

IN THE SUPREME COURT OF GUAM

DAVID J. SABLAN, as Chairman of the Republican Party of Guam and a registered voter; the **REPUBLICAN PARTY OF GUAM**; and **ORPHA T. MATANANE**,
Petitioner-Appellee,

v.

CARL T.C. GUTIERREZ, in his official capacity
as *I Maga'lahaen Guåhan*,
Respondent-Appellant,

and

GERALD A. TAITANO, in his official capacity
as Executive Director of the Guam Election
Commission; and the **GUAM ELECTION
COMMISSION**, Government of Guam
Respondents-Appellees.

Supreme Court Case No. CVA02-019
Superior Court Case No. SP0064-02

OPINION

Filed: August 30, 2002

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Appeal from the Superior Court of Guam
Argued and submitted on August 28, 2002
Hagåtña, Guam

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BEFORE: JOHN A. MANGLONA, Chief Justice,¹ RICHARD H. BENSON, Justice *Pro Tempore*, and HOWARD TRAPP, Justice *Pro Tempore*.

PER CURIAM:

[1] David J. Sablan (Chairman of the Republican Party of Guam), the Republican Party of Guam, and Orpha T. Matanane (hereinafter collectively referred to as “Petitioners”) requested the Superior Court to issue a writ of mandamus commanding Governor Carl T.C. Gutierrez, Gerald A. Taitano (Executive Director of the Guam Election Commission), and the Guam Election Commission to appoint those individuals recommended by the Republican Party to the Guam Election Commission (hereinafter “GEC”). The Petitioners argued and the Superior Court found that, pursuant to Title 3 GCA § 2101(a) (1996), the Governor has no discretion in the appointment of members of the GEC, and that he must appoint those very persons whose names are submitted to him by the political parties. From our study of the same provision, we conclude that a certain amount of discretion does reside in the Governor in appointing members of the GEC, and therefore reverse the judgment of the Superior Court. We vacate the Judgment Regarding Preemptory Writ of Mandate which directs the Governor to appoint to the board of the GEC the persons currently recommended by the Republican Party, and find that the Governor may, in the exercise of sound discretion, reject the names submitted by the Republican Party and request additional recommendations.

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¹ The Chief Justice and Associated Justices recused themselves from this matter. Designated Justice Manglona, as the senior member of the panel, was designated as the Acting Chief Justice.

I.

[2] Petitioners filed a Petition for Writ of Mandamus in the Superior Court of Guam asking that the lower court issue a writ of mandate directing the Governor to appoint the board of the GEC as required by Title 3 GCA § 2101(a).

[3] Section 2101(a) directs the governor to appoint six members to the board of the GEC from recommendations made by the recognized political parties of Guam. The Governor failed to appoint any of the three persons recommended by the Republican party. The lower court held that the Governor's failure to name the Republican nominees to the GEC board violated section 2101(a). The lower court's decision rested on two alternative grounds. First, the board of the GEC is not a part of the executive branch, and thereby not within the Governor's power of appointment as conferred by the Organic Act. Second, even assuming the GEC is an executive agency, the power of appointment is not exclusive to the Governor and can be limited by the legislature.

[4] Based on the above findings, the lower court rendered a judgment directing that a writ of mandate issue, compelling the Governor to appoint to the GEC board those individuals who have been recommended by the Republican and Democratic parties of Guam. The Governor now appeals this judgment.

II.

[5] We determine that the resolution of the question of law on which the Decision and Order of the Superior Court is based will materially advance the termination of this litigation and clarify further

proceedings herein, and should it be questioned whether the judgment of the Superior Court is final and available for appellate review pursuant to Title 7 GCA § 3108(a) (1994), we certify the judgment of the Superior Court available to immediate appellate review pursuant to Title 7 GCA § 3108(b)(1) (1994).

III.

[6] The grant of a writ of mandate is generally reviewed to determine whether the court's judgment is supported by substantial evidence. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8, ¶ 6. However, when the questions presented for review are strictly questions of law and no facts are disputed, as in the instant matter, then the court's review is *de novo*. *Id.*

[7] In seeking mandamus relief, the Petitioners must establish that (1) the Governor had a clear, present, and usually ministerial duty to act; and (2) the Petitioners had a clear, present, and beneficial right to performance of that duty. *Bank of Guam v. Reidy*, 2001 Guam 14, ¶ 13.

