

LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

November 2, 2007

The Honorable Rosemary T. Fazio
Chairperson, Judicial Selection Commission
State of Hawai'i
417 South King Street
Honolulu, Hawai'i 96813

Dear Ms. Fazio:

Re: Appointment of Judicial Selection Commission's
Administrative Assistant

By letter dated September 18, 2007, we earlier advised that the State Constitution vests the Judicial Selection Commission with exclusive jurisdiction to establish and fill any and all staff positions needed to allow the Commission to fulfill its constitutionally conferred duties and responsibilities. Based upon that advice, the Commission adopted Judicial Selection Commission Rule 3.1 entitled "COMMISSION STAFF," on September 28, 2007.¹ The Commission now asks these questions:

1. Does Rule 3.1 foreclose the Judiciary from selecting and appointing a person to fill the Commission's administrative assistant II position when the current incumbent retires?
2. Is Rule 3.1 valid?
3. How would the Commission enforce Rule 3.1 and the exclusive authority it confers on the Commission

¹At the same time, however, the Judiciary continued an earlier initiated civil service recruitment to select a replacement for the Commission's present administrative assistant II, who is slated to retire on December 31, 2007.

The Honorable Rosemary T. Fazio
November 2, 2007
Page 2

to appoint its own staff, if the Judiciary continues its efforts to recruit and select a replacement for the Commission's incumbent administrative assistant II?

BRIEF ANSWERS

We answer the first two questions affirmatively. As to the third question, the Commission should ask the Judiciary to re-establish the Commission's administrative assistant II position as an exempt position effective January 1, 2008, and assist the Commission to advertise, interview, and select a person to fill the position effective January 1, 2008.

If the Judiciary does not provide the administrative support the Commission requests, the Commission may establish the exempt administrative assistant position itself, advertise, interview, and select an individual to fill the position effective January 1, 2008, and request the Comptroller directly to make all disbursements from its appropriation necessary to pay the successor administrative assistant II's salary and pension payments, and to make any payroll deductions the new employee requests. Ultimately, Rule 3.1 and the actions the Commission have taken to implement the rule would be enforceable by a civil action brought by the Attorney General under section 603-23, Hawaii Revised Statutes, in the state circuit court to enjoin the violation of the rule, or by a petition for writ of mandamus directed to a public officer brought by the Commission in the Hawai'i Supreme Court under section 602-5(a)(3), Hawaii Revised Statutes, and Hawai'i Rules of Appellate Procedure rule 21(b).

BACKGROUND INFORMATION

While the reason for its inclusion is not known by the present Commission or discernible from available records, since it was established, the Commission's administrative assistant II position has been a civil service position,² and has been listed on the Judiciary's organization chart under the Office of the

²The Department of Budget and Finance has confirmed that this is the only budgeted position assigned to the Commission.

The Honorable Rosemary T. Fazio

November 2, 2007

Page 3

Administrative Director of the Courts with the notation "Reports to the Administrative Director of the Courts for administrative purposes only."³

On August 26, 2007, the Judiciary issued an Internal Vacancy Announcement for Administrative Assistant II (Judicial Selection Commission). Two days earlier, the Commission sent a letter to the Administrative Director of the Courts to inquire about the civil service recruitment process the Judiciary had initiated, and to indicate that it believed it was the Commission's rather than the Judiciary's prerogative to fill that position. By letter dated September 4, 2007, the Administrative Director wrote to indicate otherwise.⁴

At the Commission's meeting on September 28, 2007, as required by the fourth paragraph of section 4 of article VI of the State Constitution, and by Judicial Selection Commission Rule 6D, a majority of the members of the Commission and all of the members present at the meeting approved and adopted Rule 3.1, which designated the Commission as the appointing authority for its staff, and exempted and excluded all staff so appointed from the civil service (chapter 76, Hawaii Revised Statutes) and

³We understand that the Commission's chairperson approves all of the Commission's administrative assistant II's personnel transactions, including salary adjustments and requests for leave, although it is not clear whether this is simply a longstanding practice, the result of a delegation by the Administrative Director to all line managers in the Judiciary, or in recognition of the Commission's status as an independent constitutionally established entity that is attached to the Judiciary for administrative support only.

