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August 8, 1991

WRITER'S DIRECT DIAL NUMBER

PERSONAL and CONFIDENTIAL

Honorable Howard S. Kihune
Council Chair
Maui County Council
200 S. High Street
Wailuku, Maui, Hawaii 96793

Re: Appointment of Cyrus Chan and Richard Priest

Dear Howard:

You have asked me and this office to review and analyze issues relating to Mayor Lingle's appointment and subsequent refusal to remove Cyrus Chan and Richard Priest as Acting Corporation Counsel and Acting Prosecutor, respectfully. The following sets forth our analysis.

FACTS[1]

In November 1990, Linda Lingle defeated Elmer Cravalho in the election for Mayor of Maui County (the "County). Thereafter, in December 1990, media reports surfaced that once the Mayor-elect took office, she would nominate Cyrus Chan for the office of Corporation Counsel and Richard Priest for the Office of the Prosecuting Attorney. At about this time, Mayor-elect Lingle also requested the courtesy resignations of some 30 people in civil service-exempt County positions, including Glen Kosaka and Joseph Cardoza, who were the Corporation Counsel and Prosecuting Attorney, respectively, in the outgoing mayor's administration.

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[1] This summary of the facts was prepared by referring to various newspaper articles and the March 27, 1991 legal memorandum from Deputy Corporation Counsel Robert K. Kekuna, Jr. to the Honorable Goro Hokama, regarding "'Acting' Status of Corporation Counsel and Prosecuting Attorney."

On January 2, 1991, the date on which Mayor Lingle (the "Mayor") took office, Chan and Priest were officially named Acting Corporation Counsel and Acting Prosecuting Attorney, respectively. On or about January 9, 1991, the Mayor submitted Chan's and Priest's names to the Maui County Council (the "Council") for confirmation as her choices for Corporation Counsel and Prosecuting Attorney.

On March 1, 1991, the Council rejected Chan and Priest as the Mayor's nominations for the County's top legal posts. Thereafter, the Mayor stated publicly that both Chan and Priest would stay on as acting department heads, and indicated to the media that she was in no hurry to submit other nominations. Chan and Priest have both since relinquished their offices and roles as Acting Corporation Counsel and Acting Prosecuting Attorney.

The Mayor's refusal to remove Chan and Priest after the Council rejected their nominations has raised concerns over the Mayor's authority to do so, as well as concerns over the force and effect of the post-rejection actions taken by Chan and Priest in their respective positions as Acting Corporation Counsel and Acting Prosecuting Attorney.

ISSUES

1. What authority, if any, did the Mayor have in the first instance to appoint Chan and Priest as Acting Corporation Counsel and Acting Prosecuting Attorney, respectively?

2. Assuming that the Mayor could appoint Chan and Priest as acting department heads, what authority, if any, did the Mayor have to keep Chan and Priest on as Acting Corporation Counsel and Acting Prosecuting Attorney after the Council rejected their nominations for these offices?

3. What ability, if any, does a third-party have to challenge the actions taken by Chan and Priest as acting department heads after the Council rejected their nominations?

CONCLUSION

We believe that the Mayor probably had the implied authority to appoint Chan and Priest as Acting Corporation Counsel and Acting Prosecuting Attorney in January 1991, but that they should not have been able to serve more than 60 days without Council confirmation. While we have concluded that the Mayor did, in fact, possess some implied authority to appoint Chan and Priest on an interim basis in the first instance, the fact is that the Maui County Charter is silent regarding the subject of acting department heads, which creates ambiguities and unnecessary uncertainty as to the existence and scope of the Mayor's ability to fill vacancies in the offices of Corporation Counsel and Prosecuting Attorney by appointing, without Council approval, individuals to serve on a temporary basis. These ambiguities should be addressed with appropriate amendments to the Charter.

The Mayor's implied authority to appoint an Acting Corporation Counsel and an Acting Prosecuting Attorney, did not, however, extend so far as to permit her to reappoint (or refuse to remove) Chan and Priest as Acting Corporation Counsel and Acting Prosecuting Attorney after the Council rejected their nominations for those positions. While the Charter is also silent as to the status of rejected nominees, we believe that the spirit and intent of the Charter is to render a rejected nominee ineligible to serve thereafter as the acting department head of the County department for which he or she was originally nominated. We believe, however, that the Council should limit its response to the Mayor's actions to taking the necessary steps to amend the Charter in order to prevent similar events from occurring in the future.

