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May 4, 2007

Hon. Judith P. Guthertz, DPA
Senator
29th Guam Legislature
155 Hesler Street
Hagatna, Guam 96910

Ref: LEG 07-0168

Dear Senator Guthertz:

Thank you for your inquiry. You asked whether it is against the law or unethical for any judge, justice, elected or appointed official to teach an academic course or workshop at the University of Guam (UOG) or at the Guam Community College (GCC). While the Chief Justice of the Supreme Court, the Ethics Committee and the Special Court established by the Supreme Court have jurisdiction over the subject of judicial ethics, we will give you our observations on the Executive Branch.

With respect to judges and justices, we see no ethical violations. The Code of Judicial Conduct, adopted by the Supreme Court by Order 06-0002, in Canon 4.B, explicitly encourages teaching as a method of enlightening the public as to the nature of our rule of law.

B. Avocational Activities. A judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law.

Guam law, however, puts limits on the type of employment the judge or justice may take within the Government of Guam but those limits are quite clear and they are not any more restrictive than the Judicial Code.

4 GCA §6504.1(b) provides:

(b) Effective upon confirmation, no official who occupies a position requiring the consent of I Liheslatura, [the Legislature] may be paid salary for or fill a classified position. Certifying officers shall not certify funds for the classified position in contravention of this Section and shall be liable under 4 GCA Chapter 14

Thus, paid teaching at the University of Guam or teaching in any forum is an ethically appropriate activity for a judge or justice so long as it is not a paid classified position.

The situation of elected officials and other employees is more complicated because members of the Legislature are covered by rules established in the Organic Act.

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The Organic Act distinguishes Senators from all other officers and employees of the Government of Guam. Specifically, the Organic Act provides: "No member of the Legislature shall, during the term for which he was elected or during the year following the expiration of such term, be appointed to any office which has been created, or the salary or emoluments of which have been increased during such term." Organic Act §1423e. Conversely, the implication of this section is that if an office was not created or its salary or emoluments increased during the proscribed period, then a Senator is free to occupy the office subject of course to the other laws of Guam. The laws of Guam do provide additional restrictions on the employment of Senators as well as other officers and employees of the Government of Guam.

Officers and employees may not hold more than one position in the Government of Guam unless it is one designated in 4 GCA §6504.1(a). The designated positions include teaching at the University of Guam, Guam Community College or Guam Public School System. 4 GCA §6504.1(a)(1).¹

Although Section 6504.1(a), is subject to the Organic Act, the Organic Act only restricts the employment activities of Senators. It does not state any restrictions on the activities of other elected officials. Hence, the Legislature is free to expand or restrict employment opportunities for officers and employees as it sees fit. As to Senators, however, the question arises whether a teacher at the University of Guam or the Guam Community College is occupying an office within the meaning of the Organic Act. The Organic Act's prohibition on duo office holding is not unique. So, while there is no Guam authority to guide us, the question has been addressed by the courts of the United States. A key element in deciding whether a position is a mere employment or it rises to the dignity of an office is whether the duties of the position are transient, occasional, or incidental. *People ex rel. Funnell v. Wilmont*, 217 N.Y.S. 477, 479 (N.Y. Supp. 1926); *People v. Rosales*, 27 Cal. Rptr. 3d 897, 901 (Cal. App. 2 Dist, 2006); *State v. Cole*, 148 P. 551, 553 (Nev. 1915). In contrast, an office was described by one state court as follows: "The most important characteristic of an office is that it involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. Second, an office is created by the constitution or authorized by statute. Third, the duties of an office are prescribed by the constitution or by statute or necessarily in here in and pertain to the office itself." (cities and internal quotes omitted). *Larson v. State*, 564 P. 2d 365, 370 (Alaska 1977). Consequently, the only teaching positions which Legislators are permitted to

¹ 4 GCA § 6504.1, in pertinent part, provides:

(a) No Officer or employee of the Government of Guam may be employed on a full-time, part-time or contractual basis or hold an appointment to more than one (1) position in the classified or unclassified service in any department or agency or by more than one department, agency or branch of the Government of Guam at any time except for:

(1) Persons serving as part-time teachers, part-time school health counselors and University of Guam instructors, for the Guam Community College, and instructors for the University of Guam who may be employed during the summer and at any time not in conflict with their primary employment if they are employed elsewhere in the Government of Guam as their primary employer;

* * *

accept under current law are contract positions which are not protected by the tenure provisions of the University and the Community College. Therefore, they fall within the class of employments which are transient, occasional, or incidental and therefore are not "offices" within the meaning of the Organic Act. Hence, Senators may accept such positions. On the other hand, it would be a violation of 4 GCA §6504.1(a)(1) for a Senator to accept a full-time position as a teacher at the University or Community College. Therefore it is unnecessary to decide if such a position is an "office" within the meaning of the Organic Act.

As for attorneys who are conventionally described as "officers of the court," the Guam Rules of Professional Responsibility, Preamble, para. 6 gives the basic answer.

. . . As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Employment of attorneys as part time instructors pursuant to 4 GCA §6504 is consistent with these ethical responsibilities. 4 GCA §6504.1 (a)(5) exempts "attorneys engaging in the active practice of law, or part-time judges or part-time court referees" from the restrictions on holding multiple appointments.

