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MEMORANDUM (Opinion)

To: Chairman, Civil Service Commission

From: Attorney General

Subject: Whether Reorganization of the Merit System Conforms to Organic Act

You have requested an Opinion as to whether the recent reorganization of the Merit System by Public Law 28-68, §§31-45, (and the most recent amendments passed by the Legislature on March 22, 2006) conform to the requirements of the Organic Act. The Organic Act provides:

> The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system. The Government of Guam may by law establish a Civil Service Commission to administer the merit system. Members of the Commission may be removed as provided by the laws of Guam.

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48 U.S.A. §1422 (a)

While future courts may find specific acts of the civil service reorganization inorganic under specific circumstances, as a general matter, a facial challenge without specific facts cannot be made. Recently, the United States Supreme Court dealt with facial challenges (to partial birth abortions) as follows:

> It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States v. Raines*, 362 U.S. 17, 21 (1960) (internal quotation marks omitted). For this reason "[a]s-applied challenges are the basic building blocks of

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> constitutional adjudication." Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000). Gonzales v. Carhart, 127 S. Ct. 1610, 1639, Kennedy, J (2007).

The Court explained that the latitude given facial challenges in the First Amendment context is not applicable to other types of cases. *Id.* The question presented here does not implicate the First Amendment. Therefore, we are of the opinion that the reorganization of the merit system by Public Law 28-68 and later legislation is not subject to a challenge by merely asserting that the reorganization statutes, on their face, violate the Organic Act. Any Organic Act attack must await a challenge based on specific facts in a particular case brought before the court or brought to the attention of this office. As for now, we cannot say that the reorganization violates the Organic Act.

The Organic Act mandates a merit system, but allows discretion in the administration of the system. The mandatory provision of the Organic Act provides: "The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system." (underline added).

A merit system has been defined as follows:

> Merit system. The practice of hiring and promoting employees, esp. government employees, based on their competence rather than political favoritism. Cf. SPOILS SYSTEM

Blacks Law Dictionary, 8th Ed. 2004.

Another definition provides:

> Constitutions and statutes frequently provide for, or set up, civil service systems under which appointments to offices, positions, and employments are required to be made according to merit and fitness, to be ascertained, at least as far as practicable, through competitive examination.

CJS, Public Officers & Employees, §63. (Westlaw online).

In requiring a merit system, the Organic Act does not give any details about the type of merit system or how the system is to operate. The Organic Act has not defined "system" in any particular way. It has been left to the Legislature to lay out the particulars of the system. This conclusion is supported by the Guam Supreme Court ruling in *A.B. Won Pat Guam International Airport Authority v. Moylan*, 2005 Guam 05, ¶ 62 (holding that the Organic Act phrase "chief legal officer" is subject to increase, alteration or abridgment by the legislature). Likewise, the Legislature may define the operation and administration of the merit system. This Legislative authority is emphasized by the Organic Act mandate that the "legislature," not the courts or the Governor, "shall establish a merit system".

After providing that the Legislature must establish a merit system, the Organic Act allows discretion in the administration of the system. The discretionary provision states: "The Government of Guam may by law establish a Civil Service Commission to administer the merit system." (underline added). Hence, the Organic Act is permissive as to the structure the Legislature chooses when it establishes a merit system.

Guam's old civil service system was based upon the federal system in place at the time. In the 1970's, President Carter and Congress determined that the old federal system had failed the federal government. Consequently, a new federal system was created. The Guam Legislature has adopted the same pattern as the modern federal model. There is a federal merit System protection Board which handles employee appeals from appealable personnel actions. The creation of positions and employment functions is vested in the various federal offices of personnel management. On Guam, we have done a similar thing. Most appeals still remain with the Civil Service Commission, which, according to Guam law, is independent and does not serve at the pleasure of the Governor. The Department of Administration has certain specified authority regarding personnel matters and some autonomous agencies have authority to handle their own personnel matters.

Although the Guam Legislature has made changes in the administration of the merit system, the standards for employment and promotion are continued and according to the Legislature, improved. The changes in the administrators will not follow the legally mandated merit system standards.

The Guam Supreme Court has ruled on a similar situation in which the Petitioner urged an interpretation of law based on the idea that the Governor would be unreasonable or would work to frustrate the law. The Supreme Court said:

> We note the Petitioners' argument that an interpretation of Section 2101(a) which allows the Governor to reject or accept a political party's recommendations could invite a political standoff, wherein the Governor continually rejects each name submitted to him until he exhausts the pool of potential candidates. We reject such an argument and instead choose to presume good faith. See *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 1799, 138 L.Ed.2d 97 (1997) ("Ordinarily, we presume that public officials have 'properly discharged their official duties.' ") (citation omitted); see also *Reiter v. Ill. Nat'l Cas. Co.*, 397 I11. 141, 73 N.E.2d 412, 417 (I11. 1947) ("The rule is well settled that public officials in the performance of their official acts are presumed to act in good faith and with honest motives."). It is the Governor's duty to exercise his discretion in a sound and reasonable manner and not arbitrarily refuse to appoint to the GEC otherwise qualified people.

Sablan v. Gutierrez, 2002 Guam 13 ¶12. Hence, the courts will not presume that employment in the government will revert to the "spoils system" despite laws to the contrary, simply because agencies themselves, rather than the Civil Service Commission, will hear employee appeals.

We also believe that there is no violation of *Haeuser v. Govt. of Guam*, 97 F.3d 1132 (1996). In *Haeuser*, the Ninth Circuit reviewed a statute affecting the substantive classification of a group of employees (attorneys). The Court found that there was insufficient evidence to establish that it is impracticable to hire the employees under the merit system. This ruling has nothing to say about the structure of the system. The *Haeuser* case may be relevant to a future case with specific facts, but is of no assistance in a general Organic Act challenge to the merit system.

Based on the foregoing, we find no reasons to opine that P.L. 28-68:31-45 and its subsequent amendments are, on their face, contrary to the Organic Act. We are, therefore, of the opinion that reorganization of the civil service system is a valid exercise of legislative power.

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