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## OFFICE OF THE ATTORNEY GENERAL

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April 2, 2012

### LEGAL MEMORANDUM

AG No. LEG 11-1218

TO: Honorable Vicente (ben) Cabrera Pangelinan  
Senator, 31<sup>st</sup> Guam Legislature

FROM: Attorney General 

SUBJECT: Re: Frozen Salary Step Increases for Government Employees

Dear Senator Pangelinan:

We are in receipt of your letter of December 27, 2011 requesting our legal opinion on the obligation of the government to pay “reinstated” step increases that have been frozen under Executive Order 2011-14. The question is posed whether a freeze just defers the increments or removes the obligation. You also requested a legal opinion on related matter covering the 14% pay raise for teachers on teachers in the compensation plan adopted by the Guam Legislature.<sup>1</sup>

### FACTS

On October 12, 2011 the *I Maga'lahaen Guåhan para pa'go*, the Acting of Governor of Guam,<sup>2</sup> signed and promulgated Executive Order No. 2011-14, entitled Relative to Freezing Salary Step Increases for All Government of Guam Executive Branch Employees:

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<sup>1</sup> We will respond to this on a separate memorandum.

<sup>2</sup> Section 48 U.S.C. § 1422b(a) provides that in the absence of the Governor the Lieutenant Governor has the authority of the Governor. Our investigation has determined that on October 12, 2011 the Governor was in San Francisco on official business related to the rating of bonds issued by the Government of Guam. Thus, in issuing the executive order the Lieutenant Governor had whatever power the Governor had.

Effective Monday, October 10, 2011 salary step increases for all classified employees and raises for unclassified employees of the Executive Branch shall be frozen and remain in effect until further rescinded.

The preamble of the Order recites an anticipated fiscal year 2011 deficit, defaults in timely vendor payments, retirement contributions, income tax refunds, and grossly underfunded critical services, but no technical data or findings of the Bureau of Budget and Management Research (BBMR) is provided or incorporated into the order. It should be noted that Executive Order 2011-14 does not state that its intent is to remove the obligation to pay at a later time the increments that would arise during the period of suspension nor the authority by which the Governor may do so.

Salary step increases are regular scheduled increases to the base salary that is awarded to public employees whose job performance is rated satisfactory. They are awarded in accordance with Section 6220 of Title 4, Guam Code Annotated. Before each fiscal year each agency computes the total anticipated increment obligation and includes it in its budget request to the Legislature. Total increments become part of the appropriation for regular salaries of the employees of each agency. On September 20, 2011 the budget act for the Government of Guam, fiscal year 2012, became effective. Guam Pub. L. No. 31-77. Among the items for which public funds were appropriated were the regular salaries of the classified employees of the executive branch agencies. Therefore, Public Law 31-77 appropriated funds for payment of the increments that were ordered withheld by Executive Order 2011-14.

The Governor stated that he would have vetoed Public Law 31-77 but signed it “in order avert a government shutdown.” His chief criticism was that the overstatement of anticipated revenues that would result in inadequate revenues to pay total obligations. He stated that he would “use [his] executive powers to align expenditures with revenues by holding the line on spending.”

In the past both the Governor and the Guam Legislature have frozen pay increments. The only prior gubernatorial increment freeze that we have discovered is Executive Order 75-20, dated April 24, 1975. This executive order denied a step increase to employees of DPW, Highway Division. Guam Public Law No. 13-148:VI:1 (June 25, 1976) restored it. The Governor vetoed this section.

The legislative increment freezes that we have found begin with Guam Public Law No. 23-14:6(e) (May 13, 1995), as amended by Guam Pub. L. No. 23-45 (Oct. 18, 1995). It imposed a non-retroactive freeze from October 1, 1995 to September 30, 1997. It further provided that “[e]ffective October 1, 1997, all salary increments will resume in full force and effect, with no retroactive payment for the period of this freeze.”

Beginning with the budget act for fiscal year 2002, in 2001 the Guam Legislature imposed a three-year moratorium on increments:

Pub. L. No.	Section	Description	Freeze Duration
26-035	Chapter IV, § 4(a)	FY 2002 Budget Act	Oct. 1, 2001 to Sept 30, 2002
26-152	Chapter IV, § 4(a)	FY 2003 Budget Act	Oct. 1, 2002 to Sept. 30, 2003
27-029	Chapter V, § 1(a)	FY 2004 Budget Act	Oct. 1, 2003 to Sept. 30, 2004

The language used in these four public laws is uniform: there shall be “a freeze on all salary increments” during a stated period. Unlike Public Law Nos. 23-14 and 23-45, there is nothing in the text, either expressly or by implication, indicating legislative intent respecting the legal consequences of reinstating increments.

