



The Senate

STATE CAPITOL
HONOLULU, HAWAII 96813

February 16, 2021

Testimony of
Donna Mercado Kim
Senator, District 14

Senate Bill 1395

Aloha Chair Moriwaki, Vice-Chair Dela Cruz, and members of the Senate Committee on Government Operations:

I am pleased to testify in support of Senate Bill 1395: Relating to Boards and Commissions.

Senate Rule 37 on Nominations and Appointments states in part:

“...the Senate standing committee to which a nomination, removal of the chief legal officer or appointment is referred, shall report to the Senate with a recommendation to advise and consent, confirm, or reject on or before the fifty-ninth day of the session.”

However, the Governor has no requirement to make appointments to boards and commissions timely. As a result, many seats remain vacant for long periods of time and quorums are often difficult due to vacancies and absences.

Additionally, the general law limits holdovers to two legislative sessions, which was intended for all boards and commissions. However, the Attorney General’s opinion is that this general law does not apply to Hawaii Tourism Authority (HTA) appointments since it specifically states, “until the Governor names a successor.” The holdover law was adopted as an accommodation to assist the Governor; however, it seems that it is being utilized to circumvent the purpose of confirmation.

The HTA holdover of Richard Fried is a good example. In May 2018, the Senate informed the Governor that Richard Fried, Jr. was likely not to have the votes to be confirmed for a second 4-year term, the Governor withdrew his name. The Governor has since not sent a nomination for this position in the 2019, 2020 sessions and currently no nomination has been made by Governor and sent to the Senate. Mr. Fried has been serving for three years, despite the fact that he has never been confirmed.

This is not the first time this has happened over the years and nominations for vacancies often fail to be made prior to the legislative session ending, resulting in continued vacancies and holdovers. Clearly, it is time to revise the law and put in reasonable time limits that such appointments must be made.

The following is an email from Deputy Attorney General Dana Viola:

On Aug 5, 2020, at 10:36 PM, Viola, Dana O <dana.o.viola@hawaii.gov> wrote:

Dear Senator Kim:

You inquired whether L. Richard Fried, Jr. could remain on the Hawaii Tourism Authority (HTA) Board of Directors as a holdover member beyond the 2020 legislative session? Our answer is "Yes."

Mr. Fried's nomination for a second term on the HTA Board was to be considered for confirmation in the 2018 legislative session. However, on May 3, 2018, prior to the end of the session, the Governor issued G.M. No. 759, withdrawing Mr. Fried's nomination, so the Senate did not hold a vote on his nomination for a second term. Thereafter, Mr. Fried completed his first four-year term on June 30, 2018. He has been in holdover status ever since.

Hawaii Revised Statutes § 201B-2(c) provides: "Members shall be appointed by the governor for terms of four years; provided that membership on the board shall not exceed eight consecutive years; provided further that each member shall hold office until the member's successor is appointed and qualified." We interpret the second proviso as modifying the four-year term or eight-year limitation, thus allowing a member whose term has ended to continue as a holdover until their successor is appointed and qualified.

"Qualified," however, does not mean confirmed by the Senate. According to AG Op 2016-3, "qualified" refers to the Governor's review of the candidate's experience and expertise to determine if the candidate is qualified for the position. The advice and consent of the senate (or "confirmation") is not part of the qualification process. Therefore, an HTA Board member could remain in holdover status after their term has ended for as long as it takes for the Governor to pick a successor.

Accordingly, because the Senate did not take action on Mr. Fried's nomination for a second term, he can continue as a holdover after the completion of his first term and until his successor is appointed and qualified, which would include extending his holdover beyond the end of the 2020 legislative session. Please know, however, that the Governor will be selecting a successor and does not intend for Mr. Fried's holdover to run indefinitely.