

IN THE SUPERIOR COURT
OF GUAM

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RESPONSIBLE CHOICES FOR ALL
ADULTS COALITION, and
FRANKLIN P. LEON GUERRERO,

Petitioners,

vs.

GUAM ELECTION COMMISSION,

Respondent.

SPECIAL PROCEEDINGS NO. SP154-06

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

FINDINGS OF FACT

After hearing all the evidence and testimony presented in this case, it is the finding of this Court, by a preponderance of the evidence, that:

1. November 14, 2005 is the date on which the proponents, Coalition 21, submitted the draft of the initiative measure, Proposal A, to the GEC, as required by Guam Administrative Rules and Regulations §2102.

2. November 30, 2005 is the date on which the GEC delivered the summary and short title of the initiative to the proponents, and is the "official summary date," as provided in Title 3, §17210 of the Guam Code Annotated and Guam Administrative Rules and Regulations §2103(c).

3. On December 20, 2005, the GEC accepted a new submission of the initiative measure which was unaccompanied by a fee of two hundred dollars (\$200.00) as required by Title 3, §17104 of the Guam Code Annotated and Guam Administrative Rules and Regulations §2102(f).

4. The Director of the GEC, Gerald Taitano, failed to deliver the summary and short title of the initiative to the proponents and establish a new "official summary date" within thirty (30) days of the submission of the December 20, 2005, draft proposal, as required under Guam Administrative Rules and Regulations §2103(c).

5. On January 10, 2006, the GEC accepted another new submission of the initiative measure which was unaccompanied by a fee of two hundred dollars (\$200.00) as required by Title 3, §17104 of the Guam Code Annotated and Guam Administrative Rules and Regulations §2102(f).

6. January 27, 2006 is the date on which the GEC delivered the summary and short title of the

3 initiative to the proponents as required in Title 3, §17210 of the Guam Code Annotated and Guam
4 Administrative Rules and Regulations §2103(c). This date does not constitute a new “official
5 summary date,” as the submission of the proposed initiative was unaccompanied by the requisite two
6 hundred dollar (\$200.00) fee.

7 7. The GEC never prepared a ballot title as required by Title 3, §17105 of the Guam Code
8 Annotated and Guam Administrative Rules and Regulations §2109(a). The Court finds that the GEC
9 merely copied the summary prepared by legal counsel and began using the summary as the ballot title
10 after the end of the month of March, 2006.

11 8. The GEC failed to prepare an impartial ballot title of the proposed measure as required by
12 Title 3, §17105 of the Guam Code Annotated and Guam Administrative Rules and Regulations
13 §2109(a). The Court finds that the ballot title included in the ballot pamphlet by the GEC is not
14 impartial because it includes the name of the proponent of the proposal, Coalition 21, and the
15 proponent’s slogan, “Save Lives, Save Families.”

16 9. The GEC failed to provide a true ballot title for the proposed initiative as required by Title
17 3, §17105 of the Guam Code Annotated and Guam Administrative Rules and Regulations §2109(a).
18 By including the short title, which contains the word “consumption,” as part of the ballot title
19 assumed by the GEC in its ballot pamphlet, the ballot title does not independently and accurately
20 represent the purpose of the measure, which is to lower the age of possession and purchase of alcohol,
rather than to lower the drinking age.

21 10. March 14, 2006, is the date of acceptance of the initiative petition for filing by the GEC,
22 and is the date of certification according to Guam Administrative Rules and Regulations §2108(5)(b).

23 11. The GEC failed to prepare a ballot title for the proposed initiative within ten (10) days of
24 the certification of the initiative as required by Title 3, §17105 of the Guam Code Annotated and
25 Guam Administrative Rules and Regulations §2109(a). Based upon the finding that the date of
26 certification is March 14, 2006, and the Court’s finding that a ballot title did not exist until after the
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3 end of the month of March, 2006, the Court finds that the ballot title was not prepared within ten days
4 of certification.

5 12. The GEC failed to publish the ballot title once a week for three (3) consecutive weeks after
6 the ballot title was available, as required by Title 3, §17105 of the Guam Code Annotated and Guam
7 Administrative Rules and Regulations §2109(c). The Court finds that the ballot title was published
8 only once, rather than three times.

