

SPECIAL BOARD MEETING MINUTES
BOARD OF WATER SUPPLY
Wednesday, January 28, 2009

The Board of Water Supply, County of Kaua'i, met in special meeting at its office in Lihu'e on Wednesday, January 28, 2009. Chairperson Leland Kahawai called the meeting to order at 8:37 a.m. On roll call, the following answered present:

BOARD: Mr. Leland Kahawai, Chairperson (left meeting at about 10:40 a.m.)
Mr. Dee Crowell (present at about 9:05 a.m.)
Mr. Raymond McCormick
Mr. Randall Nishimura
Mr. Roy Oyama

Absent & Excused: Mr. Ian Costa
Mr. Donald Fujimoto

STAFF: Ms. Wynne M. Ushigome (left meeting at about 10:08 a.m.)
Ms. Amy Esaki (left meeting at about 9:34 a.m.)
Ms. Debra Togioka (left meeting at about 10:25 a.m.)
Mr. Paul Ganaden (10:37 to 10:46 a.m.)
Deputy County Attorney Jennifer Winn

GUESTS: Mr. Malcolm Fernandes, Dept. of Personnel Services
(left meeting at about 9:34 a.m.)
Mr. John Isobe, Mayor's Office (8:45 - 9:34 a.m.)

AGENDA

Mr. Oyama moved to approve the Agenda, seconded by Mr. Nishimura; motion was carried.

OLD BUSINESS

Re: Consideration and Action by the Board on the DOW's Hiring of the Waterworks Legal Advisor

Mr. Malcolm Fernandez, Personnel Director, of the Department of Personnel Services was present to answer the Board's questions on the Waterworks Legal Advisor (WLA) position.

On query by Chair Kahawai, Mr. Fernandez stated that per 76-77 of the Hawaii Revised Statutes (HRS), in order to qualify for a contract position, it needs to be special and unique. There is a very similar position in the County at the Police Department that is civil service. Therefore, the WLA position does not qualify under any of the exemptions.

Mr. Fernandez stated that he has discussed this and informed the DOW staff awhile back.

On query by Mr. Nishimura, Mr. Fernandez explained that the WLA position description is very similar to the legal position at the Police Department.

On query by Acting Manager Ushigome, Mr. Fernandez stated that the WLA class specifications were made for Kauai based on a similar position in the City and County of Honolulu and the WLA's position description.

Mr. John Isobe of the Mayor's Office was present at the meeting at about 8:45 a.m.

Acting Manager Ushigome discussed that this WLA position started as a ½-time position, then grew into a ¾-time position and then currently a full-time position. Acting Manager Ushigome stated that initially when this position became full time, it no longer qualified as being special and unique and Section 76-77 HRS no longer applied. They were notified late last year.

She further discussed that based on DPS' determination that this WLA position does not qualify as a contract position, the DOW followed suit with the applicable paperwork to make this WLA contract position to a civil service position. This civil service recruitment process included DPS sending out a recruitment announcement to advertise to fill this position. Then the Board had concerns about the WLA position being a civil service position and requested that the recruitment process be put on hold.

Acting Manager Ushigome stated that her understanding was that this position may possibly be special and unique but it would be very difficult to justify as there was already a classification for this position. Mr. Fernandez concurred that that this action was driven by the fact that there is another similar position existing in another jurisdiction.

Mr. Nishimura gave an overview of the initial creation of this position by the Board to have legal assistance on site for the Board and the Department. Previous to that, the Department was serviced by the County Attorney's Office. Therefore, Mr. Nishimura asked Mr. Fernandez, assuming that the Deputy County Attorneys continue to be exempt from civil service, would it be possible for the Department to fund a position through the County Attorney's Office and to have the position located at the DOW and servicing only the Water Board and the DOW? Mr. Fernandez felt that it would be possible and Mr. Nishimura discussed that it would be up to the County Attorney.

Mr. Nishimura also questioned compensation under the civil service package versus compensation that is available to deputy county attorneys. Also, he weighed the difference between the weight of a WLA versus a deputy county attorney as the WLA would still need to substantiate his/her opinion with the County Attorney.

