

Alicia G. Limtiaco
Attorney General



J. Patrick Mason
Deputy Attorney General

U. Perez



OFFICE OF THE ATTORNEY GENERAL

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Ref: DOA 07-0377

MEMORANDUM (Informational)

To: Director, Department of Administration
Executive Director, Civil Service Commission

From: Attorney General *AK*

Re: Furloughs and Layoffs under Public Law 29-02:IV:48

Rose Cruz
Just for C/S.M.
6/19/07
10:55am

This memorandum responds to the following issues raised in your inquiries to this office:

- I. The impact of Public Law 29-02, Chapter IV, Section 48 (hereafter "Section 48") on furloughs¹ and layoffs;²
- II. Whether Section 48 impinges upon the Governor's Organic Act authority.

¹ A furlough is defined in Appendix H of the Department of Administration Personnel Rules and Regulations (the "DOA Rules") as follows:

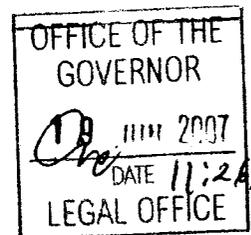
A furlough action is the placement of an employee in a temporary non-duty and non-pay status on a continuous basis (for example 10 consecutive days), or a non-continuous basis (for example one day a week). A furlough is not a layoff or a reduction in force action.

Appendix H Sec. A. The DOA Rules provide that one reason for a furlough is a lack of funds. *Id.* Sec. B.

² A layoff is defined in Appendix B of the DOA Rules as follows:

Layoff: the involuntary termination of an employee other than disciplinary reasons which does not reflect discredit on the service of the employee and includes a reduction-in-force for any of the reasons stated in GG-100 A.

Appendix B Sec. GG-100 B.4. The DOA Rules provide that one reason for a layoff is a lack of funds. *Id.* Sec. GG-100 A.



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I

In Section 48, the Legislature has made a clear statement of the protection afforded permanent classified employees and has indicated the preferential treatment to be imposed for different types of unclassified appointments. Section 48 provides:

Pursuant to Personnel Rules and Regulations of the Department of Administration, no permanent classified employees of any department or agency of the government of Guam shall be subject to layoff *or* furlough before the following categories of employees within said department *or* agency have been first subject to layoff *or* furlough. All layoff *or* furlough actions *shall* be imposed in the following order:

1. Part time, short term *or* seasonal employees (unclassified employees shall be considered short term *or* seasonal);
2. Provisional employees;
3. Temporary *or* limited term employees; and
4. Probational (initial) employees.

(italics in original). This statute is similar to the order of layoff procedures in Appendix B of the Department of Administration Personnel Rules and Regulations ("DOA Rules")³. Appendix B, in part, provides:

Affected employees of the department/agency occupying the same position class(es) shall be released 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)

DOA Rules, Appendix B, Sec. GG110 A.3. Under Appendix B, if additional layoffs are necessary, after the above classes of employees are laid off, a combination of performance rating and seniority is used to determine the order of layoff for employees not falling into the listed position classes. *Id.* Sec. GG110 A. 4. Thus, if more layoffs are necessary after the unclassified employees listed are laid off, the classified employees may then be laid off according to a performance rating and seniority formula.

In both Section 48 and Appendix B, the order of layoffs or furloughs is the same. Part-time and short term or seasonal employees must be laid off before a provisional employee is laid off or

³ For the most part, furlough procedures will follow layoff procedures. Appendix H – the employee furlough procedures – states: “[F]urlough procedures shall be administered and coordinated with procedures for employee layoff, priority placement, outside employment, and leave without pay.” DOA Rules, Appendix H at H1.

furloughed. If laying off part-time and short term employees does not result in enough savings, provisional employees may then be furloughed or laid off, and so on down the various classes of employees listed. It would be unreasonable to conclude that the Legislature intended to allow part-time employees to be furloughed for 8 hours and then to allow provisional employees to be furloughed for 8 hours also or for something less than 8 hours. Such an interpretation would permit policy makers to defeat the purpose of having a listing of priorities. And this would violate basic tenets of statutory interpretation. One basic tenet is that statutes are to be interpreted according to "their terms and legislative intent." In re: Request of Governor Camacho, 2003 Guam 16, ¶ 17. Another basic tenet is that the language of a statute should not be interpreted so as to yield impractical consequences or unreasonable results. Sumitomo Construction, Co. Ltd. v. Government of Guam, 2001 Guam 23, ¶ 17.

