



Office of the Attorney General

November 12, 2008

LEGAL MEMORANDUM

Ref: GPSS 08-0705

TO: Superintendent, Guam Public School System

FROM: Attorney General *ALG*

SUBJECT: Repeal and Re-Enactment of 17 GCA § 3125

P.L. 29-102:4 repealed and re-enacted 17 GCA § 3125. The Superintendent of the Guam Public School System (GPSS) has requested assistance regarding the effect of this re-enactment on the GPSS, especially since Section 3125(e) eliminates several GPSS positions. As the Superintendent notes, the new Section 3125 seems to replace these positions at GPSS, but is silent about the incumbents occupying them. It says little about compensation for the new positions it creates, prompting the Superintendent to inquire about the amount of those salaries. Herein, we address those issues.

The old 17 GCA § 3125 related only to the position of Chief Financial Officer, establishing qualifications and duties for that position, but authorizing the Superintendent to fill the position. The new Section 3125 relates to several positions, but liberally authorizes the Superintendent to establish the new positions' qualifications. It provides:

3125. Management Team.

(a) Unclassified Deputy Superintendent(s) Appointment.

The Superintendent shall reserve the right to select unclassified Deputy Superintendents as his management team with full management responsibility and authority as delegated unto him or her by the Superintendent. Such unclassified Deputy Superintendent(s) appointees may number from one (1) but shall not exceed four (4), unless otherwise approved by the Guam Education Policy Board. The unclassified Deputy Superintendent(s) appointed positions shall cover, *but not be limited to*:

- (1) Deputy Superintendent, Finance and Administrative Services
- (2) Deputy Superintendent Assessment and Accountability
- (3) Deputy Superintendent, Curriculum and Instructional Improvement
- (4) Deputy Superintendent, Educational Support and Community Learning...

(c) Compensation...personnel who are selected as a management team member shall receive compensation at no more than the salary established for the Superintendent of GPSS.

(d) Qualifications. The Superintendent shall establish qualifications...for each of the positions, which qualifications shall be subject to approval by the Board...

The new Section 3125(e) also eliminates three positions at GPSS: Deputy Superintendent of Education, Associate Superintendent and Chief Financial Officer. The re-enactment of Section 3125 had the practical effect of abolishing seven positions, all of which were classified: six Associate Superintendents and the Chief Financial Officer. It appears that three incumbents from these positions will have no new similar position at GPSS. The incumbents of these abolished positions received not only their base salaries but also a fourteen percent (14%) enhancement because their positions involved teaching and a seventeen percent (17%) enhancement because they were administrators.

The new Section 3125 establishes a new management team comprised of the Superintendent and between one and four Deputy Superintendents, all of whom are unclassified employees. The Superintendent will hire the Deputy Superintendents, determine and assign their job duties and supervise them. The Superintendent has, of course, been the appointing authority for all GPSS personnel for some time. 17 GCA § 3103(f). She will now have the freedom to set the qualifications for, select and supervise those who will fill these positions. The Guam Education Policy Board, however, must approve the qualifications for each Deputy Superintendent position.

The new Section 3125 does not state what the new Deputy Superintendents' salaries will be, except to mandate that they cannot exceed that of the Superintendent's. The Superintendent appoints all GPSS personnel and the Guam Education Policy Board is forbidden from influencing "...the hiring, transfer, discipline or termination of any employee of the GPSS unless expressly authorized by public law". 17 GCA § 3112(b)(1). Therefore, we believe that the Superintendent may establish the salaries for these positions in accordance with any applicable Department of Administration (DOA) rules and policies, and GPSS appropriations.

The Superintendent raises the question of whether DOA should affix the salaries for the new positions because of 4 GCA § 6302(a), which provides:

The Director of Administration shall adopt and apply the unified pay schedule and the Hay methodology of positions classification and salary administration to the extent and manner he deems appropriate...

The Guam Education Policy Board and the Superintendent have created the new positions and established that salaries shall range from Eighty Thousand Dollars (\$80,000.00) to One Hundred and Ten Thousand Dollars (\$110,000.00) per year. The DOA Director's consent was not necessary.

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The Superintendent inquires whether any formalities must be observed before this reorganization of GPSS occurs, but that is settled. *I Liheslatura* has already mandated that GPSS will be managed by the Superintendent and this management team. The customary restrictions on government reorganization, such as those found in Chapter 11 of 5 GCA, do not apply because the enactment of P.L. 29-102 supersedes them. The new Section 3125 has reorganized GPSS on its own authority. The Organic Act grants *I Liheslatura* authority to legislate regarding "all subjects of local application" and states that reorganization, including that done by *I Maga'lahi*, is subject to the laws of Guam. 48 USC. §§ 1423a and 1422c(c).

