

CHARMAINE TAVARES
Mayor



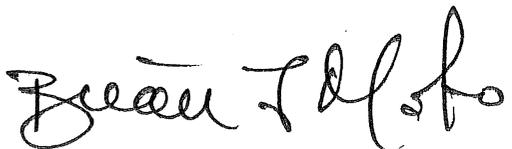
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March 18, 2008

MEMORANDUM

T O: Danny A. Mateo, Chair
Policy Committee

F R O M: Brian T. Moto, Corporation Counsel 

SUBJECT: NOMINATIONS TO BOARDS, COMMITTEES, AND COMMISSIONS
(POL-2(10))

I. Introduction.

This memorandum is in response to your memorandum, dated March 12, 2008, requesting legal advice regarding the nomination of a County of Maui civil service employee to the Maui County Civil Service Commission.

Your memorandum posed the following questions:

- (1) Does Section 76-51, Hawaii Revised Statutes ("HRS"), or any other State law prohibit county civil service employees from being appointed to any board or commission?
- (2) Is there any inconsistency or incompatibility with the appointment of a civil service employee to the Civil Service Commission in accordance with Section 78-4(b), HRS?

II. Summary of Facts.

In correspondence dated January 31, 2007, from Mayor Charmaine Tavares to the Council, the Mayor requested Council consideration of the nomination of Paula Ann Heiskell to the Civil Service Commission. Based on information provided to our Department, it is

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our understanding that Ms. Heiskell is employed by the County of Maui, Department of the Prosecuting Attorney, as a victim/witness counselor II, SR-22. Ms. Heiskell's position is a civil service position.

III. Analysis and Discussion.

- A. The Civil Service Law (HRS Chapter 76) does not prohibit civil servants from serving on the Civil Service Commission, but allows each county to determine matters relating to board composition, manner of appointment of members, and qualifications of members.

HRS Section 76-51, as amended, states, in part:

Prohibited activities by members of a merit appeals board. No person who occupies any elective or appointive office under the state or county government shall be eligible for membership on or continue to be a member of the merit appeals board. (Emphasis added).

A plain reading of HRS Section 76-51 indicates that only persons occupying an elective or appointive office under the State of Hawaii or a county is prohibited from serving on a county merit appeals board. In the County of Maui, the merit appeals board is the Civil Service Commission.¹ HRS Section 76-51 does not prohibit State or county civil servants (and other persons holding non-elective and non-appointive positions in government) from serving on the Civil Service Commission.

A prior version of HRS Section 76-51 did disqualify persons occupying "any position under the state of county government" from serving on the Civil Service Commission. However, Act 253 (2000) amended HRS Section 76-51 by repealing the reference to "any position", thus limiting the scope of the prohibition to persons occupying an elective or appointive office.²

¹ HRS §76-11 defines "merit appeals board" as "a jurisdiction's appellate body for purposes of section 76-14 regardless of whether it is named merit appeals board, civil service commission, or appeals board." HRS §76-14 pertains to the duties and jurisdiction of the merit appeals board. See also, HRS §76-71 ("There shall be a department of civil service for each of the counties of Hawaii, Maui, and Kauai, which shall include a personnel director and a merit appeals board established under 76-47.").

² §31, Act 253 (2000). §31, Act 253 (2000) took effect on July 1, 2002.

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HRS Section 76-47(b), pertaining to merit appeals boards, provides that matters relating to board composition, manner of appointment of members, and qualifications of members are to be determined by each jurisdiction. HRS Section 76-47(b) states, in part:

Members of the merit appeals board shall be persons that can objectively apply the merit principle to public employment. Other qualifications of board members and other matters pertaining to the establishment of the merit appeals board, whether composition of the board, manner of appointment, term of office, limitation on terms, chairperson, removal of members, and name for its merit appeals board, shall be left to the determination of each jurisdiction based on its own preferences and needs. A jurisdiction may continue to use its civil service commission or appeals board, with or without modification, as its merit appeals board to assume all of the functions and responsibilities under section 76-14....

- B. The Revised Charter of the County of Maui (1983), as amended ("Charter"), generally allows employees and officers of the State or County to serve on boards and commissions.

