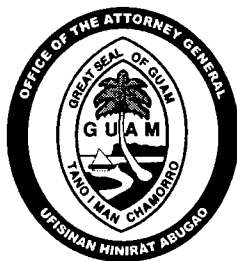


Leonardo M. Rapadas
Attorney General



Phillip J. Tydingco
Chief Deputy Attorney General


OFFICE OF THE ATTORNEY GENERAL

July 26, 2013

LEGAL MEMORANDUM

Ref: DPHSS13-0580

TO: Chair, Guam Board of Allied Health Examiners

FROM: Attorney General 

RE: Qualifications of Persons Licensed to Practice Clinical Psychology Prior to the Effective Date of Public Law 24-329

The Guam Board of Allied Health Examiners (GBAHE) has received complaints from Joel Joseph, D.V.M., alleging that Mamie (Pang) Campbell Balajadia, Ed.D., is not qualified to be licensed as a clinical psychologist on Guam, and the acting chair of the GBAHE has requested an opinion addressing the legal questions presented by Dr. Joseph's complaints. Dr. Joseph challenges Dr. Balajadia's competence to practice clinical psychology on the sole ground that she does not have a doctorate in clinical psychology, but rather has a doctorate in education.¹

This Office has reviewed Dr. Balajadia's application file and the law and relevant rules and regulations in effect at the time of her application for licensure and since, and for the reasons that follow has determined that Dr. Joseph's complaints are without merit.²

¹ Guam law provides in pertinent part as follows: "(a) Any person shall be permitted to report to the Board in writing information he or she has reason to believe indicates an allied health licensee is, or may be, professionally incompetent, guilty of unprofessional conduct or mentally or physically unable to engage safely in the practice of an allied health profession. *** (f) The Board shall promptly acknowledge all reports received under this Section. Persons or entities reporting under this Section shall also be promptly informed of the Board's final disposition of the matter reported." 10 GCA § 12822.

² Dr. Balajadia has in the past been a member of the GBAHE when it heard disciplinary complaints brought against Dr. Joseph. She has recently voluntarily recused from pending matters involving Dr. Joseph. This opinion does not address whether her recusal was necessary merely because Dr. Joseph has repeatedly challenged Dr. Balajadia's credentials to serve as a member of the Board. *See generally, Sule v. Guam Board of Dental Examiners*, 2008 Guam 20 ¶¶ 19-26 (actual bias, not appearance of impropriety standard applicable to judges and justices, governs question of disqualification of decision-makers in administrative adjudication proceedings).

DISCUSSION

Public Law 16-123 became law on December 29, 1982. Among other things, it defined the scope of practice for various “healing arts” professions, and established the Guam Commission on Licensure. Section 4(c) of P.L. 16-123 authorized the Commission on Licensure to “adopt regulations relative to the standards for licensure, application procedures, continuing education requirements of licenses for professions of the healing arts except for the practice of nursing, dentistry, optometry and pharmacy.” Section 7 of P.L. 16-123 provided, “The Board of Allied Health Examiners shall examine applicants for licensure in fields not having separate Boards of Examiners.” Pursuant to its authority to adopt regulations, the Commission on Licensure approved rules and regulations for the Guam Board of Allied Health Examiners which became effective on October 15, 1984.

Chapter IV, Section 4 of the Guam Board of Allied Health Examiners’ Rules and Regulations governing the licensing of clinical psychologists that were in effect at the time of Dr. Balajadia’s application for licensure as a clinical psychologist provided in pertinent part:

Chapter IV - Clinical Psychology

Section 4. Present Practitioners in Clinical Psychology.

The Board recognizes that there are individuals who have been practicing for [sic] clinical psychology on Guam. These individuals may be recommended to practice clinical psychology, if they meet the following conditions:

(A) They have a doctor’s degree from an accredited school in the U.S. in a program that is primarily psychological in content and have completed a doctoral dissertation that is also psychological in content and methodology;

(B) They have satisfactorily completed at least two years of clinical experience under the supervision of a doctoral level clinical psychologist or licensed psychiatrist and that the program can be demonstrated to be of high quality;

(C) They must have been in practice on Guam for at least one year prior to the promulgation of these regulations.³

In her July 2, 1985 application for licensure as a clinical psychologist Dr. Balajadia presented proof satisfactory to the GBAHE of a doctorate in education with a concentration in

³ According to a memorandum opinion dated March 26, 1986 from the Office of the Attorney General to the chairman of the GBAHE discussing proposed amendments to this section of GBAHE’s rules and regulations, “this one year period is measured back from the effective date of the original regulations, October 15, 1984.” Mem. Op. Ref: PHSS 86-0280.

mental health administration from Western Michigan University. Her doctoral dissertation was on the *Leadership Behavior of Community Mental Health Centers' Program Supervisors in Michigan as Perceived by Program Supervisors, and Immediate Subordinates*.

