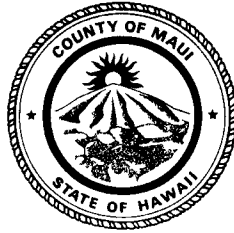


ALAN M. ARAKAWA
Mayor



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MEMO TO: Mike White, Chair
Maui County Council

FROM: Edward S. Kushi, Jr.
First Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "Edward S. Kushi, Jr.", is written over the "FROM:" line.

DATE: July 13, 2016

SUBJECT: **PROPOSED CHARTER AMENDMENTS (DEPARTMENT
DIRECTOR APPOINTMENTS) (PIA-10(14))**

This follows up our memo dated July 7, 2016 to Michael P. Victorino, Chair of the Policy and Intergovernmental Committee (copy attached), specifically with respect to the proposed charter amendments Sections 8-1.2 (Managing Director), 8-2.2 (Corporation Counsel), 8-3.2 (Prosecuting Attorney), and 8-4.2 (Director of Finance). In all of the above-referenced sections, it is proposed that the Council, independent of the Mayor, would have the authority to remove the sitting incumbents in these positions.¹ As previously stated, we have concerns and reservations that this independent power to remove department heads by the Council would be inconsistent with the power to appoint such department heads, which power of appointment currently and solely vests in the Mayor.

While our preliminary review and research was not exhaustive (mostly due to time constraints), we do opine as follows:

1) **SEPARATION OF POWERS**

"The charter has as its basic scheme a clear and definite separation of the legislative power and the executive power of the

¹ **Section 8-1.2 Managing Director.** The managing director shall be appointed by the mayor with the approval of the council and may be removed by the mayor[,] or by resolution approved by a two-thirds vote of the entire membership of the council following consultation with the mayor . . .

city and county, vesting the former in the legislative branch represented by the council and the latter in the executive branch headed by the mayor . . . each branch is coordinate with the other, and neither may exercise the power vested in the other.”²

“The Charter Commission, however, took pains to emphasize that the word ‘coordinate’ is not to be interpreted to mean co-equal in functions, but rather as co-equal in rank, importance, independence and dignity”³

The council shall be legislative body of the county.⁴ The executive power of the county shall be vested in and exercised by the executive branch, which shall be headed by the mayor, except as otherwise provided by this charter.⁵

2) **POWER TO APPOINT OFFICERS/DEPARTMENT HEADS vs. POWER TO REMOVE OFFICERS/DEPARTMENT HEADS**

As proposed, none of the subject charter amendments authorizes or gives the Council the power to appoint the subject department heads, but authorizes the Council “by resolution approved by a two-thirds vote of its entire membership of the council following consultation with the mayor” the power to remove said department heads.⁶

In the recent case of Kauai Police Commission vs. Carvalho (Nos. CAAP-13-0000015 and CAAP 12-0001123, June 30, 2016), our Hawaii Intermediate Court of Appeals cited the case of Burnap v. United States, 252 U.S. 512 (1920), for the proposition that “[t]he power to remove is, in the absence of

² City Council v. Fasi, 52 H. 3, at p 5 (1970), wherein court contrasted Honolulu’s charter provision against a proposed council resolution.

We did not reviewed Maui County’s charter commission minutes, reports, etc. (due to time constraints), but have compared Honolulu’s charter language with Maui’s, and in pertinent part, find the same analysis would apply.

³ Akahane v. Fasi, 58 H. 74, at p 81 (1977).

⁴ Section 3-6, Revised Charter of the County of Maui (1983), as amended (“Maui Charter”).

⁵ Section 6-1, Maui Charter.

⁶ Note 1, *supra*.

statutory provision to the contrary, an incident of the power to appoint. And the power of suspension is an incident of the power of removal.”⁷

From a reading of our charter, the power to appoint department heads is clearly an executive act, and accordingly vests in the Mayor.⁸

3) **OTHER COUNTY JURISDICTIONS**

City and County of Honolulu:

Except for the Medical Examiner⁹, all department heads and the managing director shall be nominated and, by and with the advice and consent of the council, appointed and may be removed by the mayor.¹⁰ There is no independent power of removal by the council.