⁴The Administrative Director wrote:

The position that . . . will be vacating is a civil servant position governed by title 7 of the Hawai'i Revised Statutes. As a civil service employee, the Judiciary handles any union grievance, investigation, and/or disciplinary action that may arise from her employment . . . the hiring of all Judiciary employees, including civil servant employees, rests with the Administrative Director of the Courts, subject to the direction of the Chief Justice.

The Director cited sections 601-2 and 601-3(b), Hawaii Revised Statutes, and invited the Commission to recommend one of the members of the hiring panel that would be created to review applications and select a successor.

The Honorable Rosemary T. Fazio
November 2, 2007
Page 4

from collective bargaining (chapter 89, Hawaii Revised Statutes).

The Commission authorized the Commission's Vice-Chairperson, who was presiding, to send a copy of Rule 3.1 to the Administrative Director of the Courts and to request that the Judiciary immediately cease all efforts to appoint an administrative assistant for the Commission. We understand that in spite of the Commission's specific request made by letter from the Vice-Chairperson to the Director dated September 29, 2007 [sic], the Judiciary interviewed applicants and selected one of them to fill the administrative assistant II position.⁵

The Administrative Director disagrees that the Commission can have exclusive jurisdiction to create and fill its staff positions because he believes that Konno v. County of Hawaii, 85 Haw. 61, 937 P.2d 397 (1997), held that the State Constitution directed the Legislature to provide for a civil service by state laws, that state laws, particularly section 76-16, Hawaii Revised Statutes, make all state employees civil servants unless exempted, and only the Legislature may exempt employees from the civil service. Consequently, it is the Administrative Director's position that, because the Legislature has not exempted the Commission's staff positions from the civil service, and sections 601-2 and 601-3, Hawaii Revised Statutes, direct the Chief Justice, and by the Chief Justice's delegation, the Administrative Director, to administer the civil service laws "as it pertains to employees of the Judiciary," the Commission's administrative assistant II must be a civil servant, and the Administrative Director, rather than the Commission, must fill any vacancy that may occur in the position.

⁵We understand further that the Judiciary plans to temporarily detail the individual selected to fill the position to the JSC beginning December 1, 2007, for transitional purposes, and that the Judiciary expects the individual to remain on temporary detail pending resolution of the on-going disagreement as to the Commission's exclusive jurisdiction to establish and fill its staff positions.

DISCUSSION

Judicial Selection Commission Rule 3.1 provides:

RULE 3.1 COMMISSION STAFF

The commission shall appoint an administrative assistant and such other staff as necessary to carryout the functions of the commission. The staff shall be appointed without regard to chapter 76, Hawaii Revised Statutes, and exempted from its provisions, and be excluded from collective bargaining and not subject to chapter 89, Hawaii Revised Statutes. The administrative assistant and any other staff shall serve at the pleasure of the commission, and be included in any benefit program applicable and available to employees of the State. The duties and salary of the administrative assistant and any other staff the commission may appoint shall be determined by the commission.

This rule shall take effect upon its approval, provided that its provisions shall not apply to the commission's incumbent administrative assistant, nor diminish or impair any of the rights, benefits, and privileges the incumbent administrative assistant enjoyed prior to the rule's adoption.⁶

A. Rule 3.1 Precludes the Judiciary From Establishing or Filling the Commission's Staff Positions

Like section 601-3(a) and (c), Hawaii Revised Statutes, which exempts the positions from the civil service and provides for the appointment of the Administrative Director of the Courts by the Chief Justice, and the appointment of a deputy administrative director of the courts and "such assistants as may be necessary" by the Administrative Director of the Courts, Rule 3.1 authorizes the Commission to appoint its administrative assistant and such other staff as it believes are necessary for

⁶Despite written request, the Judiciary has not listed Rule 3.1 on its website listing of Commission Rules.

its successful operation, and exempts all staff positions it may from time to time create from the civil service and collective bargaining.

