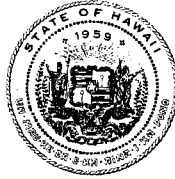


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June 30, 2016

The Honorable Rosalyn H. Baker
Senator, District 6
Chairperson, Committee on Commerce,
Consumer
State Capitol, Room 230
Honolulu, Hawai'i 96813

Dear Senator Baker:

Re: Public Utilities Commission – Interim Appointment

You have requested the reasoning that enables the Governor to make an interim appointment naming Mr. Thomas Gorak to the Public Utilities Commission (PUC).

Mr. Michael E. Champley's term on the PUC expires today, June 30, 2016. The Senate adjourned *sine die* on May 5, 2016. Article V, section 6 of the Hawai'i Constitution provides in relevant part that "[w]hen the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate." A vacancy exists upon the expiration of an appointee's term. See State v. Young, 137 La. 102, 68 So. 241 (La. 1915) (The expiration of the term of an appointive office causes a vacancy which a governor may fill by appointment during a recess of the Senate.) A term of office is a fixed period of time that an appointee is authorized to serve in office; it is a period that is established by law and specified by the executive in his or her letters of appointment. Denish v. Johnson, 121 N.M. 280, 910 P.2d 914 (N.M. 1996). In State v. Young, the court held that one who is appointed to fill a vacancy caused by the expiration of a term of office during a recess of the Senate is not required to wait until the Senate meets and confirms his appointment, but may enter upon the discharge of his office duties as soon as he has taken the oath and qualified in the manner required by law.

Article V, section 6 is self-executing; it does not contain the phrase "as provided by law," and therefore the holdover provision contained in HRS § 269-2 cannot be read to qualify the self-executing powers conferred upon the governor to exercise the governor's constitutional power to make an interim appointment. Under Article V, section 6, when a vacancy exists, the governor's

granting of a commission fills the office temporarily until the end of the next session of the senate unless an appointment is subsequently confirmed by the Senate. HRS § 269-2 must be read harmoniously with Article V, section 6 by interpreting "qualified" to mean something different from "confirmed" by the Senate.

On first review, it may appear that "qualified" means the same as "confirmed" by the Senate. Some courts have come to that conclusion. See, e.g., Mackie v. Clinton, 827 F.Supp. 56 (D.C.Cir. 1993) (until some successor has qualified, i.e., has been nominated by the President and confirmed by the Senate, there is no present vacancy but a prospective vacancy.)¹ In Hawai'i, because state law (HRS § 269-2) allows an incumbent to hold over until the successor is appointed and qualified, an argument can be made that there is no vacancy in the office at the end of a term and, therefore, the interim appointment provision of Article V, section 6, is not available. We believe that this interpretation would effectively constitute an unconstitutional limitation on the constitutional power conferred on the governor and must be avoided by construing the word "qualified" to refer to the governor's review of the qualifications of the individual as well as the taking of the oath of office by the appointee. Where different words are used, courts presume that the difference is intentional and give the difference effect when construing the statute. Cannabis Action Coalition v. City of Kent, 183 Wash.2d 219, 351 P.3d 151 (2015); Agustin v. Dan Ostrow Const. Co., 64 Haw. 80, 636 P.2d 1348 (1981). Our legislature has recognized the difference between the confirmation of an appointment and the appointment itself. See HRS § 304A-104 (with regard to the Board of Regents "[e]very member may serve beyond the expiration date of the member's term of appointment until the member's successor has been appointed by the governor and confirmed by the senate in accordance with article X, section 6 of the Hawaii State Constitution.") In appointing a PUC commissioner, HRS § 269-2 uses the word "qualified" and not "confirmed." The statute provides that the governor qualifies a person by considering persons who have had experience in "accounting, business, engineering, government, finance, law, or other similar fields." We believe that "qualified" means the governor's review of the appointee's qualifications as well as the taking of the oath of office.

Confirmation is a separate and distinct function that makes the appointment of a qualified candidate valid and final, vesting entitlement to the office for the entire statutory term. See Seeman v. Kinch, 606 A.2d 1308 (R. I. 1992); Sierra Club v. Castle & Cooke, 132 Hawai'i 184, 192, 320 P.3d 849, 857 (2013). In Seeman, the Rhode Island Supreme Court held that "[t]he advice and consent of the Senate is not part of the qualification process." In that case, qualification meant the taking of the oath of office and the posting of a bond. The court made a distinction between the confirmation of an appointment and the appointment itself, concluding that confirmation "makes the appointment of a qualified candidate valid and final, vesting entitlement to the office for the entire statutory term in that appointed person. However, confirmation is not needed to make a valid appointment, thereby creating a vacancy." The court reasoned that "[t]he Senate loses nothing in this process because it retains its exclusive overview power to confirm or to deny the appointee's final vesting of the position, without regard to the

¹ Order vacated on grounds of mootness. Mackie v. Clinton, 1994 WL 163761(1994).
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fact that such review occurs later once the Senate has reconvened."

Our previous opinion interpreted the holdover provision of a statute and not the interim appointing power conferred under article V, section 6 of the Hawai'i Constitution. In Attorney General Opinion 80-4, we advised a legislator that a holdover member of the Board of Regents could continue to serve as a *de jure* holdover even when that person was nominated for a second term but failed to be confirmed by the Senate. That Opinion was effectively overruled by the Hawai'i Supreme Court in Sierra Club v. Castle & Cooke.

Based upon the foregoing, we believe that the Governor's interim appointing authority is conferred by the Hawai'i Constitution and cannot be limited by a statute. Accordingly, we advise that the Governor can make an interim appointment to the PUC upon a vacancy arising from the expiration of a member's term and after the Legislature has adjourned *sine die*.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Chin', written in a cursive style.

Douglas S. Chin
Attorney General