

NO. 29464

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

MICHAEL P. DUPREE,

Appellant-Appellee,

vs.

ROY T. HIRAGA, Clerk of the
County of Maui, and SOLOMON P.
KAHO'OHALAHALA,

Appellees-Appellants.

CASE NO. BOR-08-01
(Agency Appeal)

APPEAL FROM FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION OF THE BOARD OF
REGISTRATION, COUNTY OF MAUI,
DATED NOVEMBER 1, 2008

APPELLANT ROY T. HIRAGA'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Statement of Facts	1
II. STATEMENT OF THE POINTS OF ERROR	9
A. The Board Of Registration Acted Exceeded Its Statutory Authority And Jurisdiction	9
B. The Board Of Registration Erred In Considering And Relying On Immaterial And Irrelevant Criteria For Residency	10
C. The Board Of Registration's Conclusions of Law Were Erroneous	10
D. The Board Of Registration Erred In Concluding That Dupree Had Met His Burden Of Proof	11
III. STANDARD OF REVIEW	11
IV. ARGUMENT	12
A. The Board Of Registration Exceeded Its Statutory Authority And Jurisdiction	12
B. The Board Of Registration Erred In Considering And Relying On Immaterial And Irrelevant Criteria For Residency	14
1. One's State Of Mind Determines One's Legal Residence	14
2. Dupree Focused On The Wrong Criteria For Residence	17
C. Kaho`ohalahala's Physical Presence In Lahaina While Employed By The State Of Hawaii Does Not Count	17
D. The Board Of Registration Erred In Concluding That Dupree Had Met His Burden Of Proof	21
V. CONCLUSION	23
VI. STATEMENT OF RELATED CASES	23

TABLE OF AUTHORITIES

	<u>Page (s)</u>
<u>CASES</u>	
<u>Citizens Against Reckless Development v. Zoning Bd. of Appeals</u> , 114 Hawai`i 184, 159 P.3d 143 (2007)	
<u>Powell v. Powell</u> , 40 Haw. 625, 1954 WL 7985 (Hawaii Terr. 1954)	11
<u>In the Matter of the Application of P.R. Hurley et al. for a Writ Of Quo Warranto Against Eric A. Knudsen</u> , 30 Haw. 887, 1929 WL 3022 (Hawaii Terr. 1929)	20, 21
<u>State ex rel. Anzai v. City & County of Honolulu</u> , 99 Hawai`i 508, 57 P.3d 433 (2002)	12
<u>Winans v. Winans</u> , 205 Mass. 388 (1910)	19
<u>HAWAII REVISED STATUTES</u>	
§ 11-13	<i>passim</i>
§ 11-25 (c)	8
§ 11-26	9, 12
§ 11-41(c)	9, 12
§ 11-51	8
§ 11-172	3, 12
§ 11-174.5	3
§ 12-3	2
§ 12-8	2, 3
§ 12-8 (a)	2
§ 91-10(5)	5, 21
<u>ATTORNEY GENERAL OPINIONS</u>	
No. 86-10	3, 7, 14, 15, 22

CHARTER OF THE COUNTY OF MAUI (1983)

RULES

Hawaii Administrative Rules

Hawai`i Rules of Appellate Procedure

Hawai`i Rules of Evidence

APPELLANT ROY T. HIRAGA'S OPENING BRIEF

COMES NOW, Appellee-Appellant ROY T. HIRAGA (hereafter referred to as the "County Clerk"), by and through his attorneys, BRIAN T. MOTO, Corporation Counsel, and JANE LOVELL, Deputy Corporation Counsel, and submits his Opening Brief pursuant to Rule 28(b) of the Hawaii Rules of Appellate Procedure as follows:

I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a decision of the Board of Registration for the County of Maui (hereafter referred to as the "Board of Registration"), dated November 1, 2008 and served by certified mail on the parties on November 12, 2008. In that decision, the Board of Registration erroneously concluded that Appellee-Appellant Solomon P. Kaho`ohalahala (hereafter referred to as "Kaho`ohalahala") was not a registered voter in District/Precinct 13/07 in Lanai. Appellees-Appellants the County Clerk and Kaho`ohalahala filed timely notices of appeal.

B. Statement of Facts

The Charter of the County of Maui (1983), as amended, provides that the Maui County Council shall include one resident of the residency area of the Island of Lanai. Charter of the County of Maui (1983) § 3-1. Kaho`ohalahala filed nomination papers for the County Council seat for the Lanai residency area for the 2008 election. (See Record on Appeal (hereafter referred to as "ROA") 38, Affidavit of Solomon Kaho`ohalahala at ¶ 7.)

