IN THE SUPREME COURT OF GUAM

CARL T.C. GUTIERREZ and FRANK B. AGUON, JR.,
Petitioners,

v.

THE GUAM ELECTION COMMISSION, JOSEPH MESA, MARTHA RUTH, JOHN TAITANO, ALICE TAIJERON, JOHN TERLAJE, JOSHUA TENORIO and ROBERT CRUZ,
Respondents.

EDWARD B. CALVO and RAYMOND TENORIO,
Real Parties in Interest.

Supreme Court Case No.: WRM10-003

OPINION

Cite as: 2011 Guam 3

Appeal from the Superior Court of Guam
Argued and submitted December 30, 2010
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice[1]; KATHERINE A. MARAMAN, Associate Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*.

TORRES, C.J.:

[1] This matter comes before the court pursuant to the Verified Petition for Writ of Mandamus and Prohibition (the "Petition") filed by Petitioners Carl T.C. Gutierrez and Frank B. Aguon, Jr. ("Gutierrez/Aguon") against Respondents The Guam Election Commission, Joseph Mesa, Martha Ruth, John Taitano, Alice Taijeron, John Terlaje, Joshua Tenorio, and Robert Cruz (collectively, "GEC") and Real Parties in Interest Edward B. Calvo and Raymond Tenorio ("Calvo/Tenorio") on December 21, 2010. In the Petition, Gutierrez/Aguon ask this court, in its original jurisdiction, to vacate the November 6, 2010 certification of the gubernatorial election results and the certificates of election issued November 30, 2010. For the reasons discussed below, the Petition is denied.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The outcome of the gubernatorial race between Gutierrez/Aguon and Calvo/Tenorio was close. On November 6, 2010, the GEC completed a recount of the votes cast for Governor of Guam in the 2010 General Election. The tabulation showed that approximately 20,066 votes were cast for Calvo/Tenorio and 19,579 votes were cast for Gutierrez/Aguon. That same evening, six of the seven members of the GEC voted to certify the election results. Several weeks later, on November 30, 2010, five GEC members signed the certificates of election for Calvo/Tenorio. Subsequent to the General Election, Carlo Branch started researching the

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

[2] This opinion supersedes the Order issued by this court *nunc pro tunc* to January 1, 2011.

"recommendation and appointment and selection of the seven (7) members of the GEC." Gutierrez/Aguon Excerpts of Record ("ER") at 2 (Carlo Branch Decl., Dec. 21, 2010).

[3] Gutierrez/Aguon now seek an extraordinary writ from this court declaring the actions taken by the GEC on both dates to be invalid, *ultra vires*, and without any legal force or effect because the GEC members were not allegedly appointed in accordance with the Guam Election Code. Gutierrez/Aguon request this court in its original jurisdiction to issue "preemptory writ[s] of mandate, writ[s] of prohibition, and/or other appropriate relief," ordering the invalidation of the certificates of election issued by GEC, on the grounds that, when the certificates were issued, all GEC members lacked an effective term of office, or their appointment to office was null and void to begin with because it occurred in contravention of the GEC board appointment statutes. *See* Pet. at 22 (Dec. 21, 2010).

II. JURISDICTION

[4] We have jurisdiction over original proceedings for a writ of mandamus or prohibition. 7 GCA § 3107(b) (2005); 48 U.S.C.A. 1424-1(a)(1) (Westlaw through Pub. L. 111-311 (2011)); *see also Underwood v. Guam Election Comm'n* ("*Underwood II*"), 2006 Guam 19 ¶ 6.

III. ANALYSIS

A. Preliminary Issues

1. Writ of Prohibition

[5] Gutierrez/Aguon seek, as one of several alternative forms of relief requested, a writ of prohibition against the GEC. Guam's writ of prohibition is provided for by 7 GCA §§ 31301-31304. Section 31301 states that a writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." 7 GCA § 31301

(2005). Previously, this court has opined that "[a] writ of prohibition is a preventive, not remedial measure." *People v. Super. Ct. (Laxamana)*, 2001 Guam 26 ¶ 10 (citing *Donner Fin. Co. v. Mun. Ct.*, 81 P.2d 1054, 1056 (Cal. Ct. App. 1938); *Crittenden v. Mun. Ct.*, 31 Cal. Rptr. 280, 281 (Ct. App. 1963)).

[6] Although Gutierrez/Aguon request a writ of prohibition restraining the GEC from engaging in further action to certify the election results of the General Election and to issue and maintain certificates of election of Calvo/Tenorio, the election results have already been certified and the certificates of election have already been issued. The primary relief they seek is the *remedial* correction of actions taken by the GEC on November 6, 2010 and November 30, 2010. Remedial relief is not available under a writ of prohibition. *Laxamana*, 2001 Guam 26 ¶ 10. In light of the foregoing authority, a writ of prohibition is not the proper vehicle to grant the entire relief Gutierrez/Aguon seek.

2. Writ of Mandate under 7 GCA § 31202

[7] Gutierrez/Aguon also seek, among other remedies, a writ of mandate issued pursuant to 7 GCA § 31202.[3] *See* Pet. at 12. While this court has the authority to exercise original jurisdiction over petitions for extraordinary writ relief, the decision to exercise such authority and assume jurisdiction in a particular case lies within the sound discretion of the court. *Underwood II*, 2006 Guam 19 ¶¶ 9-10 (citations omitted). Ordinarily, for a writ of mandate to issue, the petitioner must meet a threshold requirement established by statute: demonstration of the lack of a plain, speedy, and adequate remedy at law. *See* 7 GCA § 31203 (2005). Except in "very unusual" cases, this court will decline to exercise its original jurisdiction to issue a writ of mandamus

[3] We note that elsewhere in their Petition, Gutierrez/Aguon alternatively denominate the writ of mandate they seek as a writ of mandamus. *See, e.g.*, Pet. at 13. This is permissible, as the Guam Code indicates that the two terms are interchangeable. *See* 7 GCA § 31201 (2005).

where the lower court may grant the writ relief requested. *See Underwood II*, 2006 Guam 19 ¶ 14 (citations omitted). One such case in which the exercise of original jurisdiction may be warranted is where "'the issues are of great public importance and should be resolved promptly.'" *Id.* ¶ 15 (quoting *Brosnahan v. Brown*, 651 P.2d 274, 276 (Cal. 1982)).

[8] Although the instant Petition does not contest an election pursuant to any of the causes for contest set forth in the Election Code, Title 3 of the Guam Code Annotated, it does allege that a provision of the Election Code was violated, and that therefore the Guam Election Commission, as constituted, lacked the authority to issue the certificates of election. As such, the Petition presents an issue of great public importance; time is of the essence in its resolution, and we will exercise our discretion to assume original jurisdiction.[4]

[9] This court may issue a writ in its original jurisdiction to "compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station . . . ." 7 GCA § 31202 (2005). In *Underwood v. Guam Election Commission ("Underwood I")*, the unsuccessful Democratic Party candidates for governor and lieutenant governor filed a petition in

[4] Gutierrez/Aguon assert that they do not seek to "[contest] any election," but rather they merely seek "an extraordinary writ from this Court declaring the actions taken by Respondents on or about November 6, 2010, and November 30, 2010, invalid [. . .] ." Pet. at 10. To the extent Gutierrez/Aguon have styled their claims to not fall within the ambit of Title 3 (*see* Pet. at 22-23), GEC characterizes this approach as "a novel, extra-statutory theory for attacking an election[.]" GEC's Opp. To Pet. at 4 (Dec. 28, 2010). GEC argues that Gutierrez/Aguon improperly seeks to circumvent 3 GCA § 12105, which states that "[w]hen a voter contests any election he *shall* file with the Superior Court of Guam a written complaint . . . ." 3 GCA § 12105 (2005) (emphasis added); *see also* GEC's Opp. to Pet. at 3. GEC further argues that 3 GCA § 12105, along with other provisions of Title 3, are the exclusive means of challenging an election under Guam law. *See Id.* at 3. Even if Gutierrez/Aguon are seeking the writ in order to resolve an election dispute, whether or not it is of a type that is enumerated in section 12105, our decision in *Underwood II* has clearly established the appropriateness of seeking a writ from this court under the "great public importance" exception, in lieu of filing a complaint in the Superior Court of Guam. *See Underwood II*, 2006 Guam 19 ¶¶ 14-17. In *Underwood II*, petitioners claimed that the Guam Election Commission improperly excluded overvotes in its determination of whether the votes garnered by the Camacho/Cruz team received the "majority of the votes cast" as this phrase is used in the Organic Act, 48 U.S.C. § 1422. *Id.* ¶ 12. Such a claim could have been brought under 3 GCA § 12102(f), which provides that an election may be contested where "the Election Commission in conducting the election or in canvassing the ballots made errors sufficient to change the results of the election as to any person who has been declared elected." 3 GCA § 12102(f) (2005). However, we nonetheless asserted original jurisdiction over the mandamus petition. *Underwood II,* ¶¶ 3, 18.

this court for a writ of mandate, pursuant to 7 GCA § 31202, ordering the Guam Election Commission to conduct a runoff election. 2006 Guam 17 ¶ 15.

