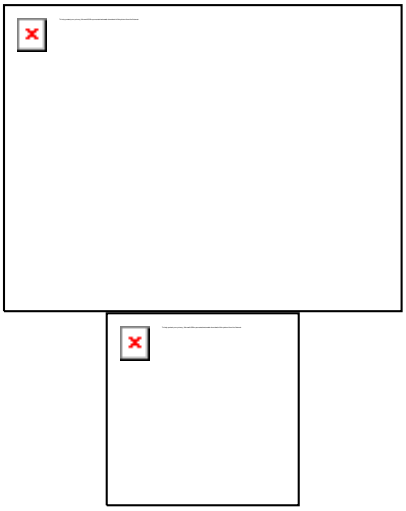
clerks@guamlegislature.org

From: Speaker's Office <speaker@guamlegislature.org>
Sent: Tuesday, May 19, 2020 11:55 AM
To: Clerks Office
Cc: Rennae Meno
Subject: Messages and Communications
Attachments: Opinion on Applicability of Double Pay Provision.pdf

05-19-20	9:00 AM	05-14-20	Request for Opinion on Applicability of Double Pay Provision in DOA Personal Rules and Regulations Rule 8.406 to COVID-19 Public Health Emergency (Ref. LEG 20-0156).	Office of the Attorney General of Guam	35GL-20-1811



Sinseru yan Minagåhet,

Office of the Speaker • Tina Rose Muña Barnes
Committee on Public Accountability, Human Resources & the Guam Buildup

35th Guam Legislature
I Mina'trentai Singko na Liheslaturan Guåhan

Guam Congress Building | 163 Chalan Santo Papa | Hagatna, GU 96910
T: (671) 477-2520/1
speaker@guamlegislature.org

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Gumai pribilehu yan konfedensia este siha na mensåhi. Solo espesiåtmente para hågu ma entensioña pat ma aturisa para unrisibi. Sen prubidu kumu ti un ma aturisa para manribisa, na'setbe, pat mandespåtcha. Yanggen lachi rinisibu-mu nu este na mensåhi , put fabot ago' guatu gi I numa'huyong gi as speaker@guamlegislature.org yan despues destrosa todu siha I kopian mensåhi. Si Yu'os ma'åse'.

35GL-20-1811
Speaker Tina Rose Muña Barnes
Speaker Tina Rose Muña Barnes
MAY 19 2020
MAY 19 2020
Time 9:00 AM
Received By:

Office of the Attorney General of Guam

590 S. Marine Corps Drive, Suite 901 ♦ Tamuning, GU 96913
671.475.3324 extension 5015 ♦ Fax 671.477.4703 ♦ Email ag@oagguam.org

Hon. Leevin Taitano Camacho
Attorney General of Guam

OPINION MEMORANDUM

To: The Honorable Joe S. San Agustin
I Mina'trentai Singko Na Liheslaturan Guåhan

From: Attorney General Leevin T. Camacho

Date: May 14, 2020

Subject: Request for Opinion on Applicability of Double Pay Provision in DOA Personnel Rules and Regulations Rule 8.406 to COVID-19 Public Health Emergency (Ref. LEG 20-0156)

This opinion memorandum is provided in response to your April 30, 2020 letter requesting legal guidance on the subject matter.

QUESTION AND ANSWER

Whether Rule 8.406 of the Department of Administration Personnel Rules and Regulations requires the government of Guam to pay essential employees double their regular rate during the current state of public health emergency?[1] It depends on whether all criteria of 8.406 are met.

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[1] For purposes of this opinion we assume, arguendo, that the Rule is valid, and limit our analysis to the application of the Rule in the current situation.

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DISCUSSION

The Governor declared a state of emergency on March 14, 2020 "as a result of the effects of COVID-19 on the island."[2] Two days later, she issued Executive Order 2020-04, which provides:

> Effective immediately and through March 30, 2020, all non-essential government of Guam offices are closed and such services are suspended. Essential personnel shall be identified and contacted by their appropriate supervisors.[3]

On March 19, 2020, the Governor issued Executive Order 2020-05 which states:

> The Government of Guam is operating in a limited capacity. Some agencies are completely closed. Several agencies are operational but closed to public access. Other agencies remain fully operational, including public access . . . . Regardless of operational status of an agency/department, all government of Guam employees remain on regular work status and are expected to report for duty within two hours from receiving notice from his/her supervisor.[4]

The question presented is whether, upon the declaration of a state of emergency on March 14, 2020, all essential employees who were required to report to work are entitled to double pay.[5]

From the outset, this matter does not lend itself to a simple and all-encompassing pronouncement as to whether the double pay compensation provision of Rule 8.406 applies uniformly and equally to each and every employee that reported for work since March 14, 2020. Rule 8.406 reads in pertinent part:

(Continued on next page.)

