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## OFFICE OF THE ATTORNEY GENERAL

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June 20, 2011

**ATTORNEY GENERAL OPINION**

Ref. DOA 11-0397

**TO:** Director, Department of Administration

**FROM:** Attorney General of Guam

**SUBJECT:** **Legality of Section 2 of P.L. 30-227; Legislative Final Approval of Group Health Care Contract**

On December 30, 2010 Public Law 30-227, the Healthcare Insurance Transparency Act of 2010, became law. The law added subsections (1), (2) and (3) to 4 GCA §4302 (c). Subsection (2) states:

(2) The negotiating team upon selection and review of the best available proposals by participating healthcare respondents/providers which reflect the most economical and beneficial healthcare insurance proposal plan for Government of Guam employees and retirees, shall forward the accepted proposals to *I Maga'lahen Guåhan* for consideration, and to *I Liheslaturan Guåhan* for final approval no later than July 31, and prior to the annual Legislative Sessions wherein the upcoming Fiscal Year Budget for the Government of Guam is before *I Liheslaturan Guåhan* for consideration; ...

In your April 28, 2011 memorandum to the Attorney General, you ask:

1. Based on current language of Section 2, P.L. 30-227, when the accepted proposals are submitted to the Governor for consideration does he still have the authority to reject proposals if final approval is now with the Guam Legislature?
2. Based on the current language of Section 2, P.L. 30-227, if final approval of proposals is now with the Guam Legislature, who will sign the health insurance contract, the Governor of Guam or the Speaker of the Guam Legislature?
3. Are the requirements of section 2, P.L. 30-227 an encroachment of the executive functions of the Governor of Guam?

An answer to the third question will be dispositive of all of the questions. Section 2 of P.L. 30-227 is not particularly clear. The most likely intent is to require the 'final approval' of the legislature to the terms and conditions of a contract for group life insurance for government employees and retirees prior to the Governor entering into such a contract. It may also be the intent of section 2 to give to the legislature final authority to approve a group health insurance proposal prior to the initiation of contract negotiations with the offeror. In either case, the effect of section 2 of 4 GCA 4302(c) is to grant to the legislature executive powers accorded to the Governor by the Organic Act of Guam. As such, 4 GCA §4392(c) (2) is a violation of the separation of powers doctrine and is, therefore, inorganic and unenforceable.

### **Discussion**

Since at least the 10<sup>th</sup> Guam Legislature, the government of Guam has been authorized to provide group health insurance for its employees, retirees and their families. The Governor is authorized to enter into contracts and reject proposals for group health insurance. In addition, the Guam Legislature and the Superior Court of Guam are authorized to either consent or not consent to join the executive branch in the contract for group health insurance. The group insurance law for government employees and retirees states:

(a) *I Maga'lahi* (the Governor) is authorized to enter contracts and reject proposals, with the written concurrence of the Speaker of *I Liheslaturan Guåhan* (the Guam Legislature) or the Presiding Judge of the Superior Court of Guam whose consents may be withheld in their sole discretion, with one(1) or more insurance companies, authorized to do business on Guam, for group insurance, including, but *not limited to*, hospitalization, medical care, life and accident, for all employees *or* separate groups of employees of the government of Guam. *If* the Legislative *or* Judicial Branches of government elect to enter into separate contracts for their employees as authorized in § 4301 (c), *I Maga'lahi* shall obtain the written concurrence of the Branch electing to remain with the Executive Branch before the group insurance contract is entered into *or* a proposal rejected.

...

4 GCA §4301 (a).<sup>1</sup> In practice, the Governor of Guam has negotiated and entered into contracts for group health and group life insurance for government employees in all three branches.<sup>2</sup> There has been no concurrence sought or received from either the legislative or judicial branches of government prior to entering into these group insurance contracts, nor has either the

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<sup>1</sup> P.L. 24-143:19 added the provisions requiring written concurrence of the Speaker and/or the Presiding Judge to a group insurance contract to be entered into by the Governor. P.L. 24-143 was vetoed by the Governor. One reason given for the veto was the violation of the separation of powers doctrine of the Organic Act of Guam by Section 19. The veto was overridden by the Legislature and P.L. 24-143 became law.

<sup>2</sup> As an example, in May 2011, the Governor entered into a three year contract for group life insurance for all three branches of government, and for retirees. The Governor did not seek, nor did the legislative or the judicial branch provide, concurrence for this contract.

legislative branch or the judicial branch opted out, to seek its own group health or group life insurance, as permitted by law. 4 GCA §4301(c).

