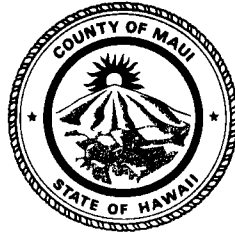


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MEMO TO: Keani Rawlins-Fernandez  
Vice-Chair, Maui County Council

FROM: Gary Y. Murai   
Deputy Corporation Counsel

DATE: April 8, 2019

SUBJECT: **EMPLOYMENT STATUS OF COUNCILMEMBERS** (PAF 19-132)

We respond to your memorandum dated March 21, 2019, requesting a Corporation Counsel opinion on the seven questions presented below, regarding the employment status of council members and related matters.

I. QUESTIONS PRESENTED

Specifically, you ask:

1. Are there any laws which classify elected Maui County officials as either part-time or full-time employees? If so, please identify the laws.
2. Is the mayor considered a full-time employee? What is this determination based on?
3. Are the council members considered part-time employees? What is this determination based on?
4. How could council members be established as full-time employees? What laws would need to be revised?

5. Council member time sheets in ADP are currently blank. If Councilmembers started inputting accurate full-time work schedules to reflect actual hours worked, for example 7:45 a.m. to 4:30 p.m., Monday through Friday, except County holidays, would that make them full-time employees?
6. Should the Maui County Salary Commission determine the compensation of elected officials based on the part-time or full-time status of elected officials? If so, what is the employment status of elected officials based on? If not, how does the Salary Commission determine the compensation of elected officials?
7. The December 27, 2001 opinion from the Department of the Corporation Counsel to the Director of Council Services states that council members are not entitled to paid vacation, but are entitled to sick leave, retirement, deferred compensation, flex spending, and health insurance. This opinion cites Chapter 79 and Section 78-6, Hawaii Revised Statutes (“HRS”). However, Chapters 78 and 79, HRS, were repealed in 2000. What are the employment benefits for elected officials and how are the benefits currently determined?

## II. BRIEF ANSWER

Elected officials<sup>1</sup> are neither full-time or part-time employees. The benefits accorded to elected officials, such as pensions and medical insurance, are those that are authorized by statute.

The Maui County Charter charges the Salary Commission with determining the compensation for elected officials. No further guidance is provided.

## III. ANALYSIS

We address your questions in the order they are presented.

1. Elected officials in the County of Maui Elected officials are neither full-time employees or part-time employees.

Hawaii law, including the Hawaii Revised Statutes, Hawaii Administrative Rules, Maui County Charter and Maui County Code, is silent as to whether

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<sup>1</sup> Unless otherwise specified, reference to “elected officials” shall mean the Mayor of the County of Maui and members of the Maui County Council.

elected officials are part-time or full-time. Indeed, with limited exceptions, no employees in Hawaii, public or private, are classified by law as full-time or part-time.<sup>2,3,4</sup> Moreover, even when an employee may be referred to as full-time, no definition is provided.<sup>5</sup> Employers have the discretion to designate their employees as part-time or full-time, but that designation does not necessarily create additional legal rights.

Rather than being based on a full-time or part-time designation, employment-related rights and benefits for workers in Hawaii are generally based on hours worked. For example, Hawaii wage and hour law requires employers to pay overtime compensation for hours worked in excess of forty hours per workweek,<sup>6</sup> and to provide prepaid health care plans for employees working at least twenty hours per week.<sup>7</sup>

Elected officials are a unique class of public servant. Under federal law, elected officials in state and county government are not considered employees. For example, the Fair Labor Standards Act of 1938, which establishes a minimum wage and eligibility for overtime pay for private sector and government employees specifically excludes from the definition of “employee” any individual who is not subject to civil service laws and holds a public elective office of that State, political subdivision or agency.<sup>8</sup> Similarly, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) exclude from the definition of employee, persons who are elected to public office in any state or political subdivision by the qualified voters.<sup>9</sup>

Unlike most employees, elected officials are not “hired” and are not subject to discipline, other than by censure or recall and may not be subject to Hawaii wage and hour law.<sup>10</sup> Where elected officials in Hawaii are included within the definition of “employee,” it is by statute and for specific purposes. For example, elected officials are considered employees for membership in

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<sup>2</sup>Employees who work in State Enterprise Zones may be classified as a full-time employee if they are “any employee, including a leased employee, and an employee under a joint employment arrangement, for whom the employer is legally required to provide employee fringe benefits.” §209E-2, H.R.S. State Enterprise Zones

<sup>3</sup> For purposes of eligibility for membership in the Hawaii Employee-Union Trust Fund, a “Part-time, temporary or seasonal employee” means a person employed for fewer than three months or whose employment is less than one-half of a full-time equivalent position. §87A-1, H.R.S.; §14-56-2, H.A.R.

<sup>4</sup> For convenience, employees of the County of Maui who work less than a forty-hour week may be informally referred to as “half-time” or “three quarter-time” employees, depending on the number of hours worked per week.

<sup>5</sup> §209E-2, H.R.S.

<sup>6</sup> §387-3, H.R.S.

<sup>7</sup> §393-3, H.R.S.

<sup>8</sup> 29 U.S. Code §203(e)(2)(C)

<sup>9</sup> 42 U.S. Code §2000(e)(f) and 29 U.S. Code §630(f)

<sup>10</sup>§387-1, H.R.S.

pension and retirement systems,<sup>11</sup> for being subject to the Hawaii Public Procurement Code,<sup>12</sup> and for withholding of taxes from wages.<sup>13</sup>

2. The mayor is not considered a full-time employee.

Based on our analysis in No. 1 above, we conclude that the office of mayor is not considered a full-time position.