Acting Manager Ushigome discussed that in 2002 when the WLA position was initially created under former Manager Ernest Lau that Hartwell Blake rendered an opinion that:

"This party would be employed by DOW and work at the DOW. He/she would not be a Deputy County Attorney. While said party would provide the Department with legal services, formal representation of DOW, in court or otherwise, would be the sole function of the Office of the County Attorney, in accordance with the County Charter."

Acting Manager Ushigome read an excerpt from a Board Report that was submitted at November 20, 2002 Board Meeting and read the following:

"Recently, the DOW decided to forego funding a deputy position and returned to the earlier approach of having a Deputy service our department on a part time basis. We have been fortunate that County Attorney Hartwell Blake agreed to serve our

department. The quality of services improved tremendously; however, timeliness was still an issue. To address this, the County Attorney agreed to work on-site for at least once a week. This allowed him to focus on our most critical issues without the distractions that he would normally experience in his office. This has allowed us to move forward on resolving certain critical issues, such as the Anahola agreements, the Kula School issue, the Kakeka Makai development PRSA, and others. “

Through all of this, we have learned some valuable lessons. They include,

- Our department's demand for legal services is growing due to an improving island economy which is limited by inadequate water infrastructure issues; a large variety of agreements being negotiated (e.g., joint source development, surface water purchase, acquisition of land and easements, etc.); the need to update our Rules and Regulations; labor issues (grievances, HLRB actions, arbitration); and the increased number of design and construction contracts as we continue to implement Water Plan 2020.*
- Funding a position in the Office of the County Attorney does not ensure that the department would obtain quality and focused legal services.*
- Creating a department legal counsel position would provide us full control over the hiring of a well-qualified legal counsel.*
- A department legal counsel working on DOW issues only and located on-site is the most effective and timely method of satisfying the department's growing demand for legal services. He would be able to focus on DOW issues without the normal daily distractions that would occur if located in the Office of the County Attorney.*
- A department legal counsel would provide better accessibility for the staff to consult with him on various issues requiring his expertise. This would also reduce the need to generate a detailed memorandum to the County Attorney (e.g., a list of eight or more background questions to be answered in the memorandum when submitting a request for a legal opinion from the County Attorney) when only simple direction is needed.*
- A department legal counsel would be the most cost effective way to obtain quality legal services (i.e., \$42 per hour versus \$250 per hour for private legal counsel).*
- A department legal counsel would reduce the need to retain outside legal counsel unless dictated by special circumstances.*
- A department legal counsel would over time be able to develop substantial expertise in water related issues previously unavailable from the Office of the County Attorney.*
- The department legal counsel would be able to resolve long standing issues more efficiently.*
- The department legal counsel would be able to advise the Chief Procurement Officer (i.e., the Manager) on matters of procurement.*

We believe that the creation of the department legal counsel position is the most cost effective and efficient way to meet our growing demand for legal services. It would also improve the quality and timeliness of service to our customers.”

Acting Manager Ushigome stated that the Board concurred in 2002 as they were convinced that we needed to hire an in-house attorney based on lessons learned and we are now reverting back; therefore, we should learn by our mistakes and move forward.

On query by Mr. Nishimura, Acting Manager Ushigome stated that this position started ½ time on contract, then ¾-time and then full time. The 'special and unique' circumstances probably do not apply now as it initially did.

Mr. Fernandez stated that this position existed for such a long time that it is ridiculous to have this position called short-term.

Mr. Nishimura stated that he would prefer to go to the County Attorney to get a full-time position at the DOW, if the WLA position could not submit a legal opinion. He realized that it would be up to the Manager's ability to work with the County Attorney, which could potentially be an obstacle.

Acting Manager Ushigome stated that she felt that the DOW has the best of both worlds because we have internal legal counsel, who keeps our documents flowing. Although our legal counsel does not have the authority to sign the documents, she reviews it internally to also assist with the timely review of our documents by the County Attorney. So if our legal counsel reviews and initials the document, the County Attorney is assured that the WLA has done the research and prep work and could sign off in a very timely manner.