9 13. The GEC failed to mail one (1) copy of each ballot pamphlet to each registered voter
10 eligible to vote in the general election at least thirty (30) days prior to the general election date as
11 required by Guam Administrative Rules and Regulations §2114(a).

12 14. The GEC failed to mail one (1) copy of each ballot pamphlet to each judge of the Superior
13 Court at least thirty (30) days prior to the general election date as required by Guam Administrative
14 Rules and Regulations §2114(c).

15 15. Gerald Taitano, the director of the GEC, assumed the duties of legal counsel by preparing
16 an analysis of the proposed initiative measure, rather than submitting that task to legal counsel, as
17 required under Guam Administrative Rules and Regulations §2111.

18 16. The GEC failed to have legal counsel prepare an analysis of the proposed initiative
19 measure by September 23, 2006, which is at least forty-five (45) days before the general election to
20 be held on November 7, 2006, as required under Guam Administrative Rules and Regulations §2111.

21 17. The GEC improperly inserted the short title of the initiative into the form language on the
22 ballot in violation of Guam Administrative Rules and Regulations §2116(b)(1).

23 **CONCLUSIONS OF LAW**

24 This Court has original jurisdiction over this matter pursuant to Title 7 G.C.A. §§3105, 31201
25 and 31202. Petitioners have filed a verified petition in compliance with Title 7 G.C.A. §31203.

26 This is not the first case to be brought against the Guam Election Commission requesting
27 mandamus relief based upon the failure of the Guam Election Commission to follow election statutes

3 and regulations. In Wade v. Taitano, the Supreme Court of Guam upheld the actions of the Guam
4 Election Commission in failing to follow §2108(c) of the Guam Rules and Regulations, by
5 invalidating that particular rule. Wade v. Taitano, 2002 Guam 16, ¶17. The Court declined to address
6 whether the GEC had substantially complied with the election rules and regulations, thus leaving the
7 standard by which to judge the GEC undetermined. Id. However, the Court noted, “An agency does
8 not have the authority to ignore its own rules.” Id. at ¶7 (citing Aetna Cas. & Sur. Co. v. Blanton, 911
9 P.2d 363, 365 (Or.Ct.App.1996).

10 In Hartsock v. Leon Guerrero, Judge Abbate found that the failure of the GEC to mail ballot
11 pamphlets to the voters as required by the Guam statutes constituted a violation which required the
12 removal of the proposed initiative from the ballot, holding that to do otherwise would contravene the
13 court’s responsibility to uphold elections laws, and would deprive voters the opportunity to educate
14 themselves before voting. Hartsock v. Leon Guerrero, Special Proceedings Case No. 246-86, Superior
15 Court of Guam, Decision and Order, October 31, 1986 p. 4, ¶¶11–15.

16 In addressing whether the GEC had substantially complied with the requirements of the
17 election code, the Court observed that “the election statutes and Election Commission Rules 211 and
18 213 are couched in *mandatory* terms. The statutes and rules give the Election Commission no options
19 as to how to educate the public about Proposal A. Rather, they give specific instructions as to how
20 the Election Commission must proceed.” Id. at pp. 3–4, ¶¶26–28, ¶¶1–2 (emphasis added).

21 This Court holds that the Guam Election Commission does not have the authority to ignore
22 the mandatory language of the election statutes or its own rules and regulations. The Guam Election
23 Code and the Guam Administrative Rules and Regulations require strict compliance with the
24 provisions they contain. To allow the Guam Election Commission to comply with some of the rules
25 or statutes, or to comply with only half of each provision would be to ignore the safeguards of these
26 laws providing for voter education and discouraging the appearance of undue influence in the
27 initiative process. Additionally, to allow substantial compliance with the election codes would grant

3 potential proponents and/or the GEC the ability to extend deadlines, and ignore the procedural
4 protections built into the statutory and regulatory scheme, in contravention of the purpose of the
5 statutes and rules.