3. Council members are not considered part-time employees

Based on our analysis in No. 1 above, we conclude that the office of council member is not considered a part-time position.

4. Designation of council members as full-time employees may be accomplished by amendment of the Maui County Charter, by ordinance, or by adoption of Rules of the Council to that effect.

Article 3 of the Maui County Charter authorizes the establishment of a county council and establishes the council's composition, terms of office, qualifications and powers, among other things. We note that to the extent that council members have work requirements, they are found in Article 3 and the Rules of Council. Article 3 requires the council, and presumably members of the council, to attend an organization meeting and twice-monthly meetings. Rule 7(a) of the current Rules of the Council requires attendance at standing committee meetings. However, aside from the requirement that council members attend certain meetings, Article 3 and the Rules of the Council do not designate council members as full-time employees or establish hours of work.

5. Recording hours worked from 7:45 a.m. to 4:30 p.m. would not, by itself create full-time employment.

As discussed in No. 1 and No. 4 above, employees in Hawaii are not generally classified by law as full-time or part-time. Therefore, even if council members are deemed to be employees, recording forty or more hours worked per week on a timesheet would not, by itself create full-time employment.

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<sup>11</sup> "Employee" includes "members of the legislature and other elective officers" §88-21, H.R.S.

<sup>12</sup> "Employee" includes "an individual drawing a salary from a governmental body, whether elected or not." §103D-104, H.R.S.

<sup>13</sup> "Employee" includes "an officer or elected official." §235-61, H.R.S

6. We decline to opine on whether the Maui County Salary Commission should consider part-time or full-time status when determining compensation for elected officials, as that is a matter of policy rather than law.

The Salary Commission is authorized by Section 8-17.1 of the Maui County Charter. However, the only charge for the Salary Commission is to establish the compensation for the mayor, council members, the auditor and appointed directors and their deputies.<sup>14</sup> No other substantive guidance is provided.<sup>15</sup>

7. The employment benefits for elected officials are those which are established by statute, or by ordinance, to the extent such ordinance is permitted by statute.

Some of the significant benefits extended to elected officials by statute include membership in the employees' retirement system,<sup>16</sup> workers' compensation,<sup>17</sup> participation in the deferred compensation plan,<sup>18</sup> and health benefits.<sup>19</sup>

Chapters 79-1 and 78-6, H.R.S. which were cited in the December 27, 2001 Corporation Counsel opinion you referred to were repealed effective July 1, 2002 as part of a comprehensive overhaul of civil service law in Hawaii.<sup>20</sup> Vacation, sick leave and other leave benefits for civil service employees are now provided for in §78-23, H.R.S.

Elected officials are exempt from the civil service system and excluded from collective bargaining.<sup>21</sup> Pursuant to §89C, H.R.S., benefits awarded to civil

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<sup>14</sup> While we decline to opine as to whether the Salary Commission should consider part-time or full-time employment status, review of the agendas and minutes of past Salary Commission meetings shows that compensation decisions for elected officials have been based on their duties and responsibilities, the cost of living in Maui County, comparison with the salaries of other elected officials in Hawaii, and testimony from the mayor, council chair, and members of the public.

<sup>15</sup> The only other guidance provided to the Salary Commission is not relevant here. The Salary Commission is required to consult with the commissions that appoint their director, including the Fire and Public Safety Commission, which appoints the Fire Chief, the Civil Service Commission, which appoints the Director of Personnel Services, the Police Commission, which appoints the Police Chief, and the Liquor Commission, which appoints the Director of Liquor Control.

<sup>16</sup> §88-42.6, H.R.S.

<sup>17</sup> §386-1, H.R.S.

<sup>18</sup> §88E-1, H.R.S.

<sup>19</sup> §87A-1, H.R.S.

<sup>20</sup> Hawaii civil service law was substantially amended by Act 253 of the 2000 Legislative Session

<sup>21</sup> §§76-77(2) and 89-6(f)(1), H.R.S.

servants via collective bargaining may be extended to public officers who are excluded from collective bargaining by an “appropriate authority,” who may make adjustments to wages, hours, benefits and other terms and conditions of employment.<sup>22</sup> However, §89C, H.R.S. does not specifically include elected officials as those whose benefits and working conditions may be adjusted, and does not identify an appropriate authority to make adjustments for council members.<sup>23</sup>

IV. CONCLUSION

Elected officials are a unique class of public servant who are neither full-time or part-time. While the county council may designate its members as full-time, the benefits accorded to elected officials are not based on that designation. The benefits available to elected officials are established by statute.

We make no opinion whether the Salary Commission should consider the full-time or part-time status of elected officials.

Please contact us if you have any questions.

APPROVED FOR TRANSMITTAL:

  
for EDWARD S. KUSHI, JR  
First Deputy Corporation Counsel

LF 2019-0553  
PAF 19-132 2019-04-08 Memo Employment Status of Councilmembers

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<sup>22</sup> However, compensation may not be adjusted under §89C, H.R.S. for county officers whose salary is fixed by a salary commission.

<sup>23</sup> “Appropriate authority” includes the governor, mayor, chief justice and board of education, among others. §89C-1.5, H.R.S.