



MICHAEL CURTIS
ELECTIONS COMMISSION CHAIR

STATE OF HAWAII ELECTIONS COMMISSION

MINUTES

REGULAR MEETING OF THE ELECTIONS COMMISSION

FEBRUARY 20, 2024 @ 1:30 PM

Pursuant to Section 92-.37, Hawaii Revised Statutes, the Elections Commission (EC) will be meeting remotely using interactive conference technology.

Commissioners in Attendance:

Michael Curtis, Chair
Dylan Andrion
Anita Aquino
Ralph Cushnie
Stafford Kiguchi
Clare McAdam
Kahiolani Papalimu
Cynthia Takenaka

Support Staff in Attendance:

Stella Kam, Department of the Attorney General (AG)
Nedielyn Bueno, Elections Commission Secretary, Office of Elections

PROCEEDINGS

I. Call to Order [1:30 p.m.]

The meeting of the Elections Commission was called to order by the Elections Commission Chair Michael Curtis at 1:30 p.m.

II. Roll call and Determination of a Quorum [1:30 p.m.]

Chair Curtis conducted roll call. All members of the Elections Commission were present at the meeting with the exception of Commissioner Jeffrey Kuwada.

III. Approval of Minutes for the January 16, 2024 meeting [1:31 p.m.]

Chair Curtis called for a motion to approve the written summary and video recording of the January 16, 2024 meeting posted online. Commissioner Cushnie made a motion to amend the minutes to add:

- 2:42 p.m. add that Chair Curtis asked staff to mute Commissioner Cushnie's microphone
- 3:08 p.m. add Deputy Attorney General Reese Nakamura stated that he represented the Office of Elections. During the vote on Investigating chain of custody, Deputy AG Reese Nakamura advised the Commission against allowing Commissioner Cushnie to participate in the vote. Commissioner Cushnie did not recuse himself but was prevented from voting.
- 3:24 p.m. add Commissioner Andrion requested that conflict of interest dispute between Deputy AG Reese Nakamura and Commissioner Cushnie get sorted out before the next meeting. Chair Curtis requested a written opinion from the Deputy Attorney General on the conflict of interest concerns.

Commissioner Andrion requested that the last amendment was incorrect noting that Chair Curtis would seek a legal opinion from the AG and not the Deputy AG. Commissioner Cushnie agreed to the correction.

Commissioner Cushnie asked if the draft minutes needed to be posted online. Deputy AG Kam responded that minutes, either draft or permanent, needs to be posted to the agency's website within 40 days of the meeting.

Commissioner Cushnie made a motion to amend the minutes of the meeting of January 16, 2024, which was seconded by Commissioner Andrion and approved by the Commission.

IV. Public Testimony [1:46 p.m.]

Jamie Detwiler stated that she stands on her written testimony submitted relating to Electronic Registration Information Center, Inc. (ERIC). She also testified in opposition to the reappointment of Scott Nago citing maladministration and failure to perform duties.

Rosmarie Jauch testified on the agenda item relating to the reappointment of Scott Nago stating that the agenda item may not be conducted Executive Session but must be conducted in open forum. She also testified on her concerns about signature verification and voting by mail.

Scott Shedko testified on the agenda item relating to the reappointment of the Chief Election Officer. Mr. Shedko shared his concerns relating to election audit

procedures.

Jennifer Cabjuan testified on the agenda item relating to the reappointment of the Chief Election Officer. Ms. Cabjuan expressed that there should be a public hearing relating to the reappointment to discuss the Chief Election Officer's performance. Ms. Cabjuan also shared concerns about the voter rolls, signature verification, and chain of custody.

Tom Stanton testified on the agenda item relating to the reappointment of the Chief Election Officer. Mr. Stanton expressed concerns about transparency and accountability under CEO Nago's administration citing issues with election audit procedures.

Doug Pasnik testified on the inefficiency of vote by mail elections and the reappointment of the Chief Election Officer citing that there were numerous court cases following the 2022 Elections questioning the administration of statutory laws governing the elections and that complaints were not investigated by the Elections Commission. Mr. Pasnik added his concerns about the certification of the 2022 Elections and voter participation. Mr. Pasnik called on the Commission to investigate the Office of Elections' implementation of vote by mail.

