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March 01, 2018

GCH 34-18-1598
Speaker Benjamin J.F. Cruz

The Honorable Eddie Baza Calvo
Governor of Guam
Ricardo J. Bordallo Governors Complex
Adelup, Guam 96910

MAR 0 2 2018
Time: 8:00 AM [ ] PM File No. 34-18
Received By:

Re: Executive Order No. 2018-03 Relative to Implementing a 32-Hour Work Week for All Executive Branch Agencies Funded or Partially Funded by the General Fund (Ref. No. GOV 18-0085)

Hafa Adai Governor Calvo:

I am issuing this memorandum regarding Executive Order No. 2018-03 ("Executive Order" or "EO-2018-03") issued on February 28, 2018.

Executive Order No. 2018-03 mandates that effective March 6, 2018, a 32-hour workweek be implemented in all Executive Branch departments, agencies and offices funded or partially funded by the General Fund, with the exception of the Guam Memorial Hospital Authority and certain federally funded positions. The Executive Order cites as the basis for this action the "Tax Cuts and Jobs Act," U.S. Public Law 115-97 enacted by the federal government on December 22, 2017; the Governor's Organic Act power to supervise and control the executive branch of the government of Guam [48 USC §1422]; and the need to implement aggressive austerity measures immediately in order to stabilize the government as a result of severe financial shortfalls.

2018 MAR -2 AM 10:36

At the outset let me state it is my opinion that the Executive Order's implementation of a 32-hour workweek imposed upon full time government of Guam employees is unenforceable unless and until it is in conformance with the applicable Rules governing the furlough process and procedures, including proper notice to affected employees. *See Attachment Department of Administration Personnel Rules and Regulations, Appendix H.*

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DISCUSSION

This is not the first time that a Governor has attempted to exercise his Organic Act authority by executive order to implement such a salary reduction upon government of Guam employees due to a financial emergency. This Office consistently has opined that the Governor is required to comply with established Rules and Regulations before a salary reduction, also referred to as furlough, can be imposed upon classified government employees.

The Organic Act authorizes the Governor of Guam to manage the executive branch pursuant to his power of "supervision and control" of the government of Guam. 48 U.S.C. § 1422. In exercising his authority, the Governor may issue "executive orders and regulations not in conflict with any applicable law." *Id.* The Organic Act also requires the establishment of a merit system under the laws of Guam. 48 U.S.C. §1422(c). Although the Governor's power to manage government is very broad under the Organic Act, it is not without limitations. The Organic Act, Bill of Rights and merit system place limitations on the Governor in his management of the executive branch of government.

Guam's merit system is codified under Title 4 G.C.A. Public Officers and Employees Chapter 4 "Personnel Policy and the Civil Service Commission." Title 4 GCA §§4105 and 4106 require the adoption of personnel rules and regulations for the implementation of Guam's merit system among executive line agencies through the Department of Administration, and among all autonomous agencies and instrumentalities. Appendix H of the Department of Administration Personnel Rules and Regulations lays out the merit system process due to employees prior to removing a portion of their pay.

It is the opinion of this Office that the Organic Act protects classified employees even against the Governor's organic supervisory powers over the Executive Branch by requiring due process. The due process notice requirements and compliance with Appendix H cannot be ignored by a declaration of financial emergency. In fact, a financial emergency is one of the primary reasons for initiating furlough procedures, not a reason to avoid them.

Attached is an Information and Guidance memorandum issued to the Office of the Governor on March 25, 2009, under similar circumstances. The guidance provided in the memorandum is directly applicable to the situation before us today and may be helpful in moving forward properly with any proposed furlough action initiated by the Governor.

CONCLUSION

In conclusion, Guam law permits the Governor to implement employee furloughs provided employees are protected under furlough procedures and notice requirements. The Governor may implement a furlough program by Executive Order across the government of Guam provided the due process and other procedural requirements of Appendix H of the DOA Personnel Rules and Regulations are complied with.

Finally, due to the complexity and timelines required by Appendix H of the DOA Personnel Rules and Regulation, legislation can be considered that might shorten and/or streamline the current requirements in order to accommodate the immediate and serious fiscal crisis of the government.

