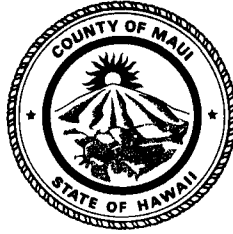


ALAN M. ARAKAWA  
Mayor



PATRICK K. WONG  
Corporation Counsel


EDWARD S. KUSHI  
First Deputy

LYDIA A. TODA  
Risk Management Officer  
Tel. No. (808) 270-7535  
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DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
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MEMO TO: Yuki Lei K. Sugimura, Chair  
Policy, Economic Development, and Agricultural Committee

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

DATE: June 28, 2018

SUBJECT: **PROPOSED CHARTER AMENDMENTS (COUNTY GOVERNANCE)** (PEA-10(2))

Pursuant to your June 13, 2018 request (copy attached, without referenced Resolution), we respond as follows.

I) Question/Issue Posed:

“. . . whether County department heads appointed by the Managing Director, instead of the Mayor as this proposal recommends, violates Hawaii Revised Statutes, Chapters 76, 78, and 89, which references the Mayor as the ‘employer’, ‘public employer’, ‘chief executive officer’, or ‘appropriate authority’ for the County.”?

In the alternative, we have interpreted your inquiry to be: “Whether the appointment process, as proposed in the amendment be in conflict with the referenced State statutes, and thereby preempted?”

II) Answer/Short Reply:

No.

III) Background:

The current Charter<sup>1</sup> authorizes the Mayor to appoint the majority of all department/administrative heads of departments<sup>2</sup>, with the exception of the department heads for Fire and Public Safety<sup>3</sup>, Personnel Services<sup>4</sup>, Police<sup>5</sup>, and Liquor Control<sup>6</sup>, which department heads are appointed by their respective commissions.

The subject charter amendment resolution (“PROPOSING AN AMENDMENT TO THE REVISED CHARTER OF THE COUNTY OF MAUI (1983), AS AMENDED, TO REORGANIZE THE EXECUTIVE BRANCH TO ESTABLISH AN OFFICE OF THE MANAGING DIRECTOR, PROVIDE FOR THE APPOINTMENT OF THE MANAGING DIRECTOR, AND DEFINE DUTIES AND RESPONSIBILITIES”, herein referenced to as the “managing director charter amendment”), except for the appointments of the Managing Director<sup>7</sup>, the Corporation Counsel and the Prosecuting Attorney, proposes to designate the Managing Director, instead of the Mayor, with the authority to appoint all other, non-commission department heads. The operative language, in ramseyered format, in the managing director charter amendment reads as follows:

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<sup>1</sup> Revised Charter of the County of Maui (1983), as amended.

<sup>2</sup> Section 8-1.3, Managing Director  
Section 8-2.2, Corporation Counsel  
Section 8-3.2, Prosecuting Attorney  
Section 8-4.2, Director of Finance  
Section 8-5.2, Director of Public Works  
Section 8-6.2, Director of Parks and Recreation  
Section 8-8.2, Planning Director  
Section 8-10.2, Director of Housing and Human Concerns  
Section 8-11.5, Director and Deputy Director of Water Supply  
Section 8-14.2, Director of Transportation  
Section 8-15.2, Director of Environmental Management

<sup>3</sup> Section 8-7.3.

<sup>4</sup> Section 8-9.2.

<sup>5</sup> Section 8-12.3.

<sup>6</sup> Section 8-13.4.

<sup>7</sup> See proposed new Section 6-5 of the managing director charter amendment, which establishes a separate appointment process and procedure.

The director of \_\_\_\_\_ shall be appointed by the [mayor] managing director with the approval of the council and may be removed by the [mayor] managing director.<sup>8</sup>

IV. Discussion:

A. June 4, 2018 correspondence from David Underwood, Director of Personnel Services, and referenced State statutes. (copy attached).

We have reviewed the above-referenced correspondence, and while we, in general, concur with Mr. Underwood’s statement that “. . . the ultimate authority on most employment-related subjects would remain with the mayor, including . . .”, we do not concur that the referenced State statutes “As these are statewide statutes of general applicability, we believe they would supersede any conflicting provisions of our charter[.]” in relation to the appointment authority of County department heads.

Chapter 76, Hawaii Revised Statutes (“HRS”); Civil Service Law

Relevant sections:

Section 76-11. Definitions.

“‘Appointing authority’ means a department head or designee having the power to make appointments or changes in the status of employees.”

“‘Chief executive’ means the governor, the respective mayors, the chief justice of the supreme court, and the . . .”

“‘Employer’ or ‘public employer’ means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court, the . . .”

Section 76-77 Civil service and exemptions.

