

John Weisenberger
Attorney General



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OFFICE OF THE ATTORNEY GENERAL

July 13, 2010

LEGAL MEMORANDUM

Ref: AG 10-0647

TO: Director, Department of Administration

FROM: Chief Deputy Attorney General 

RE: **Designation & Employment Status of John Weisenberger, Attorney General**

This office recently received an inquiry from the Department of Administration as to the proper employment status of Assistant Attorney General John Weisenberger, a classified merit system employee recently appointed by the Governor to fill the remainder of the unexpired term of Attorney General Alicia G. Limtiaco. The question in part asks whether Mr. Weisenberger must resign his classified position in order to accept the appointment. Discussed within, he does not.

There have only been two elected attorneys general since the Organic Act was amended by Congress and local law was amended by the Legislature. The nomination by the President and confirmation by the United States Senate of Guam Attorney General Alicia G. Limtiaco to the Office of United States Attorney for the District of Guam and the Northern Mariana Islands created a vacancy in the elected office which has since been filled by appointment of the Governor on June 18, 2010. On June 21, 2010, Assistant Attorney General Mr. John Weisenberger, a classified employee within the Office of Attorney General, was sworn into office to fill the vacancy left in Attorney General Limtiaco's unexpired term. This is the first opportunity to consider what happens when an appointment is made to fill a vacancy in the Office of Attorney General that occurs six months prior to the expiration of the elected official's term.

Two questions have been asked: First, what is Mr. Weisenberger's correct title? Is he the "acting" Attorney General, or simply "the" Attorney General? Second, what is the nature of Mr. Weisenberger's employment status as a classified employee appointed from within the ranks of the Office of Attorney General? Mr. Weisenberger is not the *acting* Attorney General; he *is* the Attorney General. And Mr. Weisenberger's status as a classified employee has not changed merely because he has answered the call to fill a temporary vacancy pending the election of a new attorney general.

Background

Guam's Organic Act, 48 U.S.C. § 1421g(d)(1), provides, "The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." Previously an appointed position that serves at the pleasure of the Governor, the Organic Act was amended by Congress in 1998 to authorize the Guam Legislature to provide that the attorney general may be elected.

Instead of an appointed Attorney General, the legislature may, by law, provide for the election of the Attorney General of Guam by the qualified voters of Guam in general elections after 1998 in which the Governor of Guam is elected. The term of an elected Attorney General shall be 4 years. The Attorney General may be removed by the people of Guam according to the procedures specified in section 9BA of this Act or may be removed for cause in accordance with procedures established by the legislature in law. *A vacancy in the office of an elected Attorney General shall be filled—*

(A) by appointment by the Governor of Guam if such vacancy occurs less than 6 months before a general election for the Office of Attorney General of Guam; or

(B) by a special election held no sooner than 3 months after such vacancy occurs and no later than 6 months before a general election for Attorney General of Guam, and by appointment by the Governor of Guam pending a special election under this subparagraph.

48 U.S.C. § 1421g(d)(2) (emphasis added).

As authorized by Congress, the Guam Legislature changed the Office of Attorney General from an appointed to an elected office. *See* Public Law 25-44 (June 9, 1999), amended by P.L. 29-19:VI:52 (Sept. 29, 2007), codified at 5 GCA § 30101(a) ("The Office of the Attorney General of the government of Guam *shall* be administered by the Attorney General of Guam, who *shall* be elected by the people of Guam for a term of four (4) years."). The Organic Act contemplated that until such time as the Guam Legislature did change the law, the attorney general was to be appointed by the Governor with the advice and consent of the legislature. *See* 48 U.S.C. § 1421g(d)(1) ("At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.").

The Legislature having accepted Congress' invitation to establish the Office of Attorney General as an elected office, the reference to filling vacancies by appointment of the governor with advice and consent of the legislature contained in § 1421g(d)(1) no longer controls. Now, § 1421g(d)(2) controls, and it is important to note the significance of the fact that the advice and consent of the legislature is not required in order to fill a vacancy in the Office of Attorney General, for that fact determines the appointed attorney general's designation.

