IN THE SUPREME COURT OF GUAM

SEAN WADE,
Petitioner-Appellant,

vs.

GERALD A. TAITANO,
in his capacity as the Executive Director
of the Guam Election Commission,
Respondent-Appellee.

OPINION

Supreme Court Case No.: CVA02-016
Superior Court Case No.: SP0079-02

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Appeal from the Superior Court of Guam
Argued and submitted on August 26, 2002
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice.

CARBULLIDO, J.:

[1] Petitioner-Appellant Sean Wade (hereinafter "Wade") appeals from the trial court's invalidation of Title 6 Guam Administrative Rules and Regulations (GAR) § 2108(c) (1997) (hereinafter "regulation 2108(c)"). The trial court invalidated regulation 2108(c) on the ground that the regulation is inconsistent with the Guam Election Code's verification requirement. Although we find regulation 2108(c) to be inconsistent with the Election Code on a separate ground, we affirm the trial court's ultimate invalidation of the regulation.

I.

[2] On August 17, 2001, Wade submitted to the Guam Election Commission (hereinafter "GEC") a proposed initiative measure for the Guam Gaming Act entitled, "Territorial Gaming Act of Guam, an Adoption of Nevada State law by and for the People of Guam," (hereinafter "Initiative"). The GEC processed the proposed Initiative in accordance with Title 3 GCA § 17201, *et seq* (1998). In a letter dated August 22, 2001, the GEC Executive Director Gerald Taitano (hereinafter "Taitano") informed Wade that August 22, 2001 represented the "OFFICIAL SUMMARY DATE" of the Initiative measure. This meant that Wade was required to present to the GEC a minimum of 5,332 valid signatures, constituting ten percent of the registered voters on island, "no later than 120 days from the official summary date, i.e. December 19, 2001." Record on Appeal, tab 3 (Letter dated August 22, 2001).

[3] From September 4, 2001 to December 19, 2001, Wade, on five separate occasions[1] submitted to the GEC a total of 7,030 signatures he collected pursuant to Title 3 G.C.A. § 17207 (1996). In a letter dated January 14, 2002, Taitano informed Wade that the Initiative "failed to qualify for

[1] Title 3 GCA § 18101 confers upon the GEC the authority to "promulgate rules *allowing any proponent to submit petitions to the Election Commission on a staggered schedule*, as the signed petitions are received by the proponents, rather than waiting until all petitions have been signed." Title 3 GCA § 18101 (1998).

ballot placement in this year's general election" because he failed to submit the minimum of 5,332 valid signatures. Record on Appeal, tab 3 (Letter dated January 14, 2002). Of the total 7,030 submitted signatures, the GEC found only 4,873 valid signatures, which in effect, meant that Wade's Initiative petition was 459 signatures short of the requirement mandated under Title 3 GCA § 17201 (1998). Record on Appeal, tab 3 (Letter dated January 14, 2002).

[4] On April 9, 2002, Wade filed a Petition for Alternative and Peremptory Writs of Mandamus, requesting that the trial court direct the GEC to include the Initiative in the November ballot because Taitano failed to comply with regulation 2108(c) by not notifying him within twenty days of the petition's presentation that his Initiative was rejected. Additionally, Wade challenged the GEC's verification methodology and argued that the GEC had failed to count all of the valid signatures he submitted. In response, Taitano filed an Answer on April 18, 2002 and presented a three-part argument that: 1) regulation 2108(c) was inconsistent with Title 3 GCA § 18101 (1998), which requires the verification of all signatures; (2) regulation 2108(c) should be construed to give the GEC twenty working days to provide notice of the rejection; and (3) Wade had allegedly received a tabulation sheet on December 26, 2001, which constituted effective notice under regulation 2108(c).