[10] However, it is not clear from the express language of 7 GCA § 31202 that the remedies Gutierrez/Aguon seek (specifically, to vacate GEC's actions of November 6, 2010; to de-certify the results of the election; and to cancel, invalidate, annul, and expunge the certificates of election signed on November 30, 2010) fall within the parameters of what a "writ of mandate" may compel. In contrast to the scenario presented in *Underwood I*, in which the petitioner asked this court to order the GEC to conduct a runoff election, *id.*, Gutierrez/Aguon are not seeking to compel the GEC to *do* anything, but rather seek to nullify or revoke actions taken by the GEC in the past.[5] Some legal obligation to perform an act or to fulfill a ministerial duty is an express requirement of a petition for a writ of mandate pursuant to section 7 GCA § 31202. *See, e.g.*, *Cruz v. Guam Election Comm'n*, 2007 Guam 14 ¶ 14 (citations omitted). The remedy Gutierrez/Aguon seek appears inconsistent with the language of section 31202, which is phrased solely in terms of "compelling" either present or future performance. *See* 7 GCA § 31202. However, a closer look at the historical development of the writ of mandate in California, the jurisdiction upon which our writ statutes are based, suggests that it should be available for review of agency action, unless such review is explicitly forbidden by statute.

[11] Traditionally, to obtain a writ of mandamus, a petitioner must demonstrate, among other things, that the respondent failed in a clear ministerial duty to perform an act specifically required by law. *See Limtiaco v. Guam Fire Dep't*, 2007 Guam 10 ¶ 9 (citation omitted);

[5] *Cruz v. Guam Election Commission*, a case over which we asserted original writ jurisdiction, also concerned a petitioner seeking to compel the GEC to perform an action, ordering Gerald Taitano and the GEC to place an initiative to permit slot machine gambling, known as Proposal A, the Better Jobs for Guam Act, on the upcoming special election ballot. 2007 Guam 14 ¶ 1.

Morgan v. City of L.A. Bd. of Pension Comm'rs, 102 Cal. Rptr. 2d 468, 472 (Ct. App. 2000) (citation omitted). However, mandamus has also been appropriately used to "annul or restrain administrative action already taken which is in violation of law." *Bodinson Mfg. Co. v. Cal. Employment Comm'n*, 109 P.2d 935, 941 (Cal. 1941); *see also Transdyn/Cresci JV v. City & County of San Francisco*, 85 Cal. Rptr. 2d 512, 516 (Ct. App. 1999) (quoting *Bodinson Mfg.*, 109 P.2d at 940). We find compelling the California case of *Bodinson Manufacturing*, which describes the ability of California courts, under their common law, to review administrative actions *generally*. 109 P.2d at 940-41.

[12] Up to the early 1940s, California common law dictated that the general writ of mandate was the proper vehicle to seek judicial review of an administrative agency decision in the California courts. *See id.* at 940 ("In this state, however, the law is now established that *mandamus* is the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided." (emphasis added) (citations omitted)). This included petitions for writs of mandate seeking to "annul or restrain administrative action already taken which is in violation of law." *Id.* at 941 (citations omitted). The use of the writ of mandate as a tool to review decisions, as opposed to compelling performance, was novel and outside the historical scope of the writ. *See id.* at 940 ("Historically the writ has been used for far narrower purposes than those for which it is used in this state today. *Mandamus* has traditionally been merely a proceeding to compel the performance of ministerial duties and has not been widely used as a method for reviewing the decisions of administrative agencies." (emphasis added) (citations omitted)).

[13] The California common law use of the writ to review the decisions of administrative agencies was modified by the California legislature in 1945 with the passage of the California

"Administrative Procedure Act." *See* Cal. Gov't Code § 11370 (West 2006) (California Administrative Procedure Act currently codified at Chapters 3.5 through 5 of California Government Code, Title 2, Division 3, Part 1). The Administrative Procedure Act codified the rights of parties to seek judicial review of the rules and decisions rendered by California administrative agencies after an agency hearing by writ of mandate. *See, e.g.*, Cal. Gov't Code § 11523 (West 2006) ("Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency."). The sections of the California Code of Civil Procedure dealing with the writ of mandate were altered accordingly. *See, e.g.*, Cal Civ. Proc. Code § 1094.5 (West 2006) ("Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury.").

[14] Guam adopted the Guam Administrative Adjudication Law ("AAL"), codified at 5 GCA § 9100 *et seq.*, which is substantially similar to the California Administrative Procedure Act. *See* 5 GCA §§ 9100–9312 (2005); *DCK Pac. Guam, LLC v. Morrison*, 2010 Guam 16 ¶ 17 ("Section 9241 of the AAL is substantially similar to section 11523 of California's Administrative Procedures Act." (citing Cal. Gov't Code § 11523)). Importantly, Guam's AAL provides an analog to the California law dictating how an adversely affected party is to protest a decision by a Guam administrative agency. *See* 5 GCA § 9240 (2005) ("Judicial review may be had of any agency decision by any party affected adversely by it. If the agency decision is not in accordance with law or not supported by substantial evidence, the court shall order the agency to

take action according to law or the evidence."); 5 GCA § 9241 (2005) ("*Judicial review may be had by filing a petition in the Superior Court for a writ of mandate* in accordance with the provisions of the Code of Civil Procedure." (emphasis added)).

[15] The text of 5 GCA § 9241 indicates that ordinarily, the proper vehicle for seeking review of an administrative decision is a petition *in the Superior Court* for a writ of mandate.

[16] Gutierrez/Aguon argue that the AAL in general (and implicitly 5 GCA §§ 9240 and 9241 in particular) is inapplicable in the instant case, and consequently that these provisions have no bearing on whether this court may still issue a writ in its original jurisdiction. *See* Gutierrez/Aguon Opening Br. at 16 (Dec. 27, 2010). This argument is based on 5 GCA § 9200, which reads:

> The procedure of any agency shall be conducted pursuant to the provisions of this Chapter in any proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined *after an agency hearing.*

5 GCA § 9200 (2005) (emphasis added).

[17] Since there is no provision of Guam law requiring the GEC to conduct a hearing prior to certifying election results or issuing certificates of election, Gutierrez/Aguon contend the entire AAL is inapplicable to this case. *See* Gutierrez/Aguon Opening Br. at 16. The logical extension of the interpretation suggested by Gutierrez/Aguon would strip the Guam courts of the power to review any agency "decision" under the AAL *unless* that decision was reached after a hearing. This is incorrect.

[18] The critical operative word in the text of 5 GCA § 9240 is "decision." 5 GCA § 9240. The term "decision" is not defined anywhere in the AAL. *See* 5 GCA § 9101. However, several other sections of the AAL use the term "decision" in the context of a written finding by an

administrative agency conducting a quasi-judicial adjudication. *See, e.g.*, 5 GCA §§ 9232; 9233; 9237. We discussed these same provisions of the AAL in our recent case of *DCK Pacific Guam, LLC v. Morrison*, where the proper method of seeking judicial review of an agency decision was a central issue. 2010 Guam 16 ¶¶ 15-20. Our previous case law indicates that while we accept the proposition that the AAL *must* apply when an administrative agency renders decisions after a hearing, *see Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 36 (when agencies are required to conduct hearings, AAL must be followed); *Carlson*, 2007 Guam 6 ¶ 58, we do not believe that the courts may review only agency decisions in cases where a formal hearing is required before rendering a decision. Title 5 GCA §§ 9240 and 9241 direct that *any* "decision" made by an agency may be reviewed, in the first instance, by the Superior Court.[6] This is in keeping with the general policy that courts may generally review agency "decisions" unless such review is explicitly forbidden by statute. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *cf. Pete's Mountain Homeowners Ass'n v. Or. Water Res. Dep't*, 238 P.3d 395, 403 (Or. Ct. App. 2010) (disfavoring the interpretation of ambiguities in statutes as limiting judicial review). In any event, we do not need to reach the determination of whether the AAL applies only to agency decisions made after a hearing because we find that even if it does, we are able to review the action in the instant case under our common law authority to review agency actions.

