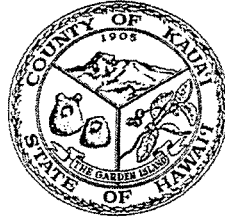


Bernard P. Carvalho, Jr.
Mayor



Alfred B. Castillo, Jr.
County Attorney

Nadine K. Nakamura
Managing Director

Jennifer S. Winn
First Deputy

OFFICE OF THE COUNTY ATTORNEY

County of Kaua'i, State of Hawai'i

4444 Rice Street, Suite 220, Lihue, Hawai'i 96766-1300
TEL (808) 241-4930 FAX (808) 241-6319

January 29, 2014

Mr. Glenn Mickens
Mr. Ken Taylor

Via Email: taylork021@hawaii.rr.com; glennruth2030@gmail.com

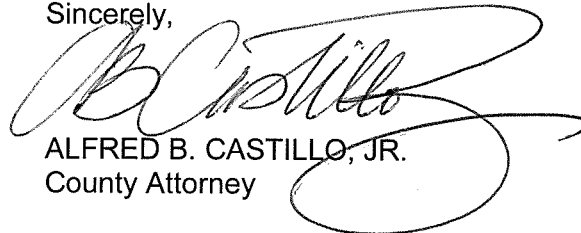
Dear Mr. Mickens and Mr. Taylor:

Your letter of January 28, 2014 addressed to Finance Director Steve Hunt and others has been referred to me by Mr. Hunt.

We have reviewed available documentation related to this matter. It is our position that Section 78-9 of Hawaii Revised Statutes is arguably not applicable to the situation in question, and may be unconstitutional.

We are prepared to review any further documentation that could be presented in this matter. I have advised Mr. Hunt to take no action at this time.

Sincerely,



ALFRED B. CASTILLO, JR.
County Attorney

C: Ernesto G. Pasion, County Auditor (auditor@kauai.gov)
Honorable Jay Furfaro, Chair and Councilmembers of the County of Kauai
(councilmembers@kauai.gov)
Chief Darryl Perry, Kauai Police Department (dperry@kauai.gov)
Steven Hunt, Finance Director (shunt@kauai.gov)
Garden Island Newspaper (dmoriki@thegardenisland.com)
Hawaii Free Press (editor@hawaiifreepress.com)
Hawaii Reporter (malia@hawaiireporter.com)
Honolulu Star-Advertiser (elynych@staradvertiser.com)

Att: Letter dated January 28, 2014

January 28, 2014

Ernesto G. Pasion, County Auditor
Office of the County Auditor
Hale Pumehana Building
3083 Akahi Street, Room 201
Lihue, Hawaii 96766
auditor@kauai.gov

RECEIVED
JAN 29 2014
DIRECTOR OF FINANCE
COUNTY OF KAUAI

Steve Hunt, Finance Director
Moikeha Building
4444 Rice Street, Suite 280
Lihue, Hawaii 96766
shunt@kauai.gov

Jay Furfaro, Council Chair
Mason K. Chock, Council Vice-Chair
Tim Bynum, Councilmember
Gary L. Hooser, Councilmember
Ross Kagawa, Councilmember
Mel Rapozo, Councilmember
JoAnn A. Yukimura, Councilmember
Office of the County Clerk
Council Services Division
4396 Rice Street, Suite 209
Lihue, Hawaii 96766
councilmembers@kauai.gov

Aloha County Auditor, Finance Director and Members of the County Council:

On January 13, 2014, we sent a letter to Mayor Bernard Carvalho Jr. (Mayor Carvalho) requesting that he vacate office pursuant to Hawaii Revised Statutes, Section 78-9 because of his failure to provide information regarding the Fuel Audit investigation (See Attached Exhibit "1"). On January 16, 2014, we received a letter from Beth Tokioka, Director of Communications, that the matter was being researched and that a response would be forthcoming when the research was concluded. No deadline was provided (See attached Exhibit "2"). On January 27, 2014, we sent a follow-up letter (See Attached Exhibit "3"), and received a response from his office (See Attached Exhibit "4").

