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OFFICE OF THE ATTORNEY GENERAL

May 28, 2009

David Manning
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GBB's Receiver Representative
GBB Solid Waste Management Consultants
Government of Guam
Department of Public Works
Solid Waste Management Division
542 North Marine Dr. Corps
Tamuning, Guam 96913

Ref: GOV 09-0442

Re: Salary Increases for DPW Employees

Dear Mr. Manning:

You forwarded a letter dated May 20, 2009 to Attorney Thomas P. Keeler indicating that you intend to supplement (or increase) the salaries of two classified employees who work at the Solid Waste Management Division (SWMD) of the Department of Public Works (DPW) and increase the salary of one vacant position at SWMD. You indicate that you will ask the Court to approve payment of the increased amounts from the Trustee Account. You indicate that the SWMD employees have responsibilities and duties comparable to certain positions at Guam Water Works Authority (GWA) and therefore, the salaries of the SWMD employees will be increased to the amount now paid for the GWA positions. You have asked if the Office of the Attorney General has any concerns or suggestions regarding this action.

The Government of Guam, through the Office of the Attorney General, objects to the taking of such action because it is in violation of federal law and local law. The Organic Act of Guam requires that the Guam Legislature establish a merit system and, as far as practicable, appointments and promotions must be made in accordance with such merit system. 28 USC § 1422c(a). In response to this Organic Act mandate, the Legislature has established a merit system through duly enacted laws and rules and regulations. See generally 4 GCA, Chapters 1 through 6. Your plan for the three SWMD positions would create three new positions at SWMD without following the required procedures and would then fill the positions created without going through the merit system as required by the Organic Act.

In order to avoid clear violations of law, new positions can be created pursuant to the established procedures and the positions then can be filled according to the merit system. Also, there is an existing procedure to reclassified existing positions to fit the duties and responsibilities being performed by the persons filling the positions. We have been advised by officials at the Department of Administration (DOA) that no one representing the Receiver or DPW has made a request to DOA for the creation of new positions or the reclassification of existing positions. The

following is a brief description of the requirements for creating new positions and for filling classified positions under the merit system.

I. Creating New Positions

DOA has been tasked with the responsibility to create new positions within the Government of Guam. "All Guam statutes and regulations ... which refer to the non-adjudicatory authority of the Civil Service Commission ... are hereby amended to reflect the transfer of said authority to the Director of Administration, who shall henceforth perform all functions regarding ... the creation of new positions..." P.L. 28-68: IV: §45.

The process for creating new positions in the Government of Guam is not complicated, nor time consuming. However, in order to reduce unnecessary duplication and to confirm that the requirements and qualifications for the person who is to fulfill that particular responsibility are understood, there is a process established by law. The process, to include the development of qualifications for a particular job, and the amount to be compensated for that job is important in order to assure merit-based employment based upon competitive selection. Such is required by the Organic Act and due process of law. The following is a brief discussion.

The process for job creation and establishment is:

- 1) The department, in this case, Public Works (or the Receiver) determines that a new position is necessary and petitions the Director of DOA in writing.
- 2) The petition is accompanied by the justification for the new position; the essential details concerning the position; an analysis of the position with similarities to already established positions; the position description; the proposed pay range for the position; and a best estimate of the fiscal impact of the position created. This information is required by law and necessary for DOA in order to determine the proper evaluation of the job for purposes of determining pay and qualifications. Note that it is appropriate to attach a job description from another department or agency, or from any other source to include the federal government or private sector.
- 3) The intent to create a new position is posted on both the DOA website, the website of the initiating agency, and published in print and broadcast media, thereby formally informing the community of the intention to create the position and inviting comments from the public concerning the intention. The website announcement is posted for 10 days.
- 4) The Director of DOA and the director of the initiating agency review comments received concerning the new position.
- 5) The Director of DOA forwards the request for the new position with a recommendation to the Governor.
- 6) The Governor may approve the creation of the position and, if so, forwards that approval to DOA and the Legislative Secretary.

The position may formally be filled thirty days after forwarding the formal approval of the Legislative Secretary. 4 GCA § 6303(c).

The Government of Guam has, by law, a unified and uniform system of position classification and compensation for the Executive and Judicial branches of government. See the

Uniform Position Classification and Salary Administration Act of 1991, 4 GCA §6102. This unified system works to assure that employment in the Government of Guam is based upon merit and competitive selection. The policy requires that compensation is based upon internal equity and external competitiveness, is targeted to U.S. averages and labor markets, and that compensation policies reward individual employees commensurate with performance. 4 GCA §6301. In order to implement these policies and accomplish these goals, the Director of Administration and the Governor provide oversight to the process of creating new positions and establishing compensation for those positions.