A. Section 2101(a)

[8] Section 2101(a) reads:

There is within, as an autonomous instrumentality and an independent commission of the government of Guam, the Election Commission. The Commission shall consist of seven (7) members, all of whom shall be eligible voters on the date of their appointment. *IMaga'lahaen Guåhan* [Governor] shall appoint six (6) members from **recommendations** made by the recognized political parties of Guam. Each of the recognized political parties, via a duly passed resolution, shall **recommend** an equal number of names to *IMaga'lahaen Guåhan* and the six (6) members appointed by *IMaga'lahaen Guåhan* shall be appointed so that the recognized political parties are equally represented. . . . One (1) member shall be selected and appointed by the six (6) members appointed by *IMaga'lahaen Guåhan*.
...

3 GCA § 2101(a) (emphasis added). The Petitioners are claiming that section 2101(a) imposes upon the

Governor a ministerial duty to appoint to the GEC board the three people recommended to him by the Republican Party. The Governor does not dispute the Petitioners' reading of the statute and instead argues that section 2101(a) violates the Organic Act by unconstitutionally restricting his power of appointment.

[9] First and foremost, we disagree with the parties' ongoing interpretation of the statute. The language of the statute requires the Governor to appoint the GEC members and to make those appointments from those persons **recommended** by Guam's recognized political parties. However, what section 2101(a) does not require is that the Governor automatically appoint any person whose name is submitted to him by a political party.

[10] Section 2101(a) states that the Governor shall appoint the GEC members from the **recommendations** made to him by the two political parties. We find that the use of the term "recommendation" vests in the Governor the discretion to decline appointing any specific individual from the list of names submitted to him. *Cf. Hetherington v. McHale*, 329 A.2d 250, 252 n.1 (Penn. 1974) (including as members of an agricultural commission persons **designated** by private groups).² This reading arises from two basic principles. First, it is consistent with the plain meaning of the term "recommendation," which "refers to an action which is advisory in nature rather than one having any binding effect." *People v. Gates*, 116 Cal. Rptr. 172, 178, 41 Cal. App. 3d 590, 599 (Ct. App. 1974). And second, we are reluctant, without a clear signal from Congress, to conclude that it intended to foreclose the Governor from exercising some degree of discretion in the appointment of the members of an agency such as the GEC.

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² The term "designate" means "to appoint." WEBSTER'S NEW WORLD DICTIONARY 164 (1991).

[11] Should either political party present the Governor with an unqualified and unsuitable candidate for membership on the board of the GEC, the Governor must, as a public official responsible for protecting and ensuring the welfare of the public, be empowered to decline to place that person in a position of public trust. If a list of names submitted to the Governor contains only three recommendations, as has been the traditional practice in Guam, there is no statutory language preventing the Governor from rejecting one or all of the recommended people for reason and requesting that some additional names be submitted. *Cf. James v. Schorr*, 65 A.2d 810, 813 (Del. 1948) (“**all** of whom are to be appointed by the Governor”) (emphasis added). Thus, unlike the lower court’s interpretation of the statute, we find that section 2101(a) does vest the Governor with some amount of discretion in making appointments to the GEC board.

[12] We note the Petitioners’ argument that an interpretation of section 2101(a) which allows the Governor to reject or accept a political party’s recommendations could invite a political standoff, wherein the Governor continually rejects each name submitted to him until he exhausts the pool of potential candidates. We reject such an argument and instead choose to presume good faith. *See Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 1799 (1997) (“Ordinarily, we presume that public officials have ‘properly discharged their official duties.’”) (citation omitted); *see also Reiter v. Ill. Nat’l Cas. Co.*, 73 N.E.2d 412, 417 (Ill. 1947) (“The rule is well settled that public officials in the performance of their official acts are presumed to act in good faith and with honest motives.”). It is the Governor’s duty to exercise his discretion in a sound and reasonable manner and not arbitrarily refuse to appoint to the GEC otherwise qualified people.