Section 12-8(a), Hawaii Revised Statutes ("HRS") provides in pertinent part that "[a]ll nomination papers filed in conformity with section 12-3 [HRS] shall be deemed valid unless objection is made thereto . . . 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." No objections to Kaho`ohalahala's candidacy were received by the County Clerk prior to the September 20, 2008 primary election. (See ROA 4.) Therefore, his nomination papers, which recited his residence in the Lanai district (see ROA 38, ¶ 7), were deemed valid by operation of law.

After the primary election was held on September 20, 2008, the County Clerk received twelve letters (hereafter referred to as "Complaint Letters") from registered voters residing in Lanai residency area. (See ROA 186 - 200.) Generally, the Complaint letters questioned whether Kaho`ohalahala, a candidate for the Maui County Council for Lanai, resided in the Lanai residency area. (See id.)

If the Complaint Letters were intended to constitute a challenge to Mr. Kaho`ohalahala's candidacy pursuant to HRS § 12-8, they were filed too late. The County Clerk determined that they were in fact untimely if filed for the purpose of challenging Kaho`ohalahala's candidacy for office.¹ (ROA 4.) If, on the other

¹The Hawaii Supreme Court agreed with the County Clerk's analysis. On December 15, 2008, the Hawaii Supreme Court dismissed an original proceeding filed by a group of Lanai residents after Kaho`ohalahala won the general election. The Hawaii Supreme Court held that although the complaint filed on November 24, 2008 and an amended complaint filed on November 26, 2008 were styled as

hand, the Complaint Letters were intended as a challenge to Mr. Kaho`ohalahala's right to be or to remain registered as a voter in the (Lanai) District/Precinct 13/07 (ROA 4 - 7), the County Clerk denied the challenge. In so ruling, the County Clerk followed the rules for determining residency set forth in HRS § 11-13. (ROA 5 - 7.) He noted that "physical presence or absence from a particular place is not the deciding factor in determining the residence of an individual. 'Under [HRS] § 11-13, one's state of mind determines one's place of residence[,]' " quoting Attorney General Opinion No. 86-10 (emphasis added). (ROA 6.)

To determine Mr. Kaho`ohalahala's state of mind, the County Clerk looked to Mr. Kaho`ohalahala's sworn affidavit. (ROA 7.) In that affidavit, Kaho`ohalahala stated that

- (a) his residence was fixed at 444 Fraser Avenue, Lanai City, and that whenever he was absent from the Island of Lanai, he intended to return;
- (b) he was born and raised on the Island of Lanai, and retained his residence on Lanai except for a brief period when he was in the service of the State of Hawaii; and

election contests brought pursuant to HRS §§ 11-172 and 11-174.5, any challenge to Kaho`ohalahala's qualifications for county office would have to have been brought pursuant to HRS § 12-8. Pursuant to Rule 201(b)(2) and (d) of the Hawaii Rules of Evidence, County Clerk asks this Court to take judicial notice of the Order of Dismissal filed December 15, 2008 in John W. Ornellas, Plaintiff v. Solomon P. Kaho`ohalahala, No. 29476.

(c) at the time of fixing his residence in Lanai City, it was with the intention of making it his permanent dwelling place. (ROA 7, 38.)

Kaho`ohalahala's brother, Gaylien Kaho`ohalahala, also submitted an affidavit, which stated that Solomon Kaho`ohalahala "presently resides at 444 Fraser Avenue and resided there since the beginning of July, 2008." (ROA 37.) The Gaylien Kaho`ohalahala affidavit recited that "Sol telephoned me and discussed with the family his intention of returning to Lanai to live," and that thereafter, "[w]e welcomed Sol's return home". (Id.)

The County Clerk reviewed Kaho`ohalahala's voter registration history, and confirmed that with the exception of the period from July 2006 to July 2008, when Kaho`ohalahala was in the service of the State of Hawaii, Kaho`ohalahala's residence address of record had always been on Lanai. (ROA 7; Transcript of the hearing held October 31, 2008, hereafter referred to as "TR 10/31/08" at pp. 34-35, ROA 275 - 276; see also ROA 218 - 221.)