⁷ Kauai Police Commission, at p 14; noted that although case involved dispute between Kauai Police Commission and Mayor regarding authority to suspend police chief, it was not disputed that only police commission had power to appoint and power to remove.

⁸ Relevant Maui Charter provisions:

“The term of office of any administrative head of a department who is appointed by the mayor, including the corporation counsel and the prosecuting attorney, shall end with the term of the mayor . . .” (emphasis added) Section 6-2(3).

“The mayor shall have the authority to appoint, on a temporary basis, an administrative head of any department, provided that such department is one where the administrative head is appointed by the mayor.” (emphasis added) Section 6-4(4)

“Within sixty (60) days of taking office, or within sixty (60) days after a vacancy is created, the mayor shall appoint the corporation counsel and prosecuting attorney with written notice of the appointment to the council . . .” (emphasis added) Section 6-2(5).

“**Powers, Duties and Functions.** The mayor shall be the chief executive officer of the county . . .” (emphasis added) Section 7-5.

⁹ “There shall be a department of the medical examiner headed by a medical examiner who shall be appointed by the mayor. The medical examiner may be removed only for cause after being given a written statement of the charges and a hearing before the council.” Section 6-1301, Revised Charter of the City & County of Honolulu, 1973.

¹⁰ Section 4-104, Revised Charter of the City & County of Honolulu, 1973.

County of Hawaii:

All department heads appointed by the mayor, confirmed by the council, and may be removed by the mayor. No independent power of removal by the council.

County of Kauai:

Except for the County Attorney¹¹, all department heads appointed by and may be removed by the mayor. No independent power of removal by the council.

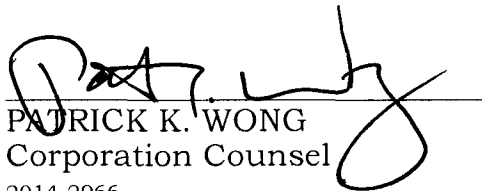
4) **CONCLUSION**

Based on the above, we are of the opinion that the subject proposed charter amendments which would enable the council to remove department heads, independent of any act of or by the mayor as the appointing authority, would at a minimum encroach onto if not negate the mayor's authority and power to appoint said department heads in the first instance. We further opine that such a proposal would violate the doctrine of separation of powers, as intended and implied from the language and scheme of the Maui Charter, and therefore would not be defensible.

We suggest, advise and urge the council to delete the offending provisions as above-referenced.

We will be available for further clarification and/or discussion if needed.

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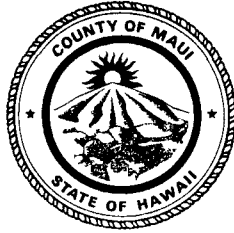
PATRICK K. WONG
Corporation Counsel

2014-2966

PIA-10(14) 2016-07-13 Dept Director Appointments
Attachment

¹¹ "The county attorney shall be appointed and may be removed by the mayor, with the approval of the council. Section 8.02, Kauai Charter (2012)

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MEMO TO: Michael P. Victorino, Chair
Policy and Intergovernmental Affairs Committee

FROM: Edward S. Kushi, Jr.
First Deputy Corporation Counsel 

DATE: July 7, 2016

SUBJECT: **PROPOSED CHARTER AMENDMENTS (DEPARTMENT
DIRECTOR APPOINTMENTS) (PIA-10(14))**

We have reviewed the latest draft Resolution regarding the above matter, and for the following reasons are returning same unsigned as to form and legality.

- 1) New proposed **“Section 6-4. Specific Qualifications of Administrative Heads of Departments.** In addition to any qualifications set forth in this charter, specific qualifications for administrative heads appointed by the mayor may be established by the council by ordinance.”