[5] A bench trial was held on May 29-30, 2002, culminating with a June 11, 2002 Decision and Order. The trial court took judicial notice that January 8, 2002 represented twenty calendar days after December 19, 2001 and that January 18, 2002 represented twenty working days after December 19, 2001. Although the trial court found that Wade satisfied the "statutory requirements for a writ of mandate," the trial court denied Wade's petition on two grounds. First, the trial court invalidated regulation 2108(c) because it found that the Executive Director of the GEC "does not have the authority to allow by administrative regulation the automatic acceptance of signatures on an

initiative petition."[2] Appellant's Excerpts of Record, tab F, p. 7 (Decision and Order, June 11, 2002). Second, and in the alternative, the trial court held that "even if the regulation was valid, the Executive Director substantially complied with the regulation by providing the required notice within 20 *working days*." Appellant's Excerpts of Record, tab F, p. 8 (Decision and Order, June 11, 2002) (emphasis added). Wade timely filed a notice of appeal on July 12, 2002, challenging the underlying legal conclusions made by the trial court.

II.

[6] We have jurisdiction over the appeal of a final judgment pursuant to Title 7 GCA § 3108(a) (1994). Because both parties have stipulated to the trial court's findings of fact,[3] we confine our review to the pivotal issue in this appeal of whether regulation 2108(c) is inconsistent with the provisions of the GEC's enabling statutes covering Initiatives, 3 GCA § 17201, *et seq*. We review questions of statutory interpretation *de novo*. *People v. Palomo*, 1998 Guam 12, ¶ 4; *People v. Guerrero*, 2000 Guam 26, ¶ 5; *Apana v. Rosario*, 2000 Guam 7, ¶ 9.

III.

[7] We begin our analysis by outlining two fundamental principles in statutory and regulatory constructions. The first principle is that "[a]n agency does not have the authority to ignore its own rules." *Aetna Cas. & Sur. Co. v. Blanton*, 911 P.2d 363, 365 (Or. Ct. App. 1996). Regulations have the same legal effect as statutes, *Schmidt v. State*, 586 N.W.2d 148, 153 (Neb. 1998), and, "[w]hen an agency has the authority to adopt rules and does so, it must follow them." *Aetna*, 911 P.2d at 365 (quotations omitted). Therefore, an agency's procedural rules "are binding upon the agency which

[2] With respect to the factual issue as to whether Wade had received earlier notice of the inadequacy of his petition, the trial court found in Wade's favor. Thus, Wade did not receive any notice that his petition failed to meet the ten percent statutory requirement until January 14, 2001.

[3] Our examination, therefore, operates under the premise that Wade has not satisfied the ten percent threshold requirement.

enacts them as well as upon the public." *Douglas County Welfare Admin. v. Parks,* 284 N.W.2d 10, 10-11 (Neb. 1979); *see also Schmidt*, 586 N.W.2d at 154 ("Regulations governing procedure are just as binding upon both the agency which enacts them and the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force.") (internal quotations and citations omitted). The second principle is that an agency, such as the GEC, is a creature of the Legislature and can "act only to implement their charter as it is written and as given to them." *Liao v. New York State Banking Dep't.*, 548 N.E.2d 911, 913 (N.Y. 1989). Because "[a]n agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature," *id.*, the court can only uphold rules and regulations promulgated by the agency "which are consistent with the legislative scheme." *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 771 P.2d 335, 339 (Wash. 1989).

[8] Consequently, in ascertaining whether we should order an agency to uphold its regulation, we must initially resolve whether the regulation is consistent with the agency's enabling statutes. In this regard, we apply the following two-step analytical framework. First, we determine whether the regulation is in contravention of the "unambiguous[] expressed intent of [the Legislature]" as reflected by the *plain meaning* of the statute "as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817-18 (1988). Second, in cases where "the statute is silent or ambiguous with respect to the specific issue addressed by the regulation," we must then decide "whether the agency regulation is a permissible construction of the statute." *Id*. at 291-92, 108 S.Ct. at 1818.

