the island of Lanai, Mr. Kaho'ohalahala submitted his affidavit in which he states that he "was born and raised on the island of Lanai and retained [his] residence on Lanai except for a brief

period in which [he] was in the service of the State of Hawai'i with the Kaho'olawe Island Reserve Commission."¹

19. Other than Mr. Kaho'ohalahala's self-proclaimed intention, which was corroborated by his brother, and a witness testifying as to his veracity, no evidence was presented regarding his abandonment of his residency in Lahaina and his permanent relocation to Lanai.

CONCLUSIONS OF LAW

....

4. Pursuant to the Maui County Charter Section 3-1, the Council shall be composed of nine members elected at large, and as it pertains to this case, one of whom shall be a resident of the island of Lanai.

5. Pursuant to Maui County Charter Section 3-3, to be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the count for a period of ninety (90) days next preceding the filing of nomination papers and at the time of the filing of nomination papers, a resident in the area from which the person seeks to be elected.

6. Pursuant to Haw. Rev. Stat. § 11-13(1), for election purposes, Mr. Kaho'ohalahala's residence is that place in which his habitation is fixed, and to which, whenever he is absent, he intends to return.

....

12. In order to relinquish one's domicile or residence there must be an intent to remain permanently at the new place where on is physically present and to simultaneously abandon the previously permanent place of abode. Acquisition of the new domicile must have been completed and the animus to remain in the new location fixed, before the former domicile can be considered lost. See Akata v. Brownell, 125 F.Supp. 6 (D. Hawaii 1954); Powell v. Powell, 40 Haw. 625 (1954); Anderson v. Anderson, 38 Haw. 261 (1948); Zumwalt v. Zumwalt, 23 Haw. 376 (1916). Residence is not lost by a temporary absence nor by maintaining of a temporary home elsewhere. Hurley v. Knudsen, 30 Haw. 887 (1929).

....

14. Mr. Dupree, as the person initiating the proceeding, presented sufficient credible evidence to prove by a preponderance that Mr. Kaho'ohalahala did not abandon his residence in Lahaina, Maui, Hawaii, and did not relocate his permanent residence to Lana'i City, Lana'i, Hawai'i.

1 The County Clerk concluded that Mr. Kaho'ohalahala "did not lose his residency due to his absence from Lanai while he was employed in the service of the State", however, Mr. Kaho'ohalahala legally changed his residency from Lanai to Lahaina on July 10, 2006.

[RA 146-153.].

III. Standards of Review

Findings of Fact and Conclusions of Law

Findings of fact are reviewed under the clearly-erroneous standard. Leslie

v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999).

[A finding of fact] is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire record that a mistake has been committed. [A finding of fact] is also clearly erroneous when the record lacks substantial evidence to support the finding. We have defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Id. (quoting State v. Kotis, 91 Hawai'i 319, 328, 984 P.2d 78, 87 (1999)) (quotation marks omitted.).

A [conclusion of law] is not binding upon an appellate court and is freely reviewable for its correctness. This court ordinarily reviews COLs under the right/wrong standard. Thus, a COL that is supported by the trial court's FOFs and that reflects an application of the correct rule of law will not be overturned. However, a COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are

dependent on the facts and circumstances of each individual case.

Chun v. Bd. of Trustees of Employees' Retirement System, 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005) (quoting Allstate v. Ponce, 105 Hawai'i 445, 453, 99 P.3d 96, 104 (2004)) (brackets, citations, and quotation marks omitted.).

Jurisdiction and Standing

"Whether the circuit court has jurisdiction to hear the plaintiffs' complaint presents a question of law, reviewable de novo. A plaintiff without standing is not entitled to invoke a court's jurisdiction. Thus, the issue of standing is reviewed de novo on appeal." Hawai'i Medical Ass'n v. Hawai'i Medical Ass'n, Inc., 113 Hawai'i 77, 91, 148 P.3d 1179, 1193 (2006) (quoting Mottl v. Miyahira, 95 Hawai'i 381, 388, 23 P.3d 716, 732 (2001)); see also Kaho'ohanohano v. Dept. of Human Services, 117 Hawai'i 262, 281, 178 P.3d 538, 557 (2008) ("Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo.").