Respectfully,

ELIZABETH BARRETT-ANDERSON
Attorney General of Guam

Attachments

Cc: All Senators

EMPLOYEE FURLOUGH PROCEDURES

PURPOSE

To establish Furlough procedures as an option for the government of Guam to cut administrative costs and continue to provide vital public service to the people of Guam. In addition, furlough procedures shall be administered and coordinated with procedures for employee layoff, priority placement, outside employment, and leave without pay policy. The Director of Administration may revise, change or add to the following policy and procedure, as appropriate, subject to the review of the Civil Service Commission.

STATEMENT OF POLICY

It is the policy of the government of Guam to resort to employee furlough, when necessary, to avoid layoff of employees and to ensure that the government meets its commitment to the people of Guam in the areas of education, health, safety, and other vital services. This procedure will be used only after all other efforts have been explored by departments and agencies to cut operating costs. Heads of departments and agencies shall submit requests for employee furlough to the Director of Administration for approval.

A. *DEFINITION*

A furlough action is the placement of an employee in a temporary non-duty and non-pay status on a continuous basis (for example 10 consecutive days), or a noncontinuous basis (for example one day a week). A furlough is not a layoff or reduction in force action.

B. *REASONS FOR FURLOUGH*

Furlough is caused by any one of the following reasons:

1. Lack of work.
2. Shortage of funds.
3. Insufficient personnel authorization.

4. Reorganization.

5. Reclassification of an employee's position due to erosion of duties when such action will take effect after a formal announcement of a reduction in force.

C. *TIME LIMIT*

Departments/agencies may furlough an employee for a period of time listed below:

1. One to thirty (1 to 30) consecutive days on a continuous basis, or 22 work days if done on a noncontinuous basis.

2. More than 30 consecutive days, or more than 22 work days to a maximum of one year. The one year limit begins the day after the notice period ends and when the furlough begins.

D. *VOLUNTARY FURLOUGH*

Employees who are interested in taking leave of absence without pay will be encouraged to voluntarily apply for a furlough. This opportunity is especially beneficial to employees who have outside part-time employment. Employees who volunteer for furlough, for a period not to exceed one year, will be allowed to work increased hours at their outside employment without regard to the scheduled hours of work with the government.

E. *INVOLUNTARY FURLOUGH*

Where budget constraints are crucial, the Director may resort to involuntary furloughs after it has been decided that the voluntary furlough will still not meet the necessary cost reduction. Furloughed employees shall be furloughed, based on retention points, for the time limits authorized above. Furlough will be used to the maximum extent possible in order to reduce the necessity for layoffs. Departments and agencies having exclusive bargaining units must work with the employee unions to explore all avenues to avert layoffs, and obtain their support for this option.

F. *RESTRICTIONS*

A department or agency may not:

1. furlough any employee it does not intend to recall to duty in the same position within one year; or

2. separate an employee through layoff while an employee with lower retention points in the same competitive level is on furlough.

G. *FURLOUGH IMPACT ON EMPLOYMENT BENEFITS*

Employees on furlough, voluntary or involuntary, will be covered for health benefits based on the following conditions:

1. The government will pay for both government and employee contributions only when the employee is certified to have no family income during the period of furlough.

2. Employees with some form of income (e.g., spouse's income, part-time or full-time job, etc.) during the furlough period will be required to pay for the employee's contribution portion only, of the health plan premium.

Employees who wish to continue their life insurance benefits will be required to pay for the premium for supplemental plans only. The employee will continue to be fully covered for the basic life insurance while on furlough.

H. *FURLOUGH RETENTION RIGHTS*

1. **Release by Furlough.** The action to release an employee scheduled for a furlough must be consistent with established layoff procedures. A department/agency may furlough an employee under the layoff provisions only, if the employee has no right of assignment, or refuses an offer of assignment. A furloughed employee who accepts another offer of assignment, becomes the incumbent of the offered position unless the employee accepts an offer of recall to the position from which furloughed.