[9] In the present appeal, Wade argues that his Initiative should be placed on the election ballot in light of regulation 2108(c), which prescribes that the GEC's failure to provide a proponent proper notice of the petition's rejection within twenty days of its presentation results in its automatic acceptance. Wade asserts that the trial court erred by holding regulation 2108(c) invalid and unenforceable. Contrarily, the GEC contends that the trial court correctly held regulation 2108(c)

invalid because the regulation is in contravention with the Election Code's Initiative provisions, which specifically require verification by the GEC of all signatures on a petition before acceptance. After employing the above principles and analytical framework, we hold that the trial court did not err in invalidating regulation 2108(c). We agree with the trial court's ultimate conclusion that regulation 2108(c) is inconsistent with the GEC's enabling statutes. However, as we explain below, we disagree with the trial court's basis in arriving at this conclusion. Contrary to the trial court's analysis, we find that regulation 2108(c) is not invalidated by the Election's Code's verification prerequisite, but, rather, by the ten percent valid signature requirement.

A. Verification

[10] Regulation 2108 (c) provides:

> The Director *shall notify the proponent of an initiative measure* in writing either personally delivered or sent by registered mail of his acceptance or refusal to accept an initiative petition for filing *within twenty (20) days of the presentation of the petition to the Commission*. The date of delivery or deposit as registered mail with the U.S. Postal Service of a notice of acceptance shall be deemed the date of acceptance. *If no notice is given within twenty (20) days, it shall be treated as an acceptance of the petition for filing on the date the period expires*. The period provided by this Paragraph may be extended no more than ten (10) days by giving notice as above of the extension to the proponent, if in the opinion of the Director, an extension of the period is necessary to determine whether the requirements for filing are met. If such extension is made and no notice of acceptance or refusal is given before expiration of the extension, it shall be treated as an acceptance as of the expiration of the extension.

6 GAR § 2108 (emphasis added). Pursuant to regulation 2108(c), the GEC, within twenty days of the proponent's presentation of the petition, must provide the proponent a notice of the petition's acceptance, refusal, or extension of the twenty days requirement or else the petition is effectively treated as having been accepted. The trial court invalidated regulation 2108(c) because the regulation creates an automatic acceptance scheme. Since the trial court found "[n]othing in the Guam Code allow[ing] for automatic acceptance of signatures on an initiative petition," it held the automatic scheme to be inconsistent with the Guam Code, which "clearly requires the Executive Director to verify that each signature on an initiative petition is that of a registered voter before accepting the initiative for filing and placement on the ballot." Appellant's Excerpts of Record, tab

F, p. 7 (Decision and Order, June 11, 2002). We disagree.

[11] The GEC is clearly conferred with the power to promulgate rules and regulations to effectuate its enabling statutes, including Title 3, Chapter 17, Article 2, which provides the statutory framework for the Initiative process on Guam. *See* Title 3 GCA §§ 2103-2104 (1996). Of particular import under the Initiative provisions is section 17211, titled "Number of Signatures Required to Place Initiative on Ballot." Section 17211 provides that, "The Election Commission *shall not accept* any petition on a proposed initiative measure unless it has been certified as provided in § 17207 and has met the qualifications provided for by § 17201 of this Chapter." Title 3 GCA § 17211 (1996) (emphasis added). Essentially, section 17211 mandates that an initiative placed on the ballot must meet two requirements: first, proper verification by the GEC of the signatures as mandated under sections 17207(a)-(c)[4] and 18101[5]; and, second, signatures of ten percent of all registered voters as

[4] Title 3 GCA § 17207. Initiative Petition: Forms; Certification.

