



Office of the Attorney General

November 12, 2008

LEGAL MEMORANDUM

Ref: GPSS 08-0957

TO: Guam Education Policy Board

FROM: Attorney General *ALG*

Subject: Legality of Rider in FY 2009 Budget Act

We hereby respond to a request for an opinion made by Gary W.F. Gumataotao on behalf of his client, the Guam Education Policy Board (Board), regarding the legality of a rider in the recently enacted FY 2009 Budget Act, P.L. 29-113. The rider purports to require write-in candidates for positions on the Board to garner at least ten percent of the votes cast to be elected. Enactment of this statute was a response to the fact that several members of the Board were elected at the last election with tiny percentages of the vote. It aims to require a Board member to have at least minimal support before he can serve.

It appears from the election results publicized on November 5, 2008, the day after the 2008 election, that there will be four vacancies on the Board if the new law is enforced. The Guam Election Commission is preparing to state that no candidate was elected to those positions and the Governor is preparing to nominate persons to serve pursuant to 17 GCA § 3117.

The Board has requested our opinion as to whether this new section of law is valid and enforceable in light of the "one-man one vote" principle based on the Equal Protection Clause of the Fourteenth Amendment articulated so frequently by the United State Supreme Court in voting rights cases. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962). The new rider provides:

- (c) Effective beginning with the November 2008 election, no write-in candidates for the Guam Education Policy Board shall qualify to be elected to sit on the Board unless he/she receives votes equal to at least ten percent (10%) of the total number of the valid ballots cast for that office in the district in which he/she is a candidate.

The statute raises some problems. It distinguishes between write-in candidates and candidates who are named on the ballot. It does not require that candidates named on the ballot obtain at least ten percent of the votes to be elected. Thus, if nine percent of the votes went for a write-in candidate and five percent went to a candidate on the ballot, there would either be no winner or the candidate on the ballot would win despite getting substantially fewer votes. In the first instance, the district would have no elected representative on the Board. In the second, its representative would sit on the Board despite being less popular than the write-in candidate.

Thus, the voters' will would be either completely or partially frustrated and the candidate receiving the most votes would not necessarily win.

In another scenario, a candidate in one district who is named on the ballot and who receives five percent of the votes could win while a write-in candidate from another district who receives eight percent could lose. The first candidate would be seated and the second would not, even though the second received a higher percentage of the votes. The first district would have an elected representative and the second would have a gubernatorial appointee. One district's voters would have a larger "voice" on the Board than the other district's voters.

American elections have traditionally followed the "first past the post" system. It is generally not necessary for a successful candidate to obtain a majority of the votes cast, but only a plurality. A candidate can be elected, therefore, with far less than fifty percent (50%) of the votes cast so long as he obtains more votes than the other candidates. Some states have run-off elections if neither candidate obtains a majority, but Guam generally follows the first system. The Organic Act mandates that Guam's Governor, Lieutenant Governor and Congressional Delegate be elected by a majority of the votes cast and requires a runoff election if no candidate obtains a majority. See 48 USC §1422 and §1712(a). Guam law provides for the conduct of runoff elections for Governor and Delegate, but not for runoff elections for other elected positions. 3 GCA §1110.1; 48 USC §1422 and §1712(a); 3 GCA §13105, §13107, §13108, and §13109.

Section 3111 of 3 GCA provides that most Board members are elected and Section 3113 creates districts for their election. However, neither statute requires that the winning candidate obtain a majority of the votes cast. In fact, in every Guam election governed by local law as opposed to federal law, it is necessary only to obtain a plurality to win, including elections for the Attorney General, 48 USC §1421(d)(1); Senators in the Guam Legislature, 48 USC §1423(b); and the Public Auditor, 1 GCA §1903.

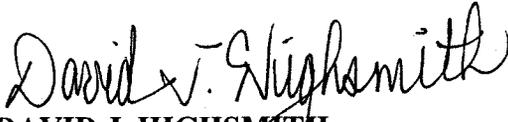
Guam requires that the Guam Election Commission not only facilitate write-in votes but that it tabulate such votes and give them effect. 3 GCA §7108(b) and §11115. It is not clear why an election to the Board should be different from most other Guam elections, nor why a write-in candidate who obtains more votes than other candidates should not serve.

The gubernatorial election in 1998 was contested by candidate Joseph Ada against the winner, Carl T.C. Gutierrez. Ada contended that the phrase "majority of votes cast" in 48 USC §1422 required a runoff election that year because Gutierrez did not obtain a majority of all votes cast in all the elections conducted that year, which included elections for Delegate and the Guam Legislature. In Gutierrez v. Ada, 528 U.S. 250, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000), the United States Supreme Court ruled that Ada was not entitled to a runoff because Governor Gutierrez had obtained a majority of the votes cast for Governor, not "in any election", thus elucidating some unusual language in 48 USC §1422. Part of the Court's reasoning was that Congress would not have intended to make it overly difficult to determine a winner. 120 S.Ct. at p. 745.

The Supreme Court of Guam relied heavily on Gutierrez v. Ada, supra, and other United States Supreme Court cases, in ruling on another gubernatorial election challenge based on the "majority" language in 48 U.S.C. §1422. Underwood v. Guam Election Commission, 2006 Guam 17. The rider we are discussing presents a different problem, but much of the Court's reasoning in Underwood is instructive. In denying Underwood's challenge, the Court followed United States Supreme Court precedent in holding that to elect someone is to make a final decision regarding who should hold an office. Foster v. Love, 522 U.S. 67 (1997). In Foster, the court struck down a Louisiana statute that would result in no selection among primary candidates. Foster upheld the right of voters to fill the office in question.

The Underwood Court also followed Bush v. Gore, 531 U.S. 98 (2000), in holding that all votes must be included in the results if they meet the properly established legal requirements. Underwood v. GEC, para. 29. Voters qualified to vote who do not vote assent to the expressed will of the majority unless the law providing for the election provides otherwise. Underwood v. GEC, para. 24, citing Cass v. Johnston, 95 U.S. 360 (1877). "The election process is not meant to be a platform for expression of discontent or some other display. It is meant to choose between candidates." Underwood v. GEC, para. 32, citing Burdick v. Takushi, 504 U.S. 430 (1992). See also Storer v. Brown, 415 U.S. 724, 735 (1974). Bush v. Gore, supra, also applied the principle of Equal Protection guaranteed by the Fourteenth Amendment to the rights of voters. The government must tabulate votes in such a way as to give each voter equal protection under the law or, in other words, every properly cast vote must be given equal value and effect. Bush v. Gore, supra.

The theme of all these decisions is that the will of the people should not be frustrated. In this case, a candidate may receive most of the votes cast but lose an election. Write-in votes are perfectly valid pursuant to 3 GCA §7108(b). They must be given the same weight as votes for candidates named on the ballot. To deny them equal weight would be to deny the persons who cast write-in votes Equal Protection of the laws because their votes would count for less than votes for candidates named on the ballot. 48 USC §1421b(n). No doubt the concern of *Liheslatura* regarding candidates winning with so little support has some political validity, but those who chose not to vote for any candidate, write-in or otherwise, assented to the expressed will of the majority as Underwood, supra, holds. Whoever obtains a plurality of the votes cast for a position on the Board must be elected, otherwise, the final decision of the voters is nullified.


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