“The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county, except the following:

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<sup>8</sup> We note that as this amendment is still being discussed in the PEA committee, revisions and/or amendments to the referenced language may be considered.

- (1) . . . ;
- (2) Positions of officers elected by public vote, positions of heads of departments, and positions of one first deputy or first assistant of heads of departments;
- (3) . . .
- (16) . . .” (emphasis added)

Chapter 78, HRS; Public Service

Section 78-1.5 Definitions.

“As used herein, unless the context clearly requires otherwise, the terms ‘appointing authority’, ‘chief executive’, ‘director’, ‘employee’, ‘employer’, and ‘jurisdiction’ shall have the same meaning as those terms are defined in section 76-11.”

Chapter 89, HRS; Collective Bargaining in Public Employment

Section 89-2 Definitions.

“‘Employee’ or ‘public employee’ means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(f).”

Section 89-6(f).

“The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

- (1) . . .
- (2) . . .
- (3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a department head, administrative officer, director, or chief of a state or county agency or major division, and legal counsel;
- (4) . . .
- (18) . . .” (emphasis added)

Chapter 89C, HRS; Public Officers and Employees Excluded from Collective Bargaining.

Section 89C-1 Purpose.

“The legislature finds that the appropriate authorities do not have sufficient flexibility to adjust the wages, hours, benefits, and other terms and conditions of employment for their respective excluded public officers and employees. The organizational status and employment conditions of these individuals in the excluded group are diverse and include: cabinet members, board and commission members, managerial employees and . . .” (emphasis added)

Based on the above, in relation to the issue/question concerning what county body, authority, person or entity is solely authorized to appoint county department heads, we cannot find and therefore do not believe that there is any direction or statewide mandate or applicability in the above-referenced statutes that requires only the County mayor to appoint a County department head. However, once appointed, these department heads would be covered under Chapters 78 and 89C, HRS.

B. Case law.

We could not find any Hawaii case law directly on point with respect to the issue at hand, however the seminal case of HGEA, et al v. County of Maui, et al, 59 Haw. 65, 576 P.2d 1029 (1978), (the “HGEA case”) provides insight, guidance and persuasion, especially since that case dealt with challenges to the validity of Maui County’s revised charter. There a government employees union (HGEA), along with members of the County’s Civil Service Commission, the Board of Water Supply, the Police Commission, and the Liquor Control Commission challenged the validity of certain provisions that amended the charter, which amendments were approved at the November 2, 1976 general election.

The challenged provisions, for the most part, dealt with the membership, organization, and operation of various County departments to which the appellant boards and commissions were attached to/associated with, specifically, the Department of Personnel Services, the Police Department, the Department of Water Supply, and the Department of Liquor Control. Prior to the initial charter (i.e., before 1969), each of these departments followed and were subject to existing State statutes that covered the relevant functions,

specifically, Chapter 76, HRS (personnel services), Chapter 52, HRS (police), Chapter 54, HRS (water), and Chapter 281, HRS (liquor).

The appellants contended that certain amended charter provisions were invalid under article VII of the State Constitution and HRS section 50-15, as the subject amendments were in direct conflict with state statutes on civil service, waterworks, police and liquor control. The applicable section of Article VII of the State Constitution states:

“Local Self-Government; Charter  
Section 2.

. . .

Charter provisions with respect to a political subdivision’s executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

. . .”<sup>9</sup>

HRS section 50-15, HRS read (and still reads):

“50-15 Reserved powers.

Notwithstanding the provisions of this chapter, there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith.”

After an exhaustive review of the charter amendments vs. the existing State statutes relevant to the functions of the respective departments and boards/commissions, the HGEA court concluded that, except for the charter provisions related to the Civil Service Commission and it’s Department of Personnel Services, all the other Maui County charter amendments relevant to the other departments/boards/commissions were valid. Further, in the areas where there existed conflicting provisions between the charter amendments and State statutes, the HGEA court ruled that pursuant to Article VII of the

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<sup>9</sup> In 1978, renumbered to Article VIII, section 2.

State Constitution, the charter amendments concerned and covered the political subdivision's executive, legislative and administrative structure and organization, and therefore are superior to the statutory (i.e., State statutes) provisions. However, with respect to the charter amendments relevant to civil service, the HGEA court stated:

“From an examination of the framer’s Standing Committee Report No. 53 (majority), we think it is clear that they intended the final authority on all civil service and compensation matters to remain with the legislature.” HGEA, at page 86.

Further that: “We need not discuss in depth the policy considerations underlying civil service and compensation laws. The merit system has become an established policy of government. This has been a policy of state-wide application.” HGEA, at page 87.