Interpretation of Statute

"The interpretation of a statute is a question of law which this court reviews de novo." Kaho'ohanohano v. Dept. of Human Services, 117 Hawai'i at 281, 178 P.3d at 557 (quoting Liberty Mut. Fire Ins. Co. v. Dennison, 108 Hawai'i 380, 384, 120 P.3d 1115, 1119 (2005)).

IV. Argument

1. The Board Lacked Jurisdiction to hear and Resolve Dupree's Appeal Because Dupree Never Challenged Kaho'ohalahala's Voter-Registration Status.

"No person shall register or vote in any other precinct than that in which the person resides[.]" HRS § 11-12(a). A registered voter may challenge another's

right "to be or to remain registered as a voter in any precinct" by writing to the county clerk. HRS § 11-25(a). "The clerk shall, as soon as possible, investigate and rule on the challenge." Id. The clerk's ruling may be appealed to the Board of Registration. HRS § 11-26(b). The Board only has jurisdiction to review and resolve rulings on these voter-registration challenges. HRS §§ 11-26(b), 11-41(c). Voter-registration challenges are designed to ensure accurate voter registries and prevent mass voter fraud. See Marston v. Lewis, 410 U.S. 679, 680, 93 S.Ct. 1211 (1973) (voter registration promotes State's interest in "prepar[ing] accurate voter records and protect[ing] its electoral processes from possible frauds."); see also Dunn v. Blumstein, 405 U.S. 330, 345-46 (1972) (registration seeks to prevent nonresidents from "temporarily invad[ing] the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud."); Friends of Jim Usry for Mayor Campaign v. Matthews for Mayor Campaign, 187 N.J.Super. 176, 453 A.2d 1360, 1360-61 (N.J. 1982) (plaintiffs brought voter challenge on grounds that approximately 200 registered voters were nonresidents).⁷

Voters can also write to county clerks in order to object to a candidate's eligibility to run for office. "All candidates for elective office . . . shall be nominated in accordance with this chapter and not otherwise." HRS § 12-1. Candidates must file nomination papers, which require "[t]he residence address and county in which the candidate resides" and a "sworn certification by self-subscribing oath by the candidate

⁷ The danger of this particular kind of voter fraud at any particular precinct is minimized in Maui County Council elections because council members "shall be elected at large." Maui County Charter § 3-1.

that the candidate qualifies under the law for the office the candidate is seeking[.]" HRS

§ 12-3. Nomination papers are presumed valid unless a registered voter timely objects:

Nomination papers; challenge; evidentiary hearings and decisions (a) All nomination papers filed in conformity with section 12-3 shall be deemed valid unless objection is made thereto by a registered voter . . . with . . . the county clerk in the case of a county office. All objections shall be filed in writing not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to the primary or special election.

HRS § 12-8(a). The Board has no jurisdiction review the Clerk's ruling on these objections. See HRS § 12-8(e) ("If the . . . clerk in the case of a county election determines that the objection may warrant the disqualification of the candidate, the . . . clerk shall file a complaint in the circuit court").

It is well-established that an agency cannot act beyond the scope of its legislative authority. Tamashiro v. Dept. of Human Services, 112 Hawai'i 388, 427, 146 P.3d 103, 142 (2006) ("Absent legislative authority, an agency has no power to act.") (quoting Foytik v. Chandler, 88 Hawai'i 307, 316, 966 P.2d 619, 628 (1998)); Capua v. Weyerhauser Co., 117 Hawai'i 439, 446, 184 P.3d 191, 198 (2008) ("an administrative agency can only wield powers expressly or implicitly granted to it by statute.") (quoting Haole v. State, 111 Hawai'i 144, 156, 140 P.3d 377, 389 (2006)); see also Stop H-3 Ass'n v. State Dept. of Transp., 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) ("application of an otherwise valid regulation in such a way as to achieve a statutorily impermissible end cannot be sanctioned by allowing the administrative body's action to stand."). Here, the Board went beyond its authorized scope in concluding it had jurisdiction to hear Dupree's appeal.

