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COUNTY COUNCIL
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February 26, 2019

MEMO TO: Patrick K. Wong
Corporation Counsel

Kelly King

F R O M: Kelly T. King, Council Chair

SUBJECT: **LEGAL ADVICE REGARDING MAYOR'S ABILITY TO APPOINT
DISAPPROVED DEPARTMENT HEADS AS INTERIM
DEPARTMENT HEADS (PAF 19-108)**

I. FACTUAL BACKGROUND

At its meeting of February 15, 2019, reconvened on February 22, 2019, the Council adopted resolutions disapproving the nominations of three department heads appointed by the Mayor. The Council disapproved the appointments of John D. Kim as Prosecuting Attorney, David Goode as Director of Public Works, and William R. Spence as Director of Housing and Human Concerns.

On Monday, February 25, 2019, the County Clerk delivered certified copies of Resolutions 19-29, 19-32, and 19-35 to the Mayor, which copies were stamped received by the Office of the Mayor at 11:00, 11:00, and 11:01 a.m., respectively. A copy of each transmittal, attaching a certified copy of each resolution, is attached for your ease of reference.

By the attached correspondence dated February 21, 2019, in response to my correspondence dated February 19, 2019, your Department opined:

The disapproved nominee should vacate the subject office upon the Mayor's receipt of certified copy of the Council's resolution disapproving such nominee. The Council's legislative "act" of confirming or denying any such nominee shall be by ordinance or

RECEIVED AT GC MEETING ON 4/4/19
from Chair Molina
(w/ attachments)

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resolution. See Section 4-1 of the Revised Charter of the County of Maui (1983), as amended (herein referenced as the "Charter").

I further asked who would be in charge of the department once a disapproved appointee has vacated the office. In response, your Department opined:

It would be the Deputy Directors, or in the case of the Corporation Counsel and Prosecutor offices, the 1st deputies of the various departments. We could find no direct, relevant Charter provision(s) to support this statement; however, it is clearly understood, intended and accordingly compensated by the Salary Commission that in the absence of a director, for whatever reason, the deputy or 1st deputy is in charge of the day to day operations of a department.

In the event the position of a deputy or 1st deputy is also vacant, the Mayor has the authority to appoint a temporary administrative head of any department [footnote citing Section 6-1(4) (*sic*) of the Charter].

By the attached press release dated February 26, 2019, the Mayor advised that he "has invoked the Maui County Charter's temporary appointment provision to maintain three acting department directors in their positions until replacements can be found and appointed." Specifically:

Mayor Victorino announced Monday that he has appointed John Kim as temporary interim prosecuting attorney until March 1. He has appointed William Spence as temporary interim director of the Department of Housing and Human Concerns until March 17, and he has appointed David Goode as temporary interim director of the Department of Public Works.

II. QUESTION PRESENTED

Does the Mayor have the authority to appoint, on a temporary basis, the same individual who has been disapproved by the Council as the administrative head of a department?

III. ANALYSIS

Subsections 4 and 5 of Charter Section 6-2 may be perceived as conflicting.

Charter Subsection 6-2(5) provides:

Within sixty (60) days of taking office, or within sixty (60) days after a vacancy is created, the mayor shall appoint the managing director, corporation counsel, prosecuting attorney, director of finance, director of public works, director of parks and recreation, planning director, director of housing and human concerns, director of water supply, director of transportation, and director of environmental management, 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 deemed to be confirmed. (Emphasis added.)

Charter Subsection 6-2(4) provides:

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.

In resolving the potential conflict, may I request you consider the following.

Time of approval for differing provisions of law

A canon of statutory construction is that a more recently enacted provision of law prevails over a potentially conflicting provision on the same subject. See, e.g., Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 340 (1999).

Charter Subsection 6-2(5) was amended in 2016 to also require Council approval of all mayoral-appointed department heads, in addition to the Corporation Counsel and Prosecuting Attorney, for whom Council approval was already required.

Charter Subsection 6-2(4) was enacted under a 1992 Charter amendment, along with an earlier version of Charter Subsection 6-2(5) that was applicable to the Corporation Counsel and Prosecuting Attorney.

General vs. specific provisions

Specific provisions are usually deemed to prevail over potentially conflicting general provisions of law. See, e.g., In re Pacific Marine & Supply Co., Ltd., 55 Hawai'i 572, 578 n. 5 (1974) (“[T]he more general and the more specific words of a statute must be considered together in determining the meaning of the statute, and [that] the general words are restricted to a meaning that should not be inconsistent with, or alien to, the narrower meanings of the more specific words of the statute.”).

The Mayor’s authority under Subsection 6-2(4) to appoint a temporary administrative head of a department for which the Mayor appoints the head appears to be general, whereas Subsection 6-2(5) specifically provides that a disapproved nominee “shall not continue in office if the council denies the appointment.”

Legislative history and intent

Subsection 6-2(5) was proposed by the Council based on “the need for the Council to have approval authority for all of the Mayor's appointments of department directors to ensure transparency in the appointment process and the appointment of qualified candidates.” Policy and Intergovernmental Affairs Committee Report 16-110 (July 5, 2016).

In addition, a committee of the 1991-1992 Charter Review Commission recommended “that a rejected appointee cannot serve as an acting or interim department head after being rejected.” Committee A, Charter Review Commission, Report and Recommendations to Charter Review Commission (April 30, 1992). The report and the full list of 1992 Charter amendments are attached.

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The Charter Review Commission eventually recommended passage of the version of Section 6-2 that was in place from 1992 through 2016, including the statement that a rejected nominee for Corporation Counsel or Prosecuting Attorney “shall not continue in office.” This recommendation and the subsequent Charter language followed the County’s experience the prior year in having nominees for Prosecuting Attorney and Corporation Counsel remain in office on an interim basis after having their appointments rejected by the Council. See letter from Jeffrey Portnoy, Esq. to Council Chair Howard Kihune (Aug. 8, 1991) (attached); see also Application of Thomas, 73 Hawai`i 223 (1992).

Charter Subsection 6-2(5) appears to have a similar purpose as Section 26-34, Hawai`i Revised Statutes, which provides for Senate approval and disapproval of various State board and commission appointees. The Hawai`i Supreme Court has found the statute disqualifies a nominee from holding over in office after being disapproved by the Senate. Analyzing legislative history and intent, the Supreme Court held that allowing a disapproved nominee to temporarily remain in office would have “the unquestioned effect of diminishing the advice and consent power” of the Senate, contrary to the statute’s purpose strengthening the Senate’s authority over gubernatorial appointees. See Sierra Club v. Castle & Cooke Homes Hawaii, Inc., 132 Hawai`i 184, 196 (2013). Also, under the opinion, actions taken by individuals with invalid temporary appointments may be called into question. Id.

I trust your opinion will dispel any doubt about the validity of the three temporary appointments in light of the above.

I would appreciate receiving a written response by **Friday, March 1, 2019**. To ensure efficient processing, please include the relevant PAF number in the subject line of your response.

Should you have any questions, please contact me, Supervising Legislative Attorney David Raatz (ext. 7664), or Legislative Attorneys Traci Fujita (ext. 7687) or Carla Nakata (ext. 7659).

paf:cmn:19-108b

Attachments

cc: Mayor Michael P. Victorino