

House Spec. Com. Rep. No. 2-15

The Special Committee (Special Committee) To Consider Miscellaneous Communication No. 1003 was formed pursuant to Rule 14 of the Rules of the House of Representatives of the Twenty-Eighth Legislature and memorandum dated February 4, 2015 issued by Speaker of the House of Representative Joseph Souki (Speaker's Memorandum). Six members of the House were appointed to the Special Committee: Karl Rhoads, Chair (Committee on Judiciary Chair); John M. Mizuno (Vice Speaker); Scott K. Saiki (Majority Leader); Cindy Evans (Majority Floor Leader); Ken Ito (Majority Whip); and Beth Fukumoto Chang (Minority Leader). Speaker's Memorandum included six rules for the conduct of the Special Committee's proceedings.

Speaker's Memorandum tasked the Special Committee with "investigat[ing] the challenge [to Speaker Emeritus Say] without delay." (Speaker's Memorandum, Rule 4) The Special Committee was required "to review relevant written documentation submitted by the petitioner and the challenged member." The Chair of the Special Committee was given the discretion to conduct a hearing "where the petitioner and the challenged member, or their respective attorneys, shall be provided an opportunity to make a brief statement and answer questions from the special committee." (Speaker's Memorandum, Rule 4)

At the conclusion of the Special Committee's investigation, it was obligated to write this report of its findings and recommendations to then be submitted for consideration by the members of the full House. Speaker's Memorandum empowered the House to affirm the report, reject the report, or take other action as it so determines. (Speaker's Memorandum, Rule 6)

Rule 5 of the Speaker's Memorandum provided the following guidance to the Special Committee in its investigation and report and to the full House in its consideration of the report:

Rule 5. Only compelling evidence shall be sufficient for the House to consider finding that the member does not have the requisite qualifications to serve.

I. Issue for Consideration by the Special Committee

Your Special Committee was charged with investigating a challenge to Speaker Emeritus Say's qualifications to hold office as the representative of the Twentieth Representative District.

The House of Representatives and any committees established under it are obligated to operate under and apply applicable constitutional and statutory provisions. There are several provisions particularly relevant to this matter:

Article II, Section 1 Qualifications [to vote]. Every citizen of the United States who shall have attained the age of eighteen years, have been a resident of this State not less than one year next preceding the election and be a voter registered as provided by law, shall be qualified to vote in any state or local election.

Article III, Section 12 Organization; Discipline; Rules; Procedure. *Each house shall be the judge of the elections, returns and qualifications of its own members* and shall have, for misconduct, disorderly behavior or neglect of duty of any member, power to punish such member by censure or, upon a two-thirds vote of all the members to which such house is entitled, by suspension or expulsion of such member... (emphasis added)

Article III, Section 6 Qualifications of Members. ...No person shall be eligible to serve as a member of the house of representatives unless the person has been a resident of the State for not less than three years, has attained the age of majority and is, prior to filing nomination papers and thereafter continues to be, a qualified voter of the representative district from which the person seeks to be elected...

Hawaii Revised Statutes §11-13 Rules for determining residency. For the purpose of this title, there can be only one residence for an individual, but in determining residency, a person may treat oneself separate from the person's spouse. The following rules shall determine residency for election purposes only:

- (1) The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has the intention to return;
- (2) *A person does not gain residence in any precinct into which the person comes without the present intention of establishing the person's permanent dwelling place within such precinct;*
- (3) If a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place;
- (4) The mere intention to acquire a new residence without physical presence at such place, does not establish residency, *neither does mere physical presence without the concurrent present intention to establish such place as the person's residence;*
- (5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
- (6) No member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this State solely by reason of being stationed in the State;
- (7) A person loses the person's residence in this State if the person votes in an election held in another state by absentee ballot or in person.