Dupree's letter to the Clerk--like all the letters--advanced a single claim: that Kaho'ohalahala was an ineligible candidate for the Lanai seat on the Maui County Council. Dupree contended that "rules that allow an individual to run in a district [sic] that he does not reside in . . . are not beneficial to achieving the goal of direct democracy and good representation." [RA 18.]. Dupree asked "off-islanders [to] give us the right to govern ourselves . . . here on Lanai" and wanted Kaho'ohalahala to "run in the district he currently reside[d] in and give a current Lanai resident the opportunity to represent their home island which they love equally as well as he." [RA 19.]. The only relief sought by Dupree was to declare Kaho'ohalahala an ineligible candidate.

The Board, however, concluded it could hear Dupree's appeal and supported its conclusion by finding that Dupree's letter to the Clerk was a "challenge of Mr. Kaho'ohalahala's right to be or to remain registered as a voter of the Lanai District/Precinct 13/07." [RA 141, 150, 146.]. Nothing in the record supports the Board. Dupree conceded to the Board that his initial letter did not challenge Kaho'ohalahala's voter registration. [RA 232.]. He also told the Board that his "fundamental reason" for bringing this case was to prevent Kaho'ohalahala from running for office. [RA 228.]. The Board had to reminded Dupree that he had to "keep it to [Kaho'ohalahala's] voter registration." [RA 247.].

The Board's decision referred to the Maui County Charter in its conclusions of law. [RA 153.]. The Maui County Charter references indicate that the Board's decision went beyond its statutory authorization. The Maui County Charter describes who is "eligible for election or appointment to the [Maui County Council." Maui County Charter § 3-3. The legislature did not authorize the Board to base its

decisions relating to voter-registration on a candidate qualifications. The Board's references to the Maui County Charter suggest that Kaho'ohalahala did not truthfully certify in his nomination papers that he qualified to run for the Maui County Council. HRS § 12-3. These conclusions have no place in the Board's decision.

The Board acted outside its statutory authorization. See, e.g., Morgan v. Planning Dept., Kauai County, 104 Hawai'i 173, 189, 173 P.3d 982, 998 (2004) (planning commission lacked authority to issue injunction when statute "clearly expresses that injunctive power is solely granted to the circuit court."). The Board had no jurisdiction to review and resolve Dupree's appeal. Dupree's letter to the Clerk constituted an objection to Kaho'ohalahala's nomination papers. The entire proceeding was intended to disqualify Kaho'ohalahala's candidacy. The Board's conclusion that it had jurisdiction is therefore erroneous. Accordingly, the Board's decision must be vacated and the Clerk's ruling that the objections pursuant to HRS § 12-8 were untimely must stand.

2. The Board Erred in Reversing the Clerk's Ruling Because Dupree Failed to Adequately Prove that Kaho'ohalahala Residence was Lahaina, Maui.

A person has one residency for voter-registration purposes. HRS § 11-13. Residence is "that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has the intention to return[.]" HRS § 11-13(1). "A person does not gain residence in any precinct into which the person comes without the present intention of establishing the person's permanent dwelling place within such precinct." HRS § 11-13(2). Furthermore, residence cannot be lost "solely

by reason of the person's presence or absence while employed in the service of the . . . State[.]" HRS § 11-13(5).

Kaho'ohalahala registered to vote for the 2008 election in the Lanai precinct. He attested that he was born and raised on the island of Lanai and that he had always retained his residence on Lanai, "except for a brief period in which [he] was in the service of the State of Hawai'i[.]" [RA 38.]. As of July 2008, Kaho'ohalahala's residence was at 444 Fraser Avenue, Lanai City. Whenever he was absent, that home was where he intended to return. [RA 38.].