Rule 3.1 was promulgated pursuant to the Commission's constitutional authority under the fifth paragraph of section 4 of Article VI of the State Constitution. In addition to directions that the members of the Commission select its chair, and that its deliberations be confidential, the fifth paragraph of section 4 of Article VI provides in pertinent part: "The commission shall adopt rules which shall have the force and effect of law." This last direction is given without qualification or limitation.

The plain language of Rule 3.1 directs the Commission to select and appoint its staff. The rule does not mention the Judiciary, or any other state agency or official to act for that purpose. Under the maxim, "*expressio unius est exclusio alterius*," the express direction to the Commission with no reference to any other agency or official confers exclusive jurisdiction on the Commission to appoint its staff.

It is not unusual for an organic document such as a constitution or charter of a political entity, to confer the power to adopt rules that have the force and effect of law directly upon an agency or official that the organic document also establishes.⁷ The power to promulgate rules that have the force and effect of law is also not unique to the Commission.

⁷See Carroll v. Comm'n on Judicial Conduct, 160 P.3d 1140, 1141 (Ariz. 2007) ("Arizona regulates judicial conduct through a system involving both this Court and the constitutionally-created Commission [on Judicial Conduct]. See Ariz. Const. art. 6.1 . . . [t]he Constitution does not itself specify procedural rules for judicial disciplinary proceedings, but instead directs this Court to make rules implementing the constitutional provision. Ariz. Const. art. 6.1, § 5."); State ex rel. Corbin v. Arizona Corp. Comm'n, 848 P.2d 301, 303 (Ariz. 1993) ("[Ariz. Const. art. 15, § 3] gives the [Arizona Corporation] commission judicial, executive and legislative powers. It exercises . . . its legislative power in ratemaking. The commission's power goes beyond strictly setting rates and extends to enactment of the rules and regulations that are reasonably necessary steps in ratemaking. The commission has the exclusive power to exercise the duties given it in art. 15"); Thoreson v. Dep't of State Civil Service, 433 So.2d 184, 190 (La. 1983) ("Rules promulgated by the Civil Service Commission have the effect of law."); Allen v. City of Beverly Hills, 911 F.2d 367, 370 (9th Cir. 1990) ("The California Constitution specifically grants 'plenary authority' to

The Honorable Rosemary T. Fazio

November 2, 2007

Page 7

A law passed by the Legislature must accede to a "law" passed by an agency pursuant to a constitutionally conferred rule-making power. The Legislature "cannot abridge the rule-making power [conferred by a constitution]." Louk v. Cormier, 622 S.E.2d 788, 798 (W. Va. 2005). Legislative enactments may not unduly infringe rule-making authority conferred by a constitution. County of Cook, Cermak Health Serv. v. Illinois State Local Labor Relations Bd., 579 N.E.2d 866, 870 (Ill. 1991). "Whatever the extent of the Legislature's 'plenary' power [of law making], it is subordinate to the 'organic' law of this State -- the . . . Constitution." Schisler v. State, 907 A.2d 175, 218 (Md. 2006). "[A]s a general rule . . . whatever power is conferred upon [an agency to adopt rules] by the Constitution cannot be enlarged or abridged by the Legislature." Amendments to the Florida Rules of Workers' Compensation Procedure, 891 So. 2d 474, 478 (Fla. 2004) quoting Allen v. Butterworth, 756 So. 2d 52, 61 (Fla. 2000) quoting State ex rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508, 512 (1933). Allowing the Legislature to ignore the rule-making power conferred by a constitution "would have the effect of eroding, or possibly even destroying the constitutional and exclusive authority of the Commission in the area of compensation for civil service." Thoreson, 433 So. 2d 184, 198.