In case of question, final determination of residence shall be made by the clerk, subject to appeal to the board of registration under part III of this chapter. (emphasis added)

II. Review of Documents Submitted Prior to the February 13, 2015 Hearing

Once your Special Committee was established on February 4, 2015, the Committee began reviewing Miscellaneous Communication No. 1003 (M.C. No. 1003). M.C. No. 1003 was a four page letter with 123 pages of attachments submitted to the Speaker by counsel for six individuals (Petitioners) who challenged the qualifications of Speaker Emeritus Say to serve as the representative of the Twentieth District. The attachments to M.C. No. 1003 are as follows:

1. Declaration of R. Hussey, alleging lack of activity at Speaker Emeritus Say's house at 1822 10th Avenue, dated September 8, 2014;
2. Declaration of K. Bonk, alleging statements made at a February 13, 2013 Palolo Neighborhood Board meeting and at a February 22, 2013 meeting with Speaker Souki, dated September 8, 2014;
3. Copy of Petitioners' Petition for Writ of Quo Warranto, dated December 29, 2012;
4. W. J. Kelly Letter to the City Clerk for the City and County of Honolulu, challenging Speaker Emeritus Say's residency and qualifications, dated May 4, 2006;
5. City Clerk Letter to Kelly, finding that correction to Speaker Emeritus Say's voter registration was not warranted, dated June 22, 2006;
6. City Clerk Certification of Response to Kelly's challenge, dated September 26, 2006;
7. M. Palcic Letter to the City Clerk for the City and County of Honolulu, challenging Speaker Emeritus Say's and Cora Say's residency, dated August 17, 2006, and including as exhibits an August 2006 log of Palcic's visits to 1822 10th Avenue, several photographs of 1822 10th Avenue, and a printout of City and County of Honolulu parcel data for 1822 10th Avenue;
8. City Clerk Certification of Palcic's challenge, dated September 26, 2006;
9. City Clerk Letter to Palcic, upholding its earlier determination that the voter register did not warrant a correction regarding Speaker Emeritus Say, dated August 22, 2006;
10. City Clerk Certification of Response to Palcic's challenge, dated September 26, 2006;
11. Board of Registration for the City and County of Honolulu Findings of Fact, Conclusions of Law and Decision, upholding the City Clerk determination regarding Speaker Emeritus Say, dated October 13, 2006;
12. V. Law and J. Calasicas Letter to the City Clerk for the City and County of Honolulu, challenging Speaker Emeritus Say's residency, dated July 29, 2010, and including as exhibits the May 4, 2006 Kelly complaint to the City Clerk and City Clerk response, a complaint from M. Palcic to the Office of Elections dated August 24, 2006, printout of City and County of Honolulu property search results for 2247 Star Road, printout of ancestry record for Stephen T. Kotake, copy of Honolulu Star-Bulletin obituaries for March 29, 2001, Declaration of Calvin K.Y. Say dated August 28, 2006, Declaration of Cora K. Say undated, the Board of Registration October 13, 2006 Findings of Fact, Conclusions of Law and Decision regarding the Palcic complaint, Cora Say Letter to the Department of the Attorney General dated November 1, 2006 regarding the appeal of the City Clerk's dismissal of the August 17, 2006 Palcic complaint, printouts of queries regarding 1822 10th Avenue and 2247 Star Road that were labeled Board of Water Supply Queries, printout of City and County of Honolulu property tax bill information for 1822 10th Avenue, affidavit of V. Law sworn on July 29, 2010, affidavit of J. Hirakawa sworn on July 23, 2010, printout of ancestry record for Hugh Sun Chung Say, and printout of City and County of Honolulu property search results for 1984 10th Avenue;
13. City Clerk Letter to Law and Calasicas, finding lack of evidence to indicate that Speaker Emeritus Say had abandoned his residence at 1822 10th Ave and therefore 1822 10th Ave continued to be his residence for voter registration purposes, dated September 7, 2010;
14. Copy of *Hussey v. Say*, 325 P.3d 641 (Haw. Ct. App. 2014).

Prior to the hearing, Petitioners' counsel submitted a letter expressing Petitioners' opinion on the Special Committee's process, dated February 10, 2015.