Lastly, we believe that a third-party would fail in any attempt to attack the actions taken by Chan and Priest as acting department heads after the Council rejected their nominations. The Mayor's reappointment (or refusal to remove) Chan and Priest after the Council's rejected their nominations, while exceeding her implied authority, probably sufficed to enable Chan and Priest to continue in their roles as de facto officers. As de facto officers, even though they occupied their offices pursuant to defective appointments by the Mayor, we believe that a court would treat the actions taken by Chan and Priest as valid as against third parties.

DISCUSSION

I. THE MAYOR'S APPOINTMENT OF CHAN AND PRIEST AS ACTING DEPARTMENT HEADS.

The Mayor's authority depends wholly upon the Charter. 3 E. McQuillan, The Law of Municipal Corporations, § 12.43, at 249 (C. Keating and G. O'Gradney 3d. Ed. 1990). As such, her powers are limited to those that the Charter expressly grants and those that are necessarily to be implied therefrom. Id. Consequently, in order to evaluate the Mayor's decision to appoint Chan and Priest as acting department heads, and then to keep them on after the Council rejected their nominations for those positions, a thorough review of the Charter's provisions regulating the appointment of department heads, and in particular the Corporation Counsel and Prosecuting Attorney, is necessary.

The Charter provides that nearly all of the heads of County departments, except the Corporation Counsel and Prosecuting Attorney, "shall be appointed and may be removed by the mayor".[2] On the other hand, the Charter provides that the Corporation Counsel and the Prosecuting Attorney "shall be appointed by the mayor with the approval of the council and may be removed by the mayor with the approval of the council." (Emphasis added).[3, 4] The Council's role in confirming or rejecting the Mayor's personnel decisions concerning the Corporation Counsel and the

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[2] See Charter, Sections 8-1.2 (Managing Director), 8-4.2 (Director of Finance), 8-5.2 (Director of Public Works), 8-6.2 (Director of Parks and Recreation), 8-7.2 (Fire Chief), 8-8.2 (Planning Director), and 8-10.2 (Director of Human Concerns).

[3] See Charter, Sections 8-2.2 (Corporation Counsel) and 8-3.2 (Prosecuting Attorney).

[4] The Charter also provides that certain county department heads shall be chosen by commissions, the constituent members of which shall be "appointed by the Mayor with the approval of the Council." See Charter, Sections 8-9.2 (Director of Personnel Services), 8-11.5 (Director of Water Supply), 8-12.3 (Police Chief), and 8-13.4 (Director of the Department of Liquor Control). For the purposes of this memorandum, when referring to departments other than Corporation Counsel and Prosecuting Attorney, unless otherwise noted, reference is being made to those departments whose heads are directly appointed by the Mayor, and not to the departments whose heads are chosen by a commission.

Prosecuting Attorney distinguishes these departments from the other County departments, and serves as a backdrop to an evaluation of the Mayor's appointment of Chan and Priest to their respective positions.

Nobody has apparently questioned the Mayor's authority to fill vacancies in the offices of Corporation Counsel and Prosecuting Attorney on an interim basis by appointing "acting" department heads.[5] Although the Charter does not grant the Mayor any express power to make such a temporary appointment, the Mayor may nevertheless have the implied power to do so as an incident to her overall power and responsibility to "[e]xercise supervision . . . over all departments enumerated in Article 8 of (the) Charter . . ." Charter, Section 7-5.1.

The ability of the Mayor to fill vacancies in the offices of Corporation Counsel and Prosecuting Attorney on an interim basis would also be in accord with "the policy of the law to fill vacancies as soon as possible after the vacancy occurs." Jones v. Pa, 34 Haw. 12, 17 (1936) (where the Hawaii Supreme Court held that an Acting Governor had the statutory authority to make a temporary appointment to the Board of Commissioners of the Public Archives); see also Reed v. President and Commissioners of Town of North East, 226 Md. 229, 172 A.2d 536, 540 (1961) (where the court stated: "It has long been recognized . . . that the public interest requires, in the absence of any provision to the contrary, that public offices should be filled at all times, without interruption").