6 The Guam Election Commission has not strictly complied with the election code or the
7 election rules and regulations. Even if the Court were to apply the lesser standard of substantial
8 compliance, the Court finds that the Guam Election Commission has violated so many of the
9 provisions of the election code and rules that it does not even meet the threshold elements of
10 substantial compliance. Any one of the violations of the Guam election code and regulations, standing
11 alone, would invalidate the placement of the proposed initiative on the ballot. *See Id.*, p. 4, ¶¶4-10
12 (single violation of failure to provide ballot pamphlets required removal of proposed initiative
13 measure from ballot.). More important than the number of violations, however, is the degree to which
14 the GEC “has violated not only the statutory scheme, but its own rules as well.” *Id.*, p. 4, ¶¶9-10.

15 In violating the code sections and rules regulating the proper manner in which to begin the
16 process of placing an initiative on the ballot, the GEC has essentially given the proponents of
17 Proposal A an enlarged time frame in which to collect signatures on petitions. In violating the
18 requirements of both the statutes and the rules mandating a true and impartial title and assessment of
19 the proposed initiative, the GEC has created an argument which is “likely to create prejudice either
20 for or against the measure.” Title 3 G.C.A. §17105. It violates the neutral function of the GEC to
21 become an advocate of the proposal, as they have seemingly done here. By failing to abide by the
22 notice requirements and failing to timely provide a proper ballot pamphlet the GEC has substantially
23 interfered with the rights of the public to be fully informed and exercise their right to vote. The
24 numerous and substantial failures of the Guam Election Commission require this Court to order that
25 Proposal A be removed from the ballot, or that any votes cast for Proposal A be discounted.

26 The GEC requested that the Court invalidate certain sections of Chapter 2 of the Guam
27 Administrative Rules and Regulations and the Court has analyzed whether such sections are
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3 invalidated by the re-enactment of Title 3 of the Guam Code Annotated. The GEC contends that the
4 following provisions of 6 GAR are invalid: 1) § 2107(a); 2) §2107(b); 3)§2108(c); 4)§2109(a);
5 5)§2112(a); 6) §2112(b); 7) §2114; and 8) §2115(d) and (e).

6 The Court recognizes that the legislature has clearly conferred upon GEC the power to
7 promulgate rules and regulations to effectuate its enabling statutes, including Title 3, Chapter 17,
8 Article 2, which provides the statutory framework for the Initiative process on Guam. See Title 3
9 GCA §§ 2103-2104 (1996). Thus, a party challenging a presumptively valid regulation carries a
10 heavy burden. *Wade v. Taitano*, 2002 WL 31006141 at ¶ 12.

11 Given the procedural history of Title 3 of the Guam Code Annotated, the Court first addresses
12 whether the repeal and consequent re-enactment of Title 3 invalidates all such regulations adopted
13 based on the previous statutory scheme. Because an act of an administrative agency which is
14 authorized by the legislature has, “the force and effect of law,” implied repeal of regulations by
15 subsequent statute is disfavored, “especially where the subsequently enacted statute supports the
16 continued validity of the regulation.” *Costain v. State Regulation & Licensing Dep’t*, 128 N.M. 68,
17 70, 989 P. 2d 443 (1999). The Court further finds persuasive evidence of continued validity of
18 Chapter 2 of 6 GAR in its continued, “existence for substantial period of time and [that] legislature
19 has not sought to override regulation.” *Dugas v. Lubermens Mut. Casualty Co.*, 217 Conn. 631, 642,
20 587 A.2d 415 (Conn. 1991).

21 In determining the validity of an administrative regulation, the Court looks to whether it is
22 consistent with the agency’s enabling statutes. The Court applies a two-step analysis in ascertaining
23 whether an agency’s regulation should be upheld. *Wade*, 2002 WL 31006141 at ¶ 8. First, the Court
24 looks to the intent of the Legislature, as reflected by the “plain meaning,” the language and design of
25 the statute, and whether such intent is contravened by the regulation. Second, if the statute is
26 ambiguous or silent as to a specific issue, the Court will then determine whether the regulation is a
27 permissible construction of the statute. *Id.* Regulations of an agency will not be invalidated unless

3 its provisions, "cannot by any reasonable construction be interpreted in harmony with the legislative
4 mandate." *Wade*, 2002 WL 31006141 at ¶ 12 (citing to *Mass. Fed'n of Teachers*, 767 N.E.2d at 557).
5 Thus, if an agency regulation conflicts with a statute, it is without legal effect. *United States v.*
6 *Larionoff*, 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977).