[19] In this case, the provisions of the AAL concerning written findings issued by an administrative agency after a quasi-judicial proceeding are inapplicable, because GEC was never required to issue such findings when it performed the actions Gutierrez/Aguon now seek to

[6] It is also essential to note that the issuance of a writ of mandate seeking review of an agency decision is *not* proper when the statute governing the particular agency involved in a case (or other Guam law) dictates that a different procedure for seeking judicial review is appropriate. *See Carlson v. Perez*, 2007 Guam 6 ¶¶ 59-71.

challenge.[7] *See* Gutierrez/Aguon Opening Br. at 16; Cal Civ. Proc. Code § 1094.5 (additions to California writ of mandate statute under the California Administrative Procedure Act contemplate review of quasi-judicial "decisions" made by administrative agencies). Nonetheless, modifications to the common law imposed by the passage of the California Administrative Procedure Act (or the Guam AAL) cannot be read to deprive courts of their *general* ability under the writ of mandate to review the propriety of the numerous actions taken by agencies which do not result in formal "decisions." *See DCK Pac.*, 2010 Guam 16 ¶ 20 (review via writ of mandate or writ of review is available for a decision of Contractors' Licensing Board to issue a fine after a hearing). Indeed, to do so would significantly curtail the judicial branch's ability to review the proceedings of Guam's administrative agencies. To the extent that the AAL, the Guam Election Code, or any other source of Guam law does *not* provide for review of agency actions which do not result in formal "decisions," we adopt the common law position exemplified by *Bodinson Manufacturing*, that all of Guam's courts retain the general ability to review actions taken by agencies and to "annul or restrain administrative action already taken which is in violation of law" when such is appropriate. 109 P.2d at 941.

[20] In any event, our assertion of original jurisdiction over a writ proceeding in this case is no different than our assertion of original jurisdiction over a writ proceeding in an election contest brought pursuant to Guam's Election Code, which ordinarily must be filed first in the Superior Court. This court may exercise its discretion to consider the issuance of a writ in its original jurisdiction, where, as here, the matter presented is of great public importance and requires

[7] Although both the "Certified Official Results" issued by the GEC at the meeting of November 6, 2010, and the certificates of election issued by the GEC on November 30, 2010, are written documents, absolutely nothing in the Guam Election Code or any other source of law would indicate that they are "decisions" as that term is used in the AAL, and as discussed in *DCK Pacific*. *See* 2010 Guam 16 ¶¶ 20-21 (discussing procedure for review of "judicial" decisions made by administrative agencies).

prompt resolution. Under the "great public importance" exception discussed in *Underwood II*, we choose to exert our original jurisdiction of writ proceedings to consider this Petition. *See* 2006 Guam 19 ¶¶ 13-17; see also Order at 2 (Dec. 28, 2010) ("In this case we believe that the substantive issue this court must consider is of great public importance which must be resolved promptly.").

3. Failure to Provide Notice to All Parties

[21] GEC asserts that "this Court lacks authority to issue any extraordinary relief because [Gutierrez/Aguon] have failed to join or give notice to all the parties in interest." GEC's Ans. to Pet. at 3 (Dec. 27, 2010) (citing *Sonoma County Nuclear Free Zone v. Super. Ct. (Lewis)*, 234 Cal. Rptr. 357, 362-63 (Ct. App. 1987)). GEC asserts that "all the candidates for public office (both winners and losers) in the 2010 Guam Primary and General Elections" are parties in interest, without presenting any meaningful analysis to support their assertion, and citing only one case. *Id.*; *see also* GEC Opp. to Pet. at 5-6.

[22] In the one California Court of Appeals case cited by GEC, *Sonoma County Nuclear Free Zone v. Superior Court (Lewis)*, the superior court issued a peremptory writ of mandate, directing the county clerk to accept for filing arguments against a ballot initiative that an opponent to the initiative, Con-NFZ, submitted after the statutory filing deadline had expired. 234 Cal. Rptr. at 359. A proponent of the ballot initiative, Pro-NFZ, sought a writ from the court of appeals directed against the superior court, on the grounds that Pro-NFZ was a real party in interest to the superior court writ proceeding, and the superior court had no authority to issue a peremptory writ of mandate without notice to the real party in interest. *Id.* at 360-61.

[23] It was clear from the trial record in *Nuclear Free Zone* that the advocacy group who was denied notice and the right to participate in the lower court proceeding had a direct interest in the

question of whether the opponent should have been permitted a late filing opposing the initiative. *Id.* at 361 ("Pro-NFZ and Con-NFZ were two cognizable groups contesting the merits of a county initiative. As the group who had authored and filed a direct pro argument for the November ballot, Pro-NFZ had a clear, direct interest in the question whether Con-NFZ should be permitted a late filing."). In contending that all of the persons who appeared on the various ballots issued in the November 2010 election are "real parties in interest," the GEC does not demonstrate a comparably direct interest.

[24] GEC's contention that all candidates are real parties in interest is grounded on the proposition that granting of "the relief sought by [Gutierrez/Aguon] would dramatically affect the rights of all the candidates for public office (both winners and losers) in the 2010 Guam Primary and General Elections, including candidates in the executive, legislative and judicial branches of government." GEC's Ans. to Pet. at 3 (Dec. 27, 2010). Although any decision by this court respecting the validity of the GEC may *impliedly* call into question all of the other races voted upon in Guam in November 2010, none of the relief requested by Gutierrez/Aguon *directly* affects any party other than Gutierrez/Aguon, the GEC and its putative members, and named Real Parties in Interest Calvo/Tenorio. *See Nuclear Free Zone*, 234 Cal. Rptr. at 361 (defining real party in interest as a person or entity whose interest will be directly affected by the proceeding). Gutierrez/Aguon pray for the court to: (1) direct the GEC to vacate the certification of the gubernatorial election which took place on November 6, 2010; (2) direct the GEC to "cancel, invalidate, annul, and expunge" the certificates of election signed on November 30, 2010; and (3) issue a writ of prohibition "restraining Respondents from engaging in further

action to certify the election results of the General Election[8] and to issue and maintain certificates of election to Calvo-Tenorio." Pet. at 22-23.

[25] We acknowledge that other candidates could theoretically file lawsuits similarly seeking to annul certificates of election issued in the General Election or even to annul decisions relating to the Primary Election. This writ action does not require others' participation, due to the limited scope of the relief requested by Gutierrez/Aguon. Courts routinely make decisions that *may* impact persons other than those present in court in hypothetical future cases. Far from being a cause for concern, the idea that previous cases may assist courts in future determinations is one of the most fundamental aspects of our system of justice. *See, e.g.*, *Allegheny Gen. Hosp. v. N.L.R.B.*, 608 F.2d 965, 969-70 (3d Cir. 1979), *overruled on other grounds by St. Margaret Mem'l Hosp. v. N.L.R.B.*, 991 F.2d 1146, 1155 (3d Cir. 1993) ("A judicial precedent . . . furnish[es] the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.").

[26] Accordingly, Gutierrez/Aguon's failure to include the potential parties identified by the GEC in this lawsuit is not grounds for dismissal.

[27] Finally, although we do not rest our conclusion on this ground, none of the potential parties identified by Calvo/Tenorio and the GEC have sought to intervene in this case by styling themselves either as "real parties in interest" or as "indispensible," and neither Calvo/Tenorio nor the GEC advanced these issues in a separate motion to dismiss or to stay this proceeding.

[8] We are not aware of any evidence that any of the other contests decided in the November 2010 election have yet to be certified.

4. Beneficially Interested Party

[28] Calvo/Tenorio argue that Gutierrez/Aguon are not "beneficially interested parties" as required to seek issuance of a writ of mandate under 7 GCA § 31203. *See* Calvo/Tenorio Opp. Br. at 21-22 (Dec. 28, 2010); 7 GCA § 31203 (2005) ("The writ . . . must be issued on the verified petition of the party beneficially interested."). Although Calvo/Tenorio are correct in pointing out that Gutierrez/Aguon seem to assume they are "beneficially interested" in the remedy with very little in terms of supporting analysis or legal authority, we find that this defect is not a fatal one for the Petition. *See* Calvo/Tenorio Opp. Br. at 21-22 (Dec. 28, 2010); Gutierrez/Aguon Opening Br. at 16. As the opponents of Calvo/Tenorio in the General Election, Gutierrez/Aguon are uniquely interested in the potential revocation of the GEC's actions of November 6, 2010, and November 30, 2010. The relief requested here could *potentially* affect the other litigation concerning the November 2010 election which is ongoing in the Superior Court. *See* Gutierrez/Aguon Reply Br. at 5 (Dec. 29, 2010). Further, Gutierrez/Aguon are correct in asserting that as one of two teams running in the gubernatorial election, they have a heightened interest in seeing that the gubernatorial election (as opposed to the other contests on the November 2010 ballot) is properly handled by the GEC. *Id.* at 4-5.

