IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

L & W CORPORATION, et al., Plaintiffs, vs. BCARD OF ELECTIONS OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, et al., Defendants.	CIVIL ACTION NO. 89-957 ORDER

Commencing several months ago, proponents of an anti-gambling initiative circulated petitions in an effort to place on the ballot for the next general election (November 4, 1989) the issue of whether most gambling in the Commonwealth should be declared illegal,

This undertaking was pursuant to Article XVIII of the Constitution of the Commonwealth which reads, in pertinent part:

> Section 1: Proposal of Amendments.
>
> Amendments to the Constitution may be proposed by constitutional convention, legislative initiative or popular initiative.

FOR PUBLICATION

. . .

Section 4: Popular Initiative.

a) The people may propose constitutional amendments by initiative. An initiative petition shall contain the full text of the proposed amendment. The petition shall be signed by at least fifty percent of the persons qualified to vote in the Commonwealth and at least twenty-five percent of the persons qualified to vote in each senatorial district. A petition shall be filed with the attorney general for certification that the requirements or this subsection have been met.

b) An initiative petition certified by the attorney general shall be submitted to each house of the legislature. If the proposal is approved by the affirmative vote of a majority of the members of each house of the legislature, the proposed amendment shall be submitted for ratification in the same manner as an amendment proposed by legislative initiative. The proposed amendment shall be submitted for ratification to the voters at the next regular general election with or without legislative approval.

Section 5: Ratification of Amendments.

a) A proposed amendment to this Constitution shall be submitted to the voters for ratification at the next regular general election or at a special election established by law.

b) An amendment proposed by legislative initiative shall become effective if approved by a majority of the votes cast. An amendment proposed by constitutional convention or by popular initiative shall become effective if approved by a majority of the votes cast and at least two-thirds of the votes cast in each of two senatorial districts.

Anticipating the initiative hand would be dealt, the Board of Elections, pursuant to 1 CMC § 6104,[1] promulgated regulations "to establish procedures by which the Attorney General shall certify popular initiative petitions that propose amendments to the Commonwealth Constitution."

These regulations, inter alia, specify the number of signatures required, who may sign a petition, and the timing sequence for certification by the Attorney General in order to have the initiative placed on the ballot.[2]

On August 23, 1989, the Attorney General certified that the requirements of Section 4 a), Article XVIII of the Constitution had been met.

The plaintiffs filed this lawsuit which challenges the certification by the Attorney General. The main thrust of the suit is that the petitions filed with the Attorney General do not support the finding that 50% of the persons qualified to vote in the Commonwealth and at least 25% of the voters in the Tinian Senatorial District signed the petition.

The government called the hand of the plaintiffs and filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Com.R.Civ.Pro. 12(b)(1).

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[1] § 6104 sets forth the duties of the Board of Elections. Sub-paragraph (f) states the Board can promulgate rules, regulations and instructions necessary to conduct and administer elections, including "questions pertaining to initiatives...."

[2] The regulations are attached to plaintiffs' motion for preliminary injunction as Exhibit BB.

THE MOTION

A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Calhoun v. United States, 475 F.Supp. 1, aff'd (CA9 Cal) 604 F.2d 647, cert. den. 444 U.S. 1078, 100 S.Ct. 1029.

The complaint alleges, inter alia, that in order to place the measure on the ballot there has to be at least 4,166 valid signatures but a review of the petitions reveals less than the required number. Additionally, it is alleged that the required number of qualified voters in Tinian failed to sign the petitions. Notwithstanding notice to the Attorney General of these alleged defects, the certification process was completed.

The Government, for the purposes of its motion, does not attack the factual allegations of the complaint per se. Its main basis for dismissal is that the court cannot intervene in the certification process for a popular initiative.

WHAT THIS CASE IS NOT ABOUT

A. THE INITIATIVE PROPOSE IS NOT A LEGISLATIVE ONE BUT A POPULAR INITIATIVE.

A legislative initiative is one that originates in the legislature and is enacted by that body for submission to the voters at an election.

A popular initiative comes about by actions of voters who wish to have an issue placed on the ballot without

legislative involvement by circulating and obtaining the constitutionally required number of signatures.

The Commonwealth Constitution recognizes and provides for both types of initiatives with the added provision that should a popular initiative receive the approval of the legislature, it can be ratified as if it was a legislative initiative. This means it need only acquire a majority vote of the electorate while the popular initiative must muster not only a majority vote but a two-thirds vote in two senatorial districts. Constitution, Article XVIII, Section 5(b).

Once a legislative initiative has been duly enacted, the courts will not intervene in the certification process. Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952); Farley v. Healey, 67 Cal.2d 325, 431 P.2d 630. The reason for this is that the legislature has spoken and it would be a violation of the doctrine of the separation of powers to interfere in the legislative process.

The legislative initiative process is a relatively simple one. Once the legislature enacts the measure to be submitted to the electorate, the certification step is akin to a rubber stamp. There are no signatures to count, no verification of voter registration, nor concern about forgeries, duplications, etc.

Popular initiatives have, by their very nature, certain requirements which place a great burden on the certifying officer. That burden is evident in this case where the

plaintiffs question over 2,000 signatures on the grounds there are duplications, forgeries, or the signatures otherwise fail to meet constitutional or legal requirements.

