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April 3, 2007

Mr. Melvin I. Chiba
Chairperson
Judicial Selection Commission
417 S. King Street
Honolulu, Hawai'i 96813

Dear Mr. Chiba:

Re: Article VI, Section 3 of the Hawai'i Constitution

This responds to your request for advice as to whether the Chief Justice timely made his selections for district court appointments and, if not, how the Judicial Selection Commission should proceed.

We understand that on March 1, 2007, the Judicial Selection Commission presented the Chief Justice with two lists of nominees to fill two district court vacancies. The Chief Justice made his selections on Monday, April 2, 2007, and presumably has sent his two nominations to the Senate for confirmation. The thirtieth day from March 1, 2007 was Saturday, March 31, 2007. The question then is whether the State Constitution required the Chief Justice to have submitted the names of his nominees no later than Saturday, March 31, 2007.

We advise that under the plain meaning of article VI, section 3, the Chief Justice did not make his nominations within the thirty-day time period. Because the Chief Justice's nominations were untimely, it is the responsibility of the Judicial Selection Commission to independently make the appointments of its choice, notwithstanding the fact that the Chief Justice may have submitted his nominations.

Article VI, section 3 provides in relevant part that:

The chief justice, with the consent of the senate, shall fill a vacancy in the district courts by appointing a person from a list of

not less than six nominees for the vacancy presented by the judicial commission. If the chief justice fails to make the appointment **within** thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate.
[Emphasis added.]

In interpreting the Hawai'i Constitution, the Hawai'i Supreme Court has instructed us that we are to begin with the words of the Constitution itself. "In interpreting constitutional provisions, the general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." Taomae v. Lingle, 108 Hawai'i 245, 251, 118 P.3d 1188, 1194 (2005). Words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them. Pray v. Judicial Selection Comm'n, 75 Haw. 333, 342, 861 P.2d 723, 727 (1993). Every clause in the Constitution is to have meaning. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 2 L.Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.")

We believe that the plain language of article VI, section 3 required the Chief Justice to have made his two nominations for district court appointments within thirty days after being presented the lists from the Judicial Selection Commission. The word "within" as used in article VI, section 3, we believe, is of critical importance to the interpretation of this provision. In First Federal Sav. & Loan Ass'n v. Pellechia, 37 Conn. App. 423, 426, 656 A.2d 688 (Conn. App. 1995), the Connecticut Appeals Court stated:

The meaning of within is not longer in time than; Webster's New International Dictionary (2d Ed.); not later than; 69 C.J. 1315; 45 Words & Phrases (Perm. Ed.), p. 378. The word within is almost universally used as a word of limitation, unless there are other controlling words in the context showing that a different meaning was intended. (Internal quotation marks omitted.) Royce v. Freedom of Information Commission, 177 Conn. 584, 586-87, 418 A.2d 939 (1979).

Mr. Melvin I. Chiba
April 3, 2007
Page 3

In the debates in Committee of the Whole on Committee Proposal No. 10, relating to the Judiciary, the following was stated by Delegate Walter H. Ikeda:

The selection process will work in the following manner. After a list of names is submitted to the governor or chief justice, the appointing authority would have 30 days in which to make a selection. If for some reason the governor or the chief justice failed to act or rejected all names on the list, the commission would make the selection, which must be confirmed by the senate.

Debates in Committee of the Whole on the Judiciary, 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 345 (1980).

In Standing Committee Report No. 52 of the 1978 Constitutional Convention of Hawaii, the Committee Report stated that "[a]fter much deliberation and vigorous discussion, your Committee decided that the governor and the chief justice would each have 30 days to act on the list of nominees from the time the list is presented. In the event the governor or the chief justice fails to act within the allotted time, then the commission would make the appointment from the list." The Committee then concluded and recommended that the section be amended to "require that any selection be confirmed by the senate where the appointment is made by the governor and that action by either the governor or the chief justice be completed within thirty (30) days of presentation. In the event that this time limit expires or the senate rejects every name on the list, the commission would make the appointment." Standing Committee Report No. 52 at 621 (1980). Standing Committee Report No. 52, 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 621 (1980).

The framers of the Hawai'i Constitution intended to prescribe a time limit for the Chief Justice to act. Nothing in the constitutional history suggests that this time limit should be construed other than as plainly written. Unlike other provisions in the Hawai'i Constitution where the Constitution specifically excludes Saturdays, Sundays, and holidays in computing the number of days designated in the Constitution, article VI, section 3 contains no such provision. For example, article III, section 10, the Constitution provides that "Saturdays, Sundays, holidays, the days in mandatory recess and

Mr. Melvin I. Chiba
April 3, 2007
Page 4

any days in recess pursuant to a concurrent resolution shall be excluded in computing the number of days of any session," and article III, section 16 similarly provides that "[i]n computing the number of days designated in this section, the following days shall be excluded: Saturdays, Sundays, holidays and any days in which the legislature is in recess prior to its adjournment as provided in section 10 of this article."¹

Accordingly, in 1994, when the Legislature proposed the amendment to the Constitution to require consent of the senate for district court judges (S.B. No. 2182), the Legislature could have included language similar to article III, sections 10 and 16 to exclude Saturdays, Sundays, or holidays from the computation of the time limit for the Chief Justice to act but did not. We therefore believe that under the plain language of article VI, section 3 of the Hawai'i Constitution, the Chief Justice's nominations made on April 2, 2007, are untimely, and thus that the appointments must be made by the Judicial Selection Commission.

Very truly yours,



Russell A. Suzuki
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General

¹ In State v. Park, 55 Haw. 610, 525 P.2d 586 (1974), the Hawai'i Supreme Court interpreted a statute requiring the filing of a candidate's expense statement by unsuccessful candidates within 20 days following a primary election to include Saturdays and Sundays as there was nothing in the statute providing for the exclusion.