Adriel Lam testified on the agenda item relating to election metrics sharing his concern about the ballots not being tracked. He also testified on the agenda item relating to ERIC expressing that there is legislation regarding ERIC but that there were no discussions before the Elections Commission regarding the topic which he expresses leads to the erosion of public trust in elections. Mr. Lam called on the Commission to look into chain of custody.

Andy Crossland testified on agenda item relating to the evaluation and voting on the reappointment of the Chief Election Officer. Mr. Crossland shared his concern that the agenda violated Hawaii law by not holding a public hearing on the performance of the Chief Election Officer before discussing his reappointment. He also shared concerns about the Chief Election Officer handling the elections and is in opposition to his reappointment.

Karl Dicks testified on the agenda item relating to the reappointment of the Chief Election Officer opposing to the reappointment of Scott Nago.

AnnMarie Hamilton testified on the agenda item relating to the reappointment of the Chief Election Officer and chain of custody. Ms. Hamilton expressed the Commission is not doing its job in investigating the complaints brought before the Commission.

Mary Healy testified on the agenda items relating to ERIC and the reappointment of the Chief Election Officer. Ms. Healy expressed that low voter turnout is a result of the election process and opposes the reappointment of Scott Nago.

Gary Cordery testified in opposition to the reappointment of the Chief Election Officer expressing that low voter turnout is a result of Scott Nago's performance. Mr. Cordery also expressed election audits should be done on paper ballots. He also expressed that the discussion of Scott Nago's performance be done in public.

Brett Kulbis commented that the discussion of the reappointment of the Chief Election Officer should have been done last year so that the Commission would have had enough time to review whether they would reappoint or not.

Boyd Ready expressed his concern about the Commission conducting discussions about the performance of the Chief Election Officer in executive session. Mr. Ready added that the chief election officer is a public officer as such his evaluation of his performance should be done in public.

Moana Lutey, County Clerk of Maui, testified on the agenda item relating to the reappointment of the Chief Election Officer. Ms. Lutey expressed her support for Scott Nago's reappointment sharing that Scott has been supportive in assisting their office in planning for elections highlighting that his office has conducted trainings for all election officials. Ms. Lutey expresses that if Scott is not reappointed, then who will take on the role in a presidential election and recommends the Commission to reappoint him.

Commissioner Andrion requested to make a motion to amend the agenda to move the item relating to the discussion and reappointment of CEO Nago from executive session into open session.

Chair Curtis stated that the agenda item is a personnel matter and called upon Deputy AG Kam to discuss the propriety of going into executive session regarding personnel matters.

Deputy AG Kam stated that HRS 11-7.5(6) requires a public hearing on the performance and to consider information gathered at the hearing, but that it does not require the deliberations to be conducted in open session. She also stated that Sunshine Law provides that when a board evaluates a public officer, that it may be done in executive session. She also noted that the law provides that the public officer may choose whether they want their evaluation conducted in public. If they choose not to, then evaluation will remain in executive session. Deputy AG Kam stated that she believes CEO Nago had not agreed to have his evaluation done in open session, therefore, deliberations will remain in executive session. She added that when the Commission exits executive session, the Chair will provide the key points of the deliberations and that voting will occur during open session.

Commissioner Papalimu sought clarification from Deputy AG Kam if the

deliberations was required to be in executive session. Deputy AG Kam stated that under the executive session provision of 92-5(a)(2), the person being evaluated may choose to have their evaluation done in open session.

V. Communications & Correspondence [2:44 p.m.]

Commissioner Cushnie expressed that are concerns about chain of custody of ballots that may not be compliant with the administrative rules HAR 3-177-453 and HAR 3-177-61 and made a motion to request chain of custody documents from the County Clerks to be provided to the Commission seven days before the next meeting which was seconded by Commissioner Andrion.

Commissioner Cushnie added that he had emailed the County of Kauai with his questions about chain of custody and shared that he submitted email documentation that Kauai does not keep custody documentation and that they are not required to do so. Commissioner Cushnie believes that the other counties may not also keep documentation and repeated his request that the Commission ask for documentation from the counties relating to chain of custody.

Commissioner Cushnie made a motion to request chain of custody documents from the County Clerks to be provided to the Commission which was seconded by Commissioner Andrion.

