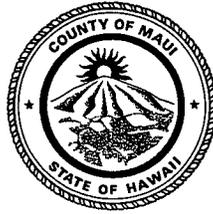


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May 5, 2011

MEMO TO: G. Riki Hokama, Chair
Policy Committee

F R O M: Moana M. Lutey, Deputy Corporation Counsel

SUBJECT: **Indemnification Authorization** (COW-1(23); COW-1(30))

This memorandum will respond to the Committee of the Whole's request for an opinion on issues involving indemnification authorization. Before addressing this request, we would like to update you on the status of the indemnification request in Wereb v. County of Maui (COW-1(23)).

When the indemnification request in Wereb v. County of Maui (COW-1(23)), was initially made, a total of ten individual defendants had been named. Prior to Council's review of this matter, two individuals were dismissed by stipulation of the parties. The Court then dismissed five more individuals based on a motion filed by the County. The three remaining individuals were denied qualified immunity.

We appealed the Court's decision and argued that the remaining individuals were entitled to qualified immunity. Plaintiffs then agreed to dismiss the remaining three individual defendants. The remaining individuals were dismissed by stipulation earlier this month. As a result of the dismissal of all individuals, the request for indemnification in Wereb became moot and was filed on November 18, 2010.

The responses to your inquiries regarding indemnification follow.

1. **Has your Department determined that there is no conflict of interest in Wereb v. County of Maui (COW-1(23)) and Gardner v. Ah Loo (COW-1(30))?**

Yes. The determination of whether a conflict existed or not

was made soon after we were served with each lawsuit. Unlike in other civil cases, we are provided with a voluminous amount of information in police cases without the need for discovery. This is due to the fact that the investigations in these cases are performed by trained officers. We typically receive the statements of all witnesses, the Plaintiff, all involved officers, diagrams, photographs and video surveillance (where applicable). As a result, we are able to make a determination as to whether a conflict exists very quickly. There was no conflict in either of the above-listed cases.

- a. **If your Department has determined that there is no conflict of interest, can you please explain the reason for seeking indemnification authorization?**

We seek indemnification to protect the individual defendants' assets. Punitive damages can only be assessed against an individual. Absent indemnification, the police officer's assets would be in jeopardy if punitive damages were imposed.

- b. **If your Department has determined that an actual or potential conflict of interest does exist, and is the basis for the request for indemnification, please explain what the actual or potential conflict of interest is. Please also explain why your Department recommends that the Council authorize indemnification, rather than hiring special counsel.**

The existence of a conflict does not determine whether indemnification will be sought. In the above-listed cases, no conflict existed. We have asked for indemnification for the officers to protect their personal assets.

Hiring special counsel would be an option if the Police Commission determined that an officer was entitled to legal counsel and had a conflict with the County. We have not yet been in that position. If we are faced with that position in the future, special counsel may be necessary.

2. **Does your Department apply a different standard for indemnification of County officers and employees who are not police officers:**

Yes. Police cases are handled differently from other types of cases because the determination of whether a police officer is entitled to legal counsel is at the sole discretion of the Police

G. Riki Hokama, Chair
May 5, 2011
Page 3

Commission. The Police Commission has this authority pursuant to Hawaii Revised Statutes §52D-9. H.R.S. § 52D-9 states:

The determination of whether an act, for which the police officer is being prosecuted or sued, was done in the performance of the police officer's duty, so as to entitle the police officer to be represented by counsel provided by the county, **shall be made by the police commission of the county.** Before making a determination, the police commission shall consult the county attorney or the corporation counsel, who may make a recommendation to the police commission with respect thereto if the county attorney or corporation counsel so desires. **The determination of the police commission shall be conclusive for the purpose of this section and section 52D-8.** (Emphasis supplied).

Based on the language contained in the above-listed statute, the County would be obligated to provide legal counsel if the Police Commission determined that representation was warranted. In cases where the Police Commission determines that the police officer is not entitled to representation, the officer is notified that he or she will need to obtain legal counsel at his or her own expense.

In regard to the timing of the presentation of police cases to the Committee of the Whole, we are required to first allow the Police Commission to make their determination on representation before presenting that matter to the Committee. A presentation to the Committee before the Police Commission has heard a police officer's legal request would be premature.

As discussed in our September 14, 2010 memorandum, we seek indemnification for police officers at the earliest practicable time. In some instances, that may be before any substantive motion has been filed. In others, such as the Wereb case where there was no legal basis for litigation against the individuals, indemnification would be sought after a substantive motion has been ruled upon.

3. Timing of the Request for Indemnification in Molokai Veterans case.

There is no conflict in our prior advice on police cases and the position taken in the Molokai Veterans case. In typical litigation cases, such as the Veterans case, the determination of conflict is difficult to assess before discovery has been

G. Riki Hokama, Chair
May 5, 2011
Page 4

conducted. To protect all parties involved, the County seeks indemnification prior to an answer being filed to eliminate the possibility of any conflict.

Our office evaluates every lawsuit on a case-by-case basis to determine the appropriate time for each case to be presented to the Committee. In non-police litigation cases, there is more time pressure to have the issue of indemnification resolved quickly. However that is not the situation in police cases.

4. Prior opinions and other cases.

The opinion and other cases cited in your request can be distinguished because they do not apply to police officers. As detailed above, we do handle police officers in a different manner from other County employees because of HRS 52D-9 and the information available to us at the onset of any litigation.

If you have any questions or inquiries, please do not hesitate to contact me.

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APPROVED FOR TRANSMITTAL:


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