Lastly, we submit that Justice Kidwell, in his concurring and dissenting opinion, best summarized the majority opinion’s ruling as follows:

“In my view, the essential difference between matters which pertain to county self-government and those which are of state-wide concern lies in whether the choices which a county makes are of significance only to the people of the county or are also of significance to the people of the state who do not reside in the county. Under this test, a county charter has constitutional superiority over state law with respect to the administrative structure and organization which deals with those matters which are not of significance to the rest of the state.....” HGEA, at pages 89 and 90.

C. State pre-emption.

Aside from the declaration set forth in Section 50-15, HRS, cited above, and without citing the vast case law concerning the interpretation of the legal concept of pre-emption (i.e., GMO case, etc.), this writer submits the following litmus test/general concept to consider when faced with the question whether a county/municipality rule, law or regulation will be pre-empted by a state rule, law or regulation:

Subject to various caveats, county cannot permit what the state prohibits. Likewise, a county cannot prohibit what the state permits.

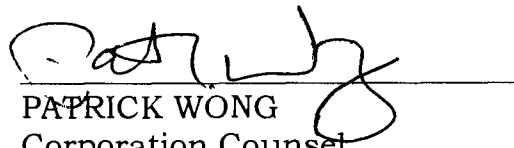
V) CONCLUSION.

The cited state statutes (Chapters 76, 78, 89 and 89C, HRS) do not mandate or require that only the mayor is authorized to appoint a county's department head.

The process and procedure of appointing county department heads is part of the county's executive, legislative and administrative structure and organization, and therefore is superior to any state statutory provisions.

There are no State statutory provisions that would prohibit the county from adopting and thereafter implementing the procedure for the appointment of department heads, as set forth in the proposed managing director charter amendment.

APPROVED FOR TRANSMITTAL:



PATRICK WONG  
Corporation Counsel

2017-0098

PEA-10(2) 2018-06-28 Memo to Chair

Attachment

cc: Patrick Wong, Corporation Counsel (w/o attachment)  
Mayor Alan M. Arakawa (w/o attachment)



Council Chair  
Mike White

Vice-Chair  
Robert Carroll

Presiding Officer Pro Tempore  
Stacy Crivello

Councilmembers  
Alika Atay  
Elle Cochran  
Don S. Guzman  
Riki Hokama  
Kelly T. King  
Yuki Lei K. Sugimura



Director of Council Services  
Maria E. Zielinski

**RECEIVED**

By Department of the Corporation Counsel at 1:25 pm, Jun 15, 2018

**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.MauiCounty.us](http://www.MauiCounty.us)

June 13, 2018

MEMO TO: Patrick K. Wong  
Corporation Counsel

F R O M: Yuki Lei K. Sugimura, Chair  
Policy, Economic Development, and Agriculture Committee

A handwritten signature in black ink that reads "Yuki Lei K. Sugimura".

SUBJECT: **PROPOSED CHARTER AMENDMENTS (COUNTY GOVERNANCE)**  
(PEA-10(2))

In addition to seeking a legal opinion from the State Attorney General, may I please request your review and comment on the attached proposed resolution to determine whether County department heads appointed by the Managing Director, instead of the Mayor as this proposal recommends, violates Hawaii Revised Statutes, Chapters 76, 78, and 89 which references the Mayor as the "employer", "public employer", "chief executive officer", or "appropriate authority" for the County.

May I request your written response **no later than Wednesday, June 27, 2018**. To ensure efficient processing, please include the relevant Committee item number in the subject line of your response.

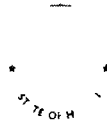
Should you have any questions, please contact me or the Committee staff (Shelly Espeleta at ext. 7134, or Clarita Balala at ext. 7668).

pea:ltr:010(2)acc01:ske

Attachment

cc: Mayor Alan M. Arakawa

ALAN M. ARAKAWA  
Mayor



DAVID J. UNDERWOOD  
Director

CYNTHIA M. RAZO PORTER  
Deputy Director

COUNTY OF MAUI  
**DEPARTMENT OF PERSONNEL SERVICES**  
200 S. HIGH STREET \* WAILUKU, MAUI, HAWAII 96793-2155  
PHONE (808) 270-7850 \* FAX (808) 270-7969  
Website: [www.mauicounty.gov/departments/Personnel](http://www.mauicounty.gov/departments/Personnel) • Email: [personnel.services@mauicounty.gov](mailto:personnel.services@mauicounty.gov)

June 4, 2018

Honorable Alan M. Arakawa  
Mayor, County of Maui  
200 South High Street  
Wailuku, Hawaii 96793

For Transmittal to:

