Olter v. National Election Commissioner & Anor

Supreme Court, Appellate Division
King C.J., Benson A.J., Santos Temp J.
6 August 1987

Statutory interpretation and construction – conflict between statute of general application and statute of particular application – more particularized provision prevails.

Administrative law – judicial review – deference to initial decision maker outweighed by large question affecting the public interest and fundamental policy considerations.

Electoral law – petition for recount of votes – procedures for tabulation of votes – recount available in the event of doubt.

At an election for a seat in the Congress of the F.S.M. to represent Pohnpei State more than 10,000 votes were cast. Three tabulators recorded the tally for each candidate in each ballot box as the name of the person voted for was called out. Provided two out of the three tabulators agreed on the number of votes cast the ballot papers were not recounted. In more than thirty of the ninety nine ballot boxes there was disagreement by one tabulator but the National Election Commissioner refused a recount even though the appellant lost the election by only fourteen votes.

HELD: Mandate issued requiring a recount of the votes cast.

(1) The timing provisions of the National Election Code, a statute aimed at a particular procedure, prevail over the conflicting timing provisions set out in the general statute concerning judicial review – the Administrative Procedures Act. In enacting the law of specific application the legislative body is better focused and speaks more directly to the affected agency and procedure. However the Administrative Procedures Act is not rendered wholly inapplicable to an electoral recount petition because of the conflict in timing provisions.

(2) In United States law there are conflicting lines of cases concerning whether deference should be accorded to an administrative agency's legal interpretation or whether an active court role in reviewing legal rulings of such agencies is required. This Court need not adhere to U.S. decisions but instead should consider developing or adopting an independent analysis by searching for reconciling principles which will serve as a guide to courts within the F.S.M.

Only two justifications for deference are appropriate. One is if Congress by direct statement in the National Election Code or its legislative history intended that this Court should defer to legal interpretations of the national election commissioners. Secondly the Court would defer if an administrative agency, because of its procedures and special expertise, would have a better

understanding of the relevant law. Neither grounds for deference were applicable in this case. The decision to grant or deny a recount is a large question affecting the public interest profoundly and invoking fundamental policy considerations.

(3) The "two out of three tabulators" mechanism is not unreasonable or improper and may be used but the commissioner is required by the statute to order a recount if "there is a substantial possibility that the outcome of the election would be affected by a recount". The statutory scheme of the National Election Code strongly suggests that Congress intended the word "substantial" to be applied liberally so that in the event of doubt a recount would be available. The Code reflects considerable solicitude for the right of one seeking a recount.

Cases referred to in judgment:

Abbott Laboratories v. *Gardner* 387 U.S. 136, 87 S.Ct. 1507, 18 L. Ed. 2d 681 (1967)

Bureau of Alcohol, Tobacco, and Firearms v. *Federal Labour Relations Authority* 464 U.S. 89, 104 S.Ct. 439, 78 L. Ed. 2d 195 (1983)

Consolo v. *Federal Maritime Commission* 383 U.S. 607, 86 S.Ct. 1018, 16 L. Ed. 2d 131 (1966)

Federal Trade Commission v. *Colgate-Palmolive Co.* 380 U.S. 374, 85 S.Ct. 1035, 13 L. Ed. 2d 904 (1965)

Innocenti v. *Wainit* 2 F.S.M. Intrm. 173 (App. 1986)

Mayburg v. *Secretary of Health & Human Services* 740 F.2d 100 (1st Cir. 1984)

Morton v. *Ruiz* 415 U.S. 199, 94 S.Ct. 1055, 39 L. Ed. 2d 270 (1974)

Pacific Coast Medical Enterprises v. *Harris* 633 F.2d 123 (9th Cir. 1980)

Pittston Stevedoring Corp. v. *Dellaventura* 544 F.2d 35 (2d Cir. 1976) *affirmed sub nom. Northeast Marine Terminal Co. Inc.* v. *Caputo* 432 U.S. 249, 97 S.Ct. 2348, 53 L. Ed. 2d 320 (1977)

Richardson v. *Perales* 402 U.S. 389, 91 S.Ct. 1420, 28 L. Ed 842 (1971)

Schweiker v. *Gray Panthers* 453 U.S. 34, 101 S.Ct. 2633, 69 L. Ed. 2d 460 (1981)

State Department of Income Maintenance v. *Schweiker* 557 F. Supp. 1077 (D. Conn. 1983)

Tammow v. *F.S.M.* 2 F.S.M. Intrm. 53 (App. 1985)

Villa View Community Hospital Inc. v. *Heckler* 720 F.2d 1086 (9th Cir. 1983)

Legislation referred to in judgment:

Administrative Procedure Act, 5 U.S.C.S. section 706

Administrative Procedures Act, 17 F.S.M.C. sections 101-113

F.S.M. Constitution, Articles IX, X, XI

National Election Code, 9 F.S.M.C. sections 704, 901-904

Other sources referred to in judgment:

Breyer, "Judicial Review of Questions of Law and Policy" (1986) 38 Ad. L. Rev. 363

K. Davis, *Administrative Law* (Supp. 1982)

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KING C.J.