> (a) Each section of the initiative petition shall have a half-inch column to the left of the place for printed names for use of the election clerks. Each signer shall sign his signature next to his printed name and in the next place, print his place of residence (giving the street and number if such exist, plus P.O. Box) and social security or C.I. number.
>
> (b) The number of signatures attached to each section of the petition shall be at the pleasure of the person soliciting signatures to the same. Any qualified voter of the territory of Guam shall be competent to solicit said signatures. The petition shall have attached thereto the affidavit of the person soliciting signatures stating his qualifications and that all the signatures to the attached section were made in his presence and that to the best of his knowledge and belief each signature to the section is the genuine signature of the person whose name it purports to be, and no other affidavit thereto shall be required.
>
> (c) The affidavit of any person soliciting signatures hereunder shall be verified free of charge by any officer authorized to administer oaths. Petitions so verified shall be prima facie evidence that the signatures thereon are genuine and that the persons signing the same are qualified voters.

Title 3 GCA § 17207 (1994).

[5] Title 3 GCA § 18101 Verification of Signatures.

> The Election Commission shall verify all signatures contained in any petition for any initiative, referendum, or recall, to insure that all signatures on the petitions are the signatures of persons registered to vote in the territory. In order to facilitate the verification of signatures on petitions, the Election Commission may promulgate rules allowing any proponent to submit petitions to the Election Commission on a staggered schedule, as the signed petitions are received by the proponents, rather than waiting until all petitions have been signed.

Title 3 GCA § 18101(1998).

of the time the proposed initiative measure is submitted to the GEC as required under section 17201. The trial court grounded the invalidation of regulation 2108(c) on the first prerequisite, or the verification requirement. For the following two reasons, we find that the trial court erred in this regard.

[12] First, the GEC has not met its burden in establishing that regulation 2108(c) is in conflict with the verification process. A party challenging a presumptively valid regulation carries a heavy burden. *See Mass. Fed'n of Teachers v. Bd. of Educ.*, 767 N.E.2d 549, 557 (Mass. 2002) ("A highly deferential standard of review governs a facial challenge to regulations promulgated by a government agency."); *Tomlinson v. Qualcomm, Inc.*, 118 Cal. Rptr. 2d 822, 826 (2002) ("On review, the burden of proof is on the party challenging the regulation, because the administrative agency's action comes before the court with a presumption of correctness and regularity.") (citations omitted). In order to succeed, the challenging party "must establish the absence of any conceivable grounds upon which [the rule] may be upheld," and an agency's regulation will not be invalidated "unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Mass. Fed'n of Teachers*, 767 N.E.2d at 557 (internal quotations and citations omitted). Here, it can be fairly inferred that the GEC's intent in promulgating regulation 2108(c) was to provide both the agency and the proponent a time frame when the agency will notify the proponent about the status of their petition. *See* 6 Title GAR § 2100 (1997) ("The purpose of these rules and regulations is to implement Public Law 14-23, 3 GCA Chapter 17 and in doing so establish an *orderly and efficient method* for the processing of initiative, referendum and legislative submission matters.") (emphasis added). Although the Initiative statutes, 3 GCA §§ 17101-09, do not provide the GEC with a time frame to complete the verification process, the statutes do allow the GEC to promulgate rules and regulations to effectuate the election statutes. 3 GCA §§ 2103(d), 2104[6]. In enacting regulation 2108(c), the GEC was merely imposing upon itself a time frame

[6] 3 GCA § 2104 provides: Election Manual.

It shall be the duty and responsibility of the Commission to prepare a public manual of administrative

within which to complete a task. *See ASARCO*, 771 P.2d at 339 (noting that an agency "may fill in gaps of the statutory framework if necessary to effectuate a general statutory scheme"); *see also Marshall v. McMahon*, 22 Cal. Rptr. 2d 220, 224 (App. Ct. 1993) ("[T]he absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority . . . . The [agency] is authorized to fill up the details of the statutory scheme.") (quotations and citations omitted) (alterations in original). We do not find the GEC's mere imposition of *when* to complete a statutory duty to be, in and of itself, inherently inconsistent with the performance of that duty.