Moreover, the Mayor's authority to appoint both an Acting Corporation Counsel and an Acting Prosecuting Attorney would at first blush appear appropriate in situations, such as

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[5] This situation must be distinguished from the situation where an office is not vacant, but the department head is temporarily unable to perform his or her duties. In this latter case, the department head could designate a subordinate within the department to assume the role of "acting" department head pursuant to Section 6-3.3 of the Charter, which states:

> "The powers, duties and functions of the administrative head of any department may be assigned to any staff member or members of the department by the administration head."

This power of a department head to delegate duties applies to all department heads, including the Corporation Counsel and Prosecuting Attorney.

happened in the present case, where the vacancies in the offices occur at the beginning of a new Mayor's term and the Mayor's nominees for the offices are awaiting confirmation by the Council. Cf. Schooner v. City of Verona, 245 Wis. 239, 14 N.W.2d 9, 12 (1945) (where, in determining whether a mayor had the authority to fill a vacancy in the city's police department with an individual whom the city council had not yet confirmed, the court stated: "The fact that the confirmation did not occur until May 19, 1943 does not mean that the Mayor was without power in November (1942) to appoint an officer to fill a vacancy subject to the Council's confirmation").

On the other hand, any implied power possessed by the Mayor to appoint, without Council approval, an Acting Corporation Counsel and an Acting Prosecuting Attorney would seem to disregard and negate the Council's role, as expressly set forth in the Charter, to confirm or reject the appointment of the individuals who occupy those offices. As such, under a strict construction of the Charter, while the Mayor may have the implied power to appoint interim department heads to departments whose head officers "shall be appointed and may be removed by the Mayor," the same cannot be said with respect to her ability to appoint an Acting Corporation Counsel or an Acting Prosecuting Attorney. See Beresford v. Donaldson, 103 N.Y.S. 600, 605 (1907) (where, in determining that the mayor's supervisory powers over the city's departments did not confer upon him the implied power to appoint an acting commissioner for public works, the court stated: "[T]he mayor (does not have the) power to appoint or designate a person to fill an office created by the charter, when the charter expressly provides that the appointment shall be with the consent or have the approval of the common council").

Moreover, one could argue that there is no need to grant a mayor implied authority for use at the beginning of a term, because the Charter already contains an express provision to facilitate a smooth transition between mayoral administrations. Section 6-2.3 of the Charter, while mandating that the terms of all department heads appointed by a mayor, including the Corporation Counsel and Prosecuting Attorney, end with the term of office of the mayor, also states: "Such officers shall not hold over more than 60 days after their respective terms of office, and shall immediately vacate their respective offices at the end of the 60-day period or upon the appointment of a successor in accordance with this Charter, whichever occurs first." Section 6-2.3 of the Charter therefore appears to contemplate that each mayor has a 60-day period at the beginning of his or her term to appoint, and in the case of the Corporation Counsel and

Prosecuting Attorney, to also get confirmed, those department heads who the Charter empowers the mayor to appoint.[6]

Pursuant to the foregoing line of thought, the Mayor did not possess any implied powers to fill vacancies in the offices of Corporation Counsel and Prosecuting Attorney at the beginning of her term because, pursuant to explicit provisions of the Charter, those vacancies could have been avoided for at least the first 60 days of the new term by having the former Corporation Counsel and Prosecuting Attorney hold over. See, Territory v. Morita, 41 Haw. 1, 16 (1955) (where, in the process of holding that County officers could not hold over from a previous administration in violation of a statute, even though their failure to hold over would create vacancies in their offices, the court stated: "The mayor and the board of supervisors can fill such vacancies forthwith. In fact, under the statute it is their duty to do so and the presumption is that they will perform this duty").

On the other hand, another construction of Section 6-2.3's holdover provision is that it recognizes and grants the Mayor the implied authority to appoint an Acting Corporation Counsel and an Acting Prosecutor at the beginning of a term, but such individuals may serve on an interim basis only a maximum of 60 days without being confirmed by the Council. In the present case, this would mean that Chan and Priest, who assumed their roles as acting department heads on January 2, 1991, should not have served in those capacities beyond March 3, 1991.

This conclusion receives some support from the legislative history to the holdover provision, which, curiously enough, was proposed as an amendment to the Charter in 1984 by the Mayor herself when she was serving as a Council Member. At an

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[6] Compare Section 13-8 of Charter of the County of Hawaii, which states:

> The terms of department heads, deputies and assistants shall be co-terminous with that of the appointing authority; provided, that where a successor has not been appointed and qualified, a department head, deputy or assistant, as the case may be, shall continue in office pending such appointment and qualification.

