The statute authorizes representation of Chuuk subdivisions only "when appropriate." It is unclear whether these two plaintiffs even qualify as a Chuuk subdivision or that the representation would be appropriate. To rule at this stage that they do would be to implicitly decide (in the plaintiffs' favor) one of the two major issues of this case before the adversary process has gotten underway. Considering all the circumstances, the fairness of the proceeding could reasonably be questioned if the Chuuk Attorney General's Office continued to represent Marsolo and the plaintiff Tolensom. Since the Chuuk Attorney General's Office will remain counsel for the state plaintiffs, it will not be precluded from raising any issues, introducing any evidence, or advancing any arguments that it would otherwise have been able to do. The matter's timely disposition would also not be delayed.

III. CONCLUSION

Accordingly, the motions to disqualify the Chuuk Attorney General's Office from representing the State of Chuuk and Governor Wesley Simina are denied; the motion to disqualify the Chuuk Attorney General's Office from representing Amanto Marsolo and plaintiff Tolensom Municipality is granted; and 30 days from the entry of this order is allowed for counsel to appear on behalf of Amanto Marsolo and plaintiff Tolensom Municipality and to file and serve any further papers or pleadings deemed needed.

* * * *

CHUUK STATE SUPREME COURT TRIAL DIVISION

JOHANNES JACKSON,	)	CSSC CIVIL ACTION NO. 029-2011
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK STATE ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
vs.	)	
	)	
SEASON JACKY,	)	
	)	
Real Party in Interest.	)	
	)	

ORDER DENYING INJUNCTIVE RELIEF AND DISMISSING PETITION FOR DECLARATORY JUDGMENT

Midasy O. Aisek
Associate Justice

Chamber Conference: April 14, 2011
Decided: April 14, 2011

APPEARANCE:

For the Plaintiff: Johnny Meippen, Esq.
P.O. Box 705
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Civil Procedure – Dismissal – Lack of Jurisdiction; Elections

A plaintiff's request that the court issue a declaratory judgment against defendant Election Commission stating that the scheduled revote election violates plaintiff's due process rights will be dismissed for lack of jurisdiction when that Election Commission decision is already being reviewed by the Appellate Division. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 490 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions

An ex parte temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if both 1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and 2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required but those arguments are superfluous when the defendant has been notified. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 490 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions – Irreparable Harm; Elections

When the election law provides for remedies that have not yet been used, a candidate cannot show irreparable harm necessary for the issuance of a temporary restraining order. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 490 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions – Irreparable Harm; Elections

Since section 131 of Chuuk State Law No. 3-95-26 provides for trials in the Chuuk State Supreme Court Appellate Division when review of Election Commission decisions regarding contested elections is sought and since the plaintiff has availed himself of that remedy, he cannot show irreparable harm. But a court must weigh three factors other than irreparable harm when considering injunctive relief – the relative harm to the plaintiff and to the defendant, the public interest, and the likelihood of success by the plaintiff in the underlying case – and when none of those factors weigh so strongly in the plaintiff's favor to overcome the lack of irreparable harm injunctive relief will not be granted. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 490 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions – Balance of Injuries; Elections – Revote

When the Election Commission has ordered a revote and that order has been appealed, the relative harm to each party, or even that either party faces an impending harm at all, is difficult to fathom. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 490 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions; Elections

It is the nature of the political process that elections typically yield a single winner and one or more losers. Absent a showing of foul play or procedural irregularity, a defeated election contestant has no claim before any court of law. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487,

491 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions – Irreparable Harm; Elections – Revote

When the trial court is without jurisdiction to either decide or second guess the reasoning underpinning future appellate division decisions and, whatever the results of the revote, neither party is likely to suffer a harm of such import that cannot potentially be redressed through the procedures set forth under our laws. The plaintiff does not stand to lose anything of a magnitude so great as to justify issuance of an order enjoining the election from taking place at all because if the defendant prevails in the appeal, there may be utility in the revote and if the plaintiff prevails in the appeal, the revote becomes a nullity. Under either scenario, the results of the revote may be administratively and, if necessary, judicially appealed. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 491 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions – Likelihood of Success; Elections – Contests

A court cannot, for lack of jurisdiction, weigh the likelihood of plaintiff's success on the merits when, pursuant to state law, the merits of his appeal are not before the court because they were duly presented in their proper forum of the appellate division. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 491 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions – Public Interest; Elections – Revote

When a plaintiff argues that the District No. 11 constituents should not incur the expenses of a revote where there is a likelihood that the appellate court will set aside the results, the public interest is best served if due process is allowed to run its course. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 491 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions; Elections – Revote

When, at least procedurally, the law governing appeals of administrative decisions on contested elections has been properly complied with, a plaintiff's petition requesting an injunction against the revote ordered by the Election Commission is wholly without merit and can only serve to frustrate the legal process underway in appellate division. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 491 (Chk. S. Ct. Tr. 2011).

Civil Procedure – Injunctions

When a plaintiff fails to show that any of the factors considered weigh strongly enough in his favor to overcome the lack of irreparable harm, his motion for a temporary restraining order will be denied. Jackson v. Chuuk State Election Comm'n, 17 FSM Intrm. 487, 491 (Chk. S. Ct. Tr. 2011).

