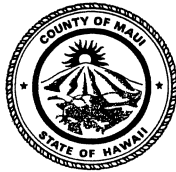


ALAN M. ARAKAWA
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February 3, 2005

MEMO TO: Michael J. Molina, Chair
Committee of the Whole

F R O M: James A. Giroux, Deputy Corporation Counsel

SUBJECT: **RESIGNATION OF DONAVAN R. KEALOHA FROM THE LANAI PLANNING COMMISSION (COW-7)**

This is in response to your January 24, 2005 memorandum. Your memorandum posed questions regarding procedures to be followed when appointing a person to a board or commission after the resignation of a board or commission member.

Background.

On November 18, 2004, the office of the mayor received Commission Member Donovan R. Kealoha's resignation from the Lanai Planning Commission.¹ On January 12, 2005, the council received a letter from the office of the mayor, signed by David DeLeon, Senior Executive Assistant to the Mayor, notifying the council of Mr. Kealoha's resignation.

Applicable Charter provisions and ordinances.

Section 13-2(17), Revised Charter of the County of Maui (1983), as amended ("Charter"), states:

A vacancy on a commission or board due to death, resignation or removal shall be filled as follows:

Within thirty (30) days of the occurrence of a vacancy the mayor shall submit to the council the name of the mayor's nominee to fill the vacancy. Within sixty (60) days thereafter the council shall act to approve or disapprove the nominee. If the council disapproves the nominee it shall immediately so notify the mayor of its action. The mayor shall then submit the name of a second

¹Letter to G. Riki Hokama, Council Chair, from David DeLeon ("for Alan M. Arakawa, Mayor"), January 12, 2005.

nominee to the council within ten (10) days and the council shall act thereon within sixty (60) days. This process shall continue until the vacancy is filled. In the event that the council fails to approve or disapprove a nominee within the time periods provided for herein, that nominee shall be deemed appointed to fill the vacancy upon its occurrence. If the mayor fails to submit the name of a nominee within the times provided for herein, the council may within sixty (60) days nominate and approve the appointment of an individual to fill the vacancy. (Emphasis added).

Maui County Code ("MCC") Section 2.41.040 states:

The mayor shall notify the council in writing of any vacancy on a board, commission, or committee within five days of said vacancy.

MCC Section 2.41.050 states:

A. In accordance with section 13-2, Revised Charter of the County of Maui (1983), as amended, should the mayor fail to submit the name of a nominee within the times provided for by law, the council may, within sixty days after the expiration of the times so provided, nominate and approve the appointment of an individual to fill a vacancy. If the mayor submits the name of a nominee within the sixty-day period, the mayor's submittal shall be deemed invalid.

B. Any member of the council may nominate one individual per vacancy by transmitting the information required under section 2.41.020 to the council or appropriate council committee.

C. Upon receipt of the required information, the council may approve or disapprove the nomination.

Questions.

1. Is the Senior Executive Assistant to the Mayor authorized to notify the Council on behalf of the Mayor?

No. Under MCC Section 2.41.040, the mayor shall notify the council in writing of any vacancy in a commission.

Charter Section 7-6(2) states, in part:

[I]n the temporary absence of the mayor from the State, or a temporary disability of the mayor, the managing director shall act as mayor. If there is no managing director or if the managing director is unable to act,

the finance director shall act as mayor. In the event of the temporary absence of the mayor from the county, or temporary leave, the mayor may designate the managing director or, in the managing director's absence or unavailability, the finance director to act as mayor.

Pursuant to Charter Section 13-2(17) and MCC Section 2.41.040, it is the duty of the mayor to notify council of a vacancy. When the mayor is temporarily absent from the county,² the mayor may, under Charter Section 7-6(2), designate the managing director or, in the managing director's absence or unavailability, the finance director, to act as mayor and transmit the notice to council required by law.³ In no event is an executive assistant to the mayor authorized by law to provide such notification.

2. When was the Mayor required to notify Council of Mr. Kealoha's resignation?

Under MCC Section 2.41.040, the mayor is required to notify council of a vacancy within five days of the vacancy.

