Vice Speaker Therese M. Terlaje
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GUAM CCU

CONSOLIDATED COMMISSION ON UTILITIES
Guam Power Authority | Guam Waterworks Authority
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Commissioners
Consolidated Commission on Utilities

October 2, 2018

RE: Adoption of a policy in reference to Guam Public Law 34-116 (FY 2019 Budget Law)

To the General Managers of Guam Power and Waterworks Authorities,

P.L. 34-116 lapsed into law on August 24, 2018. In that Bill, the Guam Legislature ostensibly intended to prevent public corporations, among others, from hiring new personnel from September 1, 2018 through December 31, 2018 and prohibit any promotions, along with any incremental or other upward pay adjustments for employees during fiscal year 2019.

The CCU does not recognize the Guam Legislature's authority to encroach on the staffing decisions of the Waterworks and Power Authorities because staffing functions are at the very core of the day-to-day operation of the respective utilities.

The CCU policy set forth herein is supported by its plenary authority granted by statute and the Guam Attorney General Opinion AG 12-0014 dated January 9, 2012 which is attached hereto. Opinion AG 0014 states with certainty that the personnel restrictions contained in P.L. 34-116 are void *ab injtio* as an inorganic, unconstitutional and thereby impermissible encroachment on the plenary powers of the CCU.

It is therefore the policy of the CCU that the personnel restrictions set forth in P.L. 34-116 do not apply to the Guam Power Authority nor the Guam Waterworks Authority.

Joseph T. Duenas, Chairperson

J. George Bamba, Secretary

Simon A. Sanchez II, Commissioner

Francis E. Santos, Commissioner

Judith Guthertz, Commissioner

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Leonardo M. Rapadas
Attorney General

Phillip J. Tydingco
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

January 9, 2012

OPINION

Ref: AG 12-0014

TO: Director, Department of Administration

FROM: Attorney General

RE: **Organicity of Legislatively Imposed Hiring Freeze and Other Conditions on Executive Management Decisions in P.L. 31-77 (Sept. 20, 2011)**

FACTS

Chapter XIV, Part II of Public Law 31-77, signed into law by the Governor on September 20, 2001, reads in pertinent part:

> **Section 1. Legislative Findings and Intent.** *I Liheslaturan Guåhan* finds that in reviewing the submittal of Bill 145-31 (COR), the Executive Branch's Budget Request for Fiscal Year 2012, the sum of Eleven Million Six Hundred Fifty-Four Thousand Nine Hundred Twenty-Seven Dollars ($11,654,927) was requested to fill three hundred fifty-six (356) vacancies under the direction of *I Maga'låhen Guåhan.*
>
> *I Liheslatura* further finds that the funding level for the Guam Department of Education (GDOE), included with *I Maga'låhi's* request, was underfunded by over Ten Million Dollars ($10,000,000) below the adjusted authorized levels for Fiscal Year 2011 and trended for organic growth.
>
> *I Liheslatura* recognizes that funding these vacancies as requested by *I Maga'låhi* and allowing appropriation levels for GDOE to fall below its current requirements, also as proposed by the Executive Branch, is tantamount to an egregious sacrifice in the quality of education for the students of Guam who already experience the downfall of financial disturbances at their school campuses and in the classrooms.
>
> It is the intent of *I Liheslaturan Guåhan*, therefore, that vacancies in Fiscal Year 2012 that are funded by the General Fund *shall not*[1] be included in appropriations in this Act.

[1] Unless otherwise noted, emphases in italics contained in quoted provisions of P.L. 77-31 are in the original.

In his transmittal letter to the Legislature, the Governor noted the following:

> **Shortfalls in Critical Service Areas**
> **Chapter XIV, Section 2. Hiring Freeze.** The government may not have the ability to fill management level positions critical to departments operations when incumbent vacates through resignation, retirement or other separations. This will negatively impact the ability of departments and agencies to provide mandated services with manpower deficiencies.

The Governor then identified eight specific departments in which shortfalls have already been identified that if the Legislature's hiring freeze mandate were observed would or could "negatively impact the ability of departments and agencies to provide mandated services with manpower deficiencies," including the Veterans Affairs Office; Guam Fire Department; Guam Memorial Hospital Authority; Department of Mental Health and Substance Abuse; Department of Integrated Services for Individuals with Disabilities; Department of Administration; Guam Regional Transit Authority; and Department of Revenue & Taxation.

The question presented is whether the legislative prohibition on filling vacancies in "[a]ll departments and agencies of the executive branch," with exceptions for a limited number of departments and agencies whose discretion is further limited to only being permitted to "fill positions vacated due to retirement, termination or resignation at or below the grade-step level of the vacated position," runs afoul of the separation of powers doctrine.

DISCUSSION

"[U]nder the Organic Act, the government of Guam is comprised of three separate but co-equal branches of government." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 32; *Hamlet v. Charfauros*, 1999 Guam 18 ¶ 9; *Taisipic v. Marion*, 1996 Guam 9 ¶ 6.