Speaker Emeritus Say's counsel submitted a pre-hearing letter to the Committee, dated February 11, 2015. The letter was 17 pages in length plus 115 pages of attachments. The attachments were as follows:

1. Declaration of Speaker Emeritus Say, regarding his residence and prior challenges, undated;
2. Declaration of Cora Say, regarding the Say's residences and prior challenges, undated;
3. Voter record printouts for Petitioner Natalia Hussey-Burdick, Petitioner Ramona Hussey, and Speaker Emeritus Say, dated 2/5/2015;
4. City Clerk Certification of Kelly's challenge, dated September 26, 2006;
5. W. J. Kelly Letter to the City Clerk for the City and County of Honolulu, challenging Speaker Emeritus Say's residency and qualifications, dated May 4, 2006;
6. City Clerk Letter to Kelly, finding that correction to Speaker Emeritus Say's voter registration was not warranted, dated June 22, 2006;
7. City Clerk Certification of Response to Kelly's challenge, dated September 26, 2006;
8. M. Palcic Letter to the City Clerk for the City and County of Honolulu, challenging Speaker Emeritus Say's and Cora Say's residency, dated August 17, 2006, and including the exhibits listed with attachment #7 to M.C. No. 1003;
9. City Clerk Certification of Palcic's challenge, dated September 26, 2006;
10. City Clerk Letter to Palcic, upholding its earlier determination that the voter register did not warrant a correction regarding Speaker Emeritus Say, dated August 22, 2006;
11. City Clerk Certification of Response to Palcic's challenge, dated September 26, 2006;
12. Board of Registration for the City and County of Honolulu Findings of Fact, Conclusions of Law and Decision, upholding the City Clerk determination regarding Speaker Emeritus Say, dated October 13, 2006;

13. V. Law and J. Calasicas Letter to the City Clerk for the City and County of Honolulu, challenging Speaker Emeritus Say's residency, dated July 29, 2010, and including the exhibits listed with attachment #12 to M.C. No. 1003;
14. City Clerk Letter to Law and Calasicas, finding lack of evidence to indicate that Speaker Emeritus Say had abandoned his residence at 1822 10th Ave and therefore 1822 10th Ave continued to be his residence for voter registration purposes, dated September 7, 2010;
15. Office of Elections letter to Speaker Emeritus Say informing him of an objection to his nomination papers filed by M. Nicholson and M. Heskett and providing a copy of the objections, dated June 9, 2014;
16. Office of Elections letter to M. Nicholson, finding that Speaker Emeritus Say's nomination papers were filed in conformity with the law, dated June 16, 2014;
17. Office of Elections letter to M. Heskett, finding that Speaker Emeritus Say's nomination papers were filed in conformity with the law, dated June 16, 2014.

Speaker Emeritus Say supplemented his and his wife's declarations by letter dated February 13, 2015.

III. Special Committee Hearing of February 13, 2015

Your Special Committee Chair determined that a hearing was necessary to learn more from the Petitioners about the complaint and to provide the Committee an opportunity to ask questions of the Petitioners and Speaker Emeritus Say, or their respective counsel. Counsel for Petitioners and Speaker Emeritus Say were consulted about hearing dates and both confirmed their availability for the afternoon of February 13, 2015. On February 6, two days after the Special Committee was established, a notice for a public hearing on February 13, at 2:00 pm at the Hawaii State Capitol was issued. (Special Committee Hearing Notice 02-13-15)

Pursuant to Rule 4 as announced in Speaker's Memorandum, counsel were advised that they would each be allowed to make a brief statement of twenty minutes followed by questions from the Special Committee members. Pursuant to standard practices of the legislature, the legislature's public access broadcast system, Capitol TV, was permitted, if it chose, to live broadcast the hearing, which it did. The hearing was also made available to the public via live webstreaming by Olelo Community Media. In addition, the Chair determined that the hearing should be transcribed by a legal reporter, at the House's expense.

While the parties were encouraged to submit information as soon as possible to help inform the Special Committee's understanding, they were notified, on February 6, that the deadline for receipt of written materials was 5:00 pm on February 17. This was to allow reasonable time for either party to respond, if it desired, to questions from the Committee and arguments made by opposing counsel at the hearing.

The hearing began as scheduled at 2:00 pm with the Chair welcoming the parties and the public, reviewing the guidelines for the hearing, and allowing counsel an opportunity to clarify the guidelines. Then Petitioners' counsel presented their statement, utilizing approximately 16 of the 20 available minutes. The Special Committee asked questions of Petitioners' counsel for 25 to 30 minutes. After a brief recess of approximately 5 minutes, Speaker Emeritus Say's counsel presented his statement for approximately 10 of the 20 available minutes, followed by Committee members' questions for another 25 to 30 minutes. Additionally, Speaker Emeritus Say's counsel provided a written copy of his presentation to the Committee.