Upon further examination, it appears that the Mayor and an unnamed County Employee (Unnamed County Employee) referred to in the lawsuit filed by Ernesto G. Pasion cited below, will not voluntarily comply with the law and vacate office. Thus, we are hereby requesting that the County Auditor, Finance Director and the County Council do its due diligence to ensure that the laws are followed in an expeditious

manner so that further public funds and/or salaries are not allocated for an illegal purpose.

Hawaii Revised Statutes Sections 78-8 to 78-11 cover responsibilities of Public Officers and Employees.

First, under HRS Section 78-8 it states:

“The persons subject to sections 78-8 to 78-11 are those elected to or appointed or employed in the government of the State or any county, or in any political subdivision thereof, or appointed to or employed in any office or employment any part of the compensation of which is paid out of public funds.”

Clearly, it is undisputed that Mayor Carvalho, as an elected official employed by the County of which he is compensated from public funds, is subject to sections 78-9 to 78-11. Further, Unnamed County Employee, who gets paid from public funds, would also be subject to these laws.

Second, under HRS Section 78-9, it states:

“If any person subject to sections 78-8 to 78-11, after lawful notice or process, wilfully refuses or fails to appear before any court or judge, any legislative committee, or any officer, board, or commission, or *having appeared refuses to testify or to answer any question regarding (1) the government, property or affairs of the State or of any political subdivision thereof, or (2) the person's qualifications for public office or employment, or (3) the qualifications of any officer or employee of the State or any political subdivision thereof, on the ground that the person's answer would tend to incriminate the person,* or refuses to testify or to answer any such question without right, the *person's term or tenure of office or employment shall terminate* and the office or employment shall be vacant, and the person shall not be eligible to election or appointment to any office or employment under the State or any political subdivision thereof. To the extent that the State is without authority to require, under the constitution or laws of the United States, compliance by any public officer or public employee herewith, sections 78-8 to 78-11 shall not apply to the officer or employee, but the sections shall apply to the extent that they or any part thereof can lawfully be made applicable.”

In Civil No. 13-1-0340, Ernesto G. Pasion vs. County of Kauai; Jay Furfaro; et.al. , the following was asserted:

In November 2008, the people voted to approve an amendment to the County of Kauai Charter that created the Office of the County Auditor. The County Auditor was named the officer of the Office of the County Auditor (OCA),

which was established within the legislative branch of Kauai County. (COK Charter, Section 32.01). Commencing in August 2010, a Fuel Audit was made. Incident to that Audit, an investigation was conducted in which it was revealed that "Official A", a certain high elected official, also known as Mayor Carvalho, used County resources and taxpayer's monies for his own personal purpose.

Mayor Carvalho, who was represented by County Attorney Alfred Castillo (CA Castillo) during the investigation appeared, invoked his rights under the 5th Amendment of the US Constitution and refused to answer any questions. Similarly, Unnamed County Employee, in such investigation, who was also represented by CA Castillo invoked the 5th Amendment and refused to answer questions.

At the conclusion of the investigation, the investigators recommended that the matter be referred to law enforcement agencies to investigate further for criminal liability.

In applying HRS Section 78-9, the Mayor and the Unnamed County Employee, who are both subject to that section, appeared before the investigators hired by the County Auditor, a County Officer, under a legislative committee, OCA, and refused to testify regarding questions regarding County fuel irregularities by invoking their 5th Amendment Right against self-incrimination.

Upon refusing to testify, HRS Section 78-9 dictates that the employment of Mayor Carvalho and Unnamed County Employee SHALL terminate and the persons shall not be eligible for election or appointment to any County or State office.

Although HRS Section 78-9 is crystal clear, it is apparent that the Mayor and the Unnamed County Employee have not voluntarily vacated their employment. Because the Mayor has failed under COK Charter Article 7, Section L to enforce all applicable laws, he is subjected to COK Charter Section 23.10 that provides penalties of up to one year imprisonment.

