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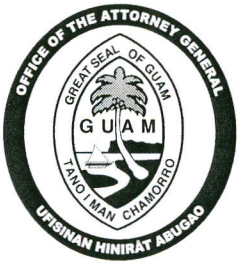

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OFFICE OF THE ATTORNEY GENERAL

December 23, 2010

HAND DELIVER

LEGAL MEMORANDUM **Ref. No.** CSC 10-1120

To: Executive Director, Civil Service Commission

From: Attorney General J.W.

Subject: **Request for Opinion on Public Law 30-196 and Governor's Executive Orders 2010-24 and 25 Re: Hay Study Recommendations**

Background

On January 3, 2008, the Legislature voted to override the Governor's veto and enacted Public Law 29-52, Section 13, which appropriated funds to hire an expert to conduct a study on updating the government's Unified Pay Scale. The Hay Group Consultants were subsequently hired to conduct the study. On September 1, 2010, Public Law 30-196, Chapter VI, Section 7, (The Government of Guam Competitive Wage Act of 2011) was signed into law. This law authorizes the Governor and the Department of Administration to implement salary adjustments as recommended by the Hay Group Consultants study (hereinafter referred to as the "Hay Study".) As part of the same law, the Legislature appropriated $13.1 Million for implementation of the Hay Study. Public Law 30-196 specifically provides that the Hay Study recommendations shall be effective only upon formal adoption by the Governor of a plan consistent with the study.

On September 23, 2010, the Governor signed Executive Order 2010-24 adopting the Hay Study and instructing the Department of Administration to implement it "upon an additional legislative appropriation of $5.5 Million and availability of funding." On October 29, 2010, the Governor signed Executive Order 2010- 25, amending the prior executive order and instructing the Department of Administration to implement the Hay Study effective October 1, 2010.

The Hay Study recommends six pay plans: one general pay plan and specialty pay plans for nurses, law enforcement officers, directors, teachers and attorneys. However, the Guam Legislature has failed to explicitly repeal statutes establishing the pay plan in effect prior to the enactment of Public Law 30-196. See e.g., 4 GCA Section 6201 (compensation schedule), 4 GCA Section 6302 (Administration), 4 GCA Section 6303 (Creation of Positions), 4 GCA Section 6208 (Government Attorney Salaries). These statutes establish a different pay plan than the Hay Study.

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You have asked the Attorney General a series of questions regarding the validity of the Governor's Executive Orders and whether the Hay Study is in effect.

ISSSUE 1: The Hay Group is recommending six (6) pay plans: one General Pay Plan and five specialty pay plans for nurses, law enforcement officers, directors, teachers and attorneys.

(a) Which compensation schedule should be used when implementing the Government of Guam Competitive Wage Act authorized by PL 30-196?
(b) Should the six pay plans recommended by the Hay Group be used or should the Unified Pay Plan in 4 GCA Section 6201 and the Attorney Pay Plan in 4 GCA Section 6208 be used?

ANSWER:

The six pay plans recommended by the Hay Group should be used. The Unified Pay Plan in 4 GCA Section 6201 and the Attorney Pay Plan in 4 GCA Section 6208 have been repealed by implication. While repeals by implication are disfavored, such repeal may be found when a later statute covers the whole situation of an earlier one and is clearly intended as a substitute. *Topasna v. Superior Court,* 1996 Guam 5, ¶ 13. The two statutory schemes cannot be reconciled. In deciding which statute to give effect, it is a well-settled rule that later statutes repeal by implication earlier irreconcilable statutes. *People v. Quinata*, 1982 WL 30546 (D. Guam A.D.)

Here the General Pay Plan and the Attorney Pay plan within the Hay Study are clearly intended as substitutes for 4 GCA Section 6201 and 4 GCA Section 6208 and cannot be read together to form one statutory scheme.

ISSUE 2: It appears there are new job positions created by the Hay Group.
Are the recommended job creations by the Hay Group to be implemented or does 4 GCA Section 6303 still have force and effect in that Section 6303 requires that job positions being created shall be posted on the agency's website, filed with the Legislature secretary thereafter and cannot be filled until 30 days thereafter?

ANSWER:

4 GCA Section 6303 sets forth a procedure for creating new positions within the government. However, the Hay Study did not create new positions. It created new pay scales which include some reclassifications of existing positions based upon job duties. As such, compliance with the procedures set forth in 4 GCA Section 6303 is not a prerequisite to adoption of the Hay Study pay scales.

