

Maui County Charter

Article 13, General Provisions, Section 13-2, Boards and Commissions, Subsection 17

Require the County of Maui to Fund the Defense of Members of All County of Maui Boards and
Commissions and to Indemnify Said Members

Proposed Charter Amendment

Shall Article 13, General Provisions, of the Charter of the County of Maui be amended to require the County of Maui to fund the defense of members of county of all Maui boards and commissions in the bona fide and good faith discharge of their official duties and indemnify said members in the event of civil action as a result of the lawful performance of their duties?

[added material is underlined, deleted material is bracketed.]

Amend Article 13, General Provisions, to add a new section:

Section _____ . The county shall provide funds to pay for the defense of members of all Maui county boards and commissions and shall indemnify all members of boards and commissions in the event of a civil action as a result of the bona fide and good faith discharge of their official duties and indemnify said members in the event of the lawful performance of their duties. The county shall not indemnify a member for any portion of a judgment or settlement that represents punitive or exemplary damages.

****Commission Analyst Analysis and Comments**

Generally public officers are entitled to a defense at the expense of the public in a law suit arising from the performance of the officer's official duties and while serving a public purpose. Courts have authorized eligibility for such reimbursement only to those public officials who defend against misconduct occurring in connection with the good-faith performance of their official duties and while serving the public interest and who ultimately prevail in that underlying suit.

Courts have found that the public does have an interest in such a controversy and may pay the reasonable and necessary legal fees incurred by the public officer in successfully defending against unfounded allegations of official misconduct.

However, reimbursement provisions must not violate the general constitutional prohibition banning the expenditure of public funds for private purposes. It may be that this proposal is too broad.

1. This proposal makes it automatic that the attorneys' fees shall be paid from public funds although it does require that the reimbursement can be only for the bona fide and good faith and lawful discharge of official duties.

2. There are no checks and balance on the need for the retention of private/special counsel. Under the current Maui charter, the Council must approve the retention and authorize the funds. And implicit in the requirement that the corporation counsel ordinarily provide a defense, is the requirement that first there be a conflict of interest such that the corporation counsel cannot provide a defense and private/special counsel is required.

3. It is not clear from the proposal how the funds would be appropriated. Could the council be sued to be required to appropriate the public funds? Courts are generally reluctant to order legislative bodies to appropriate funds.

4. The proposal does not include employees and officers of the county, presumably on the theory that the members of boards and commissions serve pro bono. However, HRS Chapter Sec. 662D provides *immunity* for most acts or omissions to volunteers, a person serving without compensation, for governmental entities, which includes county boards and commissions.

HRS 662D-2 provides that

(a) A volunteer shall be *immune from civil liability* in any action on the basis of any act or omission of a volunteer resulting in damage or injury if:

(1) The volunteer was acting in good faith and within the scope of the volunteer's official functions and duties for a nonprofit organization, a nonprofit corporation, a hospital, or a governmental entity;

(2) The damage or injury was caused by the volunteer's negligent conduct. . .

Furthermore it is very clear that HRS 662D-2(b) provides that the county is responsible, not the volunteer, Thus in any lawsuit against a governmental entity for civil damages based upon the negligent act or omission of a volunteer, proof of the act or omission is sufficient to establish *the responsibility of the governmental entity under the doctrine of respondeat superior*, notwithstanding the immunity granted to the volunteer with respect to any act or omission.

There are circumstances under which a person may sue and recover civil damages from a volunteer. These circumstances are ones that it would seem that public funds should not be used for. These are factual situations based upon:

(1) Any conduct engaged in by the volunteer that would constitute gross negligence, wilful and wanton misconduct, or intentional misconduct;

(2) Any act or omission in connection with the operation of a motor vehicle;

(3) Any conduct engaged in by the volunteer while the volunteer is unreasonably interfering with the lawful activities of another;

(4) Any conduct engaged in by the volunteer that takes place on private property when the volunteer's presence on the property was not consented to by the owner;

(5) Any act or omission within a volunteer's scope of practice for which the volunteer is licensed, certified, permitted, or registered under state law to perform; provided that this paragraph shall not apply to volunteer medical assistance services pursuant to HRS Sec. 321-2.5; and

(6) Any criminal offense committed by the volunteer.

Hawaii Revised Statutes, Section 26-35.5 then governs the defense and indemnification of members of state boards and commissions. It provides that:

**The State shall not indemnify a member who would otherwise be entitled to indemnification, if the member fails to cooperate fully in the defense of the civil action which is made available to the member.

**The State shall not indemnify a member for any portion of a judgment that represents punitive or exemplary damages. The State shall not indemnify a member for any portion of a settlement which is deemed unreasonable by the legislature.