Section 5-2.6 of the County of Hawaii Charter limits the time in which a Corporation Counsel may hold over from a previous administration to three months.

August 24, 1984 Special Meeting of the Council in which proposed Charter Amendments were discussed, Council Member Lingle explained the purpose of the proposed 60-day holdover period as follows:

> Mr. Chairman, the purpose of the offered amendment is to make clearer the intent of paragraph 3 (of Section 6-2). During some research, we found that there have been instances in other jurisdictions where a similar provision was contained in a Charter and, as you know, one of the purposes of this particular paragraph was so that the Corporation Counsel and the Prosecutors, those two offices which this Council confirm would, in fact, be resubmitted to the Council when the term of the Mayor expired. However, other jurisdictions have had problems. In fact, they have gone into court cases because mayors refuse to resubmit the names and made these people acting corporation counsel or acting prosecutor. And some might be familiar with the City and County case involving both the prosecutor and the corp. counsel.[7] So to avoid something like that coming up, not to say that it would but just to make it clearer and to make our intent clear, I offer this amendment.

Minutes of The Special Meeting of The Council The County of Maui (August 24, 1984), discussing Resolution 84-116, Proposing Amendments to the Maui Charter (comments of Council Member Lingle) (emphasis added).

Council Member Velma M. Santos supported the proposed 60-day holdover provision based upon the following understanding of the amendment:

> [A]fter reviewing it for a while, you know, apparently, the term of the office, being co-terminous with the appointing authority, would end on January 1st. As a result, it could possibly be that it takes quite a while, maybe a month for confirmation to occur, you know,

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[7] These comments make it clear that as early as August 1984 the Mayor was familiar with the case presented in In the matter of the Application of Robert G. Dodge, S.P. No. 4282 (First Circuit Court, State of Hawaii). See supra at pp. 11-12 for a discussion of this case.

> for the names to be submitted to the Council; and there is that possibility that we will not have a corporation counsel or a prosecutor in the meantime, in the interim. We could say "acting" but it could go on forever as Miss Lingle indicated.

Minutes of The Special Meeting of The Council of The County of Maui (August 24, 1984) (comments of Council Member Santos) (emphasis added).

According to then-Council Member Lingle's comments in 1984, the 60-day hold over provision in Section 6.2-3 was therefore included in the Charter primarily in order to force a re-elected mayor to resubmit his or her nominees for Corporation Counsel and Prosecutor to the Council for confirmation, and not attempt to avoid this duty by having the Corporation Counsel and Prosecutor under the mayor's previous administration hold over for an indefinite period of time as acting department heads. Council Member Santos, on the other hand, viewed Section 6.2-3 more simply as a means to fill the offices of Corporation Counsel and Prosecutor at the beginning of a new term pending the confirmation of the mayor's nominees to those positions.

Despite the subtle differences in the perspectives that they espoused, the 1984 comments of both Council Members Lingle and Santos reflect a common understanding that the hold over provision in Section 6.2-3 was meant to address a concern over, and distrust of, a mayor's attempt to fill vacancies in the offices of Corporation counsel and Prosecutor with acting department heads. Section 6.2-3's hold over provision addresses this concern by limiting to 60 days the time that a previously confirmed Corporation Counsel or Prosecutor can serve at the beginning of a new term without reconfirmation by the Council.

Assuming that a County mayor possesses the implied authority to appoint an Acting Corporation Counsel and Acting Prosecutor in the first instance, we believe that such individuals may serve at most 60 days without the Council's confirmation. This conclusion makes practical as well as common sense. Because the Charter expressly limits to 60 days the amount of time that a previously confirmed Corporation Counsel or Prosecutor may serve at the beginning of a new term without Council confirmation, we do not believe that the Charter can be construed to permit someone who the Council has never confirmed from serving on an interim basis for longer than 60 days. As previously stated, this would mean that Priest and Chan should not have been allowed to serve as acting department heads beyond March 3, 1991.