Chair Curtis asked if there were further discussion and Commissioner Andrion expressed his support for the motion and added that he was under the impression that the counties would be providing information on chain of custody at today's meeting as he recalled that Chair Curtis said he would ask the counties to attend and present information on chain of custody. Chair Curtis stated that he had asked the counties to attend.

Chair Curtis called for a vote on the motion and the motion passed unanimously by the Commission.

Commissioner Cushnie stated that he submitted a formal complaint to the Office of Elections challenging the Office of Elections' report on Implementing Elections By Mail dated October 26, 2023 and made a motion to direct the Office of Elections to answer his formal complaint in writing seven days before the March meeting which was seconded by Commissioner Papalimu.

Commissioner Andrion expressed that he supports asking the Office of Elections to respond to the Commission in writing so that there is a record to refer to.

Chair Curtis asked for a vote on the motion which passed unanimously by the

Commission.

Commissioner Cushnie stated that he had correspondence with Deputy AG Reese Nakamura following the last EC meeting and made a motion that the Elections Commission request a deputy AG that is not conflicted to represent the Commission. Chair Curtis stated that Stella Kam is now the Commission's legal advisor. Chair Curtis introduced Deputy AG Kam who shared a brief background on herself sharing that she has been with the AG's office for over two decades and her specialties are procurement, Uniform Information Practices Act, and Sunshine Law.

Chair Curtis shared that he had sought clarification from Deputy AG Kam as a result of emails from Commissioner Cushnie addressed to the Commission. Chair Curtis thought that when three or more commissioners interact with each other that constitutes colluding. Chair Curtis shared that if three or more commissioners interact with each other regarding commission business, that the communication should be disclosed and the context reported back to the Commission. Deputy AG Stella Kam clarified that Sunshine Law states that Commissioners should not be discussing commission business amongst each other. She further added that any discussion on commission matters should be held pursuant to a properly noticed agenda at an open session meeting unless the topic is specifically reserved for executive session.

Commissioner Andrion asked for further clarification as he understood Sunshine Law permitted one-on-one interaction with commission members. Deputy AG Kam stated that the law does not prohibit two commissioners from talking about commission matters and that the purpose for the prohibition on more than two commissioners talking about commission matters is that the discussion should be conducted in open session. She also shared that the Sunshine Law does allow exceptions specifically when the commission has determined that it does not have the time to investigate a specific matter in which the chair of a commission may create a permitted interaction group of three commissioners but less than a quorum. The permitted interaction group may conduct investigations as a group then report their findings back to the full commission. Deputy AG Kam stated that it is not prohibited for commissioners to have discussions with each other but is discouraged.

Commissioner Papalimu asked Deputy AG Kam if she has represented the Office of Elections in which Deputy AG Kam replied that she has no connection with the office.

Commissioner Takenaka asked Chair Curtis to clarify what the conflict of interest was between Deputy AG Reese Nakamura and Commissioner Cushnie. Chair Curtis shared that Deputy AG Nakamura represented the Office of Elections and the Elections Commission when Commissioner Cushnie filed a formal complaint against the Office of Elections.

Commissioner Cushnie felt there was a conflict of interest as Deputy AG Nakamura represented both entities. As such, to avoid any conflict of interest or appearance of conflict, Deputy AG Stella Kam has been assigned as an advisor to the Elections Commission.

Commissioner Cushnie asked if there was a rule prohibiting a deputy AG and commissioners to interact outside of a public meeting. Deputy AG Kam stated that there is no rule prohibiting it.

Commissioner Cushnie stated that he currently had a motion on the floor to have the Elections Commission request a deputy AG that is not conflicted to represent the Commission. Chair Curtis responded that the action has already taken place and that the motion is moot.

Commissioner Cushnie brought forth the topic about communication to the Elections Commission. He made a motion for the Commission to direct the Office of Elections to respond in writing to all inquiries within 15 business days of receipt and to post the responses publicly on the Office of Elections' website by the same deadline. The motion was seconded by Commissioner Andriou.

Deputy AG Kam expressed her concern about the motion noting that the Office of Elections is separate from the Elections Commission and believes that the Commission does not have the powers to direct the Office of Elections to respond to all inquiries submitted to the office.