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[2] Executive Order No. 2020-03, par. 1 (Mar. 14, 2020).
[3] E.O. No. 2020-04, par. 1 (Mar. 16, 2020).
[4] Executive Order Nos. 2020-05, par. 5 (Mar. 19, 2020); *see also* E.O. 2020-11, par. 3(e) (Apr. 30, 2020); *but see* E.O. 2020-14 (May 8, 2020) (placing Guam in Pandemic Condition of Readiness 2 and omitting language stating that "[o]ther agencies remain fully operational, including public access.")
[5] The request was focused primarily on the double pay provision of Rule 8.406 and this Opinion has been drafted as such. We would note, however, that the Rule provides that eligible employees would be entitled to either double pay or compensatory leave credits.

8.406 Natural Disasters and Other Emergency Conditions

C. When the Governor declares a State of Emergency, the appointing authority shall determine whether affected facilities or portions thereof, which are located in the area covered by the Executive Order or proclamation, are to be closed.

1. Except for those employees determined by the appointing authority to be necessary for providing essential services, employees shall be released from duty with pay, without charge to leave, for the period the facility is closed.

2. Those employees, required to remain on duty to provide essential services, shall be paid at double the regular rate, or granted compensatory leave credits for the hours worked during the period the facility is closed and the other employees are on excused leave.

. . . .

Under Rule 8.406, an employee is entitled to receive double pay or compensatory leave credits when (1) the Governor has declared a state of emergency; (2) the facility that the employee works at is closed; and (3) the employee is still required to report to work in order to provide essential services.[6] There is no question that the first criteria has been satisfied. However, the answer to whether the remaining criteria have been satisfied may not be as neatly packaged as desired, and will instead depend on an agency-by-agency determination of the particular circumstances regarding the operational status of each agency and the work status of the affected employee(s).

1. Is the employee's facility closed?

Executive Order 2020-04 closed all non-essential government offices and suspended such services. Three days later, Executive Order 2020-05 announced that the "Government of Guam is operating in a limited capacity. Some agencies are

[6] Although it has no bearing on our interpretation of Rule 8.406, we have been unable to find any documented instances where government line agency employees who were required to remain on duty to provide essential services during a declared emergency were paid double pay under Rule 8.406.

completely closed. Several agencies are operational but closed to public access. Other agencies remain fully operational, including public access."[7]

The Governor's Executive Orders created three categories of agencies: (1) fully operational, including public access; (2) operational but closed to public access; and (3) completely closed. If an agency is "fully operational, including public access," it follows that the facility is not closed and employees who report to work would not be eligible to receive double pay. If an agency is "completely closed," then there is an argument that employees who remain on duty to provide essential services may be entitled to double pay. The more difficult category to assess for Rule 8.406 purposes is the category of agencies that are "operational but closed to the public." One could argue that these agencies are closed and that their essential employees who remained on duty may be eligible for double pay, or vice versa.

Therefore, there would first have to be a determination as to each agency's open/closed status during this emergency period.[8] However, our office is not in a position to categorize executive branch agencies for purposes of applying Rule 8.406. The rule itself confers that responsibility on the appointing authority.

2. Is the employee required to remain on duty to perform essential services while their facility is closed?

After determining whether to close a facility or portion of a facility, the appointing authority is required to determine which employees are required to remain on duty in order to provide essential services.

The Director of Administration has taken the position that the double pay provision of Rule 8.406 is not applicable to the current state of emergency. In reaching his determination, the Director focused on the two-pronged requirements in Subsection (C)(2) whereby employees would be entitled to double pay for hours worked during the period (i) that the facility is closed and (ii) that other employees are on excused

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[7] This language was included in E.O. 2020-11 (Apr. 30, 2020) and again in E.O. 2020-14, except for the latter phrase. *See* E.O. 2020-14 (May 8, 2020) (placing Guam in Pandemic Condition of Readiness 2 and omitting language stating that "[o]ther agencies remain fully operational, including public access.")