In September 2004, the 27<sup>th</sup> Guam Legislature passed Guam Public Law No. 27-106, the Appropriation Act for fiscal year 2005. Eligible employees of the government were entitled to a single salary increment on October 2004 and multiple salary increments on May 2005. First, “a one-step salary increment shall be uniformly restored to all eligible employees ...” Pub. L. No. 27-106:VI:1(a). Second, “... unexpended lapses [of appropriated funds for the executive branch from the 2004 fiscal year and prior fiscal years] shall be expended as necessary for the payment of the uniform restoration of *all* salary increments due to all Executive Branch government of Guam employees funded by the General Fund pursuant to Subsection (a).” Pub. L. No. 27-106:1(c) (emphasis added). The Department of Administration (DOA) interpreted the three public laws placing the moratorium and the latter two subsections of P.L. 27-106 to mean that increments did not accrue to executive branch employees during the moratorium but P.L. 27-106:VI:1(a) & (b) retroactively restored them, in two phases. Dep’t of Admin. Circ. Nos. 05-001 & 05-016 (Oct. 18, 2004 & June 8, 2005, respectively). Regarding retroactivity of payment, DOA Circular 05-016 expressly stated the rule for those who had increment dates during the moratorium: “[a]ll salary adjustments are prospective and not retroactive from the date of promotion,” but in fact DOA applied the same non-retroactivity rule respecting payment to all eligible employees.

### QUESTION PRESENTED

If and when the Governor of Guam by Executive Order rescinds Executive Order 2011-14, will the government be legally obligated to pay salary step increases that were withheld during the freeze on salaries?

### SHORT ANSWER

Under the Organic Act and laws of Guam, the Governor of Guam has the statutory authority to withhold payment of salary step increments that arise during the effective period of his order but he has neither independent nor delegated authority to remove the obligation to pay them.

### SELECTED RELEVANT STATUTES AND REGULATIONS

Every classified employee in Pay Grades A through V shall be entitled to one step salary increment for satisfactory performance. Employees at Steps 1 through 6 shall be entitled to an increment after twelve (12) months of satisfactory performance.

Employees at Steps 7 through 9 shall be entitled to an increment after eighteen (18) months of satisfactory performance. Employees at Step 10 shall be entitled to an increment equivalent to 3.5% of an employee's based salary after twenty-four (24) months of satisfactory performance; the Director of Administration shall prepare an increment schedule consisting of at least Steps 11 to 20 to implement the 3.5% increment policy.

4 G.C.A. § 6202.

[The Governor] shall have to power to issue executive orders and regulations not in conflict with any applicable law. ... The Lieutenant Governor shall have such executive powers and perform such duties as may be assigned to him by the Governor or prescribed by this chapter or under the laws of Guam.

48 U.S.C. § 1422.

Salary increment increases shall be granted as authorized by law. Pers. R. 6.301(A). Every classified employee shall be entitled to a one step salary increment for satisfying performance, except as otherwise provided by statute. *Id.* 10.008. Freezes on salary increments do not change increment anniversary dates. *Id.* 6.301(C). Employees who are entitled to an increment increase are entitled to receive it according to a schedule based upon the step at which they have if performance is evaluated as satisfactory. *Id.* 6.302.

(c) The Bureau of Budget and Management Research shall:

...

*(3) Modify or withhold the planned expenditures at any time during the appropriation period if the Bureau of Budget and Management Research finds that such expenditures are greater than those necessary to execute the programs at the level authorized by I Maga'lahi (the Governor) and I Liheslatura (the Legislature), or that the receipts and surpluses will be insufficient to meet the authorized expenditure levels, provided that no planned expenditures necessary to provide every public school student an adequate public education shall be modified or withheld.* The Director of the Bureau of Budget and Management Research, in collaboration with the Director of Revenue and Taxation and the Director of Administration, shall determine revenue tracking for every fiscal year based on the actual collections of every preceding month, and prepare monthly Comparative Revenue and Expenditure Analysis Reports that compare the budgeted and actual revenues and departmental program appropriations with expenditures and encumbrances. If revenues are tracking below projected revenues for the year, the Bureau of Budget and Management Research shall adjust

and sequester an amount of the remaining allotments equal to the percentage of revenues that are below the fiscal year's projected revenues. The Director of the Bureau of Budget and Management Research, the Director of Administration, and the Director of Revenue and Taxation shall certify said reports, which shall be transmitted to *I Maga'lahañ Guåhan* and the Speaker of *I Liheslaturan Guåhan* no later than twenty (20) days after the end of each month.

