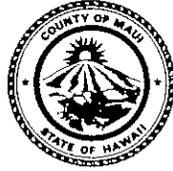


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
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December 10, 2009

MEMORANDUM

T O: Danny A. Mateo, Council Chair

F R O M: Kimberly A.B. Sloper, Deputy Corporation Counsel *Kimberly A.B. Sloper*

SUBJECT: **LIABILITY OF PERSONS ASSISTING THE COUNTY DURING EMERGENCIES (PAF 03-136)**

This memorandum is in response to your correspondence, dated October 1, 2009, requesting a response to the following two questions from former Council Chair Dain P. Kane:

1. In emergency situations where a County department or agency requests the assistance of an individual or business, to what extent would that individual or business be exposed to liability in the event of resulting injury or property damage?
2. If the Mayor, Managing Director, Chief of Police, Fire Chief, or some equivalent departmental executive were to request private sector assistance in such a situation, under what circumstances would the volunteer be shielded from liability?

Former Council Chair Kane cited a fire in Kahikinui, where firefighters were assisted by Ulupalakua Ranch workers and heavy equipment operators from Goodfellow Brothers.

Your correspondence further requests responses to the following three questions:

3. In emergency situations where a County department or agency requests the assistance of an individual or business, to what extent would the County be

exposed to liability in the event of resulting injury or property damage?

4. If a County department or agency did not make the request for assistance, but volunteers come to assist and the County knowingly accepts their assistance, to what extent would the County be liable for injury or property damage as a result of the volunteers' assistance?
5. Would the County's insurance generally cover claims or damages resulting from such voluntary assistance?

As your request recognizes, in the absence of a specific set of facts, we are limited in our ability to respond to the questions posed. Our advice, therefore, is general in nature. The precise consequences of an actual emergency involving volunteers will depend on the relevant facts and circumstances.

Because this memorandum is intended for public disclosure, we do not discuss matters that are more appropriately reviewed in an executive session. Nothing expressed in this memorandum constitutes, or should be interpreted as, an admission by Corporation Counsel or the County of Maui of any liability with regard to any actual or potential claim for loss or damages arising from, or associated with, any incident, past or future, involving volunteers.

This opinion focuses on emergency firefighting services as that was the example cited in the original request from former Council Chair Kane.

I. Municipal liability for emergency fire services in general.

The general rule across the country is that there is no municipal liability for negligence in fire protection.¹ A municipality does not assume an affirmative duty or form a special relationship merely by performing its statutory duties such as inspections, developing a prevention plan for a particular property, or responding to a fire.²

¹ McQuillin Mun. Corp. § 53.52 (3rd ed.).

² McQuillin Mun. Corp. § 53.53 (3rd ed.).

II. Immunity for volunteers under Hawaii Revised Statutes Chapter 662D and liability for governmental entities under a theory of respondeat superior.

Section 662D-1, Hawaii Revised Statutes ("HRS"), defines "volunteer" as:

a person performing services without compensation, other than reimbursement for actual expenses incurred, for a ... governmental entity. The term includes a volunteer serving as a ... direct service volunteer.³

In the hypothetical context described in your request, those who of their own volition come to the County's aid for emergency firefighting purposes, or whose assistance is requested, would be defined as "volunteers" under Section 662D-1, HRS.⁴

Pursuant to Section 662D-2, HRS, volunteers are immune from civil liability for their acts or omissions resulting in damage or injury as long as the volunteers are acting in good faith within the scope of their functions or duties for the County of Maui, and the damage or injury was caused by the volunteer's negligent conduct.⁵ Notwithstanding this statutory grant of immunity, a

³ HRS § 662D-1.

⁴ According to the Department of Fire and Public Safety ("DFPS"), DFPS has on occasion requested the assistance of Goodfellow Brothers, but most of the time, Goodfellow Brothers volunteers without being asked. Goodfellow Brothers has provided bulldozers for cutting fire breaks and water tankers to fill DFPS trucks.