Commissioner Papalimu commented that instead of directing the Office of Elections to respond, can the Commission respond on their own to the inquiries.

Chair Curtis commented that questions and correspondence to the Commission are addressed at Commission meetings and that the Commission has no purview over the Office of Elections operations other than to advise the office.

Commissioner Cushnie expressed that under HAR 3-170-4 and HAR 3-170-5, public requests can be made to inspect government records or requests can be made for copies of government records maintained by the Elections Commission. He expressed that the public is having a difficult time getting a response to their inquiries.

Deputy AG Kam commented that requests under Chapter 92F falls under the Uniform Information Practices Act which governs access to government records. She clarified that if a person requests for government records then the agency is required to respond as directed by Chapter 92F. However, she felt that the request being made by Commissioner Cushnie is not related to

access to government records. She added that there is no statute requiring an agency to respond to general inquiries for information.

Commissioner Cushnie asked for clarification on HAR 3-170-5 related to requests to view activities of the Elections Commission. Deputy AG Kam clarified that the rule refers to information the agency maintains as a government record such as agenda and minutes.

Commissioner Takenaka asked what other documents other than agendas, minutes and reports that are submitted to the Commission do they maintain. Chair Curtis noted that all records maintained by the Elections Commission are posted online for the public to view.

Commissioner Cushnie expressed that his concern relates to the unresponsiveness of the Office of Elections regarding inquiries to documents such as the county certifications of county elections which he states that the Office of Elections should have to certify the overall election. He feels that the information should be readily available for the public to view. He shared that since there are concerns about getting this type of information from the Office of Elections, he would like the Commission to get involved and have the information posted online.

Chair Curtis asked CEO Nago if there are records that each county submits to the Office of Elections relating to county certification. CEO Nago replied that the Office of Elections handles the certification of the results for federal, state and county elections pursuant to HRS 11-155. He added that the Office of Elections handles the certification of elections for federal and state elections as well as state constitutional questions that passed. He clarified that the certification of election is a certificate stating that the candidate is the winner, likewise, a certificate is issued for constitutional amendment questions that pass. He added that the counties are responsible for distribution of certification of elections for county contests and county charter amendment questions. CEO Nago also clarified that the counties do not certify the results of their county elections as that falls under the State responsibility pursuant to HRS 11-155.

Commissioner Andrion expressed that he would still like transparency as it relates to inquiries made to the Office of Elections. He wants to be assured that the office is responding to these inquiries and feels that it is the Commission's role to ensure that the public is getting responses and supports to continue with the motion to have the Office of Elections to respond to public inquiries in writing within 15 days of receipt.

Chair Curtis commented that the Commission is solely advisory and that they do not have the powers to direct the office to answer every public inquiry stating that such a task is overwhelming and that it is the Office of Elections

which determines how they manage public inquiries.

Commissioner Cushnie asked what the mechanism would be for someone who would like to request for records relating HRS 11-155 in which CEO Nago replied that the individual can make the request under the Open Records Act. Commissioners Cushnie and Andrion expressed that such records should be posted online. Deputy AG Kam noted that state agency websites have a limit to its data storage therefore agencies must be cognizant of what is posted.

Commissioner Cushnie repeated the motion to have the Elections Commission direct the Office of Elections to respond in writing to all written inquiries within 15 business days in accordance with HAR 3-170-4 and HAR 3-170-5. Chair Curtis asked Commissioner Cushnie to amend the motion use the word advise instead of direct as the role of the Elections Commission is to advise the Office of Elections and not direct.

Deputy Stella Kam asked if the Commission would like to add a time period to the motion

Commissioner Kiguchi asked for clarification whether the Office of Elections would be required to respond to all inquiries. Commissioner Cushnie expressed that what he envisions is that the Office of Elections provide an acknowledgement that the inquiry has been received.

Commissioner Takenaka expressed her concern for the motion stating that it is too broad and should be more defined and expressed that she would be voting no to the motion.

Commissioner Aquino commented that the motion should be limited to more current inquiries rather than going back to previous years.

Commissioner Kiguchi asked if the motion would allow the Office of Elections latitude to make its own decisions which Chair Curtis responded yes clarifying that the motion is to advise the Office of Elections.