### Separation of Powers and the Organic Act of Guam

There is a thorough review of the separation of powers doctrine, which is clearly established by the Organic Act of Guam and of the case law that has interpreted and applied that doctrine to cases on Guam, found at the recent Opinion of the Attorney General, issued to the Honorable Edward J.B. Calvo, Governor of Guam, concerning the organicity of the Guam First Commission. See, Organicity of I Kumision Guåhan Fine'nana (Guam First Commission); P.L. 29-128, codified at 1 GCA§2401 *et seq.*, Op. Att'y Gen. No. AG 09-0170 (Feb. 25, 2011).

The statutory and case history set out in the Attorney General opinion is relevant to this analysis, is relied upon, and need not be repeated here. "Under the Organic Act, the government of Guam is comprised of three separate but co-equal branches of government." *In re Request of Governor Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 32; *Hamlet v. Charfauros*, 1999 Guam 18 ¶ 9; *Taisipic v. Marion*, 1996 Guam 9 ¶ 26.

The separation of powers doctrine exists to "prevent[] the abuses that can flow... from centralization of power." *Mo. Coalition for Env't v. Joint Comm. on Admin. Rules*, 948 S.W. 2d 125, 132 (Mo. 1997) (en banc) (citation omitted); see also *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 149 N.E. 2d 273, 293 (1958) (recognizing that the purpose of separating the powers of each branch is "to preclude a commingling of these essentially different powers of the government in the same hands") (citation omitted). The concentration of the separately delineated powers in the hands of one branch "may justly be pronounced the very definition of tyranny." *Beckert v. Warren*, 497 Pa. 137, 439 A.2d 638, 642 (1981).

*In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 33.

The Organic Act authority of the Guam Legislature is set forth at 48 U.S.C. § 1423a, which provides: "The legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam ...". As well, the Governor's powers are provided for. The Organic Act states: "The executive power of Guam shall be vested in an executive officer whose official title shall be the 'Governor of Guam'." 48 U.S.C. § 1422.

The Governor shall have general supervision and control of all departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam. ... He shall be responsible for the faithful execution of the laws of Guam and the laws of the United States applicable to Guam.

48 U.S.C. §1422.

Quoting the Supreme Court of Guam:

We recognize that, under the separation of powers doctrine, one branch of government is prohibited from either delegating its enumerated powers to another branch of the government or aggrandizing its powers by reserving for itself the powers given to another branch. (citations omitted) At least one court has noted that “the *taking* of power is more prone to abuse and therefore warrants an especially careful scrutiny.” *Communications Workers*, 617 A.2d 223 at 232 (emphasis added). Even absent a finding that one branch has usurped a power exclusively reserved for another branch, a separation of powers violation may be found if “one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.” *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App. 1990)(citations omitted); see *Perez*, 1999 Guam 2 at 17.

*In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 35 (indicated citations omitted; footnote omitted; emphasis supplied by the court).

The development, negotiation and execution of contracts for executive departments and agencies of the government of Guam are executive functions that are carried out by the Governor pursuant to his Organic Act powers. In *Santos v. Calvo*, 1982 WL 30790 (D.Guam A.D. 1982), the District Court of Guam Appellate Division considered an appeal by the Governor of Guam from a Superior Court decision granting Senator Santos an injunction to prevent the Governor from entering into and executing an agreement to make severance payments to the Attorney General in exchange for the Attorney General resigning from his position. In granting the injunction, the trial court relied on a provision of Guam law: “No officer of the government of Guam including the Governor of Guam, shall: ... (3) Involve the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of an appropriation made for such purpose.” Senator Santos contended that the law prohibited the severance pay agreement because there was no specific appropriation authorizing this severance pay agreement and, therefore, the Governor exceeded his statutory authority.

The Appellate Division disagreed. It found that the legislature had appropriated funds. The court held that whereas the legislature has plenary power over appropriations, and may attach conditions on the expenditure of appropriated funds, the legislature cannot extend that power to exercising authority over how the executive branch should administer its appropriated funds.

In the present case, Santos is essentially attempting to give the legislature the power to determine how the executive branch should spend its appropriated funds. Such an authorization would greatly hinder the Governor in carrying out his duty to supervise and control the executive branch as required by 48 U.S.C. § 1422.

