

BENJAMIN J. CAYETANO
GOVERNOR



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February 16, 1996

The Honorable Benjamin J. Cayetano
Governor of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

Re: Organizational Placement of Executive Branch Agencies

By memorandums dated February 2 and 11, 1996, a member of your staff requested a copy of written legal advice that your staff member incorrectly believed to have been already issued regarding the constitutional validity of the placement of state executive branch agencies placed within the Office of the Governor. Although we had orally advised you of our concern about the constitutional validity of the placement of those agencies, we have not previously issued an opinion that explains our concerns. Consequently, this opinion serves to confirm our previous oral advice and to provide further explanation in support of our advice.

We believe that the first paragraph of section 6 of article V of the Constitution of the State of Hawaii requires that state executive branch agencies be placed within the principal departments of the executive branch of state government, unless they are commissions or agencies that are both temporary and for special purposes. The Office of the Governor is not a principal department of the executive branch of state government. Therefore, any agency that is not temporary and for special purposes cannot be validly placed within the Office of the Governor.

The first paragraph of section 6 of article V of the State Constitution provides as follows:

All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and

Op. No. 96-1

related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

The requirement of allocation by law among and within not more than twenty principal departments was originally proposed in Committee Proposal No. 22 of the Committee on Executive Powers and Functions of the Constitutional Convention of Hawaii of 1950. As originally proposed, the allocation requirement was in the first paragraph of section 10 of Committee Proposal No. 22, which read as follows:

SECTION 10. [Executive and Administrative Offices and Departments.] All executive and administrative offices, departments and instrumentalities of the State government and their respective functions, powers and duties shall be allocated by law among and within not more than 20 principal departments, in such manner as to group the same according to major purposes so far as practicable. Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 221 (1960).

In Standing Committee Report No. 67, the Committee on Executive Powers and Functions stated in part as follows:

Section 10 deals with executive and administrative offices and departments.

At the outset it should be declared that said Section 10 incorporates paragraphs 1, 2 and 4, Section IV, Article V of the New Jersey Constitution, with some modifications.

The number of principal departments in the executive branch shall be limited to not more than 20 and the Legislature shall be required to allocate the existing departments, boards and other agencies among and within the 20 or less principal departments.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 217 (1960).

During the Committee of the Whole debates held on June 20, 1950, Delegates Randolph Crossley of Kapaa, Kauai, and W. Harold Loper and Harold S. Roberts of Honolulu, Oahu, discussed the

purposes of the allocation of agencies within a limited number of departments:

CROSSLEY: I'd like to continue, if I could, uninterrupted. I was trying to point out that when you look at states like New Jersey, that is limited and does operate under 20, and some of these other states, that the whole purpose of trying to get a fewer number of boards is just to prevent what the previous speaker is talking about, and that is that every man who is going to be in charge of some division of government will have an entire independent setup of his own. If you limit the number, it will be found that those functions of government that are well related can be brought together and put under a single department without losing any of the efficiency. As a matter of fact, every single study that has been made on this subject, every revision of a state constitution, has brought about a limiting of the number for the sole purpose of bringing together these departments and trying in that manner to cut the cost of government and to bring about a more efficient government in so doing.

. . . .

LOPER: I wish to speak in support of the committee report and the position taken by the delegate from Kauai and add just this additional argument, which I don't believe has been brought out. Part of the reason for limiting the number to 20 is based upon a principle of organization, good administrative organization whether military, business or governmental, and that is that there is a limit to the spread of supervisory authority and responsibility, and by limiting it -- as a matter of fact 20 is too many to be supervised by any one executive -- but by limiting it, it's an invitation when some new function of government comes along, to find one of the existing departments to assign it to instead of setting up another commission or department.

. . . .

ROBERTS: I'd like to speak in support of the proposal. The section, to me, is a very valuable one. It goes to the very heart of proper executive function and integration of operations so that the governor, the chief executive, has a limited number of departments that he, personally, can keep in touch with and can follow the functions and operations of

those departments. The section does not spell out how the existing departments are to be allocated, that is left for the legislature. The legislature then can re-allocate and place the departments where they think they properly belong. This proposal merely provides an adequate method of administration with a limited number of departments so that the executive can keep personally in touch with their operation and see to it that the executive functions are effectively carried out in the State. I think the purpose is good and I think we ought to support the proposal.

