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Office of the Attorney General

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LEGAL MEMORANDUM **Ref: DOA 07-0780**

TO: Director, Department of Administration

FROM: Attorney General

SUBJECT: Employment Status of OPA Employees

In a Memorandum dated August 23, 2007, you asked us to resolve two questions that also arose in the litigation filed by the Office of the Public Auditor against you, Office of the Public Auditor v. Lourdes Perez, Superior Court SP192-07. The OPA was seeking therein a court order restraining you from enforcing salary limitations imposed on its employees by 4 GCA §6205.2(b) (as enacted/amended by P.L. 29-19). In the presentation of evidence, the Public Auditor revealed that all OPA employees are unclassified. She also claimed that a certain OPA employee was her "first assistant" within the meaning of 4 GCA §4102 and was therefore entitled to a Deputy's salary regardless of 4 GCA §6205.2(b).

Judge Elizabeth Barrett Anderson ruled in our favor, holding on November 13, 2008 that the limit imposed by §6205.2(b) applies. However, her decision did not specifically address the impact of the decision in Haeuser v. Department of Law, 97 F.3d 1152 (1997), because the parties agreed that it did not apply. Since the OPA positions are classified, although the employees occupying them are not classified, their salaries would remain the same because the limitation imposed on them by P.L. 29-19 would apply regardless. You now ask whether the OPA can continue to hire employees on an unclassified basis.

You also enquire whether a certain OPA employee in question is the "first assistant" to the Public Auditor and therefore enjoys the authority and compensation of a deputy. The only evidence presented at trial that said employee was the first assistant was some memoranda that named her as head of the office in the Public Auditor's absence.

Haeuser, *supra*, holds that the crucial law is 48 USC §1422c(a), a part of the Organic Act, which requires the government of Guam to hire all government employees in the merit system "whenever practicable." Haeuser also holds that an official seeking to hire outside the merit system bears a heavy burden of demonstrating by evidence and persuasion that a position should be outside the merit system.

We do not believe that the Public Auditor can meet that burden. In Haeuser, *supra*, the positions in question were those of Assistants Attorney General. A statute authorized the Attorney General to hire them by contract outside the merit system. Nevertheless, the Ninth Circuit struck down the statute as inorganic because it violated 48 USC §1422c(a). Although government lawyers are highly educated and trained professionals, the government could not demonstrate a need to hire them outside the merit system.

Unlike the Attorney General in Haeuser, the Public Auditor has no statutory authority to hire outside the merit system. Neither is she authorized to enact her own personnel rules. Certainly, auditors and accountants are highly trained professionals, but no more so than attorneys. These positions cannot be exceptions to the merit system if attorneys are not. There is neither justification for hiring OPA employees outside the merit system nor legal authority.

This brings us to the related question of what action DOA should now take regarding the OPA's employees since they were not hired within the merit system but have been working, in most cases, for the Government of Guam for several years. When an employee is hired into the classified service, he must usually apply at DOA, undergo a competitive procedure and be found more qualified than the other applicants. The unclassified OPA employees did not undergo this process; however, their status as long time government employees entitles them to some consideration.

Once again, Haeuser supplies the answer. Haeuser was hired on contract as an Assistant Attorney General but was later terminated for alleged incompetence. He sued to be reinstated, claiming that he should have been hired initially as a member of the classified service and was therefore entitled to civil service due process rights such as notice of the charges against him and a hearing before the Civil Service Commission before termination. The Ninth Circuit agreed and ordered him reinstated because he had been terminated summarily.

The Supreme Court of the United States has held that most government employees have a property right in their position, that they are usually entitled to notice and a hearing before termination and that a legitimate state interest is not sufficient to deny them those rights. Elrod v. Burns, 247 U.S. 347, 96 S.Ct. 2673 (1976); Loudermill v. Cleveland Board of Education, 470 U.S. 532, 105 S.Ct. 1487 (1985). The Guam cases involving issues of whether an employee was hired into the classified or the unclassified service indicate that if the employee should have been hired as a classified employee, he is and should be considered classified. Blas v. Customs and Quarantine, 2000 Guam 12; University of Guam v. Civil Service Commission, 2002 Guam 4.

In the UOG case, *supra*, a college professor was hired into the classified service. Years later, a rule change purported to convert her status to unclassified. When she was terminated, the court held that she had always been classified because that was her status at the time of hiring. She won reinstatement. In the case of the OPA, the law at the time of hiring indicated that the OPA employees could not be hired on an unclassified basis.

In Blas, *supra,* an employee was promoted to a higher position at the Department of Customs and Quarantine where he worked. A new director then demoted him to his old position. The court held that he was entitled to civil service protection and could not be demoted without notice and a hearing. (The fact of his hiring at the new position was enough to give him civil service protection.) See ¶22 of Blas.

Thus, we believe that the employees who were hired several years ago are and have been classified employees since their appointment to the government service. They should have been hired as such and must be treated as such. To terminate them now would amount to an Adverse Action and they would be reinstated by the Civil Service Commission and the courts, regardless of whether they were given a chance to apply for competitive hiring. They must be treated as classified employees.

The question of whether the OPA employee in question, or any other OPA employee, can be a first assistant or deputy has an instructive history. The Public Auditor is an elected official. When the office was first created, there was a Deputy Public Auditor. *See* 1 GCA §1907 as enacted by P.L. 25-42. Then *I Liheslatura* abolished the position. P.L. 28-68:IV:63. This demonstrates clear legislative intent that there can be no deputy position at the OPA.

4 GCA §4102 states that the "first assistant, by whatever title denominated" is unclassified. However, the denomination must come from *I Liheslatura*. The Public Auditor cannot create a "first assistant" position outside the law. She may designate an OPA employee to manage the office while she is gone or to exercise part of her authority, but that employee would not be a deputy.

It should be noted that the Public Auditor has not taken the necessary steps to create a deputy position or any new positions at her office. The personnel actions of the employee in question state that she is a Management Analyst IV. There is no legal authority for her position to come under 4 GCA §4102. The Public Auditor has no authority to create personnel rules and regulations. 4 GCA §4104.

Therefore, OPA employees must be transferred from the unclassified to the classified service and the OPA has no "first assistant" within the meaning of 4 GCA §4102. If you require anything further, please let us know.

David J. Highsmith

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