As specified in the hearing notice and relayed in advance to the parties' counsel, the Committee did not engage in discussion or decision-making at the conclusion of the February 13th hearing. This was to allow the Committee time for further review of the information presented as of the hearing as well as any subsequent information provided by the parties.

IV. Investigation and Review of Documents Submitted Post-Hearing

The parties submitted the following supplemental documents following the February 13th hearing and in accordance with the agreed-upon deadline of February 17:

1. Petitioners' letter, via its counsel, dated February 17, 2015, comprising five pages in length plus a one-page attachment of a printout of a City and County of Honolulu building permit search;
2. Speaker Emeritus Say's letter, via his counsel, dated February 17, 2015, comprising five pages in length and the following 35 pages of attachments:
 - a. Declaration of Speaker Emeritus Say, regarding his residence, prior challenges, and renovations to the 1822 10th Avenue property, dated February 17, 2015;
 - b. Declaration of Edward Oda, regarding renovations to the 1822 10th Avenue property performed in 2013, dated February 17, 2015;
 - c. City and County of Honolulu Parcel History for 1822 10th Avenue;
 - d. City and County of Honolulu Property Assessment notices for 1822 10th Avenue;
 - e. Title history for 1822 10th Avenue;
 - f. Proposal for work at 1822 10th Avenue, dated January 9, 2002;
 - g. City and County of Honolulu building permit for 1822 10th Avenue, issued March 22, 2002;
 - h. Invoice for work performed at 1822 10th Avenue, with two dates noted: March 31 and April 3, 2002;
 - i. Invoice for work performed at 1822 10th Avenue, dated April 25, 2002;
 - j. Cashier's check for work performed at 1822 10th Avenue, dated May 7, 2002;

- k. Personal check for work performed at 1822 10th Avenue, dated May 7, 2002;
- l. Invoice for work performed at 1822 10th Avenue, dated June 13, 2002;
- m. Personal check for work performed at 1822 10th Avenue, dated June 19, 2002.

In addition to the extensive information provided by the Petitioners and by Speaker Emeritus Say, your Committee independently verified relevant information. This examination included the following:

1. Reviewing property tax records for the City and County of Honolulu, which confirmed that Speaker Emeritus Say and his wife owned the house at 1822 10th Avenue, Honolulu, HI 96816, and had claimed a homeowners' exemption for the property, which is only available to individuals who own and occupy the property as their principal home;
2. Reviewing the Palolo Neighborhood Board No. 6 Regular Meeting Minutes for February 13, 2013, which reported that Speaker Emeritus Say "noted that he does reside at 1822 10th Avenue 90 percent of the time;"
3. Reviewing Special Committee Report No. 1 from the Committee on Credentials that was presented to and adopted by the House on January 21, 2015, and had found that Speaker Emeritus Say was "duly qualified" to sit as a member of the House as the representative of the Twentieth District;
4. Reviewing the Certificate of Election issued by the Office of Elections by transmittal dated December 5, 2014 for Speaker Emeritus Say which stated that he was "duly elected" as the representative of the Twentieth District;
5. Checking the voter registration records for Speaker Emeritus Say, which verified that he was registered to vote at 1822 10th Avenue, Honolulu, HI 96816;
6. Checking the voter registration records for the six Petitioners, which verified that four of the Petitioners were registered voters in the Twentieth Representative District and that one Petitioner was a registered voter in the Twenty-Third Representative District and another Petitioner was a registered voter in the Fifty-First Representative District.

It should be emphasized that Rule 1 of Speaker's Memorandum requires that in order to file a challenge with the House, a petitioner must be a registered voter who lives in the district of the member being challenged. While two of the six Petitioners were not registered voters in the Twentieth Representative District, there were four other Petitioners who met the requirements to challenge Speaker Emeritus Say and, consequently, your Committee proceeded with its investigation.

