

DISSENTING OPINION OF ACOBA, J.

The Governor of the State of Hawai'i (Petitioner) requests this court's analysis and construction of Hawai'i Revised Statutes (HRS) § 17-2 (1993), and a writ requiring the Chief Election Officer (Respondent) to consider whether it is practicable to adhere to the literal provision of HRS § 17-2 that there be at least a sixty day interval between the issuance of an election proclamation and a special election to fill Congresswoman Mink's vacant Second Congressional District seat. It is Petitioner's position that "[HRS] § 17-2 confers discretion on the Chief Election Officer to determine the practicability of the sixty day interval . . . [and] to shorten the interval [so] that . . . the special election . . . [may] be held in conjunction with the State's 2002 general election on November 5, 2002." This would mean that less than sixty days would elapse from September 30, 2002, the date of the Chief Election Officer's proclamation which presently sets the special election for November 30, 2002. Respondent's affidavit, filed in conjunction with the petition, indicates his willingness to advance the date presently set for the special election to November 5, 2002 and that such advancement would be in the State's interest.

Petitioner maintains that this court has discretion to entertain the writ and acknowledges that he must demonstrate "(1) a clear and indisputable right to relief and (2) a lack of other means to adequately redress the alleged wrong or obtain the

requested action.” Quoting Salling v. Moon, 76 Hawai‘i 273, 274, 874 P.2d 1098, 1099 (1994) (emphasis added) (citations omitted). He concedes that, “[a]t first blush, it may appear incongruous to ask this [c]ourt to use its power to intervene . . . when the task the [Petitioner] asks the [c]ourt to direct the Chief Election Officer to perform is discretionary[,]” but maintains that he seeks only that this court “assure the Chief Election Officer that he has the discretion to determine whether it is practicable to shorten [HRS] § 17-2’s [sixty] day pre-special election interval.” In that regard it is reiterated that this court “analyze and construe the last sentence of [HRS] § 17-2 such that . . . the Chief Election Officer can exercise that discretion to consider the practicability of holding the special election in conjunction with the State’s November 5, 2002 general election[.]”

I.

In effect, the petition does not ask that the court direct Respondent to take any action. The request therefore is not one for which mandamus will lie. However, in requesting this court to ascertain whether the statute permits Respondent to exercise his discretion to set the election at a period less than sixty days from the election date, the inquiry is one for which a declaratory judgment will lie. Thus, whether Respondent chooses one course over the other is not within the purview of this court’s jurisdiction, but whether such a choice exists is.

While a writ of mandamus could not issue, we may treat the petition as one for decision on an agreed statement of facts. Hawai'i Rules of Appellate Procedure (HRAP) Rule 18(a) (2002) permits parties to submit their case directly to the Supreme Court of Hawai'i upon an agreed statement of facts.

As authorized by law, the parties to a dispute that might be the subject of a civil action or proceeding in a Hawai'i appellate court, circuit court, district court, family court, land court or tax appeal court may, without the action of a trial court or agency, agree to submit a case directly to a Hawai'i appellate court upon a statement containing the facts upon which the controversy depends, a statement of the question or issues, the contentions of the parties as to each issue, and, the form of judgment that each party requests the appellate court to render.

(Emphasis added). This court has considered cases based on agreed statements of fact. See e.g., Office of Hawaiian Affairs v. Cayetano, 94 Hawai'i 1, 6 P.3d 799 (2000) (deciding the issue of "whether a recent United States Supreme Court decision created a 'vacancy' that 'occurs through any cause other than expiration of the term of office' under HRS § 13D-5 as to certain Office of Hawaiian Affairs trustees who were elected in 1996 and/or 1998"); Convention Ctr. Auth. v. Anzai, 78 Hawai'i 157, 890 P.2d 1197 (1995) (resolving the question of whether bonds authorized by legislature to finance convention center would be excluded from constitutional debt limit).¹ In the interest of promoting

¹ Pursuant to HRAP Rule 18(a), first, for a case to be submitted to this court, the parties must agree "upon a statement containing the facts upon which the controversy depends." Here, both parties agree that "[t]he death of Congresswoman Mink has left Hawaii's Second Congressional seat vacant in the second session of the 107th Congress of the United States." The parties concur that "[o]n September 30, 2002, the State's Chief Election Officer has issued a proclamation for a special election to be held on November 30, 2002." Both parties agree that HRS § 17-2 applies in this case.

Second, there must be "a statement of the question or issues." HRAP Rule 18(a). The petition presents the issue of

justice, this court has previously recharacterized pleas for an extraordinary writ due to the nature of the claim involved or the

[w]hether the Haw. Rev. Stat. § 17-2 confers discretion on the Chief Election Officer of the State of Hawai'i to shorten its sixty day interval between the issuance of a proclamation for a special election to fill a vacancy in the United States House of Representatives[.]

Hence, there is "a statement of the question or issues." HRAP Rule 18(a). Third, the case must contain "the contentions of the parties as to each issue." Essentially, Petitioner contends that "[HRS] § 17-2 confers discretion upon the Chief Election Officer to advance the date of the special election." The Chief Election Officer argues that he is "not convinced that [he] ha[s] the discretion under [HRS] § 17-2 to advance the date of the special election to an earlier date."

Fourth, there must be a "form of judgment that each party requests the appellate court to render." HRAP Rule 18(a). Petitioner requests

[a] writ directing the Chief Election Officer to consider whether it would be practicable to shorten the interval between the issuance of the special election proclamation to fill the vacancy in the United States House of Representatives, and if practicable, to amend the proclamation so that the special election to fill Mrs. Mink's seat and complete her term may be held in conjunction with the State's November 5, 2002 general election[.]

