

NO. 29464

IN THE INTERMEDIATE COURT OF APPEALS

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

REPLY BRIEF

and

CERTIFICATE OF SERVICE

C. CASIL, CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII  
Clerk, Second Circuit Court and  
ex-officio Clerk, Supreme Court

2009 JUN 26 AM 10:20

FILED

BENJAMIN E. LOWENTHAL (8645)  
33 North Market Street, Suite 101  
Wailuku, Hawaii 96793  
(808) 242-5000 (Maui)  
(808) 242-1500 (facsimile)

Attorney for Appellant  
SOLOMON P. KAHO'OHALAHALA

JUN 27 2009

NO. 29464

IN THE INTERMEDIATE COURT OF APPEALS

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

REPLY BRIEF

**1. Dupree did not Challenge Kaho'ohalala's Right to vote and the Board had no Jurisdiction to hear his Appeal from the Clerk's Ruling.**

Appellee Michael "Phoenix" Dupree argues that the Board of Registration for Maui County (Board) had jurisdiction to hear his appeal because he was a registered voter who claimed that Appellant Solomon P. Kaho'ohalahala was "not a resident of Lanai." [Answering Brief (AB) at 17.]. Dupree is mistaken. The legislature created two separate and distinct grievance procedures for registered voters that begin with county clerks: an objection to a candidate's nomination papers and challenges to another voter's right to vote. Dupree plainly and unambiguously objected to Kaho'ohalahala's candidacy and nothing more.

Candidates in county elections must file nomination papers, which require the candidate to state his or her residential address and aver that he or she "qualifies under the law for the office the candidate is seeking[.]" Hawaii'i Revised Statutes (HRS)

§§ 12-1 and 12-3. In order to run for the Lanai seat on the Maui County Council, a candidate must be a Lanai resident<sup>1</sup>. Maui County Charter § 3-3. Nomination papers are deemed valid "unless objection is made thereto by a registered voter[.]" HRS § 12-8(a). The objection must be presented in writing to the county clerk. Id.

The Board has no jurisdiction to review objections to a candidate's nomination papers. The Board can only review a voter-registration "challenge prior to election day[.]" HRS § 11-26(b). A "challenge" arises when a registered voter claims that another voter has no right "to be or to remain registered as a voter in any precinct[.]" HRS § 11-25(a). A "challenge" must be presented in writing to the county clerk. Id. A "challenge" defined by HRS § 11-25(a) is not the same thing as an objection to a candidate's nomination papers under HRS § 12-8(a).

In his letter to the Maui County Clerk, Dupree did not request the Clerk to render Kaho'ohalahala an unqualified voter as well as an impermissible candidate. Dupree stated that his "overall goal" was "good, direct, representative democracy on the Maui County Council for the residents of Lanai." [Record on Appeal (RA) at 18.]. Dupree asked that "off-islanders give us the right and opportunity to govern ourselves . . . here on Lanai" and wanted Kaho'ohalahala to "run in the district that he currently resides in and give a current Lanai resident the opportunity to represent their home island[.]" [RA 19.]. Dupree nonetheless maintains that his letter somehow constituted a challenge to Kaho'ohalahala's right to vote and an objection to his candidacy. [AB 18.].

Pleadings in administrative hearings "need not be drawn with the refinements and subtleties of pleadings before a court." Perry v. Planning Com'n of

---

<sup>1</sup> The Maui County Charter does not define the term "resident."

Hawaii County, 62 Haw. 666, 685, 619 P.2d 95, 108 (1980) (quoting Secrest v. Dept. of Corrections, 64 Ill.App.3d 458, 381 N.E.2d 367, 368 (Ill. App. 1978)). This standard, however, does not excuse Dupree from scrutiny. The petitioner must still advance claims for administrative relief with some degree of specificity. See Rohrback v. Illinois Dept. of Employment Sec., 361 Ill.App.3d 298, 835 N.E. 2d 955, 964 (Ill. App. 2005) ("Charges in an administrative proceeding need not be exact and detailed as judicial pleadings, but they must contain a clear statement of the theory on which the agency intends to rely, so that the [respondent] can prepare a defense."); Hunter v. Dept. of Prof. Regulation, 458 So.2d 842, 844 (Fla. App. 1984) (Although administrative complaint "is not required to fulfill the technical niceties of a legal pleading, it must be specific enough to inform the accused with reasonable certainty of the nature of the charges."); Brown v. Saranac Lake Cent. School Dist., 709 N.Y.S.2d 706, 707 (N.Y. App. Div. 2003) (agency erred in finding guilt based on conduct outside the scope of the charge because "[e]ven in an administrative proceeding, no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged.").

