

NO. 28181

IN THE SUPREME COURT OF THE STATE OF HAWAII

EM. RIMANDO
CLERK APPELLATE COURTS
STATE OF HAWAII

2006 OCT 11 AM 9:43

FILED

REX SAUNDERS, Plaintiff

vs.

DWAYNE D. YOSHINA, Chief Election Officer
for the State of Hawai'i, Defendant

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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

We have considered Plaintiff Rex Saunders' Election Complaint, Defendant Dwayne D. Yoshina's motion to dismiss and the declaration 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"), we set forth the following findings of fact and conclusions of law and enter the following judgment.

FINDINGS OF FACT

1. Plaintiff Rex Saunders was one of three Democratic party candidates for the office of state representative, District 23, in the September 23, 2006 primary election.

2. The election results for the Democratic candidates for the office of state representative, District 23, were: (1) Tom Brower: 1,262 votes; (2) Rex Saunders: 540 votes; and (3) Louis Erteschik: 456 votes.

3. Plaintiff Saunders challenged the election results by filing a complaint in the office of the clerk of the supreme court on September 29, 2006 at 4:31 p.m.

4. The complaint alleges that: (i) Hawaii's primary election law (HRS § 12-31) is unconstitutional and violates plaintiff Saunders' federal constitutional rights of freedom of association and freedom of assembly, restricts plaintiff Saunders' "freedom of election choice" and allowed Republican party members to vote for candidate Brower and (ii) candidate Erteschik and House District 23 Republican candidate Mike Peters "grossly exceeded" campaign spending limits.

5. Plaintiff Saunders seeks judgment from the supreme court: (1) enjoining the enforcement of HRS § 12-31 and (2) ordering a special primary election and/or the inclusion of plaintiff Saunders' name as a Democratic or nonpartisan candidate for the office of state representative, District 23, on the November 7, 2006 general election ballot.

6. Defendant Yoshina moves to dismiss the complaint as not having been filed within the time provision HRS § 11-173.5(a) (Supp. 2005) and failing to state claims upon which relief can be granted.

CONCLUSIONS OF LAW

I.

1. HRS § 11-173.5(a) (Supp. 2005) provides that a complaint challenging a primary election "shall be filed in the office of the clerk of the supreme court not later than 4:30 p.m. on the sixth day after a primary or special primary election."

2. Where the language of a statute is plain and unambiguous that a specific time provision must be met, it is mandatory and not merely directory. Coon v. City and County of

Honolulu, 98 Hawai'i 233, 255, 47 P.3d 348, 370 (2002); State v. Himuro, 70 Haw. 103, 105, 761 P.2d 1148, 1149 (1988).

3. While the word "shall" is generally regarded as mandatory, in certain situations it may be given a directory meaning. Coon, 98 Hawai'i at 256, 47 P.3d at 371; Himuro, 70 Haw. at 105, 761 P.2d at 1149.

4. In determining whether a statute is mandatory or directory, the intent of the legislature must be ascertained. Himuro, 70 Haw. at 105, 761 P.2d at 1149; Jack Endo Electric, Inc. V. Lear Siegler, Inc., 59 Haw. 612, 617, 585 P.2d 1265, 1269 (1978).

5. Legislative intent may be determined from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. Himuro, 70 Haw. at 105, 761 P.2d at 1149.

6. The legislature's object in enacting HRS § 11-173.5(a) was to enable the State of Hawai'i Office of Elections to expeditiously administer elections. Sen. Conf. Comm. Rep. No. 17-74, 1974 Senate Journal at 770.

7. A mandatory reading of "the sixth day" provision of HRS § 11-173.5(a) (Supp. 2005) and a directory reading of the "no later than 4:30 p.m." provision of HRS § 11-173.5(a) (Supp. 2005) is consistent with the entire act, its nature, its object, and the consequences that would result from construing it one way or the other.

8. The election complaint filed on September 29, 2006 at 4:31 p.m. was filed within the time provision of HRS § 11-173.5(a) (Supp. 2005).

II.

9. 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).

10. 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).

11. 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).

12. HRS § 12-31 has not been ruled unconstitutional by any court and conducting the September 23, 2006 primary election in accordance with HRS § 12-31 was not a mistake, error or irregularity in the primary election that would change the outcome of the Democratic party election for House District 23.

13. The failure of candidates Esterschik and Peters to abide by campaign spending limits does not demonstrate that the results of the Democratic party election for House District 23 would have been changed.

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

15. 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.

16. An injunction against the enforcement of HRS § 12-31 and allowing a special primary election and/or including plaintiff Saunders' name as a Democratic or nonpartisan candidate for the office of state representative, District 23, on the November 7, 2006 general election ballot are not authorized by HRS § 11-173.5(b) (Supp. 2005).

17. There is no genuine issue of material fact related to plaintiff Saunders' primary election contest.

JUDGMENT

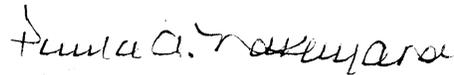
Based upon the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant Dwayne Yoshina.

The clerk of the supreme court shall forthwith serve a certified copy of this judgment on the chief election officer in accordance with HRS § 11-173.5(b) (Supp. 2005).

DATED: Honolulu, Hawai'i, October 11, 2006.

Rex Saunders,
plaintiff *pro se*
on the complaint

Russell A. Suzuki,
Robyn B. Chun and
Steven K. Chang for
defendant Dwayne Yoshina
on the motion to dismiss



Kamae E. Duddy, Jr.