On October 10, 2008, the County Clerk ruled that to the extent that the Complaint Letters constituted a challenge to Kaho`ohalahala's right to remain a registered voter in (Lanai) District/Precinct 13/07, the challenge was not sustained. (ROA 3 - 7.) The County Clerk advised each of the people who had submitted Complaint Letters that they had 10 days within which to appeal his decision. (ROA 40 - 51.) The instant appeal was filed by one of the people who had submitted a Complaint Letter, namely Appellant-

Appellee Michael "Phoenix" Dupree (hereafter referred to as "Dupree.")

On October 20, 2008 Dupree submitted a letter to the State Office of Elections. (ROA 52-54.) In that letter, Dupree acknowledged that a challenge to Kaho`ohalahala's candidacy for office was "received on an untimely basis," but Dupree asked that "in this specific situation an exception should be granted and further consideration be given to this challenge." (Id.) The letter specifically referred to § 3-1 of the Charter of the County of Maui (see ROA 53) and asked that Kaho`ohalahala's name be removed from the ballot and replaced with a "true resident of Lanai." (ROA 54.)

Despite these clear indications that Dupree was continuing to press an untimely challenge to Kaho`ohalahala's candidacy for county office, the Dupree letter was treated by the Board of Registration as an appeal from the October 10, 2008 ruling of the Maui County Clerk with respect to Kaho`ohalahala's voter registration status. (ROA 147, Finding of Fact No. 6.)

As the person initiating the proceeding, Dupree had the burden of proof, as well as the burden of persuasion. (HRS § 91-10(5); Haw. Admin. R. § 2-51-43(h); ROA 152, Conclusion of Law No. 13.) At the hearing on his appeal to the Board of Registration, Dupree presented testimony from himself and from one additional witness, Ron McOmber. Dupree argued that Kaho`ohalahala's bank statements and utility bills were not sent to a Lanai City address, TR 10/31/08 at p. 5, ROA 246, but Dupree did not offer any supporting documents in evidence. He argued that Kaho`ohalahala was

no longer a state employee, id., although he later appeared to acknowledge that Kaho`ohalahala was in fact a state employee because he was employed as an instructor at Maui Community College. (TR 10/31/08 at p. 22, ROA 263.) Dupree also expressed his dissatisfaction with the established and controlling state law on which the County Clerk's decision was based, arguing that "state of mind [a]s the determining factor [for residency] is completely arbitrary and unaccountable." (Id.)

Dupree's other witness, Ron McOmber, testified that he had lived on Lanai for 39 years, that he had known Kaho`ohalahala for that length of time, and that Kaho`ohalahala "has not physically lived on Lanai" for the past ten years. (TR 10/31/08 at p. 27, ROA 268.) McOmber testified that "there is no indication that I can find anywhere from anybody that Sol has moved back there and lived there for the last, at least, ten years," id., asserting that "this is common knowledge through Lanai[.]" (TR 10/31/08 at p. 28, ROA 269.) In response to a question from Board member John Henry, McOmber testified that he had not seen Kaho`ohalahala "come back over there, and move in, move clothes in, bring a car over there." (TR 10/31/08 at p. 31, ROA 272.) However, McOmber appeared to acknowledge seeing Kaho`ohalahala on Lanai: "His brother picks him up at the dock and, and drives him around, he does not own a car that I know of over there." (Id.)

At the close of Dupree's case, Kaho`ohalahala moved for a directed verdict and the County Clerk moved for nonsuit.² (TR 10/31/08 at p. 32, ROA 273). The motions were denied. (Id.)

Thereafter, the County Clerk testified in support of his decision. (TR 10/31/08 at pp. 33 - 38, ROA 274 - 279). The County Clerk testified about his experience and duties (TR 10/31/08 at pp. 33 - 34, ROA 274 - 275), and explained how he determined that Kaho`ohalahala was a resident of the island of Lanai. (TR 10/31/08 at pp. 34 - 36, ROA 275 - 277). The County Clerk testified that he relied on Kaho`ohalahala's voter registration records, and that he was guided in his analysis by HRS § 11-13 and by the Attorney General's Opinion 86-10. (TR 10/31/08 at p. 35, ROA 276.) The County Clerk noted that Kaho`ohalahala was a state employee during the two years that he was registered to vote in Lahaina rather than in Lanai. (TR 10/31/08 at p. 36, ROA 277.) The County Clerk submitted his October 10, 2008 letter ruling on the challenge to Kaho`ohalahala's residency, which was received in evidence. (TR 10/31/08 at p. 33, ROA 274.)

