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## Office of the Attorney General

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June 3, 2008

### LEGAL MEMORANDUM

Ref: GPSS 08-0496

TO: Superintendent, Guam Public School System

FROM: Attorney General *ALG*

**SUBJECT: Whether GPSS Teachers Are Entitled to Additional Pay for "Make-Up" of Instructional Days Outside of School Calendar**

By memorandum dated May 21, 2008, you have requested an opinion regarding the following issue:

**REQUEST:** Are GPSS teachers entitled to additional pay for "make-up" of instructional days which fall outside of the school calendar year?

**ANSWER:** Yes.

### STATEMENT OF FACTS:

Beginning in March 2008, the GPSS Health and Safety Task Force (Task Force) closed several public schools for violating health, safety and environmental regulations. As a result, the instructional days that were missed by the students of these schools will have to be made up because Guam law requires 180 actual instructional days as expressed in the statutory definition of an "adequate public education." The definition includes the following requirement:

At least one hundred eighty (180) instructional days each school year with school years ending *no later than* thirty (30) days following the end of the calendared school year . . . .

1 G.C.A. §715(m).

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When the GPSS and Guam Federation of Teachers (GFT) negotiated the collective bargaining agreement finalized on August 24, 2006 ("Agreement"), they decided that each year a joint committee would recommend a school calendar to the Guam Education Policy Board (GEPB). They also decided that the joint committee would have to "take into consideration make-up days for instructional days lost due to natural disasters or inclement weather, specific instructional days, teacher workdays, holidays and days for system wide events and other educational activities." Agreement, Article VI, 6.A.2. The GEPB itself, however, would set the actual school calendar as a part of its statutory duties and responsibilities. 17 G.C.A. §3112(a)(6).

Accordingly, the GEPB decided that the last day of the 2007-2008 school year would be June 2, 2008. Included in the school calendar ending June 2, 2008 were 186 duty days as agreed to in the Collective Bargaining Agreement. Article 6.A.1. of the Agreement provides:

The school year shall consist of 186 duty days for bargaining unit members within which there shall be 180 instructional days, 2 teacher workdays, 2 staff development days and 2 parent teacher conference days.

However, in order to meet the requirement of 180 instructional days, each of the schools closed for violations will now have to make up some of the missed instructional days after June 2, 2008.

The GFT's position is that any work performed by teachers beyond June 2, 2008 must be compensated as additional pay because, on June 2, 2008, teachers would have been available for the 186 duty days as called for by Article 6.A.1 of the Agreement and as scheduled by the GEPB to be completed by June 2, 2008. Article 9.J of the Agreement provides:

When teachers who are members of the bargaining unit choose to work during summer school or Eskuelan Puengi or any other teaching assignment outside their normal duties, they may be paid the hourly rate of their current annual salary based on their teacher classification and step. [Emphasis added.]

The GPSS has taken the position that teachers are entitled to their full per annum salary only if they actually work 180 instructional days, and that the days the schools were closed for various health and safety violations do not count as instructional days because no instruction took place. The GPSS feels that, therefore, the teachers have an obligation to fulfill the requirement of actually teaching 180 instructional days by making the lost days up without extra pay even if the new instructional days go beyond the end of the school calendar.

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**DISCUSSION:**

1. The Superior Court of Guam in *Department of Education v. Civil Service Commission ex rel. Taimanao*, Special Proceeding Case No. SP184-04 (*Taimanano*) adopted the Civil Service Commission's finding that teachers are full-time classified employees.

2. At their option, teachers may be paid on a 26 bi-weekly basis, like the rest of the government's full-time classified employees, or on a 21 bi-weekly basis, which roughly covers the nine-month school calendar year. Regardless of which payment option is chosen, in the end, the teachers would have received the same total amount of pay.

3. Full-time classified teachers, regardless of their payment option of 21 or 26 bi-weekly payments, get paid to perform 186 duty days in accordance with the Collective Bargaining Agreement, Article 6.A.1. The Agreement breaks the 186 duty days down into 180 instructional days, 2 teacher workdays, 2 staff development days and 2 parent teacher conference days.