II. Filling New Positions

The Organic Act of Guam is the federal statute establishing the Government of Guam, and serves as Guam's constitution. *Bordallo v. Baldwin*, 624 F.2d 932 (CA 9, 1980). The Organic Act provides that the Guam legislature establish a system of government employment based upon merit. "The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system." 28 USC §1422c (a). This charge to establish a merit system of employment is specific and binds the Government of Guam. *Haenser v. Department of Law*, 97 F. 3d 1152 (9th Cir. 1996).

Employees hired by the Government of Guam pursuant to competitive merit-based selection are classified employees. *Carleson v. Perez*, 2007 Guam 6, ¶32. Classified employees within the Government of Guam have a property interest in their employment. *Limtiaco v. Guam Fire Department*, 2006 Guam 10; *Carlson v. Perez*, 2007 Guam 6. Procedural due process imposes constraints on action taken by the government that deprives an individual of liberty or property interests within the meaning of the Due Process Clause of the Fourteenth Amendment. *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982).

As required by federal law, the Legislature did establish a merit system. It provides that "[e]mployment in the service of the Government of Guam shall be based upon merit, and selection and promotion of employees shall be free of personal or political consideration. ... All personnel actions, including appointments and promotions, shall be based, insofar as practicable, on competitive practical tests and evaluations..." 4 GCA §4101(a) (emphasis contained within the statute). All employees of the Government of Guam have an interest in the proper application of the merit-based system of employment because promotion and upward mobility is determined by this same merit-based system. The system provides, as follows:

- "All offices and employment in the Government of Guam, except for employment as academic personnel of the Guam Community College (GCC) and the University of Guam (UOG), ..., shall be divided into classified and unclassified services ..." 4 GCA §4102.
- "No preferences shall be given in the government service, except that residents of Guam who are physically or mentally impaired, but are physically and mentally able to perform

..., who are veterans of the Armed Services of the United States, or who are former members of the Guam Police Combat Patrol, ... shall receive a preferential credit of five (5) points, which shall be added to their competitive examination score ..." 4 GCA § 4104.

- "Rules subject to criteria established by this Chapter governing the selection, promotion, performance, evaluation, demotion, suspension and other disciplinary action of classified employees shall be adopted ... by the Director of Administration as to all other Executive Branch employment." 4 GCA §4105(a).
- "The personnel rules provided for in §4105 of the Chapter shall provide procedures for the employment of persons on the basis of merit, and shall include an orderly and systematic method of recruitment and the establishment of qualified lists for employment purposes. ... Specific policies shall be included, governing ... (1) The announcement of vacancies and acceptance of applications for employment; (2) Preparation and conduct of examinations; (3) Establishment and use of employment lists containing names of persons eligible for employment; (4) Establishment of promotional policies; (5) Certification of employment of persons from employment lists to fill vacancies and the making of temporary and emergency appointments; ... (7) Transfer, promotion and reinstatement of employees in the competitive service; ... (10) Development of employee morale, welfare and training; ..." 4 GCA §4106.

The system is not cumbersome or difficult to comply with. DOA, Human Resources Division, has qualified personnel who administer this merit-based system effectively for thousands of employees and many departments and agencies. It necessarily takes some time to assure that the appointment of individuals to classified positions within the government is fair and equitable. However, the Organic Act requires that the process be followed in all instances when it is not impracticable to do so. 28 USC 1422c(a) and *Haenser, supra*.

In addition to creating and filling new positions, DOA may reclassify existing positions if the duties and responsibilities of a position do not comport with the position being filled.

We do not believe that the Court's Order appointing the Receiver allows the Receiver to bypass the requirements of the Organic Act and the merit system as these laws relate to the pay classifications for government employees. The Court ordered that the Receiver was to "assume all the responsibilities, functions, duties, powers and authority of the Solid Waste Management Division of the Department of Public Works and any and all departments, or other divisions of the Department of Public Works insofar as they affect the Government of Guam's compliance with the Consent Decree." See March 17, 2008 Order Re: Appointment of Receiver, pp. 15-16. DPW is subject to the requirements of the Organic Act and the merit system. In appointing a Receiver to assume the duties of DPW, the Court has not authorized the Receiver to ignore the requirements of the Organic Act and the merit system as they relate to government personnel. The Court has also ordered that the Government of Guam "shall be responsible for compensation and expenses of the Receiver and of any and all persons or entities employed or contracted by the Receiver in carrying out the provisions of this Order." *Id.* at 18. **This allows the Receiver to hire its own employees and to enter into contracts for services.** It does not allow the Receiver to violate the Organic Act mandate requiring the Government of Guam to establish a merit system and to make appointments

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and promotions according to such system. And it does not allow the Receiver to avoid the requirements of the merit system established by the Guam Legislature. Classified employees employed by DPW are subject to the requirements of the merit system. It is our position that the Receiver, in assuming the duties of the SWMD of DPW, must follow the requirements of the merit system when dealing with DPW employees. **If the Receiver deems it necessary to hire its own employees to handle Consent Decree matters or contract with other entities to handle Consent Decree matters, it can do so pursuant to and in compliance with Guam and federal laws.**

PATRICK MASON
Deputy Attorney General