Even if both the Commission and the Legislature had concurrent powers to "make law" to implement the provisions of section 4 of Article VI, the provisions of chapter 76 are not solely determinative of whether a state employee is or is not a civil servant. In Konno, 85 Haw. at 70, 937 P.2d 397 at 406, the Hawai'i Supreme Court, in interpreting the civil service provision in section 1 of Article XVI of the State Constitution, noted:

[b]y its express terms, this provision simply means that the civil service, however defined, is to be

cities to promulgate rules providing for the 'terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal.'"); Springfield Command Officers Ass'n v. Springfield City Comm'n, 575 N.E.2d 499, 502-503 (Ohio App. 1990) (charter provisions and rules adopted pursuant to Ohio Const. art. XVIII, §§ 3 and 7 must prevail over conflicting state civil service provisions).

governed by merit principles. It does not define the precise scope of the civil service, i.e., the particular job positions that are within the civil service. Instead, article XVI, section 1 expressly refers to other sources for a definition of "civil service." It states: "civil service, as defined by law"

To determine the scope of the term "civil service," the Court concluded, "we must examine statutory law and case law."

Konno did not hold that article XVI, section 1 conferred exclusive authority on the Legislature to define or exempt civil service positions. Thus, chapter 76 cannot limit the Commission's constitutional authority to promulgate rules simply because the rule the Commission adopts relates to the civil service. See Anzai v. City & County of Honolulu, 99 Haw. 508, 57 P.3d 433 (2002) (It is beyond the power of the legislature to amend the Hawai'i Constitution merely through the enactment of a state law. See Haw. Const. art. XVII, § 3.)

B. Rule 3.1 Is Valid

The Hawai'i Supreme Court has said that the three-part standard for determining the constitutionality of a legislative enactment should be used to assess the constitutionality of a rule adopted by the Judicial Selection Commission pursuant to its constitutionally conferred power to make rules. Pray v. Judicial Selection Comm'n, 75 Haw. 333, 340, 861 P.2d 723, 727 (1993). In Pray, the court concluded that a rule of the Commission adopted pursuant to the authority conferred by the fifth paragraph of section 4 of Article VI, is presumptively constitutional unless the party challenging its constitutionality shows beyond a reasonable doubt that the rule is unconstitutional, and the constitutional defect is "clear, manifest and unmistakable." Id.

The fact that the fifth paragraph of section 4 of Article VI neither limits nor elaborates upon the scope of the Commission's rule-making power should not render Rule 3.1 unconstitutional, or preclude the Commission from adopting a rule relating to its staff and the form of their tenure,

The Honorable Rosemary T. Fazio
November 2, 2007
Page 9

including whether they are to be included in or exempt from the civil service. The authority of an agency includes those implied powers that are reasonably necessary to carry out the powers expressly granted. Morgan v. Planning Dep't, County of Kauai, 104 Haw. 173, 86 P.3d 982 (2004). Even if the subject of a rule is not expressly stated in the constitution, the general authority to make rules "empowers [the agency] to promulgate . . . rules to facilitate the [agency's] discharge of its constitutional duties." Cermak Health Services, 579 N.E.2d at 870. The agency's constitutional authority to promulgate rules extends to all rules reasonably necessary to fulfilling the agency's powers, and is exclusive. State ex rel. Corbin, 848 P.2d at 303.

Despite the lack of specificity as to what the Commission could make rules about, the accompanying constitutional history suggests that the delegates intended a broad delegation of authority to the Commission to promulgate its own rules.

It is the intent of your Committee that the commission promulgate its own rules which shall have the force and effect of law.

Stand. Comm. Rep. No. 52, 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 626 (1980). But even if the constitutional history is equivocal, it would not establish beyond a reasonable doubt that the delegates intended to preclude the Commission from adopting rules relating to its staff. Pray, 75 Haw. at 346, 861 P.2d at 729.