4. The 180 instructional days mentioned in Article 6.A.1 of the Agreement accurately reflects 1 G.C.A. §715(m) which requires 180 instructional days within a school year. More importantly, however, §715(m) indicates that school years must end "no later than thirty (30) days following the end of the calendared school year." [Emphasis added.] What §715(m) essentially does is to provide authority for alternative ending dates for the calendar school year. In other words, a school calendar could be changed to end after the calendar school year as originally set by the GEPB. However, in no event may the last day be changed to end more than 30 extra days after the original end date set by the GEPB.

5. Calendar school years are set by the GEPB as part of the Board's statutory duties and responsibilities. 17 G.C.A. §3112(a)(6). A school calendar sets the beginning date and the end date of a school year, and decides which days in between the two dates shall be used for what specific purposes, to include the 186 duty days as broken down by Article 6.A.1 of the Collective Bargaining Agreement, holidays, school activity days, and make-up days due to bad weather or disasters. See, generally, *Eastbrook Community Schools Corp. v. Indiana Education Employment Relations Board*, 446 N.E.2d 1007 (Ind. 1983).

6. While the Collective Bargaining Agreement authorizes a joint committee of persons appointed by the GEPB and GFT to recommend a school calendar, only the Board may actually set the calendar school year and the joint committee's recommendation is merely advisory. If the GEPB found it necessary for any reason to extend the end date of a school year or to re-arrange the scheduled purposes of days within a calendar school year, then the GEPB could change or amend the calendar school year, even after the

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school year had begun, so long as the school year ended "no later than thirty (30) days following the end of the calendared school year."

7. The court in *Taimanao* at page 5 agreed with the Civil Service Commission that the GEPB has the authority to make "whatever changes or adjustments to the school calendar deemed fit and proper for educational purposes." This is consistent with court decisions in at least some jurisdictions which have concluded that school boards must change the school calendar to make up for instructional days if the pre-selected make-up days within the originally set school calendar are insufficient to cover all the instructional days missed.

In *Scanlon v. Mount Union Area Board of School Directors*, 415 A.2d 96 (Pa. 1980), a strike by teachers affected 22 instructional days of the 180 required by law. The school calendar was originally set to end June 5, 1979 and would have included 180 instructional days. Soon after the strike ended, the board re-set the end of the calendar year to June 8, 1979, but the new end date would have provided for only 165 instructional days. The Secretary of Education challenged the school board's failure to re-schedule the full 180 instructional days. The *Scanlon* court quoted from *Commonwealth v. Leechburg Area School Board*, 339 A.2d 149 (Pa. 1975) which said:

(S)chool boards must schedule 180 days of instruction . . . the requirement of 180 days of instruction must be adhered to unless it is impossible or impractical to do so for reasons not within the board's control . . . if it is impossible or impractical to provide the number of days required, boards must nevertheless amend their schedules so as to provide as many days as sound educational practice requires.

339 A.2d at 150-51.

The *Scanlon* court also quoted another case which said that the school board had a "clear duty to modify the previously established calendar" to make up for lost instructional days. *Pittenger v. Union Area School Board*, 356 A.2d 866 at 870 (Pa. 1976).

8. Thus, school boards have an affirmative duty to promptly revise school calendars upon the happening of events that so require. What distinguishes the situation encountered by the GPSS is that the GEPB has not, to our knowledge, officially changed the end date of the calendar year which still remains at June 2, 2008. To properly cover the required 180 instructional days for the schools closed for violations, the GEPB could have changed the school calendar ending date of June 2, 2008 to some date beyond, so long as the new ending date was within thirty days after June 2, 2008. Had this been done, all 180 instructional days for the closed schools could have been made to fall within the calendar school year as amended.

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9. As it is, some make-up days for instruction are now set to occur after June 2, 2008, even though the calendar school year will have ended on June 2, 2008. It is unclear how to characterize the so-called make-up days scheduled after June 2, 2008 because these make-up days are technically outside of the official last calendar day of the 2007-2008 school year.