Judgment:

This is an appeal by Congressional candidate Bailey Olter from the denial by the National Election Commissioner for Pohnpei, Heinrick Stevenson, of Mr Olter's petition for recount of the votes cast in the 3 March 1987 election held in Pohnpei for that state's four-year-at-large seat in the Congress of the Federated States of Micronesia.

The principal issue is whether there is a "substantial possibility" within the meaning of the National Election Code, 9 F.S.M.C. 904, that the outcome of the election would be affected by a recount where it is shown that: (1) there was disagreement among the three official tabulators for one or the other of the two leading candidates as to the precise number of votes cast for that candidate in more than thirty of the ninety-nine ballot boxes, and (2) the winning margin in the challenged election was only fourteen votes.

A second major issue concerns eighteen absentee ballots which arrived from Honolulu after the statutory deadline and after counting was completed. Mr Olter appeals from the commissioner's refusal to permit these ballots to be counted.

We have concluded that the statute requires a recount under these circumstances but that the eighteen absentee ballots may not be included. In light of the statutory mandate that we act promptly, 9 F.S.M.C. 903(2), and the practical need for rapid action, this Court's decision was announced orally in open court on 21 April and mandate issued on that date.[1] The reasons for our decision are now set forth in this memorandum opinion.

I. Factual Background

In the election held in Pohnpei on 3 March 1987 for the four-year-at-large congressional seat, more than 10,000 votes were cast for the three candidates. The certified vote had Mr Leo Falcam the winner with 4045 votes, fourteen more than his nearest competitor, Mr Bailey Olter.

On 17 March, Mr Otler filed with National Election Commissioner Heinrick Stevenson a petition seeking, among other remedies, a recount of the votes.

The petition objected, among other things, to the counting of thirteen votes from ballots found under what were contended to be questionable circumstances and the refusal to count eighteen absentee ballots which arrived from Honolulu after the statutory deadline.

Moreover, the petition asserted that the above issues, compounded with: (1) alleged difficulty of the tabulators in hearing names of candidates being called during the tallying process; (2) acceptance of the majority vote, without a recount of the ballots in the box, when one of the three tabulators for a candidate disagreed with the other two concerning the number of votes in the ballot box; (3) an affidavit from the community of Nansaloi stating that more members of that community voted for Mr Olter than were reflected in the certified election results; and other claimed deficiencies, reflected general confusion in the tallying process. Based upon these factors and the extraordinary closeness of the race, Mr Olter asked that the

1 While preparing this decision we have concluded that one aspect of the earlier oral explanation should be amended. Therefore, for the reasons set out in this opinion, we now find that the judicial review provisions of the Administrative Procedures Act do apply to appeals to this Court from denial of a petition for recount.

votes be recounted.

On 3 April 1987, the commissioner issued an eight page opinion, denying each of Mr Olter's claims. Concerning the request for a recount, the commissioner found no "substantial question of fraud or error" and no "substantial possibility that the outcome of the election would be affected by a recount." 9 F.S.M.C. 904.

II. Legal Analysis

A. *Expedited Procedure*

The National Election Code states that an "aggrieved candidate" may appeal to the Supreme Court from refusal by the commissioner to grant a recount and from a ruling concerning acceptability of votes. 9 F.S.M.C. 903(1) and (2). Section 903(1) requires this Court to "review the appeal promptly and render a decision."

The Court has taken judicial notice of the fact that the next Congress is to convene in Pohnpei on or about 11 May to select the next President and Vice President of the Federated States of Micronesia. Under the Constitution the only persons who may be selected for those positions are the four members of Congress who hold four-year terms and have been elected at large by their respective states. F.S.M. Constitution Article IX, section 8; Article X, sections 4, 5. The Pohnpei at-large election under consideration in this case will determine the identity of one of those four members.