There ought to also be no question but that Rule 3.1 furthers section 4 of Article VI's overarching objective of creating an impartial process for selecting justices and judges by creating a commission-based system that is set as far apart from the other branches of government as possible, to maximize the expressly stated goals of the State Constitution and the Convention's delegates that the system be nonpartisan and independent.⁸ By adopting Rule 3.1 to expressly exempt its staff

⁸In Standing Committee Report No. 52, the Committee on Judiciary noted in pertinent part:

Your Committee believes the following summary of major reasons supports a commission:

from the civil service and designate itself as the appointing authority for its staff, the Commission avoided the inherently partisan legislative debate for that purpose, and reduced its need to rely on administrative support for personnel matters from the Judiciary.

To emphasize that the Legislature was to have a limited role, the Committee of the Whole removed the sentence, "The legislature shall by statute provide for the time and manner of appointments and elections to conform with this section," and explained that this was done "to make the matter of the setting up of the judicial selection commission as self-executing as possible without the need of any further statutory action." 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 378 (1980). To make plain that the Legislature was to have only one role, i.e., to provide funding, the Committee of the Whole replaced the sentence "The legislature shall provide for operation, staff and other expenses incidental to the performance of commission duties" with the first sentence of the sixth paragraph of section 4 of Article VI, "The legislature shall provide for the staff and operating expenses of the judicial selection commission in a separate budget."⁹

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1. It removes the selection of judges from the political consideration of one person and places it in the hands of a nonpartisan board of citizens;
 2. The choice of nominees is made without consideration or influence of partisan politics;
 3. It forms an independent panel of commissioners whose sole and exclusive function is to seek out, encourage and screen all candidates for judicial appointment;

⁹During the Debate in the Committee of the Whole on August 31, 1978, Delegate Ikeda, the Chairperson of the Committee on the Judiciary explained the purpose of this amendment:

This amendment would delete the present sentence [in the committee's proposal] which provides that the legislature "shall provide for operation, staff and other expenses incidental to the performance of commission duties." We have replaced that with the sentences as stated in the amendment [last two paragraphs of section 4 of Article VI].

As you will note, what is intended is to provide in somewhat more specific detail that the legislature should provide for the staff and operating expenses in a separate budget, . . .

The delegates intended to establish a similar distance between the Commission and the Judiciary as well. The Commission was attached to the Judiciary "simply for purposes of administration," and "simply to make it possible for the commission to be operational as soon as possible."

2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 401 (1980). The role the delegates envisioned for the Judiciary was limited to providing the Commission with whatever administrative support the Commission determined it needed to administer the independent and impartial selection process section 4 of Article VI contemplates.¹⁰

The delegates could have specified or limited the scope of the Commission's rule-making powers, or reserved the power to make laws affecting state employment exclusively for the

2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 401 (1980).

¹⁰As to the intended effect of the separate budget and administrative support amendments he proposed vis-à-vis the Judiciary, Delegate Ikeda explained:

As you will note, what is intended is to provide in somewhat more specific detail that the legislature should provide for the staff and operating expenses in a separate budget, . . . The amendment also places the commission under the judiciary branch of the state government simply for purposes of administration, where it would be an organization element of the judiciary. What was intended here was simply to make it possible for the commission to be operational as soon as possible.

2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 401 (1980). (Emphases added.) In response to the question, "is it the intent to have the commission as set up - to have any of the commissioners come before the legislature to request these funds, or would this be handled by the judiciary?," Delegate Ikeda replied:

. . . I really don't believe I can give an adequate answer. Based upon my understanding of how other independent commissions operate within the state government, I think it is the practice for the chairman of the commission to appear before the legislature at the time of approval on budgetary requests. So I imagine this would probably be handled in the same manner.

Id. at 402.

Legislature, but they did neither. Rule 3.1 reasonably can be said to further the delegates' overarching objective of establishing an impartial judicial selection process. We are thus of the opinion that Rule 3.1 is valid.