[29] Generally, "[i]n a mandamus proceeding . . . it has been recognized that a petitioner must seek to protect a clear interest. But [t]he conditions of petitioner's right and respondent's duty ... may be greatly relaxed, if not virtually abandoned, where the question is one of public interest." *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 109 Cal. Rptr. 724, 731 (Ct. App. 1973) (second omission in original) (citations and internal quotation marks omitted). The test for whether the question decided in a specific case is "one of great public interest" is laid down in *Board of Social Welfare v. Los Angeles County*, where the California Supreme Court stated that:

> By the preponderance of authority . . . where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. . . . *Generally, when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same.*

162 P.2d 627, 628-29 (Cal. 1945) (emphasis added) (citation and internal quotation marks omitted); *see also Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶¶ 29-30 (applying test found in *Board of Social Welfare*). Here, Gutierrez/Aguon similarly seek to procure what they describe as a "public duty" of the GEC: a revocation of the GEC's purported actions of November 6, 2010, and November 30, 2010. *See* Pet. at 22-23. Although we do not yet pass on the merits of this claim, these assertions concerning the nature of the GEC's responsibilities, along with the numerous interests unique to Gutierrez/Aguon themselves, are sufficient for the bringing of this Petition.

[30] Having determined that we will exercise our original jurisdiction in this case, we now address the merits of the Petition.

B. The Merits of the Petition

[31] Gutierrez/Aguon allege that defects in the appointment to office of each of the seven members of the GEC prevented a quorum of lawfully sitting members on the dates that GEC certified the gubernatorial election results and issued the certificates of election. Specifically, they assert that three of the members' terms of office expired, and that the politically-appointed members assumed office despite the failure of their parties to issue "duly passed resolutions" recommending their appointment, as required by 3 GCA § 2101(a). Gutierrez/Aguon ask the court to act pursuant to its power to declare invalid and vacate the actions of an administrative

board when such board lacks a quorum of bona fide, legally appointed members. Gutierrez/Aguon Opening Br. at 22 (citing *City of Hoboken v. City of Jersey City*, 789 A.2d 668, 675-78 (N.J. Super. Ct. Law Div. 2001)). We decline to do so, because we find that the actions of the GEC were not *ultra vires*; the appointment statute is directory rather than mandatory; and even if GEC members lacked a legal right to office, they acted under color of authority as *de facto* members.

1. Statutory Requirements for Nomination and Appointment to the GEC

[32] Guam law states that the GEC is composed of seven members. 3 GCA § 2101(a) (2005). Six of the members are appointed by the Governor from recommendations made by the recognized political parties of Guam via a duly passed resolution, while the seventh member is subsequently elected by the six appointed members. *Id.* On November 2, 2010, the GEC was purportedly composed of the following seven members: Alice Taijeron, John Terlaje, Joshua Tenorio, John Mesa, Martha Ruth, John Taitano, and Robert Cruz. The first three listed are members of the Democratic Party. The second three listed are members of the Republican Party. The seventh, Robert Cruz, is the independent member who was elected by the other six members of the GEC.

[33] Gutierrez/Aguon allege that all seven members lacked valid appointments to the GEC on Election Day as well as during the post-election process. Pet. at 3-4. Gutierrez/Aguon specifically allege that because of these purportedly invalid appointments, the GEC's recount of the ballots and final vote certification, which occurred on November 6, 2010, and the issuance of certificates of election, which occurred on November 30, 2010, must now be declared null and void.

[34] This argument that all seven GEC members lacked the authority to act in their official capacities during the November election is premised on two assertions. First, GEC members Taijeron, Taitano, Tenorio, and Terlaje were not properly appointed because they were not properly nominated in accordance with the requirements of Guam statutory law, specifically, 3 GCA § 2101. Second, the remaining three GEC members – Cruz, Mesa, and Ruth – were neither properly (re)nominated nor (re)appointed and were, therefore, improperly acting under expired terms of office. *Id.* at 6-10. Based on these allegations, Gutierrez/Aguon argue that the actions of the GEC on November 6 and November 30, 2010 were illegal, *ultra vires*, and void *ab initio*. *Id.* at 11.

[35] The appointment of members to the GEC is governed by 3 GCA § 2101, which provides, in relevant part:

> The Commission shall consist of seven (7) members, all of whom shall be eligible voters on the date of their appointment. *I Maga'lahen 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 [*I Maga'lahen Guåhan*] and the six (6) members appointed by *I Maga'lahen 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 *I Maga'lahen Guåhan*. The appointment of the seventh member of the Commission shall be concurred in by at least four (4) members. *The members shall serve for a term of two (2) years*. If a vacancy should occur on the Commission, said vacancy shall be filled for the remainder of the term only, and by the method originally prescribed for its appointment.

3 GCA § 2101(a) (second and sixth emphases added).

[36] Further, "[a] majority of the members of the Commission shall constitute a quorum and no action of the Commission shall be authorized, except upon a vote of four (4) of the members." 3 GCA § 2101(d).

[37] For the following reasons, even supposing Gutierrez/Aguon's allegations are true, we find no cause to invalidate the certification of the election or the issuance of the certificates of election.

a. Actions of GEC were not *ultra vires*

[38] Gutierrez/Aguon cite several cases in support of their position that due to alleged defects in the appointment, reappointment, or renomination of GEC members, the GEC's actions to certify the election and issue the election certificates are *ultra vires* and void. These cases, involving planning boards, irrigation districts, state commerce commissions, industrial commissions, and limited liability companies, support the general proposition that *ultra vires* acts are void. *See, e.g.*, *S. Tacoma Way, LLC v. State*, 233 P.3d 871, 874 (Wash. 2010) ("Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed."); *Haslund v. City of Seattle*, 547 P.2d 1221, 1230 (Wash. 1976).

[39] However, the cases fail to demonstrate that the actions of the GEC in certifying the election results were indeed *ultra vires*. A number of the cases upon which Gutierrez/Aguon rely involved actions by an agency that exceeded the scope of substantive authority granted to the agency by law. For instance, in *Turlock Irrigation District v. Hetrick*, the court considered whether an irrigation district could sell natural gas to its customers. 84 Cal. Rptr. 2d 175, 176 (Ct. App. 1999). The court determined that it could not, because sale of natural gas exceeded the scope of power granted to irrigation districts under either the Public Utilities Code or the California Constitution. *Id.* Therefore, any act taken in furtherance of this unauthorized activity would be *ultra vires*. *Id.* Similarly, in *Siddens v. Industrial Commission*, the court held that where a court enters a final judgment to an appeal of the state industrial commission's action, the

commission lacks the substantive statutory authority to review the merits of the appeal in the underlying case to determine whether that appeal was frivolous for purposes of a post-appeal petition for penalties and attorney fees under relevant worker compensation provisions. 711 N.E.2d 18, 22-23 (Ill. App. Ct. 1999).

[40] In contrast, here there is no dispute about whether certifying election results and issuing certificates of election are within the substantive scope of authority of the GEC. There is no question that the GEC has the statutory mandate to certify election results and issue election certificates. There is also no assertion that the board members exceeded the power vested in the office *de jure*. Instead, at issue is whether procedural irregularities in the appointment of the GEC members render their post-election actions void. Gutierrez/Aguon contend that mandamus is an appropriate remedy to challenge the post-election actions of an "unlawfully constituted board." Gutierrez/Aguon Reply Br. at 9. The question, then, is whether, if the GEC is "unlawfully constituted," the relief requested by Gutierrez/Aguon, invalidating two specific actions of the board, is appropriate.

