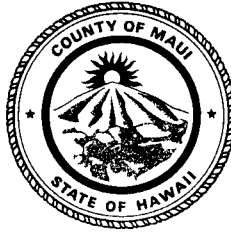


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MEMO TO: Gladys C. Baisa, Chair
Water Resources Committee

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

A handwritten signature in black ink, appearing to be "E. Kushi", is written over the printed name of Edward S. Kushi, Jr.

DATE: September 12, 2016

SUBJECT: **DEPARTMENT OF WATER SUPPLY PRESENTATION** (WR-6(1))

We respond to your September 1, 2016 memo (copy attached) as follows:

- A. "The Committee discussed the possibility of employing temporary hires to assist with expediting the process. Please provide an opinion on the legality of employing temporary hires for this purpose."

The State authority to employ temporary hires is found in Section 76-77(8), Hawaii Revised Statutes ("HRS"), which states:

"Section 76-77. **Civil service and exemptions.** 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:

...

(8) Positions of a temporary nature needed in the public interest where the need does not exceed ninety days; provided that before any person may be employed to render temporary service

pursuant to this paragraph, the director shall certify that the service is of a temporary nature and that recruitment through normal civil service recruitment procedures is not practical; and provided further that employment of any person pursuant to this paragraph may be extended for good cause for an additional period not to exceed ninety days upon similar certification by the director.

. . .
(emphasis added)

The County authority to employ temporary hires is found in the following administrative rules of the Director of Personnel Services¹:

Section 11-205-3. Discretion of appointing authority in filling vacancies. (a) An appointing authority may fill any position in the civil service by appointment from a civil service list or other means provided for by the director.

(b) An appointing authority may fill, on a temporary basis, any position for which there is a pending classification action, administrative review of classification action, classification appeal, reduction-in-force in progress, or for any other reason approved by the director. (emphasis added)

Section 11-205-26. Exempt appointment. (a) In addition to the exemptions under sections 46-33 and 76-77 of the Hawaii Revised Statutes, the director may exempt additional positions if the reason for exempting the position is for the same reason as a position that is included in the list of exemptions for the respective jurisdiction.

(b) The director may provide for a one time exemption from civil service recruitment procedures if the appointment to the position has a limitation date and it would be impractical to recruit under civil service procedures because the required probationary period² that is part of the examination process cannot be completed by the limitation date. (emphasis added)

¹ Title MC-11, Department of Personnel Services, Subtitle 2, Chapters 205 and 207.

² Section 11-205-25(e) states:

(e) The normal duration of an initial probationary period for police officers and fire fighters is 12 months and six months for other civil service employees.

Section 11-207-1. General provisions. (a) The exempt service consists of those positions, and persons in these positions, and persons providing personal services which are by statutes excepted from all or part of the provisions of the civil service laws of the State.

(b) All positions and persons in the exempt service are excluded from the requirements of the civil service recruitment procedures and from membership in the civil service.

(c) Except as provided by statutes, the requirements of position classification and compensation may not be applicable.

(d) Employees shall meet the citizenship and state residency requirements as provided by section 78-1, Hawaii Revised Statutes. (emphasis added)

DISCUSSION AND ALTERNATIVE

As discussed in committee, the Department of Water Supply ("DWS") has many vacant engineering positions, and is actively, albeit unsuccessfully³, recruiting applicants to fill said positions. When filled said positions would greatly assist DWS in its mission to expedite the process of dealing with the Upcountry Meter Priority List. Use of temporary hires, in lieu of full-time permanent engineers, would possible help DWS.

This writer has not been involved with the intricate, internal process that the Department of Personnel Services ("DPS") has used with other department heads, but on information and belief, I am informed that such hires have happened in the past.⁴

Accordingly, unless DPS believes or advises otherwise, I would suggest the following process/procedure/interaction by and between DWS and DPS to accomplish and implement the use of temporary hires, up to and until DWS is fully staffed:

- 1) DWS to formally request DPS's review and consideration to fill the vacant engineering position(s) with temporary hires.
- 2) Subject to DPS certification, DWS and DPS personnel to prepare a statement of minimum qualifications for the subject positions, together with recommended compensation ranges.

³ Due to the current, favorable construction industry activity and economy.

⁴ Would strongly urge this committee request the advice and consultation of the DPS.

- 3) Certification would be needed by either the Budget Office or the Department of Finance that funds are available to fill these positions on a temporary basis.
- 4) Thereafter, DPS and/or DWS to actively advertise to recruit applicants to fill such temporary positions.
- 5) Lastly, the DWS Director, as the appointing authority makes the selection(s) to fill such positions, without regard to regular civil service recruitment procedures.

- B. “Section 14.13.080, Maui County Code, provides the Director of Water Supply may waive or modify the provisions of Chapter 14, when certain situations exist. When can this waiver provision be utilized, if at all? If it cannot be utilized, please explain why it was originally included.”

Section 14.13.080, Maui County Code (“MCC”), states as follows:

“Waiver or modification. The director may waive or modify the provisions of this chapter when not contrary to the public’s health, safety or welfare, and when the director finds:

1. Strict application of the provisions of this chapter would cause an absurd, unfair, or unreasonably harsh result;
2. The director finds the circumstances or condition is unique or exceptional, and the director would grant the same request if made by every similarly situated applicant; and
3. The resulting action of the director will be without detriment to existing users.” (emphasis added)

Based on the above, in order for the director to exercise discretion to waive or modify provisions of Chapter 14.13, MCC, the director must find that such waiver or modification:

-would not be contrary to the public’s health, safety or welfare;

- would avoid or prevent an absurd, unfair or unreasonably harsh result;
- would be granted to any similarly situated applicants; and
- will be without detriment to existing users.

Accordingly, such waivers or modifications are not, and should not be, freely granted as the justification and finding requirements are stringent. However, in this writer's representation of DWS for the past 15+ years, I have seen and do recall isolated instances wherein such waivers/modification were requested, and were either granted or denied by the director, and based on said director's denial, an appeal to the Board of Water Supply was taken.

As concerns the substance or situations wherein such requests would be made, it is noted that the provisions of Chapter 14.13, MCC are fairly straightforward, and were intended to be applied in an almost a clerical fashion, i.e., applying to be on the priority list, responding to DWS upon being notified, and applying for a reservation, etc. However, unforeseen and unintended situations may arise, such as changes in mailing addresses, change of name, change in property ownership, disputed date(s) of application(s) received by DWS, etc., which situations may affect an applicant's status on the priority list. As understood, any and all requests for waivers or modifications are reviewed and considered on a case-by-case basis.

Lastly, Section 14.13.080, MCC, was codified into the Maui County Code in 2009⁵. Prior to said codification, the same provision was set forth in Section 16-106-08 of the Rules of the Board of Water Supply⁶, however the rules version vested the authority to grant waivers or modifications in the Board of Water Supply, not the director.⁷

ESK:lk

2014-3085

WR-6(1) 2016-09-12 Memo to Chair

Attachment

cc: David Underwood, Deputy Director, Department of Personnel Services
Jennifer M.P.E. Oana, Deputy Corporation Counsel, Corporation Counsel
David Taylor, P.E., Director, Department of Water Supply

⁵ Ordinance No. 3667.

⁶ Title MC-16, Subtitle 1, Chapter 106, Subchapter 3.

⁷ "Section 16-106-08. Waiver or modification. The board by a two thirds vote of its entire voting membership may waive or modify requirements of this rule when . . ."