It is therefore imperative that the results of this election be finalized as soon as possible. If the appeal from the commissioner's decision were to go first to the trial division of the Court, with an opportunity to appeal from the trial court's decision to the appellate division, pursuant to the normal procedures of this Court, no final decision could be reached until well after the new Congress goes into session in May. This would neither meet the needs of the nation nor respond to the statutory mandate that the Court act "promptly".

We find within the Administrative Procedures Act, 17 F.S.M.C. sections 101-113, the necessary flexibility to expedite review of an administrative proceeding. The A.P.A. assures a person adversely affected by agency action of judicial review in the Federated States of Micronesia Supreme Court but, like the National Election Code, does not state whether the proceedings are to be initiated in the trial division or whether they may go directly to the appellate division.

The Constitution permits the appellate division to exercise original jurisdiction in cases arising under national law. "National courts," including this Court's appellate division, are given "concurrent original jurisdiction" in such cases. F.S.M. Constitution Article XI, section 6(b)

Therefore we have treated this as a direct appeal to the appellate division of this Court and have established an expedited schedule for briefing and oral argument of the appeal.

B. *Standard of Review*

This is the first case in which this Court has been presented with issues arising under either the A.P.A. or the National Election Code. It is therefore necessary here to determine the standards of review to be employed in reviewing the commissioner's decision.

1. *Administrative Procedures Act* – The Administrative Procedures Act provides

for court review of administrative determinations. 17 F.S.M.C. section 111. The appellees contend that the A.P.A. limits the scope of review so that the Court must uphold the commissioner unless his decision is found to be arbitrary and capricious or without substantial evidence to support it.

On the other side, Mr Olter contends that the A.P.A.'s standards do not apply to review of the denial of a petition for recount of an election. He argues that the contrast between the National Election Code's tight timing for recount petitions and action by the commissioner or board of election, 9 F.S.M.C. sections 901-902, and the more relaxed A.P.A. time limits, 17 F.S.M.C. sections 107-109, reveals that Congress wanted proceedings concerning petitions for election recounts to be unaffected by the A.P.A.

Moreover, Mr Olter points out that 9 F.S.M.C. 903 authorizes the Supreme Court to determine that there shall be a recount. He contends that this is beyond the power provided by the A.P.A. to "set aside" agency actions and decisions. 17 F.S.M.C. 111(3)(b). He sees this as another indication that Congress intended appeals under the National Election Code to be outside the A.P.A.

We do not agree that those aspects of the National Election Code are sufficient to remove this appeal from A.P.A. coverage. There can be no doubt, and all parties agree, that the commissioner is an "authority of the Government of the Federated States of Micronesia," hence is an "agency" within the meaning of 17 F.S.M.C. 101(1). Moreover, the commissioner's denial of Mr Olter's recount petition was indisputably "agency action." 17 F.S.M.C. 101(2). The A.P.A. states that its judicial review provisions apply to any challenge of agency action "except to the extent that statutes enacted by the Congress of the Federated States of Micronesia explicitly limit judicial review." 17 F.S.M.C. 111(1).

It is true, as the Olter argument assumes, that if there are irreconcilable conflicts between the terms of the A.P.A. and the National Election Code, the National Election Code provisions must prevail for purposes of any appeal concerning a national election. This is pursuant to the well-established rule of statutory construction that where there is a conflict between a statute of general application to numerous agencies or situations, such as the A.P.A., and a statute specially aimed at a particular agency or procedure, such as the National Election Code, the more particularized provision will prevail. This rule is based upon recognition that the legislative body in enacting the law of specific application is better focused and speaks more directly to the affected agency and procedure.

Accordingly, for the elections, the timing provisions of the National Election Code prevail over any conflicting timing set out in the A.P.A.

However, the fact that some provisions of the A.P.A. are overridden by the National Election Code does not constitute either an explicit or implied statement that the judicial review provisions of the A.P.A. are partially or wholly inapplicable to appeals from a decision of the commissioner. The A.P.A. is not an all or nothing statute. That the A.P.A.'s timing provisions do not apply to recount petitions does not mean the A.P.A.'s judicial review provisions are inapplicable to appeals from denial of such petitions.

We also do not accept the petitioner's restrictive view of the Court's power in reviewing agency action under the A.P.A. We do not read the A.P.A.'s specific authorization to set aside agency action as a prohibition of other traditional forms of

relief.[2] Further, petitioner's argument ignores the fact that the A.P.A. empowers the Court affirmatively to "compel agency action unlawfully withheld." 17 F.S.M.C. 111(3)(a). Accordingly, the National Election Code authorization for this Court to decide whether a recount must occur is not a departure from established law concerning judicial review in other jurisdictions or from the judicial review provisions of the A.P.A.