⁵ **§ 662D-2 Scope of immunity.** (a) A volunteer shall be immune from civil liability in any action on the basis of any act or omission of a volunteer resulting in damage or injury if:

(1) The volunteer was acting in good faith and within the scope of the volunteer's official functions and duties for a nonprofit organization, a nonprofit corporation, a hospital, or a governmental entity;

(2) The damage or injury was caused by the volunteer's negligent conduct; and

(3) With respect to a nonprofit organization, nonprofit corporation, or hospital, the entity for which the volunteer was acting either:

(A) Has a general liability policy in force, both at the time of injury and at the time the claim is made against the entity, and the minimum coverage is in an amount of not less than: \$200,000 per

volunteer may be liable for civil damages where, for example, the damages result from a volunteer's intentional misconduct, or operation of a motor vehicle.⁶

Under a theory of respondeat superior, and pursuant to Section 662D-2(b), HRS, the County of Maui may, in certain circumstances, be liable for the acts or omissions of the volunteer.⁷ In the

occurrence and \$500,000 aggregate; or

(B) Has total assets, exclusive of grants and allocations, of less than \$50,000.

⁶ HRS § 662D-3 states:

Notwithstanding section 662D-2, if otherwise permitted by law, a person may sue and recover civil damages from a volunteer based upon:

(1) Any conduct engaged in by the volunteer that would constitute gross negligence, wilful and wanton misconduct, or intentional misconduct;

(2) Any act or omission in connection with the operation of a motor vehicle;

(3) Any conduct engaged in by the volunteer while the volunteer is unreasonably interfering with the lawful activities of another;

(4) Any conduct engaged in by the volunteer that takes place on private property when the volunteer's presence on the property was not consented to by the owner;

(5) Any act or omission within a volunteer's scope of practice for which the volunteer is licensed, certified, permitted, or registered under state law to perform; and

(6) Any criminal offense committed by the volunteer.

⁷ HRS § 662D-2(b) states:

In any suit against a nonprofit organization, a nonprofit corporation, a hospital, or a governmental entity for civil damages based upon the negligent act or omission of a volunteer, proof of the act or omission shall be sufficient to establish the responsibility of the entity therefor under the doctrine of respondeat superior, notwithstanding the immunity granted to the volunteer with respect to any act or omission included under subsection (a).

Danny A. Mateo, Council Chair
December 10, 2009
Page 5

event that the County of Maui is found to be liable, coverage of such claims would be subject to the terms and provisions of the County of Maui's general and excess liability insurance policies.

III. Workers' compensation coverage for volunteers.

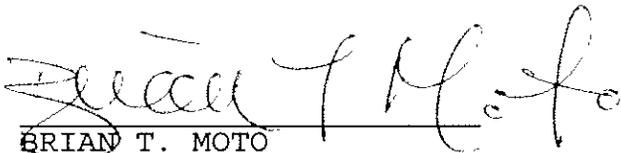
Pursuant to Chapter 386, HRS, pertaining to workers' compensation, a person injured while performing voluntary service under the authorized direction of a public officer or employee, and who has not secured payment of the person's hospital and medical expenses from the State or County or from a third person, is entitled to payment of reasonable hospital and medical expenses.⁸

However, when a volunteer participates in a firefighting emergency at the direction of the volunteer's employer, the employer's workers' compensation carrier would be responsible for the hospital and medical expenses resulting from the covered injuries of the volunteer. Expenses not covered by the employers' workers' compensation carrier may be covered under the County of Maui's workers' compensation coverage under Section 386-171, HRS.

KABS:lkk

cc: Chief Jeffrey A. Murray, Department of Fire and Public Safety
Webpage

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

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⁸ §386-171 Volunteer personnel, medical, etc., expenses. Any person who is injured in performing service for the State or any county in any voluntary or unpaid capacity under the authorized direction of a public officer or employee, and who has not secured payment of the person's hospital and medical expenses from the State or the county under any other provision of law and has not secured payment thereof from any third person, shall be paid the person's reasonable hospital and medical expenses under this chapter.