

NO. 28182

IN THE SUPREME COURT OF THE STATE OF HAWAII

DANIEL CUNNINGHAM, Candidate for Governor
for the State of Hawai'i and THIRTY REGISTERED
VOTERS of the State of Hawai'i, Plaintiffs

vs.

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

EMERSON
E. M. RIMANDO
CLERK
APPELLATE COURTS
HAWAII

2006 OCT 11 AM 9:44

FILED

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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

We have considered the Election Complaint of Plaintiffs Daniel Cunningham and thirty voters (collectively "Plaintiffs"), Defendant Dwayne D. Yoshina's motion to dismiss and the declaration and exhibits appended thereto. 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 Daniel Cunningham was one of three nonpartisan candidates for the office of governor in the September 23, 2006 primary election.
2. Plaintiff Cunningham and the other two nonpartisan gubernatorial candidates, Bradley Hara and Paul J. Mattes, did not receive the minimum votes required by HRS § 12-41(b) in the September 23, 2006 primary election to advance to the November 7, 2006 general election.

3. Plaintiff Cunningham challenged the gubernatorial election results by filing a complaint in the office of the clerk of the supreme court on September 29, 2006 at 4:36 p.m.

4. The complaint named as plaintiffs Daniel Cunningham and "Thirty Registered Voters for the State of Hawaii."

5. The thirty plaintiff voters were identified by names, addresses and signatures in a pleading filed in the supreme court on October 2, 2006.

6. Plaintiffs contend that the State of Hawai'i Office of Elections "misinformed" and "mislead" nonpartisan candidates and voters into believing that nonpartisan candidates would advance to the general election pursuant to the majority vote law for party candidates (HRS § 12-41(a)), rather than the minimum vote law for nonpartisan candidates (HRS § 12-41(b)) because the primary election ballot for the nonpartisan candidates was designated "NONPARTISAN PARTY BALLOT (N)", like the "party ballot" designation on the primary election ballots for the party candidates.

7. Plaintiffs contend that voters did not vote for the nonpartisan gubernatorial candidates because of the designation of the nonpartisan ballot as a "NONPARTISAN PARTY BALLOT."

8. Plaintiffs seek judgment from the supreme court: (1) placing Daniel Cunningham, Bradley Hara and Paul Mattes on the ballot of the November 7, 2006 general election and (2) directing the Office of Elections to provide the public with accurate voter information.

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 4:36 p.m. was filed within the time provision of HRS § 11-173.5(a) (Supp. 2005).

II.

9. An amendment adding plaintiffs to a complaint relates back to the date of the complaint when the additional plaintiffs' claim arose from the conduct, transaction or occurrence that gave rise to the original plaintiff's claim and the complaint gave the defendant notice of a reasonable likelihood that the added plaintiffs might later assert a claim. HRCP 15(c); Kest v. Hana Ranch, Inc., 7 Haw. App. 565, 571, 785 P.2d 1325, 1330 (1990).

10. The October 2, 2006 pleading is an amendment adding thirty plaintiff voters to the September 29, 2006 complaint that related back to the date of the complaint.

11. The September 29, 2006 complaint was filed within the time provision of HRS § 11-173.5(a) as to the thirty plaintiff voters.

III.

12. 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).

13. 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).

14. 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).

15. 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.

16. Plaintiffs have not provided actual information that voters did not vote for the nonpartisan gubernatorial candidates because the nonpartisan ballot was designated "NONPARTISAN PARTY BALLOT."

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

18. 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.

19. Placing Daniel Cunningham, Bradley Hara and Paul Mattes on the ballot of the general election and directing the Office of Elections to provide the public with accurate voter information are not authorized by HRS § 11-173.5(b) (Supp. 2005).

20. There is no genuine issue of material fact related to Plaintiffs' primary election contest.

JUDGMENT

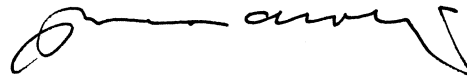
Based upon the foregoing findings of fact and conclusions of law, judgment is entered in favor of defendant Dwayne Yoshina.

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.

Daniel Cunningham and
Thirty Voters of the
State of Hawai'i, plaintiffs
pro se on the complaint

Charleen M. Aina and
Steven K. Chang
for defendant Dwayne Yoshina



Dwayne E. Yoshina Jr.