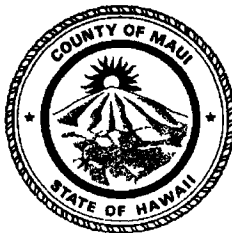


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October 5, 2016

MEMO TO: Don Couch
Council Member

FROM: Gary Y. Murai
Deputy Corporation Counsel

SUBJECT: **HOMELESS WORK ASSISTANCE**

This memorandum is in response to your memorandum dated August 22, 2016, describing the City of Albuquerque's "There's a Better Way" program¹ (hereinafter "the City," and "the Program," respectively) and requesting a written opinion as to the following:

1. If the County of Maui should implement such a program would there be any restrictions in terms of union contracts?
2. As noted by the City's Community Outreach Coordinator, do we share the opinion and position of the City that "personnel issues, workers compensation, unemployment benefits and valid work document do not apply"; even though the jobs are offered by a city department, the program is funded by a City grant, and the individual is paid directly by a non-profit?
3. Beyond the potential concern of conflict with union contracts, are there are other issues or laws that might restrict the County of Maui from implementing such a work day program with County jobs?

¹The materials you provided describe the City of Albuquerque's "There's a Better Way" program as a response to panhandlers begging for money on city streets. As an alternative to citing and prosecuting panhandlers, the City of Albuquerque partners with a non-profit agency to offer day-labor jobs to those willing to work. The work is primarily city beautification and includes weeding and picking up trash. The participants are paid \$9.00 per hour by the non-profit agency and are offered housing and medical services.

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We opine as follows:

1. As to whether such a program would be restricted by union contracts if implemented in Hawaii, our answer is a qualified no.

The collective bargaining agreements to which the county is a party generally cover civil service employees who are union members or who are eligible to be union members and do not address the use of homeless programs to perform work provided by the county. However, Hawaii civil service law and the Hawaii appellate court decisions that interpret civil service law are instructive, and will be discussed below.

2. As to whether we share the opinion and position of the City that “personnel issues, workers compensation, unemployment benefits and valid work document do not apply”; even though the jobs are offered by a city department, the program is funded by a City grant, yet the individual is paid directly by a non-profit, our answer is a qualified yes.

The available information regarding the Program is not clear whether the participants are classified as employees, independent contractors, volunteers, participants in a vocational training program, participants in a rehabilitative program or something else. It is also not clear whether the money paid to the participants is considered wages, stipends, or something else. However, notwithstanding that the work is provided and funded by the City, it appears that program participants are recruited, supervised and paid by the Program. Should the county consider a similar program, care should be taken to assure that the program participants are correctly classified and cannot be construed as employees or volunteers of the county.

By comparison, existing county grants and contracts with non-profit and for-profit entities to provide services to the community require the entity to have sufficient insurance, to indemnify the county, and to follow all county, state, and federal labor and employment laws. Should the county consider a program like the City’s Program, thought should be given to imposing similar conditions upon the non-profit grantee via the grant agreement.

3. As to whether there other issues or laws that might restrict the county from implementing such a work day program with county jobs, we believe civil service law and the Hawaii Supreme Court decisions that interpret the law limit the kind of work that can be performed by non-civil servants.

The work performed by the There’s a Better Way program participants has been described as “beautification” projects consisting of weeding and picking up litter. The Hawaii Supreme Court has ruled that the counties may not privatize or contract for services that are not exempted by §§76-16, 76-77 or 46-33,

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H.R.S., or to privatize work that “encompasses those services that have customarily and historically been provided by civil servants.”²

HRS §76-77, *Civil service and exemptions*, which governs the use of non-civil servants to provide personal services to the county lists sixteen exemptions.³ One possible applicable exception is HRS §76-77(16), which provides:

Civil service and exemptions. The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county, except the following:

(16) Positions or contracts for personal services with private persons or entities for services lasting no more than one year and at a cost of no more than \$750,000; provided that the exemption under this paragraph shall apply to contracts for building, custodial, and grounds maintenance services with qualified community rehabilitation programs, as defined in section 103D-1001, lasting for no more than a year and at a cost of no more than \$850,000.

However, HRS §76-77(16) is a narrow exception, limited to building, custodial and grounds maintenance services provided through a nonprofit community rehabilitation program for persons with disabilities.

²See: Konno v. County of Hawaii, 85 Hawaii 61 (1997) (Hawaii County contracted with a private firm to operate a newly created landfill. Applying a “nature of services” test, the Hawaii Supreme Court ruled that operation of a landfill is a function “customarily and historically provided by civil servants,” and does not fall within any exception to HRS §76-77. Therefore, Hawaii County’s contract with a private entity violated civil service law.) See also: Salera v. Caldwell, 137 Hawaii 409 (2016) (City and County of Honolulu unilaterally discontinued front loader refuse collection services to condominiums, churches and non-profit agencies, forcing those customers to hire private refuse haulers. Applying the nature of services test described in Konno v. County of Hawaii, discontinuation of frontloader refuse collection by the City and County of Honolulu displaced public employees and privatized a function customarily and historically provided by civil servants).

³Generally, HRS §76-77 exempts from civil service certain classes of county employees, including elected officials, department heads, county attorneys and others. HRS §76-16 applies to state employees, HRS §46-33 applies to the City and County of Honolulu.

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It is unknown if the Program, as described can be considered a qualified community rehabilitation program if replicated in Hawaii.⁴

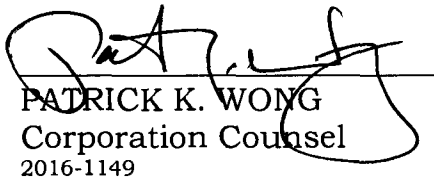
Therefore, absent an applicable exception to civil service law, the kind of work offered to homeless individuals through a non-profit agency funded by a county grant should be of a nature not customarily and historically provided by civil servants.

Please contact me if you have any questions or concerns regarding this matter

GYM:tl

cc: Carol Reimann, Director of Housing & Human Concerns

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel
2016-1149

⁴HRS §1003D-1001 defines qualified community rehabilitation program as a nonprofit program for persons with disabilities.