Speaker's Office <speaker@guamlegislature.org>

Fwd: AG Opinion Ref. DOA 18-0692

1 message

Senator Therese Terlaje <senatorterlajeguam@gmail.com> Wed, Dec 12, 2018 at 1:38 PM
To: speaker@guamlegislature.org

---------- Forwarded message ---------
From: **Pauline I. Untalan** <puntalan@guamag.org>
Date: Tue, Dec 11, 2018 at 4:38 PM
Subject: AG Opinion Ref. DOA 18-0692
To: Edward <Edward.Birn@doa.guam.gov>
Cc: Sandra Miller <sandra.miller@guam.gov>, Senator Therese Terlaje <senatorterlajeguam@gmail.com>, Dee Chaco <dee.chaco@guam.gov>

Good Afternoon Director Birn:

Please see attached Opinion Memorandum issued by AG Barrett-Anderson. Original opinion will be delivered to your office before the end of the day.

Thank you.

==========

Respectfully,

Pauline I. Untalan

Special Assistant to the Attorney General of Guam

Office of the Attorney General of Guam

590 S. Marine Corps Dr. Suite 901

Tamuning, Guam 96913

(671)475-3324 ext. 5030 –phone

(671)477-4703 – fax

www.guamag.org

2018 DEC 12 PM 3:29

Vice Speaker Therese M. Terlaje
34GL-18-2641
DEC 12 2018
Time: 13:38
Received by:

CONFIDENTIALITY NOTICE: This email and any files transmitted with it may be legally privileged and confidential and is intended solely for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any review, dissemination or copying of this email, or taking any action in reliance on the contents of this information is strictly prohibited. If you received this transmission in error, please notify us immediately by e-mail or telephone to arrange for the return of this email and any files to us or to verify it has been deleted from your system.

2641

Opinion Memorandum Ref. DOA 18-0692.pdf
1339K

Office of the Attorney General of Guam

590 S. Marine Corps Dr., Ste. 706, Tamuning, Guam 96913

December 12, 2018

Ref.: DOA 18-0692

OPINION MEMORANDUM

TO: Director, Department of Administration

FROM: Attorney General of Guam

SUBJECT: Validity of FY2019 Budget Restrictions on Promotions

Question:

Does the October 15, 2018 Attorney General ("AG") legal memorandum to the Department of Administration ("DOA") apply to positions that have automatic upgrade or automatic promotion provisions from the Trainee/Recruit positions, which were initially filled through the competitive recruitment and selection process via the merit system? Does the Legislature's freeze on promotions in P.L. 34-116:XIII:1:3 violate the doctrine of separation of powers? The answer to both questions is **YES**.

Discussion:

The AG letter to DOA dated October 15, 1998 (reference PCF No. 18-0532) (the "AG Letter") stated: "[b]ased on our 2012 opinion, the hiring freeze provision in P.L. 34-116, like the one in P.L. 31-77, violates the separation of powers doctrine and therefore is inorganic an unenforceable." The AG Letter reaffirms the AG Opinion dated January 9, 2012 (reference PCF No. AG 12-0014) (the "2012 AG Opinion").

The 2012 Opinion stated that hiring decisions regarding government employees fall within the Governor's Organic Act power of general supervision and control of the government of Guam, and concluded:

> these hiring freeze provisions of Public Law 31-77 do not merely appropriate funds. The provisions impermissibly encroach upon the executive decision making process of evaluating whether or not to replace an employee and determining what employee skill level best suits the needs of an agency. Consequently, the hiring freeze provisions of Public Law 31-77 unconstitutionally intrudes upon the Governor's Organic Act authority to supervise and control the departments, agencies and other instrumentalities of the executive branch of the

> government. Therefore, Chapter XIV, Part II, Section 2 of Public Law 31-77 violates the doctrine of separation of powers and is inorganic.

Op. Att'y Gen. Guam, DOA 12-0014 pp. 9, 10 (2012).

Having opined that the *I Mina'Trentai Kuartro Na Lih*eslaturan *Guahan* exceeded its authority by restricting the Governor's Organic Act authority to hire employees in the executive branch, we now address the question of whether promotions of government employees fall within the same executive branch authority of the Governor to supervise and control the government. We think it does.

The 2012 AG Opinion took note of the Guam Supreme Court opinion in *In re Request of Governor Gutierrez Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 5, wherein the Court stated:

> The Legislature's plenary power of appropriation includes the power to impose conditions upon the expenditure of appropriated funds. One such condition to an appropriation is the designation of positions within the government. The legislature may also designate salaries for various positions.
>
> However, the Legislature may not set limitations or conditions which purport to reserve to the legislature powers of close supervision that are essentially executive in character. Staffing decisions are at the core of the Governor's day-to-day administration of government. Accordingly, the legislature may not set conditions to an appropriation which impinge on the executive's power to allocate staff and resources for the proper fulfilment of its duty to execute the laws.

Id. at ¶¶ 44,45 (citations and internal quotation marks omitted, emphasis added).

The fair promotion of government employees is one of the fundamental objectives of the merit system. The Organic Act provides: "The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system." 48 U.S.C. § 1422c (emphasis added). Guam law provides: "[e]mployment in the service of the government of Guam shall be based upon merit, and selection and promotion of employees shall be free of personal or political consideration." 4 GCA § 4104(a)(1) (emphasis added). The Government of Guam Department of Administration Personnel Rules and Regulations state: "[t]he following merit system principles shall guide personnel administration: recruiting, selecting applicants and advancing employees on the basis of their knowledge, abilities, and skills." Dep't of Admin. Pers. Rules & Regs. § 1.100.A (emphasis added).

Promoting is the process through which every Governor must depend upon for the efficient management and supervision of the government of Guam. Hiring and promoting are at the heart of staffing decisions involved in the day-to day administration of the executive branch. *See Hawthorne PBA Local 200 v. Borough of Hawthorne*, 945 A.2d 736, 472-743 (N.J. Super. Ct. App. Div. 2008) (A state law delegating power to the borough mayor to appoint and promote police officers was challenged by police union claiming that this was a legislative function of the borough council. The court here found that "[t]he appointment and promotion of police officers falls within the panoply of executive functions" and upheld the state law). Promotions are an integral part of government of Guam's merit hiring system.

CONCLUSION

For the foregoing reasons we opine that the prohibition against promoting employees within the government of Guam as contained in Public Law 34-116:XIII:1:3 violates the separation of powers doctrine, and therefore, is ***inorganic*** and unenforceable.

ELIZABETH BARRETT-ANDERSON
Attorney General

cc: Governor of Guam
Acting Speaker 34th Guam Legislature