The few state court decisions that have dealt with this issue have held that the executive branch is responsible for the administration of appropriations. (citations omitted)

*Id.*, 1982 WL 30790 \*4 \*5. The court held that it would be an unconstitutional exercise of executive powers for the legislature to attempt to retain authority to oversee the expenditure of funds once appropriated.

Thus, the legislature has plenary or absolute power over appropriations, and it may attach conditions upon the expenditure of appropriated funds. See *MacManus v. Love*, 179 Colo. 218, 499 P.2d 609, 610 (Colo.1972); *State ex rel. Meyer v. State Board of Equalization and Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (Neb.1970). The doctrine of separation of powers, however, restricts the power of the legislature to legislative functions. As a general rule, the legislature cannot exercise executive power, and the executive branch cannot exercise legislative power. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). Legislative power extends to making laws, but not to enforcing them. *Id.* In a recent opinion, the United States Supreme Court recognized that although total separation of the three branches is never mandatory, the separation of powers is a "vital check against tyranny;" each branch should avoid assuming the "constitutional field of another branch." *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976).

*Id.*, 1982 WL 30790 \*3

The Guam Supreme Court has addressed directly the question of whether the legislature can insert itself into the development, negotiation and execution of contracts, and has held that to do so is a violation of the separation of powers doctrine. In *In re Request of Governor Gutierrez*, 2002 Guam 1, the Governor sought a declaratory judgment, invoking the Guam Supreme Court's original jurisdiction, requesting the Court "to declare specific provisions of Public Laws 26-35, 26-36, 26-47, 26-49, and Bill No. 205 void under both the Organic Act of Guam and the Constitution of the United States." *Id.*, 2002 Guam 1 ¶ 1. The Governor raised "four separation of powers challenges in the Budget Bill, each of which allege that the Legislature has either reserved for itself powers specifically given to the Governor in the Organic Act or interfered with the Governor's ability to perform his constitutional functions." *Id.*, 2002 Guam 1 ¶ 23.

Of interest here was the legislature's attempt in Bill 205 to dictate the terms of a lease of office space for the Family Division of the Department of Law. The Court applied the framework for analysis of separation of powers challenges adopted in *People of Guam v. Perez*, 1999 Guam 2. *Perez* involved a challenge to a provision of the Family Violence Act which permitted the court in its discretion and on motion of the defendant, to reduce a charge of family violence from felony to a misdemeanor. In *Perez*, the Guam Supreme Court adopted the United States Supreme Court's framework for analyzing claims that the doctrine of separation of powers has been violated:

The United States Supreme Court set forth a framework for evaluating separation of powers challenges:

In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

*Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977)(citations omitted). Thus, two separate elements must be evaluated: (1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by any overriding constitutional need.

*People of Guam v. Perez*, 1999 Guam 2 ¶ 17.

In its analysis of Bill 205, the Court in *In re Request of Governor Gutierrez* held that to dictate the terms of a lease for the rental of office space for the Attorney General was inorganic. It stated:

The provisions of Budget Bill that dictate terms of the lease are more problematic. In *Chaffin v. Ark. Game & Fish Comm'n*, 296 Ark. 431, 757 S.W.2d 950 (1988), the court was presented with a constitutional challenge to an appropriation bill. Specifically, the challenged legislation prohibited the Fish and Game Commission from entering into contracts for professional and consultant services which either extend more than 20 working days, or exceed \$5,000.00, without first seeking the advice of the legislature. *Chaffin*, 757 S.W.2d at 956. After receiving a contract, a committee of the Legislative Council reviews the contract and stamps it favorable or unfavorable. *Id.* Although the stamp of approval or disapproval was not binding on the agency, the court found that “the ‘advice’ offered by the [legislative] committee to an agency is tantamount to a legislative order on how to execute a contract.” *Id.* The court held the requirement that the agency submit its contracts for legislative advice to be in violation of the separation of powers doctrine, and therefore unconstitutional. *Id.*

The instant case is analogous to *Chaffin*, and supports a finding of a more egregious violation of the separation of powers doctrine. In the instant case, the Legislature has not merely reserved for itself the power to give “advice” on the specifics of a contract; rather, the Legislature has dictated the exact terms of the contract. As *Chaffin* instructs, it is the executive’s function to determine how to execute a contract. *See id.* At 956-57. The execution of a contract necessarily includes determining the terms of the contract. By determining the terms of the lease, the Legislature has engaged in a clear executive function.