Honorable Yuki Lei Sugimura  
Chair, Policy, Economic Development, and Agriculture Committee  
Maui County Council  
200 South High Street  
Wailuku, Hawaii 96793

Dear Chair Sugimura:

**SUBJECT: PROPOSED CHARTER AMENDMENTS (COUNTY GOVERNANCE) (PEA-10(2))**

We are in receipt of your communication (PEA-10(2)), which requests:

*"May I please request your assistance with addressing areas where the Charter amendment proposal related to county governance may conflict with the County's requirement for a Mayor, as set forth in the Hawaii Revised Statutes."*

Thank you for the opportunity to comment on this issue. As our area of expertise is in public employment, we have focused our analysis in this area. We have not attempted to perform a comprehensive review of the statutes outside of this purview, as we felt other areas would be better addressed by legal counsel or by other departments whose expertise may lie in those areas.

Generally speaking, in areas such as employment, collective bargaining, and establishing terms and conditions of employment, statutory authority is vested specifically in the mayor. This is found in several locations within Title 7, Public Officers and Employees, of the Hawaii Revised Statutes:

- Chapter 76, Civil Service Law, specifically defines the "chief executive" for the County as the mayor.

AN EQUAL OPPORTUNITY EMPLOYER

Honorable Yuki Lei Sugimura  
June 4, 2018  
Page 2

- Chapter 76, Civil Service Law, specifically defines "employer" or "public employer" for the County as the mayor.
- Chapter 78, Public Service, defines the "chief executive," "employer," and "public employer" as the mayor via reference to Chapter 76.
- Chapter 89, Collective Bargaining in Public Employment, defines the "employer" or "public employer" for the County as the mayor.
- Chapter 89C, Public Officers and Employees Excluded from Collective Bargaining, defines the "appropriate authority" for the County as the mayor.

As these are statewide statutes of general applicability, we believe they would supersede any conflicting provisions of our charter.

As a result, we believe that the ultimate authority on most employment-related subjects would remain with the mayor, including any decision-making in collective bargaining (such as negotiating master contracts and supplemental agreements), deciding grievances and internal complaints, and setting wages, hours, and other terms and conditions of employment for employees not covered by collective bargaining. While the mayor could choose to delegate any of these tasks to the managing director, should he/she choose not to do so, or if a conflict arose, the statutory authority would fall to the mayor.

As we noted above, we have not attempted to review the statutes outside of those pertaining to public employment. However, we are aware that statutes exist that specifically describe powers and duties of the mayor, and thus may be of interest to your committee. For example, HRS Chapter 127A specifically reserves to the mayor the emergency powers necessary to prepare for and respond to emergencies or disasters. Per this chapter, direct responsibility for the organization, administration, and operation of the county emergency management agency is granted specifically to the mayor.

The powers and responsibilities of the managing director are described very broadly in the proposed amendment as those "powers and responsibilities commonly possessed by a chief operating officer." As such, it is difficult to determine whether there is a specific conflict with those authorities reserved to the mayor by statute. However, we thought it was important to note the potential limitations on the authority of this position.

I hope this addresses your request. If you have any questions, please feel free to contact me at extension 7850.

Sincerely,



DAVID UNDERWOOD  
Director of Personnel Services

DU

Council Chair  
Mike White

Vice-Chair  
Robert Carroll

Presiding Officer Pro Tempore  
Stacy Crivello

Councilmembers  
Alika Atay  
Elle Cochran  
Don S. Guzman  
Riki Hokama  
Kelly T. King  
Yuki Lei K. Sugimura



vices

**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
www.MauiCoun us

May 31, 2018

Mr. David Underwood, Director  
Department of Personnel Services  
County of Maui  
Wailuku, Hawaii 96793

Dear Mr. Underwood:

**SUBJECT: PROPOSED CHARTER AMENDMENTS (COUNTY GOVERNANCE) (PEA-10(2))**

May I please request your assistance with addressing areas where the Charter amendment proposal related to county governance may conflict with the County's requirement for a Mayor, as set forth in the Hawaii Revised Statutes.

May I please request you provide your written response to the Policy, Economic Development, and Agriculture Committee at its meeting on June 5, 2018, when this matter will be discussed.

Thank you for your assistance with this matter. Should you have any questions, please contact me or the Committee staff (Shelly Espeleta at ext. 7134, or Clarita Balala at ext. 7668).

Sincerely,

A handwritten signature in black ink that reads "Yuki Lei K. Sugimura".

YUKI LEI K. SUGIMURA, Chair  
Policy, Economic Development, and  
Agriculture Committee

pea.ltr.010(2)aps01.ske

cc: Mayor Alan M. Arakawa

RECEIVED  
COUNTY OF MAUI