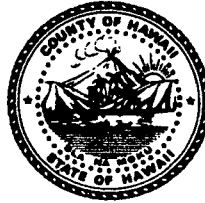


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PRIVILEGED AND CONFIDENTIAL COMMUNICATION
ATTORNEY-CLIENT COMMUNICATION
NOT A PUBLIC RECORD

March 11, 2005

Honorable Constance Kiriu
County Clerk
County of Hawai'i
25 Aupuni St.
Hilo, HI 96720

Dear Ms. Kiriu:

RE: Appointing Authority of the County Clerk

Our office has been tasked with the responsibility of reviewing and analyzing Article III of the Hawai'i County Charter (2000), appropriate civil service laws and regulations, together with applicable case law to determine the authority of the Hawai'i County Clerk with respect to her appointing authority of employees under her charge.

Charter Section 3-6

Article III, Section 3-6, Hawai'i County Charter (2000) (hereinafter "Charter"), provides in pertinent part as follows:

(b) The council shall appoint the county clerk which position shall be exempt from civil service laws and classifications. The county clerk shall:

* * * * *

(4) Appoint the deputy county clerk and the legislative auditor, with the approval of the council, and such positions shall be exempt from civil service laws and classifications.

* * * * *

- (5) Appoint necessary staff for which appropriations have been made by the council, subject to civil service laws and classifications, and exercise the same power with respect to the personnel of the clerk's office as the department heads in the executive branch.

The aforementioned Charter provision clearly and unambiguously states that the County Clerk is appointed by the Council. The Charter provision also clearly and unambiguously states the County Clerk shall appoint the deputy county clerk and legislative auditor, subject to Council approval.

The Charter, however, is silent on the method of removal of the County Clerk, Deputy County Clerk, and Legislative Auditor.

However, based on the authorities and reasons cited in this opinion, we find that in cases where there is no express provision in the Charter to the contrary, it is the *appointing authority* who has the power to remove an appointed official:

POSITION	APPOINTMENT	COUNCIL APPROVAL?	REMOVAL	COUNCIL APPROVAL?
County Clerk	Council	Yes	Council	Yes
Deputy County Clerk	County Clerk	Yes	County Clerk	No
Legislative Auditor	County Clerk	Yes	County Clerk	No

Appointment and Removal of Executive County Officers

For the executive administrative appointees, our Charter provides the following:

POSITION	APPOINTMENT	COUNCIL APPROVAL?	REMOVAL	COUNCIL APPROVAL?
Managing Director	Mayor	Yes ¹	Mayor	No
Corporation Counsel	Mayor	Yes	Mayor	Yes ²
Finance Director	Mayor	Yes	Mayor	No
Planning Director	Mayor	Yes	Mayor	No
Director of Environmental Management	Mayor	Yes	Mayor	No
Director of Research & Development	Mayor	Yes	Mayor	No
Director of Public Works	Mayor	Yes	Mayor	No
Director of Parks & Recreation	Mayor	Yes	Mayor	No
Director of Data Systems	Mayor	Yes	Mayor	No

Construction of the Charter

A recognized general rule of construction concerning municipal charters is that all laws bearing on a subject must be read together when construing the charter. *McQuillin's Municipal Corporations 3d*, Section 9.22, p. 235. Statutes relating to the same subject matter will be read into the municipal charter, so as to become a part of it; (footnote omitted) and all parts of the charter will be considered together to ascertain its true meaning (footnote omitted).

The Charter provides throughout its text the identity of the appointing authority for each appointed County official. In the case of the administration, the method of removal is also expressly stated.

In the case of the County Clerk, Deputy County Clerk, and Legislative Auditor, the method of removal is not expressly stated.

¹ Section 13-8 of the Charter provides in pertinent part that "The council shall confirm or deny confirmation within sixty days of the appointment of any department head. If the council does not act within sixty days, the department head shall be deemed to be confirmed."

² Section 13-8 of the Charter provides in pertinent part that "The council shall confirm or deny confirmation within sixty days of the appointment of any department head. If the council does not act within sixty days, the department head shall be deemed to be confirmed."