7 The Court finds that 6 GAR § 2107(a) is in conflict with 3 GCA § 17210. The regulation
8 provides that signed petitions for an initiative measure may not be presented to the Director of GEC
9 later than ninety (90) days after the official summary date. However, 3 GCA § 17210 provides that
10 signed petitions may not be presented to GEC after one hundred twenty (120) days from the official
11 summary date. The deadline set forth under 6 GAR § 2107(a) conflicts with the deadline provided
12 under the statute.

13 The Court also finds that 6 GAR § 2107(b) conflicts with 3 GCA § 17201. Pursuant to 6
14 GAR § 2107(b), the number of valid signatures required for an initiative to be placed on a ballot is
15 twenty percent (20%) of all votes counted for all candidates for Governor at the last preceding
16 general election. *See* 6 GAR § 2107(b). However, 3 GCA § 17201 sets forth a signature requirement
17 of ten percent (10%) of all registered voters at the time the proposed initiative measure is submitted
18 to GEC. The percentage of signatures required under the GAR calls for a percentage of signatures
19 of voters who voted for candidates for Governor at the last preceding election and not of those who
20 are registered at the time the initiative is submitted to GEC. The Court recognizes that although a
21 person may be registered to vote at the time an initiative is submitted, it does not necessarily follow
22 that such person voted for a candidate for Governor at the last preceding general election. Thus,
23 6 GAR § 2107(b) cannot be harmoniously interpreted with the legislative mandate reflected in the
24 statute.

24 Under 6 GAR § 2108(c), within twenty days of presentation of petitions, GEC is required to
25 send a letter to the proponent giving notice of GEC's acceptance or refusal of the initiative petition.
26 Failure to send such notice to the proponent within the twenty day time frame is treated as an
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3 automatic acceptance of such petition. In *Wade v. Taitano*, the Supreme Court of Guam invalidated
4 the provision that calls for an automatic acceptance of an initiative based on GEC's failure to send
5 notice as required under 6 GAR § 2108(c). The Court, however, finds that the remaining provisions
6 of 6 GAR § 2108(c) that require that the proponents be given notice of acceptance or refusal of the
7 initiative are still effective. Title 3 of the Guam Election Code is silent as to a requirement of GEC
8 to inform a proponent of the acceptance or refusal of an initiative. Applying the two-step analysis
9 utilized in *Wade v. Taitano*, the Court finds that the regulation is a permissible construction of the
10 statute. Hence, aside from the automatic acceptance provision of 6 GAR § 2108(c), the regulation
11 is not invalidated by the statute.

12 The Court finds that 6 GAR §2109(a) is not in conflict with 3 GCA §17105. Both the statute
13 and the regulation provide that the ballot title must be prepared within ten days of certification of the
14 initiative. Both require that the ballot title must (1) not exceed one hundred words, (2) be a true and
15 impartial statement of the purpose of the measure, and (3) not be an argument or likely to create
16 prejudice either for or against the measure. Moreover, the regulation's requirement that the ballot
17 title of an initiative be prepared by legal counsel for the GEC does not contravene the legislative
18 intent reflected in the statute.

19 The Court finds that 6 GAR §2112(a) is not in conflict of the legislative intent expressed in
20 3 GCA §17508. Under the regulation, the ballot pamphlets must be printed not less than thirty (30)
21 days prior to the election in which the initiative measure is to be submitted to the voters. The
22 number of pamphlets to be printed must be one and one-tenth times the number of registered voters.
23 3 GCA § 17508 puts forth the same requirements for the printing of the ballot pamphlets.