V. Discussion

A challenge to a sitting legislator's qualifications is a matter of first impression for the House. As such, your Special Committee researched other state legislatures' handling of similar qualification challenges. The Special Committee's process in handling this challenge is consistent with the procedures employed by other legislatures. Utah, for example, considered challenges to three representatives on its opening day where briefs were read and oral arguments made so that there was a "thorough airing of the challenges." *State v. Evans*, 735 P.2d 29, 32 (Utah 1987). Iowa's legislature likewise resolved a challenge on opening day, where a member about whom allegations that he was not qualified were made during his campaign was seated on opening day after one of the credentials committee members presented his research on the issue and then the body debated an amendment to the credential committee's report to not seat the challenged member. *Turner v. Scott*, 269 N.W.2d 828 (Iowa 1978). See also *Bond v. Floyd*, 385 U.S. 116 (1966); *Wheatley v. Commonwealth of Massachusetts*, 792 N.E.2d 645 (Mass. 2003); *Greenwood v. Registrars of Voters of Fitchburg*, 184 N.E. 390 (Mass. 1933).

Your Special Committee was responsible for fulfilling the directive of Speaker's Memorandum to investigate Petitioners' allegations that Speaker Emeritus Say is not qualified to serve as the Representative of the Twentieth District. In doing so, the Committee was bound to apply applicable constitutional provisions, statutory provisions, and House internal procedures. Pursuant to Rule 5, only "compelling evidence shall be sufficient for the House to consider finding that the member does not have the requisite qualifications to serve."

Previous challenges have been brought contesting Speaker Emeritus Say's voter registration and nomination papers (including a June 9, 2014 challenge by two of the Petitioners in the matter before this Committee) and all have been dismissed. The challenges and determinations are as follows:

1. Challenge No. 1: Kelly Voter Challenge to the City Clerk for the City and County of Honolulu dated May 4, 2006, dismissed by letter dated June 22, 2006;
2. Challenge No. 2: Palcic Voter Challenge to the City Clerk for the City and County of Honolulu dated August 17, 2006, dismissed by letter dated August 22, 2006, and subsequent appeal to the Board of Registration for the City and County of Honolulu, dismissed by letter dated October 13, 2006;
3. Challenge No. 3: Law and Calasicas Voter Challenge to the City Clerk for the City and County of Honolulu dated July 29, 2010, dismissed by letter dated September 7, 2010;
4. Challenge No. 4: Nicholson and Heskett Nomination Challenge to the Office of Elections dated June 9, 2014, dismissed by letter dated June 16, 2014.

While the legal questions in the prior challenges are not exactly the same as those referred to your Special Committee, the underlying facts are similar. Additionally, the Committee finds that a majority of the evidence submitted by Petitioners was previously presented as part of the above-referenced prior challenges and had been vetted by the Office of Elections for the State of Hawaii, the City Clerk for the City and County of Honolulu, and the Board of Registration for the City and County of Honolulu.

Our State Constitution sets three qualifications to be a member of the House of Representatives: 1) be a resident of the State for not less than three years; 2) have attained the age of majority; and 3) be a qualified voter of the representative district from which the person seeks to be elected prior to filing nomination papers and continuing thereafter. Art. III, Section 6. The first two criteria were not contested in Petitioners' challenge. Regarding the third criterion, that Speaker Emeritus Say was and remains a qualified voter of the Twentieth Representative District, your Committee finds that Speaker

Emeritus Say has met the qualification. A person "qualified to vote" is a citizen who is eighteen years of age, has been a resident of Hawaii for at least one year prior to the election, and is a voter "registered as provided by law." Article II, Section 1.

Your Special Committee finds that similar to the other bodies that have considered the factual questions at hand, Speaker Emeritus Say was and is a qualified voter of the Twentieth Representative District. Residency, for election purposes, relies upon two factors, physical presence and present intent. Section 11-13(4), Hawaii Revised Statutes ("mere intention to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present intention to establish such place as the person's residence"). There was no compelling evidence brought to the attention of the Committee, presented at the hearing, nor discovered by the Committee during its investigation of the matter that persuaded the Committee to conclude that Speaker Emeritus Say was not a resident of the Twentieth Representative District.

Therefore, your Special Committee finds that Speaker Emeritus Say is qualified to sit as the member representing the Twentieth District. No further action is recommended.

Respectfully submitted, Representatives Rhoads, Mizuno, Saiki, Evans, Ito and Fukumoto Chang.