* * * *

COURT'S OPINION

MIDASY O. AISEK, Associate Justice:

An *ex parte* chamber conference was held on April 14, 2011 in the matter captioned above. Attorney Johnny Meippen appeared on behalf of plaintiff. No representative from the Attorney General's office was present and at the time, based on representations from plaintiff's attorney, Johnny Meippen, the Court was led to believe that the petition, filed earlier that morning, was for an *ex parte* temporary restraining order. Among other things, plaintiff requested enjoinment of an election scheduled to occur the following day, April 15, 2011. On March 30, 2011, Election Commission found that 18 illegal votes were cast during the March 8, 2011 Chuuk State Election at both the Ruo and Fanau precincts in District No. 11. It ordered that a revote be undertaken in those precincts in light of

the voting irregularities.

That decision is being reviewed by the Appellate Division, Case No. 001-2011. Plaintiff's further request that the Court issue a declaratory judgment against defendant Election Commission stating that the scheduled election violates plaintiff's due process rights is therefore dismissed for lack of jurisdiction.

Rule 65(b), Chuuk Rules of Civil Procedure, provides, in relevant part, that a

> temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

During the chamber conference, counsel for plaintiff argued that, pursuant to Billimon v. Marar, 15 FSM Intrm. 87 (Chk. 2007), only one of the two conditions required under Rule 65(b) must be met in order for the Court to grant a restraining order without oral or written notice to the opposing party. Counsel for plaintiff further stated that although he had encountered a representative of the Chuuk State Attorney General's office when filing the complaint in this matter, he did not serve that representative or that office with notice of this hearing. But the record in this case indicates that counsel for plaintiff provided the Court with a certificate of service upon the Attorney General's office dated on the day of the hearing.

It is unclear to the Court why attorney Meippen appeared requesting an *ex parte* hearing in the matter, and argued for the same, when he had already provided a certificate of service upon the office of defendant's counsel. That aside, the Court finds that Billimon v. Marar, 15 FSM Intrm. 87, provides nothing even vaguely resembling authority to support plaintiff's argument that only one of the two conditions required under Chuuk Civil Procedure Rule 65(2)(b) must be met prior to granting *ex parte* injunctive relief. But that argument is superfluous since defendant was notified. The Court turns to the substantive issues of plaintiff's request.

Where the election law provides for remedies that have not yet been used a candidate cannot show irreparable harm necessary for the issuance of a temporary restraining order. Wiliander v. Siales, 7 FSM Intrm. 77, 80 (Chk. 1995). Section 131 of Chuuk State Law No. 3-95-26 provides for trials in the Appellate Division of the Chuuk State Supreme Court when review of Election Commission decisions regarding contested elections is sought. A court must weigh three factors other than irreparable harm when considering injunctive relief. Those are: the relative harm to the plaintiff and to the defendant, the public interest, and the likelihood of success by the plaintiff in the underlying case. Where none of those factors weigh so strongly in the plaintiff's favor to overcome the lack of irreparable harm injunctive relief will not be granted. Wiliander, 7 FSM Intrm. at 80.

Since plaintiff currently avails himself to the judicial review procedure as provided under section 131 of Chuuk State Law No. 131, he fails the burden of showing irreparable harm under Wiliander. The relative harm to each party, or even that either party faces an impending harm at all, is difficult to fathom. Plaintiff's convoluted argument that he is injured if he partakes in the revote and encourages his supporters to do so, and is also injured if he does not participate in the political process, remains incomprehensible to the Court. He seems to intimate that the appellate Court will penalize him for both voting, which is his political privilege, and filing the appeal, which is his right. Defendant, on the other

hand, may potentially win an election he previously lost whereas if he loses a second time, he is in the same position as now. But if the results of the revote are allowed to stand, the consequences to the losing party cannot be characterized as a harm: it is the nature of the political process that elections typically yield a single winner and one or more losers. Absent a showing of foul play or procedural irregularity, a defeated election contestant has no claim before this or any other court of law.

This Court is without jurisdiction to either decide or second guess the reasoning underpinning future decisions of the Appellate Division. It finds that whatever the results of the revote, neither party is likely to suffer a harm of such import that cannot potentially be redressed through the procedures set forth under our laws. Certainly plaintiff does not stand to lose anything of a magnitude so great as to justify issuance of an order enjoining the election from taking place at all. If defendant prevails in the appeal, there may be utility in the revote. If plaintiff prevails in the appeal, the revote becomes a nullity. Under either scenario, the results of the revote may be administratively and, if necessary, judicially appealed.

As to the likelihood of plaintiff's success on the merits, pursuant to Chuuk State Law, the merits of his appeal are not before this Court and were duly presented in their proper forum. On this point, plaintiff puts this Court in the position of second guessing a future decision of Appellate Division, which is improper for lack of jurisdiction here. With respect to the public interest, plaintiff argues that the constituents of District No. 11 should not incur the expenses of a revote where there is a likelihood that the appellate court will set aside the results. The expense of mechanisms which the State employs to conduct elections is a subject the Court knows nothing about. But whether the constituents themselves bear the cost or whether funds are allocated for these purposes from another revenue source, or perhaps a combination of the two, or neither, it seems to the Court, is presently a political concern. If the constituents of District No. 11 incur some future harm as a result of bearing the costs of an election that proves to be unnecessary, then they shall have the opportunity to seek damages when the case is ripe for adjudication. Under our facts the public interest is best served if due process is allowed to run its course.

Even a cursory glance reveals that at least procedurally, the law governing appeals of administrative decisions on contested elections is properly complied with. Which is to say that the basis for plaintiff's petition requesting an injunction against the ordered revote is wholly without merit and can only serve to frustrate the legal process now underway in Appellate Division. The ultimate significance of the results, or whether they bear any significance at all, is an issue that must, and soon shall be, decided in that forum. Since plaintiff fails to show that any of the factors considered above weigh strongly enough in his favor to overcome the lack of irreparable harm, his motion for a temporary restraining order is denied.

IT IS SO ORDERED.

* * * *