


March 2, 2015

The Garden Island and Other Interested Individuals:

Attached is a general response to the Auditor's comments which were printed in The Garden Island on Friday February 27, 2015. I have prepared my own comments after reading the article in order to give a much more balanced understanding of the situation.

Thank You,

A handwritten signature in black ink, appearing to read 'Jay Furfaro', with a long horizontal stroke extending to the right.

Jay Furfaro

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In 2008, I introduced a resolution for a charter amendment to establish the Office of the County Auditor. The amendment passed, and in 2009, the County Council sought applications for the County Auditor. Ernie Pasion was one of three applicants. I knew Ernie as our Deputy County Clerk and I believed that of the three, he was the best choice to be the first County Auditor.

In December, 2010, Ernie came to me and told me that he suspected that a county official was illegally fueling his personal car with County gas. He told me that it was my individual responsibility (as opposed to that Council as a body) to determine if a crime had been committed, and, if so, to report the crime to law enforcement. I had just begun my tenure as Council Chair and was flabbergasted. I expressed my dismay and told Ernie that the official had given up his car allowance and was saving the County money. Why would the official give up a \$6,100 car allowance just to turn around and fraudulently steal gas? And why was Ernie asking me to make the determination instead of bringing the matter to the entire Council?

I did what Ernie asked and met with the official and some of his staff about the matter. I wanted to hear both sides of the story before reaching any judgment.

A few weeks later, Ernie insisted that since he had been prevented from hiring an investigator, the Council should conduct an investigation under Section 3.17 of the Charter. I thought that this was ridiculous, as the County Auditor derives his power from Section 3.17. Ernie, as the auditor, had the right to inspect documents and obtain testimony under oath. He had an attorney and a certified public accountant on his staff. Surely, they were capable of doing the investigation without the circus that would occur if seven councilmembers conducted the inquiry during a Council meeting.

Eventually, with assistance from the Council, Ernie hired two ex-prosecuting attorneys and a retired Honolulu police detective. They conducted an investigation and prepared a report that contained statements from numerous witnesses. The investigators learned that the County of Kauai had provided a car allowance and gasoline to former county officials. The investigators were also told that former county officials used gas cards to fuel their cars.

During the course of the investigation, the State Auditor told Ernie to consider Sections 105-1 and 105-2 of the Hawaii Revised Statutes. Those statutes

allow the Governor to use a State vehicle and the Mayors of the counties to use County vehicles for their personal use, while prohibiting other State and County employees from taking government vehicles home without authorization.

Ernie also discovered that County employees were taking County vehicles home without authorization and in violation of Section 105-1. His staff advised Ernie to investigate the use of County vehicles (and fuel) as part of the fuel audit. Ernie disregarded his staff and told the investigators to focus on a particular county official and another County employee.

After the investigation, Ernie prepared a report to the County Council. The report did not include the results of the investigation. A staff auditor told Ernie that he needed to include what the investigators had learned about the former county officials' use of gas. The staff auditor also told Ernie that the county official likely intended no wrongdoing. Despite this, Ernie left out any mention of the past practice or that there was a statute that allowed certain county officials to use a County car for personal use.

When Ernie's report came to me, I immediately requested an executive session to allow a full briefing by Ernie and his investigators. Ernie's report recommended that the matter be referred to law enforcement; the Council followed his recommendation by referring the matter to the Attorney General for the State of Hawai'i.

The Attorney General reviewed the investigator's reports and decided not to pursue a case. Who in their right mind would, knowing that certain county officials were entitled to use County cars or be paid a car allowance? Or that instead of using a County car or taking the car allowance, the county official was, in essence, donating the use of the official's car to the County? Or that the official was given a gas card that had been used by the former officials?

The staff auditor who advised Ernie to include all of the facts in his report to the Council filed a complaint with the Council about Ernie's conduct as the auditor. The complaint included serious allegations against Ernie and the Council hired a law firm to determine the validity of the claims. While the investigation was pending, the staff auditor quit and filed a claim against the County. The claim included other serious allegations against Ernie and the Council again hired a law firm to investigate and advise the Council as to what could or should be done.

In addition to Ernie's mishandling of the fuel and take home vehicle audits, the investigations revealed that Ernie was a poor manager, who allowed one of

his auditors to spend seven months on Oahu to work on audits that, by Ernie's own admission, had already been completed. He also allowed one of his auditors to accrue nearly \$15,000 in overtime pay. Ernie also fostered a hostile work environment that resulted in co-workers filing complaints against Ernie and each other.