In addition to the similarities between Section 48 and Appendix B, there is an important difference in their language. Section 48 is more expansive. Specifically, Appendix B applies the priority list to employees in the same "position class(es)" within a department or agency. But Section 48 applies the priority list to all employees in a department or agency, without restricting the priority list to any particular class of positions. Hence, Section 48 makes a major legislative change to Appendix B. Section 48 protects all classified permanent employees within a department. It does not allow permanent classified employees in a department to be laid off or furloughed until the listed unclassified employees in the department or agency have been laid off. In other words, under Section 48, only after the unclassified employees in a department are laid off will the maximum savings in unclassified personnel costs be achieved; and only then may classified employees be subject to furlough and layoff in order to realize additional needed savings.

II

We now turn to the issue of the Governor's Organic Act authority. The legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act. In re: Request of Governor Gutierrez, 2000 Guam 1, ¶ 36. The powers and duties of the Governor are enumerated in the Organic Act.

The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam. . . . He shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam and shall commission all officers he may authorized to appoint. He shall be responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam.

The Organic Act also gives the Governor the power to appoint heads of agencies with the advice and consent of the Legislature. On the other hand, the Legislature has the authority and duty to establish a merit system.

The Governor shall, except as otherwise provided in this chapter or the laws of Guam, appoint, by and with the advice and consent of the legislature, all heads of executive agencies and instrumentalities. The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system. The Government of Guam may by law establish a Civil Service Commission to administer the merit system. Members of the Commission may be removed as provided by the laws of Guam.

48 U.S.C. §1422c(a).

In the event layoffs and/or furloughs are necessary, the Legislature, in Section 48, has stated a priority for those employees who fill classified permanent positions. Classifying employees and giving them certain protections not afforded to unclassified employees is a feature of the merit system. Hence, generally speaking, the priority given permanent classified employees in Section 48 would fall within the Legislature's authority to establish a merit system. Nonetheless, there can be situations in which a duly enacted law infringes upon the Organic Act authority of the Governor.

In determining whether a legislative enactment disrupts the proper balance between branches of government, the appropriate inquiry focuses on the extent to which the Executive Branch is prevented from accomplishing its constitutionally assigned function. In re: Request of Governor Gutierrez, 2002 Guam 1, ¶ 34. The Guam Supreme Court has established a two-part test: "(1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by an overriding constitutional need." (citation and internal quote omitted). *Id.* One category of employees necessary for the Governor to accomplish his constitutional functions is agency directors.

Heads of agencies are, naturally, not permanent classified employees, because they are political appointments. Consequently, under Section 48, agency heads, as unclassified employees, would be laid off before any permanent classified employees would be subject to layoff or furlough. Although not classified employees, the heads of the agencies are clearly essential to the Governor's control over the departments and agencies which he must run in order to fulfill his Organic Act mandate to faithfully execute the laws of Guam and the laws of the United States applicable to Guam. We are of the opinion that the disruptive impact of removing agency heads would prevent the Governor from performing his Organic Act mandate to supervise and control the executive agencies and departments. Therefore, as to this category of employees, Section 48 impinges upon the Governor's Organic Act authority.

We, of course, are not aware of the specific duties of all executive branch employees. Although the Supreme Court's two-part test for overriding a legislative enactment presents a rigorous standard, we cannot say that there are no other positions which meet the requirements. Ultimately, the courts may have to make the analysis, if other unclassified positions are exempted from the requirements of Section 48.

This is an informational memorandum. It is not a formal opinion of the Attorney General.


J. PATRICK MASON