[41] Gutierrez/Aguon rely heavily on the case of *People ex rel. Martin v. White*, 67 N.E.2d 498 (Ill. App. Ct. 1946), for the proposition that the GEC is an unlawfully constituted board whose actions should be invalidated. In that case, an Illinois court of appeals held that where a court had previously ordered via mandamus an election board dissolved on the ground that the board was not lawfully constituted, a decision of the board that a certain party ticket should not be placed on the ballot for the village election was invalid, and mandamus would issue to compel that the names of the candidates on that ticket be placed on the ballot. *Id.* at 499-502. The court stated that, even "assuming that the decision had been made by a legally constituted board, we are still of the opinion that the Superior [C]ourt had jurisdiction to review by mandamus the

action of a board which was so clearly an abuse of power and so arbitrary as to amount to fraud." *Id.* at 503. The court found that, on the "plain facts" of the case, the purported electoral board had "entered into an undertaking which was in the nature of a conspiracy to keep the Regular People's Political Party candidates off the ballot in order to insure the election of the candidates of the Progressive Political Party with which respondents were affiliated." *Id.* at 504. The case involved a particularly egregious cause of fraud which the court described as "nothing short of an infamous and disgraceful scheme to steal an election." *Id.* at 504.

[42] Although Gutierrez/Aguon are correct that *White* demonstrates that mandamus can be used to invalidate a statutorily-authorized decision of an unlawfully constituted board, we would not read *White* to require us to invalidate all decisions by an unlawfully constituted board, especially where there has been no evidence of an abuse of power "so arbitrary as to amount to fraud." *Id.* at 499-502. Here, no evidence was introduced of misconduct, fraud or abuse of discretion, such as a conspiracy that would threaten justice and democracy. We will not follow *White* in invalidating the GEC's actions here, where there is no evidence before us of misconduct or of fraudulent or arbitrary decision making.

b. Directory v. mandatory statutory provisions

[43] Title 3 GCA § 2101(a) includes numerous requirements governing the appointment of GEC members. For example, it states "[e]ach of the recognized political parties, *via a duly passed resolution, shall* recommend an equal number of names to" the Governor. 3 GCA § 2101(a) (emphases added). Gutierrez/Aguon's contention that the GEC's actions are invalid is premised on violation of this statute, and hinges on whether its directives are mandatory or directory. "The failure to comply with a 'mandatory' provision in a statute renders proceedings thereunder to which the statute relates void by definition, while the observance of a 'directory'

provision may not in every case be essential to the validity of such proceedings." *State ex rel. Stabler v. Whittington*, 290 A.2d 659, 662 (Del. Super. Ct. 1972) (citing *Hester v. Kamykowski*, 150 N.E.2d 196 (Ill. 1958); *Black's Law Dictionary* 1114 (4th ed. 1951)).

[44] We adopted this distinction in *Benavente v. Taitano*, in which we considered a primary election challenge. 2006 Guam 16 ¶ 35. We articulated the well-settled rule that "'[m]andatory provisions of election laws are those the violation of which invalidates the election, whereas directory provisions are those which, while they should be obeyed, may nevertheless be deviated from without necessarily invalidating the election.'" *Id.* ¶ 27 (quoting 29 C.J.S. *Elections* § 341 (2006)) (alteration in original). We also examined the distinction made by the Indiana Supreme Court that "'[i]f the statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits.'" *Id.* ¶ 28 (quoting *Schafer v. Ort*, 177 N.E. 438, 440 (Ind. 1931)).

[45] When the violation of an election statute is raised only after the election has taken place, and relates to issues that did not directly affect the outcome of the election (as opposed to, say, affirmative fraud), a court is likely to find that the statutory requirement is merely a "directory" provision. *Id.* ¶¶ 29-35; *accord Nesbitt v. Coburn*, 143 S.W.2d 229, 232 (Tex. Civ. App. 1940) ("The rule seems to be that the statutes with reference to the manner of appointing election officers are directory and that irregularities therein will not affect the validity of the election."). "This is because once the will of the voters has been expressed, courts prefer to ascertain and effectuate such will." *Benavente*, 2006 Guam 16 ¶ 30. Errors or irregularities in complying with mere directory provisions will not lead to invalidation of an election. *Id.* ¶¶ 27-35.

[46] These statements in *Benavente* are consistent with a general approach of courts that after an election is over, the statutory provisions governing the election are construed as directory rather than mandatory in nature, for "[i]t is the duty of the Court, if possible, to sustain elections which have resulted in a full and fair expression of the public will." *Whittington*, 290 A.2d at 662 (citing *Rich v. Walker*, 374 S.W.2d 476 (Ark. 1964); *Stanley v. Sw. Cmty. Coll. Merged Area (Merged Area XIV)*, 184 N.W.2d 29 (Iowa 1971)) (failure to use voting machines required by law was a minor procedural irregularity in the conduct of an election unaccompanied by fraud or unfair dealing, that did not affect the result, and would not void an election otherwise valid); *see also In re Contest of Election of Vetsch*, 71 N.W.2d 652, 658 (Minn. 1955).

[47] In their Petition, Gutierrez/Aguon do not directly contest the voting itself. In their Reply Brief, they argue "what Petitioners challenge are the post-election actions and decisions of the GEC in the context of a razor-thin gubernatorial race, including the GEC's decision to certify results arising from a machine recount (instead of a manual recount), and to thereafter execute certificates of election in favor of Calvo-Tenorio." Gutierrez/Aguon Reply Br. at 15. Their claim is not that GEC made a wrong decision, but that, as composed, it had no authority to make any decision. *Id.* at 17. Likewise, they submit that the Calvo/Tenorio directory/mandatory arguments are irrelevant, because such principles apply only when a party seeks to invalidate an election. Their Petition, while not a petition to invalidate an election or an election contest brought pursuant to Chapter 12 of the Guam Election Code, asserts that a provision of the Election Code was violated, and in this sense it is an election challenge. The principles that animate our analysis in the election context are of direct relevance here. With these principles in mind, we consider the effect of the alleged defects in the appointments of the GEC members

under 3 GCA § 2101(a) on the validity of the GEC's actions certifying the gubernatorial election results.

[48] We have stated that to succeed in contesting a primary election, a person filing a contest under Chapter 12[9] must establish that any claimed error or errors will affect the outcome of the election. *Benavente,* 2006 Guam 16 ¶ 15. This standard parallels what is sometimes known as the "outcome" test, a test generally accepted and used by many other jurisdictions in election challenges. *See id.* (citing cases). Where the outcome of an election has been unaffected by the failure to strictly comply with an election code in appointing an election official, the election will not be invalidated. *See, e.g., Alvarez v. Espinoza*, 844 S.W.2d 238, 242-43 (Tex. App. 1992) (appointment of election official in violation of election code did not affect outcome of election and was "directory" in nature). Minor irregularities will not invalidate an election. *See Green v. Indep. Consol. Sch. Dist. No. 1 of Lyon County*, 89 N.W.2d 12, 17-18 (Minn. 1958). Rather, "in

[9] Title 3 GCA § 12102, "Causes for Contest," provides:

> Any voter of the territory of Guam in a general election, or of a municipality or precinct in a municipal election, may contest any election held therein, for any of the following causes:
>
> (a) That the person who has been declared elected to an office other than as a member of the Guam Legislature was not, at the time of the election, eligible to that office.
>
> (b) That the precinct board or any member thereof was guilty of misconduct.
>
> (c) That the defendant has given to any elector or inspector, judge or clerk of the election, any bribe or reward or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise of Guam.
>
> (d) That illegal votes were cast.
>
> (e) That the precinct board in conducting the election or in counting the ballots, made errors sufficient to change the results of the election as to any person who has been declared elected.
>
> (f) That the Election Commission in conducting the election or in canvassing the ballots made errors sufficient to change the results of the election as to any person who has been declared elected.

3 GCA § 12102 (2005).

the interest of justice and fairness," a court may overlook the lack of strict compliance with an election law, if no one will be prejudiced by it and the normal election process will not be unduly upset. *Jordan v. Previte*, 376 N.Y.S.2d 69, 70-71 (N.Y. Sup. Ct. 1975) (holding that defects in the appointment of election inspectors in violation of election law mandates, including that they did not take an oath, did not receive certificates of appointment, applications for their appointment were not forwarded to respective county committees, and applications were not authenticated, were not sufficient cause to warrant a new election). *Compare Vetsch*, 71 N.W.2d at 659-60 (vote cast at village precinct held void, where violations of election laws were so substantial and numerous, including improper appointment of the election board, improper handling of ballots by the village clerk, unauthorized issuance of absentee ballots, failure to take proper oaths, unauthorized and ineligible persons filling in as judges and clerks, the intermixing of clerk and judge functions, failure to count ballots before issuing receipts for them, and inadequate maintenance of the election register, that doubt and suspicion were cast upon election and integrity of vote was impeached) *with Green*, 89 N.W.2d at 17-18 (upholding election where election officials in special school bond election took oath in form prescribed by inapplicable statute, no one actually counted the number of blank ballots, and numerous other minor irregularities occurred, but trial court found no evidence of fraud and court determined that election resulted in free and fair expression of will of voters on the merits).