Kaho`ohalahala presented evidence from one witness, Ellen Pelisero (misidentified in the transcript as Ellen "Pelesaro"). (TR 10/31/08 at pp. 40 - 46, ROA 281 - 287). Ms. Pelisero testified that she knew Kaho`ohalahala well and that she had personal knowledge of his work for the State of Hawaii when he was the Executive Director of the Kaho`olawe Island Reserve Commission. Ms.

² The County's motion for nonsuit was misidentified in the transcript as a "motion for nonsup."

Pelisero also knew that Kaho`ohalahala was currently working for the State of Hawaii as an instructor at Maui Community College. (TR 10/31/08 at pp. 41, 44, ROA 282, 285.) She testified about Kaho`ohalahala's expressed intentions with respect to his residence on the island of Lanai: "he and his wife had talked 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 . . . it was work related why he had to physically not be there all the time." (TR 10/31/08 at p. 42, ROA 283.)

Ms. Pelisero explained that Kaho`ohalahala was able to commute from the island of Maui to the island of Lanai during his previous term of office as a Maui County Councilmember because he received an allowance for that purpose. She testified that Kaho`ohalahala could not continue to commute to and from Lanai during his employment by the State of Hawaii due to budget constraints. (TR 10/31/08 at p. 42, ROA 283.) She also testified to Kaho`ohalahala's truthfulness. (Id.)

On or about November 12, 2008, the Board of Registration served by mail its written Findings of Fact, Conclusions of Law, and Decision, dated November 1, 2008, which sustained Dupree's appeal, and overruled the County Clerk's October 10, 2008 ruling. (ROA 145-157.) The Board of Registration ruled that "[f]or purposes of this 2008 election, Mr. Kaho`ohalahala is a resident of Lahaina, Maui, Hawai`i" and that Mr. Kaho`ohalahala would only be allowed to vote by provisional ballot according to the procedures set out in HRS § 11-25(c). (ROA 153.) Pursuant to HRS § 11-51, the Board of

Registration's decision was a final appealable order from which no motion for reconsideration could be taken.

This appeal followed.

II. STATEMENT OF THE POINTS OF ERROR

A. The Board Of Registration Exceeded Its Statutory Authority and Jurisdiction

Although the Board of Registration is empowered by HRS §§ 11-26 and 11-41(c) to hear and rule on appeals from decisions of the County Clerk relating to a voter's right to remain on, or be removed from, the register of voters, the Board of Registration's decision improperly expanded the Board's jurisdiction to rule on whether Kaho`ohalahala's candidacy for County office met the criteria set out in the County Charter (see ROA 146, Finding of Fact No. 2; Conclusions of Law No. 4, and 5, ROA 150). The Board of Registration also lacked jurisdiction to rule generally on a candidate's residence "for election purposes." (See Conclusions of Law No. 3, 6, ROA 150.) Likewise, the Board of Registration lacked jurisdiction to determine that "[f]or purposes of this 2008 election, Mr. Kaho`ohalahala is a resident of Lahaina, Maui, Hawai`i." (ROA 153.)

These errors were brought to the attention of the Board of Registration at ROA 58-63 through the motion to dismiss for lack of jurisdiction filed by Kaho`ohalahala and during the two hearings held on the matter. (See Transcript of the hearing held October 27, 2008, hereafter referred to as "TR 10/27/08," at pp. 1-2, 9, 11, 13, ROA 225-226, 233, 235, 237; TR 10/31/08 at pp. 5 - 6, ROA 246-247.)

B. The Board Of Registration Erred In Considering And Relying On Immaterial And Irrelevant Criteria For Residency

In determining Kaho`ohalahala's residency for voting purposes, the Board of Registration also erroneously considered immaterial and irrelevant criteria such as whether Kaho`ohalahala owned or worked for a business on Lana`i, owned a house there, kept a car there, or had been seen by Appellant-Appellee Dupree at various places on Lanai. (See Findings of Fact No. 12, 13, 14, ROA 148.) These errors were brought to the attention of the Board of Registration at ROA 234-235, TR 10/27/08 at pp. 10-11; ROA 243, TR 10/31/08 at p. 2.

The Board of Registration also erred in relying on letters from eleven other residents of Lana`i who questioned Kaho`ohalahala's residence, but who did not file a timely appeal of the County Clerk's decision, and who did not testify at the hearing.³ (See Finding of Fact No. 15, ROA 148.)

C. The Board Of Registration's Conclusions Of Law Were Erroneous

As shown in II. A., above, the Board of Registration erred as a matter of law in adopting Conclusions of Law No. 3, 4, 5, and 6 because the Board of Registration lacked statutory authority and jurisdiction to draw these legal conclusions.