Also at the time of her application Dr. Balajadia had been a practicing clinical psychologist on Guam for at least 6 1/2 years: from July 1972 to August 1973 and from August 1974 to August 1977 as a clinical psychologist employed by the Guam Community Mental Health Center, Guam Memorial Hospital Authority; as Chief Clinical Psychologist from April to September 1981 and from June to December 1982 at GCMHC, GMH, and from October 1983 through the date of her application under the Department of Mental Health and Substance Abuse. In the year immediately preceding her application, Dr. Balajadia also provided psychological services on a private basis, as well as maintained clinical privileges at GMHA.

Dr. Balajadia presented letters of reference attesting to her qualifications and experience as a practicing clinical psychologist from George Kallingal, Ph.D., Clinical Psychologist at the Department of Mental Health and Substance Abuse; K.M. Chen, M.D., Neurologist and Council Member of the Department of Mental Health and Substance Abuse; and David L.G. Shimizu, Ed.D., the Director of the Department of Mental Health and Substance Abuse and a member of the Guam Commission on Licensure.

In his letter of reference recommending Dr. Balajadia for licensure, Dr. Kallingal wrote, "I have worked with Dr. Balajadia for about a year as a colleague and approximately three years under her administrative supervision. During this period, I have had many opportunities to observe her clinical skills and administrative abilities. She has excellent skills, both as a clinician and as a mental health administrator. Guam stands to benefit by licensing her as a clinical psychologist and therefore I am strongly recommending her for licensure." Dr. Chen wrote, "Mrs. Balajadia has rich experiences in clinical psychology. She is conscientious, reliable and responsible in her work, and respected by her colleagues. I recommend her to be licensed to practice clinical psychology without reservation." And Dr. Shimizu, the Director of DMHSA, wrote, "Since October 1983, Dr. Balajadia has function[ed] as the Clinical Administrator of the Department. In addition to her administrative role, she also functions as a clinical psychologist. I am very familiar with Dr. Balajadia's professional work. I have no hesitation but high regards for her as a clinician and integrity as a professional woman. Therefore, I cannot help but only to recommend her highly for licensure."

On July 24, 1985, upon the recommendation of the GBAHE, the Commission on Licensure issued Mamie Campbell Balajadia a license to practice clinical psychology on Guam, License No. CP-3.⁴ In the opinion of the Board of Allied Health Examiners and the Commission on Licensure, Dr. Balajadia possessed all the qualifications necessary for licensure under Guam law and the relevant rules and regulations of the GBHAE at the time that she was issued a license to practice clinical psychology. Her qualifications have never been questioned by the Commission on Licensure or the Board of Allied Health Examiners.

⁴ The license mistakenly refers to Dr. Balajadia as a "Ph.D." However, her application clearly reflects that her degree is a doctorate in education.

On January 4, 1999, nearly thirteen and a half years after Dr. Balajadia was issued a license to practice clinical psychology, Public Law 24-329, *An Act relative to providing for a Guam Allied Health Practice Act by adding a new articles 8 through 21 to Chapter 12, Division 1, all of title 10 of the Guam Code Annotated, and to cite the act as the Guam Allied Health Practice Act of 1998*, was signed into law. The provisions of P.L. 24-329 pertaining to the practice of clinical psychology are codified at Title 10, Chapter 12, Article 12, of the Guam Code Annotated and now provide that an applicant to practice as a clinical psychologist must have a doctorate in clinical psychology from an accredited college or university of the U.S. See, 10 GCA § 121202(a). The next question then is whether the amendments to the qualifications for licensure as a clinical psychologist contained in P.L. 24-329 which now require a doctorate in clinical psychology apply retroactively to persons already licensed to practice under P.L. 16-123. The answer is no.

Unless made retroactive expressly or by necessary implication it is presumed that laws are not intended to be applied retroactively. See, 1 GCA § 702 (“No part of this Code is retroactive, unless expressly so declared.”). “There is a presumption against the retroactive application of statutes. The ‘presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.’ *Jenkins v. Montallana*, 2007 Guam 12 ¶ 12 (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 316 (2001)). “As a rule, a statute is presumed to have only prospective effect unless it is made expressly retroactive or is retroactive by ‘necessary implication.’ ” *In re Request of Twenty-Fourth Guam Legislature for Declaratory Judgment*, 1997 Guam 15 ¶ 15 (citing 1 GCA § 702; quoting *Nelson v. Ada*, 878 F.2d 277, 280 (9th Cir. 1989)).

In *Jenkins v. Montallana*, 2007 Guam 12 ¶ 13, the Guam Supreme Court cited with approval the following from a decision by the United States Supreme Court.

Statutes are disfavored as retroactive when their application would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed. The modern law thus follows Justice Story’s definition of a retroactive statute, as taking away or impairing vested rights acquired under existing laws, or creating a new obligation, imposing a new duty, or attaching a new disability, in respect to transactions or considerations already past. Accordingly, it has become a rule of general application that “a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.

This Court has worked out a sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute’s enactment. We first look to whether Congress has expressly prescribed the statute’s proper reach, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying our normal rules of construction. If that effort fails, we ask whether applying the statute to the

person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the absence of a clear indication from Congress that it intended such a result.

Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37-38 (2006) (quotations and citations omitted).