All employees wishing to engage in any outside employment must secure the written approval of their department or agency head and the work must not interfere with their regular duty hours, not conflict with their obligations to the government and not bring the government into disrepute. 4 GCA §4105(d).

Finally, there is the concern of officers or employees obtaining another employment with the government through a procurement. Officers of the Government of Guam are in a sense its employees as well. Consequently, a person in the employment of the government is regulated by 5 GCA §5628. Under this statute, it is a breach of ethical standards for any employee to participate "directly or indirectly" in a procurement when the employee has a financial interest pertaining to the procurement. Direct or indirect participation includes "involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering advice, investigation, auditing or in any other financial capacity." 5 GCA §5601(d). The prohibition and the definition are both phrased very broadly so it is difficult to anticipate and advise an officer or employee of all of the ways in which their conduct might impinge on the law's prohibition. Obviously, more is prohibited than the formal preparation and presentation of documents and actual personal participation in the award of a contract. The greater authority and responsibility of an officer will require closer attention to their ethical responsibilities. The greater scope and variety of the officer's responsibilities creates more of a likelihood that they may face a conflict between their public duties and their financial interests. Any further analysis regarding a conflict of interest under 5 GCA § 5628 must await a specific factual situation.

Opinion – Outside Teaching

To: Sen. Judith P. Guthertz

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In conclusion, officers and employees may accept part-time or summer teaching positions if they had no involvement in the creation of the employment opportunity through any approval, disapproval or investigation related to the position; through any preparation of any part of a purchase order or through influencing the content of any specification or procurement standard related to the position; through rendering advise about the position, doing an audit related to the position or acting in any advisory capacity related to the position. A more precise analysis must wait on very specific facts regarding a particular question.

We will be quite happy to discuss these matters with you.

Sincerely yours,



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DEPARTMENT OF EDUCATION

Hon. Judith T. Won Pat, Ed.D.
Senator
29th Guam Legislature
116 Chalan Santo Papa, Suite 102
Hagåtña, Guam 96910

Dear Senator Won Pat,

You have requested that our
within the Guam Public Scho
"teachers". To do this, we must
construction as applied to Guam by the U

OPM.

28-36 and determine whether administrators
d be given the same salary consideration as are
ic law involved and the principles of statutory
eme Court.

The title of Public Law 28-36 established "A Compensation Plan Review for Certificated Personnel . . . of the Department of Education". Section 1, *Legislative Findings and Intent*, describes the teacher shortage in Guam, teachers' low pay as compared to the national average, and the difficulty this causes in recruitment and retention of teachers. A "teacher" is not defined in this section. Section 2, following the title of the law, directs a study to be made of the salaries of "Certificated Personnel and Healthcare Professionals". When the study is finished, the Commission is directed to implement the results of the study. Likewise, "certificated professionals" are not defined in Section 2 of the law.

The Superintendent has said that there are several types of teaching certificates. This law does not differentiate between types of certificates, nor among the actual positions occupied by those certificated personnel. This is similar to the procedure as it applies to government lawyers. It does not matter if the license is temporary or permanent, or general or limited, or to the assignment of an individual lawyer in question. So long as it authorizes the person to practice his profession, it is a valid license for all purposes.

The Guam Supreme Court has set the standard for statutory interpretation:

[23] We have long held that in cases of statutory construction, we start with the plain language of the statute. *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23, aff'd, 276 F.3d 539 (9th Cir.2002). Furthermore, our "task is to determine whether or not the statutory language is 'plain and unambiguous'" and our inquiry in this regard "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)).

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Fleet Services v. Dept. of Admin., Govt. of Guam, et al, 2006 Guam 6, 2006 WL 86071, Guam Supreme Court.

Section 2 of Public Law 28-36 describes only "certificated personnel and healthcare professionals" as the ones to benefit from the law. There is no indication in either the Legislative Findings and Intent or in the operative section that there is to be a subclassification of either "certificated personnel" (the possibly broader term) or of "teachers". People with teaching certificates are assigned to many positions within GPSS. The use of "teacher" caused much confusion in the selection of the Superintendent. There is no additional clarity here. Many years ago the Honorable Peter Siguenza, then of the Superior Court of Guam, ruled that statements of legislators after the adoption of a law are not admissible for determining legislative intent. Therefore, we must make our determination on the basis of the law before us.

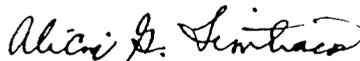
For these reasons, for as long as a person has a valid teaching certificate, that person should be paid as a certificated person.

Regarding your inquiry on possible ways to address any legal concerns, there are two suggestions. First, since the intent of the law was to alleviate the teacher shortage in general, it may be appropriate to amend the study to include all certificated personnel but modify those "administrative" positions whose incumbents are certificated personnel. This amendment would treat the pay continuum as one for all certificated personnel, adjusting administrators' pay as appropriate. This study might involve a change in those salaries which were alleged to have been raised twice, once under a prior law for administrators and now under Public Law 28-36. No change in the law would be required for this.

The second option is to change the law, being specific as to the positions covered by the raise, but also being careful to assure that you state the rational basis for differentiating between types of certificated personnel.

If you have any further questions, please feel free to contact Patrick Mason, Civil Litigation/Solicitors Division Deputy, or me.

Sincerely yours,



ALICIA G. LIMTIACO
Attorney General

cc: Governor
Superintendent of Education
Director of Administration

Prepared by: Charles H. Troutman