However, 4 GCA Section 6303 is still in effect as it has not been repealed or amended. To the extent the executive or judicial branch may create new positions in the future, the procedures set forth in 4 GCA Section 6303 would still apply.

ISSUE 3: It is apparent the Hay Group's recommended six (6) pay plans were to be accompanied with implementation Rules and Regulations along with legislative amendments to the current statute to transition the Hay's recommendation. These rules and regulations and legislative amendments are currently before the Legislature in the form of Bill 469-30 and have not been enacted into law.

(a) Can the Governor and the Director of Administration implement the Government of Guam Competitive Wage Act, as authorized by PL 30-196 (Chapter VI, Miscellaneous Appropriations, Section 7) using the Hay Group's recommended six (6) pay plans or are they confined by law to stay within the existing codified Compensation Schedule of 4 GCA Sections 6201 and 6208 (for attorneys).

Answer: The Governor and the Director of the Department of Administration must use the Hay Groups' recommended pay plans. (See answers to Issues 1 and 5).

ISSUE 4: Public Law 29-52, Executive Order 2006-21 and Public Law 30-196, direct the Department of Administration to conduct a <u>compensation</u> review to update the Unified Pay Plan. In the DOA Personnel Rules and Regulations and in practice, "compensation" and "classification" are two distinct subjects, albeit, they go hand in hand. Classification involves the assignment of pay grades for job positions based upon the related duties, responsibilities and qualifications for each job position.

(a) Did the Department of Administration exceed their authority when they included a classification review as opposed to merely doing a compensation review?

Answer: No. Classification and compensation are intertwined concepts in a merit system such as Guam's. Public Law 29-52, Section 13, appropriated funds to hire an expert in both "compensation and classification" to update the Unified Pay Scale. Similarly, Executive Order 2006-21 ordered the Department of Administration to hire a private firm to conduct a "*comprehensive* compensation review to update the Unified Pay Schedule." Emphasis added. It further required the director of the department to notify all employees and agencies that "they may be required to complete a position description (PD) and be interviewed". Clearly, more was contemplated by the Legislative and Executive branches than a mere review of the existing salary amounts within the existing pay scale.

If there was any doubt as to the authority of the Department of Administration to conduct such a study, such doubt was eliminated when the Legislature in Public Law 30-196 ratified the department's actions by appropriating money to implement the Hay Study.

ISSUE 5: Executive Order 2010-25 directs the implementation of the Hay Study recommended salary increases for classified employees and further adopts the implementation of Rules and Regulations accompanying Bill 469-30 which is currently before the Legislature.

(a) Can Personnel rules and regulations be adopted for application and use within the government of Guam via executive order or is the adoption of such rules subject to the Administrative Adjudication Law found at 5 GCA Section 9100 et seq.?
(b) Can Executive Order 2010-25 amend statutes?
(c) Are Executive Orders 2010-24 and 25 in direct conflict with existing laws?

The Organic Act expressly provides the Governor with authority to issue executive orders, stating that: "[The Governor] shall have the power to issue executive orders and regulations not in conflict with any applicable law." 48 U.S.C. § 1422. Through Executive Orders 2010-24 and 25, the Governor has instructed the Department of Administration to implement the Hay Study. Such executive orders have the force of law. *In Re Request Of Governor Felix P. Camacho,* 2004 Guam 10, para. 58. Both of these executive orders provide that "[t]hese policies and procedures shall supersede existing pay policies, rules, regulations and procedures that are inconsistent, notwithstanding any other provisions of law."

An executive order is invalid if it usurps legislative authority by acting contrary to the express or implied will of the Legislature. *Communication Workers of America v. Christie*, 994 A.2d 545 (N.J. 2010). Executive orders are not subject to the procedures set forth under the Administrative Adjudication Law. See e.g., *Maryland v. Maryland State Family Child Care Assn.*, 966 A.2d 939 (M.D. 2009). As such, Executive Orders 2010-24 and 25 are valid insofar as they are consistent with existing statutes.

Public Law 30-196 authorized the Governor to implement the Hay Study via executive order and appropriated $13.1 million to partially fund it. The Legislature provided that implementation of the Hay Study would be effective "only upon formal adoption by I Maga'lahi of a Plan consistent with the Hay Group, Inc. and consistent with this act." Public Law 30-196 does not require the adoption of Rules and Regulations pursuant to the Administrative Adjudication Law in order to become effective. The Governor is only required to adopt a "plan". Executive Orders 2010-24 and 25 adopt such a "plan" and are consistent with Public Law 30-196.

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