In addition, the Board of Registration erred in concluding that "Mr. Kaho`ohalahala did not abandon his residence in Lahaina,

³ Many of these letters focused on the same irrelevant and immaterial criteria relied on by Dupree. (See Finding of Fact No. 15, ROA 148.)

Maui, Hawaii, and did not relocate his permanent residence to Lana`i City, Lana`i, Hawai`i." (Conclusion of Law No. 14, ROA 153.) This conclusion does not accurately state the law and is not supported by the evidence.

D. The Board Of Registration Erred In Concluding That Dupree Had Met His Burden Of Proof

The Board of Registration also erred as a matter of law in concluding, as it did in Conclusion of Law No. 14, that "Mr. Dupree as the person initiating the proceeding presented sufficient credible evidence to prove by a preponderance [of evidence] 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." (ROA 153.)⁴ This error was brought to the Board of Registration's attention at TR 10/31/08 at p. 32, ROA 273 by means of a motion for directed verdict made by Kaho`ohalahala and through the motion for nonsuit made by the County Clerk. (TR 10/31/08 at p. 32, ROA 273.)

III. STANDARD OF REVIEW

In this case, the principal issue is whether the County Clerk correctly determined, pursuant to HRS § 11-13, that Kaho`ohalahala was a resident of Lanai when he registered to vote in July 2008. Whether the County Clerk correctly interpreted and applied HRS § 11-13 is a question of law, reviewed by this Court de novo under the "right/wrong" standard. See Citizens Against Reckless Development v. Zoning Bd. of Appeals, 114 Hawai`i 184, 193,

⁴ This was also an incorrect legal standard. See HRS § 11-13.

159 P.3d 143, 152 (2007) [agency appeal governed by HRS §91-14]; State ex rel. Anzai v. City and County of Honolulu, 99 Hawai'i 508, 514, 57 P.3d 433, 439 (2002) [question of constitutional law].

IV. ARGUMENT

A. The Board Of Registration Exceeded Its Statutory Authority and Jurisdiction

The powers of the Board of Registration are limited to those enumerated in HRS §§ 11-26 and 11-41(c). Pursuant to these statutory provisions, the Board of Registration is empowered to hear and rule on appeals from decisions of the County Clerk relating to a voter's right to remain on, or be removed from, the register of voters. The Board of Registration does not possess jurisdiction outside of the specific powers conferred on it by statute, and in particular, does not have any jurisdiction over election disputes.

Instead, the appellate courts of the state have exclusive jurisdiction over election contests. HRS § 11-172 vests exclusive jurisdiction in the Hawaii Supreme Court to rule on contests for cause. Pursuant to HRS § 11-172, only the Hawaii Supreme Court is empowered to reverse, correct, or change decisions of precinct officials, and to rule on, inter alia, allegations of fraud that could cause a difference in election results.

Furthermore, nothing in HRS Chapter 11 gives the Board of Registration jurisdiction to rule on whether a candidate for County office meets the qualifications for office set out in the County Charter (see ROA 146, Finding of Fact No. 2; Conclusions of Law No. 4, and 5, ROA 150.) The Board of Registration likewise lacks

jurisdiction to rule generally on a candidate's residence "for election purposes." (See Conclusions of Law No. 3, 6, ROA 150.)

Despite these limitations on the Board of Registration's jurisdiction, Appellee Dupree's October 16, 2007 letter (which was treated as a notice of appeal from the decision of the County Clerk) referred to Section 3-1 of the Charter of the County of Maui and argued that the County Clerk's decision would not help achieve "good, direct, democratic representation for Lanai residents" on the Maui County Council. (ROA 53.) Appellee Dupree's letter is not limited to the subject of Kaho`ohalahala's voter registration, but instead, is replete with references to Kaho`ohalahala's eligibility to serve on the Maui County Council. (See ROA 52-54.)

In responding to Appellee Dupree's appeal, the Board of Registration strayed beyond the limits of its own jurisdiction. Although the Board of Registration is not empowered to rule generally on a candidate's residence "for election purposes" (see Conclusions of Law No. 3, 6, ROA 150), the Board of Registration acted in excess of its jurisdiction in determining that "[f]or purposes of this 2008 election, Mr. Kaho`ohalahala is a resident of Lahaina, Maui, Hawai`i." (Decision, ROA 153.)

