



**STATE OF HAWAII  
OFFICE OF ELECTIONS**

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SCOTT T. NAGO  
CHIEF ELECTION OFFICER

August 15, 2012

To: Elections Commission

From: Scott T. Nago  
Chief Election Officer

Re: STATUS OF OPERATIONS

The Office of Elections has completed conducting the 2012 Primary Election. The purpose of this report is to discuss that the results of the 2012 Primary Election.

General Operations

Other than the standard issues that typically arise with a primary election, there were no notable issues other than the conducting of elections in the County of Hawaii, which will be discussed separately. The most significant of these typical issues are the following: (1) voters accidentally going to the wrong polling place and being directed to the correct polling place; and (2) voters not being familiar with the nuances of a primary election in which voters are restricted to voting for candidates of one party.

In regards to voters going to the wrong polling place, the Notice of Voter Registration and Address Confirmation Card ("yellow card"), which is sent to all registered voters, includes information on which polling place to go to. As such, voters who go to the wrong polling place are typically limited to voters who failed to review their yellow cards or voters who have moved after the yellow cards had been mailed out. Specifically, some voters assumed that their polling place would be the same as it was in 2010 and did not consider that the decennial reapportionment process may have resulted in them being assigned to a new polling place. Others, who moved after the yellow cards were mailed out, simply went to the polling place on their yellow card and then had to update their voter registration and be directed to the polling place associated with their new address.

As for voters attempting to vote for more than one party, this has been a continuing voter education issue. Voters do not necessarily only support candidates of

one particular party. As such, similar to the General Election voters expect that they can vote for candidates of different political parties for different offices. This results in multi-party votes not being counted.

We have posted instructions in each voting booth and include an absentee ballot instructions sheet with each absentee mail ballot, which explain that voters may either only select candidates of one particular party or only select candidates designated as nonpartisan. Additionally, we have made some headway with a redesign of the ballot in 2008, due to our utilization of a new voting system vendor, in which we have a separate section where the voter needs to designate a political party for purposes of the ballot (i.e. Republican, Americans Elect, Green, Nonpartisan, Libertarian, and Democratic). The act of checking off a box next to one of these political parties or the nonpartisan category, appears to act as a reminder or guide to the voter that he or she must only vote for candidates within that category.

### County of Hawaii

In order to understand what occurred in the County of Hawaii, it necessary to first reiterate, as we have told people in the past, the different roles and responsibilities of the State and the counties when it comes to elections.

As provided for in the Hawaii State Constitution, my duties include the supervision of state elections. Article IV, Section 3. In regards to county elections those are within the purview of each county. As provided for in the County of Hawaii's charter, "[t]he council shall appoint the county clerk" and the county clerk shall "[c]onduct all elections held within the county." Section 3-6(b).

The County of Hawaii, similar to the other counties, provides in its charter that its elections will be held in conjunction with the Primary and General Election. Section 13-27. As such, the Office of Elections attempts to work in coordination with the county clerks in running our combined elections, while recognizing the autonomy of each county. Article VIII, Section 2 (Local Self-Government; Charter).

In county only elections, the county is responsible for all aspects of an election ranging from voter registration, polling places, absentee voting, operation of the voting system, counting of the ballots and reporting of the results. Similarly in state elections, the State is responsible for all aspects of the elections. HRS §§ 11-182 and 11-183.

In combined state/county elections, the counties are responsible for voter registration and absentee voting. HRS §§ 11-11 and 15-4. Those responsibilities are always the statutory province of the counties. Additionally, the counties are responsible for storage of election materials. The State in combined elections is responsible for operating election day polling places and in operating the voting system including the

counting of ballots and reporting of results. There are various other subsidiary responsibilities that the counties and the State split in an equitable manner. HRS § 11-184.

Having said that, given that the Office of Elections is based on Oahu, the State is authorized under HRS § 11-2 to “delegate responsibilities in state elections within a county to the clerk of that county.” In recognition of the fact that state elections includes not only state contests but county contests, the State and counties split the costs of any overtime in regards to poll worker recruitment and for county election officials who work on election day and at other times, such as the logic and accuracy testing of the voting system. This cooperative relationship between the counties and the State has always worked to the benefit of the voters. It is our assumption that the county clerks factor this into justifying their personnel descriptions for their civil service positions, staffing allocations, and in requesting budget appropriations from their county councils for elections.