Summarizing, the National Election Code contains no express statement rendering the A.P.A.'s judicial review provisions inapplicable. Moreover, the Code contains no language so in conflict with the A.P.A.'s judicial review provisions as to amount to an explicit or implicit limitation of those provisions. We therefore conclude that the judicial review provisions of the A.P.A. do apply to this appeal.

2. *Review of factual findings* – Our conclusion that the A.P.A. judicial review provisions apply, however, does not cause us to agree that the scope of review of factual findings is so limited as the commissioner and Mr Falcam maintain.

They point out that in the United States factual findings of administrative agencies generally are accepted if there is in the record substantial evidence to support the agency decision. See *Richardson* v. *Perales* 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L. Ed. 2d 842, (1971); *Consolo* v. *Federal Maritime Commission* 383 U.S. 607, 86 S.Ct. 1018, 16 L. Ed. 2d 131 (1966). This is specifically prescribed in the United States Administrative Procedure Act.[3]

The A.P.A. enacted by the Congress of the Federated States of Micronesia is generally quite similar to the United States Administrative Procedure Act. Yet the A.P.A. here is pointedly different from the United States' version concerning the responsibility of courts to review factual findings. Instead of adopting the United States approach that courts are to accept an agency's factual findings if supported by substantial evidence, the F.S.M. A.P.A. specifically provides that the Court, in reviewing an agency decision, "shall conduct a de novo trial of the matter." 17 F.S.M.C. 111(2).[4]

Similarly, the A.P.A. requires the reviewing Court to "decide all relevant questions of law and fact," in contrast to the United States Administrative Procedure Act which limits this responsibility to questions of law. 5 U.S.C.S. section 706.

Such specific departures from the United States statute upon which the A.P.A. is otherwise modelled apparently represent "a conscious effort [by the F.S.M. Congress] to select a road other than that paved by the United States" for judicial review of factual findings of administrative agencies. See *Tammow* v. *F.S.M.* 2 F.S.M. Intrm. 53, 57 (App. 1985)[5]

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2 The United States Supreme Court, in considering the effect of the United States Administrative Procedure Act, upon which the F.S.M. A.P.A. is patterned, has said, "The specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review." *Abbott Laboratories* v. *Gardner* 387 U.S. 136, 142, 87 S.Ct 1507, 18 L. Ed. 2d 681 (1967).

3 5 U.S.C.S. section 706(2)(E): "[T]he reviewing court shall . . . set aside agency action . . . found to be . . . unsupported by substantial evidence. . . ."

4 The A.P.A. mentions a substantial evidence standard only for appeals to the appellate division from a trial court decision. For those appeals only, the A.P.A. directs that the judgment be reviewed by considering whether the finding of the trial court was "justified by substantial evidence of record." 17 F.S.M.C. 112.

5 The other statute to which Congress is likely to have referred in drafting the A.P.A. is the Trust Territory Administrative Procedures Act. That statute followed the United States' approach as to the substantial evidence rule, 17 F.S.M.C. 212(6)(b)(v), and the more limited instruction for courts to decide "all relevant questions of law," with no mention of questions of fact. 17 F.S.M.C. 212(6).

Thus, we conclude that the reviewing court is not bound to accept every factual finding of the agency which is supported by substantial evidence in the record. Instead, the A.P.A. imposes more affirmative obligations and requires the court to make its own factual determinations.

3. *Review of legal conclusions* – The A.P.A. states that the Court shall set aside agency decisions found to be "arbitrary, capricious, [or] an abuse of discretion." 17 F.S.M.C. 111(b)(i). The commissioner and Mr Falcam contend that these provisions require the Court to accept the commissioner's interpretation if it is "a reasonable construction of the relevant statute and a [sic] conformity with the purpose and wording of the law." Comm'r. Br. at 3, citing *Pacific Coast Medical Enterprises* v. *Harris* 633 F.2d 123 (9th Cir. 1980) and *Villa View Community Hospital Inc.* v. *Heckler* 720 F.2d 1086 (9th Cir. 1983).

While it is true that the statutory language quoted above seems to imply that reasonable agency decisions should be upheld, the A.P.A. also contains language providing authority for courts to set aside agency actions which are "not in accordance with law." 17 F.S.M.C. 111(b)(iii). Moreover, the A.P.A. states that "the reviewing Court", not the agency, "shall decide all relevant questions of law and fact." 17 F.S.M.C. 111(3).