Likewise, the Board of Registration was not empowered by statute to rule on whether a candidate for County office meets the qualifications for office set out in the Charter of the County of Maui. Yet, the Board of Registration found that "Mr. Kaho`ohalahala is a candidate for the Maui County Council for the seat designated for the resident of the Island of Lanai for the 2008 general

election." (ROA 146, Finding of Fact No. 2.) The Board of Registration concluded that "[p]ursuant to the Maui County Charter Section 3-1, the [Maui County] 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." (Conclusion of Law No. 4, ROA 150, emphasis supplied.) The Board of Registration also concluded that "[p]ursuant to Maui County Charter Section 3-3, to be eligible for election or appointment to the [Maui County] [C]ouncil, a person must be . . . a resident in the area from which the person seeks to be elected." (Conclusion of Law No. 5, ROA 150.)

None of these issues are relevant to Kaho`ohalahala's status as a registered voter. In considering and ruling on these matters, the Board of Registration exceeded its statutory jurisdiction.

B. The Board Of Registration Erred In Considering And Relying On Immaterial And Irrelevant Criteria For Residency

1. One's State Of Mind Determines One's Legal Residence

In ruling that Kaho`ohalahala's residency for voter registration purposes, the County Clerk was guided by HRS § 11-13 and by Attorney General Opinion No. 86-10. (See ROA 5 - 7.) HRS § 11-13 sets forth the criteria to be used in determining residency, while Opinion No. 86-10 interprets and construes HRS § 11-13. The key to determining residency is the person's state of mind. HRS § 11-13(1)-(4). The Attorney General's opinion construing HRS § 11-13, also emphasizes intention as the deciding factor: "[u]nder

section 11-13, one's **state of mind** determines one's place of residence." (Atty. Gen. Op. 86-10, emphasis added.)

HRS § 11-13 contains rules to determine residency "for election purposes only," four of which turn on the person's intention or state of mind:

"(1) The residence of a person 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;

(2) 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;

(3) If a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the **intention** of remaining there shall be considered a resident where the person has established such dwelling place;

(4) The mere **intention** to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present **intention** to establish such place as the person's residence[.]

HRS 11-13, emphasis added.

Kaho`ohalahala established his intentions to the County Clerk's satisfaction. He submitted a sworn affidavit to the County Clerk, stating (among other things) that:

". . .

2. My residence is fixed at 444 Fraser Avenue, Lana`i City, and whenever I am absent from the island of Lana`i, I intend to return.

. . .

4. At the time of fixing my residence in Lana`i City, it was with the intention of making it my permanent dwelling place."

(ROA 7, 38, emphasis added.) This affidavit demonstrated that Kaho`ohalahala's state of mind and intention were to make Lanai City his residence.

At the hearing below, witness Ellen Pelissero corroborated Kaho`ohalahala's affidavit, testifying that:

"everything that he ever talked about that island, was this immense love affair with that island, he came right back from college and went to work there and began to do community service on that island that led ultimately to his running for office. [H]e and his wife had talked 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 . . . it was work related why he had to physically not be there all the time." (TR 10/31/08 at pp.41-42, ROA 282-283, emphasis added.)

Appellant Dupree did not introduce any testimony or documentary evidence concerning Kaho`ohalahala's intention or state of mind that would tend to impeach or contradict Kaho`ohalahala's affidavit or the testimony of Ms. Pelissero.

2. Dupree Focused On The Wrong Criteria For Residence

Instead of presenting evidence concerning Kaho`ohalahala's state of mind, Appellee Dupree focused on Kaho`ohalahala's physical presence or absence from Lanai, issues that are not material or determinative. None of the rules enunciated in HRS § 11-13 require a person to "own or work for a business" or to "own or rent a house or keep a car" in the location. (See Finding of Fact No. 12, ROA 148.) Likewise, nothing in HRS § 11-13 required that Kaho`ohalahala be "seen" by Appellant Dupree "at the post office, either bank, the Lanai`i store, the gas station, or any restaurant on Lanai`i" in the four months preceding the October 31, 2008 hearing below in order to establish or maintain residency there. (See Finding of Fact No. 14, ROA 148.)

In focusing on irrelevant and immaterial criteria for residency, and in failing to give appropriate weight to uncontradicted evidence of Kaho`ohalahala's intentions and state of mind, the Board of Registration erred.