[13] Second, we remain unconvinced by the GEC's argument that regulation 2108(c) is inconsistent with the verification procedures in light of the GEC's failure to aver that compliance with the regulation's time limitation deters them from wholly complying with its statutory obligation to verify the signatures. The GEC does not contend that the twenty days limitation under the regulation was insufficient time for it to verify all the signatures submitted by Wade, which would then help explain why the GEC failed to provide Wade with a timely notice of the rejection.[7] Instead, the evidence points to the contrary. The GEC's admission during trial that they had completed the initial tabulation of the signatures ahead of the twenty-day period establishes the GEC's ability to comport with regulation 2108(c) without compromising their statutory duty to verify the signatures in accordance with the Initiative statutes. *See* Record on Appeal, tab 10, p. 4 (Appellee's Trial Brief, April 26, 2002) ("The following day, December 20, 2001, the initial

> procedures, rules, regulations and forms to be used in the conduct of elections. After January 1, 2001, all manuals and publications shall be prepared pursuant to the Administrative Adjudication Law. The manual shall set forth the regulations to be followed by all election officials, as well as the descriptions of the necessary equipment and forms to be used in election procedures.

[7] We also note that regulation 2108(c) was enacted and has been in place since 1977. As the agency conferred by the legislature to effectuate the Election Code, we are confident that the GEC intended only to promulgate a regulation that was consistent with its enabling statutes. However, if sometime during the twenty years since the regulation's enactment, the GEC found that complying with the regulation's time limit resulted in non-compliance with the verification statute, the GEC was well within its discretion to change the regulation. *See De Beaussaert v. Shelby Tp.*, 333 N.W.2d 22, 23 (Mich. Ct. App. 1982) (affirming a commission's duty to comply with its own rules because "[n]othing prevents the commission from changing its rule.").

tabulation was completed, and an updated tabulation form was prepared. . . . The December 20, 2001 updated tabulation sheet indicated that the signatures verified by the GEC fell short of the required number, and therefore the Initiative proposal failed to qualify in accordance with the Election Code."). In essence, the "GEC's [duty to] perform a verification process to weed out all signers that are ineligible under the Election Code," Record on Appeal, tab 10, p. 8 (Appellee's Trial Brief, April 26, 2002), is not defeated by a self-imposed regulation that requires the agency to complete the process within a certain time frame. *See Charles A. Beard Classroom Teachers Ass'n v. Bd. of School Trs. of Charles A. Beard Mem'l School Corp.*, 668 N.E.2d 1222, 1226 (Ind. 1996) (finding that an agency's regulation, which provided for extensions of time in which to file objections comported with its enabling statutes).

[14] In sum, we find that regulation 2108(c) is not inconsistent with the Election Code's verification requirement. Thus, the trial court erred in invalidating regulation 2108(c) on that basis.

B. Ten percent threshold

[15] Although we found that the trial court improperly invalidated regulation 2108(c) based on its conflict with the verification requirement, we do find that regulation 2108(c) is invalidated by sections 17211 and 17201's ten percent threshold requirement.[8] Section 17201 expressly mandates that, "[i]nitiative measures may be proposed by presenting to the Election Commission petitions, as set forth in this Chapter with bona fide signatures of voters equal in number to *ten percent (10%)* of all registered voters as of the time the proposed initiative measure is submitted to the Election Commission prior to circulation." Title 3 GCA § 17201 (1998) (emphasis added).[9]

[8] Notwithstanding the parties' and the trial court's focus on the regulation's inconsistency based on the verification process, this issue is within the scope of our review because the central issue in this appeal is whether regulation 2108(c) is inconsistent with the Initiative provisions as a whole.