[49] In *Carabajal v. Lucero*, an election contest case, the court held that elections conducted fairly and honestly, where no fraud or illegal voting is shown, would not be set aside for mere irregularity in the manner of the appointment of the election officials. 158 P. 1088, 1091 (N.M. 1916) (quoting *Hankey v. Bowman*, 84 N.W. 1002 (Minn. 1901)). The court found that a showing as to the irregularity in the selection of a judge and the time of the opening of the polls,

and the arrangement of a window, in the absence of protest, did not constitute sufficient evidence to show fraud upon the part of the election officials and invalidate the returns. *Id.* at 1092. It was "significant that not one word of protest was uttered at the time of the holding of this election as to . . . the [illegal] appointment of a third judge by the other two judges or by the electors present." *Id.* at 1091 (discussing also the *de facto* officer doctrine, considered below).

[50] Perhaps the rule was best distilled by the Washington Supreme Court more than a century ago in *Murphy v. City of Spokane*, 117 P. 476 (Wash. 1911). Refusing to declare an election illegal where the election officials were not duly chosen or qualified, the court stated:

> If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative and all considerations touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.

Id. at 478 (citation and internal quotation marks omitted).

[51] Where as here a petitioner seeks the remedy of invalidating the certification of an election and the issuance of certificates of election, we will apply the "outcome test" in determining whether the GEC appointment statutes violated were mandatory or directory in nature, even if the petition is not brought pursuant to the "Election Contest" provisions of 3 GCA § 12101 *et seq.* or to invalidate an election. Gutierrez/Aguon have not alleged nor presented any evidence of fraud, misconduct or bad faith on the part of any of the GEC members in the performance of their duties. Gutierrez/Aguon do not complain of any prejudice or effect on the outcome of the election stemming from this violation of the code, but instead claim that the actions of the GEC

are void *ab initio* and *ultra vires*. They have made no showing that, but for the defects in the appointment, there is a reasonable probability that the election's outcome or the vote to certify and issue certificates of election would have been different.

[52] "We do not mean to suggest, of course, that election officials may simply ignore directory provisions of the [Elections Law]." *Benavente,* 2006 Guam 16 ¶ 36 (quoting *Pullen v. Mulligan*, 561 N.E.2d 585, 596 (Ill. 1990)) (alteration in original). The provision requiring the parties to recommend members via a duly passed resolution is directory in the sense that its violation does not justify an order setting aside the election or the post-election decision of the GEC.[10]

[53] This is not to say that there is no remedy for addressing such procedural irregularities. A petitioner could seek a writ ordering appointment of GEC members in compliance with the statutory directives. However, that is not the remedy that Gutierrez/Aguon seek here. "The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents." *Carabajal*, 158 P. at 1090. The violations as alleged here do not affect the merits of the election, and Gutierrez/Aguon have failed to introduce any evidence to suggest a wholesale violation of election laws, even if they be only directory, existed so as to impeach the integrity of the ballot.

[10] One of the purposes of the statute is to ensure election officers are divided between the parties, but even where election officers are not divided between opposing parties when so required by law, this alone will not vitiate an election. *See, e.g., Dial v. Hollandsworth*, 19 S.E. 557, 557-58 (W. Va. 1894) (holding that while the election law required the ballot clerks to be of opposite politics, the mere fact that they were not was not sufficient alone to justify the exclusion of the poll from the count); *Carabajal*, 158 P. at 1090 ("It would indeed present an anomalous situation if it were true, as apparently contended by appellees, that the returns of an election in a given precinct would be invalidated by reason of the fact that three of the judges of the election selected by the county commissioners or selected by the people at the polls, all belonged to one political party.").

2. *De Jure* and *De Facto* Officer Doctrine

[54] The evidence in the record before us is not sufficient to permit us to make a finding as to whether or not the GEC members were appointed via duly passed resolutions and in full compliance with the procedures prescribed by statute. The absence of a written resolution in the records of the GEC for each member, without more, does not conclusively establish that the member's party failed to pass such a resolution.[11] Gutierrez/Aguon have presented evidence that the Governor made the appointments upon the recommendation of the chairs of the respective political parties, but this too fails to prove the existence or nonexistence of a duly passed resolution. *See* Excerpts of Record ("ER") at 9-10, 12-15, 17. In any event, even assuming that the alleged irregularities existed in the nomination and appointment process and therefore the GEC members were not appointed in strict compliance with the appointment statute, a well-founded common law doctrine applies to uphold the actions taken by the GEC, the *de facto* officer doctrine.[12]

[55] A *de facto* officer is defined as a person who is found openly in the occupation of a public office, whose title is not good in law, but who is in fact discharging the duties of such office in full view of the public, in such manner and under such circumstances as not to present

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[11] In addition to the fact that the absence of a recorded resolution fails to establish that a GEC member's respective political party did not pass such a resolution, the express language of the Election Code does not require that the resolution be in writing. The GEC appointment statute, 3 GCA § 2101, only requires that "[e]ach of the recognized political parties, *via a duly passed resolution*, shall recommend an equal number of names to [the Governor] . . . ." 3 GCA § 2101(a) (emphasis added). The statute does not expressly require that the resolution be in writing and submitted to the Governor or the GEC, and absent such express language, we will not read such requirements into the mandate of the statute.

[12] In exercising original jurisdiction, this court has the duty to consider evidence and make findings of fact. Gutierrez/Aguon bear the burden of justifying the issuance of the writ. *People v. Super. Ct. (Bruneman)*, 1998 Guam 24 ¶ 3 (citing *People v. Super. Ct. (Quint)*, 1997 Guam 7 ¶ 7). The parties have submitted evidence by way of declarations and documents. We are not able, based on the record, to resolve some issues regarding the evidence such as completeness, credibility and authenticity. Nevertheless, based on the record before us, we are persuaded that not all of the GEC members met all technical requirements of the position of member *de jure*. Thus, our holding is grounded in application of the *de facto* officer doctrine, the discussion of which is not merely advisory.

the appearance of being an intruder or usurper, such that third persons having occasion to deal with him in his capacity as an officer may safely act upon the assumption that he is a rightful officer. *Waite v. City of Santa Cruz*, 184 U.S. 302, 323 (1902).

[56] There are five requisites that must be met before an individual can be considered a *de facto* officer:

> First, there must be a *de jure* office in order to have a *de facto* officer. Second, the *de facto* officer must be in actual possession and control of the office to the exclusion of the *de jure* officer. In other words, actual and physical possession of the office by one ready to act, as distinguished from the legal or technical possession that the *de jure* officer is considered to have. The third requisite is that the alleged *de facto* officer must be discharging his functions under color of authority. "By color of authority" mean[s] the authority derived from an election or appointment, however irregular or informal, so that the incumbent not be a mere volunteer.
>
> . . . . The fourth requisite [is] that the *de facto* officer must act under circumstances which normally and reasonably surround the *de jure* officer's functions. Finally, the *de facto* officers must convey an appearance to the public of legitimate title in the official performing governmental duties.

Santos v. Amaro, 923 F. Supp. 300, 303 (D. P.R. 1996) (citations omitted).

[57] Although this court has not previously adopted the doctrine, the *de facto* officer doctrine is well-established in the common law relied upon by both state and federal courts, including the United States Supreme Court. *See, e.g.*, *Waite*, 184 U.S. at 323-24; *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 77 (2003) ("The *de facto* officer doctrine . . . 'confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient.'" (quoting *Ryder v. United States*, 515 U.S. 177, 180 (1995)); *McDowell v. United States*, 159 U.S. 596, 601-02 (1895) ("[T]he rule is well settled that where there is an office to be filled, and one, acting under color of authority, fills the office and discharges its duties, his actions are those of

an officer de facto, and binding upon the public."); *State v. Doyle*, 940 A.2d. 245, 249-51 (N.H. 2007); *State v. Smejkal*, 395 N.W.2d 588, 590-92 (S.D. 1986).