During Ernie's tenure, the County Auditor has had an annual budget of over \$1.5 million dollars. If you compare the audits he proposed with those he actually completed, keeping in mind that many of the audits utilized private consultants or certified public accountants, you will conclude, as the Council did, that Ernie was over-promising and under-delivering. So, it was not a surprise that some Council members believed that Ernie's poor performance and failure to adhere to the standards and ethics required of the County Auditor warranted his termination.

The Council took two votes in determining how to discipline Ernie. The first ended in a vote for his dismissal and the second resulted in his suspension. In the end, Ernie was suspended and placed on probation. Ernie filed a lawsuit, claiming that the disciplinary actions were in retaliation for Ernie's investigation related to the Fuel Audit.

In his lawsuit, Ernie claims that the Council, and I, in my personal capacity, retaliated against Ernie because he was a "whistleblower". Ernie claims that the Council's motive was to punish him for investigating the county official. It was the Council, however, that unanimously supported funding Ernie's investigation of the county official and unanimously voted to refer the investigation to the Attorney General. Why would we then turn around and punish Ernie for actions that we supported? None of us would punish Ernie for doing the right thing.

The lawsuit cost the County over half a million dollars. I recused myself from decision making in the lawsuit, since Ernie named me in my personal capacity - which was really odd, considering that I voted against firing him.

I believed that the cost of litigation outweighed termination, especially since his term is going to end this year. But no good deed goes unpunished, and Ernie saw fit to name me personally. In the end, the Council decided to settle the case, no doubt because the cost of further litigation was prohibitive. I hope that the next County Auditor has the integrity and intelligence to carry out the duties of the office to best serve the people of this County.

§105-1 Government motor vehicles; certain uses prohibited.

Except as provided in section 105-2, it shall be unlawful for any person to use, operate, or drive any motor vehicle owned or controlled by the State, or by any county thereof, for personal pleasure or personal use (as distinguished from official or governmental service or use) including, without limitation to the generality of the foregoing, travel by or conveyance of any officer or employee of the State, or of any county thereof, directly or indirectly, from his place of service or from his work to or near his place of abode, or, directly or indirectly, from such place of abode to his place of service or to his work. [L 1919, c 227, pt of §1; RL 1945, pt of §462; am L 1949, c 389, pt of §1(a); RL 1955, §7-10; HRS §105-1]

Attorney General Opinions

State may hold employee responsible for negligent damage to vehicle under the employee's control. Att. Gen. Op. 63-31.

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§105-2 Exceptions. Section 105-1 shall not apply to:

- ✓ (1) The governor;
- ✓ (2) The mayor of any county;
- (3) Any member of a police department or a fire department or of the staff of a hospital, or any officer or employee of the board of water supply of the city and county of Honolulu, when using a motor vehicle for a personal purpose incidental to the person's service or work (but not for pleasure);
- (4) Any officer or employee of the State who, upon written recommendation of the comptroller, is given written permission by the governor to use, operate, or drive for personal use (but not for pleasure) any motor vehicle owned or controlled by the State;
- (5) Any officer or employee of any county who, upon written recommendation of the budget director, is given written permission by the mayor, to use, operate or drive for personal use (but not for pleasure) any motor vehicle owned or controlled by the county;
- (6) Any officer or employee of the State, or of any county, who, in case of emergency, because of the person's illness, or the person's incapacity caused by accident while at work, or because of the illness of a member of the person's immediate family including a reciprocal beneficiary while the person is at work, is conveyed in a motor vehicle to the person's place of abode, or to a hospital or other place, but every such use of such a motor vehicle shall be certified to by the officer or by the head of the department, commission, board, bureau, agency, or instrumentality controlling or possessing the motor vehicle immediately thereafter, and the certificate shall be forthwith filed with the comptroller, in the case of the State, or with the budget director, in the case of a county; and
- (7) The assigned driver of a Van Go Hawaii vehicle or any other state ridesharing program vehicle. [L 1919, c 227, pt of §1; RL 1945, pt of §462; am L 1949, c 389, pt of §1(a); RL 1955, §7-11; am L 1965, c 11, §1; HRS §105-2; am L 1981, c 49, §1; gen ch 1993; am L 1997, c 383, §34]

Attorney General Opinions

Narcotics enforcement division investigators have authority for personal use of state vehicles incident to law enforcement purposes where prior written permission has been obtained from governor upon written recommendation of comptroller. Att. Gen. Op. 91-03.

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