Attached find copy of the July 6, 2015 memo to Councilmember Don S. Guzman from our office that addressed a proposed ordinance to establish additional criteria/requirements for the positions of Corporation Counsel, Prosecuting Attorney, and the Director of Water Supply. We find that the conclusion set forth therein (i.e., “that such new, additional requirements would be in conflict with the existing charter provisions, and are therefore invalid, and would not withstand judicial scrutiny.”) would apply to this proposed charter amendment. Albeit any such ordinance to be considered/proposed would be done in

the future, and may be consistent with the existing, applicable charter requirements, the possibility of a conflict still exists.

In the alternative, we suggest that any new, additional and specific qualifications for these positions be listed and set forth in the charter itself.

- 2) Proposed amendments to Sections 8-1.2 (Managing Director), 8-2.2 (Corporation Counsel), 8-3.2(Prosecuting Attorney), and 8-4.2(Director of Finance).

In all of the above-referenced sections, it is proposed that the Council, independent of the Mayor, would have the authority to remove the sitting incumbents in these positions.¹ As stated in committee we have concerns and reservations that this independent power to remove department heads by the Council would be inconsistent with the power to appoint such department heads, which power is solely vested in the Mayor. It is our belief that the power to appoint also includes the power to remove, and that such powers should lie with the executive branch. Accordingly, until we have completed our research on this issue, we decline to sign-off of the proposed resolution.

- 3) Lastly, we advise that the ballot question listed at page 7, Section 17 of the proposed resolution be revised to read:

“Shall the below-listed sections of the Charter* be amended to require Council approval of the Mayor’s appointment of the Managing Director, Director of Finance, Director of Public Works, Director of Parks and Recreation, Planning Director, Director of Housing and Human Concerns, Director of Transportation, and Director of Environmental Management; to allow the Council to remove the managing Director, Corporation Counsel, Prosecuting Attorney, and Director of Finance by a two-thirds vote of its entire membership following consultation with the Mayor; and to allow additional qualifications for department directors to be established by ordinance?”

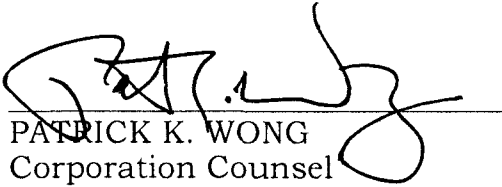
*6-4(new); 3-8; 6-2; 8.1.2; 8-2.2; 8-3.22; 8-4.2; 8-5.2; 8-6.2; 8-8.2; 8-10.2; 8-11.5; 8-14.2; and 8-15.2”

¹ **Section 8-1.2 Managing Director.** The managing director shall be appointed by the mayor with the approval of the council and may be removed by the mayor[.] or by resolution approved by a two-thirds vote of the entire membership of the council following consultation with the mayor . . .

Michael P. Victorino, Chair
Policy and Intergovernmental Affairs Committee
July 7, 2016
Page 3

Call if further clarification and/or discussion is needed.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

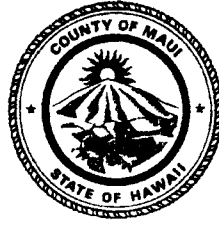
2014-2966

PIA-10(14) 2016-07-07 Dept Director Appointments

Attachment

cc: David M. Raatz, Office of Council Services
Gary Murai, Deputy Corporation Counsel
Jeffrey Ueoka, Deputy Corporation Counsel

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Mayor



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July 6, 2015

MEMORANDUM

To: Don S. Guzman, Council Member

From: Jeffrey Ueoka, Deputy Corporation Counsel *JU*

Subject: NOMINATIONS AND SUPPORTING DOCUMENTATIONS (PAF 15-059)

Responding to your request of June 12, 2015, we return your request unsigned as we are unable to approve as to form and legality for the reasons detailed below.