2. **Assignment Rights.** In determining whether a furloughed employee has assignment rights to another position, it is important for the department/agency to consider whether the offer would result in undue interruption to the organization. Since a furlough anticipates an employee's recall to the same

position, the agency should consider whether undue interruption would result from the displacement of a lower-standing employee, and from the recall of both employees to their positions of record at the end of the furlough period. The assignment right does not apply when all employees in the department/agency are furloughed at the same time, or on the same basis. For example, if all employees in the Department of Administration were furloughed one day a week (either the same day or different days) on a noncontinuous basis for 28 weeks, none of the employees would have a right of assignment to another position. If only some of the employees were furloughed one day a week for 28 weeks, and other employees were not furloughed, the furloughed employees would have a right of assignment to positions held by employees with lower retention standing, and not affected by the furlough only if there was no undue interruption.

I. *RECALL FROM FURLOUGH*

If all employees furloughed from a competitive level cannot be recalled at the same time, the employees must be recalled according to their retention points beginning with the highest-standing employee.

J. *SEPARATION IN LIEU OF RECALL*

1. **No Recall.** If the situation changes and a department/agency determines that a furloughed employee cannot be recalled within the one year period, the employee must be separated unless the employee accepted an offer of assignment to another position. If some, but not all furloughed employees in a competitive level must be separated, employees are selected for separation by retention standing points beginning with the lowest-standing employee. A new layoff notice of separation must be given to the furloughed employee at least 60 days prior to the end of the one year furlough period. The separation of a furloughed employee is a new layoff action. Separated employees are entitled to the same rights as those employees separated through regular layoff procedures.

2. **Failure to Return.** If a furloughed employee refuses or does not respond to a notice to return to duty, the department/ agency may separate the employee by layoff effective on the specified date of recall. A new layoff notice of separation is not required.

K. *PROCEDURES*

Department and agency heads must submit a request to the Director of Administration for authorization to conduct a furlough within six months of the proposed furlough. The request must specify the reason for the furlough, the number of employees and/or positions to be affected, and the duration of the furlough. After the Director's approval, the following procedure applies:

1. A written 90 day notice that a furlough is planned, must be issued to all employees (whether or not identified for furlough) in the department/agency. The notice must include the following information:

   a. The date the furlough will commence.

   b. The period of furlough (i.e., 1-30 days continuous, 22 or more days non-continuous, or a maximum of one year).

   c. Employees may volunteer to be furloughed.

   d. Lost of some employment benefits for furloughed employees.

   e. Employees under furlough are not restricted from seeking other employment during the furlough period. Those employees who already have part-time jobs while employed with the government, may opt to increase their hours of work up to a full-time basis during the furlough period.

   f. Furloughed employees must report to work when recalled to duty.

   g. Furlough will be conducted in accordance with employees' retention standing points.

   h. Furloughed employees have the right to appeal to the Civil Service Commission.

2. Encourage the use of voluntary furlough to the maximum extent possible before implementing involuntary furlough.

3. Coordinate with the Department of Administration, Division of Personnel Management, with regard to the feasibility of assigning employees reached for furlough, to ensure fairness in the assignment and that the furlough poses no unnecessary disruption to the agency's/department's mission.

4. Those employees who cannot be assigned to other positions within the department/agency will receive written "Notice of Furlough". This final (or second notice) will again include the same information as the first notice. In addition, the furloughed employee shall be:

   a. encouraged to continue his insurance coverage by personally paying for the premiums.

   b. informed that his name will be retained in a "recall list" for one year, and must keep current address and telephone number at the DOA Personnel Office.

   c. informed that if he fails to provide a current home address on record with the personnel office, will lose recall rights.

   d. informed that he must respond to the recall notice within seven days of receipt or its attempted delivery, or lose his rights for reemployment.

   e. notified that he must inform the agency/department, or DOA Personnel Office if he becomes unavailable for recall.

   f. provided appeal rights to the Civil Service Commission.

L. *RECALL*

Employees will be recalled according to need, classification, or ability to do the job based on retention standing points. The recall notice will be sent registered mail, return receipt requested, to the current home address furnished by the employee.

Returning employees will be paid the same salary as before they were furloughed. Any unused sick leave or annual leave accrued prior to the furlough will be reinstated. All employment benefits will be restored at the same rate as before the furlough.

Alicia G. Limtiaco
Attorney General

Alberto E. Tolentino
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

March 25, 2009

INFORMATION AND GUIDANCE (Confidential) **Ref: Gov 09-0212**

TO: George Bamba, Chief of Staff, Office of the Governor

FROM: Assistant Attorney General

SUBJECT: Procedures for Furlough of Employees; 'Across the Board' Furlough.

