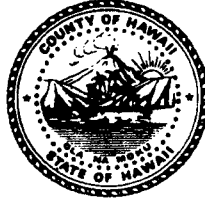


Harry Kim
Mayor



Lincoln S.T. Ashida
Corporation Counsel

Gerald Takase
Assistant Corporation
Counsel

COUNTY OF HAWAI'I
OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622

October 4, 2005

Ms. Gabriella M. Cabanas
Civil Service Department
101 Pauahi Street, Suite 2
Hilo, Hawai'i 96720

**CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE.
NOT TO BE COPIED, RELEASED, OR
CIRCULATED TO THE PUBLIC OR ANYONE
WITHOUT THE CONSENT OF THE OFFICE OF
THE CORPORATION COUNSEL.**

*Re: Constitutionality of County's Job Application Process
Work Request No. 05-10169*

Dear Ms. Cabanas:

Over the past years, decisions from all courts in the United States, including the Supreme Court of the State of Hawai'i, have reduced or restricted residence requirements for public employment. In those cases where a residence requirement was upheld, the employer had to provide specific information to the court showing there was a compelling reason to require residence for continued employment.

The Supreme Court of Hawai'i in the case of *York v. State* (1972) struck down the durational residence requirements for public employment, stating that the statute containing a three-year residency requirement for public employment created an arbitrary classification without rational relation to a public employee applicant's capabilities of performing satisfactorily for the State, operated irrationally without reference to any legitimate state interest, and was unconstitutional, violating the equal protection clause of the United States Constitution. Other courts, including the Supreme Court of the United States, have severely restricted residence requirements because of their chilling effect on a person's constitutional right to travel.

In the year 2000, the Legislature of the State of Hawai'i enacted the Civil Service Reform Act. A thorough review of this legislation and the committee reports prepared in conjunction with hearings on this reform provides no assistance to the questions regarding a requirement for residency at the time the application for employment is filed pursuant to Section 78-1, HRS.

This section of the statutes provides its own definition of residence, stating:

"Resident" means a person who is physically present in the State at the time the person claims to have established the person's domicile in the State and shows the person's intent is to make Hawai'i the Person's permanent

Ms. Gabriella M. Cabanas
October 4, 2005
Page 2

residence. In determining this intent, the following factors shall be considered:

- (1) Maintenance of a domicile or permanent place of residence in the State;
- (2) Absence of residency in another state; and
- (3) Former residence in the State.

Domicile is generally defined as the place where a person has his true, fixed, and permanent home and to which, whenever he is absent, he has the intention of returning. None of the factors mentioned are required to be given more weight than any of the other factors, nor does a reading of the statute itself provide us with a compelling reason which would support a restrictive interpretation of "resident."

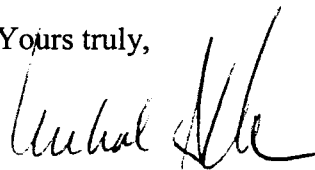
Accordingly, any reading of this statute requires us to apply the definition given in the statute in any attempt to define "resident." This is especially true since legislative history offers no assistance. While the definition is awkward in its application, we must be mindful that since the legislature provided us with this definition, we must use it in our application to the facts of any particular case.

Utilizing this definition, as well as keeping in mind that the trend in the courts is to disfavor residence requirements absent some compelling reason to require a resident requirement, the following opinion is offered to you.

If a person who formerly resided in the State of Hawai'i submits an application for employment, that person should be considered a resident for purposes of this statute if he had formed the intent to make Hawai'i his permanent home while he was physically present in the State of Hawai'i. This is true regardless of his location at the time the application is filed. I will admit that the interpretation of this statute, which is suggested, is a liberal interpretation.

However in the absence of any contrary evidence that the applicant does not meet the criteria set forth in the statute, applications for employment from persons who formerly resided in this State should be accepted.

Yours truly,



Michael J. Udovic
Deputy Corporation Counsel

MJU:mc

cc: Mr. Mike Ben

s:\work 2005\oct\wrk 05-10169\recom to civil svc re residency requirements 10-4-05 MJUmc