Based on the facts presented, the office of the mayor received notice of the vacancy on November 18, 2004. MCC Section 1.04.020(E) states:

The time within which an act is to be done as provided in any provision in this code or any order issued pursuant to any provision in this code, when expressed in days, shall be computed by excluding the first day and including the last, unless the last day is a Sunday or holiday, in which case it is also excluded.

Therefore, pursuant to MCC Sections 1.04.020(E) and 2.41.040, the mayor had five days from November 18, 2004 in which to notify the council, and the deadline for notification was November 23, 2004.⁴

²It is our understanding that Mayor Alan Arakawa was on Oahu on January 12, 2005, the date of the letter signed by David DeLeon.

³We are unaware as to whether such a designation in fact took place.

⁴Unlike Rule 6, Hawaii Rules of Civil Procedure, MCC Section 1.04.020 does not exclude intermediate Saturdays, Sundays, and holidays in the computation of a prescribed time period that is less than seven days.

3. When did the Mayor's thirty-day time period to nominate a replacement begin and end?

Under Charter Section 13-2(17), the thirty-day period begins upon "the occurrence of a vacancy". Neither the Charter nor the Maui County Code elaborate upon the meaning of the phrase, "the occurrence of a vacancy", and neither specifies when and how a resignation becomes effective.

In the absence of a special rule prescribing how a resignation is to take effect or to which authority a resignation should be presented, a resignation is generally effected by delivery of notice of resignation to the authority that has the power to fill the vacancy.⁵ Therefore, inasmuch as the mayor has the authority to appoint members of the planning commissions,⁶ delivery of a notice of resignation to the mayor would constitute "the occurrence of a vacancy" for purposes of Charter Section 13-2(17). Accordingly, the thirty-day period would commence from the date of delivery of the notice of resignation.

In this case, Mr. Kealoha's resignation was received by the office of the mayor on November 18, 2004, and, in accordance with the counting convention set forth in MCC Section 1.04.020(E) (cited above), the thirty-day period described in Charter Section 13-2(17) ended on Saturday, December 18, 2004.⁷

4. When does the Council's sixty-day time period to nominate and approve a replacement begin and end?

Charter Section 13-2(17) states, in part:

⁵See McQuillin Municipal Corporations §§12.122, 12.125 (3d ed.), at 590-91, 596-97 ("Where the holding of an office is not compulsory, in the absence of legal provision, resignation upon delivery to the proper authorities takes effect without acceptance; and in such case a successor may be appointed ... without the formal acceptance of the resignation....")

In the absence of any special rule prescribing to what authority a resignation should be presented, the proper authority to accept a resignation is that which has power to fill the vacancy.")

⁶See Charter §8-8.4 ("Each planning commission shall consist of nine members appointed by the mayor with the approval of the council.").

⁷MCC §1.04.020(E) does not exclude Saturdays in the computation of a prescribed period of time.

If the mayor fails to submit the name of a nominee within the times provided for herein, the council may within sixty (60) days nominate and approve the appointment of an individual to fill the vacancy. (Emphasis added.)

MCC Section 2.41.050(A) states, in part:

[S]hould the mayor fail to submit the name of a nominee within the times provided for by law, the council may, within sixty days after the expiration of the times so provided, nominate and approve the appointment of an individual to fill a vacancy. (Emphasis added.)

In this case, a senior executive assistant, by a letter dated January 12, 2005 and signed ostensibly for the mayor, gave notice of a vacancy on the Lanai Planning Commission after the five-day notice requirement of MCC Section 2.41.040 had passed (and after the thirty-day time period for the mayor to nominate a successor had elapsed).

Neither Charter Section 13-2(17) nor MCC Section 2.41.050(A) explicitly address situations like the one presented; however, at least several beginning dates for the sixty-day period are arguable: (i) December 19, 2004, the day after the last day of the thirty-day period (see answer to Question 3, above), in which case the sixty-day period would expire on February 16, 2005; (ii) January 12, 2005, the date of council's receipt of the letter signed by Mr. DeLeon, in which case the sixty-day period would expire on March 14, 2005 (March 13, 2005 being a Sunday); and (iii) the date of council's receipt of a letter signed by the mayor (or someone acting as mayor pursuant to Charter Section 7-6(2)) notifying council of a vacancy, in which case the sixty-day period has not yet commenced.⁸

The sixty-day period described in (i) is consistent with a literal reading of MCC Section 2.41.050(A), which provides that the sixty-day period commences "after the expiration of the times so provided" (i.e., after the expiration of the deadline for the mayor to submit the name of a nominee). However, calculating the sixty-day period from the date of expiration of the thirty-day period does not take into account the possibility (in this case, the actuality) of the failure of the office of the mayor to notify the council of a resignation until nearly two months after the date of resignation. In situations where the council receives late notice of a resignation, calculating the sixty-day period from the expiration of the thirty-day period may provide the council with little or no time to act. Such a result would appear to contravene

⁸We are not aware of such a letter having been delivered.

the purpose of Charter Section 13-2(17), as amended, which authorizes the council to nominate individuals when the mayor has failed to submit the name of a nominee in a timely manner.⁹

The sixty-day period described in (iii) is consistent with the provision (discussed in the answer to Question 1, above) that requires that the mayor, or someone authorized by law to act as mayor, notify the council in writing of a vacancy. However, (iii) makes commencement of the sixty-day period wholly dependent upon the mayor fulfilling the technical requirements of MCC Section 2.41.040. This could result in situations where the council, even though aware of a resignation, would not be able to initiate an appointment solely because the Section 2.41.040 notice was deficient. It is conceivable that a mayor, for whatever reason or reasons, may in certain circumstances be unwilling or unable to comply with MCC Section 2.41.040, in which case the sixty-day period would, under (iii), never commence. We do not believe such a result was envisioned or intended. It would be ironic if a Charter provision that was intended to ensure the timely appointment of individuals to boards and commissions were interpreted in such a way as to cause additional delays in the filling of vacancies.

For the reasons discussed above, the sixty-day period described in (ii) appears most consistent with Charter Section 13-2(17), as amended, and its overall purpose of providing for the timely appointment of individuals to fill vacancies resulting from resignation, death, or removal. Therefore, council having received (albeit technically deficient) notice of a resignation, and the mayor having failed to submit the name of a nominee within the time provided for under the Charter, we advise that the council is now empowered, within a sixty-day period that will expire on March 14, 2005, to "nominate and approve the appointment of an individual to fill the vacancy."¹⁰

5. When may the Mayor submit a subsequent nomination to the Council?

MCC Section 2.41.050(A) states, in part:

⁹Charter §13-2(17) was amended in 2002 when Charter amendment proposal number 16, granting the Council the power to nominate and approve the appointment of an individual to fill a vacancy, was approved by voters. The Charter amendment was proposed by Resolution No. 02-99.

¹⁰Charter §13-2(17).

If the mayor submits the name of a nominee within the sixty-day period, the mayor's submittal shall be deemed invalid.

Therefore, any submission made by the mayor during the sixty-day period (which, as discussed in the answer to Question 4, above, began on January 12, 2005 and expires on March 14, 2005) will be invalid. Once the sixty-day period has expired, MCC Section 2.41.050 would no longer invalidate a submission and, therefore, the mayor would be empowered to submit the name of a nominee.¹¹

6. What happens if the Council does not appoint within their sixty-day time period and the Mayor does not submit a subsequent nomination?

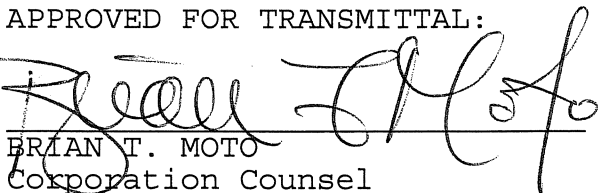
Inasmuch as this Question poses a hypothetical situation, we reserve our answer and recommend that further advice be sought if and when facts and circumstances present a basis for analysis.

cc: Mayor Alan M. Arakawa
Traci Fujita Villarosa,
First Deputy Corporation Counsel
David DeLeon, Senior Executive Assistant

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APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

¹¹See McQuillin Municipal Corporations §12.83 (3d ed.), at 468-69 ("Where the power of appointment exists the rule usually is that, in a proper case, it may be exercised at any time during the term of the officer ... authorized to act in the premises.")