In the case of the Corporation Counsel, the Charter makes clear that removal may only occur with the consent of *both* the Mayor and the Council. The Corporation Counsel is the only executive branch appointee who requires Council approval for his removal, and this requirement is specifically provided for in the Charter.

Council Approval is Not Necessary for the Removal of the Deputy County Clerk and Legislative Auditor

It is our considered opinion that as the appointing authority, the County Clerk may remove both the Deputy County Clerk and Legislative Auditor without Council approval or consent.

The Charter contains provisions for various County officers, wherein the method of removal specifically provides for Council or other board approval. Examples of this are the removal provision for the Corporation Counsel by the Council, and the removal provision of the deputy chief of police by the Police Commission.³

Had Council approval been required for the removal of the Deputy County Clerk and the Legislative Auditor, the Charter would have said so.

The aforementioned position is supported by the authority found in *Rine v. City of Sherrill*, 152 Misc.2d 19, 574 N.Y.S.2d 641 (1991). In that case, a police officer in New York sought declaratory relief, alleging that he was improperly removed by the city manager. The police officer claimed that since the city's charter gave the police commission the authority to appoint him, he could only be removed by that commission. The charter was silent on any removal provision.

In finding for the city and against the police officer, the Supreme Court of Oneida County, New York, found it was proper for the city manager to remove the police officer. The Court stated as follows:

The Court concurs in the City's position. While the Charter could have expressly provided in Section 191 that the Commission also have the authority to remove policemen, that Section was silent as to removal authority. The removal authority is granted in Section 41(2) to the City Manager "except as herein provided"; there are no contrary exceptions provided in the Charter. *A Court may not read into a statute (here a Charter) words not used by the legislature which would defeat the purpose of the statute. In determining the legislative intent in the construction of a statute, such intent is to be ascertained from the words and language used, and the statutory language should be construed according to the*

³ Section 7-2.3 of the Charter provides in pertinent part that "The deputy (police chief) shall be appointed by the chief of police with the confirmation of the police commission and may be removed by the chief of police with the approval of the commission, without cause being stated."

natural and most obvious sense, without resorting to an artificial or forced construction, and each word must be given its appropriate meaning and sense must be brought out of the words used.

574 N.Y.S.2d at 642-643 (Citations omitted throughout; emphasis supplied).

Critics of our position will no doubt argue that since Charter Section 3-6 provides that Council approval for the appointment of the Deputy County Clerk and Legislative Auditor is required, the same Council approval is necessary for their removal. This argument is not supported by our laws. In fact, this argument is exactly the type of "artificial or forced construction" discussed by the *Rine* court, *supra*. Nowhere in our Charter Section 3-6 does it require Council approval for the removal of these two officers.

Although the Council is the appointing authority of the County Clerk, they are *not* the appointing authority of the Deputy County Clerk and Legislative Auditor. This authority is clearly and unambiguously vested with the County Clerk. When the term or tenure of a public officer is not fixed by law, and the removal is not governed by a constitutional or statutory provision, as a rule, the power of removal is incident to the power to appoint. 63 Am.Jr.2d Section 171; *accord Richman v. Staley*, 48 F.3d 1139 (1995) (Generally, power of removal is implicit in the power of appointment unless the appointment carries with it a definite term of office or constitutional or statutory provision limits the removal power).

There exists a "check and balance" in our present law which provides a remedy for the Council, in the event they are not satisfied with the decision made by the County Clerk in the removal of either the Deputy County Clerk or Legislative Auditor (or for any other reason justifying the termination of an at-will employee). Since the appointing authority of the County Clerk is the Council, the County Clerk may be removed by action of the Council.

Honorable Constance Kiriu
March 11, 2005
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Conclusion

Based on the foregoing reasons and authorities, we conclude the Hawai'i County Charter (2000) authorizes the Hawai'i County Clerk, as the appointing authority for the Deputy County Clerk and Legislative Auditor, to remove both the Deputy County Clerk and Legislative Auditor from office, without approval of the Council.

Please contact me if you would like to discuss any aspect of this opinion.

Very truly yours,



LINCOLN S. T. ASHIDA
Corporation Counsel

S: Departments/County Clerk/LSA Misc. Corresp./Letter to Clerk re removal powers 3-11-05/LSAmr