When the Guam Legislature changed the law to provide for an elected attorney general, local law with respect to filling of vacancies in the office was amended to mirror the Organic Act, and the legislature's advice and consent is no longer required in order to fill a vacancy.

As provided in the Organic Act of Guam, a vacancy in the position of Attorney General shall be filled:

(1) by appointment by *I Maga'lahren Guåhan* [the Governor] if such vacancy occurs less than six (6) months before a General Election for the Office of the Attorney General of Guam; or

(2) by a special election held no sooner than three (3) months after such vacancy occurs, and no later than six (6) months before a general election for Attorney General of Guam, and by appointment by *I Maga'lahren Guåhan* [the Governor] pending a special election under this Subparagraph.

5 GCA § 30101(c).

Question One: What is Mr. Weisenberger's Designation?

In Guam law, the term "acting" is in fact a term of art, and is a reference to appointed positions requiring the consent of, or confirmation, by the Legislature. *See e.g.*, 4 GCA § 2103 ("Any office to which appointment requires legislative consent which becomes vacant shall remain vacant until the Legislature consents to the appointment; provided, however, that the confirmation of an *Acting* appointee shall automatically include approval of retroactive pay to the date of his acting appointment.") (emphasis added). The term "acting" can also informally refer to someone filling in for the Attorney General temporarily, while he or she is off-island or otherwise indisposed, or holding over past the term of an appointment. Although serving in a temporary or interim capacity to fill a vacancy, Mr. Weisenberger is not the "acting" Attorney General; he is *the* Attorney General.

Title 4 GCA § 2103.4 defines "*appointed position*" as "any position which is filled by appointment by the Governor." An appointment to fill a vacancy in the Office of Attorney General as provided by 5 GCA § 30101(c) easily meets the definition of "appointed position" 4 GCA § 2103.4. That, however, does not answer whether the term "acting" is applicable. Title 4 GCA § 2103.4(k) provides in part: "*Acting appointment* – the filling of a position by a person who has not been appointed to fill the position on a permanent basis, or, in the case of positions requiring the advice and consent of *I Liheslatura*, the situation where a person is filling the position in an acting capacity whose nomination to fill the position permanently has been received by *I Liheslatura*, but has not been confirmed to the position by *I Liheslatura*." And 4 GCA § 2103.4 (l) provides: "*Acting capacity* – the serving of a person in a position in an acting capacity or pursuant to an acting appointment."

While it may be tempting to suggest that the filling of a vacancy for less than six months by appointment of the Governor meets the definition of “*acting* appointment,” it would not be entirely accurate, because an appointment to fill the vacancy described in 5 GCA § 30101(c) is not “the filling of a position by a person who has not been appointed to fill the position on a permanent basis.” This is because the Governor does not appoint the Attorney General to “permanent” office, the attorney general does not serve at the pleasure of the governor, and the consent of the Legislature is not required, as was true prior to the amendments to Guam’s Organic Act. This is further illustrated by 4 GCA § 2103.9(a), which provides for time limits on *acting* capacity appointments requiring legislative approval:

I Maga’lahen Guåhan [the Governor] or appointing authority may, by separate appointment, appoint a person in an acting capacity to fill a salaried position which requires the advice and consent of *I Liheslaturan Guåhan* [Guam Legislature]. No person may serve in such an acting capacity for a period in excess of ninety (90) days, provided, that no acting director who is not otherwise a classified employee of the government of Guam may serve in the capacity of acting director without the transmittal of such person’s name to *I Liheslaturan Guåhan* for the purpose of confirmation within fifteen (15) days of their appointment as acting director.

See also, 4 GCA § 2103.12 (No person who shall be appointed to a position which requires advice and consent of *I Liheslatura* may serve in an acting capacity as head or director of a department, agency or instrumentality for a period in excess of ninety (90) days.”). The obvious intent of these statutes is to ensure that the governor does not bypass the requirement for the Legislature’s advice and consent by a succession of *acting* appointments.