Section 13-2(7) of the Charter states:

Employees and officers of the State or county shall be eligible to serve on boards and commissions, provided that such service does not result in a conflict of interest.

We are not aware of any particular facts, or of law pertaining to Charter Section 13-2(7), that would indicate that Ms. Heiskell would have a "conflict of interest" that would render her ineligible to serve on the Civil Service Commission.

- C. The Public Service Law (HRS Chapter 78) generally allows government employees to serve on boards and commissions.

HRS Section 78-4(b) states:

Any prohibition in any law against the holding of outside employment or dual public office, employment, or position by an employee shall not bar the appointment of an employee to membership on a board or commission unless service on the board or commission would be inconsistent

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or incompatible with or would tend to interfere with the duties and responsibilities of the other office, employment, or position held by the employee.

For purposes of HRS Section 78-4(b), the term "employee" means any person employed in a State or county position.³ The wording of HRS Section 78-4(b) and, in particular, its reference to "the other office, employment, or position held by the employee" indicates that this section is concerned with whether service on a board will interfere with employment-related duties and responsibilities. The wording of HRS Section 78-4(b) does not appear to indicate that this section is concerned with whether such employment might interfere with board service.

Further, we are not aware of HRS Section 78-4(b) being interpreted or applied in a manner that bars civil servants from serving on a board or commission. Such a reading would be inconsistent with Act 253 (2000) and its amendment to HRS Section 76-51 (discussed above), which removed a provision prohibiting government employees from serving on merit appeals boards.⁴ Construing HRS Sections 78-4(b) and 76-51 together, we believe that civil servants are not automatically disqualified from serving on the Civil Service Commission, but may be appointed to the Commission unless such service would interfere with the civil servant's employment-related duties and responsibilities.

We are not aware of any facts concerning Ms. Heiskell or her employment by the Department of the Prosecuting Attorney that would indicate that service by her on the Civil Service Commission would interfere with her employment-related duties and responsibilities.

- D. Issues relating to alleged bias or conflict of interests, if any, can be addressed post-appointment on a case-by-case basis under the Rules of the Civil Service Commission and the Code of Ethics.

All persons appointed to the Civil Service Commission are subject to the Commission's own administrative rules relating to personal bias or prejudice and to the provisions of the Code of Ethics relating to conflicts of interest. Therefore, assuming, for

³ HRS §§78-1.5, 76-11.

⁴ See HRS §1-16 ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.")

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the sake of argument, that Ms. Heiskell, or other civil servant, were appointed to the Civil Service Commission, issues relating to fairness or conflict of interests could be raised and addressed on a case-by-case basis under Civil Service Commission administrative rules or the Code of Ethics, as applicable.⁵

BTM:lak

c: Mayor Charmaine Tavares
Lynn Krieg, Director, Department of Personnel Services
Marian Feenstra, Executive Assistant
Adrienne Heely, Deputy Corporation Counsel
Traci Fujita Villarosa, First Deputy Corporation Counsel
Michele White, Legal Assistant

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⁵ See §11-102-13, Rules of Practice and Procedure of the Civil Service Commission ("Disqualification of commissioner or hearing officer. (a) Any party to a hearing may, up to five days before the proceeding, file an affidavit that one or more of the commissioners or a hearing officer has a personal bias or prejudice. (1) The commissioner against whom the affidavit is so filed may answer the affidavit or may file a disqualifying certificate with the commission; (2) If the commissioner or hearing officer chooses to answer the affidavit, the remaining commissioners shall decide by a majority of all the members to which the commission is entitled whether that commissioner or hearing officer should be disqualified from proceeding therein; and (3) Every such affidavit shall state the facts and reasons for the belief that bias or prejudice exists and shall be filed at least five days before the hearing, or good cause shall be shown for the failure to file it within such time. (b) Any commissioner or hearing officer may be recused by filing with the chair a certificate of recusal citing their reason to preside with impartiality in the pending hearing."); see also Charter §10-4(1)(c) ("No officer or employee of the county shall:... Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of the officer's or employee's official duties or which may tend to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties.")