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LEGAL MEMORANDUM

Ref: DOA 07-0401

TO: Director, Department of Administration

FROM: Attorney General *ALG*

SUBJECT: E.O. 2006-16

We have received your request of May 22, 2007 for an opinion regarding the legality of certain aspects of Executive Order 2006-16, which enacted Appendix F of the Department of Administration's (DOA) personnel rules for the Government of Guam. P.L. 28-68, the Budget Act for 2006, transferred considerable authority regarding personnel decision making from the Civil Service Commission (CSC) to DOA. Some government officials believe that P.L. 28-68 transferred all responsibility for EEO matters to DOA, while others believe it transferred only administrative and not adjudicative functions. This is the conflict you have asked us to resolve. E.O. 2006-16 requires that an Administrative Law Judge hired by DOA hear EEO complaints, which would be illegal if that adjudicatory function remains with the CSC.

Traditionally, the CSC had two different functions regarding personnel issues on Guam. First, in its judicial or adjudicative capacity, it decided appeals from Adverse Actions taken against civil service employees and ruled on employee grievances and other matters. Second, in its legislative or rulemaking function, it enacted rules regarding pay scales, administered the government's EEO programs and monitored working conditions for employees.

It was plainly not the intent of P.L. 28-68 to transfer any adjudicative functions, except for the post-audit function created by Title 4 GCA §4403(d), away from the CSC.¹ Those sections of P.L. 28-68 that apply to the CSC bifurcated the Commission's two functions, as they were some years ago in the federal government. In the federal government, the Merit Systems Protection Board hears employee appeals and the Office of Personnel Management enacts personnel policy. P.L. 28-68 had a similar aim: to divide adjudicative and legislative functions regarding personnel issues between two different agencies.

This is made clear by the various sections in Title 4 GCA left untouched by P.L. 28-68, some of which are cited by you in your request. Title 4 GCA §4105(c) provides: "Personnel rules of any other Executive Branch entities shall require that their classified employee appeals be heard by the [Civil Service] Commission." See also 4 GCA §4105(b). Title 4 GCA §4407(b)

¹ The CSC's post audit function has since been restored. See P.L. 29-02:VI:27.

provides: "Upon the hearing of a grievance, *discrimination complaint* or other appeal, the burden of proof shall be upon the employee to show that the action of the Government was improper." (emphasis added). Most importantly, P.L. 28-68 added new Subsections (b) and (c) to 4 GCA §4101.1, a section that grants responsibility to the Director of DOA for policy matters only, not adjudication:

§ 4101.1. Responsibilities of the Director of Administration Regarding Personnel Policy of the Government. The Director of Administration shall perform the following functions:

- (a) Maintain and from time to time modify a general personnel policy for all government of Guam line agencies...;
- (b) Investigate conditions of government employment as he deems necessary, and report his findings thereon to *I Maga'lahaen Guåhan* and *I Liheslaturan Guåhan* annually;
- (c) Administer the Equal Employment Opportunity Program for the Executive Branch of the government of Guam;...
- (f) Establish and maintain, in coordination with the Attorney General, a panel of hearing officers;
- (g) Take cognizance of compliance with the provisions of 4 GCA § 4101;...

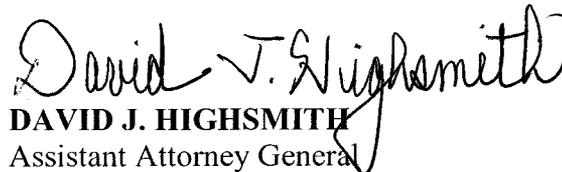
Administering the EEO program for the Executive Branch is not the same thing as adjudicating EEO grievances. Administering the program refers to enacting rules, educating government employees, reporting on EEO issues to *I Magalahi* and *I Liheslatura* and the like. Subsection (g) authorizes the Director to "Take cognizance of compliance with the provisions of 4 GCA 4101", a statute that refers to EEO issues. Section 4101(a) provides for equal employment in the government, but was left untouched by P.L. 28-68:

- (a) Employment in the service of the government of Guam shall be based upon merit, and selection and promotion of employees shall be free of personal or political consideration. No person shall be discriminated against in an application for employment or promotion or dismissed from employment on account of race, color, age, religion, sex, national origin or physical or mental impairment...

Sections 45 through 48 of P.L. 28-68 specifically state that only "non adjudicatory functions" of the Commission were transferred to the Director of DOA. Therefore, the appropriate manner for an employee to seek administrative judicial relief in an EEO case is still to pursue a grievance procedure which will be heard by the CSC as the last step before proceeding to the Superior Court of Guam. The Director of DOA has no authority to hear EEO complaints or to hire hearing officers to hear them.

For this reason, those sections of E.O. 2006-26 and Appendix F of the Personnel Rules that authorize an Administrative Law Judge (ALJ) to hear EEO cases are illegal. An executive order cannot contradict the terms of a statute. McCulloch v. Glendening, 702 A.2d 99 (Md. 1997); Rapp v. Carey, 88 Misc.2d 428, 390 N.Y.S.2d 573 (N.Y.Sup. 1977). DOA may still maintain a panel of ALJs, but not to hear EEO matters. §4101.1(f) *supra*.

We hope that this answers your enquiries, but we are available to discuss any further concerns you may have.


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