As the foregoing discussion suggests, we believe that the public policy in favor of filling vacant offices is, on balance, sufficient to find that the Mayor did indeed possess a limited amount of authority to fill vacancies in the offices of Corporation Counsel and Prosecuting Attorney by appointing acting department heads. Although both the Mayor and the Council have apparently assumed all along that the Mayor possessed these powers, the above discussion nevertheless reveals certain omissions and ambiguities in the Charter that could be, and should be, addressed through appropriate amendments thereto. See, e.g. Haw. Rev. Stat. § 26-32 (1991) (acting department heads in Hawaii State government); Rev. Charter of the City and County of Honolulu, Sec. 8-106 (1984, as amended) (vacancies in the office of Prosecuting Attorney);[8] County of Honolulu, Rev. Ordinances § 2-2.5 (1983, as amended) (acting department heads in Honolulu County government); and County of Hawaii Charter § 13-8 (1980, as amended) (succession between mayoral administrations).

II. THE MAYOR'S REFUSAL TO REMOVE CHAN AND PRIEST AFTER THE COUNCIL REJECTED THEIR NOMINATIONS.

Assuming that the Mayor possessed the implied authority to appoint Chan and Priest as Acting Corporation Counsel and Acting Prosecutor in the first instance, the question remains whether she could refuse to remove them from those positions after the Council rejected their respective nominations. The Charter is silent as to the status of rejected nominees to the offices of Corporation Counsel and Prosecuting Attorney. As such, the answer to the question concerning whether the Mayor acted properly after the Council rejected her nominations once again turns upon an evaluation of the Mayor's implied powers.

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[8] Section 8-106 of the Revised Charter of the City and County of Honolulu, states in pertinent part:

> A vacancy in the office of prosecuting attorney shall be filled by the first deputy who shall act as prosecuting attorney, or if the position of first deputy is vacant or if the first deputy is unable to so act, the mayor with the approval of the council shall fill the vacancy by appointment of a person with the requisite qualifications within thirty days after the occurrence of the vacancy.

An analogous case was presented in In the Matter of the Application of Robert G. Dodge, S.P. No. 4282 (First Circuit Court, State of Hawaii 1977) ("In re Dodge"), wherein the court, in a quo warranto proceeding, ordered Barry Chung, as Acting Corporation Counsel for the City and County of Honolulu ("Honolulu"), and Maurice Sapienza, as Honolulu's Acting Prosecuting Attorney, to vacate their offices on the grounds that neither were appointed by the Mayor with the approval of the City Council.[9]

The dispute in In re Dodge arose out of the manipulation of a provision in the Revised Charter of Honolulu that provided that the highest ranking deputy in a department would serve as acting department head in situations where, at the beginning of a new term, the previous department head was not reappointed and a new department head had not yet been appointed. Chung and Sapienza were, respectively, the Corporation Counsel and Prosecuting Attorney under Mayor Frank Fasi for the term that ended January 2, 1977. By switching places with their deputies at or around the time that their terms ended, Chung and Sapienza attempted to hold over in their offices, although officially only as acting department heads, without a formal appointment by the Mayor, which would have required the approval of the city council.

On January 20, 1977, Robert G. Dodge filed petitions for the issuance of Writs of Quo Warranto directed at Chung and Sapienza that required them to appear and show by what authority they claimed entitlement to their offices. Chung and Sapienza argued that they legitimately held their respective offices pursuant to the literal terms of the Honolulu Charter. The court, while conceding that a strict, narrow, construction of the Honolulu Charter would support Chung's and Sapienza's arguments, nonetheless determined that were not rightfully occupying their offices, and ordered them both to vacate the same until such time as they were appointed to the offices by the mayor with the approval of the city council. Amended Judgment, p. 2 (February 11 1977).[10] In reaching its conclusion, the court, stated: "To allow the present situation to exist would mean the true spirit and meaning of the Charter could be violated merely by no appointments being made . . ." Amended Findings of Fact and Conclusions of Law (February 11, 1977). In 1981, the Hawaii

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[9] See the Mayor's comments in 1984, discussed infra at p. 8 n. 7 and accompanying text.

[10] The Court's Amended Judgment and Amended Findings of Fact and Conclusions of Law are not materially different from the orders that it originally filed on January 26, 1977.

Supreme Court dismissed, on mootness grounds, an appeal of the court's order filed by Chung and Sapienza.

The proceedings in In re Dodge, while not giving rise to a published opinion, nonetheless serve to underscore the fact that in the present case, any implied authority possessed by the Mayor is circumscribed by both the letter and underlying intent of the Charter. See also La Fleur v. Roberts, 157 So. 2d 340, 343 (La. Ct. App. 1963) (where, in the process of holding that a mayor could not appoint an unqualified individual as the director of the city's department of public works, the court acknowledged that the Mayor possessed a large amount of discretion to carry out his duties, but added: "On the other hand, charter provisions limiting or qualifying the authority of municipal officials cannot be disregarded as if not written").