She added that the Police Department probably wanted the same benefits that we have with timely legal reviews.

Ms. Esaki concurred that she had a good relationship with former County Attorney Pyun and with current interim County Attorney; whereby, as long as she reviewed and sign off on the documents, they would also sign off. She added that if they were working on a pending legal matter, she would do the prep work to finalize the document for the County Attorney's Office. If there is a protest, they would try to work it out in-house first, etc.

Ms. Esaki stated that she remembered previously when she was with the County Attorney's Office that the DOW would not have a choice on who would be designated to the DOW.

Mr. Nishimura discussed that there are pros and cons to have the WLA position a civil service position. One of the cons is that once this position is established as civil service, it is hard to go the other way, short of not funding the position.

Mr. Nishimura also discussed would the WLA serve at the pleasure of the Manager or not or is the WLA protected by civil service rules.

Mr. Nishimura stated that he personally felt, right or wrong, that since Managers come and go, that the Manager should have the ability to hire his primary staff. He added that the concern is over the position and not the person in the position.

Acting Manager Ushigome felt that if the WLA position is made into a Deputy County Attorney at the County Attorney's Office, it is contrary to what the Board is intending.

On query by Mr. Nishimura, Acting Manager Ushigome stated that she is looking for direction from the Board on which avenue to take.

Mr. Dee Crowell was present at the meeting at about 9:05 a.m.

Deputy County Attorney Winn stated that our new County Attorney Al Castillo will not be on board until March 1, 2009 at the earliest, which is not a firm date.

Acting Manager Ushigome summarized that it was determined at their meeting that in the civil service laws, Section 76-77 of the HRS, the Personnel Director, Malcolm Fernandez, shall determine the applicability of this section and shall determine whether or not the position is exempt per Paragraph 7 and 8. Acting Manager Ushigome stated that at this point, it was her understanding that DPS made the determination that this position is not an exempt position, so we moved forward with the civil service recruitment process. Then the Board stopped the recruitment process in late December, 2008. Former Chair Oyama and Mr. Nishimura then met with DPS, along with herself and Ms. Togioka to verify what the civil service laws required. They were told that if the exemption did fall under Section 76-77 then it did not have to be civil service.

Acting Manager Ushigome added that this matter was later on the January 8, 2009 Board Meeting Agenda, as well as today's Agenda and she is looking for direction from the Board on how to proceed.

Mr. Crowell stated that his main concern is the long-term effect of a civil service position on staff. As once the position becomes a civil service position, it is hard to turn back. Acting Manager Ushigome added that the Board could choose to not fund the position, which is a risk with any civil service position.

Mr. Oyama recognized that the DOW has had prompt legal review and timely processing of contracts from Ms. Esaki. He felt that it was efficient to have internal legal services instead of always having to go to the County Attorney's Office. Mr. Oyama added that it is important for government to always try to improve efficiency to serve the public. Acting Manager Ushigome concurred that as a water utility, it is essential and the best route to conduct business.

Ms. Esaki stated that she has experience while working with the County Attorney's Office as a Deputy County Attorney and worked with DOW and they were not afforded the luxury of time to focus only on the DOW projects as they had to balance it with other duties. However, as a Waterworks Legal Adviser, she has the opportunity to focus on projects from the start and followup to completion. She has been working on the DOW's land acquisitions that have been lingering for years and have now been able to move it forward like the Koloa Tank land acquisition before the Board. Ms. Esaki stated that over the years, there were many deputy county attorneys that were familiar with this project but never had time to complete the land acquisition process.

Ms. Esaki stated that some of the land acquisitions are getting closer to completion because she could focus and follow through on the process. She has also been working on the acquisition of the Kukuilono Tank Site as the DOW is squatting on private lands. Also, she is getting close on the negotiations with Grove Farm's attorney for the Maalo Road to acquire the land through condemnation.

Acting Manager Ushigome added that it took about one year from the time our previous WLA left and the hiring of Ms. Esaki. In that interim, it was a struggle for the Department. She added that having a WLA onsite is a tremendous benefit for the DOW, as the Department gets quick answers/solutions to our many legal questions, whether it is a minor notary questions on a trust, or something more significant. It would take so much time to route all the detailed legal questions to the County Attorney's Office via written correspondence.