10. If they do teach beyond the last day of the calendar school year, then teachers are entitled to extra pay.

11. A teacher's normal duty is to perform 180 instructional days, 2 teacher workdays, 2 staff development days and 2 parent teacher conference days, all within the calendar school year as set by the GEPB. The GEPB may extend the calendar school year by taking official action, thereby also extending the teacher's duty to perform within such extended time without additional pay. However, in no event would a teacher be required to work more than 180 instructional days, 2 teacher workdays, 2 staff development days and 2 parent teacher conference days within any calendar school year, even as extended.

12. Furthermore, teachers should not be docked for not providing 180 instructional days of service within the calendared school year if schools are closed for violations of health, safety and environmental regulations and the full 180 instructional days are not made up before the end of the calendar school year, as may be extended. The administrative leave rules for the GPSS provide for paid leave when there exists emergency conditions that create unsafe working conditions.<sup>1</sup> Section 910.406 of the Rules states, in part:

- A. Excused absence with pay and without charge to leave shall be granted to employees when natural disasters or other emergency conditions create unsafe working conditions.
- B. Excused absence, for natural disaster or other emergency conditions, may be granted only when there has been an official proclamation of the hazardous conditions by Executive Order, or an equivalent announcement by the Governor.
- C. When the Governor declares a State of Emergency, the Director of Education/Superintendent shall determine whether affected facilities or portions thereof, which are located in the area covered by the Executive

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<sup>1</sup> Section 901.000A states that the GPSS Personnel Rules and Regulations (Rules) apply to all classified employees working for the GPSS. Therefore, as classified employees, teachers are covered by the Rules, at least to the extent possible. I say "to the extent possible" because the annual leave provisions of the Rules would not cover teachers who instead earn "personal leave," which is the teachers's equivalent of annual leave. 4 G.C.A. §4104b. However, the Rules do not once mention personal leave.

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order or proclamation, are to be closed.

1. Except for those employees determined by the Director of Education/Superintendent 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.

The first closure of a school by the Task Force took place on March 14, 2008. On March 19, 2008, the Superintendent wrote to the Governor declaring a state of emergency for GPSS and finding that the safety, health and welfare of students, staff and faculty had been "compromised" by "serious deficiencies in sanitation, health, and safety hazards." The declaration was a prelude to procuring supplies and services on an emergency basis to fix the problems, and the Governor, on the same day, concurred in writing with the declaration. On April 19, 2008, a second emergency was certified by the Superintendent and approved by the Governor.

While both the emergency declaration and certification were made to satisfy emergency procurement requirements, they may also be viewed as satisfying the requirement in the Rules at Section 910.406B that there be an "official proclamation of the hazardous conditions by Executive Order, or an equivalent announcement by the Governor."

In *Freidhoff v. Board of School Directors of Conemaugh Valley School District*, 586 A.2d 1038 (Pa. 1991), 44 of 180 instructional days required by law were lost due to strike, bad weather and fuel shortage during the 1976-1977 school year. To permit make-up of instructional days, the school board revised the last day to end on June 30, 1977, the last day permitted by Pennsylvania law. However, only 160 instructional days could be included by June 30, 1977. Therefore, the school did not pay the teachers for the 20 make-up days which could not be scheduled by June 30, 1977, and the teachers sued for back wages for the 20 un-scheduled days. Citing a law that would provide for the same compensation to which an employee would otherwise be entitled to had emergency weather conditions not been encountered, the court reversed the lower court's denial of compensation for the 20 un-scheduled instructional days, and the teachers were paid even though they did not work those 20 instructional days which could not be re-scheduled.

The situation for the GPSS is much the same as in *Freidhoff*. The GPSS Rules authorize paid leave for disasters and emergency closures. Therefore, for those days that the GPSS

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schools were closed for violations, the teachers were entitled to not show up or teach, and if the GEPB for any reason has not re-scheduled sufficient make-up days before the last calendar day, as may be amended, then the teachers are still entitled to payment of their full 180 instructional days.

**CONCLUSION:**

The GEPB has a duty to schedule 180 instructional days within the calendar school year, and extend the ending date of the official calendar school year if 180 instructional days cannot be included by the last calendar school day. As a part of the Collective Bargaining Agreement with the GPSS, teachers are required to teach 180 instructional days. If they teach beyond the official school calendar ending June 2, 2008, then they are entitled to additional pay.



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