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Attorney General



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OFFICE OF THE ATTORNEY GENERAL

April 30, 2009

LEGAL MEMORANDUM

Ref: DOA 08-0830

TO: Director, Department of Administration

FROM: Attorney General *AGL*

SUBJECT: Jurisdiction to Investigate Complaint re: Protection of Public Employees Act

We hereby respond to your memorandum dated July 7, 2008 wherein you seek clarification of Public Law 28-68, transferring some responsibilities and jurisdiction of the Civil Service Commission to the Department of Administration; specifically, whether the investigative functions of the Protection of Public Employees Act have been transferred from the Civil Service Commission to the Department of Administration.

This question is raised by the June 13, 2008 Memorandum from the Executive Director of the Civil Service Commission to the Director of Administration attempting to transfer two complaints under the Protection of Public Employees Act to the Director of Administration for investigation. The basis given in the June 13, 2008 memorandum is P.L. 28-68 and the transfer of non-adjudicatory functions from the Civil Service Commission to the Department of Administration. The Memorandum is attached for reference.

1. Transfer of Non-Adjudicatory Functions from Civil Service to Department of Administration.

Public Law 28-68, Chapter IV, §§31-48 set out a Legislative policy to transfer certain authority and functions of the Civil Service Commission to the Department of Administration. The Public Law at §45 states:

“Transfer of Authority of the Civil Service Commission to the Department of Administration.

- (a) All Guam statutes and regulations not specifically mentioned in this enactment which refer to the non-adjudicatory authority of the Civil Service Commission or which purport to create such authority in the Civil Service Commission are hereby amended to reflect the transfer of said authority to the Director of Administration, who shall henceforth perform all functions regarding rulemaking, the creation of new positions, pay scales, personnel rules and the like which formerly were performed by the Commission. The Civil Service Commission shall retain its duties under the Mini-Hatch Act and Ethics in Public Contracting laws except as may be provided herein.” (Emphasis added.)

The Public Law, at §46, added a new §4101.1 to Title 4, Guam Code Annotated:

“§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 line agencies through the adoption of rules and regulations pursuant to the Administrative Adjudication Law;
- (b) Investigate conditions of government employment as he deems necessary and report findings thereon to *I Maga 'lahen Guåhan* and *I Liheslaturan Guåhan* annually;
- (c) Administer the Equal Employment Opportunity Program for the Executive Branch of the government of Guam.”

To carry out the remaining adjudicatory responsibilities of the Commission, the Public Law, at §48, provided that the Executive Director of the Civil Service Commission and the Director of Administration execute a Memorandum of Understanding “which shall designate the Commission employees, including an attorney, not to exceed three in number, who shall be retained” to support the performance and execution of its remaining functions.” Further, all personalty, equipment, supplies, records, files, books and other papers pertaining to the non-adjudicatory functions of the Civil Service Commission were transferred to the Department of Administration.

Public Law 28-68, Ch. IV, at §31, amended 4 GCA §4403 to repeal all those powers, duties and responsibilities of the Civil Service Commission that were non-adjudicatory, specifically retaining for the Civil Service Commission, at §4403 (b), the responsibility to:

“hear appeals from adverse actions taken to suspend, demote or dismiss an employee from the classified service if such right of appeal to the Commission is established in the personnel rules governing the employee...”

The Legislature went to lengths at §§42 and 43 of the Public Law to specifically amend or repeal twenty-four provisions in Guam law in order to clarify those non-adjudicatory personnel functions that were now the responsibility of the Director of Administration.

2. Enforcing the Protection of Public Employees Act.

Public Law 24-69, codified at 5 GCA §§4501- 4507, enacted the Protection of Public Employees Act. You have referred to this as the 'Whistleblower' Act. This law intended to encourage public employees to disclose information on actions of agencies that are not in the public interest in order to reduce the waste and mismanagement of public funds, to reduce abuses in government authority, and to prevent illegal and unethical practices. 5 GCA §4501.

The law set out a process for public employees to follow in order to properly disclose information about such practices, and most importantly, to protect employees who have experienced reprisal or disciplinary action as a result of 'blowing the whistle' on someone or some practice. The law specifically prohibits the initiation or administration of any disciplinary action against an employee by an appointing authority or supervisor on account of the employee's disclosure of information. 5 GCA §4503.

Of direct importance to this question is the clear scheme set out in the Protection of Public Employees Act to protect employees who disclose information and have been subject to retaliation by a supervisor or appointing authority. See 4 GCA §4504. The scheme includes:

- (a.) An employee may file a complaint about such retaliation with the personnel board.
- (b.) The personnel board shall cause an investigation to be made of the charges in the complaint.
- (c.) Upon receiving notice of a complaint, a supervisor or appointing authority may petition the personnel board for a hearing.
- (d.) The personnel board shall grant and conduct the hearing.
- (e.) After a hearing or an investigation with no hearing, and a reasonable basis for the complaint is found, the personnel board shall order appropriate relief, including reinstatement, back pay, restoration of lost service credit, and expungement of the records of the employee, and reimbursement of costs incurred.