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B. Organic Act

[13] Although section 2101(a) does not completely divest the Governor of his discretion in appointing the members of the GEC, it does place a limitation on his power of appointment by restricting his group of candidates to persons recommended by Guam's recognized political parties. Therefore, we must address the Governor's argument that *any* limitation placed on his power of appointment violates the Organic Act. The Governor's appointment authority is limited and set forth in 48 U.S.C. § 1422, which states that the Governor "shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam" 48 U.S.C. § 1422 (1950). Assuming *arguendo* that the GEC is an executive agency, the phrase "except as otherwise provided . . . under the law[]" . . ." is an "unmistakable recognition of the authority of the lawmaking department to provide for the appointment of all officers whose appointment is not definitely regulated by the Constitution itself." *Driscoll v. Sakin*, 1 A.2d 881, 882 (N.J. 1938).

[14] Unlike the facts presented in *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), and *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989), no other provision within the Organic Act limits the manner in which the legislature may restrict the power of appointment with respect to the GEC. See *Bordallo*, 624 F.2d at 934-35 (finding that a statute rendering the Governor's power to appoint hospital trustees ministerial conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's health services); see also *Nelson*, 878 F.2d at 279-80 (finding that a statute divesting the Governor of his power to appoint school board members conflicted with the provision of the Organic Act that vested the

Governor with authority to maintain Guam’s public school system). Therefore, section 2101(a) is a legitimate exercise by the legislature of its express authority to determine how the members of a board it created are to be selected and appointed. *See Welch v. Key*, 365 P.2d 154, 157 (Okla. 1961).

[15] Moreover, limiting the Governor’s power of appointment in this manner is a reasonable and accepted method of ensuring that the body of an election commission is representative of an area’s political parties. *See Independence League v. Taylor*, 97 P. 303, 305, 154 Cal. 179, 183 (1908). Bipartisan membership in an election commission is a desirable means for securing a fair and honest election. *See Driscoll*, 1 A.2d at 882 (“To insure a democratic form of government, it is necessary that there be at least two strong political parties holding different views upon political questions. . . . To insure honest elections it is essential that the county board be made up at least by the choice of both powerful political parties.”).

[16] Therefore, we find that the legislature can restrict the Governor’s selection and appointment of the GEC board members to persons recommended by Guam’s recognized political parties without being inconsistent with the Organic Act. *See Welch*, 365 P.2d at 157. Although the Governor retains some discretion to either reject or accept the names submitted to him, he does not have the discretion to select individuals not recommended by the political parties.

[17] The mandate as issued by the lower court requires the Governor to appoint the very people recommended. Because the Governor could, in a reasonable exercise of his discretion, reject those recommendations, we find that the issuance of such a mandate was in error. Despite our ruling, we note that a writ of mandate may still be proper. “Mandamus may not ordinarily issue to command a body to exercise its discretion in a particular manner. . . . Nonetheless, where the exercise of discretion, or the

failure to exercise such discretion is so fraudulent, arbitrary, or palpably unreasonable that it constitutes an abuse of discretion as a matter of law, mandamus may issue.” *Holmes*, 1998 Guam 8 at ¶ 12 (citations omitted); *see also Hollman v. Warren*, 196 P.2d 562, 565, 32 Cal. 2d 351, 355 (1948) (“While ordinarily, mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result, it does lie to command the exercise of discretion to compel some action upon the subject involved.”); *Independence League*, 97 P. at 304-05, 154 Cal. at 180-83. Given the Governor’s imperative duty to appoint a GEC board, a preemptory writ of mandate could lie to compel the Governor to exercise his discretion and select the individuals to be appointed. *See Holmes*, 1998 Guam 8 at ¶ 11-12.

[18] As a final matter, we address the lower court’s holding that the GEC was not an executive branch agency. We find that in light of the foregoing, we need not address this issue. Whether or not the GEC is an agency within the executive branch, the Governor is vested with the power to appoint its board. We find it unnecessary to determine whether the Governor’s power of appointment is derived from the Organic Act or from statute.

IV.

[19]1 Section 2101(a) does not preclude the Governor from rejecting the recommendations of political parties. Also, the statute constitutes a permissible restriction on the Governor’s power of appointment. Because the Governor retained discretion to reject for reason the three names submitted by the Republican Party, the lower court’s granting of the writ of mandate was in error.

[20] The Decision and Order of the lower court is **REVERSED**. This matter is **REMANDED** with directions that the Judgment Regarding Preemptory Writ of Mandate be **VACATED** and for further proceedings consistent with this opinion.

[21] Let our mandate to the Superior Court issue forthwith.

[22] The filing of a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit or the United States Supreme Court shall not stay our mandate.