The numerous United States cases holding that courts should accord deference to agency legal interpretations are offset by other cases reflecting and requiring an active court role in reviewing legal rulings of agencies. *Bureau of Alcohol, Tobacco, and Firearms* v. *Federal Labour Relations Authority* 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L. Ed. 2d 195 (1983) (court reviewing agency interpretation of law must not "slip into ... judicial inertia" or "rubber stamp" agency decision); *Federal Trade Commission* v. *Colgate-Palmolive Co.* 380 U.S. 374, 385, 85 S.Ct. 1035, 1043, 13 L. Ed. 2d 904 (1965) ("while informed judicial determination is dependent upon enlightenment gained from administrative experience," words setting forth "a legal standard ... must get their final meaning from judicial construction"); *Morton* v. *Ruiz* 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L. Ed. 2d 270 (1974) ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.").

Scholars of administrative law have recognized these apparently conflicting lines of cases concerning the scope of judicial review of administrative action and have called for clarification. Breyer, "Judicial Review of Questions of Law and Policy" 38 Ad. L. Rev. 363 (1986).[6]

This Court has previously recognized that when United States court decisions are unsettled under a United States constitutional or statutory provision from which an F.S.M. provision is drawn, we need not adhere to those decisions but instead should consider developing or adopting an independent analysis. *Innocenti* v. *Wainit* 2 F.S.M. Intrm. 173, 178 (App. 1986). Thus, we need not dwell upon the apparent conflicts between two lines of cases in the United States. Instead, we should search for reconciling principles which will serve as a guide to courts within the Federated States of Micronesia when reviewing agency decisions of law.

Analysis of whether, and how much, deference is owing to an agency's legal

6 *See also* K. Davis, *Administrative Law Treatise* section 30.00 (Supp. 1982) ("*The answer to the question whether the [United States] Supreme Court will use the rational basis test on a problem of applying law to established or undisputed facts is yes and no, with no guide as to when it is yes and when it is no.*" (Emphasis in original text).

interpretation properly begins with recognition that this Court is charged by statute and Constitution with deciding legal questions. Even if some deference is accorded to the legal judgment of an agency, the courts must remain the final authorities on issues of statutory construction. Any court deference to another decision maker on a legal question is a departure from the norm and may occur only when there is sound reason for such a departure.

We recognize two appropriate justifications for deference.[7] One is that Congress has told the courts to defer. As already discussed the A.P.A. itself contains no such instruction. Intent of Congress that the Court defer to an agency's legal rulings could be expressed or implied in the statute or legislative history empowering the agency to act.[8]

We find no direct statement in the National Election Code or its legislative history that Congress intended that this Court defer to legal interpretations of the national election commissioners. Even without an express statement though, the statute may imply that some deference is owing to the agency's decision:

> [I]f Congress is silent, courts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. . . . They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. . . . Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.
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> *Mayburg* v. *Secretary of Health and Human Services* 740 F.2d 100 (1st Cir. 1984) (citations omitted).

A decision whether to grant or deny a recount is not an everyday administrative decision. This is a large question affecting the public interest profoundly and invoking fundamental policy considerations.

Congressional intent that courts defer could also be implied by congressional delegation to an agency of broad policymaking responsibilities. When, as here, the agency's primary role is more that of an umpire than policymaker, assuring fairness by monitoring and applying procedures prescribed by statute, courts are less likely to defer. *Pittston Stevedoring Corp.* v. *Dellaventura* 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom. North East Marine Terminal Co. Inc.* v. *Caputo* 432 U.S. 249, 97 S.Ct. 2348, 53 L. Ed. 2d 320 (1977).

The second basic justification for court deference to an agency's legal ruling is that the agency has a better understanding of relevant law. An obvious example of this might be when a particular statutory provision was actually drafted and proposed by the agency itself.

Also, if the administrative decision involves technical or scientific knowledge, or

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7 This analysis draws upon Breyer J.'s article, "Judicial Review of Questions of Law and Policy" 38 Ad. L. Rev. 363 (1986).