The personnel board is defined at §4502 (e) of this act to mean:

“(e) *Personnel Board* means the Civil Service Commission, the Judicial Council or other government entity charged with hearing the appeal of a classified employee pursuant to §4105 of this Chapter or under the personnel rules governing such employee.”

The Protection of Public Employees Act specifically refers to the authority of the Civil Service Commission, found at 4 GCA §4406, to conduct investigations and hearings on personnel actions against classified employees who are dismissed, demoted or suspended. The Act establishes a defense to any dismissal, demotion or suspension, if the action against the employee was initiated in violation of the Protection of Public Employees Act. 4 GCA §4504(c).

It is the clear intent of the Legislature that, for classified employees of the Executive Branch and others, the Civil Service Commission is the proper entity for both the investigation of complaints under the Protection of Public Employees Act, and also the conduct of hearings, the determination of the issues, the determination of the proper relief, and the implementation of that relief. The entire investigation and hearing scheme is adjudicatory in nature, and precisely like the investigation and hearing process that the Civil Service Commission is charged with for classified employees facing dismissal, demotion and suspension.

3. Applying the Administrative Adjudication Law.

Finally, the Administrative Adjudication Law, 5 GCA §§9100, et seq., is applicable to this question. The Protection of Public Employees Act relies on and refers to 4 GCA §4105 in defining Personnel Board to include the Civil Service Commission. Pursuant to §4105 (e), the adoption of rules by the Civil Service Commission in the conduct of hearings is subject to the Administrative Adjudication Law.

In addition, the Administrative Adjudication Law states unequivocally, at §9200, that:

“the procedure of any agency shall be conducted pursuant to the provisions of this Chapter in any proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after an agency hearing.”

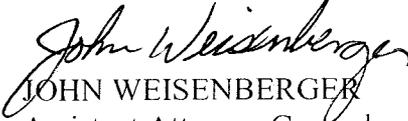
There can be no question that hearings conducted by the Civil Services Commission and hearings conducted under the Protection of Public Employees Act are hearings conducted pursuant to the Administrative Adjudication Law. The Administrative Adjudication Law defines adjudication. An administrative adjudication means “that administrative investigation, hearing and determination by any agency of issues or cases applicable to particular parties.” (Emphasis added.) 5 GCA §9108.

It can be assumed, therefore, that the legislative intent to remove all non-adjudicatory functions from the Civil Services Commission means that all adjudicatory functions were intended to remain. Those functions include investigation, hearing and determination of matters.

4. Conclusion.

Public Law 28-68 does not transfer the investigation of complaints under the Protection of Public Employees Act from the Civil Service Commission to the Department of Administration. The investigative function required by the Protection of Public Employees Act is a fundamental part of the adjudication responsibilities that remain with the Civil Service

Commission. The investigation of these two complaints by the Civil Service Commission should proceed immediately so that the intent and purpose of the Protection of Public Employees Act is fulfilled on behalf of the employees involved.


JOHN WEISENBERGER
Assistant Attorney General



GOVERNMENT OF GUAM



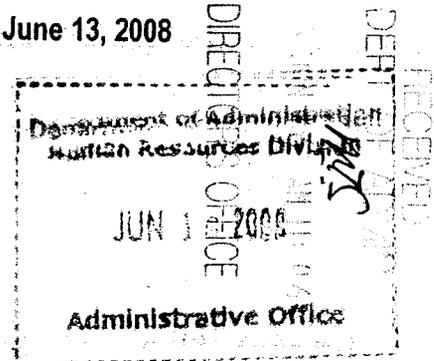
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CSC NO. 2008-070

June 13, 2008

MEMORANDUM

TO: Lourdes Perez,
Director of Administration
FROM: Executive Director
SUBJECT: PUBLIC EMPLOYEE PROTECTION STATUTE



Hafa Adai! I have enclosed two complaints made to the Civil Service Commission alleging retaliation by employers for disclosures made by the complainants. The Public Employee Protection statute (also known as Whistleblower), codified at 4GCA Section 4501, allows complaints to be made where there is a belief that retaliation has resulted from disclosure or reporting of fraud, waste, abuse, mismanagement, etc.. The act requires a preliminary review (investigation) to determine if there is a reasonable basis for such a complaint. However, I believe the Civil Service Commission may not conduct such an investigation based on recent law changes.

As a result of Public Law 28-68, all non-adjudicatory functions of the CSC were transferred to the Director of the Department of Administration. The initial review and investigation stage involved in a Public Employee Protection complaint is non-adjudicative and should be addressed by your agency. In the event you find there is a reasonable basis for the complaint, the transgressor may have the option for a hearing on the matter. Should either of these two cases reach this stage, the CSC may then exercise jurisdiction and adjudicate the matter.

The complainants referred to above are: 1) Fred Moser, GPSS and 2) Juanita Quintanilla, Department of Chamorro Affairs. I have informed the Board of Commissioners of the transfer of these cases to your agency for initial processing.

If you need any assistance or information regarding these matters do not hesitate to call. Si Yu'us Ma'ase!

Senseramente,

[Signature]
VERNON P. PEREZ

cc: Chairman, CSC Board
Mr. Fred Moser
Ms. Juanita Quintanilla
File