C. **Kaho`ohalahala's Physical Presence In Lahaina, Maui While Employed By The State Of Hawaii Does Not Count**

HRS § 11-13(5) provides that residence cannot be gained or lost while a person is employed in the service of the United

States or the State of Hawaii: " (5) 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 the United States or of this State " HRS § 11-13(5), emphasis added. The evidence in the record is uncontroverted that Kaho`ohalahala's physical presence on the island of Maui at all relevant times was owing to his work as an employee of the State of Hawaii. In his affidavit, Kaho`ohalahala stated that he was born and raised on the island of Lanai and retained his residence there "except for a brief period in which I was in the service of the State of Hawai`i with the Kaho`olawe Island Reserve Commission." (ROA 38.) At all times relevant to Appellee Dupree's challenge, Kaho`ohalahala was employed by the State of Hawaii as an instructor at Maui Community College. (Finding of Fact No. 10, ROA 147.) His wife, Lynn Kaho`ohalahala, was likewise employed by the State of Hawaii as vice principal of Lahainaluna High School. (Finding of Fact No. 11, ROA 148.)

The County Clerk concluded, correctly, that Kaho`ohalahala "did not lose his residency due to his absence from Lanai while he was employed in the service of the State." (ROA 6.) The Board of Registration erroneously disagreed, emphasizing in a footnote to its decision that Kaho`ohalahala had changed his voter registration from Lanai to Lahaina on July 10, 2006. (ROA 149, fn. 1.) At that time, Kaho`ohalahala was employed by the State of Hawaii with the Kaho`olawe Island Reserve Commission. (ROA 38; ROA 148-149.)

The Board of Registration found that Kaho`ohalahala had not abandoned his residence in Lahaina and had not permanently relocated to Lanai. (Finding of Fact No. 19, ROA 149.) However, the weight of the evidence was otherwise. Kaho`ohalahala's brother, Gaylien K. Kaho`ohalahala, provided a sworn affidavit in which he stated that Kaho`ohalahala had made his expressed intention a reality when, in July 2008, Gaylien Kaho`ohalahala and his family "welcomed Sol's return home":

"3. In the beginning of July, 2008, Sol telephoned me and discussed with the family his intention of returning to Lanai to live.

4. We welcomed Sol's return home and he presently resides at 444 Fraser Avenue and resided there since the beginning of July, 2008."

Kaho`ohalahala's own affidavit reiterated that "[b]efore returning to Lanai . . . I sought permission from my family. They welcomed me home." (ROA 38.)

Under Hawaii law, Kaho`ohalahala was not required to spend any particular length of time on Lanai, once his family had "welcomed him home," in order to maintain or re-establish legal residence there. Length of residence is not a factor in acquiring a new domicile; even one day's residence is sufficient provided the appropriate intention is present. Powell v. Powell, 40 Haw. 625, 630, 1954 WL 7985 *3 (Hawai`i Terr. 1954), citing Winans v. Winans, 205 Mass. 388, 391 (1910) ["A day or an hour . . . will suffice for the acquisition of a domicile."]

Hawaii law is also clear that a county council member or supervisor need not reside exclusively in his district, and may maintain temporary homes in other places. In the Matter of the Application of P. F. Hurley et al. for a Writ Of Quo Warranto Against Eric A. Knudsen, 30 Haw. 887, 1929 WL 3022 (Hawai`i Terr. 1929). In Knudsen, the respondent and his family lived in a home at Halemanu in the Waimea district of Kauai on weekends and during school vacations. For convenience, Mr. Knudsen spent much of his time in the Koloa district, where he had business interests. Some of his children went to school in Lihue. Knudsen also owned a home in Honolulu, occupied by the family when two of his children attended school at Punahou. Knudsen had at various times been registered to vote in Waimea, Koloa, and Kekaha. He eventually filed nomination papers for the position of county supervisor for the district of Waimea, and was elected. Petitioners sought a writ of quo warranto, claiming that Knudsen was not a Waimea resident. Because Knudsen had a home and business interests in Koloa, and paid taxes there, the trial judge concluded that these circumstances were evidence of an intention to establish permanent residence in Koloa, rather than in Waimea. 30 Haw. at 893, 1929 WL at *4.

The Supreme Court of the Territory of Hawai`i reversed, concluding that Knudsen's residence was in Waimea. The Court noted that Knudsen had a "permanent and fixed abode" in Waimea with the concurrent "intention there to remain," 30 Haw. at 896, 1929 WL at *5, even though Knudsen and his family only occupied

the home during vacations and on weekends. The Court found that factors such as his registration as a voter in the Waimea district and his candidacy for office from that district corroborated Knudsen's express declaration of intention to reside in Waimea. (Id., 30 Haw. at 897, 1929 WL at * 5.) The Court concluded that "[a] residence so maintained is not lost by a temporary absence of the party claiming it . . . in the pursuit of business, pleasure or education nor by the maintenance of a temporary home elsewhere." (Id.)

