

2/21/07



Charles H. Troutman
Deputy Attorney General/
Consumer Counsel

3.19.07

REC'D	Alicia C. Limtiaco
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Office of the Attorney General

February 21, 2007

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MEMORANDUM (Opinion)

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Office of the Compiler of Laws

To: Governor Felix P. Camacho
Members, Guam Board of Medical Examiners

By: *L. Roberto*

Date: *3-19-07*

Time: _____

From: Attorney General *AG*

OFFICE OF THE GOVERNOR
19 MAR 2007
DATE <i>10:52am</i>
LEGAL OFFICE

Subject: Authority of the Governor to Remove Board Members without Cause

You have requested our opinion as to whether the Governor has the power to remove a member of the Board of Medical Examiners. We believe that the Governor has such power.

All of the relevant United States Supreme Court cases, from *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926) to the present, relate the matter of removal to the Constitution, the specific law involved and to the nature of the person's office whose removal is sought. This Opinion will do likewise.

The Organic Act has several provisions on removal. The first, which was taken from the U.S. Constitution, is the phrase "He shall be responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam." Unlike the Constitution, the Organic Act has provided additional terms regarding appointment and removal not shared by the Constitution and omits a very important clause, the "Appointments Clause" which is contained in the Constitution. Guam cases have made much of these differences. See *People v. Camacho, et al.*, 1 Guam Rep. 501 (1976); Guam Supreme Court; Finally, the Organic Act has provided for special provisions concerning public health. *Territorial Prosecutor v. Superior Court*, 1983 WL 30224 (1983) (D.Guam. App.Div.), citing to *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980).

With this as background, we now examine the local law governing the Board of Medical Examiners (GBME). First, we note that, unlike the boards and commissions that are meant to be somewhat independent, the boards of examiners in the health arena are placed within the Department of Public and Health & Social Services (DPH&SS). Indeed, In the case of the Civil Service Commission (CSC), the law is clear:

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The Governor may remove members of the Civil Service Commission but only for conviction of a crime constituting a felony or a misdemeanor involving moral turpitude, willful misconduct in office, willful and persistent failure to perform the duties of office, or any conduct which is prejudicial to the administration of the merit system of the government of Guam. Nothing in this Section shall require the reappointment of any member. A person sought to be removed may challenge the decision by an action for declaratory judgment in the Superior Court.
4 GCA §440(e).

This limitation on the power of removal required an amendment to the Organic Act, as did similar limitations on the removal of the Public Auditor and Public Prosecutor (of which there is none now). (The CSC is a separate agency, also provided by law). In contrast, the health examiners system is set up within the Department of Public Health, and by law may be made a Division under that agency and its Director, who is appointed to serve at the pleasure of the Governor. The law establishing the Commission provides:

The Department of Public Health and Social Services shall be the Department responsible for the implementation of this Act and may establish the Division of Commission of the Healing Arts and Licensure for the purpose of this Act. The Director of the Department of Public Health and Social Services shall provide such office space, staff, supplies, equipment, vehicle and assistants as may be necessary for the work of the Commission for each of the examining boards, including statutorily created boards and the execution and enforcement of this Chapter. The Attorney General shall provide legal services to the Commission and the Boards of Examiners without a fee.

12 GCA §12104.

This description of the position of the Commission and its various Boards is that they are an integral part of an executive department and, it practical, maybe made into a Division of that Department. From this organization, it appears that the Legislature intended to blind these functions into the overall Public Health functions of the Government and, therefore, under 48 U.S.C.A. §1421g(a), the Legislature may not curtail the basic powers of the Governor. See *Bordallo v. Baldwin*. This conclusion is buttressed by the very language of the law creating the Board of Medical Examiners. 10 GCA §12203(f) states:

- (f) A member of the Board should be subject to removal when he or she:
1. ceases to be qualified;
 2. is found guilty of a felony or an unlawful act involving moral turpitude by a court of competent jurisdiction;
 3. is found guilty of malfeasance, misfeasance or nonfeasance in relation to his or her Board duties by a court of competent jurisdiction;
 4. is found mentally incompetent by a court of competent jurisdiction;
 5. fails to attend three (3) successive Board meetings without just cause as determined by the Board; or
 6. is found in violation of the Physicians Practice Act.

The term, "should" is not defined in general Guam law. Both "may" and "shall" are defined in 1 GCA Chapter 7, the former to mean a permissive act and the latter to mean a mandatory act. The term "should" is rare in a statute. One place where "should" is found is in those federal laws describing the



protocols used and the proper respect for the United States flag on non-federal property. There, the term "should" is used to describe the behavior described. Of that term, the courts have held that

. . . Further, § 1759c) provides that 'no other flag * * * should be placed above' the American flag. Again, a strange choice of language if the codification is intended to mandate behavior and not merely to influence it.

Delaware v. Hodson, 265 F.Supp. 308 D.C.Del. 1967.

Other cases have held similarly and none exists where "should" is read as mandatory.

Since the Organic Act gives the power of removal to the Governor unless otherwise stated in local or federal law, we are of the opinion that no such limitation has been otherwise stated. For these above reasons, namely, that the Organic Act and local law place the GBME within the executive powers of the Governor, that the term "should" is not read as mandatory, and that the GBME is or could be an integral part of the Department of Public Health & Social Services, it is our opinion that the Governor has the power to remove a member of the GBME for the causes stated in the law or for any other reason the Governor thinks proper. Any change in this situation needs to be done by law, not just with respect to the GBME, but with respect to the entire health examiners system now under the DPH&SS.

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