Buenas and Hafa Adai! You have asked us about the furlough of government employees due to a shortage of funds. The process of implementing and managing a furlough of employees is discussed in order to address questions concerning the use of an across the board furlough and whether 'bumping' and other disruptive situations can be avoided.

1. **Does the Governor have the authority to order the furlough of all executive branch employees, and order an across the board furlough?**

As a preliminary matter, understanding the process of furloughing classified employees is necessary to answer this question. Having the furlough process understood will aid in appreciating that the answer to the question is partly determined by personnel law, and ultimately a policy question to be decided by the governor.

A reduction in work hours from forty hours a week to thirty two hours a week is defined in the Personnel Rules and Regulations of the government of Guam (Rules) as a furlough. The furlough of employees must be justified. One justification, among others, is a shortage of funds. Rules, Appendix H, at B. A furlough action includes the placement of an employee in a temporary non-duty and non-pay status on a non-continuous basis (for example, one day a week). Rules: Appendix H, at A. Furlough policy permits resort to employee furlough, when necessary, to avoid the layoff of employees and to ensure that the government meets its commitment to the people in areas of education, health, safety, and other vital services. Finally, the furlough procedure is appropriate after all other efforts have been explored by agencies and departments to cut costs. Rules, Appendix H, at Statement of Policy.

As a general rule, the personnel policy, law and rules are developed for, and applied to protect classified employees and assure that merit system principles are used to guide personnel

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administration within the government of Guam. Rules, § 1.000 (A), (B). Merit system principles include advancing employees on the basis of knowledge, abilities, and skill, retaining employees on the basis of performance, and providing for fair and expedient resolution of personnel conflict. Rules, § 1.100.

There are two preliminary steps that must be taken prior to the consideration of an involuntary furlough of any classified employees. First, a voluntary furlough must be attempted initially to meet the necessary cost reduction. "Where budget constraints are crucial, the Director may resort to involuntary furloughs after it has been decided that the voluntary furloughs will still not meet the necessary cost reduction." Rules, Appendix H, at E (emphasis added.). Second, it is implicit in the Rules that cost cutting must be done prior to the involuntary furlough of classified employees. The furlough procedure "will be used only after all other efforts have been explored by departments and agencies to cut operating costs." Rules, Appendix H, at Statement of Policy.

The furlough process is understood by applying furlough rules and importing into those rules applicable layoff procedures. "The action to release an employee scheduled for a furlough must be consistent with established layoff procedures." Rules, Appendix H, (H) (1). Established layoff procedure includes a specific order for layoff.[1] It is understood, therefore, that a furlough would require a specific order for the furlough. The layoff procedure *(read, furlough procedure)* states:

> "The order of layoff *(furlough)* shall be determined by each department/agency head in accordance with the following formula, and shall be applied on a department-wide or agency-wide basis:
>
> 1. The department/agency head shall determine where in his department/agency the layoff *(furlough)* shall occur.
>
> 2. The department/agency head shall determine the position class(es) (e.g., Clerk-Typist I, II, III) and the number of positions to be eliminated *(furloughed)*.
>
> 3. Affected employees of the department/agency occupying the same position class(es) shall be released *(furloughed)* in the following order:
>
>   a. First - Part-time, short term or seasonal
>   b. Second – Provisional
>   c. Third – Temporary or limited term
>   d. Fourth - Probationary (initial)."

[1] In 2007, P.L. 29-02:IV:48 established a slightly different priority for furloughs and layoffs. Reference is made to Attorney General Informational Memo, Ref: DOA 07—377, and the applicability of that Section 48. Section 48, contained in an appropriations act, expired September 30, 2007.

Rules, Appendix B at GG-110(A).

This is understood to mean, at the point when a department or agency head has decided that involuntary furloughs are necessary, that the unclassified employees, presumably all of those in a-d above, must be furloughed first, prior to the furlough of any classified employee. Note, that although there is an argument to be made that unclassified employees must be released from government service prior to an involuntary furlough of any classified employee, in this instance, based upon the definition of 'employee' the Rules indicate that all employees, classified and unclassified, are to be protected from layoff. "It is the policy of the government of Guam to resort to employee furlough, when necessary, to avoid layoff of employees and to ensure that the government meets its commitment to the people of Guam in the areas of education, health, safety, and other vital services. Rules, Appendix H, at Statement of Policy (emphasis added). 'Employee' is defined in the Rules Glossary to be "any person employed by the government."

