

OCT - 9 2006

C O U N T Y O F K A U A I

O F F I C E O F T H E C O U N T Y A T T O R N E Y

M E M O R A N D U M

DATE: July 16, 1998

TO: C. Bunji Shimomura, County Clerk

FROM: Galen T. Nakamura, Deputy County Attorney

SUBJECT: Request for Opinion concerning blank votes and over votes in County non-partisan elections

I. Summary of Request

This is in response to your June 19, 1998 memorandum requesting this Office's opinion regarding the following matter:

"The State Office of Elections has requested that an opinion be rendered to determine whether blank and overvotes will be included when calculating a majority [under Charter Sec. 1.03]."

II. Summary of Response

For the following reasons, under subparagraph 1., paragraph B. of Sec. 1.03 of the Kauai County Charter, as amended (hereafter "Charter"), the term "majority of votes cast for that office" does not include blank votes and over votes.

III. Summary of Facts

This issue arises in conjunction with Charter Sec. 1.03, the newly adopted Charter provision calling for non-partisan elections for all County elective offices. The specific question arises under subparagraph 1., paragraph B. of Sec. 1.03, which states that:

"B. First nonpartisan election. To the extent possible, the first nonpartisan election shall be held in conjunction with the primary election of the applicable year.

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1. Offices of the Mayor, Prosecuting Attorney and Council members to be elected by districts, if any. In the case of the offices of mayor, prosecuting attorney, or any council members to be elected by districts, any candidates receiving a majority of the votes cast for that office shall be elected. However, if there is only one candidate for each of said offices, such candidates shall be elected." (emphasis added).

Since Kauai's electorate did not adopt districting for County councilmembers in the 1996 general elections, our review is confined to the question of whether blank ballots and over votes are included when calculating a majority of the votes cast for the offices of Mayor and Prosecuting Attorney in the first nonpartisan election.

#### IV. Analysis

##### A. Blank votes

In Republican Party of Hawaii vs. Waihee, 68 Haw. 258, 709 P.2d 980 (1985) (per curiam), the Hawaii Supreme Court decided the issue of whether, under Sec. 12-103 of the 1973 Charter of the City and County of Honolulu (hereafter "City Charter"), blank ballots must be counted in determining whether or not a majority of registered voters voted affirmatively on the question of the recall of a city councilmember.

The City Charter provision in question stated that:

"If a majority of the registered electors who vote on the question at a recall election shall vote "Yes", the elected official shall be deemed recalled and removed from office, otherwise he shall remain in office."

In analyzing this issue, the Court acknowledged the general view that:

"[A] qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes."

68 Haw. at 259-260, 709 P.2d at 981 (citations omitted). The Court then focused on the City Charter provision in issue, stating that:

"Under Section 12-03, an official is recalled when a majority of the votes of registered voters 'on the question' are 'yes'. ....

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In our view, the language of Section 12-103 is clear and unambiguous. The ballot gives the voter a choice of voting either 'yes' or 'no' on the question of whether a particular councilmember is to be recalled. A blank vote, being neither a 'yes' nor a 'no' vote on the question of recall, cannot be considered in determining whether or not there was a majority of 'yes' votes on that question."

68 Haw. at 260, 709 P.2d at 981 (emphasis in original).

We believe that the Waihee Court's holding controls the question of whether blank ballots should be counted when calculating a majority of the votes cast for the County offices in question. A ballot for mayor or prosecuting attorney usually contains two or more candidates for each office. Fundamentally, a blank vote is not a vote for any particular candidate for that office. As such, it cannot be considered in calculating a majority of the votes cast for the office of either mayor or prosecuting attorney. Further, just as a blank vote was considered neither a "yes" nor a "no" vote by the Waihee court on the question presented, neither can a blank vote be considered a vote either for or against any candidate running for a particular office.

Also, we believe it unlikely that the term "votes cast for that office"<sup>1</sup> would be deemed by the courts to be significantly distinguishable from the term "vote[s] on the question"<sup>2</sup>, so as to change our stated conclusion.