There is no evidence that the Legislature intended P.L. 24-329 to apply retroactively to clinical psychologists already licensed under P.L. 16-123 and the rules and regulations promulgated pursuant thereto. In view of the analysis adopted with approval by the Guam Supreme Court the provisions of P.L. 24-329 amending the educational qualifications for licensure as a clinical psychologist to require a specific doctorate degree in clinical psychology applies prospectively only, to applicants for licensure who apply *after* the effective date of the act, not to already licensed practitioners who seek to renew a license previously conferred.


The determination that the provisions of P.L. 24-329 requiring a doctorate in clinical psychology do not apply retroactively to persons already in possession of a license conferred under the authority of P.L. 16-123 is consistent with the holdings of numerous courts recognizing that the right to practice one's chosen profession *once conferred* by the state is a valuable right protected by the Constitution. *See, e.g., Colorado Soc. of Community and Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 713 (Colo. 1987) (citing cases); *Abramson v. Gonzalez*, 949 F.2d 1567, 1580 (11th Cir. 1992) ("a state may not use newly-enacted stricter standards for entry into a profession to deny those already legally practicing the profession of their right to continue practicing thereafter") (citations omitted); *Taylor v. Hayes*, 131 Ill.App.2d 305, 311, 264 N.E.2d 814, 818 (Ill. App. 1970) ("When a profession is regulated for the first time, it may be assumed that those who have followed this profession in the community for a period of years have the qualifications for their work. In the instant case the right of the plaintiff to pursue his profession was fixed during the pre-regulatory period and any subsequent legislation affecting his profession must be reasonable as it affects his special situation."); *id.* ("We note that our holding only affects plaintiff's particular situation. All those who have entered the psychologist field since the enactment of the Act have been put on notice of the educational requirements for registration as psychologist and they would be in no position to challenge the Act on the grounds asserted by the plaintiff herein."); *accord, Miller v. Department of Professional Regulation*, 276 Ill.App.3d 133, 141-42, 658 N.E.2d 523, 529 (Ill. App. 1995); *see esp., Berger v. Board of Psychologist Examiners*, 521 F.2d 1056, 1061 (D.C. Cir. 1975) ("Possession of a graduate degree in psychology does not signify the absorption of a corpus of knowledge as does a medical, engineering, or law degree; rather it is simply a convenient line for legislatures to draw, on the brave assumption that whatever is taught in the varied graduate curricula of university psychology departments must make one a competent psychologist, or at least competent enough to be allowed to take a licensing examination. While it may not be irrational to assume that this academic background should in the future be a prerequisite to the practice of psychology, it is of questionable rationality to insist that current practitioners, who may have studied and practiced at a time when graduate courses in psychology were even less meaningful, are conclusively incapable of meeting today's new standards because they did not

take those courses. Supporting this view are several decisions by the United States Supreme Court upholding state licensing statutes which presumed competence on the part of professionals who had practical experience but no degree.”) (footnotes omitted); *id.*, 521 F.2d 1063 (“Here the irrebuttable presumption of professional incompetence absent a graduate degree is not invalid with respect to future psychologists, but only with respect to current practitioners who have no meaningful grandfather rights.”) (footnote omitted); *Donahue v. District of Columbia Bd. of Psychology*, 562 A.2d 116, 121-22 (D.C. 1989) (“To the extent [petitioner] relies on the grandfather provisions of prior licensing laws in the District of Columbia, her reliance is misplaced since those provisions protected only persons who had been lawfully engaged in the District of Columbia in the practice of the profession before the statutory requirements were changed.”) (footnote omitted); *Fink v. Board of Examiners of Psychologists*, 693 A.2d 321, 325 (Del.Super. 1996) (“In this light, it is apparent that the Board did not apply the new requirements retroactively in Appellant’s case. This certainly is not a situation where Appellant had a license and the Board revoked it because of after-enacted requirements.”) (citations and footnote omitted); *Pierce v. Alabama Bd. of Optometry*, 835 F.Supp. 593, 600 (M.D. Ala. 1993) (“The state of Alabama rationally decided to phase in its new requirements for licensing of optometrists by applying them to only new applicants for licenses. Indeed, it has been held that where a state upgrades a professional license requirement, due process may *require* a grandfather provision.”) (quotation marks omitted) (citing *Nordgren v. Hafter*, 789 F.2d 334, 339 (5th Cir. 1986) (emphasis in original)).

CONCLUSION

In view of the foregoing the conclusion is inescapable that the provisions of P.L. 24-329 now codified at 10 GCA § 121202(a) requiring applicants for licensure as clinical psychologists to hold a doctorate in clinical psychology do not apply retroactively to persons already licensed to practice clinical psychology pursuant to P.L. 16-123 and the rules and regulations promulgated thereunder. Mamie Campbell Balajadia, who was determined by the Guam Board of Allied Health Examiners and the Commission on Licensure to be fully qualified to practice clinical psychology on Guam pursuant to P.L. 16-123 on July 24, 1985, remains qualified today.

OFFICE OF THE ATTORNEY GENERAL
Leonardo M. Rapadas, Attorney General


ROBERT M. WEINBERG
Assistant Attorney General