Claims advanced in administrative proceedings are particularly important where the agency's jurisdiction is limited to certain kinds of claims. Board of Medical Examiners v. Duhon, 867 P.2d 20, 25 (Colo. App. 1993) ("if the nature of the complaint will determine the jurisdiction of the board to act, the board must clearly demonstrate the nature of that complaint."); John A. v. Board of Educ. for Howard County, 400 Md. 363, 929 A.2d 136, 151 (Md. 2007) ("The scope of an administrative hearing is limited to the matters contained in the 'complaint' filed.") (citing County of San Diego v. Cal. Special Educ. Hearing Office, 93 F.3d 1458, 1465 (9th Cir. 1996)).

The Board's jurisdiction to hear Dupree's appeal depended on the claim in his letter to the Clerk. Dupree's only claim was that Kaho'ohalahala could not represent Lanai on the Maui County Council because he was not a resident of the island. Even with the leeway given to administrative pleadings, Dupree failed to raise a voter-registration "challenge." The Clerk erroneously concluded--and the Board agreed--that Dupree's initial letter was a such a "challenge." The Board had no jurisdiction to hear Dupree's appeal. Accordingly, its decisions must be vacated<sup>2</sup>. Accord Lingle v. Hawai'i

---

<sup>2</sup> Dupree's argument that the Board's jurisdiction in this case was decided by the Hawai'i Supreme Court's order denying mandamus relief is without merit. [Answering Brief at 21.]. In his petition for mandamus relief, Kaho'ohalahala requested an order "directing [the Clerk] to vacate the October 10, 2008 [r]uling and dismissing the [appeal before the Board] for lack of jurisdiction as an election contest since such a determination could effect the outcome of the primary/first special election of September 20, 2008[.]" [Record on Appeal at 79.]. The Hawai'i Supreme Court denied the petition because it was "not tantamount to a judgment in a primary election contest given pursuant to HRS § 11-173.5(b) (1993), but was a ruling only on a challenge to nomination papers and on a person's voter registration status. Jurisdiction to render such ruling was with [the Clerk] pursuant to HRS §§12-8(b) (1993) and 11-25(a) (1993)." Order in Appellate Number 29415.

"A writ of mandamus . . . is an extraordinary remedy that will not issue unless the petitioner demonstrates a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action. Such writs are not meant . . . to serve as legal remedies in lieu of normal appellate procedures." Kema v. Gaddis, 91 Hawai'i 200, 204, 982 P.2d 334, 339 (1999) (citing Straub Clinic & Hospital v. Kochi, 81 Hawai'i 410, 414, 917 P.2d 1284, 1288 (1996)).

The Hawai'i Supreme Court denied Kaho'ohalahala's petition because the relief sought--the vacation of the Clerk's determination that there was a voter challenge giving rise to Board jurisdiction-- is available through the "normal appellate procedures," which begins here at the Intermediate Court of Appeals. Moreover, questions of the Board's jurisdiction were never decided in the Hawai'i Supreme Court's order and claim preclusion, as Dupree suggests, is inappropriate. See Tortorello v. Tortorello, 113 Hawai'i 432, 439, 153 P.3d 1117, 1124 (2007) (party asserting claim preclusion must show, *inter alia*, that "the claim decided in the original suit is identical with the one presented in the action in question.") (quoting Bremer v. Weeks, 104 Hawai'i 43, 54, 85 P.3d 150, 161 (2004)) (emphasis added.).

Gov't Employees Ass'n, AFSCME, Local 152, AFL-CIO, 107 Hawai'i 178, 182, 111 P.3d 587, 591 (2005) ("A judgment rendered by a circuit court without subject matter jurisdiction is void.") (quoting Amantiad v. Odum, 90 Hawai'i 152, 159, 977 P.2d 160, 167 (1999)).

**2. The Record Shows Sufficient Evidence that in 2008 Kaho'ohalahala's Fixed Habitat was on Lanai and that he Intended to Return to Lanai Whenever he left the Island.**

A voter's 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). Residency is analogous to common law domicile, which requires "evidence of two facts: physical presence at a particular place and intention of the party to reside there permanently; or, as is sometimes said, to make the place his [or her] home with no present intent to leave at any foreseeable future time." In re Estate of Marcos, 88 Hawai'i 148, 154, 963 P.2d 1124, 1130 (1998) (quoting Arakaki v. Arakaki, 54 Haw. 60, 62, 502 P.2d 380, 382 (1972) (emphasis omitted); see also Yamane v. Piper, 51 Haw. 339, 340, 461 P.2d 131, 132 (1969) ("In order to acquire new domicile there must be residence or bodily presence in the new location and an intention to remain; act and intent must concur; in addition there must be an intention to abandon the old domicile.") (quoting Powell v. Powell, 40 Haw. 625, 629 (Terr. 1954))). There was sufficient evidence establishing both facts.