We further believe that Haw. Rev. Stat., as amended (hereafter "H.R.S.") §11-151(3) is also controlling on this issue.<sup>3</sup> This provision states that:

"Each contest or question on a ballot shall be counted independently as follows:

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<sup>1</sup> See Charter Sec. 1.03.

<sup>2</sup> See City Charter Sec. 12-103.

<sup>3</sup> H.R.S. §11-151 applies to our County Charter by virtue of H.R.S. §11-3, which states that, "This chapter shall apply to all elections, primary, special, special primary, general, special general, special, or county, held in the State, under all voting systems used within the State, so far as applicable and not inconsistent herewith." (emphasis added). Since the provisions of H.R.S. §11-151 are not inconsistent with the provisions of our Charter, H.R.S. §11-151 applies to the question presented.

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(3) If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of a constitutional amendment." (emphasis added)

The contests for County mayor and prosecuting attorney require a majority of votes cast for each office in order for any candidate to be elected outright in the first nonpartisan election. As such, H.R.S. §11-151 requires that no blank ballots be tallied as votes cast in either contest.<sup>4</sup>

**B. Over votes**

An over vote has been defined by Hawaii courts as ballots which evidence both yes and no votes on a question. See Republican Party of Hawaii vs. Waihee, Hawai'i State AFL-CIO vs. Yoshina. With respect to contests for elective office, the definition of an over vote can be gleaned from H.R.S. §11-151(2), which essentially characterizes an over vote as votes cast in a contest which exceed the number to be elected for that contested office.

We believe that Waihee also controls the question of whether over votes should be counted when calculating a majority of the votes cast for the County offices in question.

Again, as stated by the Waihee court, the general view is that:

"[A] qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes."

68 Haw. at 259-260, 709 P.2d at 981 (citations omitted).

Further,

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<sup>4</sup> We are mindful of the recent Hawaii Supreme Court decision Hawai'i State AFL-CIO vs. Yoshina, 84 Hawai'i 374, 935 P.2d 89 (1997). However, we believe that Yoshina is not applicable here. Fundamentally, the Court in Yoshina was asked to rule on the term "ballots cast" as opposed to "votes cast". Further, for the very reason that the Court said H.R.S. §11-151 was inapplicable in Yoshina, we believe that H.R.S. §11-151 is applicable here. 84 Haw. at 380.

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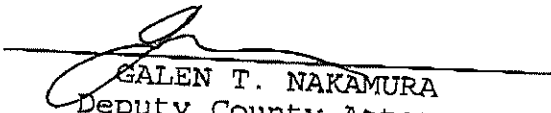
"In our view, the language of [City Charter] Section 12-103 is clear and unambiguous. The ballot gives the voter a choice of voting either 'yes' or 'no' on the question of whether a particular councilmember is to be recalled. A blank vote, being neither a 'yes' nor a 'no' vote on the question of recall, cannot be considered in determining whether or not there was a majority of 'yes' votes on that question."

68 Haw. at 260, 709 P.2d at 981 (emphasis in original).

Just as the Court found the language "vote on the question" in City Charter Section 12-103 to be clear and unambiguous, so do we believe the term "votes cast for that office" in Charter Sec. 1.03 to be explicit and understandable (emphasis added). Similarly, just as the Waihee Court found that the ballot gave the voter a choice of voting either "yes" or "no" on the question presented, so do ballots for the office of mayor and prosecuting attorney give the voter a choice of voting for not more than one candidate for each office. Finally, just as a blank vote was considered neither a "yes" nor a "no" vote by the Waihee court on the question presented, neither can an over vote in a contest for mayor or prosecuting attorney be considered a vote for any one, particular candidate for that office.

For the preceding reasons, when a voter in the first nonpartisan election casts votes for more than one candidate in a contest for either mayor or prosecuting attorney, none of the voter's votes should be counted in calculating a majority of the votes cast for the contest in which the over votes appear.

Should you have any questions, please do not hesitate to contact me.

  
GALEN T. NAKAMURA  
Deputy County Attorney

cc: Hartwell H.K. Blake, County Attorney