5 G.C.A. § 4109(c)(3).

### LEGAL ANALYSIS

It is well settled that a Legislature may change the terms of compensation for public employees at any time, such as suspending pay increments or repealing the law granting them: there is no contractual right to a particular compensation plan. The Organic Act is silent respecting the power of the Governor to change the laws that govern the compensation of government employees. If he has such a power, then it is an implied executive power or one that the Legislature has delegated to him

An understanding of the law that determines the answer to the question should begin with the intent of the executive order and the meaning of the phrase “to freeze ... salary step increases.” The act of freezing is “to cause to be fixed and unable to increase” *Black’s Law Dictionary* 691 (9th ed.) What is it that is intended to be fixed and unable to increase? In the absence of the executive order the Department of Administration, in accordance with Section 6202, would have increased the salary of each government employee on pre-determined dates if his or her job performance was rated satisfactory. Therefore, it is the salary of each public employee that is the subject of the freeze. The Governor’s intent and the end in mind is to keep salaries constant and the means is a directive to the Department of Administration to withhold payment of the increases mandated by Section 6202. The result is that until the rescission of the order all salaries will remain constant and shall not increase. Although the thing that is frozen is total payroll, the term “freeze” will hereafter be used to mean an order to withhold payment of salary step increases.

In our view the Governor of Guam has authority to withhold the payment of step increments but he has no authority to remove the obligation to pay them. In a nutshell, the argument for this conclusion is that entitlement to pay increments for satisfactory job performance was the law when Executive Order 2012-14 was promulgated and has been the law for more than sixty years. See Guam Gov’t Code § 4103–4104 (1952). The Governor must faithfully execute the laws, 48 U.S.C. § 1423d, and he may not issue an executive order that is in conflict with a statute, *id.* § 1422.

The Guam Legislature has delegated its authority to the Governor to freeze salaries in the sense that he may order the withholding of increases for a period of time. Under Section 4109 of Title 5 the Director of the Bureau of Budget and Management Research may “withhold ... planned expenditures at any time during the appropriations period ... if receipts ... will be insufficient to meet authorized expenditure levels....” 5 G.C.A. § 4109(c)(3). (Expenditures that are necessary to provide adequate public education are the only

exception.) This provision is part of the laws governing program budgeting and financial management, found at 5 G.C.A. §§ 4101–4121. (In context of the present question, the “authorized expenditure level” appears to be the total authorized expenditures for the executive branch.)

Several preliminary questions are raised by Executive Order 2011-14 read in relation to Section 4109: (1) Does the power of the BBMR Director belong to the Governor?; (2) Before the issuance of the executive order did BBMR make the necessary finding in accordance with Section 4109(c)(3)?; (3) If so, was Executive Order 2011-14 based upon the findings of BBMR?; and (4) does the withholding of a planned expenditure remove a pre-existing obligation to expend money? First, since the BBMR Director is appointed by the Governor and is within the Office of the Governor, we will presume that the Governor in his own office may implement the delegated power. Second, we will presume that BBMR made such a finding or could retroactively make such a finding. There is abundant evidence in the public record and executive materials regarding the shortfalls in revenue. Third, although the executive order did not recite any BBMR finding for support, we will assume that it need not do so if BBMR did or could make the finding and the executive recites such a financial fact, as Executive Order 2011-14 did.