2 Proceedings of the Constitutional Convention of Hawaii 1950, at 318-19 (1961).

In accordance with the first paragraph of section 6 of article V of the State Constitution, section 26-4, Hawaii Revised Statutes, provides that, "[u]nder the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments that are hereby established," and lists the eighteen state executive branch agencies established as principal departments of the state executive branch. The offices of the Governor and of the Lieutenant Governor are constitutional offices established by sections 1 and 2 of article V of the State Constitution and are not principal departments of the state executive branch listed in section 26-4.

The second sentence of the first paragraph of section 6 of article V of the State Constitution does provide for an exception to the requirement of allocation by law within a principal department. The second sentence states, "Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department." We initially did have some uncertainty whether this sentence referred to "commissions or agencies" that are both "temporary" and "for special purposes" or whether this sentence referred to "temporary commissions" and "agencies for special purposes." Hawaii's provision was based on the New Jersey Constitution, which states in paragraph 1 of section IV of article V, "Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department." The requirements of "temporary" and "for special purposes" both applied to the commissions referred to. However, there still remained the question of whether the Hawaii Constitution's wording was deliberately changed to make the requirement of "temporary" status applicable only to "commissions" and the requirement of

"for special purposes" applicable only to "agencies." We believe that the wording was not substantively changed.

Committee Proposal No. 22, Relating to the Executive, originally contained the same wording as the New Jersey Constitution, "Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department." 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 221 (1960). The Committee of the Whole of the Constitutional Convention of Hawaii of 1950 reported on the pertinent provision in Committee Proposal No. 22, R.D. 1, stating, "Section 10, 1st paragraph, is recommended for adoption without amendment." Comm. of the Whole Rep. No. 17, 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 325 (1960). Committee Proposal No. 22 passed second reading and was referred to the Committee on Style. The Committee on Style "examined each proposal agreed upon in the Committee of the Whole, studied the language of the proposal and arranged it as an article, or part of an article, within the format of the constitution, but without changing the substance or meaning of the article approved by the convention at second reading." 1 Proceedings of the Constitutional Convention of Hawaii 1950, Preface at ix (1960) (emphasis added).

In Standing Committee Report No. 119, the Committee on Style reported on the provision originally designated as "section 10" in pertinent part as follows:

Section 6. (See Section 10 of original draft). The letter "s" in the word "state" (second line of paragraph 1) is not capitalized in the redraft, the word "state" in this instance being used as an adjective. The words "or agencies" have been inserted between the words "commissions" and "for" in lines 7-8, to conform to what your committee believes to have been the intent of the Convention.

The word "however," together with the commas setting it apart, have been deleted in line 8.

The words "such commissions" have been deleted before the word "need" in line 9, as unnecessary in view of the reconstruction of the sentence.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 273 (1960) (emphasis added). As amended by the Committee on Style, the second sentence of the first paragraph read, "Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department." 1 Proceedings of the Constitutional Convention of

The Honorable Benjamin J. Cayetano
February 16, 1996
Page 6

Hawaii 1950, at 274 (1960). The sentence remains unchanged in the current constitution.

The report of the Committee on Style was presented to the convention on July 11, 1950, and was adopted without any reported discussion. 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 120 (1960). With a further amendment on the floor (to add another sentence regarding interim appointments), Committee Proposal No. 22, Relating to the Executive, passed third reading on July 14, 1950. 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 126 (1960).

Consequently, since the words "or agencies" were inserted by the Committee on Style, which was to make changes without changing the substance or meaning, we believe that the "commissions or agencies" referred to in the second sentence of the first paragraph of section 6 of article V of the State Constitution must meet both of the stated requirements and must be both "temporary" and "for special purposes."

In conclusion, we believe that "offices" or other agencies created by law and not placed within a principal department of the state executive branch, "in such a manner as to group the same according to common purposes and related functions," are subject to attack as being invalidly placed in violation of the first sentence of the first paragraph of section 6 of article V of the State Constitution. However, if the "offices" or other agencies are temporary and for special purposes, they may be established by law and need not be allocated within a principal department pursuant to the second sentence of the first paragraph of section 6 of article V of the State Constitution.

Very truly yours,

Maurice S. Kato

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Deputy Attorney General

APPROVED:

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Op. No. 96-1