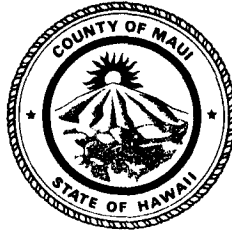


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MEMO TO: Michael P. Victorino, Chair  
Policy and Intergovernmental Affairs Committee

FROM: Edward S. Kushi, Jr.  
First Deputy Corporation Counsel

DATE: June 22, 2016

SUBJECT: **PROPOSED CHARTER AMENDMENTS (COUNTY MANAGER  
FORM OF GOVERNANCE)** (PIA-10(16))

It has come to our attention that the State of Hawaii Attorney General's office has recently issued an opinion (the "AG Opinion") dated June 6, 2016, to Mel Rapozo, Chair of the Kauai County Council, which opinion may affect your consideration and deliberations regarding the above-entitled committee item. A copy of the June 6, 2016 opinion is attached for reference.

The AG Opinion strikes down Kauai's proposed charter amendment that would have a County Manager be the chief executive officer for Kauai County instead of its Mayor. The Kauai County Manager would be appointed by the council; his or her salary would be determined by the council; and the County Manager can be removed by the council. According to the AG Opinion, "Such a method of selection is permissible only if the position is exempt from civil service."

Referencing Sections 76-77(1) and (2)<sup>1</sup>, Hawaii Revised Statutes, the AG Opinion concludes that the proposed Kauai County Manager position would

<sup>1</sup> HRS Sections 76-77(1) and (2), in pertinent parts:

"The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county, except the following:

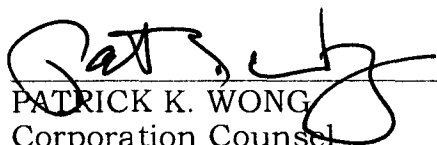
not be exempt from civil service. Therefore, citing State legislative preemption with regard to personnel matters, the AG opines that the proposed charter amendment would be invalid.

As Maui's proposed charter amendments with respect to the Managing Director are almost identical to Kauai's proposed amendments regarding its County Manager, we submit that the AG Opinion would likewise apply, and accordingly advise caution in proceeding further.

However, we will be available at your committee's June 27, 2016 meeting to further discuss this matter, and perhaps, offer alternatives that may comply with the referenced AG Opinion.

Call if further clarification and/or discussion is needed.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG  
Corporation Counsel  
2014-2966

Attachment

cc: Lance T. Hiromoto, Director, Department of Personnel Services  
David M. Raatz, Office of Council Services

- 
- (1) Positions in the office of the mayor; provided that the positions shall be included in the classification systems;  
(2) Positions of officers elected by public vote, positions of heads of departments, and positions of one first deputy or first assistant of heads of departments; . . ."

DAVID Y. IGE  
GOVERNOR



DOUGLAS S. CHIN  
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RUSSELL A. SUZUKI  
FIRST DEPUTY ATTORNEY GENERAL

June 6, 2016

The Honorable Mel Rapozo, Council Chair  
Kaua'i County Council  
Council Services Division  
4396 Rice Street, Suite 209  
Lihu'e, Hawai'i 96766

Re: Proposed Changes to Kaua'i County Charter

Dear Chair Rapozo:

This letter responds to your letter dated May 20, 2016, in which you asked for guidance from our office about certain proposed amendments to the Kaua'i County Charter. In particular, you inquired about what effect the civil service exemptions in Hawaii Revised Statutes (HRS) § 76-77 will have on the proposed charter amendments. We understand from your letter that these proposed charter amendments are to be considered at the Council's June 15 meeting. We offer this letter to provide the views of our office on the proposed amendments.

Question Presented. The questions you posed are:

(1) County Manager. The proposed charter amendment would repeal the provisions of the charter regarding the office of the mayor and replace them with provisions making a county manager the executive officer of the county. The county manager would be appointed by the Council; his or her salary would be determined by the Council; and the manager can be removed by the Council. You inquired whether these proposed amendments would be "nugatory" given the civil service exemptions listed in HRS § 76-77 and the holding of Hawaii Gov't Employees Ass'n v. County of Maui, 59 Haw. 65, 576 P.2d 1029 (1978) (HGEA).

(2) County Auditor. Existing charter language provides that a county auditor is appointed by the Council for a term of six years. The county salary commission sets the auditor's salary and the charter provides that the auditor has "the same powers with respect to the personnel of the office of the county auditor as

Mr. Mel Rapozo  
June 6, 2016  
Page 2 of 4

department heads have over their personnel[.]” Charter Section 32.01. You again inquired whether these provisions are consistent with the civil service exemptions listed in HRS § 76-77 and the holding in HGEA.

Short Answer. In sum, as outlined below, we conclude that a county manager position is not exempted from civil service under HRS § 76-77. Controlling Hawai‘i precedent has already determined that civil service and compensation matters are matters of statewide concern. HGEA. These matters are therefore beyond the County’s authority in the limited home-rule provision of article VIII, section 2 of the Hawai‘i Constitution and are instead subject to statewide regulation by the Legislature. For that reason, the county manager position must comport with existing civil service laws. As explained below, we believe it does not do so and therefore can proceed only with an appropriate statutory amendment.