On query by Chair Kahawai, Mr. Fernandez stated that this position is an Excluded Managerial (EM) 5 position, which is at a range. Acting Manager Ushigome added that the salary would be based on the WLA's experience and knowledge and also that the funding of this position would be the same, whether it is contract or civil service.

On query by Mr. Nishimura, Mr. Fernandez stated that it would be dependent on the EM-5 range to distinguish the salary of both the WLA and the Deputy County Attorney.

On query by Mr. Nishimura, Mr. John Isobe stated that he was invited to this meeting for this agenda item on behalf of the Boards and Commissions Office, Office of the Mayor.

Mr. Nishimura asked Mr. Isobe if it would be possible to have the DOW fund a Deputy County Attorney's position but to have that position located at the DOW?

Mr. Isobe premised with that he was not at the meeting to interfere with the DOW's operations as he was invited to attend; also, his short answer was yes. Since he was invited to the meeting, he offered his opinions in hopes of assisting the Board in their decision. Mr. Isobe stated that he has a lot of County experience prior to his present position.

Mr. Isobe discussed that the County is transitioning into a new County Attorney and that the County is looking at a 5-15% reduction in revenues so there will be at least a 10% reduction in funds across the board. Therefore, the Administration should be more flexible in handling their operations.

Mr. Isobe further discussed that it is a foregone conclusion that the DOW does need legal services. He stated that how to provide legal services are an operational and a technical question. There are 2 tracks: 1) hiring under the normal County hiring process through the civil service process; and 2) hiring via the County Attorney's Office.

Mr. Isobe stated that he was asked earlier if the County Attorney could assign a deputy to the DOW and he replied yes, along with the execution of an Agreement between the County Attorney's Office and the DOW. It would be up to the new County Attorney whether he/she would agree to the DOW paying his/her office the salary to have a deputy county attorney assigned to the DOW, with the caveat that person would be physically assigned to the DOW.

Mr. Isobe added that the downside of this proposed situation would be that the County Attorney could change and the County Attorney could change his/her mind on this proposed situation. Then if there are changes, the DOW would be able to retract the Agreement.

Mr. Isobe felt that the WLA could be hired via a civil service process and would still be able to support the DOW well, short of being able to render legal opinions, signing of contracts, etc.

Mr. Isobe discussed that if the DOW's legal services are via the County Attorney's Office with a deputy county attorney assigned to the DOW, only one deputy county attorney would be attending Board meetings as an authorized agent of the County Attorney's Office. Our deputy county attorney would then be the one to work on our contracts, etc. from start to finish and would have the ability to sign the contracts. Mr. Isobe also discussed that he was not advocating a decision one way or another; however, the reason why he brought up this

situation is, again, that the County is looking at major budget cuts. Therefore, if the County Attorney's Office staffing is not increased, it would be of help to the County for the DOW to have our own DOW paid deputy county attorney present at our Board Meetings and to reassign the other deputy county attorney to other County operations. However, all of this conjecture would be dependent on our new County Attorney that has not started with the County yet.

Mr. Isobe stated the DOW would then have one legal counsel that could do everything from start to finish and that he knew that Ms. Esaki would be very capable to serve in that capacity. However, the decision lies with our new County Attorney and Ms. Winn mentioned that our new County Attorney Al Castillo would be on board sometime in March, 2009 at the earliest. So it would be up to the Board whether they would want to wait for our new County Attorney to be on board to verify if he would be agreeable to the proposed situation or vote today. Mr. Isobe concurred with Ms. Winn that our present Acting County Attorney cannot make that decision.

Acting Manager Ushigome stated that unfortunately time is short as our WLA's contract expires on February 25, 2009. On query by Mr. Nishimura, Ms. Esaki stated that she would not be agreeable to an 89-day contract as there would be a break in service for her.