In the present case, any reasonable construction of the scope of the Mayor's implied powers to appoint an Acting Corporation Counsel or an Acting Prosecuting Attorney, again assuming that she possesses such authority, must conclude that the Mayor may not appoint (and may not refuse to remove) an acting department head immediately after the Council has rejected the individual's nomination for that office. To conclude otherwise would imbue the Mayor with implied powers that could render the Council's rejection of the nominee, pursuant to an exercise of express powers, at least a temporary nullity. At the very least, the Mayor's actions therefore violated the spirit and intent of the Charter.

In response to the above, the Mayor could claim that: (1) the Council's rejection of the nominations of Chan and Priest only reflected a Council's decision not to permit them to serve for a full term; and (2) the Mayor's implied powers to fill vacancies in public offices permitted, if not required, her to keep Chan and Priest on in their respective positions. Both arguments are without merit. First, by rejecting the Mayor's nominees for Corporation Counsel and Prosecuting Attorney, the Council passed upon the eligibility of both men to serve in those offices. The Council's decision not to permit Chan and Priest to serve a full term in the offices for which they were nominated, at least pursuant to the intent of the Charter, also encompassed a decision not to permit them to serve temporarily. And second, after the Council rejected Chan's and Priest's nominations, the Mayor could have adequately satisfied the policy that favors filling public offices by appointing as acting department heads individuals who had not just been rejected by the Council.

In light of the foregoing, the most reasonable assessment of the Council's rejection of Chan and Priest as the Mayor's nominees is that the Council's action rendered both men

ineligible to continue in their appointed positions as Acting Corporation Counsel an Acting Prosecuting Attorney.[11] Cf. Mink v. Pua, 68 Haw. 263, 711 P.2d 723 (1985) (where the Court held that, under the Honolulu Revised Charter, a councilman who had been recalled was ineligible to run in the special election to fill his unexpired term); State ex rel. Childs v. Dart, 57 Minn. 261, 59 N.W. 190, 190 (1884) (where the Court held that a governor's action suspending a county treasurer from his office made him ineligible for the office, and that the county commissioners could not thereafter appoint him interim treasurer pending his suspension).

While we believe that the Mayor exceeded her implied powers under the Charter, we also believe, from a purely legal perspective, that the Council should limit its response to the Mayor's actions to taking the necessary steps to amend the Charter in order to prevent similar events from occurring in the future.[12] Significantly, the Mayor's actions have already been reviewed and substantially validated in the March 27, 1991 memorandum by Deputy Corporation Counsel Robert K. Kukuna. While the Kekuna memorandum does not address the exact same questions as does this letter, its analysis, especially when compared with this letter, serves to underscore the fact that the Mayor's authority under the Charter to appoint a Corporation Counsel or a Prosecutor on an interim basis is ambiguous at best.

Consequently, although an evaluation of this case from a political perspective might reach a different conclusion, we do not believe that the facts of this case suggest or reveal that the Mayor intentionally violated the Charter or otherwise performed her duties in wanton disregard to the limits of her authority. As such, we conclude that the Mayor could not be held liable under Section 1.12.020 of the Maui County Code, promulgated pursuant to Section 13-10 of the Charter, which makes any person "who

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[11] See also discussion infra at pp. 7-9, which concludes that Chan and Priest should not have been allowed to serve as acting department heads more than 60 days, viz., beyond March 3, 1991.

[12] With respect to nominees to State offices, the Hawaii State Constitution, Art. V, § 6, states: "No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office." Moreover, the Revised Ordinances of Honolulu, § 2-2.5(a), states in pertinent part: "Any person whose appointment fails to receive Council's confirmation shall not be eligible for another appointment to the same office during the term of the appointing authority."

intentionally fails to exercise his duties and responsibilities as set forth in the (C)harter" subject to a fine of up to one thousand dollars and/or imprisonment of up to one year. (Emphasis added).

III. THE ABILITY OF A THIRD-PARTY TO CHALLENGE THE ACTIONS TAKEN BY CHAN AND PRIEST AFTER THE COUNCIL REJECTED THEIR NOMINATIONS.

