



Office of the Attorney General

September 10, 2008

OPINION

Ref: CSC 07-0776

TO: Executive Director, Civil Service Commission

FROM: Attorney General

SUBJECT: Salary of Government Employee Serving as Acting Director

We hereby respond to your request of August 29, 2007 for an opinion regarding the compensation that should be paid to a classified employee of the Government of Guam who serves as Acting Director of a government agency. Some employees' salaries are higher than the Director's, which leads you to enquire as to whether the Acting Director should be paid the salary appropriate for his usual classified position or the Director's salary. A review of the Guam statutes on public officers and public employment will answer this question.

Title 4 GCA §2103.4(k) and (l) define "Acting appointment" and "acting capacity."

- (k) *Acting appointment* – the filling by a person who has not been appointed to fill the position on a permanent basis, or, in the case of positions requiring the advice and consent of *I Liheslatura*, the situation where a person is filling the position in an acting capacity...but has not been confirmed to the position by *I Liheslatura*...
- (l) *Acting capacity* – the serving of a person in a position in an acting capacity or pursuant to an acting appointment.

Subsection (k) creates two kinds of acting appointments: one is the appointment of a person who fills an office until *I Maga'lahi* nominates someone else and the other is a permanent nomination where the nominee serves until he is legislatively confirmed. Title 4 GCA §2103 describes the process of gubernatorial nomination and legislative confirmation. A nominee, of course, does not have to be a government employee.

Title 4 GCA §2103.9(a) then mandates that no person can serve in an acting capacity for more than ninety days plus three legislative days in any twelve month period. However, he can be renominated to the same position. *Ibid*. Also, no one can serve in an acting capacity for more than twelve months. 4 GCA §2103.12. A classified employee who serves in an acting capacity may return to his classified position, presumably with no loss of benefits. *Ibid*. Title 4 GCA

§4118 repeats the one year time limitation imposed by Section 2103.12, expressly referring to employees of an agency who are elevated to the position of Acting Director.

The law deals explicitly with the situation of a classified employee who is permanently nominated for the position of Director. Such an employee receives his customary salary while serving as Acting Director until *I Liheslatura* votes on the nomination. 4 GCA §2103, §2103.1 and §2103.9(c). If *I Liheslatura* confirms his appointment, he receives the Director's salary retroactively to the date *I Maga'lahi* submitted his nomination. Ibid. However, if *I Liheslatura* rejects his appointment, he returns to his former position and salary. 4 GCA §4118.

The statutes regarding duration cited above seem to assume that a classified employee serving as Acting Director will temporarily receive the Director's salary. However, none of them specifically require this. As your request indicates, part of the answer to your question depends on the interpretation of 4 GCA §6206:

6206. Step to Step Upon Promotion. Classified employees in Grades A through V who are promoted competitively or by reclassification, or temporarily, to a higher Pay Grade shall receive a salary increase closest to a one (1) step increase in the pay grade held prior to promotion.

This statute refers only to the advancement of government employees through promotion or reclassification. Guam employment statutes do not expressly define "promotion", but the temporary appointment of a government employee to the position of "Acting Director" is not a promotion within the meaning of Section 6206, which refers only to promotion from one pay grade or classified position to another. It may appear to be a "promotion" if an employee is elevated to the directorship, even temporarily; but "promotion" is a term of art in Guam civil service law. We believe it means moving upwards within the classified service, not a political appointment. Therefore, there is no statutory authority for the payment of the Director's salary to a classified government employee who is named temporarily to the Director's position.

However, DOA Personnel Rule 6.009 provides:

An employee who is appointed by a cognizant authority to serve temporarily in an acting capacity as head or deputy head of a department or agency,...shall be compensated during the period of such services by a payment differential to be added to his base rate of pay, measured by the difference in amount between the step in the pay grade he holds and the salary paid the Director or deputy head's position...

This is adequate legal authority for payment of the Director's salary to an employee who is serving temporarily as Acting Director, but only if the employee is not nominated to take the Director's position on a permanent basis. DOA Personnel Rules are enacted by executive order and filed with *I Liheslatura* and are subject to the Administrative Adjudication Law. Since Rule

6.009 was enacted by executive order it cannot contradict a statute. In other words, Rule 6.009 cannot contradict 4 GCA §2103.1 and §2103.9 (c) because an administrative rule cannot contravene legislation. The Organic Act authorizes *I Maga'lahi* to enact executive orders, but subject to the laws of Guam. 48 U.S.C. §1422 and §1422(c). Therefore, Sections 2103 and 2103.12 govern employees who are nominated to a Directorship.

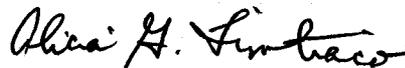
Furthermore, Rule 6.009 authorizes only the payment of a differential increase in compensation only if the employee's salary is less than the Director's and says nothing about a decrease in the employee's pay if his salary is more. Therefore, an employee with a higher salary will suffer no loss thereof while he serves as Acting Director. It should be noted that Rule 6.009 authorizes the payment of the Director's salary while the employee is serving as Acting Director—he need not wait until returning to his civil service position to receive his differential.

In summary, a classified employee who serves as Acting Director until *I Maga'lahi* nominates someone else pursuant to 4 GCA §2103 should, while serving, receive the Director's salary if his usual salary is lower than the Director's. On the other hand, such an employee should receive his usual salary if it is higher than the Director's.

However, in the other situation envisioned by 4 GCA §2105.4(k), if *I Maga'lahi* nominates a classified employee for Director pursuant to 4 GCA §2103, then that employee should receive his usual salary while serving as Acting Director until *I Liheslatura* votes on his confirmation. If confirmed, he should receive the Director's salary retroactively from the effective date of his nomination, as that date is specified by Section 2103. However, if *I Liheslatura* rejects the nomination, the employee will not receive the Director's salary. 4 GCA §2103.1 and §2103.9(c). However, he may return to his old position. 4 GCA §4118.

Please remember that the Acting Director's term and, hence, his authority to receive the higher salary is effective only within the time limits mandated by 4 GCA §2103.9, §2103.12 and §4118.

The employee described in your request, who served as Acting Director for more than thirty (30) days, should have received his usual salary of Pay Grade "Q" Step 17 during the time he so served.



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