In light of this situation, HRS Section 78-10 states:

"If any person subject to sections 78-8 to 78-11 refuses to appear or refuses to testify under any of the circumstances contemplated in section 78-9, the presiding judge or officer of the court or **body before which the default or refusal occurs shall certify the fact** thereof to the appointing or employing authority having cognizance of the person as a public officer or public employee and to the comptroller or other disbursing officer who issues warrants or checks to pay the person for the person's services as a public officer or public employee. If the default or refusal occurs before any court or body whose presiding judge or officer may not be required by the legislature to make and file such a certificate, then (1) the presiding judge or

officer may make and file the certificate, and (2) the attorney general of the State, upon learning of the default or refusal, shall make and file the certificate if the presiding judge or officer of the court or body has not filed the same. ***Upon receiving a certificate, (A) the appointing or employing authority shall remove or discharge the person from office or employment, and (B) the comptroller or other disbursing officer shall make no further payments of public funds to the person,*** except to pay the person the salary, wages, bonus, or other compensation to which the person otherwise would be entitled if the person were voluntarily terminating the person's office or employment on the day the order is served on the comptroller or other disbursing officer. "

Thus, the County Auditor, who is the Officer of the OCA, the body before which the the refusal occurred, SHALL certify that fact to the people who elected the Mayor and the employing authority of the Unnamed County Employee AND to the Finance Director.

Upon receiving the certificate, the people SHALL remove the Mayor from office and the employing authority SHALL remove the unnamed employee from office AND the Finance Director SHALL make no further payments of public funds to the Mayor and unnamed employee.

Further, under HRS Section 78-11, as stated below, the removal of the Mayor and the Unnamed County Employee shall not be reviewable by any court, County and/or State agency.

HRS Section 78-11 states:

" The removal or discharge of any person from office or employment under sections 78-8 to 78-11 shall not be reviewable by any court, officer, or agency of the State or county, or any political subdivision thereof, but nothing herein shall preclude any court of competent jurisdiction from reviewing the question whether the removal or discharge is in accordance with the sections. In the case of any officer who may only be removed from office by the governor by and with the advice and consent of the senate of the State, the removal of the officer shall not be effected until the advice and consent of the senate thereto is given, but the duties of the comptroller or other appropriate disbursing officer hereinbefore specified shall remain the same. "

After the Mayor has vacated office, COK Charter Section 7.07 provides the process for selection of a new Mayor by the County Council.

In conclusion, we are requesting that the following actions occur:

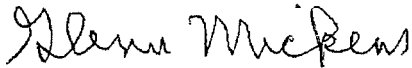
- 1) The County Auditor certify that Mayor Carvalho and Unnamed County Employee appeared and refused to answer any questions regarding the

property or affairs of the County on the ground that the person's answer would tend to incriminate the person;

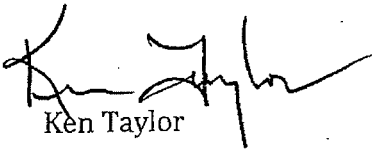
- 2) The County Auditor send said Certification to the electorate, the appointing authority of the Unnamed County Employee, and to the Finance Director;
- 3) The Finance Director terminate employment of Mayor Carvalho and Unnamed County Employee;
- 4) The Finance Director stop all payments of funds and/or salaries to Mayor Carvalho and Unnamed County Employee;
- 5) The Kauai Police Department and/or any other law enforcement agency investigate whether the Mayor and Unnamed County Employee have violated any County and/or State laws by refusing to comply with HRS Section 78-9 to 78-11;
- 6) The County Council invokes its authority to fill the vacancy of the Mayor, and the appointing authority of the Unnamed County Employee fill the vacancy of the Unnamed County Employee.

Your early reply will be expected.