Because the Legislature’s consent is not required nor even contemplated with respect to the Office of Attorney General, an appointment to fill the vacancy of an unexpired term of that office is also not an “acting appointment” within the meaning of 4 GCA § 2103 (“Any office to which appointment requires legislative consent which becomes vacant shall remain vacant until the Legislature consents to the appointment; provided, however, that the confirmation of an *Acting appointee* shall automatically include approval of retroactive pay to the date of his acting appointment.”). The term “acting” is a term of art throughout the Guam Code that uniformly contemplates confirmation by the consent or approval of, or rejection by, the Legislature.

Mr. Weisenberger has not been temporarily assigned or detailed to the position either, for the governor’s appointment to fill a vacancy in this particular elected office is not a “temporary assignment” within the meaning of 4 GCA § 4117 (“No employee shall be temporarily assigned or detailed to a position nor shall the employee assume the duties and responsibilities of a position other than the one to which he has been appointed for a period in excess of ninety (90) days unless the appointing authority obtains an exemption upon written application to the Director of Administration, which exemption shall not extend beyond an additional ninety (90) days.”). Rather, as provided 4 GCA § 2102 (“Whenever a vacancy occurs in any office the term of which is fixed by law, such vacancy shall be filled as provided by law for the balance of the unexpired term thereof.”), this is simply an *appointment* to fill a vacancy in an office the term of

which is fixed by law, and the filling of which is expressly provided for by law, *see* 5 GCA § 30101(c). In order to maintain uniformity of definition and understanding throughout the Guam Code, the term “acting” should be reserved as the specific term of art intended by the Legislature. The proper designation for Mr. Weisenberger therefore is not “acting Attorney General,” but simply “Attorney General.”

Question Two: What is the Employment Status of a Classified Employee Appointed to Fill the Vacancy in an Unexpired Term?

Assistant Attorney General John Weisenberger, appointed to fill the vacancy of the unexpired term of elective office of former Attorney General Alicia G. Limtiaco is currently serving as a classified employee within the merit system. His job classification is Attorney IV, and he presently earns in excess of the statutory salary of the elected attorney general as provided by 5 GCA § 30116(a) (“The Attorney General shall be compensated in twenty-six (26) equal installments for an annual salary based on ninety percent (90%) of the annual compensation of a judge of the Superior Court of Guam.”). The question is how his appointment to fill this particular vacancy affects his present salary and employment rights under the merit system. In this particular case, it does not.

There is no statute directly applicable to this situation, nor does there appear to be any precedent from any court either on Guam or in any other similarly situated jurisdiction applicable to the fact pattern presented here. However, the Government of Guam Department of Administration Personnel Rules and Regulation do provide a simple answer that is logically consistent with the preceding analysis. Chapter 6 of the Rules, § 6.009, provides in part:

Compensation Following Appointment in an Acting Capacity

An employee who is appointed by a cognizant authority to serve temporarily in an acting capacity as head or deputy or deputy head of a department or agency, *or to other non-classified appointments*, shall be compensated during the period of such services by a payment differential to be added to his base rate of pay, measured by the difference in amount between the step in the pay grade he holds and the salary paid the Director or deputy head’s position for that department *or other non-classified positions*, provided that ... [p]ositions that do not require the advice and consent of the Legislature, shall not be less than 30 days and not to exceed one year. Payment differential shall be deferred until the employee has served 30 calendar days in an acting capacity.

(Emphasis added.) “In the absence of an administrative interpretation of the regulation at issue, courts should ‘proceed to interpret the regulation in accordance with applicable rules of statutory construction,’ looking to ‘a variety of extrinsic aids’ if ‘the agency’s intent cannot be discerned directly from the language of the regulation.’” *O’Connor v. Starbucks Corp.*, 2008 WL 2761586 (N.D. Cal. 2008) (quoting *Manriquez v. Gourley*, 105 Cal.App.4th 1227, 130 Cal.Rptr.2d 209, 215 (Cal. App.2003)); accord *Paul v. Department of Transp., State of Hawai’i*, 115 Hawai’i 416,

168 P.3d 546 (Hawai'i 2007) (“[i]n construing an administrative rule, general rules of statutory construction are applicable”) (citations omitted).