[9] Wade argues for the liberal construction of the Initiative provisions in favor of the proponent in light of the importance of the initiative process. Wade correctly observes that a citizen's right to participate in the initiative process is fundamental as reflected by its inclusion in the Guam Organic Act, which provides, "[t]he people of Guam shall have the right of initiative and referendum, to be exercised under conditions and procedures specified in the laws of Guam." Title 48 U.S.C. § 1422a (1987). However, "this right is *not without limitations*," *In re Initiative Petition No. 366*, 46 P.3d 123, 125 (Okla. 2002) (emphasis added), and a proponent of an initiative must meet certain statutory requirements in order to successfully place the initiative on the ballot.

[16] Here, Wade stipulated to the trial court's factual finding that he failed to present the required number of valid signatures. If regulation 2108(c) is enforced, the GEC would have to accept Wade's petition even though it clearly failed to meet the ten percent threshold requirement. Such a result would be in direct contravention of sections 17201 and 17211, which explicitly require that all initiative petitions contain valid signatures of ten percent of Guam's registered voters. Therefore, enforcement of the automatic acceptance scheme prescribed under regulation 2108(c) is inconsistent with and is "contrary to the plain meaning" of the Initiative provisions. *Skinner v. Brown*, 27 F.3d 1571, 1575 (Cir. Fed. 1994); *see also Davis v. Town of Barrington*, 497 A.2d 1232, 1234 (N.H. 1985) (finding that the regulation's automatic acceptance scheme was inconsistent with the board's statute, which "clearly reject[s] the policy that an *unmeritorious* application . . . should nonetheless be approved merely because a . . . board takes too long to disapprove it.") (emphasis added). Accordingly, the trial court should have invalidated regulation 2108(c) based on its inconsistency with the ten percent threshold requirement rather than the verification prerequisite.

C. Substantial Compliance

[17] The trial court held, in the alternative, "that even if . . . regulation [2108(c)] was valid, the Executive Director substantially complied with the regulation by providing the required notice within 20 working days." Appellant's Excerpts of Record, tab F, p. 8 (Decision and Order, June 11, 2002). In view of our holding that regulation 2108(c) is invalid and therefore, unenforceable, we find it unnecessary to address this alternative ground.[10]

[10] We emphasize, however, that in choosing not to address the substantial compliance issue, our opinion, in effect, does not affirm the trial court's recognition of the GEC's interpretation of the word *days* to mean *working days* in regulation 2108(c). *See* Appellee's Brief, p. 2. Although we reserve formally opining on this issue, we note the following two reasons that exposes the GEC's potential misinterpretation of the word *day*. First, although the word "day" is not defined within the Election Code or the GEC regulations, it is defined within Title 1 GCA § 1008, appropriately titled "Month, Week and Day Defined." Section 1008 provides in relevant part: "[D]ay is the period of time between any midnight and the midnight following. Midnight of any given day is 12:00 post meridian (p.m.), the end of the day." Title 1 GCA § 1008 (1996). The commentary to section 1008 notes the definition's general applicability to the rest of the Guam Code, including the provisions governing elections. The commentary provides:

> COMMENT: Sections 209-211 were a part of the original Government Code. In 1959 the Legislature saw fit to add the definition of midnight of a given day in reference to the Governor's action on

IV.

[18] We hold that the trial court erred in finding regulation 2108(c) inconsistent with the Election Code's verification requirement. However, we do find that the regulation was inconsistent with the Election Code's ten percent threshold prerequisite. Therefore, the trial court did not err in ultimately invalidating regulation 2108(c). Accordingly, the trial court's judgment is **AFFIRMED**.

> legislation. *There is no good reason why such a definition should not be made uniform throughout the whole Code, and is therefore placed in this Chapter*. Thus, midnight on Monday would occur at that moment ending Monday and commencing Tuesday.

Title 1 GCA § 1008 (1996) cmt. Consequently, the GEC's construction of *day* to mean *working day* is inconsistent with the Guam Code. Second, the GEC's internal inconsistency in construing the word was reflected by the GEC legal counsel's admission during oral arguments that in other sections of their enabling statutes, the GEC has construed the word *day* to mean *calendar day* and not *working day*.