8 *Schweiker* v. *Gray Panthers* 453 U.S. 34, 44, 101 S.Ct. 2633, 2640-41, 69 L. Ed. 2d 460 (1981).

calls for special expertise or experience which the agency is established to provide, courts are more likely to concede that the agency may be more familiar with the meaning and implications of the statutory language. Those considerations are not present here.[9]

Finally, if the agency decision at issue is a considered judgment arrived at on the basis of hearings, a full record, and careful reflection, courts are more likely to rely on the knowledge and judgment of the agency and to restrict the scope of judicial review. *Pittston Stevedoring Corp.* 544 F.2d 49-50. The commissioner's decision here was made under heavy time pressures. No hearings were held. The record upon which the commissioner's decision was based consisted only of the petition, and memoranda and affidavits filed by the parties, all of which are before this Court. There is a much greater need for court vigilance in reviewing a decision necessarily arrived at in such hurried fashion.

We find no grounds here for deferring to the commissioner's application of the statute. All factors we have considered point toward the need for this Court to exercise fully the normal judicial function in construing the statutory language at issue here.

III. Application of Law to Facts

Having waded through the preliminary questions, we finally reach the principal tasks, review of the commissioner's factual findings and interpretation of the recount provisions of 9 F.S.M.C. 904.

A. *Factual Findings*

As already discussed, the A.P.A., 17 F.S.M.C. 111(2), contemplates that the reviewing court may conduct evidentiary hearings rather than rely upon the record developed in the agency proceedings. However the parties here have stipulated pursuant to the same subsection that the factual record before the commissioner may be considered by this Court. Except as discussed hereafter concerning the two-of-three mechanism, we have found the record established before the commissioner to be adequate to permit review of the factual findings.

Having reviewed that record carefully, we find no adequate support for most of Mr Olter's factual claims. Specifically, we dismiss as unsupported by the record the claims that tabulator difficulty in discerning which names were being called may have affected the accuracy of the count, that procedures employed in recording votes of persons confined in the hospital improperly failed to ensure secrecy or preclude tampering, that the counting of additional ballots found after counting was completed was improper and that there was error in tallying the votes of the people of Nansaloi. While it is established that, shortly before completion of the counting, the chairman of the counting and tabulating committee erroneously announced that only three votes separated the two leading candidates, it is equally plain that the chairman's error was an honest one, which had no bearing on the election outcome. None of these claims raises a substantial question of error.

The remaining grounds for a recount then are the facts that the election was

9 *State Dep't of Income Maintenance* v. *Schweiker* 557 F. Supp. 1077, 1089 (D. Conn. 1983): "[E]ven a clear, long-standing agency interpretation would not deserve deference here. The reason is that the statutory construction at issue involves not technical details but the statute's broad purpose. While agencies are expert at the former, courts are expert at the latter."

extraordinarily close with only fourteen votes separating Messrs. Falcam and Olter, coupled with the use of what the commissioner in his opinion called the "two-of-three mechanism" for counting votes. This counting procedure is explained well in the commissioner's opinion at p. 3:

> Under this mechanism three individual tabulators are assigned to tally the votes for a particular candidate as they are read aloud by the person reading the ballots. The three people are seated apart from one another in the counting room. When the ballots from each box have been read the results of each of the three tabulators are checked as regards their particular candidate. If all three tabulators produce the same result, that is taken as correct. If two of the three have the same result and the third differs by only one vote, the result of the two is taken as correct.

The record originally revealed twenty six instances where the count of the two agreeing tabulators differed by one vote from the third tabulator's count. Although the stated policy calls for a recount where one tabulator differs from the others by two or more votes, the commissioner also noted two instances where the count of the two agreeing tabulators was accepted without a recount, although the third person's tabulation differed by two votes.

The record as originally presented to the Court was inconclusive as to whether there may have been still more incidents of unresolved one-vote or two-vote disagreements. The Court's justice ombudsman for Pohnpei, Edgar Santos, was appointed special master to make that determination by reviewing the videotape of the ballot counting. Based upon the report of the special master, and our review of the balance of the record, we have concluded that there was a total of at least thirty unresolved one-vote, and four unresolved two-vote, disagreements.

B. *The Statute*

With these factual findings in hand, we proceed to interpretation of the statute itself, 9 F.S.M.C. 904:

> Section 904. *Approval of petition, notice of recount.* Regardless of whether a petition is first filed with a board of election or with the National election commissioner, if the National election commissioner determines that there is a substantial question of fraud or error and that there is a substantial possibility that the outcome of the election would be affected by a recount, he shall cause notice of the recount to be given in a manner decided by him.