The County of Hawaii has never refused this delegation of responsibility or the compensation from the State and it has always said it was up to the task, even when it terminated its civil service election administrator in an election year. Instead, at all times, the County Clerk has contended that she was up to the task and that there were no problems. The State in reviewing the matter has spoken to the County Clerk several times and corresponded with her about the county’s readiness for the elections. At all times, the County Clerk had said she was prepared.

The Hawaii State Elections Commission dedicated a portion of its May 30, 2012 meeting to discuss with the county clerk whether she was prepared for the 2012 elections, given correspondence it had received from Councilmember Dennis Onishi. The County Clerk insisted that everything was under control. Attached is a copy of the draft minutes from that meeting.

During the meeting, the Elections Commission sought for the County Council to provide additional assurances that the elections would be successful in the County of Hawaii.

Commissioner Orikasa asked Councilman Onishi how the Clerk is selected and Onishi responded that the Clerk is appointed by the Council Chair. Commissioner Orikasa then asked what opportunities are available for the Council to get involved with getting assurances that the elections will be successful.

Councilman Onishi responded that he could make a request to the Council Chair that the elections topic be placed on the agenda for the next Council meeting. He also explained that since the election time frame is so short,

he wrote to the OE and the Elections Commission to see if he could get the status on the Hawaii County elections.

Commissioner Orikasa then suggested that Councilman Onishi go ahead and try to have the elections topic placed on the agenda. Onishi said that he would ask the Chair to place the topic on the next meetings agenda. Councilman Onishi also stated that his intent for going to the OE and the Elections Commission was to protect the people of Hawaii County and make sure that they have a fair and open election.

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Chair Marston expressed to Councilman Onishi that he hopes he will report back to the Council the concerns that the Commission has regarding elections. He also wanted to comment that the elections are a cooperative effort that involves all parties and he also encourages County Clerk Kawauchi to get whatever resources necessary to succeed in this election. Councilman Onishi suggested that if available, the Commissioners could attend the next Council meeting. Commissioners Okazaki and Masunaga said that they would be willing to attend the meeting if elections were placed on the agenda. Councilman Onishi also expressed that he is appreciative that this issue was placed on this Commission meeting agenda for discussion.

Elections Commission Meeting Minutes (Draft) at pages 7 and 8.

Ultimately, it is our understanding that the County Council never elected to put the issue on their agenda. As such, we had to continue to legally rely on the representations of its county clerk who by charter “[c]onduct all elections held within the county.” Section 3-6(b). In other words, it is our understanding that no one other than the County Clerk, or perhaps the County Council that appoints her, has legal authority to speak on behalf of the County of Hawaii in regards to election matters.

As we got closer to the Primary Election, the Clerk’s issue regarding communicating in a timely and detailed manner to the Office of Elections and the other county clerks reached a critical point when the County Clerk failed to communicate the circumstances surrounding her closure of her Hilo office on July 23, 2012. We noted to her, in part the following,

We are fielding calls as to what is going on in your county, as well as, when your absentee ballots are going to be mailed out. Your closure on July 23, 2012, and your failure to thoroughly communicate to the rest of

the election community and the media as to the reasons for the closure, has unnecessarily lead to significant speculation in the public about the integrity of our elections only a few weeks before the August 11, 2012, Primary Election. This is simply unacceptable on the part of a fellow election administrator. The public relies on us to be assured that their elections are safe and secure.

Excerpt of Letter to County Clerk (July 25, 2012).

Ultimately, the County Clerk explained that her "audit" had found some duplicate voter registrations and that possibly a handful of voters may have voted twice. The County Clerk's lack of familiarity with voter registration and absentee voting records, which are the jurisdiction of the county clerks, apparently lead to her inability to definitively say what she had found.

In debriefing with her and the other county clerks on July 31, 2012, it was our hope that the Clerk of the County of Hawaii had come to the realization that she needed to communicate with the Office of Elections and the other county clerks, and that she would benefit from the institutional knowledge and election administration experience of these election administrators.

As we approached the Primary Election, on August 11, 2012, despite the representations by the County Clerk that everything was fine, I felt it important to send one of my veteran section heads to help trouble shoot any problems that might occur, as we had a new counting center manager. Additionally, I requested the Department of the Attorney General to assign a deputy attorney general to the Board of Registration that would be based in the County of Hawaii for the election.

What my staff witnessed was poor planning, implementation, and leadership by the County Clerk. Despite this, the hard working staff and volunteers did their best under the circumstances and were able to get through the election. Essentially, the County Clerk on election day is supposed to be like a field general with a plan of attack, who acts confidently, and has the support of his or her troops. The County Clerk was in no way, shape, or form that type of leader.