[8] We note that the Director of Administration maintains that "the facilities at which essential workers were carrying out their duties were not closed[.]" While seemingly logical on its face, this assertion if accepted would necessarily negate Rule 8.406(C)(2) altogether. Under this reasoning, a facility where essential workers remained on duty during a declared emergency conceivably would never be considered closed; therefore, there would be no circumstance where an essential worker would ever be entitled to double pay under the rule. We do not agree with this wholesale reasoning and advise instead that an agency-by-agency analysis be conducted.

leave. According to the Director, "the facilities at which essential workers were carrying out their duties were not closed, neither were the other employees on excused leave."[9]

The Director differentiated government employees between "essential workers" who were "require[d] to report to the workplace" and those "whose job duties involved non-essential activities [and] were required to remain at home." Of the second group, the Director stated they "remain on duty during normal working hours, ready to report to work at two hours' notice and, if their duties permitted or if appropriate arrangements were made, they were required to work from home." This is consistent with Executive Order 2020-05 stating, "[r]egardless of operational status of an agency/department all government of Guam employees remain on regular work status and are expected to report for duty within two hours from receiving notice from his/her supervisor."[10] The Director has argued that this second group of employees was "not placed on administrative leave with pay" and therefore the second prong of Rule 8.406(C)(2) was not met.

We recognize that the Administration's action in keeping non-essential employees, who were directed to stay at home, on regular work status during a declared emergency is a departure from past practice of placing such employees on administrative leave. For example, during emergencies declared for Typhoon Conditions I and II, 4 GCA § 6226 provides that employees in permanent positions "whose presence is not required at work, shall be granted administrative leave." Rule 8.406(A) itself states that "[e]xcused absence with pay and without charge to leave [i.e., administrative leave] shall be granted to employees when natural disasters or other emergency conditions create unsafe working conditions." Furthermore, Rule 8.406(C)(1) provides "[e]xcept for those employees determined . . . to be necessary for providing essential services, employees shall be released from duty with pay, without charge to leave, for the period the facility is closed." During typhoons, the common practice has been to identify essential employees and place non-essential employees on administrative leave.

However, we must acknowledge that the current pandemic crisis situation is unprecedented and the government's response path generally uncharted. Outside of the nomenclature of "conditions of readiness," there is very little in common between the COVID-19 pandemic and natural disasters, such as typhoons. Although identifying essential services and essential employees during Typhoon

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[9] Letter from DOA Director Edward M. Birn to Sen. Joe San Agustin re: Compliance with Government of Guam Personnel Rules and Regulations (May 4, 2020).
[10] This language was also included in E.O. 2020-11 (Apr. 30, 2020) and E.O. 2020-14 (May 8, 2020).

Conditions I and II is relatively straightforward compared to doing so during our current state of emergency, it is an identification the appointing authority must make for purposes of the Rule.

CONCLUSION

While the criteria of Rule 8.406(C)(2) is clear, we recognize the application of the Rule to our current state of emergency could lead to unintended and illogical inequities among employees in different agencies.

For example, the Guam Memorial Hospital (GMH) and the community health centers would most likely be categorized as agencies that are "fully operational, including public access." It would follow, then, that the dedicated and hardworking doctors, nurses, and other health professionals who have been directly exposed to COVID-19 patients and have risked their lives to provide care and treatment to our people in the government's medical facilities would not be eligible for double pay compensation.

On the other hand, essential employees at agencies that did not provide direct COVID-19 related duties, such as payroll or other administrative support, may be eligible for double pay if it is determined that their agencies were categorized as "completely closed." The potential for such disparate and unequal treatment under the rule, where frontline health care workers could not receive special emergency compensation under the Rule but administrative support workers might, would be a travesty of the highest degree.

Our office's role, however, is to interpret the rules as they are written. Amending these rules is of course a matter of policy most appropriate for the Legislature. The Organic Act, in fact, expressly authorizes the Legislature to set the compensation of all government of Guam employees.

LEEVIN TAITANO CAMACHO
Attorney General

cc: Hon. Lourdes A. Leon Guerrero, *i Maga'hågan Guåhan*
Hon. Tina Rose Muna Barnes, Speaker, *i Minta'trentai Singko na Liheslaturan Guåhan*
Edward Birn, Director of Administration