



Office of the Attorney General of Guam



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OPINION MEMORANDUM

Ref: GSWA 17-0609

TO: Chairperson, Guam Solid Waste Authority

FROM: Attorney General

SUBJECT: Guam Solid Waste Authority (GSWA) Board Request for Opinion Regarding Contract with PHRS for Transition of Non-Government Employees

This is in response to your request of whether Pacific Human Resource Services, Inc. ("PHRS") contract may continue services with Guam Solid Waste Authority ("GSWA") upon termination of the Receivership.

STATEMENT OF FACTS

PHR was contracted by Gershman, Brickner & Bratton, Inc. ("Receiver") to provide temporary employees to assist in the Solid Waste Management Division ("SWMD"). The contract was executed pursuant to a Request for Proposals dated August 27, 2009, and is set to expire with the end of receivership.

GSWA will assume control of its operations when the Receivership ends, which is anticipated to be on December 31, 2017. GSWA wishes to continue the contract with PHR so as to allow a smooth transition from the receivership and avoid any disruption of services to the community and municipalities of Guam. Legislation authorizing GSWA to continue contracts related to employment services between the Receiver and PHRS for a period of up to three-years is pending enactment.

For reasons which are unclear, the Receiver believes such a contract may violate the Organic Act. The Receiver has expressed concern regarding a letter authored by former Deputy Attorney General Patrick Mason. Deputy Mason sent the Receiver a guidance letter (hereinafter referred to as the "Mason guidance"), dated May 28, 2009, pertaining to salary increases for Department of Public Works employees.

In the letter, the Office of the Attorney General, on behalf of the government of

Guam, objected to the Receiver's plans to supplement (or increase) the salaries of two classified employees who worked at the Solid Waste Management Division of the Department of Public Works and increase the salary of one vacant position at SWMD as a violation of federal law and local law. The plan would create three new positions without following the required procedures through the merit system as required by the Organic Act of Guam.

DISCUSSION

The Organic Act of Guam provides that the Guam Legislature shall "...establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system." 48 USC §1422(c)(a). Guam's Organic Act's merit system is "designed to secure adequate protection to public career employees from political discrimination." *Haeuser v. Civil Serv. Comm'n*, 97 F.3d 1152, 1156 (9th Cir.1996) (quoting *State ex rel. Murtagh v. Dep't of City Civil Serv.*, 42 So.2d 65, 70 (1949)). The purpose of the merit system would not be furthered by applying it to the employees of a private company. Guam's merit system has no applicability to the private sector.

Guam's merit system requirement is not violated by continuing to have PHRS employees perform duties which were formerly performed by government of Guam employees prior to the Receivership. Guam's merit system does not categorically prohibit the government of Guam from contracting with private entities to perform governmental functions. See *Vermont State Employees' Association, Inc. v. Vermont Criminal Justice Training Council*, 704 A.2d 769 (Vt. 1997) (Attorney General did not clearly abuse his discretion in certifying that contract privatizing food service previously provided by state employees at state facility did not violate spirit and intent of classification plan and merit system principles); *Moore v. Department of Transp.*, 875 P.2d 765, 769, 772 (Alaska 1994) (State Constitution's merit system provision did not bar privatization of state employment); and *Mary Haub v. Montgomery County*, 727 A.2d 369 (Md. 1997) (In accord with the clear majority of cases throughout the country, we do not believe that general provisions establishing a merit system for government employees, such as those contained in the Montgomery County Charter, preclude the government from privatizing or contracting out to non-government entities specific government functions.)

The Mason guidance has no application to the contract of the PHRS non-government employees, and should not be extended beyond the question presented.

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Ref: GSWA 17-0609

Re: Guam Solid Waste Board Request for Opinion Regarding
Contract with PHRS for Transition of Employees

Page 3

SUMMARY & CONCLUSION

Maintaining the services of non-government employees to provide stability of solid waste services to the people of Guam does not violate the Organic Act. The Mason guidance is not relevant, nor is it applicable, to the issues surrounding transition from federal receivership to the government of Guam.

Sincerely,



ELIZABETH BARRETT-ANDERSON
Attorney General of Guam

cc: The Honorable Ray Tenorio, Lt. Governor of Guam
All Members, Guam Solid Waste Authority Board