For example, the issue regarding the late opening of polls. While irregularities may happen on election day, as we are dealing with hundreds of stipended volunteers, and many moving parts, the County Clerk lacked the ability to definitively articulate the nature of the problem to the Office of Elections or the public. This resulted in the need for the Governor to conduct triage, in the form of an emergency proclamation, extending polling place hours, based on the limited information that she provided the Attorney General.

Specifically, the County Clerk at no specific time had a handle on how many polling places out of the forty in the county opened late. The election proclamation issued by the Governor refers to over half of the polling places in the County of Hawaii had not opened on time. The County Clerk initially reported three precincts had opened late, later on we were told by the Attorney General's Office that they had been told twenty five by the County Clerk, and then later in the day we were told by the County Clerk that there were at least eleven but that she was still looking into it.

The public's confidence in our elections was rocked by this election proclamation, which normally is only issued when a natural disaster or emergency occurs. The Governor did not lightly issue this proclamation and under the circumstances, he arguably had no other choice than to protect the rights of the voters, if the County Clerk's general representations to Attorney General were correct.

Following the election, we waited for the County Clerk to follow up on her representation that she would follow up and get a more definite answer as to what the scope of the problem was. We heard nothing on Sunday or Monday from her regarding any further details. A statewide meeting, in Hilo, was scheduled for August 14, 2012 (Tuesday) with all the county clerks to debrief about the Primary Election.

During the meeting, the County Clerk still could not answer the question of how many polls had opened late. Additionally, she had no answers to why there had been problems with delivering supplies in West Hawaii to the polling places on election day. Her answers were essentially that she was still looking into it. In the end, we did not get the responses we expected from a county clerk, who had been entrusted with elections within her county.

Having said that, given that the public is asking and the fact that we needed to know what the scope of the opening of polls problem was, we immediately conducted our own investigation. Specifically, we took custody of the record books for all forty polling places in the County of Hawaii. We also, immediately began calling every precinct chairperson in the County of Hawaii to get answers, with calls being made that evening and the following morning.

The result of that investigation, which was completed the following morning, after reviewing the records books and the notes from the telephone calls, was that a total of thirteen polling places out of forty polling places opened late. However, of those thirteen polling places, four opened between 7:01 a.m. and 7:03 a.m., five opened no later 7:30 a.m., two opened no later than 8:00 a.m., and the final two opened at 8:40 a.m. A copy of the spreadsheet showing the exact opening times for each polling place is attached.

Our review of what transpired in the County of Hawaii focused on two things. First, was the conduct of the 2012 Primary Election defensible under the law? Second, did the conduct of the County Clerk unnecessarily undermine the public's confidence in our electoral system?

In regards to the first question, our initial review of the matter indicates that the irregularities complained of, while unfortunate, do not rise to the level of changing the election results. Specifically, irregularities must involve sufficient evidence to demonstrate that the irregularities complained of could have caused a difference in the election results. Sufficient evidence requires something more than a "mere fishing expedition undertaken in the hope that in an examination of all the ballots enough might be discovered to change the result." Brown v. Laukea, 18 Haw. 131, 133 (1906). Additionally, any challenger would need to show "actual information of mistakes or errors sufficient to change the result." Funakoshi, 65 Haw. at 316-17 (citing Laukea, 18 Haw. at 133). Further, a challenge cannot be based on "mere belief or indefinite information." Akaka, 84 Hawai'i at 388 (citing Kulike v. Fern, 19 Haw. 278, 283 (1909)).

Ultimately, the Hawaii Supreme Court has determined that "[i]n the absence of facts showing that irregularities exceed the reported margin between the candidates, the complaint is legally insufficient because, even if its truth were assumed, the result of the election would not be affected." Akaka, 84 Hawai'i at 388 (internal citations omitted). In the present case, the irregularities complained of do not appear to be legally sufficient to change the election results.

As for the question of whether the conduct of the County Clerk unnecessarily undermined the public's confidence in our electoral system, the answer is unfortunately yes, for the reasons previously noted. This cannot be allowed to happen again. The County Clerk must rededicate herself to mastering election administration or at the very minimum to surround herself with individuals with expertise in election administration. Additionally, the County Clerk must work on learning to communicate effectively and in a timely manner to other members of the election community and to the public as a whole. We look forward to continuing to work with the Office of the County Clerk, so as to learn from the events of the Primary Election, and to ensure a well administered General Election.