

STATE OF HAWAII

DEPARTMENT OF HAWAIIAN HOME LANDS

AUGUST 18, 2020

TO: Members, Hawaiian Homes Commission

FROM: Hokulei Lindsey, Administrative Rules Officer
Jobie Masagatani, Executive Assistant
Staff to the HHC Investigative Committee on Native
Hawaiian Qualification Process

SUBJECT: Report from the Investigative Committee on Native
Hawaiian Qualification Process

RECOMMENDED MOTION/ACTION

None. For information only.

DISCUSSION:

At the March 2019 regular meeting of the Hawaiian Homes Commission (HHC), the Chairman appointed an investigative committee pursuant to Hawaii Revised Statutes section 92-2.5 and Hawaii Administrative Rules section 10-2-16(b) (1), to review and, if appropriate, recommend changes to HHC policy guiding the strategies used to determine native Hawaiian Qualification (NHQ) under the Hawaiian Homes Commission Act (HHCA or Act). The committee members were Commissioners David Kaapu, Randy Awo, Pauline Namuo, and the Chairman.

The committee met five times. On August 2, 2019 and on January 9, 2020, the committee met with Homestead Services Division (HSD) staff that implement the NHQ process; first for information and then for follow up and feedback on initial thoughts for a proposal. On December 17, 2019, January 13, 2020, and on August 6, 2020 the committee met to deliberate.

The HHCA section 201 defines native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Section 207 of the Act authorizes the Department of Hawaiian Home Lands (DHHL or Department) to lease to native Hawaiians agriculture lands, pastoral lands, or lots for residence. In section 208, the Act requires the original lessee to be a native

Hawaiian of not less than eighteen years old. The Act, however, does not provide guidance about how to determine who is native Hawaiian and therefore eligible for a lease under the HHCA. By administrative rule, the Commission delegates administrative functions to the Chairman, reserving for itself "duties requiring the exercise of judgement or discretion." (Hawaii Administrative Rules § 10-2-16(a)). The determination and acceptance of NHQ has been interpreted as among those delegated administrative functions.

To accomplish this function, the Department has developed a kumu 'ohana methodology using birth certificates and other supporting documents to determine a native Hawaiian blood quantum for the purposes of NHQ. Genealogical research of this kind has its particular complexities. Some of the documentation required is historic and hard to find, read, or both while some historic records have been damaged or destroyed by fire or natural disaster. Over time and as a result of changes in societal norms, people sometimes self-report their information differently. Vital records (i.e. birth, marriage, and death certificates) as well as the type of information collected for vital records also vary over time. While any of these factors alone can render documentation for a bloodline difficult to compile or interpret; some genealogies encounter all or a combination of these factors. Such circumstances can result in uncertain or exhausted documentation, leaving potential beneficiaries in a limbo-like situation and Department staff in the difficult situation of having to exercise a degree of judgement and discretion that the committee believes is beyond administrative function.

With these factors of uncertainty, one may easily imagine a new applicant trying to gather documentation while encountering some of these potential obstacles, and perhaps even failing despite long-held oral family histories that indicate the individual is a native Hawaiian. However, given the nature of family trees and their interconnectedness, it is also possible that these factors can impact someone or an entire bloodline after an application has been accepted and a lease awarded if new documentation is discovered that may cast doubt on earlier conclusions. For example, if a new applicant shares a common ancestor with an existing lessee, newly discovered information provided by the applicant that was previously unknown could negatively impact that existing lessee's previously documented blood quantum. Such subsequent information can cause upheaval for a family or several families if siblings are involved. Because the documentation used to verify blood quantum is

imperfect and the decision surrounding NHQ can potentially have a profound impact, the exercise of judgment and discretion is required that the Committee believes extends beyond an administrative function.

Verification of NHQ stands as the gatekeeper and it is what sets Hawaiian Home Lands apart in its purpose; the rehabilitation of the "native Hawaiian," as defined in the HHCA. The benefits available to those meeting the required blood quantum are increasingly valuable and important as Hawai'i's available land area becomes both scarce and more expensive. In light of the possibilities and potential consequences, the committee recommends the HHC take a more active role in the NHQ process recalling from the Department the final determination and acceptance of NHQ as a duty requiring the exercise of judgement or discretion.

The committee was able to discern three categories of NHQ cases:

1. Qualified through the Department's kumu 'ohana methodology;
2. Unqualified based upon uncertain and/or exhausted documentation; and
3. Unqualified because impacted by subsequent information.

Using this as a guide, the committee recommends a policy whereby each of the three categories would come before the HHC for review and action:

1. The most common cases would be in the "qualified" category, comprised of applicants, transferees, and successors determined qualified by the Department upon completion of the kumu 'ohana. As envisioned, those cases would come before the HHC as part of the consent agenda;
2. Complex cases where the applicant, transferee, or successor is categorized as "unqualified based upon uncertain/exhausted documentation" would come before the HHC in a submittal for review and action. The submittal include a detailed analysis and recommendation prepared by the Department to inform the Commission's deliberation. Not every unqualified case would fall into this category. Existing available documentation should indicate a strong probability of qualification to be considered by the HHC. The intent is that only those cases incapable of administrative determination and requiring the exercise of judgment or discretion would come before the HHC in this category. The submittal and

deliberation would be held in executive session pursuant to Haw. Rev. Stat. §92J-1(b); and

3. Cases where a previously qualified individual becomes "unqualified because impacted by subsequent information" such that the available documentation appears to no longer demonstrate the NHQ minimum would be brought before the Commission by the Department as a contested case.

Through its review, the committee finds the responsibility and weight of the decisions required by NHQ are the burden of the Commission and beyond administrative function. The committee also believes that Commission action for each category is an important assurance for beneficiaries that there is a process available to them through the Department's governing body. By the recommended policy, the Commission can offer a greater degree of certainty to its beneficiaries as well as relieve staff of unintended burdens related to NHQ. Those significantly impacted by the NHQ process and potentially life altering questions involving NHQ can be addressed by the Commission, after weighing all pertinent facts and evidence.

The committee very much appreciates the care and diligence Department staff employ in the NHQ verification process. The staff rightfully take this function seriously and are protective of its integrity. The gravity of the NHQ determination together with the value of the benefit is why the committee recommends that the HHC take a more active role. While the Commission should have the burden of the "final say" in difficult cases, it is the diligence and expertise of the Department in fact finding and analysis that provides the foundation.

RECOMMENDATION:

The committee recommends the HHC recall, pursuant to § 10-2-16(a), HAR, the final acceptance of the NHQ determination as a function requiring the exercise of judgment or discretion. The committee further recommends the HHC use three categories to review NHQ for final acceptance:

1. Qualified through kumu 'ohana and accepted by consent of the HHC;
2. Unqualified based upon uncertain and/or exhausted documentation to be reviewed and acted upon by the HHC with detailed analysis and recommendation from the Department; and

3. Unqualified because impacted by subsequent information to be addressed by the HHC through a contested case brought by the Department.

The Committee intends to continue meeting in order to identify and recommend criteria to help implement the above recommendations.