Of course, the fourth question is the question for which you seek legal guidance. The expenditure of money by the executive branch is either optional or a requirement of the law. For example, under Section 4109 the Governor could withhold expenditures for an authorized capital improvement project before any contractual obligation has arisen. But the payment to employees for services rendered is not optional but rather a requirement of the law in effect at the time of the service. The decision to withhold payment of a legal obligation does not remove the obligation; it can only defer payment to a later time unless the obligee waives it, the passage of time bars his power to enforce it, or other reasons. We have found no Guam court that has interpreted or applied Section 4109, but have found five other jurisdictions that have adopted the same statute. From those five jurisdictions only one reported case has been found, *McBean v. Gov't of the State*, 1995 V.I. Lexis 21 (Terr. Ct. St. T. and St. J. 1995), which was an action by public employees of the Virgin Islands challenging the decision of the Governor of the Virgin Islands to rollback pay raises for which monies had been appropriated in an appropriation bill entitled Act 6035. While upholding the rollback based upon the Governor's finding that receipts could not meet authorized expenditures for the fiscal year, the court noted with approval that “[the Governor and the Government of the Virgin Islands] have acknowledged that the Act 6035 salary increases remain an outstanding debt of the Government to its employees and that they will be paid once funds become available.” *Id.* at \*19.

The power to control the departments of the executive branch does not extend to suspending the compensation laws and annulling statutory obligations to pay. The Guam Supreme Court held in *dicta* that this power includes the power of expenditure. *In re Request of Governor Carl T. C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1, ¶ 38. The court noted with approval a statement from *Opinion of the Justices*, 376 N.E.2d 1217, 1221 (Mass. 1978) to the effect that spending is essentially an executive function that necessarily includes the authority to use discretion in applying its available resources in achieving the purposes and objectives of the law. *Id.* at ¶ 39. In the *Opinion of*

*the Justices* the court held that the Governor had the authority by way of impoundment to expend less than appropriated amounts. Thus, *In re Request of Governor Gutierrez* is not authority for a power to suspend the compensation laws.

The only other remaining power that we see is the power and duty to refuse payment of a claim for which no appropriation exists. For example, in *Sherwin v. Camacho*, CV 222-10 (Super. Ct. Guam Apr. 22, 2010), the Superior Court denied a petition for a writ compelling the government to pay a 10% pay raise to law enforcement officers, but in that case there was no showing that an appropriation existed from which to pay it. Public funds may not be expended without legislative authorization and an appropriation from which to pay them. 5 G.C.A. § 7103. As noted, there was an appropriation for the pay increments that would arise in fiscal year 2012.

Many state cases are in accord with our analysis of this question and none have been found upholding an executive power to suspend the compensation laws for public employees. Regarding municipal employees it has been held that if the compensation has been properly fixed by law, its recovery may be had irrespective of whether the legislative body of a municipality appropriates a sufficient, or insufficient sum, or nothing, to pay such salaries. *La. Lilley v. City of Shreveport*, 163 So. 722, 723 (La. App. 2d Cir. 1935); *Crowley v. City of Boston*, 173 N.E.2d 647, 649 (Mass. 1961); *Coleman v. Kansas City*, 173 S.W.2d 572, 574 (Mo. 1943); *McEvoy v. Mayor and Council of Borough of Cliffside Park*, 199 A.2d 397, 400 (N.J. Super. L. Div. 1964); *Flike v. Strobel*, 297 N.Y.S. 412, 413 (N.Y. App. Div. 4th Dept. 1937). Regarding state employees it was held that the Governor of Kentucky had no authority to suspend the state compensation laws granting pay increments to public employees. *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006). It should be noted that the Organic Act of Guam is silent with respect to suspensions of laws except for the writ of habeas corpus. 48 U.S.C. § 1421b(l).<sup>2</sup>

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<sup>2</sup> The question whether the Legislature has the power to suspend compensation laws retroactively is a question that is not presented by your letter. We do not here suggest the answer, but will note that the Legislature has the power to suspend laws. The Guam Legislature did so retroactively in Public Law No. 27-106. Some state constitutions state expressly that *only* the Legislature may suspend or authorize the suspension of the execution of a law. In one case it was held that the Legislature may retroactively suspend statutes if that is their expressed intent. *Beshear v. Haydon Bridge Co.*, 304 S.W.3d 682 (Ky. 2010).

## CONCLUSION

For the foregoing reasons, we conclude that there is no statutory, inherent, or implied executive power in the office of the Governor to freeze pay increments. The Governor may acquire such power only by legislative grant. Section 4109(c)(3) grants this power to the Director of BBMR and thus to the Governor. The Governor may freeze pay increments by executive order. However, the freeze does not remove the obligation, and unless the Legislature removes the obligation by law, frozen increments must be eventually paid, either from existing appropriations that may be lawfully drawn upon or by a new appropriation.

Buenas Yan Saluda!

### OFFICE OF THE ATTORNEY GENERAL

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By:   
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