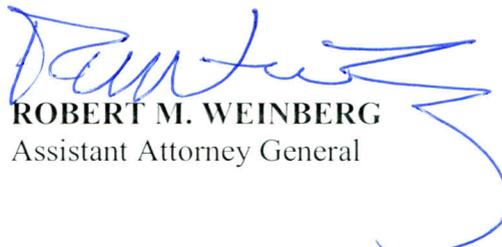
Here, there is no ambiguity, and the placement of the term “acting capacity” in the title of the Rule 6.009 does not restrict its meaning because “[t]itle or chapter headings are unofficial and do not alter the explicit scope, meaning, or intent of a statute.” *DaFonte v. Up-Right, Inc.*, 2 Cal.4th 593, 602, 828 P.2d 140, 145 (Cal. 1992); accord, *County of San Diego v. Alcoholic Beverage Control Appeals Bd.*, 184 Cal.App.4th 396, 403, 109 Cal.Rptr.3d 59, 63 (2010) (quoting *Wasatch Property Management v. Degrate*, 35 Cal.4th 1111, 1119, 29 Cal.Rptr.3d 262, 112 P.3d 647 (2005)). For reasons discussed earlier, it is technically inaccurate to describe Mr. Weisenberger’s appointment as serving in an “acting capacity” because that term contemplates eventual presentment to and confirmation or rejection by the Guam Legislature. Mr. Weisenberger is therefore not serving in an “acting capacity.” Mr. Weisenberger does, however, come within category of “other non-classified appointments.”

As mandated by the Organic Act, 4 GCA § 4102 provides, “All offices and employment in the Government of Guam, [with exceptions for employment as academic personnel of the Guam Community College and the University of Guam], shall be divided into classified and unclassified services....” Section 4102(a) then proceeds to list 17 categories of unclassified service within the government of Guam, including “elective officials.” 4 GCA § 4102(a)(1). Section 4102(b) states that the “classified service shall include all other positions in the government of Guam.” Obviously, Mr. Weisenberger is not serving in the office of Attorney General as an “elective official,” because he was not elected to the office. And he does not fit within any other category contained in § 4102(a); nor does he fall within the category, “all offices and employment in the Executive Branch whose appointment are required to be confirmed by the Guam Legislature,” 4 GCA § 4102(a)(9), because his appointment does not require the Legislature’s consent. Because Mr. Weisenberger is not holding office within any of the specifically enumerated categories provided in § 4102, his appointment therefore must fall within the category of “other non-classified appointments” provided for in § 6.009 of the Department of Administration’s Personnel Rules and Regulations.

Applying the pay differential analysis described in § 6.009 to a classified employee who accepts a temporary appointment to fill the unexpired term of an elected official or “other non-classified appointment,” Mr. Weisenberger would be entitled to a pay differential “to be added to his base rate of pay, measured by the difference in amount between the step in the pay grade he holds and the salary paid,” but only if the salary for attorney general was higher than what he is presently earning. There is however no provision in the law, by statute or rule, authorizing a downward pay differential in the event the salary of the appointment to the elective office is less than what the classified employee presently earns. Nor does it require much imagination to appreciate that when the Department of Administration’s Personnel Rules and Regulations were promulgated and submitted to the Legislature by Executive Order 96-24, it was not intended that a classified employee’s acceptance of a temporary call to higher public service would be accompanied by and conditioned upon accepting a downward differential in pay.

Conclusion

For the foregoing reasons, it should be unnecessary to document any change in employment status at the Department of Personnel, because as a matter of law, there is none. Mr. Weisenberger should continue to receive his salary and benefits as a classified employee during the term of his appointment; and his correct title is simply "Attorney General," not "acting Attorney General."



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