As to the county auditor, however, we believe that the existing civil service exemptions in HRS § 76-77 cover the auditor’s position as a department head. This is analyzed below.

Limited Home-Rule Under Article VIII, Section 2. There are two provisions of the Hawai‘i Constitution that determine the scope of the County’s authority in this context. Article VIII provides for a limited form of home rule:

Charter provisions with respect to a political subdivision’s executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

Haw. Const. art. VIII, § 2. But article VIII also provides that “[t]his article shall not limit the power of the legislature to enact laws of statewide concern.” Haw. Const. art. VIII, § 6. In analyzing how these two provision interact, the Hawai‘i Supreme Court held that “it is clear that [the framers] intended the final authority on all civil service and compensation matters to remain with the legislature.” HGEA, 59 Haw. at 86, 576 P.2d at 1041. Personnel matters are matters of statewide concern, and therefore beyond the reach of the county authority contemplated by article VIII, section 2. Id. See also id. at 77 n.3, 576 P.2d at 1037 n.3. (“civil service and compensation” are “not . . . included within the area of [county] structure and organization” under this provision).

The Hawai‘i Supreme Court later confirmed this conclusion:

From this review of the history of the adoption of the constitutional provision at hand, it is clear that the state legislature may enact general laws

concerning state matters. Provisions of a charter or ordinance of a political subdivision of the state will be held superior to legislative enactments only if the charter provisions relate to a county government's executive, legislative or administrative structure and organization. *Personnel matters, including civil service and compensation matters, remain subject to legislative control.*

City & County of Honolulu v. Ariyoshi, 67 Haw. 412, 420-21, 689 P.2d 757, 764 (1984) (emphasis added) (discussing HGEA). Based on this case law, the County can re-structure the executive branch of county government. However, the County may *not* seek to exempt officers from the civil service by itself. Instead, those positions would be exempted from civil service only if consistent with current statutory law set by the State Legislature. For this reason, the answer to both of your questions is a matter of statutory law rather than constitutional law.

County Manager Position. Under the proposed charter amendments, the mayor would be replaced with a county manager, chosen by the county council. Such a method of selection is permissible only if the position is exempt from civil service. In our view, the existing statutory exemptions do not contemplate an exemption for a county manager. The relevant exemptions are the first two:

The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county, except the following:

- (1) Positions in the office of the mayor; provided that the positions shall be included in the classification systems;
- (2) Positions of officers elected by public vote, positions of heads of departments, and positions of one first deputy or first assistant of heads of departments;

HRS § 76-77. As described in the charter amendments, the county manager would not be in the office of the mayor, which would be abolished by the charter amendments.<sup>1</sup> HRS § 76-77(1). The manager would also not be elected by public vote, be a head of a department or a first deputy of a department head. HRS § 76-77(2). A county manager is not exempt from civil service. As a result, the position

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<sup>1</sup> We note that exemption (1) applies to positions "in the office of the mayor[.]" not to the mayor himself or herself. HRS § 76-77(1) (emphasis added). The mayor is currently elected and is covered by exemption (2) for elected positions. HRS § 76-77(2). Because an elected mayor and an appointed county manager are different methods of structuring the county executive branch, we do not believe that a county manager can be equated to "the office of the mayor" for purposes of HRS § 76-77(1).

Mr. Mel Rapozo  
June 6, 2016  
Page 4 of 4

of county manager cannot be structured as currently envisioned by the proposed charter amendments without statutory amendments to HRS chapter 76.

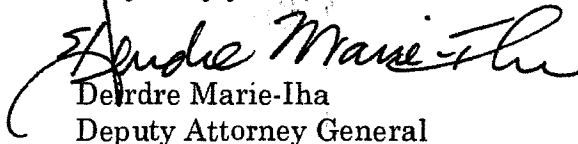
If a county manager position is desired, the County should seek a statutory amendment. For example, HRS § 76-77(1) could be amended to permit a civil service exemption for positions "in the county executive branch," instead of just "in the office of the mayor[.]" Or HRS § 76-77(2) could be amended to specifically exempt county managers along with elected officials.

County Auditor Position. The county auditor position must also be exempt under existing civil service laws for the same reason explained above. We believe that this position, as described in the charter, is akin to a department head and therefore exempt under HRS § 76-77(2).


Chapter 76 defines "department" as "any department, board, commission, or agency of a jurisdiction." HRS § 76-11. "Jurisdiction," in turn, is defined as "the State, the city and county of Honolulu, the county of Hawaii, the county of Maui [and] the county of Kauai[.]" among others. Id. The county auditor is the head of an "agency of a jurisdiction," and the county of Kaua'i is a "jurisdiction" under these provisions. In our view, therefore, the office of the county auditor is exempted from civil service by HRS § 76-77(2).

We hope this letter proves helpful. If you have any questions you may contact us at 586-1292. Thank you.

Very truly yours,

  
Deirdre Marie-Iha  
Deputy Attorney General

APPROVED:

  
Douglas S. Chin  
Attorney General

cc: ~~Kaua'i County Council~~  
✓Kaua'i County Attorney