C. The Commission May Establish an Exempt Position, Fill It, and Request Administrative Assistance From the Comptroller

Paragraph seven of section 4 of Article VI attaches the Commission to the Judiciary, and assigns the responsibility for providing administrative support for the Commission to the Judiciary. Accordingly, having properly adopted Rule 3.1, the Commission is well within its authority, to ask the Judiciary to rescind its selection of a civil service replacement for its current administrative assistant II, and furnish all administrative support necessary to re-establish its administrative assistant II position as an exempt position effective January 1, 2008, and assist the Commission in advertising, interviewing and selecting a replacement for its incumbent upon her retirement.

If the Judiciary declines to comply with Rule 3.1, the fact that the Commission is administratively attached to the Judiciary does not and cannot bar the Commission from seeking to effectuate the Rule. Thus, if the Judiciary refuses the Commission's request, the Commission may establish the exempt administrative assistant position itself, advertise, interview and select an individual to fill the position effective January 1, 2008, and ask the Comptroller directly to refuse any request for salary disbursements for the administrative assistant II the Judiciary selected, and disburse the salary, and make payroll deductions for the employee the Commission selects instead.

Section 5 of Article VII of the State Constitution provides in pertinent part: "Provision for the control of the rate of expenditures of appropriated state moneys, . . . shall be made by law." Sections 40-1(c) and 40-51, Hawaii Revised Statutes, authorize the Comptroller to maintain custody of all of the Judiciary's appropriations and to make all disbursements and provide financial services involving the issuance of warrants for the Judiciary, if the Judiciary requests the Comptroller so to do. From the Comptroller we understand that the Judiciary has asked the Comptroller to provide these services, and that

The Honorable Rosemary T. Fazio

November 2, 2007

Page 13

the Comptroller presently makes all disbursements, issues all warrants, and pays the salaries and pension payments of and makes all payroll deductions for all Judiciary employees.

The Commission's appropriation is included among the appropriations the Comptroller maintains for the Judiciary, and through the Judiciary's provision of administrative support for the Commission, all disbursements for Commission's expenses, including its administrative assistant II's salary, are paid and processed by the Comptroller.

Because the Judiciary is effectively the Commission's agent for purposes of ensuring that its expenses and staff are paid, and the Judiciary has included that responsibility among the tasks it has delegated to the Comptroller to complete on its behalf under the prerogatives conferred by sections 40-1 and 40-51, it is our view that the Commission may withdraw its prior reliance on the Judiciary for administrative support, and ask the Comptroller to provide financial services directly to the Commission instead.

D. The Commission Should Separately Submit Its Own Budget to the Legislature

For the long-term, and as section 4 of Article VI literally provides, the Commission should prepare and submit a separate budget for the next fiscal year and every fiscal biennium thereafter,¹¹ so that the Commission's appropriation is maintained by the Comptroller separately from the Judiciary's appropriations pursuant to sections 40-1 and 40-51. The Commission should also consider proposing legislation to amend sections 40-1 and 40-51 to expressly authorize the Comptroller to make the financial services the Comptroller presently makes available to the Judiciary and the Legislature, available to the Commission as well.

E. Rule 3.1 Can Be Enforced Through Court Action

¹¹Under sections 37-71 and 37-72, Hawaii Revised Statutes, the biennium and supplemental budgets must be submitted to the Legislature not fewer than 30 days before the regular session. A supplemental budget should be submitted on or before December 17, 2007.

The Honorable Rosemary T. Fazio
November 2, 2007
Page 14

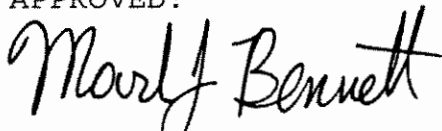
Ultimately, Rule 3.1 and any action the Commission takes to implement the rule is enforceable by a civil action brought by the Attorney General under section 603-23, Hawaii Revised Statutes, in the state circuit court to enjoin the violation of the rule or for declaratory relief, or by a petition for writ of mandamus directed to a public officer brought by the Commission in the Hawai'i Supreme Court under section 602-5(a)(3), Hawaii Revised Statutes, and Hawai'i Rules of Appellate Procedure rule 21(b).

Very truly yours,



Russell A. Suzuki
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General