1. THE REVISED CHARTER OF THE COUNTY OF MAUI (1983), AS AMENDED (THE "CHARTER"), PROVISIONS REGARDING APPOINTMENTS OF THE CORPORATION COUNSEL, THE PROSECUTING ATTORNEY, AND THE DIRECTOR OF THE DEPARTMENT OF WATER SUPPLY, AS CONTRASTED TO, PROVISIONS PROPOSED IN NEW CHAPTER 2.45, MAUI COUNTY CODE (THE "MCC").

A. Corporation Counsel and Prosecuting Attorney.

i) Charter provisions.

"The corporation counsel shall be appointed by the mayor with the approval of the council and may be removed by the mayor with the approval of the council. The corporation counsel shall be an attorney licensed to practice and in good standing before the Supreme Court of

the State and shall have engaged in the practice of law for at least three years." (emphasis added)¹

"The prosecuting attorney shall be appointed by the mayor with the approval of the council and may be removed by the mayor with the approval of the council. The prosecuting attorney shall be an attorney licensed to practice and in good standing before the Supreme Court of the State and shall have engaged in the practice of law for at least three years." (emphasis added)²

ii) Chapter 2.45, MCC, provisions.

"2.45.010. Documents required for appointment of corporation counsel and prosecuting attorney. When the mayor appoints the corporation counsel or prosecuting attorney, the mayor shall provide to council copies of the following documents:

1. A certificate of good standing from the Hawaii Supreme Court showing the appointee is qualified to practice law in the State of Hawaii;
2. Official transcripts of the appointee's postsecondary academic record;
3. A current curricula vitae or resume showing the appointee's entire history of employment in the practice of law;
4. The applicant's signed authorization for the release of liability for former employers relating to the furnishing of information about the appointee's employment;
5. At least three references relating to the appointee's practice of law; and
6. At least two personal references relating to the appointee's character." (emphasis added)

B. Director of Water Supply.

i) Charter provisions.

"The director of the department of water supply shall be appointed by the mayor with the approval of the council, and may be removed by the mayor with the approval of the council. The director of the department of water supply shall have a

¹ Section 8-2.2, Charter.

² Section 8-3.2, Charter.

minimum of five years of experience in a management capacity, either in public service or private business, or both. The deputy director of the department of water supply shall be appointed by the mayor and may be removed by the mayor. The director or the deputy of the department of water supply shall be a registered engineer." (emphasis added)³

ii) Chapter 2.45, MCC, provisions.

"2.45.020. Documents required for appointment of director of the department of water supply. When the mayor appoints the director of water supply for approval, the mayor shall provide to the council copies of the following documents:

1. The appointee's engineering license, if any;
2. Official transcripts of the appointee's postsecondary academic record;
3. A current curricular vitae or resume showing the appointee's entire history of employment in engineering, public administration, nonprofit administration, or business administration;
4. The applicant's signed authorization for the release of liability for former employers relating to the furnishing of information about the applicant's employment;
5. At least three references relating to the appointee's professional experience in a management capacity of as an engineer, and
6. At least two personal references relating to the appointee's character." (emphasis added)

2. AN ORDINANCE MUST CONFORM TO, BE SUBORDINATE TO, NOT CONFLICT WITH, AND NOT EXCEED THE CHARTER.

In the case of Fasi v. City and County of Honolulu, 823 P.2d 742, 72 Haw. 513 (1992), concerning mayoral appointments to boards and commission, the City Council passed Ordinance No. 90-54, entitled "Method of Appointment on Boards, Commission and Committees", which, in relevant part, provided that:

"All appointments covered by this article shall terminate on the expiration date noted on the Mayor's letter of appointment, and in no instance shall such appointees immediately continue to serve in the same

³ Section 8-11.5, Charter.

capacity beyond the expiration date whether as a temporary appointee or as a reappointed member for a full consecutive term." (emphasis added)

The administration (plaintiffs Mayor Fasi, and Boniface Aiu, in his capacity as a holdover member of the Ethics Commission) challenged the legality of Ordinance No. 09-54, claiming that said ordinance conflicted with Section 13-103 of the Revised Charter of the City and County of Honolulu, which, in relevant part stated:

"Section 13-103. Boards and Commission – Except as otherwise provided by this charter or by law, all boards and commissions established by this charter or by ordinance shall be governed by the following provisions:

...