Gaylien Kaho'ohalahala corroborated these statements. According to Gaylien, Kaho'ohalahala called him in 2008. They discussed his return to Lanai with the rest of his family. Kaho'ohalahala was welcomed home. [RA 37-38.]. Eight of the twelve letters to the Clerk confirmed that Kaho'ohalahala had "a [p]ost [o]ffice [b]ox in order to receive mail[.]" [RA 8-11, 13-16.]. Mcomber's testimony also corroborates Kaho'ohalahala's return to Lanai and his intention to make Lanai his residence. Mcomber testified that he saw Kaho'ohalahala on the island after July 2008. [RA 268.]. According to Mcomber, Gaylien would pick up Kaho'ohalahala at the dock and drive him around. [RA 272.].

The Clerk's investigation revealed that since 1982 Kaho'ohalahala registered to vote at the Lanai precinct except for a two-year period from 2006 to 2008. [RA 7, 275-76.]. Kaho'ohalahala left Lanai to work for the State of Hawai'i under the Kaho'ohalawe Island Reserve Commission. [RA 285.]. He then took another job with the State at Maui Community College. [Id.]. When Kaho'ohalahala was in between jobs, he was on Lanai with his family. [RA 287.]. Pelesaro testified that Kaho'ohalahala

and his wife often "had long talks . . . about remaining on Lanai for the rest of their lives" and that Kaho'ohalahala's children and grandchildren are there. [RA 282-83.].

Pelesaro explained that Kaho'ohalahala's absences from the island were "work related." [RA 283.]

The record establishes that when Kaho'ohalahala registered to vote in the Lanai precinct for the 2008 election, he had a fixed dwelling place on Lanai and whenever he was off island, he intended to return to Lanai. His off-island employment with the State cannot be considered as a factor in determining residency. HRS § 11-13(5). Thus, the Clerk did not err in concluding that Kaho'ohalahala's residence was in the Lanai precinct. The record further demonstrates that Dupree failed to present any evidence contrary to this conclusion.

Dupree claimed that because Kaho'ohalahala did not own any property on Lanai, he was not a true resident of Lanai. [RA 246.]. Dupree admitted that he lacked any personal knowledge as to where Kaho'ohalahala actually lived and how long he had been frequenting Lahaina. [RA 255.]. He also admitted that much of his theories surrounding Kaho'ohalahala's residency stemmed from "second hand information." [RA 255-56.].

The Board, however, concluded that because Kaho'ohalahala registered to vote in Lahaina, Maui in 2006, his residency changed and, thus, Kaho'ohalahala had to prove that he abandoned Lahaina for Lanai⁸. [RA 149 n. 1.]. The Board then

⁸ Even if the Board did not err in placing the burden on Kaho'ohalahala to show that he abandoned Lahaina, Maui, the record still shows that Kaho'ohalahala presented sufficient evidence that his fixed dwelling place was on Lanai and that he had the requisite intent to return to Lanai whenever he was off island. Thus, the Board still erred in reversing the Clerk's ruling.

concluded that there was no such abandonment because "[o]ther than Mr. Kaho'ohalahala's self-proclaimed intention, which was corroborated by his brother, and a witness testifying as to his veracity, no evidence was presented regarding his abandonment of his residency in Lahaina[.]" [RA 149.]. The Board found that Kaho'ohalahala owned no property on Lanai and did not work on the island. [RA 148.]. The Board also found that Mcomber had not seen Kaho'ohalahala on the island and agreed with Dupree's unsubstantiated assertions. [Id.]. The Board's findings are erroneous and irrelevant in determining residency under HRS § 11-13.

The Board's findings contradict Mcomber's testimony. Mcomber testified that he saw Kaho'ohalahala return to the island and that Gaylien picked up his brother at the dock and drive him around Lanai. [RA 268, 272.]. Furthermore, the Board's finding that Kaho'ohalahala's owned no home, car, or business on Lanai is not dispositive for questions of residency. Ownership of property in a particular place is not a residency requirement under the rules in HRS § 11-13.