> The applicability of the separation of powers doctrine is evident in the language of the Organic Act itself, which provides that "[t]he government of Guam shall consist of three branches, executive, legislative, and judicial...." 48 U.S.C. § 1421a (1992); *see also Hamlet*, 1999 Guam 18 at ¶ 9 ("By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions.") (citation omitted)."

Villagomez-Palisson v. Superior Court, 2004 Guam 13 ¶ 14 (editorial brackets in the original).

> The issue before us is clearly an Organic Act issue. This is because of the well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act
>
> We underscored this principle in *In re Request of Governor Gutierrez*, when we stated that the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.
>
> The Ninth Circuit Court of Appeals also recognizes that Guam's self-government is constrained by the Organic Act and therefore, courts are compelled to invalidate Guam statutes in derogation of the Organic Act. Thus, the Legislature's powers are broad, but

In *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), the Ninth Circuit Court of Appeals was confronted with a challenge to legislation intended to circumscribe the Governor's power of appointment with respect to the board of trustees of the Guam Memorial Hospital. The court rejected the Legislature's argument that the phrase in Guam's Organic Act "except as otherwise provided in this chapter or the laws of Guam" and the inclusion of the phrase "subject to the laws of Guam" was intended to authorize the Legislature to limit the Governor's powers of appointment.

> Defendants argue that the Governor's general appointive power as set forth in Section 1422c(a). was clearly intended to be subject to legislative action, otherwise Congress would not have included the phrase "except as otherwise provided in this chapter or the laws of Guam", and that his specific responsibility with respect to hospitals is restricted by the inclusion in Section 1421g(a) of the phrase "subject to the laws of Guam". But they failed to recognize that legislative power is limited by Section 1423a to subjects "not inconsistent with the provisions of this chapter".

Bordallo, 624 F.2d at 934-35. Even though the Legislature's power is plenary, it is constrained "by Section 1423a to subjects 'not inconsistent with the provisions of this chapter,' " *id.*, namely, that the Legislature's power is always subject to the doctrine of separation of powers expressed in § 1421a.

In *Santos v. Calvo*, 1982 WL 30790 (D.Guam A.D. 1982), the appellate division of the district court of Guam was presented with the question whether the Governor was required to seek legislative approval and a special appropriation before executing a settlement agreement which provided for the payment of severance pay to the Attorney General. The superior court had previously found that the agreement violated a provision of Guam law which provides: "No officer or employee of the government of Guam including the Governor of Guam, shall: Involve the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of an appropriation made for such purpose." The court noted the general rule that whereas the Legislature has plenary power over appropriations, and may attach conditions to the expenditure of appropriated funds, once those funds are appropriated, the legislature's involvement ends. The court quoted the following from the Nebraska Supreme Court's decision in *State ex rel. Meyer v. State Board of Equalization and Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (Neb.1970) with approval:

> "The Legislature has plenary or absolute power over appropriations. It may make them upon such conditions and with such restrictions as it pleases within constitutional limits. There is one thing, however, which it cannot do, ... [i]t cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed."

Santos, *5. " 'Were this action not permitted by the Governor the Legislature could restrict the executive branch in the operation of its various functions thereby exercising an executive prerogative in direct conflict with the precept of our Constitution which prohibits one branch of government from encroaching upon or performing the duties of another.' " *Id.*, *6 (quoting *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421, 435 (W.Va.1973)).

In *In re Request of Governor Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1, the Guam Supreme Court discussed the respective powers and responsibilities of the executive and legislative branches.

> of the contract. By determining the terms of the lease, the Legislature has engaged in a clear executive function.

Id., 2002 Guam 1 ¶¶ 53, 54 (footnote omitted; editorial brackets in original). As the case illustrates, it is one thing for the legislature to set dollar limits on the amounts available in the first instance by way of conditional appropriations. It is a different matter for the legislature to dictate exact terms of a contract or be involved in the process of negotiation and execution of a lease after funds have been appropriated.

The Court recognized that conditional appropriations, i.e., 'appropriations that are released upon the satisfaction of predefined conditions precedent or that lapse if not used, do not violate the separation of powers doctrine *per se*. Writing separately with respect to another provision of the challenged law, Justice pro tempore Richard H. Benson noted, "The legislature's power of appropriation includes the power **to impose a condition that funds lapse if not used. The limitation to this power is that the condition imposed must not create such an interference with another branch's functions so as to prevent that other branch from fulfilling its constitutionally prescribed duties.**" *Id.*, 2002 Guam 1 ¶ 74 (Benson, J., concurring and dissenting) (citations omitted; emphasis added).

Decisions from Georgia and New York involving budget controversies between legislative bodies and coordinate branches of state and local government – executive and judicial – have held that while the legislative branch may be authorized to reduce funding in an executive or judicial budget, it may not encroach on executive or administrative discretion in the manner in which hiring, firing, and supervising decisions are made.