Mr. Fernandes and Mr. Isobe both excused themselves due to another appointment and left the meeting at about 9:33 a.m. Ms. Esaki also excused herself for the Board's ability to talk freely and left the meeting at about 9:34 a.m.

On comment by Mr. Crowell, Mr. Nishimura stated that under the current structure, the WLA position serves the Manager and not the Board directly.

Mr. Nishimura stated his personal thoughts that he would want to have one legal opinion.

Acting Manager Ushigome stated that the initial intent of the WLA position was to assist the County Attorney's Office by drafting, reviewing and finalizing documents so the County Attorney's Office would have minimal review time to approve and sign our documents. She added that the DOW has always had a good relationship with the County Attorney's Office.

Mr. McCormick stated that he was not familiar if the WLA position serviced the Board; however, he felt that it is something to look into.

Acting Manager Ushigome added that it is mandated by the County Charter that the County Attorney's Office does all of the legal services for the County.

Mr. Oyama stated that Ms. Esaki has always been available to assist him with his questions either in person or by phone and if she could not find an answer, she would seek it out. He understood that it would take much longer for a response if the DOW had to have their legal services only with the County Attorney's Office, as it also takes time to seek first who is the best one to answer our concerns.

Mr. Crowell responded that this is not an issue with Ms. Esaki but with the position. Mr. Oyama added that it is valuable to have a legal counsel internally so you can get a quick answer to start and plan the next action.

Acting Manager Ushigome discussed that DPS looks at positions a little differently. If the position is funded, like how the WLA contract position was initially funded, for DPS, it is considered a funded position like any other position.

Mr. Crowell discussed that Managers and Board Members come and go so the WLA position would be the de-facto Water Manager position.

There was some discussion on Ms. Esaki being an appointee to be the Acting Deputy Manager; however, the HRS states that the Deputy Manager would need to be a licensed professional engineer.

On query by Mr. Nishimura, Acting Manager Ushigome stated that DPS was willing to extend Ms. Esaki's contract as long as they knew that the Department was actively and earnestly trying to resolve this matter.

Acting Manager Ushigome stated that the crux to all of this is what is mandated by law.

Chair Kahawai entertained the motion to approve the Waterworks Legal Advisor position as a civil service position. Mr. Oyama moved that the Board approve the Waterworks Legal Advisor position as a civil service position, seconded by Mr. Nishimura for discussion purposes.

Mr. Nishimura stated that he had reservations that this position should be a civil service position and that this position should also serve the Board. He also wanted to work with the County Attorney's Office on getting a DOW funded Deputy County Attorney. In the mean time, Mr. Nishimura also wanted to work with DPS to extend Ms. Esaki's contract.

Mr. Crowell added that he would want to know the duties of this position and the timelines for each task.

Mr. Oyama stated that there is no perfect solution; however, we do have a lot of work to move forward and the staff recommended civil service; therefore, although he understood the Board's stance, he wanted to support the staff.

Acting Manager Ushigome discussed that the long-term solution is to go to the Legislature and fix the HRS to make another exemption for our WLA position.

Chair Kahawai called for the vote: Raymond McCormick: aye; Roy Oyama: aye; Leland Kahawai: aye. Randall Nishimura: nay and Dee Crowell: nay. With the lack of a majority of 4 aye votes, motion died.

Mr. Nishimura concurred that going to the Legislature is an avenue that is the cleanest way to do it in order for the Manager to have direct control over the WLA.

Mr. Crowell stated that the Board needs legal counsel to advocate for them, which a civil servant may not be motivated to do.

The Board requested that Acting Manager Ushigome work with DPS to get an extension of the WLA's contract. There is a leeway as the Board's next meeting is on February 19, 2009 and Ms. Esaki's contract expires on February 25, 2009.

Acting Manager Ushigome left the meeting at about 10:08 a.m.

Re: Discussion, deliberation and decision-making or action regarding steps, actions, procedures and processes necessary to select a new Manager and Chief Engineer for the Kauai Water Department

Ms. Debra Togioka, Human Resources Coordinator was present at the meeting.

Ms. Togioka reported that one (1) application only was received for the Manager Recruitment. She added that she advertised in all islands' newspapers plus the AWWA, Hawaii Section & UH Alumni websites.