Furloughs shall be applied on a department-wide or agency-wide basis. Rules, Appendix B, at GG-110 (A). A department or agency head shall submit requests for employee furloughs to the Director of Administration for review , amendment, and approval .Rules, Appendix H, Statement of Policy. In applying the layoff procedures to furlough, as is required, fundamental decisions about the 'how' and 'to whom' to apply the furlough are decided on the department or agency level. In implementing the process for deciding the order of furlough basic decisions are made at the department level, such as the class of positions to be affected, the numbers in each class chosen to be affected, and the application of retention rights in the event that fewer than all of the persons in a given class are to be furloughed. Rules, Appendix B, at GG-110 (A) (4).

There is one further process consideration. There is potential for the need to determine the retention rights of employees, and the 'retention number' of each employee, in a department or agency, and the possibility of employees 'bumping' other employees in order to avoid a furlough, depending on the decisions made about who and how many employees are to be furloughed. Rules, Appendix B, GG-110 (A) (4).[2]

There are two time limits established for a furlough. The Rules, at Appendix H, (C), states:

> "C. Time Limits.
>
> Departments/agencies may furlough an employee for a period of time listed below:
>
> 1. One to thirty (1 to 30) consecutive days on a continuous basis, or 22 work days if done on a noncontinuous basis.

[2] According to Cecilia Martinez, Human Services Manager, Dept. of Administration, there was no 'bumping' exercised by any employee during the furlough in 2007.

2. More than 30 consecutive days, or more than 22 work days to a maximum of one year. The one year limit begins the day after the notice period ends and when the furlough begins."[3]

A non-continuous furlough, the one considered here, can be up to twenty two (22) work days long, or it can be for a maximum of one year in length. As an involuntary furlough must be justified by a lack of funds, the furlough would likely end at the end of the fiscal year, and until there is a new justification for another furlough period to be declared. Rules, Appendix H, at D.

An involuntary furlough requires a ninety (90) day notice be given to all employees of the department or agency that intends to implement a furlough. This begins a process of encouraging voluntary furlough and a process of determining which specific employees are to be furloughed. Once it is determined which employees are to be furloughed, those employees are to receive a second written "Notice of Furlough." Rules, Appendix H, at K (4). There is no specified time period established for providing this second notice to specific employees, but it may be prudent to provide sixty (60) days notice as is required for a layoff. Rules, Appendix B, GG-105.

With this background it is possible to reach some conclusions about the Governor's authority to do an across the board furlough. First, although a furlough "shall be applied on a department-wide or agency-wide basis," pursuant to Appendix H, (H)(1) and B, GG-110, the governor can require all departments and agencies within his authority to institute a furlough. Second, it is imperative that the justification for instituting an involuntary furlough, in this case a lack of adequate funding, be verifiable. This will require cost cutting measures to precede voluntary and involuntary furloughs, and the ability to demonstrate actual financial need in each department or agency that institutes furloughs. Third, there should be consideration of whether employees whose positions are federally funded will be furloughed.[4]

2. If 'bumping' is necessary, would it be within each agency separately or government-wide?

As discussed above, furloughs are justified and managed on a department-wide and agency-wide basis. If the process of bumping by one employee against another is to occur, it will occur within a given department or agency, and within a given class of employees. This process is applicable to furloughs but located in the rules for layoffs. Rules, Appendix B, GG-110 (A). Good management of the decisions concerning implementation of an involuntary furlough at the department or agency level will resolve the need for this practice. If the decisions

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[3] Beginning with the week of March 30, 2009, there are 26 work weeks remaining in the fiscal year

[4] Reference is made to Attorney General Informational Memo, Ref: AG 07-0377; and to the experience of GEPA and feedback received from the U.S. Environmental Protection Agency in 2007 concerning federal funded positions.

to be made by the department or agency head are clear as to classes of employees to be affected, and it could be all classes within the department or agency, and if the work done to determine 'retention points' is done correctly in the first instance, there will be no bumping necessary or possible.

John Weisenberger

JOHN M. WEISENBERGER
Assistant Attorney General