Fwd: AG Opinion Ref. DOA 18-0692 -AMENDED

Speaker's Office <speaker@guamlegislature.org> Thu, Dec 13, 2018 at 9
To: Carl Sanchez <clerks@guamlegislature.org>, Rennae Meno <rennae@guamlegislature.org>

Date Received	Time Received	Date of Document	Description of Document	Department/Agency	Document Number
12-13-18	**8:50**	**12-13-18**	Office of the Attorney General Opinion Memorandum – AMENDED Ref. DOA 18-0692 issued by AG Barrett-Anderson . *Email	Office of the Attorney General of Guam	34GL-18-2644

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Opinion Memorandum AMENDED Ref. DOA 18-0692 Issued 12-13-18.pdf
1695K

Vice Speaker Therese M. Terlaje
34GL-18-2644
DEC 13 2018
Time: 8:50
Received by:

2018 DEC 13 PM 12:02

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December 13, 2018

OPINION MEMORANDUM – (Amended) **Ref.: DOA 18-0692**

TO: Director, Department of Administration

FROM: Attorney General of Guam

SUBJECT: **Organicity of Freeze on Promotions in Public Law 34-116, the General Appropriations Act of 2019**

This Office is in receipt of your November 29, 2018 request for legal guidance on whether the October 15, 2018 Attorney General letter to you, opining that the hiring freeze in Chapter XIII, Part I, Section 1 of P.L. 34-116 is inorganic and unenforceable, is applicable to the freeze on promotions in Chapter XIII, Part I, Section 3 of the same public law. As it is a matter of urgency, this response addresses only the freeze on promotions. The freeze on salary increments, merit bonuses and other pay adjustments will be addressed in due course.

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:I:3 violate the doctrine of separation of powers? The answer to both questions is **YES**.

Discussion:

Chapter XIII, Part I, Section 3 of P.L. 34-116 states:

> **Salary Increments Freeze.** Notwithstanding any other provision of law, rule or regulation, there *shall* be a freeze on all salary increments, promotions, reclassifications, merit bonuses, and any other upward pay adjustment, which *shall* take effect October 1, 2018 and *shall* remain in effect through September 30, 2019; and *shall* be applicable to all positions in the Executive, Legislative, and Judicial branches, to include all government of Guam departments and agencies, public corporation, bureaus, instrumentalities, entities, and sub-entities. Upon the lifting of such salary increments and merit bonus freeze, the payment of increments or merit bonuses *shall not* be retroactively applied and *shall only* be prospectively paid.

This Section 3 imposes a legislative prohibition on promotions by the executive branch during the current Fiscal Year. Your question requires this Office to consider whether promotions, like hiring, fall within the Governor's general supervision and control authority over the executive branch as was addressed in the AG letter to DOA dated October 15, 2018 (reference PCF No. 18-0532) (the "AG Letter").

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 AG Opinion stated that hiring decisions regarding government employees "fall within the Governor's Organic Act authority to supervise and control agencies and to appoint and remove all officers and employees of the executive branches of the government" 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 *I Liheslaturan Guahan* exceeded its Organic Act authority by restricting the Governor's Organic Act authority to hire employees in the executive branch, we now address the question of whether the promotions of government employees fall within same executive branch authority to hire, supervise, control and fire government employees. 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:I:3 violates the separation of powers doctrine, and therefore, is ***inorganic*** and unenforceable.[1]

ELIZABETH BARRETT-ANDERSON
Attorney General

cc: Governor of Guam
Acting Speaker, 34th Guam Legislature

[1] This opinion does not apply to reclassifications or desk audits which are not involved in the merit hiring process.