The incumbents who formerly occupied the eliminated positions were, in effect, removed from their positions by the repeal and re-enactment of Section 3125 on its stated effective date, September 1, 2008. 17 GCA § 3125(g). On that day, they became unemployed. The legislature has plenary power over government employment; it may create or abolish positions and set the terms and conditions of employment at will. Starkweather v. Blair, 71 N.W.2d 869 (Minn. 1955); Roe v. Borough of Upper Saddle River, 765 A.2d 779 (N.J. 2001); Proksa v. Arizona State School for the Deaf and Blind, 74 P.3d 939 (Az. 2003); Civil Service Commission v. Department of Labor, 384 N.W.2d 728 (1986); Schisler v. State, 907 A.2d 175 (Mich. 2006); Armstrong v. Board of Education of Birmingham, 430 F.Supp. 595 (N.D.Ala. 1977).

Setting the compensation of public employees is a plenary power of the legislature in the absence of constitutional provision to the contrary. Orleans Ed. Ass'n v. School Dist. of Orleans in Harlan County, 229 N.W.2d 172 (Neb. 1975); Rice v. Board of Commissioners of Roads and Revenue of Putnam County, 129 S.E.2d 401 (Ga. 1963). A public employee can receive only the compensation provided to him by statute or rule. Setting government salaries is a legislative function and government salaries may be reduced by an official using proper legislative authority. Tirapelle v. Davis, 20 Cal.App.4th 1317, 26 Cal.Rptr.2d 666 (1993). In the absence of contractual or constitutional restraints, the legislature may alter public salaries and public pensions at will. U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 174, 101 S.Ct. 456, 458, 66 L.Ed.2d 368 (1980); State ex rel. Cannon v. Moran, 321 N.W.2d 550 (Wis. 1982).

We have examined the GPSS personnel rules regarding furloughs, layoffs and demotions. We believe that the only recourse for the former incumbents, if they are not appointed to the new Deputy Superintendent positions, is to accept either a transfer or a voluntary demotion to another position at GPSS. See GG-100(B)(2); GG-120 and GG-125. An employee who transfers can accept a "comparable vacant position" in GPSS or a different agency. GG-120. An employee who accepts a voluntary demotion may suffer a reduction in pay, but that may be his or her only choice if he or she desires or wishes to continue employment at GPSS.

It would not be appropriate to take adverse action against these employees. Adverse actions are disciplinary actions based on employee misconduct. 4 GCA §§ 4403 and 4406.

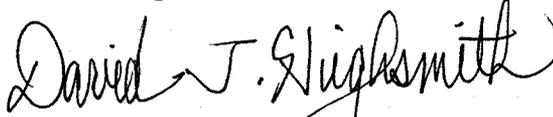
The question of whether these employees may retain the pay enhancements mentioned above depends entirely on whether the new positions they fill, either through transfer or voluntary demotion, entitles the holder of it to the enhancements. As noted above, the incumbents became unemployed as of September 1, 2008, at which time they lost the

enhancements. They cannot take the enhancements with them to their new positions. The enhancements go with or follow the positions. The employee cannot transfer them to his or her new position. The former incumbents can only receive the enhancements now if they are entitled to them through the new positions they occupy.

However, there is nothing to prevent the Superintendent from hiring one or all of the former incumbents for the new Deputy Superintendent positions, provided they meet the qualifications the Superintendent and the Guam Education Policy Board established therefor.

In a memorandum to the Superintendent dated September 3, 2008, the Director of DOA suggests that, in dealing with these incumbents, GPSS must comply with Section 49 of the Miscellaneous Provisions of P.L. 29-02, the FY 2008 Budget Act. However, that section is inapplicable. It pertains to layoffs and furloughs and specifies which categories of Government of Guam employees should be laid off first. However, these incumbents were not laid off or furloughed. They were terminated by an act of *I Liheslatura*. In this case, the more recent legislative enactment, P.L. 29-102, supersedes the previous enactment, P.L. 29-02.

The new Deputy Superintendent positions are in place and have been advertised. They will soon be filled. When the new management team is in place, the Superintendent may direct the management team's activities and functions according to the laws of Guam.


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