[58] A *de facto* officer performs duties under color of right, or color of official title, when a defect in the officer's authority, caused by circumstances such as an irregular or illegal election, an invalid appointment, or the absence of a necessary qualification, escapes public notice. *See People ex rel. Rush v. Wortman*, 165 N.E. 788, 789 (Ill. 1928). As articulated by the United States Supreme Court: "[T]he rule is well established that to constitute an officer de facto it is not a necessary prerequisite that there shall have been an attempted exercise of competent or prima facie power of appointment or election." *United States v. Royer*, 268 U.S. 394, 397 (1925).

[59] The *de facto* officer doctrine does not exist to protect individual officers. Instead, it is viewed as necessary for the functioning of administrative bodies and the good of the public.

> [T]he doctrine of *de facto* officers rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular *de facto* officer or the claims or rights of rival claimants to the particular office. The law validates the acts of *de facto* officers as to the public and third persons on the ground that, although not officers *de jure*, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.

State ex rel. Paul v. Russell, 122 N.E.2d 780, 782 (Ohio 1954) (citing 43 Am. Jur. *Public Officers* § 470). The *de facto* officer doctrine was judicially created based upon "'considerations of policy and public convenience.'" *Rawitz v. County of Essex*, 791 A.2d 314, 318-19 (N.J. Super. Ct. Law Div. 2000) (quoting *Jersey City v. Dep't of Civil Serv.*, 153 A.2d 757, 765 (N.J. Super. Ct. App. Div. 1959)). The policy considerations underlying the doctrine include the promotion of governmental stability and efficiency and public reliance on authority by instilling confidence in the acts of government, even where there is an issue as to legal qualification of a

person holding office. *See Benne v. ABB Power T & D Co.*, 106 S.W.3d 595, 599 (Mo. Ct. App. 2003) (citing *Harbaugh v. Winsor*, 38 Mo. 327, 332 (1866)).

[60] The policies animating application of the *de facto* officer doctrine are strongly implicated when decisions of election officials are challenged. Decisions of election officials have been historically upheld by courts, despite defects in the officials' appointments or qualifications. In the 1850s, a New York court considered objections to election inspectors on the grounds that their appointment had been irregular or illegal and that they had failed to take the proper oath of office and therefore were unqualified. *People v. Cook*, 14 Barb. 259 (N.Y. Sup. Ct. 1852). The court applied the *de facto* officer doctrine, stating:

> [it] will not stop to inquire whether these inspectors, in these several cases, were inspectors *de jure* or not. It is sufficient that they were inspectors *de facto*. They came into office by color of title, and that is sufficient to constitute them officers *de facto*.

Id.

[61] An officer whose appointment has expired, but who continues to act in his official capacity, may similarly be considered a *de facto* officer. In a case involving an election judge who had been duly appointed at the preceding election, but continued to act as election judge after the appointment expired, where both he and the other officers assumed that the appointment was good for the remainder of the year, the Pennsylvania Supreme Court explained: "It was a mistake, but the claim and its allowance were enough to give him color of right to the office and to prevent him from being considered as a mere usurper. Certainly the rights of the voters should not be prejudiced by any such irregularity as this." *In re Krickbaum's Contested Election*, 70 A. 852, 854-55 (Pa. 1908). For a person claiming office to be a usurper, "there must be present

actual knowledge of an adverse claim to the office; otherwise, the claimant is not a usurper." *Goldstein v. Kenville*, 124 N.Y.S.2d 1, 4 (N.Y. Sup. Ct. 1953).

[62] We find the authority above persuasive and adopt the *de facto* officer doctrine, defining a *de facto* officer as one whose title to office is somehow defective, but who is in fact in the unobstructed possession of an office, discharging duties in full view of the public, and doing so in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. Furthermore, we find that the actions taken by the GEC members in the instant case did not exceed the statutory grant of substantive authority of the GEC. Under this analysis, it is clear that every member of the GEC was at a minimum a *de facto* officer. His or her possession of office was unobstructed prior to the instant writ petition. The evidence shows that the GEC members were discharging the duties of office in full view of the public and in such manner as not to present the appearance of being intruders. Gutierrez/Aguon themselves assert that they did not become aware of any defects in the appointment of the GEC members until after the election had been certified. ER at 3 (Decl. of Carlo Branch, Dec. 21, 2010). Indeed, Gutierrez/Aguon also appear to rely on the doctrine, to the extent they do not seek to invalidate earlier acts of the GEC, such as actions taken with respect to the Primary Election and prior to the vote to issue certificates of election in the gubernatorial General Election.

[63] Gutierrez/Aguon concede that the *de facto* officer doctrine prevents third parties or members of the public from raising collateral challenges to a public officer's qualifications to hold office if considerations of public policy require that the officer's acts be considered valid. Gutierrez/Aguon Reply Br. at 16 (citing *Wortman*, 165 N.E. at 789). Gutierrez/Aguon propose, however, that one of several exceptions to the *de facto* officer doctrine should be applied here.

[64] Gutierrez/Aguon assert that there is an exception to the application of the *de facto* officer doctrine where a statute defining specific appointment and election procedures has as its primary purpose the protection of individual rights. *Id.* at 16-17, n.12. Here, Gutierrez/Aguon specifically argue that the language of 3 GCA § 2101, which requires that a GEC member be recommended to the Governor pursuant to a "duly passed resolution" of his or her respective political party, exists to protect the individual rights of candidates such as Gutierrez/Aguon. Because members of the GEC were allegedly appointed absent proof of a "duly passed resolution," Gutierrez/Aguon further allege that their protected rights as individuals have been infringed upon and the *de facto* doctrine cannot be applied to shield the actions of a purportedly illegal Commission.

[65] First, Gutierrez/Aguon incorrectly rely on the California case of *Fair Political Practices Commission v. Californians Against Corruption*, 134 Cal. Rptr. 2d 659, 665 (Ct. App. 2003), to assert that the protection exception to the *de facto* officer doctrine applies. The *Fair* court, however, did not adopt this exception as California law, finding that the exception was inapplicable to the facts of that case. *Id.* at 665-66. Second, even if we were to adopt this exception, Gutierrez/Aguon's understanding of the purposes for the relevant statute is misplaced.

[66] In determining whether the individual "protection exception" applies, we must evaluate whether the statute in question is designed to protect the rights and interests of individuals who appear before the GEC, or whether the same statute primarily seeks to protect the interests of the public through ensuring the proper administration of government. *See generally id.* at 665. Where it appears that more than one interest is protected, we believe that if protection of the individual interests does not outweigh the need to protect the interests of the public, it is the public interests that must be upheld.

[67] The relevant appointment statute protects the interests of the candidates, the political parties, the GEC and the Governor, as well as the public. Were the protection exception to apply to the case at hand, the statutory requirements for appointment to the GEC would have to exist primarily to protect the candidates, specifically the Petitioners (Gutierrez/Aguon) and the Real Parties in Interest (Calvo/Tenorio). The statute, however, clearly protects more than just the candidates, as it protects the interests of the political parties to ensure the nomination of their chosen members to the GEC; it protects the interests of the Governor to appoint people chosen by their respective parties; and, perhaps most critically, it protects the interests of the public in fair elections by ensuring that the GEC is constituted by an equal number of representatives from each of the political parties. For these reasons, the protection exception is not met, and the *de facto* officer doctrine still applies.

[68] The second exception suggested by Gutierrez/Aguon is that the *de facto* officer doctrine should only be applied where there exists a good faith misunderstanding of the facts or a reasonable uncertainty as to the state of the law. Gutierrez/Aguon Reply Br. at 17. Relying entirely on a statement from the New Jersey case of *City of Hoboken v. City of Jersey City*, they imply that the GEC members acted in bad faith (or failed to act pursuant to a good faith misunderstanding), because knowledge of the appointment defects should be imputed to the GEC members. *See id.* (citing *Hoboken*, 789 A.2d at 677). However, a closer look at *Hoboken* suggests that the GEC members' failure to recognize the technical defects in their appointment is not the kind of conduct lacking in "good faith" as discussed in that decision. In *Hoboken*, the court declined to apply the *de facto* officer doctrine where the actions of a city planning board were taken without a quorum of bona fide, legally appointed members. 789 A.2d at 678. The court explained that "review of the cases where the de facto doctrine has been invoked reveals a

consistent theme. Most involved a good faith, yet legally mistaken belief that the individuals serving had been properly appointed or elected." *Id.* at 676 (citations omitted). However, the *Hoboken* court found that under the facts of that case, the mayor's failure to appoint new members to fill vacancies on the planning board, or to appoint individuals who met the legal residency requirement, "can only be attributable to a deliberate plan to frustrate the Legislative plan embodied in the Municipal Land Use Law." *Id.* at 677.