Dupree argues that Kaho'ohalahala did not reside on Lanai because he did not spend enough time on the island. [AB 11.]. The argument misses the point. "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[.]” Powell v. Powell, 40 Haw. at 630 (citing Winans v. Winans, 205 Mass. 388, 91 N.E. 394 (1910)). Kaho’ohalahala’s fixed habitation was on Lanai. Kaho’ohalahala attested that in 2008 his residence was at 444 Fraser Avenue, Lanai City. [RA 38.]. Kaho’ohalahala consistently registered to vote in the Lanai precinct from 1982 to 2006. [RA 7, 275-76.]. At the hearing before the Board, Ron Mcomber testified that he saw Kaho’ohalahala return to the island and meet with his brother. [RA 268, 272.]. Gaylien Kaho’ohalahala’s affidavit corroborates Mcomber’s testimony because Kaho’ohalahala was welcomed home by his family. [RA 37,38.].

Dupree also argues that there was insufficient evidence establishing Kaho’ohalahala’s physical presence on Lanai because Kaho’ohalahala lived in Lahaina with his wife and worked on Maui. [AB 11.]. The fact that Kaho’ohalahala’s wife may reside on Maui is irrelevant in determining Kaho’ohalahala’s residency. “[I]n determining residency, a person may treat oneself separate from the person’s spouse.” HRS § 11-13. As for Kaho’ohalahala’s place of employment, it is well-established that at the time he registered to vote in 2008, Kaho’ohalahala was employed by the State. “A person does not gain or lose a residence solely by reason of the person’s presence or absence while employed in the service of . . . this State[.]” HRS § 11-13(5). Dupree cannot refute evidence of Kaho’ohalahala’s presence on Lanai.

Kaho’ohalahala also possessed the requisite intent. Gaylien Kaho’ohalahala attested that in 2008, Kaho’ohalahala discussed his return to Lanai with the family and was welcomed home. [RA 37-38.]. Kaho’ohalahala attested that whenever he was absent, he intended to return to his family home on Lanai. [RA 38.]. Furthermore, Ellen Pelesaro testified that Kaho’ohalahala and his wife often “had long

talks . . . about remaining on Lanai for the rest of their lives." [RA 282-83.]. There is ample evidence in the record establishing the two facts for residency under HRS § 11-13(1).

Dupree claims that despite the evidence, this court should defer to the Board. [AB 13-14.]. The Board's findings of fact are reviewed under the clearly-erroneous standard. "An agency's findings are not clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made." Brescia v. North Shore Ohana, 115 Hawai'i 477, 491-92, 168 P.3d 929, 943-44 (2007) (quoting Poe v. Hawai'i Labor Relations Bd., 105 Hawai'i 97, 100, 94 P.3d 652, 655 (2004)). As for conclusions of law, this court need not defer to the Board and "may freely review an agency's conclusions of law." Id. at 492, 168 P.3d at 944 (quoting Lanai Co., Inc. v. Land Use Com'n, 105 Hawai'i 296, 307, 97 P.3d 372 (2004)).

The Board's findings of fact are irrelevant in determining residency and not supported by the evidence. For example, Mcomber's testimony regarding Kaho'ohalahala's presence on Lanai is inconsistent with the Board's Finding of Fact 13, which stated that Mcomber "testified that he ha[d] not seen Mr. Kaho'ohalahala on Lana'i." [RA 148]. The Board's findings of fact incorrectly emphasize the irrelevant or distort the evidence. They are clearly erroneous. Moreover, the Board's conclusions of law fail to take into account that there is no time requirement for a person's physical presence. See Powell, supra. Accordingly, the Board's decision must be reversed.



## Conclusion

The Board had no jurisdiction to hear Dupree's appeal because Dupree did not "challenge" Kaho'ohalahala's right to vote. The Board's decisions are not supported by the evidence adduced at the hearings and are out of step with the well-established law of domicile and residency. The Board's decisions, therefore, should be vacated and the Clerk's ruling should be reinstated.

DATED: Wailuku, Maui, Hawai'i June 26, 2009

  
BENJAMIN E. LOWENTHAL  
Attorney for Appellant