The Supreme Court of Georgia has held, "a county commission does not, by itself, have the authority to disapprove expenditures for a county officer once that officer's budget has been approved by the commission." *Griffies v. Coweta County*, 272 Ga. 506, 508, 530 S.E.2d 718, 720 (Ga. 2000). *See also*, *Chaffin v. Calhoun*, 262 Ga. 202, 203, 415 S.E.2d 906, 907-08 (Ga. 1992) ("although the county commission has the power and the duty to issue a budget, the county commission may not dictate to the sheriff how that budget will be spent in the exercise of his duties"). The courts of that state appear to require development of a trial record. *See*, *Board of Com'rs of Dougherty County v. Saba*, 278 Ga. 176, 177, 178, 598 S.E.2d 437, 439-40 (Ga. 2004) ("Accordingly, we vacate the trial court's order and remand the case to the trial court for determination of the question apropos of the case at this juncture: Did the Board of Commissioners adopt a budget for the Sheriff's department that did not reasonably and adequately provide for the personnel and equipment necessary to enable the Sheriff to perform his duties of enforcing the law and preserving the peace, and thereby abuse its discretion?") (citations omitted); *Boswell v. Bramlett*, 274 Ga. 50, 52, 549 S.E.2d 100, 102-03 (Ga. 2001) ("We note, however, that the county commission has the authority to review and approve the proposed budget for Boswell's office, and that its action in making the appropriations for Boswell's office is subject to review only for an abuse of discretion. On the other hand, the commission does not have the authority to dictate to Boswell how she will spend the budget that has been approved for her office. In the present case, because the record shows that there was money in Boswell's budget, as approved by the commission, to pay for the salary increases in question, we conclude that Boswell acted properly in granting those pay increases.") (footnotes omitted).

In New York, in *In re Mohr v Greenan*, 10 Misc.3d 610, 803 N.Y.S.2d 876 (2005), the trial court held that a resolution approving a hiring freeze adopted by the Erie County Legislature was unenforceable as applied to the County Board of Elections. "The effect of the hiring freeze resolution, if applied to the Board of Elections, would be inconsistent with and undermine petitioners' constitutional and statutory authority." *Id.*, 10 Misc.3d 616, 803 N.Y.S.2d 876 (citations omitted), *aff'd*, 37 A.D.3d 1094, 828

Appropriations once made are, of course, always subject to the continued availability of funds. The question is: Who has final authority to decide how those funds are to be managed *after* they have been appropriated, assuming funds *do* remain in the event of a vacancy due to retirement, termination or resignation?

Under the Organic Act, the Governor is given the responsibility and authority to supervise and control departments, agencies and other instrumentalities of the executive branch of the government. This includes ensuring, within budgetary limits, that each executive branch department and agency has sufficient manpower with the skills necessary to perform the functions for which each agency and department was created. An agency or a division of an agency may have a position which requires certain skills that are important to fulfilling the agency's mission, such as a need for a particular type of engineer. If the person currently occupying the position resigns, the agency will need to find a replacement or be left without an employee who is key to the work of the agency. Additionally, if an agency has two vacancies, its Director may decide that it is best for the agency to use its budget to hire only one employee at a higher skill level, thereby requiring a higher grade and/or step for the new employee. These are just two examples of executive decision making in government agencies related to hiring government employees. Such decisions 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. Hence, the Governor has the authority to fill classified positions, through the merit system, in a manner which he feels is in the best interest of a particular agency.

CONCLUSION

In exercising its Organic Act authority, the Legislature appropriates funds to each executive department and agency. But, when the Legislature mandates how the appropriated funds are to be spent in regard to filling or not filling positions and at what grade and step level positions will be filled, it encroaches upon the Governor's administrative authority to supervise and control the executive branch of the government.

Chapter XIV, Part II, Section 2 of Public Law 31-77 prohibits the filling of vacancies in some executive departments and agencies and allows the filling of vacancies in other departments and agencies but only at or below the grade and step level of the vacated position (the "hiring freeze provisions"). The executive branch must operate within its legislative appropriations. However, 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

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unable to provide the services constitutionally required of it."); and *Maricopa County v. Tinney*, 183 Ariz. 412, 9413, 04 P.2d 1236, 1237 (Ariz. 1995) ("The outcome of this case is controlled by our opinion in *Maricopa County v. Dunn*, 157 Ariz. 396, 758 P.2d 1298 (1988). We agree with the superior court that to prevail, the supervisors are required to show that the judges in question acted unreasonably, arbitrarily, or capriciously in issuing orders to fund the new bailiff. Judicial officers 'have the right to appoint necessary personnel to carry out the court's constitutional and statutory duties, and ... boards of supervisors have the duty of approving personnel requests of the courts unless there is a clear showing that the judges acted unreasonably, arbitrarily, or capriciously in making the request.' *Id.* at 398, 758 P.2d at 1300. *See also Broomfield v. Maricopa County*, 112 Ariz. 565, 568, 544 P.2d 1080, 1083 (1975). In *Dann*, however, we also made it clear that a presiding judge acts unreasonably and arbitrarily in refusing to follow reasonable county procedures for filling vacancies during a hiring freeze.")