Hawaii courts have recognized the doctrine governing de facto public officers, which states that the acts of an individual holding a public office that are performed while the individual possesses colorable title to that office are valid as far as the rights of third parties are concerned, and are not subject to collateral attack, even though some defect exists in the individual's legal right to the office. See In re Application of Sherretz, 40 Haw. 366, 372-373 (1953) (where the court held that the acts of a de facto member of a civil service commission, taken after he was statutorily ineligible for the position, were not subject to collateral attack); Territory v. Morita, 41 Haw. 1, 13-14 (1955) (discussing the validity of acts taken by de facto officers); see also 3 E. McQuillan, The Law of Municipal Corporations § 12.102 p. 502 (C. Keating and G. O'Gradney 3d Ed. 1990).

In the present case, whether a third-party could collaterally attack the actions taken by Chan and Priest after the Council rejected their nominations depends upon whether they were de facto officers at the time. As already stated, we believe that Chan and Priest were ineligible to serve as acting department heads at the time that the Mayor reappointed (or refused to remove) them. Nevertheless, this does not change the fact that both Chan and Priest continued to occupy the offices of Acting Corporation Counsel and Acting Prosecuting Attorney pursuant to a colorable right, viz., each received temporary, albeit defective, appointments from the Mayor. We believe that a court would construe the Mayor's actions in reappointing Chan and Priest as acting department heads, or, viewed another way, her public actions in asserting that Chan and Priest could continue as acting department heads, as sufficient to bestow upon them de facto status, notwithstanding the Council's rejection of their nominations. 3 E. McQuillan, The Law of Municipal Corporations § 12.101 p. 502 (C. Keating and G. O'Gradney 3d Ed. 1990).

The actions taken by Chan and Priest, as de facto officers, are therefore not subject to collateral attack by third parties. State v. Bell, 84 Idaho 153, 160, 370 P.2d 508, 511 (1982) (where the court held that, although the appointment of the

special prosecutor was defective, the special prosecutor became a de facto officer so far as the defendant was concerned, and the prosecutor's actions were not subject to collateral attack by a criminal defendant); People v. Davis, 86 Mich. App. 514, 272 N.W.2d 707, 710 (1979) (where the court held that, although the incumbency of the special prosecutor was illegal because the judge who appointed him did not have the power to do so, the criminal trial judge was wrong in dismissing the warrants issued by the special prosecutor because "the de facto officer in this instance could not be attacked collaterally, but required a (quo warranto) proceeding instituted directly for that purpose.").

For the foregoing reasons, we believe that a third-party would fail in an attempt to challenge the actions taken by Chan and Priest after the Council rejected their nominations. See also State ex rel. Buckner v. Mayor of City of Butte, 41 Mont. 377, 109 P. 710, 712 (1910) (where, in the process of holding that the actions taken by a city board in appointing a city police chief could not be challenged by a third-party even though the board was not properly confirmed by the city council, the court stated: "The rights of the people are paramount to those of the mayor and council. They should, of course, be able to agree upon appointments. In order to do this, in the case at bar, one or the other must have given away. Both refused to do so. . .").

Moreover, although Chow and Priest occupied their respective offices pursuant to defective appointments, we also believe that the County would fail in any attempt to recover the salaries paid to them (or to deputies that they may have appointed) during the period in which they acted as de facto officers. The general rule is that a public authority cannot recover salaries paid to a de facto officer where he or she actually rendered the services for which payment was made. See U.S. v. Roger, 268 U.S. 394, 402 (1925) (where, in deciding whether the government could recover the excess in salary paid to a de jure captain in the military during the period in which he acted as a de facto major, the court held: "[C]learly, the money having been paid for services actually rendered in an office held de facto, and the government presumably having benefitted to the extent of the payment, in equity and good conscience (the de facto officer) should not be required to refund it"); Miller v. County Commissioners of Carroll County, 226 Md. 185, 172 A.2d 867, 865 (1961) (where, in an action to recover the salary paid to an individual technically ineligible to serve as a county officer, the court stated: "To permit the appellants . . . to compel Grier to refund all monies paid to him by the County would seem to us inequitable both as imposing a penalty on Grier and as conferring an unjust enrichment upon the County to the extent of the value of his services").

I would be pleased to discuss this matter further with you and the other members of the Council at your convenience. I thank you for the opportunity of reviewing this most interesting matter.

Very truly yours,

Jeffrey S. Portnoy
for
CADES SCHUTTE FLEMING & WRIGHT