The fact that Lanai residents had not seen Kaho'ohalahala at the post office, gas station, or other public places on the island does not negate Kaho'ohalahala's intention to keep Lanai as his residency whenever he was away. Absences do not signify a change in residence. "A residence . . . is not lost by a temporary absence of the party claiming it or of members of his [or her] family in the pursuit of business, pleasure or education nor by the maintenance of a temporary home elsewhere." Hurley v. Knudsen, 30 Haw. 887, 891 (Terr. 1929); see also Madigan v. Baumgartner, 355 Ill.App.3d 842, 823 N.E.2d 1144, 1150 (Ill. App. 2005) ("Where a person leaves his residence and goes to another place, . . . with an intention to return to

his former abode, or with only a conditional intention of acquiring a new residence, he does not lose his former residence so long as his intention remains conditional.") (brackets and citation omitted.); Mitchell v. Kinney, 242 Ala. 196, 5 So.2d 788, 798 (Ala. 1942) ("long years of absence and written statements of certain voters that their residence had been at other places or states was not conclusive . . . to overturn their claim to domicile and the right to vote."); Dietz v. City of Medora, 333 N.W.2d 702, 705 (N.D. 1983) ("An individual does not lose his [or her] legal residency for voting eligibility solely because of temporary absences from the area."); Kiehne v. Jones, 274 S.W.3d 259, 265 (Tex. App. 2007) ("A temporary move does not create a new residence, nor cause the loss of an old one.").

Kaho'ohalahala's absence from Lanai was attributed to his employment with the State. HRS § 11-13(5) allows people to keep their residency when they are in the service of the state and federal governments. Moreover, Kaho'ohalahala is not required to spend a particular length of time on Lanai in order to reclaim his residency. See Powell v. Powell, 40 Haw. 625, 628 (Terr. 1954) ("Length of residence is not a factor where the act and intention to acquire a domicile concur No definite period of time is necessary to create a domicile and one day is sufficient provided the [requisite intent] exists.").

The Board cannot ignore Kaho'ohalahala's declaration that Lanai City was his residence and whenever he was away from Lanai he intended to return there. The Board also cannot ignore the evidence that corroborated Kaho'ohalahala's avowed intention. Blackburn v. Blackburn, 41 Haw. 37, 39 (Terr. 1955) ("The fact of intention sometimes involves difficulties of proof. The declarations of a person accompanying


change of dwelling place are competent to explain the change as part of the res gestae."); Hurley v. Knudsen, 30 Haw. at 891 ("The declarations of the party himself [or herself], where he [or she] can have no object or inducement to falsify the truth or to deceive those to whom such declarations are made, are the best evidence of his [or her] intention to make his [or her] actual residence his [or her] permanent residence also.") (quotation marks omitted.).

Kaho'ohalahala was born on the island of Lanai. His brother lived in Lanai City with their parents. He left the island to work for the Kaho'olawe Island Resource Commission. He and his wife often discussed moving back to Lanai. His children and grandchildren are there. He returned to Lanai after his first job with the State, but soon left again to take another State position at Maui Community College. In July 2008, Lanai residents saw Kaho'ohalahala with his brother on the island. The Board's findings and conclusions are not supported by the record. The decision must be reversed.

V. Conclusion

The Board erroneously concluded that it had jurisdiction to hear Dupree's objection to Kaho'ohalahala's candidacy. The Board also erred in concluding that Kaho'ohalahala was not Lanai resident. Accordingly, the Board's decision should be reversed and the Clerk's ruling that the objection to Kaho'ohalahala's candidacy was untimely should be reinstated.

DATED: Wailuku, Maui, Hawai'i May 18, 2009


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STATEMENT OF RELATED CASES

Ornellas v. Kaho'ohalahala et al. (29476) was an election challenge initially brought by twenty-one plaintiffs, but was later amended to Kaho'ohalahala's opponent in the general election. The Hawai'i Supreme Court dismissed the action.

De Jetley et al v. Kaho'ohalahala et al. (Civ. No. 08-01-0678) was brought by the same twenty-one plaintiffs who initially brought the election challenge. On February 13, 2009, the Circuit Court of the Second Circuit granted Kaho'ohalahala's motion for judgment on the pleadings. Reconsideration was denied on April 29, 2009.