*Id.*, 2002 Guam 1 ¶¶ 53, 54. (footnote omitted; editorial brackets in original). The Court, in applying the two step analysis required by *Perez*, found the legislature's attempt to dictate the terms of a lease in a legislative enactment a clear usurpation of the executive function of developing, negotiating and executing a contract for an executive agency. After determining that the Bill did prevent the accomplishment of an executive function, the Court turned to an analysis of whether the disruptive impact of the Bill had an overriding need justified by functions and roles of the legislature.

Section 11(c) of Bill 405 would be constitutionally proper if the "legislative action ... [was] necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes...." *Communications Workers*, 617 A.2d at 232-33.

*Id.*, 2002 Guam 1 ¶ 55. The Court found that the purpose of section 11(c) was to further fiscal policy and that this policy could be achieved by a direct appropriation without the need for the legislature to dictate specifications for rental space and other contract terms. The provision was found to be a violation of the separation of powers between the executive and legislative branches under the two-step analysis of *Perez*.

**An Analysis of the Healthcare Insurance Transparency Act of 2010; specifically P.L. 30-227:2; 4 GCA §4302(c)(2).**

The process for the acquisition of group health insurance entails the following steps:

1. The Department of Administration ("DOA") develops a Request For Proposals, receiving input from the Negotiating Team and professional support from an actuary consultant who takes the lead role in development of the specifications and the presentation of the required data and supportive information (As provided in group insurance law).
2. The Request For Proposal ("RFP") is published and a formal process ensues in which prospective offerors ask questions about the RFP and DOA and its consultant provide answers to all of the prospective offerors (As provided in procurement law).
3. As necessary, amendments to the RFP are published to all prospective offerors (Procurement law).
4. Offerors submit formal proposals on or before the due date for submission of proposals (Procurement law).
5. The consultant studies all submitted proposals and prepares a report for the Negotiating Team (Group insurance law).
6. The Negotiating Team, with the report on the proposals prepared by the consultant, and with direct input from the consultant during the evaluation process, evaluates and ranks the proposals from best to last. The Negotiating Team makes a recommendation to the Director of Administration on the rankings of the proposals, and the final ranking is determined and approved (Procurement law).

7. The Negotiating Team negotiates with one or more proposers until final agreements are reached on one or more group health contracts for government employees and retirees (Procurement law and group insurance law).
8. A briefing memorandum is sent to the Governor who ultimately approves the negotiated deal made with one or more contractors (Procurement law).
9. A contract is drawn up and the Governor, on behalf of the executive branch and the other branches of the government to be covered (traditionally both the legislative and the judicial branches of government have joined with the executive branch), executes the contract with the health care contractor. (Procurement law and group insurance law).

Into this established process, subsection 2 of §4302(c)(2) adds the following requirement:

The negotiating team ... shall forward the accepted proposals to *I Maga'lahen Guåhan* for consideration, and to *I Liheslaturan Guåhan* for final approval no later than July 31, and prior to the annual Legislative Sessions wherein the upcoming Fiscal Year Budget for the Government of Guam is before *I Liheslaturan Guåhan* for consideration;

It is noted that the Governor is permitted to "consider" the accepted proposals, but the Legislature is to provide "final approval". As stated above, it is not entirely clear at what stage the "final approval" of the legislature, as mandated by §4302(c)(2), is required. This final approval takes place at either step #6 or step #8.

Both step #6 and #8 are integral parts of the development, negotiation, and execution of the health care contract.<sup>3</sup> By virtue of the powers granted to the Governor by the Organic Act, he is responsible for the development, negotiation, and execution of contracts for the executive branch of government. *In re Request of Governor Gutierrez*, 2002 Guam 1.<sup>4</sup> After the enactment of P.L. 30-227:2, the Governor would be relegated to the role of considering, and the Legislature would be promoted to the role approving.

The insertion of required legislative approval at a key stage of the contract development process prevents the accomplishment of an exclusively executive function accorded to the Governor under the Organic Act of Guam. *Id.* Thus, the first prong of the two prong analysis established by *People of Guam v. Perez*, 1999 Guam 2, for determining a separation of powers violation is met.

The second prong of the *Perez* analysis is to assess whether the disruptive impact caused by the imposition of the legislature into the executive function is justified by any overriding constitutional need. P. L. 30-227 at section 1, states legislative findings and intent:

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<sup>3</sup> Note that both the legislative branch and the judicial branch of government can withdraw from the process undertaken by the Governor and develop, negotiate and execute a contract for group health insurance for their respective branches. 4 GCA §4301(c).