The same is true here. Although Kaho`ohalahala has a temporary home in Lahaina, acquired while he and his wife were both employed by the State of Hawaii, his affidavit, his brother's affidavit, the testimony of Ellen Pelissero, his registration to vote in Lanai, and his candidacy for office from that district all corroborate his expressed declaration to reside in Lanai after July 2008. As the party with the burden of proof, Appellee Dupree failed to demonstrate that Kaho`ohalahala was not a legal resident of Lanai at the time he registered to vote there.

D. The Board Of Registration Erred In Concluding That Dupree Had Met His Burden Of Proof

The Board of Registration correctly concluded that as the party initiating the proceeding, Appellee Dupree had the "burden of proof, including the burden of producing evidence as well as the burden of persuasion by a preponderance of the evidence." (Conclusion of Law No. 13, ROA 152, citing HRS § 91-10(5), Haw. Admin. R. § 2-51-43(h).) However, the Board of

Registration erred in concluding that Appellee met those burdens.

Dupree presented only two witnesses, himself and Ron McOmber. (Finding of Fact No. 13, ROA 148.) Dupree testified that since July 2008 he had not seen Kaho`ohalahala "at the post office, either bank, the Lana`i store, the gas station, or any restaurant on Lana`i." (Finding of Fact No. 14, ROA 148.) Although the Board made a finding that McOmber "testified that he has not seen Mr. Kaho`ohalahala on Lana`i" (Finding of Fact No. 13, ROA 148), McOmber did not testify that he hadn't "seen" Kaho`ohalahala on Lanai. McOmber testified that since July, "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." In other words, while McOmber did not see Kaho`ohalahala "move in" to his residence on Lanai or register a car on the island, he did see Kaho`ohalahala arriving on island by ferry, being picked up by his brother. (Id.) In any event, one need not rent a moving van or be "seen" in certain places by one or two Lanai residents in order to establish or re-establish legal residency there. (See HRS § 11-13; Attorney General Opinion No. 86-10.)⁵

⁵McOmber also testified that Kaho`ohalahala "has not physically lived on Lanai . . . he has not lived there." (TR 10/31/09 at 27, ROA 268). However, as shown above, Kaho`ohalahala could not lose his Lanai residency because he had a temporary residence on Maui while employed by the State of Hawaii. HRS § 11-13 (5).

The testimony of Dupree and McOmber focused largely on immaterial matters, and taken as a whole, the evidence presented by Appellee Dupree was not sufficient to overcome the affidavits of Kaho`ohalahala and his brother, the testimony of Ellen Pelissero, and the findings of the County Clerk. The Board of Registration erred in concluding otherwise.

V. CONCLUSION

The Board of Registration acted in excess of its jurisdiction, relied on immaterial and irrelevant criteria for determining residency, improperly disregarded Kaho`ohalahala's status as a state employee, and erred in finding that Appellee Dupree had met his burden of proof. Therefore, the decision of the Board of Registration should be overturned, and the ruling of the County Clerk should be affirmed.

VI. STATEMENT OF RELATED CASES

To the knowledge of Appellee-Appellant County Clerk and his counsel, there are no related cases currently pending before the appellate courts of this state.

However, a related case was filed by 21 plaintiffs (including Appellant-Appellee Michael "Phoenix" Dupree) against Appellee-Appellants Kaho`ohalahala and County Clerk in the Circuit Court for the Second Circuit, under the name Alberta S. DeJetley et al. v. Solomon P. Kaho`ohalahala et al., Civil No. 08-1-0678(3). The County Clerk was dismissed from that lawsuit, and the Circuit Court's records should reflect that Kaho`ohalahala's motion to dismiss was recently granted.

On December 15, 2008, the Hawaii Supreme Court dismissed a related Original Proceeding filed by 21 plaintiffs (including Appellant-Appellee Michael "Phoenix" Dupree) against Appellees-Appellants Kaho`ohalahala and the County Clerk, entitled Alberta DeJetley et al. v. Solomon P. Kaho`ohalahala et al., No. 29476.

DATED: Wailuku, Maui, Hawaii, March 25, 2009.

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