Mr. Nishimura added that the Manager's ad should also go in the Building Industry Digest Magazine.

The Board discussed the Department's Chain of Command, which is an internal Standard Operating Procedure (SOP) that was revised in December, 2006:

1. Manager and Chief Engineer
2. Deputy Manager and Engineer
3. Water Resources and Planning Division Head
4. Chief of Operations
5. Waterworks Controller
6. Engineering Division, Special Projects Section Head
7. Engineering Division, Design & Construction Section Head

On request by Mr. Nishimura, Ms. Togioka will look into the Engineering newsletter, Wiliki, which deadline for the February, 2009 issue was already passed.

EXECUTIVE SESSION

ES-2008-8 (6-05-08) – Pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(2)(4)(6)(8), one of the purposes of this executive session is to consider matters that require confidentiality under state law, to wit, to meet with the Board's legal counsel with regard to the Board's powers, duties, privileges and immunities and/or liabilities, claims and/or potential claims, as such powers, duties, privileges and immunities and/or liabilities, claims and/or potential claims as they relate to the selection of an individual to be given supervisory and/or managerial and/or developmental and/or consultation duties over the Kauai Department of Water and/or the Kaua'i Department of Water's Water Plan 2020. The further purpose of this executive session is to meet with the Board's legal counsel on questions and issues relating to the Board's powers, duties, privileges and immunities and/or liabilities, claims and/or potential claims, as such powers, duties, privileges and immunities and/or liabilities, claims and/or potential claims, as they relate to the foregoing and to take such action as the Board deems appropriate.

Mr. Nishimura moved to go into Executive Session at about 10:20 a.m. as posted on the Agenda as J5, seconded by Mr. Oyama.

There was no Board discussion and no public testimony. Motion was carried
The Regular Meeting was called back to order at 10:24 a.m.

Chair Kahawai reported that it was discussed to have the deadline date for the Manager Recruitment Ad be postponed from February 6, 2009 to March 6, 2009.

Mr. Crowell moved to approve the deadline extension, seconded by Mr. Nishimura; motion was carried.

Ms. Togioka left the meeting at about 10:25 a.m.

Re: Board Discussion on Setting 2009 Goals

Chair Kahawai discussed that this agenda item was to have the opportunity for the Board to discuss the goals for 2009 from the Board perspective.

Mr. Nishimura discussed that it may be better to wait till the new Manager is hired to set the 2009 goals.

On query by Mr. Oyama, Chair Kahawai stated that Acting Manager Ushigome would report back to the Board at the February 19, 2009 Board Meeting on the status of the overtime situation. Mr. Oyama felt that followup to the investigation is important.

Mr. Nishimura explained to the Board that he had asked Waterworks Controller Ganaden to compile an overtime (OT) status report by each division for their information. He felt that in these hard economic times OT should be reduced; therefore, he felt that a specific goal for Acting Manager Ushigome should be to reduce OT by 15%.

Mr. Nishimura discussed that he would want to know how many Water Plan 2020 projects can the DOW project to do for 2009. If the projects are ready to go, the Federal Government may foot the bill as part of the economy stimulus package.

Waterworks Controller Ganaden was present at the meeting at about 10:37 a.m. to help clarify the OT Report for the Board. Chair Kahawai left the meeting at about 10:40 a.m. and Vice Chair Nishimura presided over this meeting in his place. Waterworks Controller Ganaden left the meeting at about 10:46 a.m.

In the interim, the Board gave Acting Manager Ushigome the following goals:

1. Reduce OT by 15%.
2. Reduce 2510.
3. Submit 20 priority Water Plan 2020 projects
4. Find ways to reduce our electricity cost by 10%.
 - a. Sustainable/energy efficiencies

ADJOURNMENT:

There being no further business, Mr. Oyama moved to adjourn the meeting at about 10:58 a.m., seconded by Mr. McCormick; motion was carried.

Respectfully submitted,

Rona Miura, Secretary

APPROVED:

Wynne M. Ushigome
Acting Manager & Chief Engineer

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