**A member may retain counsel of the member's own choice at the member's own expense. If the member chooses to retain counsel at the member's own expense, the State shall not indemnify the member even though the member would have been entitled to indemnification.

**Any moneys which the State is required to pay to a member under this section shall be paid from an appropriation made by the legislature at the next session after the requirement to pay inures to the member.

Under the terms of the current Maui charter, the council clearly has the authority to decide whether or not to repay the legal fees incurred by an officer, employee, or member of a board or commission in an action arising out of his or her bona fide discharge of his or her official duties.

Section 2-2 of the Maui County charter provides that “[a]ll powers of the county shall be carried into execution as provided by this charter, or, if the charter makes no provisions, as provided by ordinance or resolution of the county council.” Pursuant to the charter's section 8-2.3(b), the corporation counsel is “the chief legal advisor and legal representative to the council, the mayor, all departments, all boards and commissions, and of all officers and employees in matters relating to their official duties.” Thus members of boards and commissions to the extent that they are sued in their official capacity are already entitled to a defense.

If a member of a board or commission were sued in his or her individual capacity, and if Maui corporation counsel determined that there was a conflict of interest, then the corporation counsel makes a determination of need and recommendation to the council regarding the need and justification for hiring outside counsel. Section 3-6(6) of the charter delineates the council's sole

prerogative in the hiring of outside attorneys: “the council shall have the power ... [t]o retain or employ, by a vote of two-thirds of its entire membership, special counsel for any special matter presenting a real necessity for such employment.”

The requirement of a 2/3rds vote establishes a meaningful standard and high bar before the expenditure of public funds for hiring of special counsel.

In *Maui County Council v. Thompson*, 84 Hawai‘i 105, 929 P.2d 1355 (Hawai‘i,1996), William P. and Jo Ann Carroll brought an action against the County of Maui (county) for wrongful discharge. Their complaint additionally alleged that Mayor Lingle and others had committed ***willful and intentional wrongful acts in their individual capacities***.

Maui County Charter section 8-2.3(b) restricts the Office of Corporation Counsel's representation to “matters relating to ... official duties.” In the *Thompson* case, county officers and employees were also sued in their individual capacities. To the extent that members of boards and commissions were sued in the official capacity, they were entitled to representation by Corporation Counsel. In the *Thompson* case, the defendants were advised by Maui's corporation counsel that conflicts could arise regarding the defenses that might be raised on behalf of the county. The corporation counsel recommended that the ***named individual defendants*** be separately represented, and authorized these individuals to retain attorneys of their choice at the county's expense.

The Office of the Director of Finance executed contracts for \$30,000 for one law firm and \$50,000 for another. Each contract was subsequently amended, such that the first amounted to \$140,000 and the latter \$450,000. The council was not asked to approve these contracts or amendments. On January 21, 1994, the council passed a resolution formally noting its disapproval of the executive branch's action. The council filed their complaint in this action on June 3, 1994. On November 10, 1994, the court granted the defendants' motion for summary judgment.

The Hawaii Supreme Court found that the Maui county council's power in the Maui charter necessarily implies the absence of any such power in the executive branch.

In analyzing the principles of paying for the attorneys' fees and indemnification of a county officer, the Hawaii Supreme Court quoted from a decision by the Territorial Supreme Court and explained that it is the law in Hawaii and other jurisdictions:

[i]t is within the ***discretionary power*** of a municipality to indemnify one of its officers against liability incurred by reason of any act done by him while in the ***bona fide discharge of his official duties***, and the municipality has the right to employ counsel to defend the officer or to appropriate funds for the necessary expenses incurred by him in such defense.

Machado v. Bal, 31 Haw. 559, 564 (1930) (quoting 43 C.J. 695) [emphasis added]; *see also* E. McQuillin, *The Law of Municipal Corporations* § 29.14 (3d ed.1990).

Machado v. Bal involved a dispute as to the power of the Maui council to indemnify a police officer for his legal expenses incurred in both criminal and civil proceedings arising out of an incident in which the officer shot a person in the course of executing an arrest warrant. The relevant statutory provision provided language similar to the current Maui Charter: [n]othing ... shall preclude the board of supervisors of any county from retaining or engaging special counsel when in their opinion such action may seem to be desirable or required.” *Id.* at 565. The court concluded “that it is within the power of a county board of supervisors to indemnify a police officer for attorney's fees incurred in defending himself in a civil action....” *Id.*

The Hawaii Supreme Court further explained that Maui County and other municipalities were under no legal obligation to provide such defense even for actions within the scope of official duties and reasoned that:

It would seem to be ***wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city***, that, on the one hand, they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and, on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution.

Id. at 1357, 157. Quoting from *Machado*, 31 Haw. at 564 (which was quoting *Moorhead v. Murphy*, 94 Minn. 123, 102 N.W. 219, 220 (1905)).