(b) All appointed members shall serve for staggered terms of five years, and they shall serve until their successors have been appointed and qualified. The initial appointments shall be as follows: . . ." (emphasis added)

Our Supreme Court stated that "A basic tenet of municipal corporation law is that an ordinance which conflicts with an express provision in a charter is invalid."⁴

Further, the court cited McQuillin in adopting the general rule that:

"The proposition is self-evident....that an ordinance must conform to, be subordinate to, not conflict with, and not exceed the charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state. Ordinances must not only conform with the express terms of the charter, but they must not conflict in any degree with its object or with the purposes for which the local corporation is organized . . ."⁵

Lastly, in striking down Ordinance 90-54, the court offered the following scenario:

"Moreover, if we were to adopt the council's position, the council could conceivably, by ordinance, remove the mayor as the appointing authority over board and commission members."⁶

⁴ Fasi, *supra*, at p 518.

⁵ Fasi, *supra*, at pg. 519, citing McQuillin, Section 15.19 (3d ed. 1989).

⁶ Fasi, *supra*, pg. 519.

3. EXISTING CHARTER PROVISIONS VS. PROPOSED CHAPTER 2.45, MCC, PROVISIONS.

A. Corporation Counsel and Prosecuting Attorney.

For both the Corporation Counsel and Prosecuting Attorney appointments, the proposed Section 2.45.010, MCC, **adds** five (5) more criteria or requirements to the existing two (2) criteria/requirements mandated by the relevant charter provision. For both positions, the relevant charter provisions⁷ require the applicants:

- 1) To be licensed to practice and in good standing before the Supreme Court of the State; and
- 2) To have engaged in the practice of law for at least three years.

If adopted, Section 2.45.010, MCC, would add the following requirements, before a candidate for such positions could even be considered:

- “3) Official transcripts of the appointee’s postsecondary academic record;
- 4) A current curricular vitae or resume showing the appointee’s entire history of employment in the practice of law;
- 5) The applicant’s signed authorization for the release of liability for former employer’s relating to the furnishing of information about the appointee’s employment;
- 6) At least three references relating to the appointee’s practice of law; and
- 7) At least two personal references relating to the appointee’s character.”

Based on the rational and reasoning set forth in the Fasi case, we opine that such new, additional requirements would be in conflict with the existing charter provisions, and are therefore invalid, and would not withstand judicial scrutiny. Query: what would happen if an applicant qualifies/satisfies both criteria set forth in Section 8-2.2, or 8-3.2 of the Charter, but for whatever reason, cannot satisfy one or two of the new criteria set forth in Section 2.45.010, MCC (i.e., official postsecondary transcripts not available, lack of references, etc.)?

⁷ See section 1, A, I, above.

Don S. Guzman, Council Member
July 6, 2015
Page 6

B. Director of Water Supply.

Likewise, for the same reasons set forth above with respect to the Corporation Counsel and the Prosecuting Attorney, we opine that the proposed additional criteria/requirements for the Director of Water Supply would be invalid. In addition, we further note that a definite conflict may occur, in that the existing Charter criteria does not require an applicant to be a college or university graduate, so therefore obtaining a postsecondary transcript would be impossible.

4. CONCLUSION.

Based on the above, we will not "Approve as to form and legality" the proposed bill establishing a new Chapter 2.45, MCC, as said chapter would be in conflict with the existing Charter provisions regarding the subject appointments.

However, we advise that the existing Charter provisions could be amended to include such additional criteria/requirements, provided the amendment process is followed.

APPROVED FOR TRANSMITTAL:



EDWARD S. KUSHI, JR.
First Deputy Corporation Counsel
2015-4469