Commissioner Andrion asked CEO Nago if the Office of Elections already has in place procedures for responding to public inquiries in which CEO Nago replied that office has a general rule to respond within 48 hours.

Chair Curtis called for a vote on the motion.

Motion: Motion to advise the Office of Elections to respond in writing to all written inquiries starting from the approval of the Commission within 15 business days in accordance with HAR 3-170-4 and HAR 3-170-5. The motion passed.

AYES: Andrion, Aquino, Cushnie, Kiguchi, Papalimu, and Curtis

NOES: McAdam, Takenaka

EXCUSED: Kuwada

VI. Election Metrics [3:32 p.m.]

Commissioner Papalimu expressed that she would have preferred the report on Election Metrics provided by the Office of Elections and Offices of the County Clerks to have been in a more reader-friendly format.

Commissioner Cushnie commented that the report did not address ballots that were not voted on in each precinct. Chair Curtis clarified that the difference would be between the number of ballots sent and the number of ballots received.

Chair Curtis requested that any future reports submitted to the Commission delimited data files be included.

Chair Curtis asked for clarification about voters that received a ballot but were out-of-state. CEO Nago explained that the ballot is mailed to the voter's mailing address on file and that state law requires a Hawaii address. He added that the law also provides for voters to request an absentee ballot if they will be away from their residence for example if they are traveling. In that case, the voter would indicate on the absentee ballot request the address which they would like their ballot to be sent and that the request is only limited to that election.

Chair Curtis explained that the reason for requesting the metrics from the Office of Elections was a result of Commissioner Andrion request from the last meeting for metrics related to the election to include data on registered voters, ballots mailed, ballots received/counted, ballots returned/deficient, ballots returned/undeliverable and voter registration numbers. He added that the metrics would be used to assess the performance of the chief election officer. Commissioner Papalimu shared that she would have wanted to see metrics related to the cost of elections. CEO Nago shared that the cost of the elections can be found in the last report that was submitted to the legislature and the Commission.

Commissioner Cushnie requested that the topic of election metrics be moved to the next meeting for further discussion.

VII. Voted Ballot Security [3:43 p.m.]

CEO Nago shared that the Report on Election Security: The Authentication, Accounting, and Securing Ballots, was a joint report by the Office of Elections and the Offices of the County Clerks addressing election security. CEO Nago explained that procedures are in place to address election security and highlighted that security must be viewed in totality and not in pieces as each aspect works hand in hand to accomplish the goal of securing elections.

Commissioner Cushnie asked about checks and balances as it relates to chain of custody. CEO Nago explained that the report addresses non-fungible ballots. Chair Curtis asked CEO Nago if he could explain the discrepancy of the 3,400 ballots from County of Kauai. CEO Nago explained that he believes it was an election day issue relating to ballots that were collected at places of deposits.

Commissioner Andrion expressed that since the Commission has heard from the public and the Office of Elections and Counties regarding the matter on chain of custody, that he would like to make a motion to investigate chain of custody. The motion was seconded by Commissioner Papalimu.

Commissioner Papalimu expressed concern that the counties may not be properly trained. Chair Curtis asked County Clerk Moana Lutey if she could comment on the matter of chain of custody. Clerk Lutey stated that the county will comply with all legal requirements and shared that their office will work with the Office of Elections and the other counties to ensure uniformity. CEO Nago added that the Office of Elections and Counties do meet to discuss each offices roles and responsibilities and reconfirmed that they will comply with the law.

Chair Curtis expressed that the investigation should be more defined and proposed that the investigation be limited to investigation into the discrepancy of ballots to help flesh out chain of custody procedures. He believes that it would help recognize the deficiencies of the vote by mail process.

Commissioner Andrion expressed that he would support either a broad investigation or a more targeted investigation.

Commissioner Takenaka expressed that she is not in favor of a broad investigation but may consider an investigation if it is more targeted.

Commissioner McAdam expressed that she is not in favor of a broad investigation and added that looking into the Kauai issue might be something to consider.

Commissioner Cushnie made a motion to amend the original motion made by Commissioner Andrion to specify documentation be provided related to HAR 3-177-453 and HAR 3-177-61. The motion failed as no Commissioner

seconded the motion.