<sup>4</sup> However, the legislative and judicial branches, if each has not opted out of the process, are provided an important role in this process. Each branch appoints members to the Negotiating Team. 4 GCA §4302(c).

The Government of Guam will be burdened with expending monies, as much as \$17 Million Dollars, for an underfunded obligation, which is in direct contravention of accepted program budgeting and financial management standards for GovGuam.

It is the intent of *I Liheslaturan Guåhan*, through the "HealthCare Insurance Transparency Act of 2010", to ensure the healthcare insurance negotiations reflect the most economical and beneficial health plans that provide the requisite medical care needs and services for Government of Guam employees, retirees and their families. As well, through this Act, the obligation of the approved health care insurance benefit *shall* be known prior to the annual "Open Enrollment" period as the process is brought into the standards of conformance with the annual Budget Act process of the island.

It is understood that the legislature wishes to provide economical and beneficial health plans to government employees and retirees. As well, it is necessary that the legislature know the potential cost of the group health insurance plan prior to undertaking the annual budget act process for the succeeding year. The potential cost of the group health plan does need to be known by the legislature on or about July 31<sup>st</sup> in order to be considered and accommodated in the annual budget process. These are understood to be the stated legislative intentions for the enactment of 4 GCA §4302(c)(2).

Accomplishing these legislative intentions does not require the ability to approve either the proposals before negotiations, or approve contract terms after negotiations. The legislature already has numerous means by which to accomplish these legislative goals. A few are stated here.

1. A representative of the legislature serves on the Negotiating Team that actually negotiates the contract for the executive branch. §4302(c).
2. Two legislators have been added to the Negotiating Team, as ex-officio, non-voting members. P.L. 31-24, amending §4302(c).
3. §4302(c) (2) sets a July 31 deadline for final approval of one or more health care proposals. Providing the details of the final approval to the legislature by July 31, and prior to the annual budget act process does not create an interference with executive functions.
4. The extent of the government financial commitment to group health care coverage for employees and retirees is determined. §4301(b).
5. The group health insurance statutes, at 4 GCA §§ 4301 and 4302, have been amended numerous times to provide clarity on health care benefits that are to be provided in the annual benefits package. Ample direction is provided to the executive in the existing statutes. §4301(e), (f) and (h), and §4302(d), (f) and (h) and (i).
6. Existing and recently enacted provisions of the group health care laws are directed at and intended to increase both the number of offerors who will participate in the process of offering health insurance programs to the government of Guam, to increase the

competitiveness of the process, and, as a result decrease the cost of the end product. See, as an example, P.L. 30-93:3, requiring companies currently offering insurance to provided detailed claims utilization and cost information annually and quarterly so that this information can (1) be provided to prospective offerors in subsequent years, making it easier to for prospective offerors to understand the group to be insured and anticipate the cost of providing insurance to that group, and (2) provided to the Negotiating Team so that the government and its consultant can negotiate better and more economical terms. §4302(a), (b), (c) and (g).

With this much direction and limitation already provided in the group insurance laws, giving the executive ample guidance in acquiring group health care, there can be no legitimate justification for the legislature to interpose itself into the process of developing, negotiating and executing the actual healthcare contract. It may be argued that in the past, and particularly with regard to the fiscal 2011 group healthcare contract, the legislature did not have ample information about the cost of healthcare in a timely manner to successfully complete the budget and appropriation process. Involvement of legislative representatives in the negotiating process going forward will resolve this issue.

The disruptive imposition of the legislature into the executive function of contract development, negotiation and execution is not justified by any overriding constitutional need. *In re Request of Governor Gutierrez*, 2002 Guam 1; *People of Guam v. Perez*, 1999 Guam 2.

### **Conclusion**

Public Law 30-227:2, as codified at 4 GCA §4302(c) (2), is inorganic as a violation of the separation of powers doctrine to the extent that it interposes the legislature into the approval and decision-making process of the development, negotiation and execution of the group healthcare contract by giving it authority to approve either (1) which proposals are to be chosen, leading to negotiating of a healthcare contract, or (2) the terms and conditions of the group healthcare contract. By virtue of the Organic Act of Guam these responsibilities are executive functions that properly belong with the Governor.



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