[69] In contrast, here there is no evidence that the alleged failure of *both political parties*, the Governor and the GEC to strictly adhere to the election statutes governing the appointment of the members is attributable to any lack of good faith, much less that the alleged defects in the appointments equate to bad faith comparable to a deliberate plan to frustrate the intentions of the Legislature. Gutierrez/Aguon have the burden of proving bad faith, since they must shoulder the burden of showing that a writ should issue. *People v. Super. Ct. (Bruneman)*, 1998 Guam 24 ¶ 3 (citing *People v. Super. Ct. (Quint)*, 1997 Guam 7 ¶ 7). They allege bad faith should be presumed, because the court should impute to the GEC members the knowledge that their terms had expired or their appointments were deficient. Gutierrez/Aguon's evidence consists of: (1) letters to two of the members stating exactly when their terms began (the date of the appointment letter) and when the two-year terms ended; (2) the fact that the appointment statute had been in existence for years, and had been discussed extensively in an opinion by this court, *Sablan v. Gutierrez*, 2002 Guam 13; (3) the fact that the "GEC [members] include various learned professional men and women, some of whom have previously served on the GEC for many years"; (4) the fact that responsible political party officials were informed by the Governor's Office of the requirement to submit nominations by a duly passed resolution; and (5) the argument that the appointments of all seven GEC members are allegedly defective and therefore

the pervasiveness creates bad faith. Gutierrez/Aguon Reply Br. at 17-18; ER at 5-6 (Mesa and Ruth Appt. Ltrs. to GEC, June 18, 2007 and Oct. 29, 2008, respectively); Gutierrez/Aguon Supplemental Excerpts of Record ("SER") at 55-59 (Christine A. Chargualaf Decl., Dec. 28, 2010). In light of these circumstances, Gutierrez/Aguon assert that a "good faith misunderstanding cannot be attributed to the GEC members."[13] Gutierrez/Aguon Reply Br. at 17. In doing so, they mischaracterize the law and stretch the facts too far.

[70] First, their claim rests in part on the argument that each GEC member was a sophisticated party, obliged to be familiar with and uphold Guam election law, and therefore should have been aware that his or her term expired after two years. Here, the most compelling evidence presented is in the form of appointment letters that included the date a first appointment started and the fact that it was limited to a two-year duration.[14] This still does not establish that any member should have had knowledge that he or she had not been validly reappointed, upon expiration of their term. We will not presume from such facts that a member of the GEC had knowledge that his or her term had expired; it is Gutierrez/Aguon's duty to make such a showing. *See Cromer v. Boinest*, 3 S.E. 849, 851 (S.C. 1887) (explaining that it is the duty of the appellant to prove such knowledge, if his claim relies on the argument that the officer knowingly remained in office after an expired term).

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[13] The GEC submitted evidence that it did not consider the majority of appointments invalid. This raises an issue as to whether there is in fact a "good faith misunderstanding." *See* John F. Blas Decl., tab E (Memo., Dec. 22, 2010).

[14] Gutierrez/Aguon present appointment letters from Governor Felix Camacho that identify not only the commencement dates of a member's term, but also the expiration dates. ER at 5-6 (Mesa and Ruth Appt. Ltrs. to GEC, June 18, 2007 and Oct. 29, 2008, respectively). For example, Governor Camacho's June 18, 2007 letter to GEC member Joseph Mesa states: "This appointment is effective today for a term to expire on September 2, 2008." *Id.* at 5. Additionally, Governor Camacho's October 29, 2008 letter to Martha Ruth states: "This appointment is effective today for a term of two (2) years." *Id.* at 6. That the continuing validity of dates may not have necessarily been obvious is evidenced by Blas's December 22, 2010, Memorandum to the GEC Board, in which he states that Mesa's term expired on September 19, 2009, and Ruth's on January 21, 2011. John F. Blas Decl. (Dec. 23, 2010); *see also* Gutierrez/Aguon Reply Br. at 12, n.6.

[71] More importantly, even assuming the GEC members knew that their terms had expired or that their appointments were defective, this does not determine whether their continuation as members evidences a lack of good faith. A central tenet of the *de facto* officer doctrine is that the acts of officers who have remained in their positions pending appointment of a successor ordinarily will be sustained. *See Fort Osage Drainage Dist. of Jackson County v. Jackson County*, 275 S.W.2d 326, 331 (Mo. 1955) (clarifying that an officer who holds over after expiration of his term under color of right, where no successor has been appointed or chosen, and continues to exercise the functions of the office, is said to be a *de facto* officer). One of the purposes of the *de facto* officer doctrine is to ensure the continuity of governmental service. Thus, the Michigan Supreme Court went so far as to state, "The decisions are uniform in permitting old boards to continue acting until actually displaced." *Case v. Mich. Liquor Control Comm'n*, 23 N.W.2d 109, 113 (Mich. 1946) (citing case law from other jurisdictions that found that officers holding over after their term expired were *de facto* officers until the appointment of their successor). As the South Carolina Supreme Court stated:

> [I]n the absence of [a] pertinent statutory or constitutional provision, public offices [sic] hold over *de facto* until their successors are appointed or elected and qualify. Vacancy nevertheless exists in the sense that successors may be appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the 'holdovers' are entitled to retain the offices. As nature abhors a void, the law of government does not ordinarily countenance an *interregnum*.[15]

Bradford v. Byrnes, 70 S.E.2d 228, 231 (S.C. 1952) (upholding as valid the acts of commissioners who served for more than two years as *de facto* officers, while clarifying that the same offices are considered vacant for the purpose of appointing *de jure* commissioners). Indeed, Guam statutory law acknowledges that there are circumstances when an officer will

[15] An *interregnum* is the "[a]uthority exercised during a temporary vacancy of the throne or a suspension of the regular government." *Black's Law Dictionary* 681 (8th ed. 2005).

continue to fulfill the requirements of public office, after expiration of his appointment but before a successor has been duly appointed. *See, e.g.*, 4 GCA § 2103.9(e) (Westlaw 2008) (expressly providing that for positions requiring legislative approval, "[a]n appointed board *or* commission member *may* continue to serve for ninety (90) calendar plus three (3) legislative days in that persons [sic] position after that persons [sic] term has expired in an acting holdover capacity until that person, or another person, is appointed by *I Maga'lahen Guåhan* [Governor] and confirmed by *I Liheslaturan Guåhan* [the Legislature]."). In their Reply, Gutierrez/Aguon make passing mention of the absence of a holdover provision within the Election Code's appointment statute.[16] Reply Br. at 11-12. However, such a provision would merely establish *de jure* status for the time period beyond the expiration of the official appointment. During the 90-day period afforded by statute, an officer acting in a holdover capacity is a *de jure*, not *de facto*, officer. *E.g.*, *Delamora v. State*, 128 S.W.3d 344, 356 (Tex. App. 2004) (stating that an officer who holds over after the expiration of his or her term and until such officer's successor has qualified as required by law is a *de jure* and not a *de facto* officer). Therefore, the absence of a holdover provision in the Election Code statute merely prevents certain GEC members from having *de jure* status, but has no impact on their status as *de facto* officers. We are aware of no constitutional or statutory provision that would prevent application of the *de facto* officer doctrine to validate the acts of officials serving in a holdover capacity under the circumstances presented here.

[72] In short, Gutierrez/Aguon's attempt to equate the continued service of GEC members with bad faith misunderstands the *de facto* officer doctrine, which is founded on the societal need for stability arising from confidence in the acts of government where there is an issue as to legal

[16] The holdover provision in 4 GCA § 2103.9(e) applies only to members confirmed by the Legislature.

qualification of a person holding office. The public interest in a stable government is not satisfied when government boards and entities are not able to function as properly imagined. The acts of the GEC, comprised of members acting under color of authority, openly and within the scope of the substantive authority of the GEC, will not be invalidated.

IV. CONCLUSION

[73] Gutierrez/Aguon have failed to allege sufficient grounds for invalidating the certification of the election results and issuance of the certificates of election. Even if defects in the appointment of members of the Guam Election Commission rendered them *de facto* rather than *de jure* members, the actions they took to certify the election and issue certificates of election were actions taken pursuant to the color of law. These actions were within the scope of the authority of the GEC and were not *ultra vires*, but instead had legal validity that cannot be attacked collaterally via the writ proceeding. Accordingly, the Petition is **DENIED.**

Original Signed By: Miguel S. Demapan
MIGUEL S. DEMAPAN
Justice *Pro Tempore*

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice