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COUNTY COUNCIL

MEMO TO: GET-10(1) File

F R O M: Mike Molina, Chair  
Government Ethics and Transparency Committee



SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO  
APPOINTMENT OF ADMINISTRATIVE HEADS** (GET-10(1))

The attached informational document pertains to Item 10(1) on the Committee's agenda.

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Attachment

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January 21, 2020

**Question:** Whether the Mayor has the authority to appoint individuals as department heads on a temporary basis after that individual was disapproved by the County Council.

**Response:** No, but a declaratory action may be necessary to clarify.

## I. INTRODUCTION

Pursuant to Resolution 19-171, the Maui County Council ("Council") has requested an analysis of whether the Mayor's Office ("Mayor" or "mayor") has the authority to appoint individuals as department heads on a temporary basis after that same individual was disapproved by the Council.

While the limited case law contradicts my ultimate conclusion, it is unlikely the Hawai'i Supreme Court will find similarly here. The historical trend has been for reviewing courts to examine whether or not there is any limiting language in the constitution, charter, statute, or other document granting a legislative body confirmation authority. In most cases there is no limiting language to the appointing office's (i.e. mayor, governor, etc.) appointment authority (for full terms) and temporary appointment authority (positions to be filled during the recess of the confirming authority or when there is a vacancy). Additionally, courts have held that provisions that grant temporary appointment power is to be interpreted separately from the authority to appoint a full-term office holder, contingent to legislative approval. This distinction has been key in finding that while there may be qualifications or limitations in who can be appointed for full terms, there are no restrictions to who can be appointed on a temporary basis. However, in this case, the Maui County Charter ("Charter") placed no limitation on either the temporary or full-term appointment authority, but rather added language requiring a rejected appointee to vacate the office without exemption. It is this requirement that supports the conclusion that a previously rejected appointee may not subsequently be appointed on a temporary basis, despite the lack of any limiting language in the Charter.

Even more troubling is that because there is no language in the Charter that specifies a remedy or consequence if the mayor fails to name an appointee for these positions within the mandated sixty-day period, a ridiculous and absurd situation could result. Coupled with a limitless temporary appointment authority, the interpretation of the

Charter proposed by the Department of the Corporation Counsel would allow the mayor to appoint one individual to repeated temporary appointments while side-stepping the Council's confirmation process. This results in an absurdity that could not have been intended.

The written opinion of the Maui County Corporation Counsel, dated March 7, 2019 ("Corporation Counsel Opinion") stated that there is no limiting language and the legislative history of proposed charter amendments support the position that the legislature did not intend to restrict the Mayor's temporary appointment authority. However, while the Charter Review Commission ("Commission") did not adopt the explicit language preventing a previously rejected nominee from being appointed to a temporary position, the Commission did add in limiting language stating, "any disapproved nominee shall not continue in the nominated position" and allowing a new subsequent appointee to take office. Allowing a previously rejected appointee to continue in office, even on a temporary basis would require inserting exemptions to the requirement that rejected appointees vacate the office and create a new, unintended, and unilateral appointment authority. Once the Council denies appointment, the nominee must vacate the office and the Mayor must nominate a new appointee who will take office until confirmed. Any other interpretation would render the confirmation process a nullity.

## II. CORPORATION COUNSEL OPINION

In the Corporation Counsel Opinion, the Department of the Corporation Counsel reached the conclusion that the Mayor is permitted to appoint previously rejected nominees as temporary administrative department heads. It reached this conclusion for four reasons: 1) Section 6-2(4) and Section 6-2(5) are separate and do not conflict with each other; 2) there is no limitation to the Mayor's temporary appointment authority in Section 6-2(4); 3) the limitations in Section 6-2(5) do not apply to Section 6-2(4); and 4) the charter amendments made by the 1991-92 Charter Review Commission ("Commission") support a finding that the Commission did not intend to impose limitations on the Mayor's temporary appointment authority.

I agree that in rejecting the specific language that would prevent the appointment of an administrative head "provided further that such person so appointed shall not have been previously rejected by the council for such department pursuant to Section 6-2(5)[]" is indicative that the Commission did not intend to place such a limitation on the mayor's temporary appointment authority. However, I disagree that this lack of limiting language allows the mayor to appoint a previously rejected appointee. If this were the case, the fourth sentence of 6-2(5), requiring a rejected appointee vacate office, would be rendered meaningless and the resulting loophole, would circumvent the Council's expressly granted confirmation authority. Essentially, this is limiting language that demonstrates the Commission's intent to prevent previously rejected appointees from continuing in the position, even on a temporary basis. The inclusion of this language, requiring a denied

appointee the ability to continue in the office clearly demonstrates the Commission's intent to give weight to the Council's confirmation authority. It recognized that a situation, such as this, may occur and aimed to prevent it by requiring denied appointees vacate the office.

### III. ANALYSIS

#### A. County Charter

##### 1. Mayor's Authority

The term of office of any administrative head of a department who is appointed by the mayor shall end with the term of the office of the mayor, except that any such administrative head may be earlier removed as provided for in this charter. Such officers shall not hold over more than sixty (60) days after their respective terms of office, and shall immediately vacate their respective offices at the end of the 60-day period or upon the appointment of a successor in accordance with this charter, whichever occurs first.

##### 2. Temporary Appointments

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.

##### 3. Confirmation Power

Within sixty (60) days of taking office, or within sixty (60) days after a vacancy is created, the mayor shall appoint [stated administrative heads], with written notice of the appointment to the council. The council shall confirm or deny the appointment within sixty (60) days after receiving notice of the appointment by the mayor. If the council does not act within the 60-day period, the appointment shall be deemed to be confirmed. *The appointee shall take office upon appointment by the mayor but shall not continue in office if the council denies the appointment.* If the appointment is denied by the council, the mayor shall make a new appointment within sixty (60) days of the council's denial, and the council shall confirm or deny within sixty (60) days after receiving notice of the new appointment by the mayor. If the council does not act within the 60-day period, the appointment shall be confirmed.

The Commission noted that it believed providing that a disapproved nominee shall not continue in the nominated position addresses the ambiguities in the existing charter language, namely "whether to (1) authorize rejected appointees to continue to serve after rejection; and (2) if allowed to continue to serve, whether to limit the period under which such rejected appointees can continue to serve or; (3) to prohibit such rejected appointees from continuing to serve." Charter Commission Report, p. 19. Specifically, the Commission commented that "the ambiguities contained in the existing

charter will be addressed and that the rights and obligations of the executive and legislative branches of government to better defined and the validity of the actions of appointees during interim periods will have been resolved.” *Id.*

#### 4. Department Head Qualifications

In addition to ay qualifications set forth in this charter, specific qualifications for administrative heads appointed by the mayor shall be established by the council by ordinance.

#### B. Legal Analysis

In reviewing questions of constitutional law, courts review de novo under the “right/wrong” standard. *State v. Sasai*, 143 Hawai‘i 285, 294, 429 P.3d 1214, 1223 (2018); *State v. Arceo*, 84 Hawai‘i 1, 11, 928 P.2d 843, 853 (1996). “When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature which is to be obtained primarily from the language contained in the statute itself.” *Franks v. Honolulu*, 74 Haw. 328, 334 (1993) (quoting *In re Hawaiian Telephone Co.*, 61 Haw. 572, 577 (1980)) (internal quotation marks omitted). “When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute an ambiguity exists.” *State v. Sylva*, 61 Haw. 385, 388 (1980).

The Corporation Counsel Opinion asserts that Section 6-2(4) and 6-2(5) are to be read separately and that any limitation in 6-2(5) does not apply to 6-2(4). However, this is contrary to how courts engage in statutory construction and would result in a nullity the courts seek to avoid. “Three rules of statutory construction are...germane to...inquiry. First, legislative enactments are presumptively valid and should be interpreted in such a manner as to give them effect. Second, laws in *pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in to aid to explain what is doubtful in another. Third, where there is a plainly irreconcilable conflict between a general and specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.” *Richardson v. City & County of Honolulu*, 76 Haw. 46, 54-55 (1994) (quoting *State v. Spencer*, 68 Haw. 622, 624 (1986); *Kam v. Noh*, 70 Haw. 321, 325 (1989); *Mahiai v. Suwa*, 69 Haw. 349, 356-57 (1987) (internal quotation marks and citations omitted)). Here, 6-2(4) and 6-2(5) are *pari materia* in that they both generically relate to the same subject matter; the authority of the mayor to appoint and nominate administrative department heads. While one discusses temporary appointments and the other full-term appointments, they are necessarily read together in order to give each full effect.

The clear intention of Section 6-2(5) of the Charter is: 1) the mayor shall appoint certain department heads within sixty days of taking office or within sixty days of a vacancy with written notice to the Council; 2) the Council shall confirm or deny the

appointment within sixty days; 3) if the Council fails to confirm or deny, the appointment is confirmed; 4) the appointee shall take office upon appointment and shall not continue if the Council denies appointment; and 5) if the appointment is denied, the mayor shall make a new appointment within sixty days. Important to this analysis are steps 4 and 5. Step 4 states that an appointee may act as department head upon appointment by the mayor and pending confirmation or denial by the Council. However, if the appointment is denied, the appointee must vacate the office. Once an appointment has been denied, the mayor must name a new appointee within sixty days and the new appointee takes office. The critical question is what happens to the office in the sixty days between the appointment being denied and the mayor's new appointment.

Step 4 makes it clear that once an appointment is denied, *the appointee shall not continue in office*. There is no limiting language to this requirement. Once an appointment is denied, the appointee cannot continue to serve in the office without exception. There are no allowances for the denied appointee to continue pending the mayor's new appointment. The Corporation Counsel Opinion appears to opine that the unlimited authority of the mayor to make temporary appointments authorizes the appointment of any qualified person. This interpretation requires applying limiting language to Section 6-2(5) that simply is not there. In order for the mayor to be permitted to appoint a denied appointee as temporary department head pursuant to Section 6-2(4), the fourth sentence of Section 6-2(5) would contain the restriction that the denied appointee may continue if temporarily appointed by the mayor. Such language is not contained in the Charter and imposing such exceptions to Section 6-2(5) is wholly without merit or support either in case law or legislative history. See *Potter v. Haw. Newspaper Agency*, 89 Hawai'i 411, 422 (1999) ("Our rules of statutory construction require us to reject an interpretation of a statute that renders any part of the statutory language a nullity."); *Blair v. Harris*, 98 Hawai'i 176, 179 (2002) ("Courts are bound to give effect to all parts of a statute, and no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.") This leads to great confusion and unnecessary conflict when, as is the case here, the mayor ignores the decision of the Council (and the mandate in Section 6-2(5)) by allowing a rejected nominee to act as temporary administrative department head.

Additionally, such an interpretation grants the mayor an unintended and unilateral power; namely to appoint individuals to these offices after Council has denied appointment. Under the Corporation Counsel Opinion, there is nothing preventing the mayor from continuing to appoint a rejected appointee temporarily to an administrative department head position for multiple temporary terms. Courts have established that, "if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation." *Staebler v. Carter*, 464 F.Supp. 585, 599-600 (D.D.C. 1979). Allowing the mayor to appoint an individual that was previously denied by the Council would create an imbalance between the branches. Preventing the unfettered temporary