Commissioner Andrion made a motion to amend the motion to investigate that HAR 3-177-453 and HAR 3-177-61 are being followed as it relates to County of Kauai election. The motion was seconded by Commissioner Aquino. Chari Curtis called for a vote on the motion.

Motion: Motion to amend the original motion to investigate that HAR 3-177-453 and HAR 3-177-61 are being followed as it relates to County of Kauai election. The motion failed.

AYES: Andrion, Aquino, Cushnie, and Papalimu

NOES: Kiguchi, McAdam, Takenaka, and Curtis

EXCUSED: Kuwada

Chair Curtis brought the original motion to investigate chain of custody back for the Commission to consider. With no further discussion from the Commissioners, Chair Curtis called for a vote on the motion. The motion failed.

Motion: Motion for the Elections Commission to investigate chain of custody

AYES: Andrion, Cushnie, Papalimu

NOES: Kiguchi, McAdam, Takenaka, and Curtis

EXCUSED: Kuwada

VIII. Electronic Registration Information Center, Inc. (ERIC) [4:05 p.m.]

Chair Curtis shared that there is legislation regarding Hawaii joining ERIC. CEO Nago explained that ERIC is a nation-wide voter registration file sharing system further explaining that if a registered voter from Hawaii registers with another state that participates with ERIC, that Hawaii will be notified of the registration thus allowing Hawaii to take the proper steps to remove the voter from its voter roll.

The Commission discussed the drawbacks of joining ERIC and decided that the advisory position of the Commission is to oppose joining as the Commission has concerns regarding security.

Motion: Motion for the Elections Commission to oppose joining ERIC.

AYES: Andrion, Aquino, Cushnie, Papalimu, and Curtis

NOES: Kiguchi, McAdam, and Takenaka

EXCUSED: Kuwada

IX. Executive Session

Commissioner Takenaka made a motion to enter executive session to approve the minutes for the executive session for the meeting of January 16, 2024, and to discuss and evaluate the performance of and the reappointment of the Chief Election Officer. The motion was seconded by Commissioner Kiguchi and approved by the Commission noting the no vote of Commissioner Cushnie and excused absence of Commissioner Kuwada.

The Commission went into executive session at 4:20 p.m.

The Commission returned to regular session at 5:14 p.m. and Chair Curtis announced that the Commission will recess the meeting and will reconvene at 5:20 p.m.

Chair Curtis reconvened the Elections Commission meeting at 5:20 p.m.

X. Vote to approve the executive session minutes from January 16, 2024 [5:20 p.m.]

Commissioner Andrion made a motion to approve the minutes of the January 16, 2024 executive session meeting. The motion was seconded by Commissioner Papalimu and approved unanimously.

XI. Summary of the criteria and key points in the evaluation of the Chief Election Officer. Vote on the reappointment of the Chief Election Officer [5:21 p.m.]

Commissioner Andrion made a motion not to reappoint Scott Nago as Chief Election Officer. The motion was seconded by Commissioner Papalimu. Chair Curtis called for a vote on the motion. The motion failed.

AYES: Andrion, Aquino, Cushnie, Papalimu

NOES: Kiguchi, McAdam, Takenaka, and Curtis

EXCUSED: Kuwada

Commissioner Cushnie appealed the ruling stating that the agenda item was to vote on the reappointment of the Chief Election Officer and not a vote to not reappoint. Chair Curtis stated that the motion relates to reappointment and that the Commission made a motion about the reappointment.

Commissioner Andrion asked Deputy AG Kam for clarification on the confusion of the motion. Deputy AG Kam stated that the agenda provides the topic and that the Commission votes on the motion.

Commissioner Cushnie made a motion to appeal the Chair's decision and to adjourn the meeting which was seconded by Commissioner Andrion. Chair Curtis called for the vote on the motion. The motion failed.

Motion: Motion to appeal the ruling of the Chair to move to accept the last vote and to adjourn the meeting.

AYES: Andrion, Aquino, Cushnie, Papalimu

NOES: Kiguchi, McAdam, Takenaka, and Curtis

EXCUSED: Kuwada

XII. Adjournment

Commissioner Curtis adjourned the meeting at 5:37 p.m.

Respectfully submitted,



Nedielyn Bueno
Elections Commission Secretary