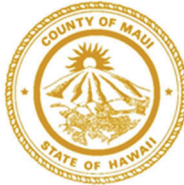


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November 23, 2021

Michael J. Molina, Chair  
Government Relations, Ethics, and Transparency Committee

### **Memorandum**

**Re: Member's Removal from Board of Water Supply (GREAT-46)**

This memorandum is provided in response to the Request for Legal Service (RFLS) our office received relating to GREAT-46. Our response to the questions raised in the RFLS are outlined below.

**1. What is "cause" for removal from a board or commission under Section 13-2?**

Section 13-2(5) of the Charter of the County of Maui (1983), as amended, provides that "the members of boards and commissions appointed by the mayor, with approval of the council, may be removed for cause upon recommendation of such removal by the mayor and the approval of two-thirds of the entire membership of the council." The term "for cause" in this context generally means neglect of duty or misconduct in office. A person may neglect their duties of office by failing to attend meetings or not performing other duties required by members of the board, as further described in Section 2.41.090, Maui County Code. Examples of misconduct in office include breaches of the code of ethics, fraud, or violations of law relating to their board position, such as knowing violation of the Sunshine Law. This is not an exhaustive list of what a "for cause" removal might entail, but instead provides a few common examples to help guide the committee.

**2. What are Council's obligations to ensure the Board member is provided notice and hearing before being removed?**

Neither the charter nor any ordinance requires notice or a hearing on Council's consideration of a volunteer board member's removal from the board. Therefore, legal notice and a hearing is only required if the constitutional right to due process mandates such notice and hearing.

A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections. Hufford v. McEnaney, 249 F.3d 1142, 1150, (9th Cir. 2001); see also Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 136, 870 P.2d 1272, 1280 (1994); Christian Fellowship v. County of San Diego, 670 F.3d 957, 983 (9th Cir. 2011).

Courts have consistently held that volunteers lack a cognizable liberty or property interest in their volunteer position. Doe v. Pasadena Unified Sch. Dist., 810 F. App'x 500, 504 (9th Cir. 2020) (Plaintiff's "Due Process claim fails because she does not have a protected property or liberty interest in volunteering."); Hyland v. Wonder, 117 F.3d 405, 412 (9th Cir. 1997) (plaintiff "fails to state a due process claim because he lacked a property interest in his position as a volunteer"); Miller v. Watson, No. 3:18-CV-00562-SB, 2019 WL 1871011, at \*17 (D. Or. Feb. 12, 2019) ("The Court finds that Miller does not have a liberty or property interest in his position as a volunteer reserve officer, and therefore the district judge should grant [the] motion to dismiss [Plaintiff's] due process claim.").

However, a law may "create an entitlement to a governmental benefit either if the statute sets out conditions under which the benefit must be granted or if the statute sets out the only conditions under which the benefit may be denied." Allen v. Beverly Hills, 911 F.2d 367, 370 (9th Cir. 1990) (quoting another source); accord Kaiser Foundation Health Plan, Inc. v. Burwell, 147 F.Supp.3d 897 (N.D. Cal. 2015) ("Whether an expectation of entitlement is sufficient to create a property interest will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the decisionmaker.").

Here, Charter Section 13-2(5) implies that a board member appointed by the mayor, and approved by Council, may not be removed unless there is "cause" for the removal. These are the exclusive conditions under which the benefit may be denied the Council must provide some process for determining whether the cause for removal set forth in the mayor's request is valid and the member is not removed arbitrarily or without cause. Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (statute "conferred upon appellee the right not to be removed save for cause" and therefore employee had a property interest which was entitled to constitutional protection).

Due process is not a fixed concept, but a flexible one that depends on the particular circumstances and rights involved. "The essential requirements of due process ... are notice and an opportunity to respond." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Where an employee can only be terminated "for cause," the Supreme Court has held that due process requires, at minimum, oral or written notice of the charges against the employee, an

explanation of the evidence, and an opportunity to correct factual mistakes. Id. Therefore, given the minimal (if any) property interest involved in a volunteer board position, due process is afforded to the board member if Council or the administration (1) informs the board member of the reasons for recommended approval, in writing or orally; (2) informs the board member that Council will make a final determination regarding the removal, which may be accomplished by sending the board member the Council agenda where their removal will be considered; and (3) permits the member an opportunity to respond to the stated reasons for removal to correct any factual errors. Council is not required to have a full adversarial hearing akin to court trial on the removal of an unpaid board member, unless significant issues arise that may situation warrant such a hearing.

Please note that the advice provided here only pertains to facts presented in your RFLS relating to an unpaid, volunteer member of County board. The due process requirements for the termination of paid staff or appointed officials may differ. This memorandum is only intended to be a general guide and different circumstances may result in different legal guidance.

Respectfully,

A handwritten signature in black ink, appearing to read "Keola R. Whittaker".

KEOLA R. WHITTAKER  
Deputy Corporation Counsel  
County of Maui