Sincerely,



Glenn Mickens



Ken Taylor

cc: Chief Darryl Perry, Kauai Police Department (dperry@kauai.gov)
cc: Garden Island Newspaper (dmoriki@thegardenisland.com)
cc: Hawaii Free Press (Editor@hawaiifreepress.com)
cc: Hawaii Reporter (Malia@hawaiireporter.com)
cc: Star-Advertiser Newspaper (elynych@staradvertiser.com)

Exhibit 1

January 13, 2014

HONORABLE MAYOR BERNARD CARVALHO
4444 RICE ST. STE
LIHUE, HI 96766

ALOHA MAYOR CARVALHO:

Section 78-9 of the Hawaii Revised Statutes provides that if after lawful notice or process an official appears before a court or an administrative body and fails to answer any question regarding government property or affairs of the State or any political subdivision on the grounds that the person's answer would tend to incriminate the person, the person's tenure in office shall terminate and the office or employment shall be vacant. It seems evident that our state intended that a county or state employee could invoke the privilege contained in our Federal constitution on a work related matter to seek to avoid criminal conviction but that such such invocation would result in termination of the employee's position.

We are informed that after having been duly served you appeared pursuant to an investigation being made related to a Fuel Audit conducted by the Kauai County Auditor and on that occasion you refused to answer inquiry as to your conduct on the grounds that the answer would tend to incriminate you and that at such appearance you were represented by Mr. Alfred Castillo, Kauai County Attorney.

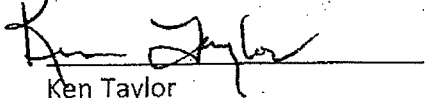
If the information mentioned is inaccurate in any material respect or if you believe that the statute is inapplicable to your conduct, we are asking for your statement as to the reasons for your belief. Otherwise we will expect that you take action to comply with the provisions of HRS Section 78-9 in order that the Council may proceed in accordance with the terms of the Kauai County Charter to fill the vacancy in the mayoral office.

A prompt response to this letter is requested.

Respectfully yours,



Glenn Mickens



Ken Taylor

Bernard P. Carvalho, Jr.
Mayor



Nadine K. Nakamura
Managing Director

Exhibit 2

OFFICE OF THE MAYOR
County of Kaua'i, State of Hawai'i
4444 Rice Street, Suite 235, Lihu'e, Hawai'i 96766
TEL (808) 241-4900 FAX (808) 241-6877

January 16, 2014

Mr. Glenn Mickens
Mr. Ken Taylor

Via Email: tayfork021@hawaii.rr.com; glennruth2030@gmail.com

Dear Glenn and Ken:

Mahalo for your letter dated January 14, 2014, regarding Section 78-9 of the Hawai'i Revised Statutes.

Please be advised the matter in question is being researched. We will respond to your questions once the research has been concluded.

Best regards,

Beth Tokioka
Director of Communications

C: Bernard P. Carvalho, Jr., Mayor

Exhibit # 3

From: Glenn Mickens <glennruth2030@gmail.com>
Subject: Our letter 1/13/14
Date: January 27, 2014 10:22:50 AM HST
To: Bernard Carvalho <Mayor@kauai.gov>

Aloha Honorable Mayor Carvalho, Jr.,

It is now two weeks since we sent you our letter on January 13, 2014 containing the information from the complaint in Pasion v. Kauai County that you had invoked the privilege against self incrimination and questioning whether you accept that HRS 78-9 should apply to this conduct. Our letter was acknowledged by your office on January 16th with the advice that the matter was being researched.

In our view, you have had a reasonable time for you to consider the matter. Your immediate reply to this letter will be appreciated.

Mahalo,

Glenn Mickens
Ken Taylor

Exhibit #4

From: Glenn Mickens <glennruth2030@gmail.com>
Subject:
Date: January 27, 2014 4:23:38 PM HST
To: Glenn Mickens <glennruth2030@gmail.com>

Aloha, Glenn and Ken. We are still researching the matter and will reply when that research is complete.

Mahalo,

Beth

Aloha Beth,

Sorry to be so impatient but thanks for your response and we will look forward to your reply soon.

Glenn & Ken