The Chief Election Officer concurs on the form of judgment, stating that

[i]f this Court were to construe [HRS] § 17-2 as authorizing me to advance the date of the special election, I would amend the special election proclamation I issued on September 30, 2002, to reschedule the special election presently scheduled for November 30, 2002, to November 5, 2002, and amend the filing deadline for nomination papers from October 15, 2002 to October 10, 2002.

In addition, HRAP Rule 18(b) requires that the controversy is real and that the proceeding is a good faith effort to determine the parties' rights.

It must be shown by affidavit or declaration that the controversy is real and that the proceedings are a good faith effort to determine the rights of the parties.

HRAP Rule 18(b) (emphases added). Here, "the controversy is real," as the Petitioner's Declaration and the Chief Election Officer's Affidavit reveals. Petitioner argues that HRS § 17-2 "confers discretion upon the Chief Election Officer to advance the date of the special election." The Chief Election Officer is "not convinced" that he has the discretion to do so. Furthermore, "the proceeding[] [is] a good faith effort to determine the rights of the parties." HRAP Rule 18(b). Petitioner's Declaration was signed under penalty of law, and the Chief Election Officer's Affidavit was made under oath. As such, this "proceeding[] [is] a good faith effort to determine the rights of the parties." HRAP Rule 18(b).

nature of the relief granted. See, e.g., In re John Doe, 67 Haw. 466, 469, 691 P.2d 1163, 1165 (1984) (charactering a plea for a writ of mandamus as a writ of prohibition) (citing State ex rel Marsland v. Town, 66 Haw. 516, 523, 668 P.2d 25, 29-30 (1983)). Other courts, favoring substance over form, have similarly recharacterized pleas for extraordinary writ. See, e.g., State ex rel. Dispatch Printing Co. v. Louden, 741 N.E.2d 517, 522 (Ohio 2001) (converting a writ of prohibition into a writ of mandamus); Kinder v. State, 779 So.2d 512, 514 (Fla. App. 2000) (interpreting a plea for a writ of prohibition as a writ of mandamus); State ex rel. Ranger Fuel Corp. v. Lilly, 267 S.E.2d 435, 436 (W.Va. 1980) (interpreting motion as a writ of mandamus); State ex rel. Ohioans for Wildlife Conservation v. Taft, 1998 WL 635799 at *2 (Ohio App. 1998) (characterizing a writ of prohibition as a writ of mandamus); In re School Asbestos Litigation, 921 F.2d 1310, 1313 (3rd Cir. 1990) (changing a plea for a writ of mandamus into a writ of prohibition), cert. denied, 499 U.S. 976 (1991). Accordingly, on such grounds we may decide the petition.

Treating the petition as such, I would hold that the words "as practicable" in HRS § 17-2 means, in common usage, "feasible" in light of the surrounding circumstances. Thus, if, in the reasoned discretion of the Chief Election Officer, the requirements of HRS § 17-2 may be feasibly met within less than sixty days from the election proclamation date, a special election may take place at an advanced date.

II.

HRS § 17-2 provides as follows:

United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the vacancy. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matter as provided for in section 11-91 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title.

(Emphases added.)

While the term "shall" as it refers to the sixty-day clause is ordinarily read as mandatory, it may in the context of this statute be interpreted as directory rather than mandatory. "In determining whether a statute is mandatory or directory the intention of the legislature must be ascertained." Jack Endo Elec., Inc. v. Lear Siegler, Inc., 59 Haw. 612, 617, 585 P.2d 1268, 1269 (1978). Here, "shall" is employed in a directory sense rather than as a mandatory term, because the statute directs the election officer to conduct an election "not later than on the sixtieth day" after the proclamation, but then subsequently directs the election officer to do so "as far as practicable. . . ." HRS § 17-2. Thus, following an outline of the detailed procedures for conducting the election, the concluding sentence of the section provides that "the special election shall be conducted and the results ascertained so far as

practicable, in accordance with this title." The procedural requirements are qualified, then, by the general approbation that such requirements shall be followed, i.e., "in accordance with" the statute "as far as practicable." This concluding qualification demonstrates the stated intent of the legislature to utilize the term "shall" in a directory, instead of a mandatory fashion.

Moreover, to construe the sixty-day period as mandatory would make the "as practicable" clause meaningless, as such a construction would negate any variation encompassed by the practicability language. "[C]ourts are bound to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." State v. Kaakimaka, 84 Hawai'i 280, 289-90, 933 P.2d 617, 626-27, reconsideration denied, 84 Hawai'i 496, 936 P.2d 191 (1997). Because the practicability clause is stated without limitations, it applies to all the foregoing requirements for conducting an election and cannot be applied to only one of the requirements without arbitrary effect. "The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." State v. Arceo, 84 Hawai'i 1, 19, 928 P.2d 843, 861 (1996) (quoting State v. Malufau, 80 Hawai'i 126, 137, 906 P.2d 612, 623 (1995) (citation and internal quotation marks omitted)).

The election officer's discretion, however, would not be unreviewable but subject to the safeguards of review for abuse. An abuse of discretion occurs whenever the decision "exceeds the bounds of reason or disregards rules or principles of law or practice" and a substantial detriment occurs. In re Estate of Herbert, 90 Hawai'i 443, 454, 979 P.2d 39, 50 (1999) (quoting Abastillas v. Kekona, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998) (citations omitted)). In that regard, the question of whether the election officer abused his discretion would be measured by whether the conduct of the election was "so far as practicable in accordance with" HRS § 17-20, the law pertaining to elections.

III.

Accordingly, I would hold that there was discretion in the election officer to advance the special election.