appointment power from being abused does not enhance the Council's power or authority, but rather prevents the expansion of the mayor's. The reason the Charter has expressly required the consent and approval of the Council in appointing individuals to these specific positions is because they are of such importance that it cannot be left to one person. It is clear that the charter never intended to allow the mayor to place administrative department heads without the approval of the Council. See e.g., *Richardson*, 76 Haw. at 56. A common sense reading of the limitation in Section 6-2(5) leads to the conclusion that the mayor is not permitted to temporarily appoint individuals previously rejected by the Council. The conclusion reached by the Corporation Council Opinion is inconsistent with the purpose of the Council's specifically granted approval and inconsistent with the intent of requiring Council approval and, therefore, illogical and absurd. See *State v. Griffin*, 83 Hawai'i 105, 108 n.4 (1996); *State v. Toyomura*, 80 Hawai'i 8, 20 (1995); Haw. Rev. Stat. § 1-15(3).

### C. Effect of Morita

A recent case from the Hawai'i Supreme Court sheds some light on how it may approach this issue. However, it is important to recognize that the language providing the governor interim appointment powers and the Charter language are very different and the analysis turns on the language in the document conferring such authority.

The Court recognized the importance of the current system of nomination and confirmation. "In accordance with the structure of our political system, the appointment of many government officials is a shared responsibility of the executive and legislative branches. The governor is entitled to choose a nominee for such positions, but the nominee typically may not take office until the senate has voted to confirm the individual, thus ensuring the appointment is generally agreeable to both elected branches." *Morita v. Gorak*, SCAP 16-0000686 at \*1 (Nov. 18, 2019).

"Balanced against these political considerations are the practical realities of ensuring the day-to-day operations of public institutions. Governmental agencies may experience difficulties fulfilling their duties when offices that are necessary for their administrative functioning are left vacant. To protect against disruption, the Hawai'i Constitution permits the governor to make interim appointments to offices that require senate confirmation when a vacancy arises and the senate is not in session. Additionally, the legislature has statutorily provided for certain office holders to continue their service as a "holdover" official following the expiration of their term, remaining in office until their successor is appointed." *Morita*, at \*1-2.

The Court found that temporary, or interim appointment authority is not subject to statutory limitations, finding that the absence of the phrase "as provided by law" to be significant in that it demonstrates that the constitution did not "contemplate a role for the legislature in prescribing the time and manner in which the governor may make interim appointments." *Morita*, at \*17. However, here, the Council does not seek to play a role in the time and manner of the mayor's temporary appointment powers. Instead, it seeks to

give effect to the clear language of the Charter that requires a rejected appointee vacate office.

Additionally, the Court found that the governor's interim appointment power is self-executing in that the constitution "define[s] standards as to when and how the governor may utilize the power." *Morita*, at \*18. If the clause had instead only laid out general principles and allowed the legislature to define the details, the power would not be self-executing and could be limited or restricted by the legislature. *Id.*

The *Morita* Court further found that such questions are ripe for declaratory actions, finding, "A conflict over the governor's authority to make an interim appointment during a commissioner's holdover service is thus likely to recur, and it is in the public interest that this court resolves this case. We thus agree that a mootness argument would easily be dispensed with because this case would fall into the public interest exception in any event." *Morita*, at \*14, n. 14.

#### IV. CONCLUSION

In conclusion, it is wholly inconsistent with the express language in the Charter and all its subsections, when read together, and the well-established body of law preventing the nullification of certain subsections to allow one branch of government unfettered authority outside the system of checks and balances, to allow the mayor to temporarily appoint a denied appointee. Moreover, allowing an unlimited temporary appointment authority could result in the mayor repeatedly appointing a denied appointee to temporary appointments, allowing him to prevent the Council from exercising its confirmation authority. It is the opinion of the undersigned that exercising an unrestricted temporary appointment power, despite the mandate in Section 6-2(5), is not allowed under the Charter. Additionally, a declaratory action by the Council is recommended as the question is ripe, pursuant to *Morita*, and should be submitted for clarification to the courts.

Sincerely,

Mia D. Obciana  
Special Counsel