Thus it is helpful to look only to cases which are concerned with the certification of popular initiatives,

B. THE ISSUE PRESENTED IS NOT A POLITICAL QUESTION.

The term "political question" is generally usea Lo encompass all questions outside the sphere of political power. Velvel v. Johnson, 287 F.Supp. 846, 850 (D.C. Kan.)

The question of "justiciability" is resolved by a determination if the claim presented or relief sought are of a type which admit of judicial resolution and whether the structure of the government renders the issue a "political question" because of the separation of powers doctrine. Committee to Free the Fort Dix 318 v. Collins, 429 F.2d. 807, 811.

An analysis of the plaintiffs' claim and relief requested reveals, without question, that they are amendable to judicial resolution. The matter is essentially a fact finding process to determine if the constitutionally required number of signatures were obtained to place the issue on the ballot. If the finding is in favor of the proponents, the issue goes to the voters. If the finding is the proposal does not meet the legal standards set forth in the Constitution, legal remedies exist to withdraw the matter for consideration.

There is no separation of powers doctrine impediment. The issue is simply whether the certifying officer has acted "... without authority or in an arbitrary or capricious manner inconsistent with the spirit and intent of the statute or constitutional provisions." State v. Coe, 302 P.2d 202, 206.

C. THE ISSUE IS NOT AN ELECTION CONTEST.

This matter involves a straightforward question of whether the initiative should be voted on by the electorate. The statutory provisions for election contests (1 CMC §§ 6421-28) are simply not applicable.

D. THE ISSUE IS NOT IF THE CERTIFYING OFFICER USED HIS DISCRETION.

The constitutional provisions as well as the regulations promulgated by the Board of Elections make it clear that the certifying officer is performing a strictly ministerial task. His duty is to count and verify if the required number of valid signatures qualify the initiative to be placed on the ballot.

WHAT THIS CASE IS ABOUT

When this case is placed in the correct posture, many of the cases cited by the Government are not applicable. The stress placed on Adams v. Bolin, supra, is misplaced because in that case the certifying officer was merely carrying out the dictates of the legislature.

Here, the certifying officer cannot be said to be acting in a legislative capacity or performing a legislative

function since the initiative was formulated by petitions circulated by certain citizens. The legislature has not engaged in any part of the process.

Therefore any implication of the court interfering in the legislative process is a non sequitur. So to is the argument that the court is engaging in deciding a "political question."

Succinctly put, the issue to be resolved is whether the court has jurisdiction to determine if the certifying officer has correctly performed his ministerial task as specified in the Board of Elections regulations for a popular initiative.

"The Superior Court has original jurisdiction over all civil actions, in law or in equity, ... and has the power to issue writs ... necessary and appropriate to the full exercise of its jurisdiction." 1 CMC § 3202.

The Board of Elections is an agency of the Government. 1 CMC § 6101. It promulgates regulations for the processing of popular initiative petitions pursuant to 1 CMC § 6104(f). These regulations incorporate the constitutional certifying duties of the Attorney General.

The Administrative Procedure Act defines a "regulation" as a "rule" (1 CMC § 9101(k)) and a "rule" means an agency statement of general applicability that implements law.

The Board of Elections had the regulations published pursuant to 1 CMC § 9102 and no issue is raised by either party as to the validity of the regulations.

Due to the constitutional requirement that the Attorney General perform the task of determining the sufficiency of the petitions, the agency "action" is not by the Board of Elections. Yet, it is clear, indeed conceded by the Government, that the Attorney General is required to abide by the Board of Elections regulations.

For this reason, the normal administrative hearing procedures do not pertain to the situation now presented by the pleadings. However, the fact remains that there. are promulgated rules which the certifying officer is duty bound to adhere to and the plaintiffs claim he has not done so. Jurisdiction, under these circumstances, is vested in this court pursuant to 1 CMC § 9112:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in the Commonwealth Trial Court (read Superior Court) or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibition or mandatory injunction ... in that court."3/

3/ Since the plaintiffs do not claim they are aggrieved by "agency action", to wit the Board of Elections, but by the certifying officer, the 30 day time limit to file in this court (1 CMC § 9112(b)) is not applicable.

Even if it can be said that the Attorney General acted in some way for the agency (Board of Elections), 1 CMC § 9112(d) provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review...." There is no issue raised here that the certification by the Attorney General was not a final decision.

The Board of Elections regulations set forth definitive and express time limitations and requirements for the gathering of the signatures to qualify the initiative for the ballot. Taken as a whole, they impose strictly ministerial tasks on the certifying officer.[4/] The regulations use the mandatory language of "shall" throughout.

The certification process is reduced to a mechanical and clerical task without any political implications nor semblance of performing any step in the legislative process.

The plaintiffs' claim is simply that errors have been made in the process of counting the signatures because there are duplications, forgeries, or because some persons were not qualified to sign. The number of signatures, of course, is critical to the popular initiative process.

[4/] In Section 3-102, the Attorney General is given discretion in accepting petitions which are not accompanied by certain information identifying the person submitting the petition. As the court discerns the complaint of the plaintiffs, this is not raised as an issue.

Neither the Constitution nor laws of the Commonwealth prohibit the courts from testing the ministerial certification process. Indeed, the statutes and common sense support the conclusion that this court has jurisdiction to determine if the constitutionally mandated number of signatures have been acquired to formally denominate it as a popular initiative.

The motion to dismiss on the ground of lack of subject matter jurisdiction is DENIED.

Dated at Saipan, MP, this 17th day of October, 1989.

Robert A. Hefner, Presiding Judge