

NO. 28178

IN THE SUPREME COURT OF THE STATE OF HAWAII

JOHN HOFF, Plaintiff

vs.

PETER NAKAMURA, County Clerk for  
the County of Kaua'i, Defendant

EMERSON  
JUDICIAL APPELLATE COURTS  
STATE OF HAWAII

2006 OCT 10 AM 10:52

FILED

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

(By: Moon, C.J., Levinson, Nakayama, Acoba and Duffy, JJ.)

We have considered Plaintiff John Hoff's Election Complaint, Defendant Peter Nakamura's motion to dismiss and the affidavit and exhibits appended to each. Having heard this matter without oral argument and in accordance with HRS § 11-173.5(b) (Supp. 2005) (requiring the supreme court to "give judgment fully stating all findings of fact and of law" and "decide what candidate was nominated or elected"), we set forth the following findings of fact and conclusions of law and enter the following judgment.

FINDINGS OF FACT

1. Plaintiff John Hoff was one of five candidates for the office of mayor of the County of Kaua'i in the September 23, 2006 Kaua'i county primary election.
2. The primary election results for the office of mayor of County of Kaua'i were: (1) Bryan J. Baptiste: 8,173 votes; (2) Jesse Fukushima: 4,725 votes; (3) John R. Hoff: 1,984 votes; (4) Bruce J. Pleas: 1,083 votes; and (4) Janee M. Taylor: 377 votes.

3. On September 26, 2006, defendant county clerk Peter Nakamura determined that candidate Bryan J. Baptiste received a majority of the votes cast for the office of mayor.

4. On September 26, 2006, defendant Nakamura declared that candidate Baptiste was elected mayor in the September 23, 2006 primary election in accordance with Section 1.03.B.1 of the Charter of the County of Kaua'i.

5. On September 29, 2006, plaintiff Hoff filed a complaint contesting the September 23, 2006 Kaua'i county primary election for mayor.

6. The complaint contests the election results for mayor based on plaintiff Hoff's allegations of the possibility of two different margins of error in the primary vote tabulation, the possibility of inconsistent procedures in processing absentee and walk-in ballots, the possibility of the erroneous addition of 794 votes to candidate Baptiste's vote count, the absence of certain official observers at the primary election, the failure of precinct officials to remind voters to vote both sides of the ballot, voter difficulties with electronic voting machines, the inability of voters to vote for "none" of the mayoral candidates and the failure of county attorney Lani Nakazawa to recuse herself from the mayoral election decision.

7. Plaintiff Hoff seeks judgment from the supreme court directing an audit of the primary election results for mayor and a declaration that Bryan J. Baptiste was not elected mayor in the September 23, 2006 county primary election.

8. Defendant Nakamura filed a motion to dismiss the complaint for failure to state claims upon which relief can be granted.

#### CONCLUSIONS OF LAW

1. When reviewing a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff; dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. AFL Hotel & Restaurant Workers Health & Welfare Trust Fund v. Bosque, 110 Hawai'i 318, 321, 132 P.3d 1229, 1232 (2006).

2. The court's consideration of matters outside the pleadings converts a motion to dismiss into one for summary judgment. Foytik v. Chandler, 88 Hawai'i 307, 313, 966 P.2d 619, 625 (1998). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Estate of Doe v. Paul Revere Ins. Group, 86 Hawai'i 262, 269-270, 948 P.2d 1103, 1110-1111 (1997).

3. A complaint challenging the results of a primary election pursuant to HRS § 11-172 fails to state a claim unless the plaintiff demonstrates errors, mistakes or irregularities that would change the outcome of the election. Akaka v. Yoshina, 84 Hawai'i 383, 387, 935 P.2d 98, 102 (1997); Elkins v. Ariyoshi,

56 Haw. 47, 48, 527 P.2d 236, 237 (1974); Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982).

4. A plaintiff challenging a primary election must show that he or she has actual information of mistakes or errors sufficient to change the result. Akaka v. Yoshina, 84 Hawai'i at 388, 935 P.2d at 103; Funakoshi v. King, 65 Haw. at 316-317, 651 P.2d at 915.

5. It is not sufficient for a plaintiff challenging a primary election to point to a poorly run and inadequately supervised election process that evinces room for abuse or possibilities of fraud. An election contest cannot be based upon mere belief or indefinite information. Akaka v. Yoshina, 84 Hawai'i at 387-388, 935 P.2d at 102-103.

6. The possible irregularities in the processing and tabulation of the September 23, 2006 Kaua'i county primary election votes do not amount to actual information of mistakes or errors sufficient to the change the election results for mayor.

7. The matters concerning primary election voting and the county attorney's participation in the primary election decision do not demonstrate that the results of the September 23, 2006 Kaua'i county primary election for mayor would have been changed.

8. In a primary election challenge, HRS § 11-173.5(b) (Supp. 2005) authorizes the supreme court to "decide what candidate was nominated or elected."

9. The remedy provided by HRS § 11-173.5(b) (Supp. 2005) of having the court decide which candidate was nominated or elected is the only remedy that can be given for primary election irregularities. Funakoshi v. King, 65 Haw. at 316, 651 P.2d at 914.

10. An audit of the September 23, 2006 primary election for mayor of the County of Kaua'i is not a remedy authorized by HRS § 11-173.5(b) (Supp. 2005).

11. There is no genuine issue of material fact related to plaintiff Hoff's primary election contest.

JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant Peter Nakamura, County Clerk for the County of Kaua'i. Bryan J. Baptiste was elected mayor of the County of Kaua'i in the September 23, 2006 county primary election.

The clerk of the supreme court shall forthwith serve a certified copy of this judgment on the county clerk for the County of Kaua'i in accordance with HRS § 11-173.5(b) (Supp. 2005).

DATED: Honolulu, Hawai'i, October 10, 2006.

John Hoff,  
plaintiff *pro se*  
on the complaint

Christiane L. Nakea-Tresler  
and Rosa Flores  
for defendant Peter Nakamura  
on the motion to dismiss



Steven H. Levinson

Peter A. Nakamura



Peter A. Nakamura