A two-prong test must be applied. We are directed first to consider whether there is a "substantial question of fraud or error."[10] It is important to note that the requirement is not that there be a "question of substantial error." Moreover, the error need not have been in the outcome or result of the entire election. If a candidate can persuade the decision maker that there is a substantial question as to whether even a single vote may have been counted or rejected in error, this first requirement is met.[11]

10 There is no claim of fraud, so our analysis is restricted to a question of error.

11 It appears that this test was not squarely applied by the commissioner. Although the beginning of the opinion states the conclusion that "there in [sic] no substantial question of fraud or error," the opinion strays to different tests in considering the two-of-three mechanism. The findings there are that there is "no indication of substantial error in the system" and that the mechanism does not

Clearly, recording of a vote count contrary to that of one of three official tabulators responsible for counting the votes in that ballot box raises a "substantial question of error" as to the recorded vote for that box.

This is not to say that the two-of-three mechanism is illegal, unreasonable, improper or may not be used. Surely the two agreeing tabulators normally will be correct. The method will yield a result sufficiently accurate to permit certain identification of the winning candidate in most elections. Yet there can be no blinking from the fact that this failure to recount where one tabulator's count is different from the other two gains efficiency at a price of at least slightly reduced accuracy. Use of this method, even for only one ballot box, raises a substantial question as to whether there has been at least some error. That is enough to satisfy the first part of the test.

But the first is far less than half the story. There are few human endeavours in which there is not a substantial question as to whether there has been at least some error. The second prong of the statutory test is the critical issue. We must determine whether there is a "substantial possibility that the outcome would be affected by a recount."

No mathematical or scientific calculations have been presented to assist us in assessing the likelihood that a recount could change the outcome. We venture a few thoughts that bear on the question. We believe that the two-of-three mechanism will produce an accurate count for most ballot boxes. Even when the method does result in mistaken counts for some ballot boxes, the inaccuracy on any particular box would almost certainly be no more than the original one or two vote differences. Moreover there is no reason to believe that inaccuracies caused by the method would be skewed for or against particular candidates. Thus, even if a recount would produce somewhat different counts for particular ballot boxes, we suspect that the margin between candidates would not be appreciably affected. We believe it quite likely that a recount will not affect the outcome of the election.

Yet we are by no means confident to the point of certainty that the outcome would be unaffected by a recount.[12]

As already noted, in more than thirty instances a count was recorded for one of the two leading candidates although one of the three official tabulators disagreed with that count. It is here, with a victory margin substantially smaller than the number of ballot boxes as to which there was disagreement about the votes recorded, that the unusual closeness of the election becomes a factor. Under such circumstances we cannot reject the possibility that the outcome would be affected by a recount. The remaining question is whether that possibility is "substantial" within the meaning of the statute.

"Substantial" is a broad, flexible word, defying precise definition. The contours and reach of such a word may differ from case to case, statute to statute depending on the circumstances and purpose for which the word is used. In construing such a word as it appears in a statute, courts should look to the broader purposes of the statute and the nature of the activity being governed.

present a "question of substantial possibility of error." Page 3. The first of these findings is an inversion of the proper test. The second is ambiguous, failing to reveal whether the commissioner was referring to no possibility of error in a single vote, or in the overall result.

12 We agree with the apparent assumption of the parties that the phrase "outcome would be affected" is to be interpreted as meaning that a different candidate might be declared the winner through a recount.

The statutory scheme of the National Election Code strongly suggests that Congress intended the word "substantial" to be applied liberally, so that in the event of doubt, a recount would be available. This conclusion asserts itself through the fact that the Code reflects considerable solicitude for the rights of one seeking a recount, none of one seeking to prevent a recount.

For example, the Code authorizes one seeking a recount to file a petition, either with the commissioner or the board of election. 9 F.S.M.C. 901. Although the commissioner permitted Mr Falcam to file memoranda and exhibits opposing Mr Olter's petition, the National Election Code itself makes no provision for such opposition.

If the commissioner denies the petition, he must "record the reasons for such decision." 9 F.S.M.C. 903(1). No explanation is required if the request is granted. The candidate seeking a recount is given to appeal to this Court from a denial. *Id.* Nothing is said about a right to appeal from a decision permitting a recount.

Noteworthy also is the fact that the National Election Code requires a commissioner to cause a recount on his own initiative, even if no petition is filed, if the commissioner determines that the mandatory standards are met. If the standards are met a recount is required, "[r]egardless of whether a petition is first filed with a board of election or with the National Election Commissioner. . . . " 9 F.S.M.C. 904.