24 According to 6 GAR §2112(b), the contents of the ballot pamphlet and the order in which
25 they must appear are as follows: 1) the ballot title; 2) the impartial analysis; 3) the selected argument
26 for the initiative; 4) the selected argument against the initiative; 5) the complete text of the initiative;
27 and 6) if in legal counsel's opinion any existing statute would be affected by the initiative, the text

3 of the statute that will be affected. 3 GCA § 17510 provides that the format of the ballot pamphlet
4 shall be prescribed by GEC, but is subject to §§17507 and 17509. These sections provide that the
5 ballot pamphlet must have an impartial analysis and that any defects in the pamphlets shall not cause
6 a delay in the election or be grounds to invalidate an election. 3 GCA §17507, §17509. The
7 requirements under the regulation do not conflict with the statutory provisions. Rather, 6 GAR
8 §2112(b) provides specificity to the statutory requirement, and thus, can be interpreted harmoniously
9 with the statutory mandate.

10 The Court finds that 6 GAR §2114 is not in conflict of the legislative intent expressed in
11 3 GCA §17511. Under the regulation, the ballot pamphlet must be mailed not less than thirty (30)
12 days prior to the election, or earlier if they are available before that date. 3 GCA § 17511 provides
13 that copies of the ballot pamphlet must be mailed as soon as they are available. Both the statute and
14 the regulation provide that the ballot pamphlets must be mailed when they become available. The
15 statute clearly expresses the legislative intent to allow the voters an opportunity to become informed
16 of initiatives that will be placed on the ballot. The regulation's additional safeguard of requiring that
17 such pamphlets be mailed no later than thirty days prior to the election does not contravene with the
18 legislative intent.

19 6 GAR § 2115(d) and (e) allows for the legislature to call a special election expressly for the
20 purpose of voting on an initiative measure; and that at this special election all pending measures that
21 have been certified of the date of such election be submitted to the voters. 3 GCA § 17217 allows
22 GEC to hold such special election pursuant to a call by the Governor or Legislature. Considering
23 the plain meaning and design of the statute, the Court finds 6 GAR §2115(d) and (e) do not
24 contravene the reflected legislative intent to allow for special elections for initiative measures.

25 The Court finds that only §2107(a) and §2107 (b) of Title 6 of the Guam Administrative
26 Rules and Regulations conflict with their corresponding sections in Title 3 of the Guam Code
27 Annotated. The Court notes that the determination of their validity is not dispositive in its

3 findings that GEC has failed to meet the requirements set forth under Title 3 of the Guam Code
4 Annotated and Title 6 of the Guam Administrative Rules and Regulations. The Court notes that
5 in *Wade v. Taitano*, GEC argued that a certain regulation was invalid because it conflicted with a
6 specific statutory mandate in Title 3 of the Guam Code Annotated. The Court further notes that
7 GEC had the ability to present to the Supreme Court of Guam its argument of invalidity of its
8 regulations based on the repeal and re-enactment of Title 3 of the Guam Code Annotated. GEC,
9 however, failed to do so. The Court finds that GEC is now judicially estopped from requesting a
10 finding that such sections are invalidated because of the reenacted statutory schemes. See *Zedner*
11 *v. United States*, 126 S. Ct. 1976, 164 L. Ed. 2d 749 (2006).

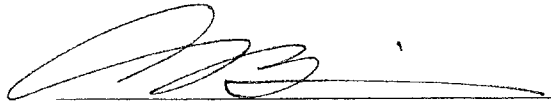
12 ORDER

13 The words of Judge Abbate are just as meaningful today as they were almost exactly
14 twenty years ago,

15 “[a] peremptory writ of mandamus shall issue to cause the Election Commission to
16 remove Proposal A from the...ballot. In view of the short amount of time remaining
17 before the election, we will leave it to the Election Commission’s discretion whether
18 to remove Proposal A from the...ballot altogether or to leave Proposal A physically
19 on the ballot but not to certify the results of the vote on Proposal A.”

20 Hartsock v. Leon Guerrero, Special Proceedings Case No. 246-86, Superior Court of Guam,
21 Decision and Order, October 31, 1986, p. 4, ¶¶19-25.

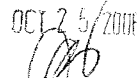
22 SO ORDERED this _____ day of OCT 25 2006 2006.

23 

24 HONORABLE ARTHUR R. BARCINAS
25 Judge, Superior Court of Guam

26 I am hereby signing this document
27 as a U.S. Marshal and not as a judge. It is
28 intended to be in the files of the
29 Clerk of the Superior Court of Guam.

OCT 25 2006


ERIC M. SANDOZ
U.S. Marshal, Superior Court of Guam