Moreover, the statutory standards set forth in 9 F.S.M.C. 904 are not necessary conditions for declaration of a recount by the commissioner. These are mandatory standards which, if met, compel a recount. The national election commissioner is the principal official responsible for assuring a fair election and an accurate count. He has "responsibility for the overall supervision and administration of the election within his State." 9 F.S.M.C. 302. This broad supervisory responsibility carries with it authority enabling a commissioner to require a recount whenever he believes a recount appropriate.

Thus, a commissioner may declare a recount forthwith without awaiting a petition or pausing to state any reasons therefor.

To be specific about the election under consideration here, when it became clear that only fourteen votes separated the two leading candidates, Commissioner Stevenson had full authority immediately to order a recount of the boxes for which the two-of-three mechanism had been used to determine the number of votes to be recorded. Had this been done, any "substantial question of error" would have been erased and no further recount or delay would have been necessary.

Plainly, the statutory scheme reflects far greater congressional concern that appropriate recounts be provided than that inappropriate recounts be prevented. This statutory tilt toward the possibility of recount presumably reflects congressional recognition of the disparity in importance between the competing interests. The right of the people to determine their political leadership is at the heart of the democratic system of government established by the Constitution of the Federated States of Micronesia. Any substantial possibility that fraud or error may have affected the outcome of a national election poses a serious threat to the very credibility and integrity of constitutional government. Congress has provided the possibility of a recount as insurance to protect these interests. If a recount is denied when it should have been granted, a grave risk is presented to constitutional government.

The interests on the other side of the equation are significant, but of far less

importance than the public interests in assuring a fair and accurate election count. Prevention of an unnecessary recount may spare the government expense and end uncertainty about the ultimate outcome of the election.[13]

These considerations persuade us that the recount provisions were intended to be applied liberally, so that recounts will be freely available if there is a real, albeit small, possibility that the outcome might be affected by a recount. In this election, there were more than thirty applications of the two-of-three mechanism while only fourteen votes separated the two leading candidates. Although one might think it unlikely that a recount will yield a different outcome, we cannot say there is no real, or substantial, possibility that the outcome would change. Under these circumstances the statutory standard is met and a recount is required.

C. *Absentee Ballots*

Mr Olter also appeals under 9 F.S.M.C. 903(2) from the commissioner's refusal, on grounds of untimeliness, to permit counting of eighteen absentee ballots received from Hawaii. Each of these ballots was postmarked in Honolulu on 27 February or before but none arrived here until 6 March, three days after the election.

The National Election Code provides that the absentee ballot envelope and affidavit "shall be mailed or delivered to reach the National election commissioner of his State issuing the absentee ballot not later than the established closing hour of business on the fourth day before the election. . . ." 9 F.S.M.C. 704(1). This formula required that the ballots reach Pohnpei on or before 27 February.

An affidavit of a Pohnpei voter, submitted on behalf of Mr Olter, states that the F.S.M. National Liaison office misled Pohnpei citizens who were in Honolulu to believe that it would be sufficient compliance with the law if their ballots were postmarked on or before 27 February. However, there is a counter affidavit refuting this claim. We conclude that the staff of the F.S.M. Liaison office in Honolulu did not mislead the voters or in any way cause them to submit their absentee ballots in untimely fashion.

We are concerned that the absentee ballot process may be unnecessarily complex, burdensome and rigid. The commissioner represented to this Court that some eighty eight ballots were sent to Hawaii but only five Pohnpei citizens residing in that state actually succeeded in having their ballots counted for this election. It may well be desirable for ballots to be sent to potential voters at an earlier date, for more aggressive public information efforts to take place and for consideration being given to softening of other requirements, including the timing set forth in 9 F.S.M.C. 704(1) and notarization.

Nonetheless, the statutory requirements at issue here are clear. They have not been met and the commissioner's refusal to count the absentee ballots was consistent with the statute.

IV. Conclusion

Use of the two-of-three mechanism raises a substantial question of error within the meaning of 9 F.S.M.C. 904. Here, where that mechanism was used more than thirty times, and the margin between the two leading candidates was only fourteen

13 We note however that in an extraordinary close election such as this one, refusal to grant a recount request will almost inevitably result in a court appeal, often causing more expense, delay and extended uncertainty about the outcome than would a prompt recount.

votes, we conclude that there is a substantial possibility that the outcome would be affected by a recount. Therefore the Court's mandate has issued requiring such a recount.

The commissioner's refusal to count the eighteen absentee ballots from Hawaii is consistent with the provisions of 9 F.S.M.C. 704(1) and is therefore affirmed. The other claims raised by Mr Olter are rejected as without sufficient support in the record.

580

Reported by: D.V.W.